

# EVICTIIONS

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TEXAS JUSTICE COURT TRAINING CENTER

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## FOREWORD

This deskbook on *Evictions (1<sup>st</sup> ed. November 2017)* represents the Texas Justice Court Training Center's ongoing commitment to provide resources, information and assistance on issues of importance to Texas Justices of the Peace and Constables and their court personnel, and continues a long tradition of support for judicial education in the State of Texas by the Justices of the Peace and Constables Association of Texas, Inc.

We hope you will find it to be a valuable resource in providing fair and impartial justice to the citizens of Texas.

Thea Whalen  
Executive Director



## USER NOTES

This deskbook on *Evictions (1<sup>st</sup> ed. November 2017)* is intended to offer a practical and readily accessible source of information relating to issues you are likely to encounter in evictions and landlord/tenant cases in justice court.

Special thanks to Tammy Jenkins, Chief Justice Court Clerk, Precinct 6, Chambers County, for the excellent flow charts included in the deskbook!

This deskbook is not intended to replace original sources of authority, such as the Property Code or the Texas Rules of Civil Procedure. We strongly recommend that you refer to the applicable statutory provisions and rules when reviewing issues discussed in this book.

Please note that all references to “Rule \_\_” are to the Texas Rules of Civil Procedure.

Rather than including the citations to cases in the text of the deskbook, we have listed only the case name in the text but have included the entire citation in the appendix of cases.

Please do not hesitate to contact us should you have any questions or comments concerning any of the matters discussed in *Evictions*.

Texas Justice Court Training Center  
November 2017

# CHAPTER 1: WHAT IS AN EVICTION CASE?

An **eviction case** is a lawsuit to recover possession of real property from someone who is occupying it. The most common eviction case is filed by a landlord to remove a tenant from the landlord's property. *Rule 500.3(d)*. If a person is evicted, they are permanently deprived of their right to possession of that property. [\*Martinez v. Bal\*](#); [\*Charalambous v. Jean Lafitte Corp.\*](#)



Eviction cases provide a simple, speedy, and inexpensive method for determining who is entitled to **possession** of a premises. A court DOES NOT determine title (who **owns** the property) in an eviction case. *Rule 510.3(e)*; [\*Holcombe v. Lorino\*](#); [\*Haginas v. Malbis Memorial Foundation\*](#). The only issue that a court may consider in an eviction case other than who gets possession of the premises is a claim for back rent (as long as the amount of back rent is within the jurisdiction of the justice court). *Rule 510.3(d)*; *Property Code § 24.0051(b)*.

There are two types of eviction cases:

**1. Forcible Entry and Detainer Suit** (*Property Code § 24.001*):

When a “person enters the real property of another without legal authority or by force and refuses to surrender possession on demand”

**2. Forcible Detainer Suit** (*Property Code § 24.002(a)*):

When a person refuses to surrender possession of real property on demand and the person is:

- a. “a tenant or subtenant willfully holding over after the termination of the tenant’s right of possession;
- b. 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
- c. a tenant of a person who acquired possession by forcible entry.”

*For more information, please see pages 4–11.*

The two types of eviction cases have identical procedures and should be processed the same way. Some courts may refer to cases as “FEDs” or “Forcibles” because of this language from the statute, but these are just other names for eviction cases.

The rules of procedure for eviction cases are found in Rules 500-507 and Rule 510 of the Texas Rules of Civil Procedure. To the extent of any conflict between Rule 510 and the other rules, Rule 510 applies. *Rule 500.3(d)*.

## “Where can I find these rules?”

Please note that whenever we refer to *Rule \_\_* in this deskbook, we are referring to the Texas Rules of Civil Procedure. You may find them at this link:

<http://www.txcourts.gov/media/1435952/trcp-all-updated-with-amendments-effective-912016.pdf>

## CHAPTER 2: JURISDICTION

### A. No Jurisdiction If Suit Is Filed in Wrong Precinct



An eviction suit must be filed in the precinct where the property is located.

KEY  
POINT

If an eviction suit is filed in the wrong precinct, the court should dismiss the case. *Rule 510.3(b); Property Code § 24.004*. The case should be dismissed without prejudice for want of jurisdiction so that the plaintiff may re-file the case in a court that has jurisdiction.



A court may NOT simply “transfer” the case to the correct precinct.

COMMON  
PITFALL

### B. No Jurisdiction to Resolve Title Issues

A justice court does not have jurisdiction to resolve issues regarding title to real property (determining who **owns** the property). *Government Code § 27.031(b)(4); Rule 510.3(e)*.

If a justice court is unable to determine who has the right to possession without resolving a title dispute, then the court does not have jurisdiction of that case. [\*Aguilar v. Weber\*](#); [\*Haith v. Drake\*](#).

In this situation the court should either:

- a. Abate (or stay) the case pending a determination of the title issue in a court of competent jurisdiction, such as a district court; or
- b. Dismiss the case without prejudice so that the plaintiff can re-file it once the title issue has been resolved.

### C. No Jurisdiction If Suit Based on Deed Executed in Violation of Chapter 21A, Business & Commerce Code

Although this is not likely to arise often, if a defendant files a sworn statement alleging the suit is based on a deed executed in violation of Chapter 21A, Business and Commerce Code, then the justice court does not have jurisdiction and must dismiss the suit. *Property Code § 24.004(b)*.

Chapter 21A prohibits a seller or lender from requiring a purchaser of residential real estate to convey a deed to the seller or lender before or at the time of the sale or loan.

## D. Court May Hear Claim for Back Rent



KEY  
POINT

A justice court DOES have jurisdiction to hear a claim for back rent in an eviction case as long as the amount of back rent is within the jurisdiction of the justice court. *Rule 510.3(d); Property Code § 24.0051(b); Haginas v. Malbis Memorial Foundation.*

Back rent is within the jurisdiction of the court if the past due amount is not more than \$10,000 **at the time of filing**. This amount does not include statutory interest and court costs, but does include any attorney fees. *Rule 500.3(d), 510.3(e).*

## E. No Counterclaims or Third Party Claims Allowed

A defendant **may not file a counterclaim** or a third party claim as part of an eviction suit. The claim would need to be brought in a separate suit. *Rule 510.3(e).* If a defendant does file one of these as part of an eviction suit, the court should dismiss the counterclaim or third party claim without prejudice (and this does not affect the original eviction suit). *Hanks v. Lake Towne Apartments.*

**“What if back rent is more than \$10,000?”**

If the back rent is above the court’s jurisdictional limit, the court must dismiss the claim for back rent but the court should not dismiss the suit for possession of the property as the landlord is entitled to proceed with that part of the case. The landlord may file a separate suit for the back rent in a court with jurisdiction.

## CHAPTER 3: LANDLORD-TENANT RELATIONSHIP

### A. Is a Landlord-Tenant Relationship Required to Bring an Eviction Case?

Generally, a “landlord-tenant relationship” is needed to file an eviction case. *Property Code § 24.002(a)(1),(2)*.

- A “landlord-tenant relationship” exists when two parties have a lease agreement (which may be written or oral); but
- It is ALSO considered a “landlord-tenant relationship” if the parties never had a lease agreement, but the occupant is deemed a tenant at will or sufferance due to certain circumstances. (See more information and examples about this in the next two sections.)
  - *Legal definition:* When a person refuses to surrender possession of real property on demand and the person is:
    - “a tenant or subtenant willfully holding over after the termination of the tenant’s right of possession” or
    - “a tenant at will or by sufferance, including an occupant at the time of foreclosure of a lien superior to the tenant’s lease.”

There are, however, two situations in which a person CAN bring an eviction suit even though there has **never been a “landlord-tenant relationship”**:

#### 1. Squatters (*Property Code § 24.001*)

- People who settle on land or occupy property of another without title, right, or payment of rent.



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*For a discussion relating to squatters, please see “When is a Squatter Not a Squatter?” in the Spring 2017 TJCTC Newsletter.*

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- *Legal definition:* When a “person enters the real property of another without legal authority or by force and refuses to surrender possession on demand.”
- *Example:* Suppose an individual just starts occupying a hunting cabin without any agreement with the owner. A justice court may hear the eviction case even though there has never been any landlord-tenant relationship.

#### 2. Tenants of Squatters (*Property Code § 24.002(a)(3)*)

- People who rent from a squatter.
  - *Legal definition:* “A tenant of a person who acquired possession by forcible entry.”

## B. Types of Tenants

### 1. Terms

**Landlord** means “the owner, lessor, or sublessor of a dwelling, but does not include a manager or agent of the landlord unless the manager or agent purports to be the owner, lessor, or sublessor in an oral or written lease.” *Property Code § 92.001(2)*.

**Lease** means “any written or oral agreement between a landlord and tenant that establishes or modifies the terms, conditions, rules, or other provisions regarding the use and occupancy of a dwelling.” *Property Code § 92.001(3)*.

**Tenant** means “a person who is authorized by a lease to occupy a dwelling to the exclusion of others...” *Property Code § 92.001(6)*.

### 2. Tenant for a Fixed Term

A tenant often has a written lease with their landlord that sets out the duration and terms of the tenancy.

For example, a person may rent an apartment under a lease for a term of one year. This means the person has the right to occupy the apartment for one year as long as they do not commit a breach of the lease (for instance, by not paying rent). The lease will also state the amount of rent the tenant must pay and the rental period (for example, monthly). The landlord may not raise the rent above the amount allowed by the lease for the one-year term. Once the year is up the landlord and tenant are free to go their separate ways (the landlord may choose to rent the apartment to someone else or the tenant may move out) or they may enter into a new lease with different terms.

### 3. Tenant at Will

A tenant at will is a person who has the owner’s or landlord’s consent to occupy the premises but there is no set time for how long the tenancy will last. *Fandey v. Lee*; *Virani v. Syal*; *Black’s Law Dictionary 1604 (9th ed. 2009)*.

## NOTICE TO TERMINATE VS. NOTICE TO VACATE

A notice to terminate a lease is not the same as a notice to vacate. A notice to terminate merely sets a date on which the lease will end. If a notice to terminate is given, that does not eliminate the landlord’s obligation to give a proper notice to vacate before filing an eviction suit.

For example, a person may rent an apartment to someone for an agreed monthly rental amount but there is no agreement as to how many months the person may occupy the apartment. Or a person could allow a friend to move in without talking about any terms or how long the friend may stay.

A tenancy at will may be terminated by either party upon proper notice. [ICM Mortgage Corp. v. Jacob](#); *Black's Law Dictionary, 1604 (9th ed. 2009)*. Generally, there is no lease termination notice that must be given; a demand for possession and notice to vacate are sufficient. However, in a **month-to-month tenancy**, provided that neither party breaches the terms of the lease (including the payment of rent by the tenant), the lease continues until one of the parties gives a “notice of termination” to the other party. The amount of notice is the same as one rental period (one month in this situation). This means one party must notify the other party that they intend to terminate a month-to-month lease by giving them one month’s notice of termination unless the parties agree in the lease to a different amount of time or that no notice is required. *Property Code § 91.001(e)*.

#### 4. Tenant by Sufferance

A tenant by sufferance is a person who was once in lawful possession of property, but who wrongfully remains as a holdover after his right to possession has expired. [ICM Mortgage Corp. v. Jacob](#); *Black's Law Dictionary, 1604 (9th ed. 2009)*. This includes a tenant at the time of a foreclosure of a lien superior to the tenant’s lease. *Property Code § 24.002(a)(2)*.

Multiple examples of tenants by sufferance can be found in the next section.

#### 5. Lodgers v. Tenants at Will

Sometimes a person occupying premises temporarily is a lodger rather than a tenant at will. Spending a night at a hotel, for example, does not make you a tenant of the hotel.

In [Byrd v. Fielding](#), the court drew the following distinctions between a lodger and a tenant:

- “Proof that the owner cares for the rooms, retains a key to the rooms, or resides on the premises in the course of a business of hiring out the rooms indicates a lodging contract.”
- Proof “that the occupant exercises complete control over the rooms indicates a lease.”

### WHAT'S THE DIFFERENCE?

#### Tenant at will:

Person has owner’s consent to occupy the property without a set time on how long the lease will continue.

- Month to month apartment rental
- Girlfriend/Boyfriend

#### Tenant by sufferance:

Person had permission to be there, it was revoked, and they won’t leave.

- Holdovers
- Post-foreclosure

If the occupant is a lodger, the owner should not have to bring an eviction suit to remove a person who refuses to leave the premises. However, law enforcement is sometimes reluctant to force an occupant to leave and may instead tell the owner to file an eviction suit. If an eviction suit is filed against a person who is a lodger rather than a tenant at will, the court may still hear the case and decide the right to possession even though there is no landlord/tenant relationship.

## **C. So What Happens When...?**

### **1. Friends, Ex-Friends and Unwanted Guests**

What happens if a person allows a significant other to move in with them and the “inevitable” occurs and they want the other person out? Or parents allow an adult child to move back in and he has worn out his welcome? The boyfriend/girlfriend or adult child will normally be deemed either a tenant at will or a tenant by sufferance. It does not matter that they were not paying any rent.

The recent case of [\*Burden v. Burden\*](#) is a good example. It involved an appeal by a woman who claimed she was the common law wife of the owner of the home. After the owner lost his initial suit for an eviction, he filed a suit for a declaratory judgment, and a district court held that the parties did not have a common law marriage. He then filed another eviction suit. The appellate court upheld the eviction because the owner had obtained a court ruling that no common law marriage had been established (and so she was a tenant at will or by sufferance). The record does not disclose the living arrangements while all these cases were pending!

### **2. Owner Who Purchases Property with an Occupant in Possession**

What if a person purchases property and an occupant is in possession of that property at the time, has no written lease agreement and won't leave? The occupant can potentially be deemed a tenant by sufferance.

In a recent case [\*Johnson v. Mohammed\*](#), the court held that although the record did not show any evidence as to how the defendant had come to live on the plaintiffs' property (like whether she originally had a lease or not), she was essentially a tenant by sufferance with respect to the purchasers because she was holding over after any right to possession had expired. Therefore, a forcible detainer suit was proper. In order to evict her, the plaintiffs had to prove:

- that they owned the property;
- that the defendant was an occupant at the time they became the owners;
- that their right to possession was superior to the defendant's right of possession;
- that they made a demand for possession; and



- the defendant refused to leave (and was thus holding over after she no longer had a right to be there).

### 3. Foreclosures

#### ***a. Purchaser's Right to Evict Former Owner after Tax Foreclosure Sale***

What if a person purchases property at a tax foreclosure sale and the former owner is in possession of that property at the time and won't leave? The former owner could potentially be deemed a tenant by sufferance.

As in the previous example, a court recently allowed a purchaser at a tax sale to maintain a forcible detainer suit against a former owner/occupant who became a tenant at sufferance after his right to possession ceased and he refused to leave following a demand to vacate. [\*Stroman v. Martinez\*](#).

But note that if there is a dispute as to the validity of the tax sale, there could potentially be a title issue that deprives the court of jurisdiction. In a recent case, the court held that the trial court lacked jurisdiction in a forcible detainer suit because the court was unable to determine which party had the superior right of possession without first determining title when the prior owner claimed the constable's sale of the property was void because the property was homestead property and exempt from sale. [\*Saihat Corp. v. Miller\*](#).

#### ***b. Purchaser's Right to Evict Former Owner Where Deed of Trust Contains a Tenancy at Sufferance Clause***

What if a person purchases property at a foreclosure sale based on a deed of trust and the former owner won't leave? If the deed of trust has a "Tenancy at Sufferance Clause," then the former owner will be deemed a tenant by sufferance.

#### **Foreclosure Process:**

When someone buys a house normally they will sign a promissory note and mortgage or deed of trust securing the payment of the purchase price for the house. Everything is fine as long as the buyer makes the monthly payments on the mortgage but what happens if he is unable to make the payments and defaults on his obligations? The holder of the mortgage is entitled to foreclose typically through a non-judicial foreclosure and the "homeowner" may become a tenant subject to eviction if certain procedures are followed. *Judicial foreclosure* involves a full judicial proceeding to foreclose the lien; it requires a judgment against the debtor and execution of that judgment through the foreclosure and sale of the real property. A person must bring a suit to foreclose a lien on real property no later than

four years after the cause of action accrues. *Civil Practices & Remedies Code § 16.035(a)*; [Whitehurst v. Estes](#).

Non-judicial foreclosure is authorized in Texas under the terms of a deed of trust granting a power of sale to a trustee. *Property Code § 51.002*. The deed of trust creates a lien on the real property as security for a promissory note given by the debtor. If the debtor fails to make timely payments and the debt has been accelerated or has otherwise matured, the holder of the lien may have the trustee foreclose on the property encumbered by the lien. *Kenneth M. Krock, The Constitutionality of Texas Non-judicial Foreclosure: Protecting Subordinate Property Interests From Deprivation Without Notice*, 32 *Houston L. R.* 815 (1995).

A mortgage holder must provide the debtor with a notice of default before foreclosing on a residence. *Property Code § 51.002(b)(3) and (d)*. The notice of default must give the debtor twenty days to cure the default. *Property Code § 51.002(b)(3) and (d)*. If the default is not cured within that time, the mortgage holder may then send a notice of foreclosure. *Property Code § 51.002(b)(3) and (d)*.

A notice of foreclosure is required for all foreclosures, not just those where the property is being used as a residence. *Property Code § 51.002(b)*. A notice of foreclosure does not have to include an opportunity to cure; it is simply a notice of when and where a foreclosure sale will occur. *Property Code § 51.002(b)*. The notice must be sent at least 21 days before the sale occurs. *Property Code § 51.002(b)(3)*; [King v. Bank of New York](#).

#### **Tenancy-at-Sufferance Clause:**

A deed of trust usually contains a “tenancy-at-sufferance” clause that creates a landlord-tenant relationship in the event of foreclosure. [Yarbrough v. Household Finance Corp. III](#); [Pinnacle Premier Props., Inc. v. Breton](#). The clause will state that the former owner becomes a tenant by sufferance and the purchaser at a foreclosure sale may bring an eviction suit. In that situation, any person who purchases the property at a foreclosure sale may evict the mortgagor (the original buyer) pursuant to the deed of trust because the new purchaser is now in the position of a landlord and the former owner is a tenant by sufferance.

Under these circumstances, a defendant's complaints about defects in the foreclosure process generally do not require a justice court to resolve a title dispute before determining the right to immediate possession, so the justice court has jurisdiction. [Pinnacle Premier Props., Inc. v. Breton](#); [Glapien v. AH4R I TX, LLC](#); [Maxwell v. U.S. Bank Nat'l Ass'n](#).

For example, in [Villalon v. Bank One](#), Bank One foreclosed on a deed of trust signed by the owner of the property. The deed of trust contained a provision stating that any person remaining on the property after a foreclosure sale is a tenant by sufferance and may be removed by writ of possession. “The landlord-tenant relationship between Bank One and Villalon was established in the deed of trust.”

Even though Villalon claimed that the foreclosure was wrongful, the court of appeals held that Bank One was entitled to immediate possession and Villalon could bring a wrongful foreclosure claim later in district court. [Trimble v. Federal National Mortgage Association](#).

***c. Purchaser's Right to Evict Former Owner after Foreclosure Sale for Failure to Pay Property Owner Association Assessments***

What if a person purchases property at a foreclosure sale for failure to pay property owner association assessments and the former owner won't leave? The former owner can be deemed a tenant by sufferance.

A court recently upheld the eviction of a former homeowner by a purchaser of the property at a constable's public sale following the foreclosure of a lien for failure to pay property owner association assessments. The court cited Section 209.011(a) of the Property Code, which states that a person who "purchases occupied property at a sale foreclosing a property owners' association's assessment lien must commence and prosecute a forcible ... detainer action ... to recover possession of the property." In light of that provision, the court found that a forcible detainer was proper based on Section 24.002(a)(2) of the Property Code, which provides for eviction of a tenant by sufferance following foreclosure of a lien superior to the occupants' right of possession. [Garcia v. Perrett](#).

***d. What If the Residence is occupied by a Tenant of the Prior Owner?***

What if a person purchases a property at a foreclosure sale and the former owner's tenant is still occupying the property?

When a tenant's landlord is foreclosed upon, the tenant's lease is generally terminated. [B.F. Avery & Sons v. Kennerly](#); [ICM Mortg. Corp. v. Jacob](#). If the lease has terminated and the tenant refuses to leave, they become a tenant by sufferance.

However, if the purchaser indicates that they wish to continue the lease, then the lease continues as before the sale with the tenant paying rent to the new owner. [Coinmach Corp. v. Aspenwood Apartment Complex](#); [Twelve Oaks Tower I, LTD. v. Premier Allergy Inc.](#)

The purchaser is required to prove the following elements in order to evict the defendant:

- the purchaser is the owner;
- the defendant was an occupant at the time of foreclosure;
- the foreclosure was of a lien superior to the defendant's lease;
- the purchaser made a demand for possession; and
- the defendant refused to leave. [Goggins v. Leo](#).

If the tenant has paid the rent and has not breached a term of the lease, the purchaser must give **30 days' written notice** to vacate if he chooses not to continue with the lease. *See page 13.*

Before a foreclosure sale, a foreclosing lienholder may give written notice to a tenant stating that a foreclosure notice has been given to the landlord or owner of the property and specifying the date of the foreclosure. *Property Code §24.005(b).*

#### **4. Contract for Deed**

What if the parties have a contract for deed? There could be a landlord/tenant relationship either by virtue of a separate lease entered into concurrently with the contract for deed or due to the terms of the contract for deed. Note that in contract for deed cases, the court should be especially careful that the issue of possession is not dependent on a title dispute. *Contracts for Deed are discussed below on page 61.*

## CHAPTER 4: GENERAL EVICTION PROCEDURES

This chapter covers eviction procedures that generally apply to residential, commercial, and manufactured home evictions. There are some situations, however, where commercial and manufactured home evictions have their own specific issues or procedures which may deviate from the general procedures in this chapter. *Please refer to the Commercial Evictions chapter on page 56 and the Manufactured Homes Evictions chapter on page 51 for more details.*

### A. Procedure for Filing an Eviction Suit

#### 1. Grounds for Eviction

General grounds for an eviction include:

- A tenant breaches a lease term (including not paying rent) and fails to surrender possession upon demand.
- A tenant holds over after termination of their lease and fails to surrender possession upon demand.
- The occupant is a tenant at will or by sufferance and fails to surrender possession upon demand. *See page 5–6.*
- The occupant is a squatter or squatter’s tenant and fails to surrender possession upon demand. *See page 4.*

#### 2. Notice to Vacate

A notice to vacate tells a tenant or occupant that they must vacate the premises within a certain amount of time. A landlord may not file an eviction suit until **after** a proper *notice to vacate* has been given. *Property Code §24.005*. Rule 510.3(a)(3) expressly requires the landlord to include in the petition “a description of when and how the notice to vacate was delivered.” Once a notice to vacate has been delivered, the landlord must wait until after the deadline for the tenant to vacate before they can file an eviction suit. For example, if a landlord has to give a tenant three days’ notice to vacate, then he has to wait until those three days have passed *after* the notice to vacate was delivered before he can file a suit.

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A notice to vacate is not the same thing as when a person gives their landlord or tenant notice that they aren’t going to renew a lease when they are coming up on the end of that lease. A notice to vacate comes after a person’s right to possession has already ended and is the first step before an eviction case may be filed.

### How Much Notice Is Required?

#### **A tenant under a written lease/oral agreement** (*Property Code §24.005(a)*):

The landlord must give a tenant who defaults (breaches a lease term, including not paying rent) or holds over after the end of the rental term or renewal period at least **three days' written notice** to vacate, **unless** the parties have contracted for a shorter or longer notice period in a written lease or agreement.

#### **A tenant at will or by sufferance** (*Property Code § 24.005(b)*):

The landlord must give the tenant at least **three days' written notice** to vacate, **unless** the parties have contracted for a shorter or longer period in a written lease or agreement.

#### **A tenant of a squatter** (*Property Code § 24.005(c)*):

The landlord must give the person at least **three days' written notice** to vacate.

#### **A squatter** (*Property Code § 24.005(d)*):

The person entitled to possession must give the occupant **oral or written notice** to vacate, but the notice may be to vacate **immediately** or by a **specified deadline**. An eviction suit may be filed immediately upon giving notice in this situation.



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#### **A residential tenant of a building that is foreclosed upon under a lien superior to the tenant's lease** (*Property Code § 24.005(b)*):

If the tenant timely pays rent and is not otherwise in default under the tenant's lease after foreclosure, the purchaser must give a **residential tenant at least 30 days' written notice to vacate** if the purchaser chooses not to continue the lease. *Property Code §24.005(b)*. [See page 10–11.](#)

A tenant is considered to have timely paid the rent if, during the month of the foreclosure sale, the tenant pays the rent for that month to the: (1) landlord before receiving any notice that a foreclosure sale is scheduled during the month; or (2) foreclosing lienholder or purchaser at foreclosure not later than the fifth day after receipt of a written notice of the name and address of a purchaser who requests payment. *Property Code §24.005(b)*.

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. *Property Code §24.005(e)*.

### How Is It Delivered?



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Generally, the notice to vacate must be given in person or by mail to the premises.

- **In Person** (*Property Code § 24.005(f)*)
  - a. Personally delivered to the tenant or any person residing at the premises who is 16 years of age or older; or

- b. Personally delivered to the premises by attaching the notice to the **INSIDE** of the main entry door.
- **By Mail** (*Property Code § 24.005(f)*)
  - a. By regular mail, registered mail or certified mail, return receipt requested, to the premises in question
    - The notice period is calculated from the day on which the notice is delivered. *Property Code § 24.005(g)*.



**If by regular mail, how does the landlord show that the notice was delivered within the required time?**

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One way the landlord might attempt to do so is to rely on a presumption that first class mail is received within three days. The United States Postal Service’s regulations state that first class mail sent within the contiguous United States will arrive within three days. *39 C.F.R. § 121, App. A*. Federal courts have relied on this presumption in case law. Of course, the burden remains on the landlord to prove that the notice to vacate was timely. [Mendez v. Knowles](#); [Lindemood v. Comm’r of Internal Revenue](#); [Cook v. Comm’r of Soc. Sec.](#)

**Alternative Option if Above Options Won’t Work** (*Property Code § 24.005(f-1)*):

This is only an option if:

- a. 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; or
- b. The landlord reasonably believes that harm to a person would result from “In Person” delivery as described above.

**Method:**

- Securely affix the notice to the outside of the main entry door in an envelope with the tenant's name, address, and the words "IMPORTANT DOCUMENT" or similar language; and
- By 5 p.m. of the same day, deposit in the mail (in the same county as the premises) a copy of the notice to vacate to the tenant.
  - Notice to vacate in this manner is considered delivered on the date the envelope is affixed to the outside of the door and is deposited in the mail, regardless of the date the notice is received. *Property Code § 24.005(f-2)*.

**What If There Is No Proper Notice To Vacate?**

If a landlord does not prove that there was a proper notice to vacate, then the court may not grant a judgment of possession to the landlord. This is because one of the elements of an eviction case that the landlord needs to prove is that there was a demand for possession (the notice to vacate) and the tenant refused to leave in the required timeframe. The landlord cannot prove this and should lose the eviction suit if:

- The landlord failed to serve a notice to vacate at all;
- The landlord served a notice to vacate, but filed the eviction suit before the date by which the tenant was required to move out; or
- The landlord served a notice to vacate which had an improper timeframe for the tenant to vacate.

[McDonald v. Claremore Apartment Homes](#); [Goggins v. Leo](#); [AMC Mortg. Services, Inc. v. Shields](#); [Gore v. Homecoming Financial Networks, Inc.](#)

If the landlord DID serve a proper notice to vacate, but failed to include the description of when and how it was delivered in the petition as required, the court could allow the landlord to amend the petition, including an amendment at trial which may be oral. If the petition is not amended, however, the court may not grant a judgment of possession to the landlord.

### 3. Filing the Eviction Suit

An eviction suit is initiated when the plaintiff or the plaintiff's authorized agent files a written **sworn** petition with the justice of the peace in the precinct where the premises are located. *Rule 510.3(b)*.



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If the petition is filed in a precinct other than the one where the premises are located, the judge must dismiss the case and the plaintiff will not be entitled to a refund of the filing fee but will be refunded any service fees paid if the case is dismissed before service is attempted. *Rule 510.3(b)*. If an eviction suit is filed in the wrong precinct, the court should dismiss the case on its own motion without waiting for a motion to dismiss by the defendant.

#### ***a. Representation in an Eviction Suit***

An individual in an eviction suit (whether the plaintiff or the defendant) may represent himself or herself, or be represented by an authorized agent or by an attorney. *Rule 500.4(a)*.

A corporation or other entity in an eviction suit may be represented by an employee, owner, officer, or partner of the entity who is not an attorney, or be represented by a property manager or other authorized agent or by an attorney. *Rule 500.4(b)*.

The court may also allow an individual who is representing himself or herself, upon showing good cause, to be **assisted** in court by a family member or other individual who is not being compensated. *Rule 500.4(c)*.



## ***b. Contents of the Petition and Grounds for Eviction***

In addition to the requirements for all civil cases in Rule 502.2, a petition in an eviction case must be sworn to by the plaintiff and **must** contain ALL of the following:

1. a description, including the address, if any, of the premises that the plaintiff seeks possession of;
2. a description of the facts and the grounds for eviction; *See page 12*
3. a description of when and how the notice to vacate was delivered; *See page 13–15*
4. the total amount of rent due and unpaid at the time of filing, if any; *See page 3 and page 33*
5. a statement that attorney’s fees are being sought, if applicable. *See page 33–34*

*Rule 510.3(a).*

If a petition does not contain everything that is required, the court may allow the plaintiff to amend the petition.

A sample petition form may be found on the TJCTC website. *See page 50 for more information.*



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### **Who Has To Be Listed As Defendants On The Petition?**

If the eviction is based on a written residential lease, the plaintiff must list **all tenants obligated under the lease** whom the plaintiff seeks to evict. A judgment or writ of possession may NOT be issued or executed against a tenant obligated under a lease who is not named in the petition and served with a citation. *Rule 510.3(c)*. This means the plaintiff must pay service fees for each defendant since each defendant must be separately served with the citation. If a judgment is entered against a defendant who was not served, the judgment is void and unenforceable against that defendant. [\*American Spiritualist Assn. v. Ravkind\*](#).

### **May A Landlord File A Petition That Lists The Defendants As “John Smith And All Occupants?”**

Yes, but a judgment for possession or writ of possession is effective against “all occupants” only if they are guests or subtenants of John Smith, not if they are themselves tenants under a written lease with the landlord. In that case, they must be named separately as defendants and served with a citation.

For example, suppose the landlord has a written residential lease with a husband and wife, John and Mary Smith, both of whom signed the lease as tenants. The landlord may not evict Mary Smith by naming “John Smith and all occupants,” thereby hoping to avoid a second service fee for serving a

## TENANTS v. OCCUPANTS

**Tenants** are persons who are obligated under a lease, which may be oral or written. All tenants must be named and served with a citation in an eviction suit.

**Occupants** are persons who are not obligated under a lease, including temporary guests and minor children.

citation on Mary Smith. If Mary Smith is a tenant under a written lease, then she must be named as a defendant and served with a citation.

### ***c. Can the Court Provide Forms and Information to Parties?***



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The court may provide forms for parties to fill out and file for their cases. This can help parties file petitions and other documents that comply with the Texas Rules of Civil Procedure. But a party may not be forced to use the court’s forms. *Rule 507.2.*

A court (or clerk) should not assist parties in filling out forms. The court (or clerk) should not give *legal advice*, such as “am I in the right precinct,” but may give *procedural* information, such as “what does ‘plaintiff’ mean,” A court may also direct a party to the Rules of Civil Procedure. The court **must** make the Rules of Civil Procedure and the Rules of Evidence available for examination, either in paper form or electronically, during the court’s business hours. *Rule 500.3(f).*

Examples of forms that may be provided to parties in eviction cases may be found on the TJCTC website. *See page 50 for more information.*

### ***d. Civil Case Information Sheet***

A justice court civil case information sheet must be filed with the petition and be signed by the plaintiff, or the plaintiff’s authorized agent or attorney. But the court may not reject a pleading if the civil case information sheet is not filed with the petition. *Rule 505.2(b).*

### ***e. Filing/Service Fees or Statement of Inability to Afford Payment of Court Costs***

#### **Filing/Service Fees:**

On filing the petition, the plaintiff must pay the appropriate filing fee and service fees with the court. *Rule 502.3(a).* Only one filing is required for each case although a service fee must be assessed for each defendant.

#### **Filing Fee:**

In most counties the filing fee is \$46. This fee is made up of:

- the general filing fee (\$25) (*Local Government Code § 118.121*);
- the fee for indigent civil legal services (\$6) (*Local Government Code §133.153*);
- the e-filing fee (\$10) (*Government Code § 51.851(c)*);

**“Is this the right precinct?”**

If someone asks “am I in the right precinct,” we suggest that rather than saying yes or no you direct them to a map showing your precinct and ask them to determine whether or not their property is within the precinct.

- the new judicial education on court security fee (\$5) (*Government Code §51.971*).

**Service Fee:**

Fees for service of civil process are set by the commissioner’s court under Section 118.131, Local Government Code, and are listed in the Sheriffs’ and Constables’ fees listing published by the Comptroller’s Office.



**Filing a Statement of Inability to Afford Payment of Court Costs in Lieu of Filing/Service Fees:**

A plaintiff who is not able to afford to pay the filing and service fees may file a “Statement of Inability to Afford Payment of Court Costs.” Upon filing of the Statement, the clerk of the court must docket the action, issue citation, and provide any other customary services. *Rule 502.3(a)*.

**Form:**

The plaintiff must use the Supreme Court form or include the information required by that form. The clerk must make the form available to all persons without charge or request. *Rule 502.3(b)*. The Statement must either be sworn to before a notary or made under penalty of perjury and include the following statement: “I am unable to pay court fees. I verify that the statements made in this statement are true and correct.” *Rule 502.3(a)*.

A copy of the Supreme Court’s form may be found on the TJCTC website. *See page 50 for more information.*

If a plaintiff files a Statement of Inability to Afford Payment of Court Costs at the time they file a petition, then a copy of the Statement should be served on the defendant with the citation.



**Contesting a Statement of Inability to Afford Payment of Court Costs:**

A Statement of Inability to Afford Payment of Court Costs **accompanied by a legal-aid provider certificate may not be contested.**

- If the person is represented by an attorney who is providing free legal services because of the person’s indigence, without contingency, and the attorney is providing the legal services either directly or by referral from a legal aid provider described in Rule 145(e)(2), the attorney may file a legal-aid provider certificate confirming that the provider screened the person for eligibility under the income and asset guidelines established by the provider. *Rule 502.3(c)*.

If a legal-aid provider certificate is NOT filed, then the defendant may file a contest of a Statement filed with the petition. In other civil cases, the contest must be filed within seven days after the day the defendant’s answer is due. *Rule 502.3(d)*. In an eviction case, however, a defendant would have to file

such a contest before that seven day deadline due to the expedited time frame of eviction cases discussed below.

**Limit on what may be contested:**

If the Statement says the plaintiff receives a government entitlement based on indigence, then the only challenge that can be made is to whether or not that is true – in other words, is the person actually receiving the government entitlement. *Rule 502.3(d)*.

**Hearing:**

The judge must hold a hearing on the contest to determine the plaintiff’s ability to afford the fees, and the burden is on the plaintiff to prove such inability. **The judge may conduct a hearing on his or her own even if the defendant does not contest the Statement.** *Rule 502.3(d)*.

**If judge determines that the plaintiff can afford fees:**

If the judge determines that the plaintiff is able to afford the fees, he or she must enter a written order listing the reasons for the determination. The plaintiff must then pay the fees in the time specified in the order or the case will be dismissed without prejudice. *Rule 502.3(d)*.

**4. Setting the Trial Date and Issuing and Serving the Citation**

When a petition is filed, the court must immediately issue a citation directed to each defendant. *Rule 510.4(a)*.

**a. Contents of the Citation**

The citation must:

1. be styled “The State of Texas;”
2. be signed by the clerk under seal of court or by the judge;
3. contain the name, location, and address of the court;
4. state the date of filing of the petition;
5. state the date of issuance of the citation;
6. state the file number and names of the parties;
7. state the plaintiff’s cause of action and relief sought;
8. be directed to the defendant;
9. state the name and address of the attorney for the plaintiff, or if the plaintiff does not have an attorney, the address of the plaintiff;
10. state the day the defendant must appear in person for trial at the court issuing the citation, which must not be less than 10 days nor more than 21 days after the petition is filed;
11. notify the defendant that if the defendant fails to appear in person for trial, judgment by default may be rendered for the relief demanded in the petition;

12. inform the defendant that, upon timely request and payment of a jury fee no later than 3 days before the day set for trial, the case will be heard by a jury;
13. contain all the warnings required by Chapter 24 of the Texas Property Code; and
14. include the following statement: “For further information, consult Part V of the Texas Rules of Civil Procedure, which is available online and also at the court listed on this citation.” *Rule 510.4(a)*.

A sample citation form may be found on the TJCTC website. *See page 50 for more information.*

### ***b. Trial Date and Computation of Time***



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The trial date must be set **not less than 10 days and not more than 21 days after the petition is filed.** *Rule 510.4(a)(10)*.

To compute time, you should:

1. exclude the day of the event that triggers the period;
2. count every day, including Saturdays, Sundays, and legal holidays; and
3. include the last day of the period, but
  - a. if the last day is a Saturday, Sunday or legal holiday, the time period is extended to the next day that is not a Saturday, Sunday or legal holiday; and
  - b. if the last day for filing falls on a day during which the court is closed before 5:00 p.m., the time period is extended to the court’s next business day. *Rule 500.5(a)*.



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#### **“Mailbox Rule”**

Under the general rules for civil cases, a document that is required to be filed by a given date is considered to be timely filed if it is put in the U.S. mail on or before that date, and received by the court within 10 days of the due date. *Rule 500.5(b)*. But in an eviction case, if a document is filed by mail and not received by the court by the due date, then the court may take any action authorized by the rules, including issuing a writ of possession requiring the tenant to leave the property. *Rule 510.2*.

On a showing of good cause, the judge may extend any time period under the rules except those relating to new trial and appeal. *Rule 500.5(c)*. (But note that a motion for a new trial is not allowed in an eviction case anyway.)

The following calendar illustrates how to count the days between the filing of a petition in an eviction case and the setting for the trial date:

<h1>July 2017</h1>						
Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
						1
2	3 <b>(Day 0) Case Filed</b>	4 (Day 1) Independence Day Holiday	5 (Day 2)	6 (Day 3)	7 (Day 4)	8 (Day 5)
9 (Day 6)	10 (Day 7)	11 (Day 8)	12 (Day 9)	13 <b>(Day 10) First day trial can be set</b>	14 (Day 11)	15 (Day 12)
16 (Day 13)	17 (Day 14)	18 (Day 15)	19 (Day 16)	20 (Day 17)	21 (Day 18)	22 (Day 19)
23 (Day 20)	24 <b>(Day 21) Last day to set trial</b>	25	26	27	28	29
30	31					

**c. Notice to Plaintiff of Trial Date**

The Rules do not state how notice of a trial date is to be given to the plaintiff, but notice could be given as follows:

- Give the plaintiff a copy of the citation with the trial date;
- Mail, email or fax a notice of the trial date to the plaintiff;
- Give the plaintiff written notice of a tentative trial date upon filing the case and confirm later.

**d. Service of Citation on Defendant and Return of Service**



**Who May Serve:**

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The citation must be served by a **constable or sheriff**, unless another person is authorized by a written court order. *Rule 510.4(b)(1)*.

**Deadline for Service:**

The citation must be served on the defendant at least **six days** before the day set for trial. *Rule 510.4(b)(2)*.

**Required Method of Service:**

- By delivering a copy to the defendant in person along with a copy of the petition; or
- By leaving a copy of the citation along with a copy of the petition with some person other than the plaintiff over the age of 16 years at the defendant’s usual place of residence. *Rule 510.4(b)(2).*

**Return of Service:**

At least one day before the day set for trial, the constable or sheriff (or other person authorized by court order) who served the citation must complete and file a return of service with the court that issued the citation. The return must meet the requirements of Rule 501.3. *Rule 510.4(b)(3).*

***e. Alternative Service of the Citation by Delivery to the Premises***

**When Allowed:**

The citation in an eviction case may be served by delivery to the premises (instead of by one of the methods described above) **if:**

1. The constable or sheriff (or other person authorized by a written court order) is unsuccessful in serving the citation on the defendant or by leaving it with a person over the age of 16 at the defendant’s usual place of residence;
2. The petition lists all the home and work addresses of the defendant that are known to the plaintiff and states that the plaintiff knows of no other home or work addresses of the defendant in the county where the premises are located; and
3. The constable or sheriff (or other person authorized by a written court order) files a sworn statement that he or she has made diligent efforts to serve the citation on **at least two occasions** at all addresses of the defendant in the county where the premises are located, stating the time and places of the attempted service.

*Rule 510.4(b)(1).*

The judge must promptly consider the sworn statement and determine whether the citation may be served by delivery to the premises. The plaintiff is not required to make a request or motion for alternative service *Rule 510.4(b)(2).*

**Method and Deadline:**

If the judge authorizes service by delivery to the premises, then the constable or sheriff (or other person authorized by written court order) must, **at least six days before the day set for trial:**

1. Deliver a copy of the citation with a copy of the petition attached to the premises by:
  - a. Placing it through a door mail chute or slipping it under the front door; or
  - b. If neither of those methods are possible, by securely attaching the citation to the front door or main entry to the premises;

**AND**

2. Mail a copy of the citation with a copy of the petition attached to the defendant at the premises by first class mail.

*Rule 510.4(b)(3).*

**Return of Service:**

The constable or sheriff (or other authorized person) must note on the return of service the date the citation was delivered to the premises and the date it was put in the mail. *Rule 510.4(b)(4).*

## **B. Request for Immediate Possession**

At the time of filing the petition or at any time prior to final judgment, the plaintiff may file a bond for immediate possession. This allows the plaintiff to get a writ of possession (and thus get possession of the premises) sooner than they normally would, provided certain requirements are met as described below.

**Bond Amount and Conditions:**

The amount of the bond is set by the judge as the probable amount of the costs of suit and damages that may result to the defendant if the suit has been improperly brought. The bond is conditioned that the plaintiff will pay the defendant all such costs and damages that are adjudged against the plaintiff. *Rule 510.5(a).*

**Notice Requirements:**

The court must notify the defendant that the plaintiff has filed an immediate possession bond. This notice must be served on the defendant in the same manner as service of the citation. The notice must inform the defendant that if the defendant does not file an answer or appear at trial, and a judgment for possession is granted by default, then **an officer will place the plaintiff in possession of the property on or after the 7<sup>th</sup> day after the date the defendant was served with the notice.** *Rule 510.5(b).* A citation containing the required notice is available on the TJCTC website.

**If Defendant Does Not Appear for Trial and Does Not File an Answer:**

A writ of possession must issue immediately upon demand by the plaintiff and payment of any required fees if:

- An immediate possession bond has been filed and approved and a notice was served on the defendant;
- The defendant did not file an answer or appear for trial; and
- A default judgment was rendered against the defendant.

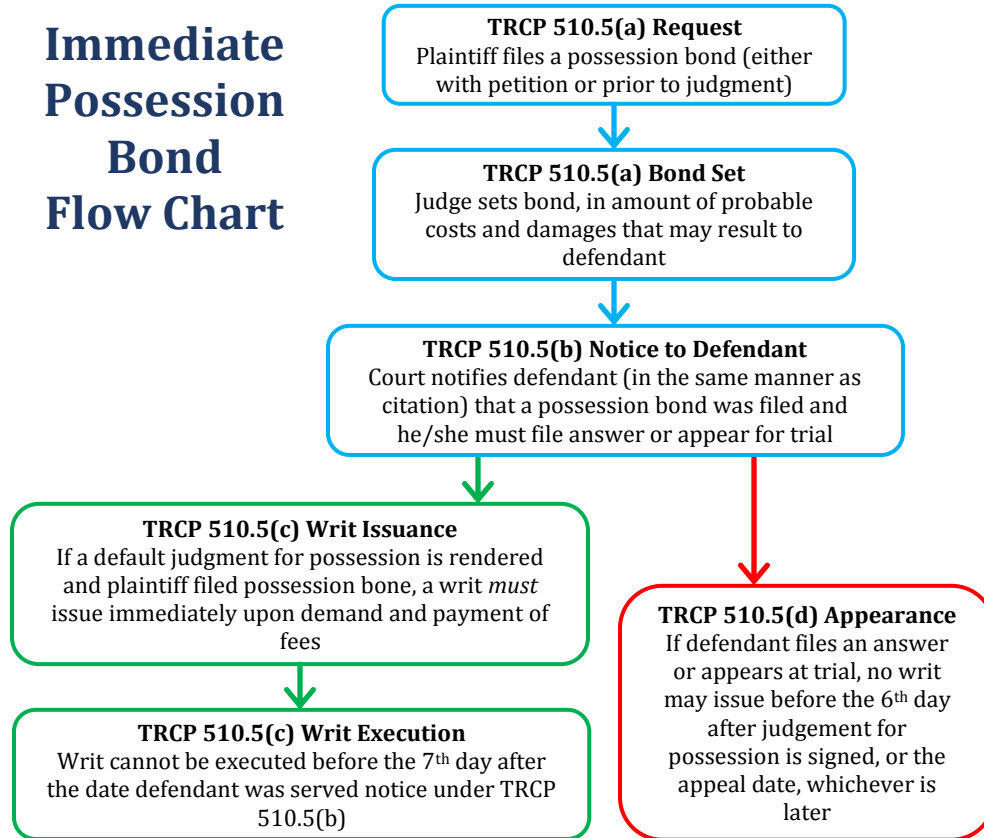


The writ of possession may not be *executed*, however, until at least the 7<sup>th</sup> day after the defendant was served with notice of the immediate possession bond. *Rule 510.5(c)*.

**If Defendant EITHER Appears for Trial OR Files an Answer:**

The case will be treated just like any other case where no immediate possession bond was filed (no writ of possession may issue before the 6<sup>th</sup> day after the date a judgment for possession is signed or the day following the deadline for the defendant to appeal the judgment, whichever is later). *Rule 510.5(d)*. In other words, **an immediate possession bond only allows immediate possession if there is a default judgment against the defendant and the defendant has not filed an answer.** So if the defendant appears for trial or files an answer, immediate possession pursuant to an immediate possession bond is off the table and the case proceeds like any other eviction case.

**Here is an immediate possession bond flow chart:**



*This chart should be used along with the Eviction Flow Chart*

## C. Default Judgment

### 1. General Requirements

The defendant may, but is not required to, file a written answer with the court on or before the trial date, but the defendant must appear for trial on the day set for trial in the citation. *Rule 510.6(a)*. If they don't (and they have been served), a default judgment could be entered against them.

#### **Default When No Answer Has Been Filed:**

The allegations of the petition must be taken as true and judgment by default must be rendered in favor of the plaintiff if:

- The petition contains all required information;
- The defendant fails to appear at trial;
- No answer was filed before the case was called for trial;
- Proof of service has been filed in accordance with Rule 510.4; and
- The plaintiff has filed the required military service affidavit and the court is not barred from granting a default judgment under the Servicemembers Civil Relief Act (see next section for more information).

*Rule 510.6(b)*.

#### **Default When an Answer Has Been Filed (Post-Answer Default):**

The court may proceed to hear the case just as they would at a normal bench trial and render judgment accordingly if the defendant filed an answer but fails to appear for trial. *Rule 510.6(b)*.



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#### **If Petition is Missing Something:**

If a plaintiff's petition is missing a required fact (such as the description of the proper notice to vacate or proper grounds for the eviction), the court may allow the plaintiff to orally amend the pleadings and provide evidence of the missing information under oath at the default hearing if the amendment will not operate as a surprise to the other party. *Rule 502.1 and 502.7(a)*.

#### **Notice to Defendant:**

When a default judgment is signed, the clerk of the court must immediately mail written notice of the judgment by first class mail to the defendant at the address of the premises. *Rule 510.6(c)*.

## 2. Affidavit and Procedures Regarding Defendant’s Military Status (Servicemembers Civil Relief Act)

The Servicemembers Civil Relief Act (“SCRA”) imposes certain procedural requirements in all civil cases, including eviction cases in justice courts. *50 U.S.C. § 3911(5)*. *See page 58–60 for additional information regarding the Servicemembers Civil Relief Act.*

### Affidavit Requirements:

In any eviction suit in which the defendant does not make an appearance, before entering a default judgment, the court “shall require the plaintiff to file with the court an affidavit:

- Stating whether or not the defendant is in military service **and showing necessary facts to support the affidavit**; or
- ...[S]tating that the defendant is unable to determine whether or not the defendant is in military service.”

*50 U.S.C. § 3931(b)*.

The affidavit may be a statement, declaration, verification, or certificate, in writing, subscribed and certified or declared to be true under penalty of perjury. *50 U.S.C. § 3931(b)(4)*.



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Typically, plaintiffs will attach a printout from the Department of Defense website (<https://www.dmdc.osd.mil/scra/owa/home>), but they are not required to use that form as long as they show “necessary facts” to support the affidavit. For example, in one case a plaintiff submitted an affidavit from the defendant’s mother stating that he was not in military service!

*A person who files a false affidavit or makes a false statement, declaration, verification or certificate knowing it to be false is subject to prosecution under Title 18 of the United States Code and may be fined and/or imprisoned for up to one year. 50 U.S.C. § 3931(c).*

### What Does the Court Do Once the Affidavit is filed?

If a proper affidavit under the SCRA is filed, there are three possibilities:

- The defendant is **not** in military service: The court may enter a default judgment.
- The court is **unable to determine whether the defendant is in military service:** The court may – but does not have to – require the defendant to post a bond in an amount approved by the court to protect the defendant if it turns out that he is in military service. *50 U.S.C. § 3931(b)(3)*.
- It appears that the defendant **is** in military service: The court may not enter a judgment until after the court appoints an attorney to represent the defendant. *50 U.S.C. § 3931(b)(2)*.

- In this situation, on the request of the attorney or on the court’s own motion, the court must grant a stay of proceedings for a minimum of 90 days under certain circumstances. *See page 29 for more information.*

**What if No Affidavit is Filed or Affidavit Doesn’t Show “Necessary Facts to Support”?**

If the plaintiff fails to file an affidavit under the SCRA in an eviction case, the court **may not** grant a default judgment.

If the plaintiff files an affidavit stating that the defendant is not in military service, but fails to “show necessary facts to support the affidavit,” the court **may not** grant a default judgment.

**What if The Court Entered a Default Judgment When It Shouldn’t Have?**

If a default judgment is entered against a service member who did not have notice of the action during his period of military service, or within 60 days after termination of or release from military service, the court shall re-open the judgment upon application of the service member for the purpose of allowing the service member to defend the action if it appears that:

- The service member was materially affected in making a defense to the action by reason of military service; and
- The service member has a meritorious or legal defense to the action or some part of it.

*50 U.S.C. § 3931(g)(1).*

A request to vacate a default judgment must be made by or on behalf of the service member no later than 90 days after the date of termination of or release from military service. *50 U.S.C. § 3931(g)(2).*



Obviously, if this situation arises, a justice court could be faced with setting aside a default judgment and re-opening a case even though the court would – in the absence of the SCRA – have lost plenary power to set aside a default judgment. But the SCRA pre-empts the usual limitations in Rules 507.1 and 510 and allows the court to do this.

**If Defendant is Served Less Than Six Days Before Trial...**

**D. Trial Procedure and Remedies**

**1. No Trial Less Than Six Days after Service**

An eviction case should be docketed and tried just as other cases. But a trial in an eviction case may not be held less than six days after service of the citation under Rule 510.4. *Rule 510.7(a).*

What should you do if the defendant is served less than six days before the date set for trial? The court must continue the trial date unless the defendant shows up for trial and waives the six day rule.

## 2. Limit on Postponement

Trial in an eviction case must not be postponed more than seven days total unless both parties agree in writing. *Rule 510.7(c)*.

## 3. Stay of Eviction When Defendant is in Military Service

The Servicemembers Civil Relief Act (“SCRA”) imposes certain procedural requirements in all civil cases, including eviction cases in justice courts. *50 U.S.C. § 3911(5)*. *See page 58–60 for additional information regarding the Servicemembers Civil Relief Act.*

### **If Servicemember Defendant has not appeared in the Case:**

If the defendant has not appeared in the case and the court determines that **he is in military service** and appoints counsel, **the court shall grant a stay of proceedings for a minimum of 90 days** upon request of counsel or upon the court’s own motion if the court determines that:

- There may be a defense to the action and it cannot be presented without the presence of the defendant; or
- After due diligence counsel has been unable to contact the defendant or otherwise determine whether a meritorious defense exists.

*50 U.S.C. § 3931(d)*.

### **If Servicemember Defendant has ACTUAL Notice of the Case:**

If a service member receives actual notice of an action against him while he is in military service or within 90 days after the end of his service, then at any time before a final judgment is entered in the case, the court may stay the case for not less than 90 days on its own motion, and shall do so upon application of the service member if the application includes:

- a letter or other communication setting forth facts stating the manner in which current military duty requirements materially affect the service members’ ability to appear and stating a date when the service member will be available to appear; and
- a letter or other communication from the service member’s commanding officer stating that the service member’s current military duty prevents his appearance and that military leave is not authorized for the service member at the time of the letter. *50 U.S.C. § 3932(b)*.

A service member who is granted a stay on this ground may apply for an additional stay, and if it is denied, the court must appoint an attorney to represent the service member. *50 U.S.C. § 3932(d)*. If a stay is denied, the service member may not obtain a stay under the procedures for a defendant who has not appeared in the case as described above. *50 U.S.C. § 3932(e)*.

### **Stay of Eviction Case for Certain Premises and Adjustment of Lease Obligations:**

A justice court may also stay an eviction case concerning residential premises that are occupied by a service member or the dependents of a service member and for which the monthly rent does not exceed \$3,584.99 (as of January 1, 2017). *50 U.S.C. § 3951(a); 82 Fed. Reg. 10762 (February 15, 2017)*. The amount of monthly rent escalates each year. *50 U.S.C. § 3951(a)(2)*.

If a suit is filed for eviction of a service member or his dependents from such premises, the court may on its own motion, and shall if a request is made by or on behalf of a service member *whose ability to pay the agreed rent is materially affected by military service*:

- Stay the proceedings for 90 days unless in the opinion of the court, justice and equity require a longer or shorter time; or
- Adjust the obligations under the lease to preserve the interests of all parties.

*50 U.S.C. § 3951(b)*.

If a stay is granted the court may grant to the landlord “such relief as equity may require.” *50 U.S.C. § 3951(b)*.

This is a separate stay provision (in addition to the ones discussed above) and to be eligible for a stay under this section the service member does not have to present a letter from his commanding officer, but instead must show that his ability to pay his rent is materially affected by his military service.

If the court grants relief to the service member under this section, the court may also specify an amount of rent to be paid to the landlord while the case is pending, and the Secretary of the relevant service branch must make an allotment of the service member’s pay to satisfy the terms of the court’s order, subject to the Secretary’s regulations concerning the maximum amount of a service member’s pay that may be allotted under the SCRA. *50 U.S.C. § 3951(d)*.

## **4. Bankruptcy Filing by Tenant**

### **Filed Before Judgment:**

If a tenant files a bankruptcy petition **before** a judgment for possession is entered, the eviction suit is automatically stayed and no further proceedings may be held until the landlord obtains an order from the bankruptcy court lifting the stay. *11 U.S.C. § 362*. The court should consider any evidence of the filing of a bankruptcy petition because there are strict penalties for going forward with a case after a bankruptcy petition has been filed.

### **Filed After Judgment:**

If a bankruptcy petition is filed **after** a judgment for possession has been entered, then the eviction case is not stayed and a writ of possession may issue. *11 U.S.C. § 362(b)(22)*.

## 5. Retaliation and Rent Deduction Defenses (Only in Residential Evictions)

If a tenant raises a retaliation or rent deduction defense in a residential eviction suit, the court will have to resolve it before entering a judgment. If a judge finds that there is a valid defense, then he or she should rule in favor of the defendant.

However, if the tenant wishes to recover civil penalties, actual damages, court costs or reasonable attorney's fees either for retaliation under Section 92.333 or for violation of the landlord's obligation to repair or remedy conditions of the premises under Section 92.0563, the tenant must file a separate suit to recover on those claims. They may not be part of the eviction suit. As Property Code § 92.335 makes clear: "Other judicial actions under this chapter [Chapter 92] may not be joined with an eviction suit or asserted as a defense or crossclaim in an eviction suit."

### **Rent Deduction Defense:**

Property Code § 92.335 expressly provides that "a rent deduction lawfully made by the tenant under [Chapter 92] is a defense for nonpayment of the rent to the extent allowed by [Chapter 92]." What this means is that a tenant may raise as a defense in an eviction suit for nonpayment of rent that the tenant was entitled to a rent deduction because of the exercise of some other right under Chapter 92, such as the tenant's repair and deduct remedies under Property Code § 92.0561. *See page 87-90.*

### **Retaliation Defense:**

Property Code § 92.335 expressly provides that retaliation by the landlord "is a defense" in an eviction suit. What this means is that if there has been retaliation by a landlord as described below, a tenant may raise that fact as a defense in an eviction suit.

A landlord may not retaliate against a tenant just because the tenant:

- In good faith exercises or attempts to exercise a right or remedy granted to the tenant by lease, ordinance or statute;
- Gives the landlord a notice to repair or exercises a remedy under Chapter 92; or
- Complains in good faith to a governmental entity, public utility or civil or nonprofit agency and claims a building or housing code violation or utility problem and believes in good faith that the complaint is valid and that the violation or problem occurred.

*Property Code § 92.331(a).*

If the tenant takes any of the above actions, then the landlord may not, within six months of the tenant's actions, retaliate against the tenant by:

- Filing an eviction proceeding except for the grounds stated in Property Code § 92.332(b). This means that an eviction or lease termination based on these grounds does not constitute retaliation:

- The tenant is delinquent in rent when the landlord gives notice to vacate or files an eviction action;
  - The tenant, or family member or guest, intentionally damages property on the premises or threatens the landlord, the landlord's employees or another tenant;
  - The tenant has materially breached the lease by serious misconduct or criminal acts;
  - The tenant holds over after giving notice of termination or intent to vacate;
  - The tenant holds over after the landlord gives notice of termination at the end of the rental term and the tenant does not take action under Section 92.331 until after the landlord gives notice of termination;
  - The tenant holds over and the landlord's notice of termination is motivated by a good faith belief that the tenant, a family member or guest might adversely affect the quiet enjoyment or health and safety of other tenants or neighbors or damage the property of the landlord, other tenants or neighbors.
- Depriving the tenant of the use of the premises except for reasons authorized by law;
  - Decreasing services to the tenant;
  - Increasing the tenant's rent or terminating the tenant's lease; or
  - Engaging in bad faith in a course of conduct that materially interferes with the tenant's rights under the lease.

*Property Code § 92.331(b).*

A landlord is not liable for retaliation if he proves that the action was not made for purposes of retaliation.

And the landlord is not liable—unless it violates a prior court order— for a rent increase that is made under an escalation clause in a written lease for utilities, taxes or insurance; or for a rent increase or service reduction that is part of a pattern of rent increases or service reductions for an entire multi-dwelling project). *Property Code § 92.332(a).*

## **6. Bench Trial**

The court will call and hear the case just like any other civil case, and may develop the facts of the case by asking questions of any witnesses or the parties. *Rule 500.6.*

If the plaintiff does not appear for trial, the court may postpone or dismiss the suit. *Rule 503.6(b).*

*For what to do if the defendant does not appear for trial, see the Default Judgment section on pages 25–27.*



If both parties are present (or the requirements for a default judgment are met), the court should award possession to the plaintiff if it can check each of the following four boxes as a result of the hearing (otherwise award possession to the defendant):

- Filed in the correct precinct – *see page 2.*
- Proper notice to vacate – *see pages 12–15.*
- Proper service – *see pages 21–23.*
- Proper grounds for eviction, such as nonpayment of rent or some other breach of the lease (and no retaliation or rent deduction defense) – *see page 12 and pages 30–31.*

When making its ruling, the court should award the following along with possession (as applicable):

- Back rent, if any – *see page 33.*
- Court costs to the prevailing party – *see page 33.*
- Attorney’s fees if allowable – *see page 33–34.*

## 7. Jury Trial

Any party may file a written demand for trial by jury by making a request to the court at least three days before the trial date. The demand must be accompanied by payment of the jury fee (\$22) or by filing a statement of inability to afford payment of the jury fee. *Rule 510.7(b).*

If a jury is demanded by either party, it will be impaneled and sworn as in other cases, and after hearing the evidence it will return its verdict in favor of the plaintiff or the defendant. If a jury is not timely demanded by either party, the judge will try the case. *Rule 510.7(b).*

## 8. Judgment

### a. General

If the judgment is in favor of the plaintiff, the judge must render judgment for the plaintiff for possession of the premises, costs, delinquent rent as of the date of entry of the judgment, if any, and attorney’s fees if recoverable by law. *Rule 510.8(b).*

## EVIDENCE OF ATTORNEY’S FEES

A party should put on evidence of the attorney’s fees claimed. *Powell v. Mel Powers Inv. Builder.* This is done by the attorney submitting an affidavit or taking the stand and introducing into evidence the fee statements or testifying as to the amount of the legal fees. “A trial judge may consider several factors in awarding the amount of attorney’s fees, including the quality of legal work, the time and effort required by the attorney, the nature and intricacies of the case and the benefit resulting from the litigation.” *Carlson’s Hill Country Beverage v. Westinghouse Road Joint Venture.*



If the judgment is in favor of the defendant, the judge must render judgment for the defendant against the plaintiff for costs and attorney's fees if recoverable by law. *Rule 510.8(c)*.

If a party is awarded money damages (back rent, attorney's fees, and costs), the party may file an abstract of judgment just as in other civil suits. *Property Code § 52.003*.

### **b. Jury Verdict**

Where a jury has returned a verdict, the judge may render judgment on the verdict or, if the verdict is contrary to the law or the evidence, the judge may render a judgment notwithstanding the verdict. *Rule 510.8(a)*. This means that even if the jury finds in favor of the tenant, the judge may render a verdict in favor of the landlord (or vice versa) if the jury verdict conflicts with the law or the evidence.

### **c. Back Rent**

An award of back rent may be included in the judgment if the claim was within the jurisdiction of the court at the time of filing (not more than \$10,000, excluding statutory interest and court costs, but including attorney's fees). *Rule 500.3(d)*.



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The judgment may be for the entire amount of back rent, including any amount that accrued after the petition was filed and before the date of judgment. *Rule 510.8(b)*. The court may enter a judgment for back rent that is more than \$10,000 due to the "mere passage of time," as long as it was under \$10,000 at the time of filing. [Wattley v. Turner](#); [Carlson's Hill Country Beverage v. Westinghouse Road Joint Venture](#). In [Kendziorski v. Saunders](#), the court recognized that a justice court's jurisdiction is not exceeded where "additional damages have been sustained as a result of the passage of time, such as attorney's fees."

The court **may not** award late fees or other penalties in an eviction suit. [Hanks v. Lake Towne Apartments](#).

### **d. Attorney's Fees and Court Costs**

#### **Court Costs:**

The prevailing party is entitled to recover court costs in an eviction case. *Property Code § 24.006(d)*. The costs should be considered as part of the total award when setting the amount of the bond for appeal. *Rule 510.8(b) and (c); Rule 510.11*.

#### **Attorney's Fees:**

**Landlord:** A prevailing landlord is entitled to recover reasonable attorney's fees from the tenant if:

- A written lease entitles the landlord to recover attorney's fees; or

- The landlord gives a tenant who is unlawfully retaining possession of the landlord’s premises a written demand to vacate the premises stating that if the tenant does not vacate the premises before the 11<sup>th</sup> day after the date of receipt of the notice and the landlord files suit, then the landlord may recover attorney’s fees. This demand must be sent by registered mail or certified mail, return receipt requested, at least 10 days before the suit is filed.

*Property Code § 24.006(a) and (b).*

**Tenant:** A prevailing tenant is entitled to recover reasonable attorney’s fees from the landlord if:

- A written lease entitles the landlord or the tenant to recover attorney’s fees; or
- The landlord gives the tenant a written demand to vacate the premises and a notice that the landlord may recover attorney’s fees. (The tenant is not required to give notice to the landlord in order to recover fees.)

*Property Code § 24.006(c).*

***e. State Amount of Appeal Bond and Rent to Be Paid Into Registry (Only in Residential Evictions for Nonpayment of Rent)***

**Appeal Bond:**

In a *residential* eviction suit for *nonpayment of rent*, the judge must state in the judgment the amount of the appeal bond, taking into consideration the money required to be paid into the court registry under Section 24.0053 (the amount of rent to be paid each rental pay period, typically each month).

*Property Code § 24.00511(a).*

**Rent Registry:**

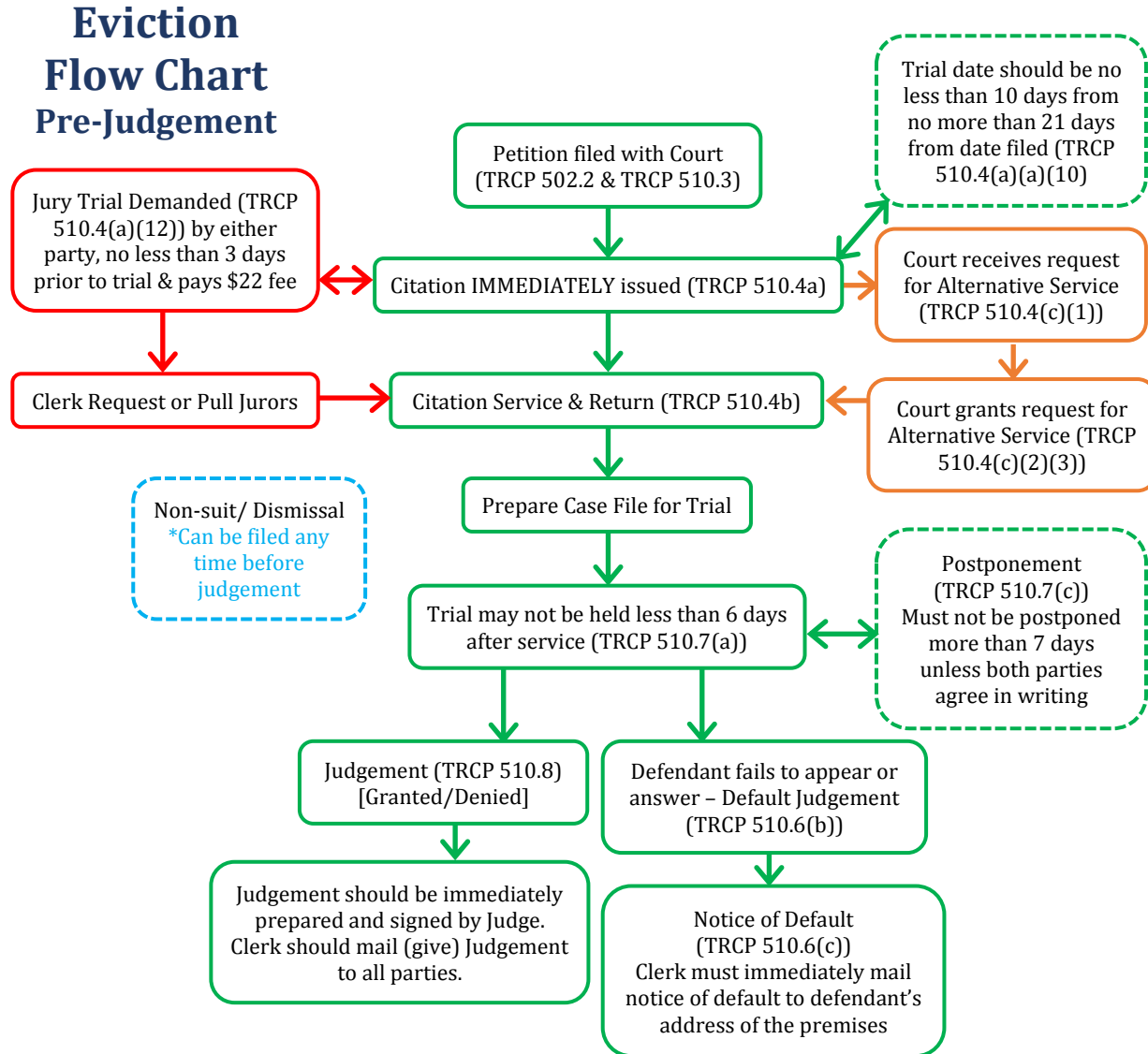
If the justice court enters judgment for the landlord in a *residential* eviction case based on *nonpayment of rent*, the judge must determine the amount of rent to be paid each rental pay period during the pendency of any appeal and shall note that amount in the judgment. If a portion of the rent is payable by a government agency, the court must determine and note in the judgment the portion of the rent to be paid by the government agency and the portion to be paid by the tenant. The court’s determination must be in accordance with the terms of the rental agreement and applicable laws and regulations. *Property Code § 24.0053(a). See page 40-41 (discussing how to set the appeal bond).*

**9. No Motion for New Trial**

A motion for a new trial may not be filed in an eviction case. *Rule 510.8(e).*

## 10. Eviction Flow Chart (Pre-Judgment)

Here is an eviction flow chart for pre-judgment issues:



## E. Writ of Possession

If the judgment is in favor of the plaintiff, the judge must award a writ of possession upon demand of the plaintiff and payment of any required fees. *Rule 510.8(d)*.

## 1. Time to Issue Writ of Possession



KEY  
POINT

Except in the case of an immediate possession bond (*see page 23-24*), a writ of possession **may not issue before the 6<sup>th</sup> day** after the date a judgment for possession is signed or the day following the deadline for the defendant to appeal the judgment, whichever is later. *Rule 510.8(d)(1)*. This gives the defendant time to perfect an appeal.

For example, suppose a judgment for possession is signed on Tuesday, September 5, 2017. The sixth day after the date the judgment for possession was signed is Monday, September 11, 2017. However, the court may **not** issue a writ of possession that day because the defendant has five days to file an appeal and the fifth day after the judgment was signed is Sunday, September 10. Therefore, under the computation of time rule in Rule 500.5, since the last day to file an appeal ends on a Sunday, the “time period is extended to the next day that is not a Saturday, Sunday or legal holiday.” This means the defendant has until Monday, September 11, to file an appeal and a writ of possession may not issue until Tuesday, September 12, 2017.



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In addition, if the court closes before 5:00 p.m. on Monday, September 11, then “the time period is extended to the court’s next business day.” *Rule 500.5(a)(3)(B)*. So if the court closes before 5:00 p.m. on Monday, then the defendant has until Tuesday, September 12, to file an appeal, and the court must not issue a writ of possession until Wednesday, September 13, 2017.

Because of these computation of time rules, it is very important to look at a calendar and determine the day on which the defendant must file an appeal. Then you can figure out what the day after that would be, which is the first day a writ of possession may issue.

Here are some examples of how to do this:

First, take the example given above, and suppose the court does **not** close before 5:00 p.m. on Monday, September 11, 2017:

<h1>September 2017</h1>						
Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
					1	2
3	4 Labor Day	5 Judgement for Possession Signed	6 (Day 1)	7 (Day 2)	8 (Day 3)	9 (Day 4)
10 (Day 5) Fifth day ends on a Sunday; therefor, defendant has until next day that is not a Saturday, Sunday, or legal holiday to file an appeal	11 (Day 6) Defendant must file appeal if court does not close before 5:00 p.m.	12 (Day 7) First day of writ of possession may issue	13	14	15	16
17	18	19	20	21	22	23
24	25	26	27	28	29	30

Now suppose the court does close before 5:00 p.m. on Monday, September 11, 2017:

<h1>September 2017</h1>						
Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
					1	2
3	4 Labor Day	5 Judgement for Possession Signed	6 (Day 1)	7 (Day 2)	8 (Day 3)	9 Day 4
10 (Day 5) Fifth day ends on a Sunday; therefore, defendant has until next day that is not a Saturday, Sunday, or legal holiday to file an appeal	11 (Day 6) Court closes before 5:00 p.m.; therefore, defendant has until the next day to file appeal	12 (Day 7) Defendant must file appeal	13 (Day 8) First day a writ of possession may issue	14	15	16
17	18	19	20	21	22	23
24	25	26	27	28	29	30



In the above example, suppose the plaintiff comes to the court at 9:00 a.m. on Tuesday, September 12, 2017, and requests a writ of possession. If the time calculation rules were not applied correctly, and the court issues the writ of possession, what do you do if the defendant then comes in at 3:00 p.m. and files an appeal? There is no good solution to this problem. This is why it's important to calculate the time periods correctly, and understand when the last day for an appeal to be filed is and when is the first day for a writ of possession to be issued.

## 2. Time Limit on Issuance of Writ of Possession

How long does a landlord have to request a writ of possession? Generally, a writ of possession may not be issued more than 60 days after a judgment for possession is signed. But for good cause, the court may extend the deadline for issuance of a writ of possession to 90 days after the judgment for possession is signed. *Rule 510.8(d)(1)*.

### 3. Deadline to Execute Writ of Possession

A writ of possession may not be executed (by the sheriff or constable) after the 90<sup>th</sup> day after a judgment for possession is signed. *Rule 510.8(d)(2)*.

### 4. Effect of Appeal



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A writ of possession **MUST NOT** be issued if an appeal is perfected and, if applicable, rent is paid into the registry of the court, as required by the rules and the Property Code. *Rule 510.8(d)(3)*. What happens if the tenant does not pay rent into the court registry after perfecting an appeal is discussed below on [page 46](#).

### 5. Execution of the Writ of Possession

#### Written Warning:

The officer (constable or sheriff) executing the writ must post a written warning 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. *Property Code § 24.0061(d)(1)*.

#### Execution:

A constable or sheriff may use “reasonable force” in executing a writ of possession. *Property Code § 24.0061(h)*.

When a tenant’s personal belongings are removed, they should be placed in such a way that they do not block a sidewalk or street, and should not be left out in inclement weather. *Property Code § 24.0061(d) and (g)*.

The writ of possession should authorize the officer, at the officer’s discretion, to engage the services of a bonded or insured warehouseman to remove and store part or all of the tenant’s personal property, subject to applicable law, at no cost to the landlord or the officer executing the writ. The officer may not require the landlord to store the property. *Property Code § 24.0061(e) and (f)*.

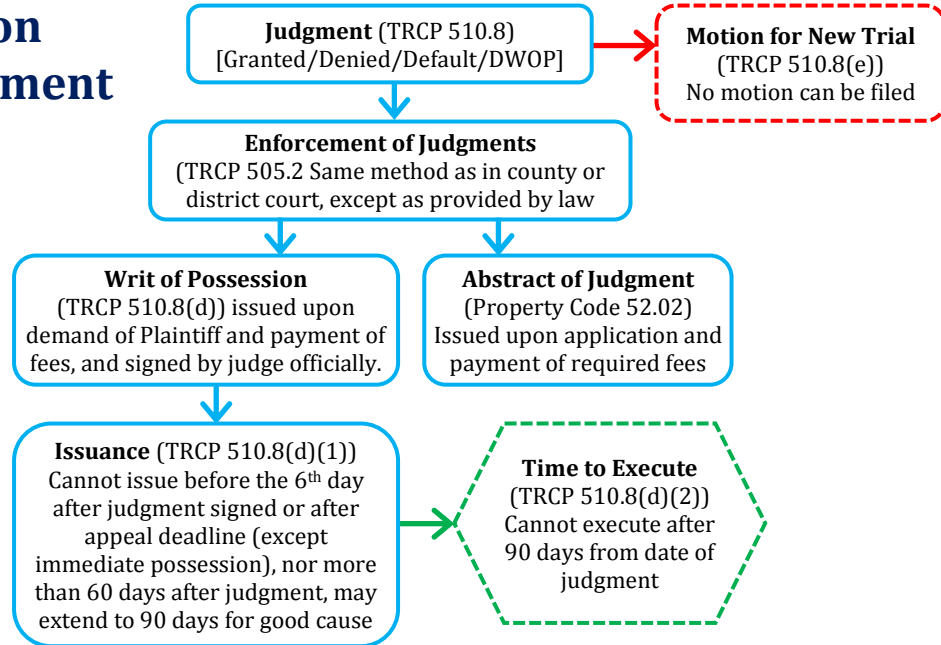
A municipality may provide a portable, closed container into which the removed personal property shall be placed by the officer executing the writ. The municipality may remove the container from the location near the rental unit and dispose of the contents by any lawful means if the owner of the removed personal property does not recover the property from the container within a reasonable time after the time the property is placed in the container. *Property Code § 24.0061(d-1)*.



## 6. Eviction Flow Chart (Post-Judgment)

Here is an eviction flow chart for post-judgment issues:

### Eviction Post Judgment



## F. Appeal

### 1. How is a Judgment Appealed?



KEY  
POINT

A party may appeal a judgment in an eviction case by:

1. filing a bond;
2. making a cash deposit; or
3. filing a Statement of Inability to Afford Payment of Court Costs within 5 days after the judgment is signed. *Rule 510.9(a)*.

Keep in mind how to calculate the deadline for a party to file an appeal, which is discussed above on [page 36-38](#). Either party is entitled to file an appeal.

### 2. Amount and Conditions of the Appeal Bond or Cash Deposit Amount

The judge must “set the amount of the appeal bond or cash deposit to include the items set out in Rule 510.11.” *Rule 510.9(b)*. This means the “damages, if any, suffered for withholding or defending possession of the premises during the pendency of the appeal.” Damages may include, but are not limited to, loss of rentals during the pendency of the appeal and any attorney’s fees in justice and

county court (assuming attorney's fees are allowed – *see page 33–34 for more information*). *Rule 510.11*. For example, if the judgment is for the landlord in a nonpayment of rent case and the rent is \$600 per month, the judge might set the amount of the appeal bond or cash deposit at \$1200 (two times the monthly rent). However, the judge has discretion to set the bond or cash deposit at a higher or lower amount based upon the factors listed in *Rule 510.11*.

Keep in mind that in a residential eviction the judge must state in the judgment the amount of the appeal bond, taking into consideration the money required to be paid into the court registry under Section 24.0053 (the amount of rent to be paid each rental pay period, typically each month). *Property Code § 24.00511(a)*.

**Conditions:**

The appeal bond or cash deposit must be payable to the appellee and must be conditioned on the appellant's prosecution of the appeal to effect and payment of any judgment and all costs rendered against it on appeal. *Rule 510.9(b)*.

The appeal bond must require the surety to provide the surety's contact information, including an address, phone number, and e-mail address, if any. If any of the contact information changes, the surety must inform the court of the surety's new contact information. *Property Code § 24.00511(b)*.

**3. Notice of Filing the Appeal Bond or Making a Cash Deposit**

Within 5 days of filing an appeal bond or making a cash deposit, **the appellant** must serve written notice of the appeal on all other parties using a method approved under *Rule 501.4*. *Rule 510.9(d)*.

**4. Contest of Appeal Bond in Residential Eviction Suit for Nonpayment of Rent**

If a party appeals the judgment of a justice court in a residential eviction suit for nonpayment of rent by filing an appeal bond, the opposing party may contest the bond amount, the form of the bond, or the financial ability of a surety to pay the bond by filing a written notice with the court contesting the appeal bond on or before the **5<sup>th</sup> day** after the date the appeal bond is filed and serving a copy on the other party. *Property Code § 24.00512(b)*. However, a party may not contest an appeal bond issued by a corporate surety authorized by the Texas Department of Insurance to engage in business in this state. *Property Code § 24.00512(a)*.

**Notice:**

After the notice of the contest is filed, the court must notify the appellant and the surety of the contest. *Property Code § 24.00512(b)*.

**Hearing:**

Not later than the 5<sup>th</sup> day after the date the contest is filed, the judge must hold a hearing to hear evidence to determine whether to approve or disapprove the amount or form of the bond or the surety. *Property Code § 24.00512(c)*.

If a party contests the amount or form of the bond, the contesting party has the burden to prove (by a preponderance of the evidence) that the amount or form of the bond is insufficient. But if a party contests the financial ability of a surety to pay the bond, the party who filed the bond must prove (by a preponderance of the evidence) that the surety has sufficient nonexempt assets to pay the appeal bond. *Property Code § 24.00512(d)*.

If the judge determines that the amount or form of the bond is insufficient or the surety does not have sufficient nonexempt assets to pay the appeal bond, the judge must disapprove the bond. If the surety fails to appear at the contest hearing, the failure to appear is prima facie evidence that the bond should be disapproved. *Property Code § 24.00512(d)*. This means that the failure to appear is in and of itself a reason to disapprove the bond unless evidence is provided as to why this should not be the case.

**If the Judge Disapproves the Appeal Bond:**

Not later than the 5<sup>th</sup> day after the date of the decision disapproving the bond, the party appealing may:

- Perfect the appeal of the judgment on the eviction suit by:
  - Making a cash deposit, or
  - Filing a statement of inability to afford payment of court costs

OR

- Appeal the decision disapproving the appeal bond to the county court.

If the appealing party fails to do one of these things, the judgment of the justice court becomes final and may be enforced. If a writ of possession is requested, it must be issued upon payment of the required fee. *Property Code § 24.00512(e)*.

**Appeal of Judge’s Disapproval of Bond:**

If an appeal is filed of the judge’s decision disapproving the appeal bond, the justice court must transmit to the county court the contest to the appeal bond and all relevant documents. The county court must docket the appeal, schedule a hearing to be held not later than the 5<sup>th</sup> day after the date the appeal is docketed, notify the parties and the surety of the hearing time and date, and hear the contest de novo. The failure of the county court to hold a timely hearing is not grounds for approval or denial of the appeal.

A writ of possession may not be issued before the county court issues a final decision on the appeal bond. *Property Code § 24.00512(f)*.



KEY  
POINT

After the contest is heard by the county court, the county clerk must transmit the transcript and records of the case to the justice court.

**If the County Court Disapproves the Appeal Bond:**



The party may, not later than the 5<sup>th</sup> day after the date the county court disapproves the appeal bond, perfect the appeal of the judgment on the eviction suit by:

- making a cash deposit in the justice court in an amount determined by the county court; or
- by filing a statement of inability to afford payment of court costs with the justice court.

*Property Code § 24.00512(g).*

If the appealing party fails to do one of these things, the judgment of the justice court becomes final and may be enforced. If a writ of possession is requested, it must be issued upon payment of the required fee.

**If the County Court Approves the Appeal Bond:**

If the appeal bond is approved by the county court, the court must transmit the transcript and other records of the case to the justice court, and the justice court must proceed as if the appeal bond was originally approved. *Property Code § 24.00512(g).*

**5. Statement of Inability to Afford Payment of Court Costs**

An appellant who cannot furnish a bond or pay a cash deposit in the amount required may instead file a Statement of Inability to Afford Payment of Court Costs. The Statement must be on the form approved by the Supreme Court or include the information required by the Court-approved form. *Rule 510.9(b).*

A copy of the form may be found on the TJCTC website. *See page 50 for more information.*

**6. Notice of the Statement of Inability to Afford Payment of Court Costs**

If a Statement of Inability to Afford Payment of Court Costs is filed, **the court must provide notice** to all other parties that the Statement was filed **no later than the next business day.** *Rule 510.9(d).*

**7. Contest of Statement of Inability to Afford Payment of Court Costs**

**Contest:**

The Statement of Inability to Afford Payment of Court Costs may be contested as provided in Rule 502.3(d) within **5 days** after the opposing party receives notice that the statement was filed. *Rule 510.9(c).*

As explained above, this means that the Statement may not be contested if a legal-aid provider certificate is filed with the Statement. And if the Statement attests to receipt of a government entitlement based on indigence, then the only challenge that can be made is with respect to whether or not the person is actually receiving the government entitlement. *Rule 502.3(d)*. *See page 18-19*.

The judge may conduct a hearing on his or her own even if the appellee does not contest the Statement. *Rule 502.3(d)*.

### **Hearing:**

The judge must hold a hearing on the contest to determine the appellant's ability to afford the appeal bond or cash deposit. At the hearing, the burden is on the appellant to prove such inability.

### **If Judge Sustains Contest of Statement:**

If the judge sustains the contest, he or she must enter a written order listing the reasons for the determination. *Rule 502.3(d)*. The appellant may appeal that decision to the county court by filing a notice with the justice court **within 5 days** of the justice court's written order. The justice court must then forward all related documents to the county court for resolution. *Rule 510.9(c)(3)*.

### **Appeal of Judge's Ruling Sustaining the Contest:**

The county court must set the matter for hearing within **5 days** and hear the contest de novo (as if there had been no previous hearing). If the appeal is granted, the county court must direct the justice court to transmit to the clerk of the county court the transcript, records and papers of the case. *Rule 510.9(c)(3)*.

### **If Appellant Does Not Appeal Ruling Sustaining Contest or if County Court Denies Appeal:**

If the appellant does not appeal the justice court's ruling sustaining the contest, or if the county court denies the appeal, then the appellant may, **within one business day**, perfect the appeal by:

- posting an appeal bond; or
- making a cash deposit in compliance with the rules.

*Rule 510.9(c)(3)*.



KEY  
POINT

Please note that if the justice of the peace sustains a contest, then an appellant has only **one business day** to perfect an appeal by filing an appeal bond or making a cash deposit but the appellant has **five days** to appeal the decision on the contest to the county court. In order to give effect to both time periods, the appellant should first be allowed five days to appeal the judge's decision disallowing the Statement of Inability to Afford Payment of Court Costs. If the appellant does not appeal that decision within five days, then the appellant has **one additional business day** in which to perfect the appeal by filing an appeal bond or making a cash deposit. Therefore, if the justice of the peace sustains a contest, a writ of possession should still **not be issued** until both the five day period to appeal the

decision on the contest and the one additional business day to perfect the appeal by filing an appeal bond or cash deposit are up.



## 8. Appeal Perfected

### COMMON

**PITFALL** An appeal is perfected when an appeal bond, a cash deposit, or a Statement of Inability to Afford Payment of Court Costs is filed in accordance with Rule 510.9. *Rule 510.9(f)*.

## 9. Payment of Rent in Nonpayment of Rent Appeals

In an eviction suit for nonpayment of rent, if a tenant appeals the case by filing **an appeal bond or a Statement of Inability to Afford Payment of Court Costs**, the tenant must pay into the justice court registry, not later than the 5<sup>th</sup> day after the date the tenant files the appeal bond or Statement, the amount of rent to be paid in one rental pay period as determined by the court. *Property Code § 24.0053(a-2),(a-3); Rule 510.9(c)(5)(A)(iii); Rule 510.9(c)(5)(B)(i)*.

During the appeal process, as rent becomes due under the rental agreement, a tenant who appealed by filing a Statement of Inability to Afford Payment of Court Costs **must continue to pay** the designated amount into the county court registry within 5 days of the rental due date under the terms of the rental agreement. *Rule 510.9(c)(5)(B)(ii)*.

The justice court must provide a **written notice** to the tenant at the time the appeal bond or Statement is filed that contains the following information in bold or conspicuous type:

1. the amount of the initial deposit of rent stated in the judgment that the tenant must pay into the justice court registry;
2. whether the initial deposit must be paid in cash, cashier's check, or money order, and to whom the cashier's check or money order, if applicable, must be made payable;
3. the calendar date by which the initial deposit must be paid into the justice court registry;
4. for a court that closes before 5 p.m. on the date specified by Paragraph (3), the time the court closes; and
5. a statement that failure to pay the required amount into the justice court registry by the date stated in Paragraph (3) may result in the court issuing a writ of possession without a hearing.

*Property Code § 24.0053(a-1); Rule 510.9(c)(5)(A)*.



### KEY POINT

Please note that there is no provision in either the Property Code or Rule 510.9 that requires a tenant who appeals an eviction case by making a cash deposit to pay rent into the registry of the court pending the appeal; nor is there any requirement that the court provide a written notice of such an obligation to a tenant who appeals by making a cash deposit.

## 10. Contest over Portion of Rent to be paid into Registry if Government Agency is Responsible for Some or All of Rent

If a government agency is responsible for all or a portion of the rent, the tenant must pay only that portion of the rent determined by the justice court to be paid during the appeal. *Rule 510.9(c)(5)(B)(iii)*.

Either party may contest the portion of the rent that the justice court determines must be paid into the county court registry by filing a contest within 5 days after the judgment is signed. If a contest is filed, the justice court must notify the parties and hold a hearing on the contest within 5 days. *Rule 510.9(c)(5)(B)(iii)*.

If the tenant objects to the justice court's ruling at the hearing, **the tenant is required to pay only the portion claimed to be owed by the tenant** until the issue is tried in county court. *Rule 510.9(c)(5)(B)(iii)*.

## 11. Writ of Possession Even If an Appeal Is Perfected When Rent Is Not Paid Into Court Registry



If a tenant has appealed an eviction for nonpayment of rent by filing an appeal bond, the justice court must issue a writ of possession **immediately and without a hearing** (upon request and payment of the applicable fee) if:

- The tenant fails to timely pay rent into the justice court registry as required; and
- The transcript has not yet been transmitted to the county court.

*Property Code § 24.0053(a-3)*.



If a tenant has appealed an eviction for nonpayment of rent by filing a Sworn Statement of Inability to Afford Payment of Court Costs, the justice court must issue a writ of possession **immediately and without a hearing** (upon request and payment of the applicable fee) if:

- The tenant was provided the notice described in Subsection 9 above;
- The tenant fails to timely pay rent into the justice court registry as required; and
- The transcript has not yet been transmitted to the clerk of the county court.

*Rule 510.9(c)(5)(B)(i); Property Code § 24.0054(a)*.



Regardless of whether a writ of possession is issued, the justice court must still transmit the transcript and appeal documents to the county court for trial de novo on issues relating to possession, rent, or attorney's fees. *Property Code § 24.0053(a-3); Property Code § 24.0054(a)*. **So even if a writ of possession is issued, as long as an appeal was perfected, the case is sent to the county court. The tenant will just not have possession during the appeal.**

## 12. Transmission of Record to County Court

Unless otherwise provided by law or the rules of civil procedure, when an appeal has been perfected, the judge must:

- Stop all further proceedings on the judgment (once the appeal has been perfected, the justice court judgment is null and void and may not be enforced by a writ of possession or otherwise); and
- Immediately send to the clerk of the county court a certified copy of all docket entries, a certified copy of the bill of costs, and the original papers in the case together with any money in the court registry. *Rule 510.10(a)*.



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PITFALL

Please note that the law does provide “otherwise” if a tenant appeals by filing a Statement of Inability to Afford Payment of Court Costs. In that case, the court “may not forward the transcript and original papers **before the sixth day after the date the tenant files** a [Statement of Inability to Afford Payment of Court Costs], except that, if the court confirms that the tenant has timely paid the initial deposit of rent into the justice court registry in accordance with Section 24.0053, the court may forward the transcript and original papers immediately.” *Property Code § 24.0054(a-2)*.

The Property Code does not contain a similar delay in transmitting the record to the county court if the tenant appeals by filing an appeal bond but fails to pay the first month’s rent into the court registry. However, *as discussed on page 46*, if the court has not yet transmitted the record to the county court, and the tenant fails to pay rent into the court registry within five days after filing the appeal bond, then the plaintiff may request a writ of possession from the justice court.

If the record is transmitted to the county court before the landlord requests a writ of possession, the landlord may file a sworn motion with the county court stating that the tenant has failed to pay rent as required under Section 24.0053, Property Code, and the county court may issue a writ of possession *Property Code § 24.0054(a-4)*.

## 13. What if the Appeal was sent to County Court Even Though it was not Properly Perfected?

If the appeal was not properly perfected, but was sent to the county court, then the proper procedure is for the county court to **dismiss** the appeal. [Cavazos v. Hancock](#); [Wetsel v. Fort Worth Brake, Clutch & Equipment, Inc.](#); [In re A.J.’s Wrecker Service of Dallas](#).

For example, suppose a defendant in an eviction case files an appeal bond in the justice court to appeal a judgment for possession but the defendant files the appeal bond three days after the due date. If the case is sent to county court, the county court may dismiss the appeal on the ground that the appeal



was not properly perfected. [Cavazos v. Hancock](#). In that case, the judgment of the justice court is not null and void and may be enforced through a writ of possession issued by the justice court.

#### **14. What if the Appellant Fails to Pay the Filing Fee in the County Court?**

According to the general rules, an appellant must pay the county court filing fees on appeal to a county court in accordance with Rule 143a. *Rule 506.1(i)*. Since there is nothing in the rules specific to evictions that contradicts this, this rule applies to eviction cases as well.

Rule 143a states that if the appellant fails to pay the filing fees within 20 days after being told to do so by the county clerk, the appeal “shall be deemed **not perfected** and the county clerk shall return all papers in said cause to the justice of the peace having original jurisdiction and the justice of the peace shall proceed as though no appeal had been attempted.”

So if the appellant does not pay the filing fee in county court, then the county court will dismiss the appeal as **not perfected**. In that case, the judgment of the justice court is still in effect and may be enforced through a writ of possession issued by the justice court.

Note, however, that if the appellant appealed by filing a Statement of Inability to Afford Payment of Court Costs, and the Statement was approved, this will cover the fees in county court. In this case, the tenant is not required to pay the county court filing fee or file a new Statement of Inability. *Property Code § 24.0052*.

#### **15. What if the Defendant Properly Perfects Their Appeal But Fails to File an Answer in the County Court?**

When a defendant appeals an eviction case, the clerk of the county court must notify the defendant that he must file a written answer in the county court within eight days if an answer was not filed in justice court. *Rule 510.10(b)*. If no answer was filed in the justice court and the defendant fails to file a written answer within eight days after the transcript is filed in the county court, the allegations of the complaint may be taken as true and a default judgment may be entered accordingly.” *Rule 510.12*.

But this does not mean the judgment of the justice court is reinstated. “[I]t is well-settled that perfection of an appeal to county court from a justice court for trial de novo vacates and annuls the judgment of the justice court.” [In re Garza](#); [Williams v. Schneiber](#); [Mullins v. Coussons](#); [Poole v. Goode](#).

So if an appeal is properly perfected from the justice court to the county court, there is no longer any judgment that may be executed or enforced by the justice court. The justice court judgment is void.

If the defendant fails to file an answer in county court, then a judgment for possession may be entered against the defendant **by the county court** and a writ of possession may be issued **by the county court**.

## 16. What is a Writ of Procedendo?

A writ of procedendo is “an order from a court of superior jurisdiction to one of inferior jurisdiction to proceed to judgment in a case, without attempting to control the inferior court as to what the judgment should be.” *38 Tex. Jur. 3d Extraordinary Writs § 408 (2016)*. A writ of procedendo “is appropriate when a court has either refused to render a judgment or has unnecessarily delayed proceeding to judgment.” *38 Tex. Jur. 3d Extraordinary Writs § 408 (2016)*. “While originally ‘procedendo’ was a writ to compel a judge to proceed to judgment, in Texas . . . ‘procedendo’ has come to mean an appeals court’s order to an inferior court to execute judgment.” *38 Tex. Jur. 3d Extraordinary Writs § 408 (2016)*.

County courts sometimes issue a writ of procedendo (or “an order of remand”) to a justice court without realizing that if an appeal was properly perfected from the judgment of a justice court, then the judgment of the justice court is null and void and there is no longer any judgment that may be executed or enforced! So if a county court issues a writ of procedendo after an appeal has been **perfected**, there is no judgment pending or that may be revived in the justice court.

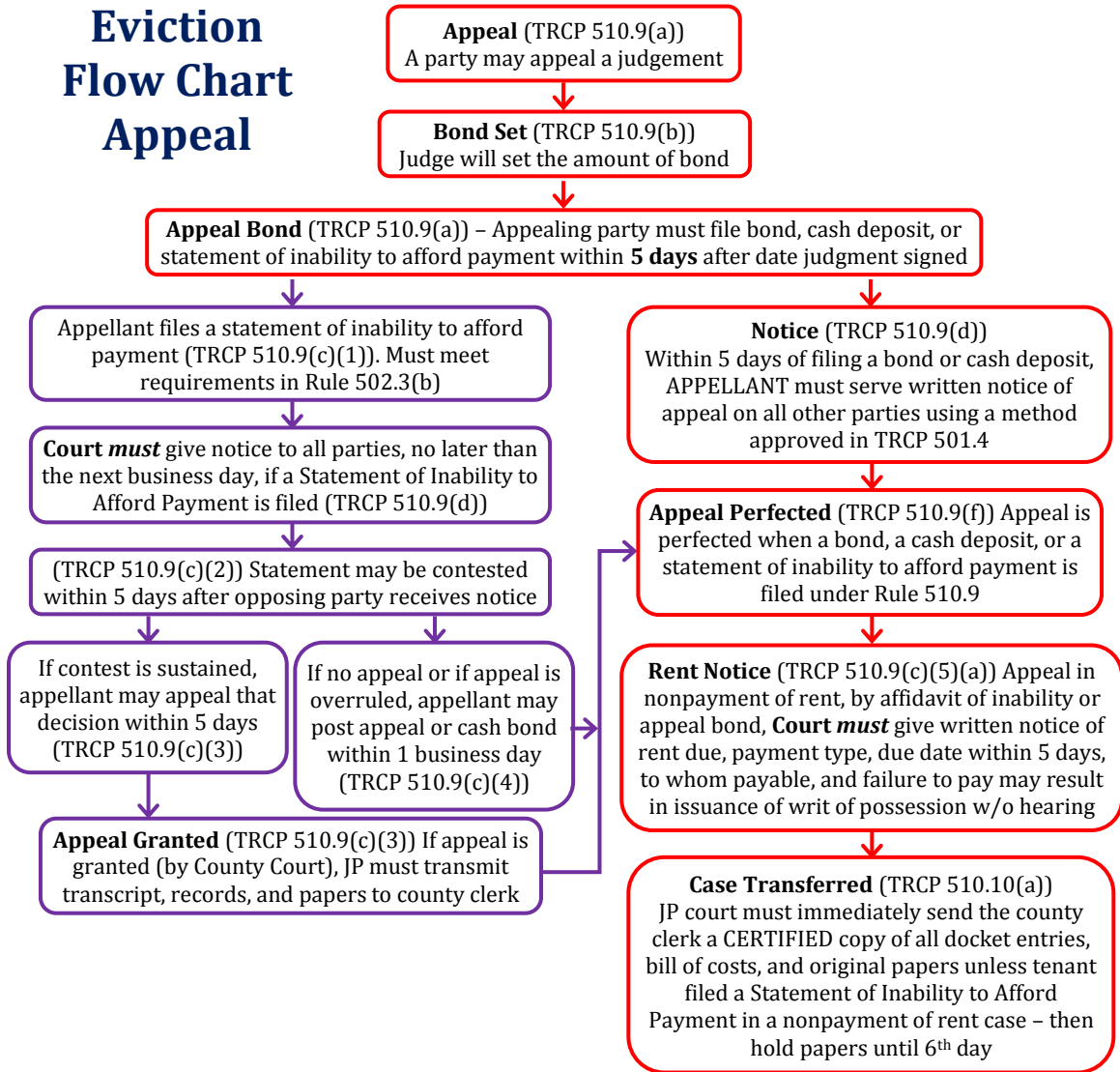
As discussed above, if an appeal is not properly perfected but is sent to the county court, or if the appellant fails to pay the filing fee in the county court (in which case the appeal will be treated as not properly perfected), the proper procedure for the county court is to **dismiss** the appeal. And in that case the justice court judgment is not null and void and may be enforced by the justice court. [\*Cavazos v. Hancock\*](#); [\*Wetsel v. Fort Worth Brake, Clutch & Equipment, Inc.\*](#); [\*In re A.J.’s Wrecker Service of Dallas\*](#).

**“If the appeal was not properly perfected...”**

A justice court could treat a writ of procedendo from the county court as an order of dismissal **only if the appeal was not properly perfected** (including as a result of the failure of the appellant to pay filing fees in the county court).

## 17. Eviction Flow Chart (Appeal)

Here is a flow chart for an appeal in an eviction case:



## G. Forms in an Eviction Case

Numerous forms relating to eviction cases may be found on the TJCTC website at the following link:

<http://www.tjctc.org/tjctc-resources/forms.html>

## CHAPTER 5: MANUFACTURED HOME EVICTIONS

### A. When Do the Manufactured Home Eviction Rules Apply?

Manufactured home eviction rules under Chapter 94 of the Property Code apply to a landlord who leases a **lot** in a “manufactured home community” to a tenant for the purpose of putting a “manufactured home” on the lot. *Property Code § 94.002(a)*. A “manufactured home community” is a parcel of land on which **four** or more lots are offered for lease for installing and occupying manufactured homes. *Property Code § 94.001(4)*.

These rules do **not** apply to:

- A landlord who owns a manufactured home and leases the manufactured home to the tenant;
- A tenant who leases a lot from a landlord in a “manufactured home community” for the placement of personal property to be lived in that is **not** a “manufactured home,” (such as an RV); or
- A landlord who leases to his or her employee or agent.

*Property Code § 94.002(b)*.

A “manufactured home” is defined as a “mobile home” or a “HUD-code manufactured home.” *Property Code § 94.001(3); Occupations Code § 1201.003*.

Both a “mobile home” and a “HUD-code manufactured home” are:

- Built on a permanent chassis;
- Designed for use as a dwelling with or without a permanent foundation when the structure is connected to the required utilities;
- Transportable in one or more sections;
- In the travelling mode, at least 8 feet in width or at least 40 feet long, or when erected on the site at least 320 square feet; and
- Furnished with the plumbing, heating, air conditioning and electrical systems of the home.

*Occupations Code § 1201.003(12) and (20)*.



#### KEY POINT

Recreational Vehicles (“RVs”) were previously defined as manufactured homes and subject to manufactured home tenancy laws under Property Code Chapter 94. The legislature changed that in SB 1268 in 2013 by removing all references to recreational vehicles from Chapter 94 of the Property Code. Therefore, RVs are now treated as residential tenancies under Chapter 92 of the Property Code, and the rules in Chapter 94 do not apply to RVs.

## B. Manufactured Home Leases

### Term Length, Renewal, and Notice to Vacate:

A landlord of a manufactured home lot must offer a tenant a lease with an initial term of at least six months. *Property Code § 94.052(a)*. But if the tenant requests a lease with a different lease period, the landlord and tenant may mutually agree to a shorter or longer lease period. *Property Code § 94.052(a)*. The landlord and tenant may mutually agree to subsequent lease periods of any length for each renewal of the lease agreement. *Property Code § 94.052(a)*.

A landlord must provide a tenant with a notice to vacate or an offer to renew the lease:

- Not later than the **60<sup>th</sup> day** before the date the current lease term expires; or
- If the lease is a month-to-month lease, not later than the **60<sup>th</sup> day** before the date the landlord intends to terminate the current term of the lease.

*Property Code § 94.055(a)*.

A landlord may ask a tenant to vacate the leased premises on less than 60 days' notice only if the landlord compensates the tenant in advance for relocation expenses, including the cost of moving and installing the manufactured home to a new location. *Property Code § 94.055(d)*.

If the landlord offers to renew the lease, the landlord must notify the tenant of the proposed rent amount and any changes in the lease terms. *Property Code § 94.055(b)*. The landlord must also inform the tenant that the tenant's failure to reject the landlord's offer to renew the lease no later than **30 days** before the current lease expires will result in the renewal of the lease under the modified terms proposed by the landlord. *Property Code § 94.055(b)*.

### Change in Land Use:

If a landlord wants to terminate a lease early in order to change the manufactured home community's land use, he may do so but only if he gives the tenant **180 days'** notice before the date the land use will change. *Property Code § 94.204*. The landlord must send this notice to:

- the tenant;
- the owner of the manufactured home if the owner is not the tenant; and
- the holder of any lien on the manufactured home if he received a written notice of the name and address of the owner and lienholder.

*Property Code § 94.204*.

The notice must specify the date the land use will change and inform the tenant, owner and lienholder, if any, that the owner must relocate the manufactured home. *Property Code § 94.204*. The landlord must also place the notice in a conspicuous place in the manufactured home community. *Property Code § 94.204*.

### **Community Rules:**

“Manufactured home community rules” are the rules provided in a written document that establish the policies and regulations of the manufactured home community, including regulations relating to the use, occupancy, and quiet enjoyment and the health, safety and welfare of tenants of the manufactured home community. *Property Code § 94.001(5)*.

### **May Not Waive Rights/Duties:**

A provision of a lease agreement or a manufactured home community rule that purports to waive a right or exempt a landlord or a tenant from a duty or from liability under Chapter 94 of the Property Code is void. *Property Code § 94.003*.



## **C. Eviction Procedures**

### **1. General Procedures for Evictions Apply Except as Modified by Chapter 94**

The general procedures and time limits that apply to all eviction cases also apply to manufactured home evictions **except** to the extent that Chapter 94 of the Property Code says something different. This means that, in general, Chapter 24 of the Property Code and Rule 510 will apply in manufactured home eviction cases, except as specifically altered or addressed by Chapter 94.

### **2. Grounds for Eviction**

A landlord may terminate the lease and evict a tenant for violation of a lease provision, including violation of a manufactured home community rule that was incorporated into the lease. *Property Code § 94.205*.

A landlord may terminate the lease and evict a tenant for nonpayment of rent if:

- The tenant fails to timely pay rent or other amounts due under the lease that in the aggregate equal the amount of at least one month’s rent;
- The landlord notifies the tenant in writing that the payment is delinquent; and
- The tenant has not paid the delinquent payment in full to the landlord before the **10<sup>th</sup> day** after the date the tenant receives the notice from the landlord.

*Property Code § 94.206*.

A landlord may also terminate a lease to change the land use of the manufactured home community as long as he gives the tenant, owner and lienholder, if any, the required 180 days’ notice discussed above. *Property Code § 94.204*.

### **3. Notice to Lienholder**

In a manufactured home eviction suit, if the tenant has disclosed the name and address of a lienholder of the manufactured home, as required by Property Code § 94.054, then the landlord must give written notice of any eviction proceedings to the lienholder no later than the third day after the date the landlord files a petition for a judgment for possession. *Property Code § 94.203(b)*.

### **4. Default Judgment**

The court must notify a tenant in writing of a default judgment for possession by sending a copy of the judgment to the leased premises by first class mail not later than 48 hours after entry of the judgment. The court must also send a copy of the judgment to the owner of the manufactured home if the tenant is not the owner and to any person who holds a lien on the manufactured home if the court has been notified in writing of the name and address of the owner and lienholder. *Property Code § 94.203(e)*.

### **5. Retaliation and Rent Deduction Defenses**

A tenant in a manufactured home eviction may raise the same retaliation and rent deduction defenses as a tenant in a residential eviction. *See page 30-31.*

Property Code § 94.256 expressly provides that retaliation by the landlord “is a defense and a rent deduction lawfully made by the tenant under [Chapter 94] is a defense for nonpayment of the rent to the extent allowed by [Chapter 94].” Section 94.203(c) further provides: “If the court finds that the landlord initiated the eviction proceeding to retaliate against the tenant in violation of Section 94.251, the court may not approve the eviction of the tenant.”

Thus, as in a residential eviction case, a tenant may raise retaliation by the landlord as a defense in a manufactured home eviction suit. The tenant may also raise as a defense to a claim of nonpayment of rent that the tenant was entitled to a rent deduction because of the exercise of some other right under Chapter 94, such as the tenant’s repair and deduct remedies under Property Code § 94.157. If a tenant raises these issues as a defense to eviction the court will have to resolve them before entering a judgment.

However, if the tenant wishes to recover civil penalties, actual damages, court costs or reasonable attorney’s fees either for retaliation under Section 94.251 or for violation of the landlord’s obligation to repair or remedy conditions of the premises under Section 94.159, or for some other violation of Chapter 94 under Section 94.301, the tenant must file a separate suit to recover on those claims. As Property Code § 94.256 makes clear: “Other judicial actions under this chapter [Chapter 94], excluding an action that would be permitted under Chapter 24, may not be joined with an eviction suit or asserted as a defense or cross-claim in an eviction suit.”

The actions by a landlord that constitute retaliation in a manufactured home eviction are the same as in a residential eviction. *Property Code § 94.251*. So are the actions by the landlord that are expressly defined as non-retaliation. *Property Code § 94.253*. *For more information, see page 30–31.*

## **6. Writ of Possession**

A court may not issue a writ of possession in favor of a landlord before the **30<sup>th</sup> day** after the date the judgment for possession is rendered if the tenant has paid the rent amount due under the lease for that 30-day period. *Property Code § 94.203(d)*.

If the landlord removes the manufactured home from the manufactured home lot after execution of a writ of possession, the landlord must send a written notice to the tenant concerning the location of the manufactured home no later than the 10<sup>th</sup> day after the manufactured home is removed. *Property Code § 94.203(f)*. The notice must be sent to the tenant's most recent mailing address as reflected in the landlord's records. The notice must also be sent to the owner of the manufactured home if the landlord was given written notice of the owner's name and address. *Property Code § 94.203(d)*.

## **D. Landlord's Remedy for Early Termination by Tenant**

The maximum amount a landlord may recover as damages for a tenant's early termination of a lease is the amount of rent that remains outstanding for the term of the lease plus any other amounts owed for the remainder of the lease under the terms of the lease. *Property Code § 94.201(a)*. However, if the tenant's manufactured home lot is re-occupied before the 21<sup>st</sup> day after the date the tenant surrenders the lot, the maximum amount the landlord may obtain as damages is one month's rent. *Property Code § 94.201(b)*.

A landlord has a duty to mitigate his damages (attempt to re-lease the lot) if a tenant vacates the manufactured home lot before the end of the lease term, and a provision of a lease that purports to waive a tenant's right or to exempt a landlord from this duty is void. *Property Code § 94.202*.



## CHAPTER 6: COMMERCIAL EVICTIONS

### A. What is Commercial Rental Property?

Property Code § 93.001(b) defines “commercial rental property” as “rental property that is not covered by Chapter 92.” Chapter 92 is entitled “Residential Tenancies” and applies “only to the relationship between landlords and tenants of residential rental property.” *Property Code § 92.002*). Therefore, commercial rental property is defined as any rental property that is not residential rental property!

### B. The Eviction Process



KEY  
POINT

The general procedures and time limits that apply to all eviction cases also apply to commercial evictions. This means that in general, Chapter 24 of the Property Code and Rule 510 will apply, except where Chapter 93 says something different.



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One area that requires special attention in a commercial eviction suit is a claim for back rent. Rule 510 permits a landlord to join a suit for back rent with an eviction suit but only if “the suit for rent is within the jurisdiction of the justice court.” In commercial evictions the amount of back rent claimed at the time the petition is filed may very well exceed the \$10,000 jurisdictional limit of a justice court. If so, the justice court must still hear the eviction case in order to determine the right of immediate possession of the premises, but the landlord’s claim for back rent would have to be filed in a separate suit in a district or county court having jurisdiction over a claim for that amount.

Keep in mind that the amount in controversy is determined by the plaintiff’s good faith pleading at the time the suit is filed. If the court has jurisdiction of a back rent claim because it was less than \$10,000 at the time the suit was filed, but additional damages accrued due to the **mere passage of time** after the suit was filed (such as additional rent coming due at the beginning of the month), the court continues to have jurisdiction even if the back rent is now more than \$10,000. [\*Peek v. Equipment Serv.\*](#); [\*French v. Moore\*](#); [\*Flynt v. Garcia\*](#); [\*Continental Coffee Prods. v. Cazarez\*](#); [\*Kendziorski v. Saunders\*](#); [\*Carlson’s Hill Country Beverage, L.C. v. Westinghouse Road Joint Venture\*](#).

### C. Procedure for Termination of Tenant’s Right of Possession due to Certain Unlawful Uses of Premises

No matter what the lease might say, a tenant's right of possession terminates and the landlord has a right to recover possession of the leased premises (by filing an eviction case) if the tenant is using the premises or allowing the premises to be used for the purposes of prostitution, promotion of

prostitution, aggravated promotion of prostitution, or compelling prostitution, as prohibited by the Penal Code. *Property Code § 93.013(a)*.

A landlord who reasonably believes a tenant is using the leased premises or allowing the leased premises to be used for such a purpose may file an eviction suit under Chapter 24 seeking possession of the premises and unpaid rent, including rent for any period of occupancy *after* the tenant's right of possession terminates. *Property Code § 93.013(b)*.

Notwithstanding Sections 24.005 or 91.001 of the Property Code, or any other law or a provision in the lease to the contrary, the landlord is not required for purposes of an eviction suit on these grounds:

- to give a notice of proposed eviction or a notice of termination before giving notice to vacate; or
- to give the tenant more than three days' notice to vacate before filing the suit.

*Property Code § 93.013(c)*.

A pending suit brought by the attorney general or a district, county, or city attorney under Chapter 125, Civil Practice and Remedies Code, alleging that the activities described above are taking place on the premises is prima facie evidence (a presumption that may be proved wrong with other evidence) that the tenant's right of possession has terminated and the landlord has a right to recover possession of the premises. *Property Code § 93.013(d)*.

A final, nonappealable determination by a court under Chapter 125, Civil Practice and Remedies Code, that the activities described above are taking place on the premises creates an irrebuttable presumption (cannot be proved wrong) that the tenant's right of possession has terminated and the landlord has a right to recover possession of the premises. *Property Code § 93.013(e)*.

## CHAPTER 7: THE SERVICEMEMBERS CIVIL RELIEF ACT

The Servicemembers Civil Relief Act (“SCRA”) (*50 U.S.C. § 3901, et seq*) is a federal law signed by President Bush on December 19, 2003, which imposes certain procedural requirements in all *civil* cases (including eviction cases) to protect members of the armed services and their families. These requirements apply to any court of any state whether or not the court is a court of record. *50 U.S.C. § 3911(5)*.

### A. Requirements for a Default Judgment

The SCRA imposes special requirements in any case in which the defendant does not make an appearance in order to protect service members. The requirements prior to entering a default judgment in an eviction case are discussed on [page 26-27](#).

### B. Stay of Eviction Case if Service Member Does not Appear

If the defendant has **not** appeared in the case and the court determines that he is in military service and appoints counsel, the court **must** grant a stay of proceedings for a minimum of 90 days under certain circumstances. *50 U.S.C. § 3931(d)*. [For more information, see page 28](#).

### C. Stay of Eviction Case if Service Member Receives Actual Notice

If a service member **receives actual notice** of an action against him while he is in military service or within 90 days after the end of his service, then at any time before a final judgment is entered in the case, the court may stay the case for not less than 90 days on its own motion, and shall do so upon application of the service member under certain circumstances. [For more information, see page 28](#).

### D. Stay of Eviction Case for Certain Premises and Adjustment of Lease Obligations

A justice court may also stay an eviction case concerning residential premises that are occupied by a service member or the dependents of a service member and for which the monthly rent does not exceed \$3,584.99 (as of January 1, 2017). *50 U.S.C. § 3951(a)*; *82 Fed. Reg. 10762 (February 15, 2017)*. [For more information, see page 29](#).

If a stay is granted the court may grant to the landlord “such relief as equity may require.” *50 U.S.C. § 3951(b)*. If the court grants relief to the service member under this section, the court may also specify an amount of rent to be paid to the landlord while the case is pending, and the Secretary of the relevant

service branch must make an allotment of the service member's pay to satisfy the terms of the court's order, subject to the Secretary's regulations concerning the maximum amount of a service member's pay that may be allotted under the SCRA. *50 U.S.C. § 3951(d)*. *For more information, see page 29.*

## **E. Lease Termination**

*For more information on how these provisions were adopted into Ch. 92 of the Property Code concerning Residential Tenancies, see pages 126–128.*

### **When Service Member May Terminate:**

A service member may terminate a lease of premises occupied or intended to be occupied by a service member or his dependents for a residential, professional, business, agricultural or similar purpose if:

- The lease is executed by or on behalf of a person who thereafter enters military service; or
- The service member, while in military service, executes the lease and thereafter receives orders to permanently relocate or deploy for not less than 90 days.

*50 U.S.C. § 3955(a) and (b).*

### **Method of Termination:**

To terminate the lease the service member must deliver a written notice of termination and a copy of his orders to the landlord by personal delivery, business carrier or by mail with a return receipt requested. Oral termination is not sufficient. *50 U.S.C. § 3955(c)*.

### **When Termination is Effective:**

If the lease provides for monthly payment of rent, the termination is effective 30 days after the first date on which the next rental payment is due after the date on which the notice is delivered. *50 U.S.C. § 3955(d)(1)*. For example, if rent is due on the first day of the month, and notice of termination is given on August 5<sup>th</sup>, the next rental payment is due on September 1<sup>st</sup>, so the lease termination is effective 30 days after September 1<sup>st</sup>, which is October 1<sup>st</sup>.

For any other lease, such as one requiring a quarterly or yearly rental payment, termination is effective the last day of the month following the month in which notice is delivered. *50 U.S.C. § 3955(d)(1)*. For example, if the lease requires quarterly rental payments and notice of termination is given on Aug. 5<sup>th</sup>, the lease termination is effective on September 30<sup>th</sup>.

### **How Rent is handled:**

A service member who terminates a lease under the SCRA is required to pay for rent only for those months before the lease is terminated. If rent has been paid in advance, the landlord must prorate and refund the unearned portion within 30 days of the effective date of termination. *50 U.S.C. § 3955(e) and (f)*.

Upon application by the lessor to a court before the termination date provided in the written notice, the relief granted to a service member relating to termination of the lease under the SCRA “may be modified as justice and equity require.” *50 U.S.C. § 3955(g)*.

## CHAPTER 8: CONTRACT FOR DEED

### A. What is a Contract for Deed?

A contract for deed or “executory contract” is a contractual relationship where instead of paying rent a buyer makes monthly payments toward the purchase price of real property. When the purchase price is paid in full, the purchaser receives the deed. [Kazmir v. Benavides](#); [Malatesta v. Dove Meadows Homeowners Assoc.](#) Such a contract must be in writing; it cannot be an oral agreement. *Property Code §§ 5.021, 5.072(a)*; *Property Code § 5.022 (containing a suggested form)*.

Even though a buyer may appear to be paying rent in these cases, what the buyer is really paying is a monthly mortgage payment and there is no landlord/tenant relationship unless it is created by the contract or by a separate lease. If the parties do not have a landlord-tenant relationship, the remedy of eviction may not be pursued, nor may any other eviction-related process such as a writ of possession.

On the other hand, the landlord may seek eviction for a breach of the lease terms (but only in accordance with the provisions of Subchapter D, Chapter 5 of the Property Code) if:

- a residential lease was executed concurrently with the contract for deed, OR
- if a landlord/tenant relationship was created as a result of terms of the contract for deed. *Property Code §5.064.*

In a contract for deed case, the superior title remains with the seller until the purchaser fulfills his part of the contract. If the purchaser defaults under the contract, the seller is entitled to possession of the property. But “the rescission of a contract for deed with the forfeiture of the purchaser’s payments and interest in the property is a harsh remedy not favored by the courts.” Therefore, “the seller’s right to retake possession of the property under the contract’s forfeiture provision may be defeated by the purchaser ‘pleading and proving such facts as would make it inequitable to enforce it.’” [Reeder v. Curry](#), citing [Stevenson v. Lohman](#). A contract for deed may specify the county in which the contract will be enforced. *Civil Practice and Remedies Code § 15.092(a)*. If the contract does not specify where the contract will be enforced, it may be heard in the county and precinct “in which the contract was to be performed.” *Civil Practice and Remedies Code § 15.092(a)*.

### B. What to Look for

If an eviction suit is filed over a written “rent to own” or “lease purchase” agreement, the case probably involves a contract for deed. The court should examine the pleadings and contract to determine the following:

1. Is title to real property at issue in the case?

- a. If yes, then the court does not have jurisdiction and must dismiss or stay the case.
  - b. If no, then the court may proceed.
2. Is there a landlord/tenant relationship either by virtue of a separate lease entered into concurrently with the contract for deed or due to terms of the contract for deed?
- a. If no, then the seller/landlord does not have grounds for an eviction since there is no landlord/tenant relationship.
  - b. If yes, then the seller/landlord may proceed with an eviction but only after following the procedures set forth in Subchapter D, Chapter 5 of the Property Code.

### C. Is Title to Real Property at Issue?

If an eviction suit is filed in which either party alleges that the parties entered into a “rent to own” or “lease purchase” agreement, a justice court should accept the filing but review the pleadings to determine whether title to real property is at issue.

“If it becomes apparent that a genuine fact issue regarding title exists in a forcible detainer suit, the court does not have jurisdiction over the matter. . . . The threshold question is whether the . . . court . . . was required to determine an issue of title to resolve the right to immediate possession. If the right to immediate possession depends upon title to the property under the terms of the contract for deed, the . . . court . . . lacks subject matter jurisdiction to issue the writ of possession. . . .” [Aguilar v. Weber](#); [Rice v. Pinney](#); [Mitchell v. Armstrong Capital Corp](#); [Haith v. Drake](#); [Rodriguez v. Sullivan](#); [American Spiritualist Ass’n v. Ravkind](#).



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If it becomes apparent that a genuine issue exists regarding title, then the justice court does not have jurisdiction to hear the case and should either abate the case pending a determination of the title issue or dismiss the case for want of jurisdiction. *Government Code § 27.031*. On the other hand, if title to the property is not at issue, or the right to immediate possession does not necessarily require the resolution of a title dispute, then the court may proceed to hear the case.

### D. Is There a Landlord/Tenant Relationship?

Whether or not there is a landlord/tenant relationship will depend on the terms of the agreement entered into by the parties. If the contract for deed does not create a landlord/tenant relationship, and if the parties did not sign a separate residential lease at the time they signed the contract for deed, then the seller does not have the remedy of eviction. In that situation the seller’s remedies on default of the contract for deed by the buyer include rescission or forfeiture and acceleration after notice is given under Property Code § 5.064. The buyer must be given an opportunity to cure the default under Section 5.065. [Sharp v. Smith](#); [American Nat. Property and Cas. Co. v. Patty](#).

If a residential lease is included in or signed concurrently with a contract for deed where the delivery of the deed will not occur within 180 days of the date the contract is signed, then the landlord/seller may proceed with an eviction but only after complying with certain procedures set forth in Subchapter D. *Property Code § 5.062(c)*.

These procedures include:

1. A notice of default in 14-point boldface print specifying the nature of the default (and amount of money due if it is failure to make a payment) and the remedy the seller intends to enforce;
2. A right by the tenant/purchaser to cure the default **within 30 days** after the date notice is given;
3. If the contract for deed is for more than three years, an annual accounting statement that the landlord/seller must provide the tenant/purchaser at the beginning of each year and liquidated damages of either \$100 or \$250 plus reasonable attorney's fees for failure to do so; and
4. If the contract for deed is for more than three years, the right to deduct the amount owed to the tenant/purchaser by the landlord/seller for any violations of Subchapter D from payments due under the contract for deed "without taking judicial action." *Property Code §§ 5.063, 5.065, 5.077, 5.084.*

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*Subchapter D contains many protections that are expressly excluded from a contract for deed under Section 5.062(e) and protections that are excluded if the contract for deed is less than three years under Section 5.062(f). It is therefore important in a contract for deed case to review the precise application of Subchapter D to the contract for deed at issue.*

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If the negotiations that preceded the execution of the contract for deed were in a language other than English then the notice of default, annual accounting statements and all transaction documents and disclosure notices **must be in that language**. *Property Code § 5.068.*

Subchapter D also prohibits a seller from including as a term of a contract for deed a provision that:

1. imposes an additional late-payment fee exceeding the lesser of:
  - a. eight percent of the monthly payment under the contract; or
  - b. the actual administrative cost of processing the late payment;
2. prohibits the purchaser from pledging his interest in the property as security to obtain a loan to place improvements on the property;
3. imposes a prepayment penalty or any similar fee if the purchaser elects to pay the entire amount due under the contract before the scheduled payment date under the contract;
4. forfeits an option fee or other option payment paid under the contract for a late payment; or
5. increases the purchase price, imposes a fee or charge of any type, or otherwise penalizes a



purchaser for requesting repairs or exercising any other right of a residential tenant under Chapter 92 of the Property Code. *Property Code § 5.073.*

A provision of a contract for deed that purports to waive a right of a tenant/purchaser or exempt a landlord/seller from a liability or duty under Subchapter D is void. *Property Code §5.073.*

# CHAPTER 9: WRITS OF RETRIEVAL, RE-ENTRY, AND RESTORATION

## A. Writ of Retrieval

### 1. What is a Writ of Retrieval?

A writ of retrieval is an order from a justice court authorizing a person to enter their **residence** or **former residence**, accompanied by a peace officer, to retrieve specific items of personal property when the current occupant is denying the person entry. *Property Code § 24A.002(a)*.

### 2. What Must an Application Show?

An application for a writ of retrieval must:

- a. Certify that the applicant is unable to enter the residence because the current occupant of the residence has either denied the applicant access to the residence or poses a clear and present danger of family violence to the applicant or the applicant's dependent;
- b. Certify that the applicant is not the subject of a protective order under the Family Code, an Emergency Protective Order, or another court order prohibiting entry to the residence, or otherwise prohibited by law from entering the residence;
- c. Allege that the applicant or the applicant's dependent requires personal items located in the residence that are only of the type listed below in Section 3;
- d. Describe the items to be retrieved with specificity; and
- e. Allege that the applicant or the applicant's dependent will suffer personal harm if the items are not retrieved promptly.



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Include a lease or **other documentary evidence** that shows the applicant is currently or was formerly authorized to occupy the residence. *Property Code § 24A.002(b)*.

### 3. What Items May be Retrieved?

A writ of retrieval may only be used to retrieve certain specific items of personal property listed in the Property Code. The items must fall into one of the following categories:

- a. Medical records.
- b. Medicine and medical supplies.
- c. Clothing.
- d. Child-care items.
- e. Legal or financial documents.
- f. Checks or bank or credit cards in the name of the applicant.
- g. Employment records.

- h. Personal identification documents.
- i. Copies of electronic records containing legal or financial documents.

*Property Code § 24A.002(b)(3).*

If the property that the applicant wishes to retrieve does not fall within one of these categories, the person may be able to obtain it by filing a small claims case for the recovery of personal property, but not by filing an application for a writ of retrieval. *Rule 505.2.*

#### **4. Bond Required Unless Waived by Judge**

Before a judge may issue a writ of retrieval, the applicant must execute a bond:

- in an amount required by the judge;
- payable to the occupant of the residence;
- with two or more “good and sufficient non-corporate sureties” or one corporate surety authorized to issue bonds in Texas; and
- conditioned on the applicant paying all damages and costs ordered against the applicant for wrongful property retrieval. *Property Code § 24A.002(c).*

The applicant must deliver the bond to the judge issuing the writ for the judge’s approval and the bond must be filed with the justice court. *Property Code § 24A.002(d).*

The judge may waive the bond requirement when issuing an ex parte writ of retrieval. *Property Code § 24A.0021(b).* Issuance of an ex parte writ of retrieval is discussed below in Section 5.b.

#### **5. When may the Judge Issue the Writ of Retrieval?**

Ordinarily, a writ of retrieval may be issued only after notice and an opportunity for a hearing is provided to the occupant. However, in some circumstances a judge may issue an ex parte writ of retrieval without providing notice and a hearing to the occupant. Each situation is discussed below.

##### ***a. Following Notice to the Occupant and an Opportunity for a Hearing***

If there is sufficient evidence of urgency and potential harm to the health and safety of any person, and after sufficient notice to the current occupant and an opportunity to be heard, a judge may issue a writ of retrieval authorizing the applicant to enter the residence accompanied by a peace officer and retrieve the property listed in the application if the judge finds that:

1. The applicant is unable to enter the residence because the current occupant of the residence has denied the applicant access to the residence to retrieve the personal property of the applicant or the applicant’s dependent;

2. The applicant is not the subject of a protective order under the Family Code, an Emergency Protective Order, or another court order prohibiting entry to the residence;
3. There is a risk of harm to the applicant or the applicant's dependent if the items listed in the application are not retrieved promptly;
4. The applicant is currently or was formerly authorized to occupy the residence according to a lease or other documentary evidence; and
5. The current occupant received notice of the application and was provided an opportunity to appear before the court to contest the application.

*Property Code § 24A.002(e).*

The statute does not say how much notice to the occupant is "sufficient;" this is up to the judge taking into account the applicant's urgent need for the items to be retrieved. The judge may allow the occupant to be heard by telephone in order to expedite the process.

The statute also does not say how notice should be delivered, but it should be done in a way that is most likely to make sure that the person does get notice, while also moving the case forward quickly.

#### ***b. Temporary ex Parte Writ of Retrieval***

A judge may issue a writ of retrieval without providing notice and a hearing to the occupant if the judge finds at a hearing on the application that:

1. The conditions listed in Paragraphs (1) – (4) in Section 5.a. above are met;
2. The current occupant poses a clear and present danger of family violence to the applicant or the applicant's dependent; and
3. The personal harm to be suffered by the applicant or the applicant's dependent will be immediate and irreparable if the application is not granted.

*Property Code § 24A.0021(a).*

A temporary ex parte writ of retrieval must state the period during which it is valid, which may not be more than five days. *Property Code § 24A.0021(d).* As noted above, the judge may waive the bond requirement when issuing a temporary ex parte writ of retrieval. *Property Code § 24A.0021(b).*

Before issuing a temporary ex parte writ of retrieval, the judge may recess the hearing on the application and notify the current occupant by telephone that the current occupant may attend the hearing or bring to the court the personal property listed in the application. The judge must reconvene the hearing before 5:00 p.m. that day regardless of whether or not the current occupant attends the hearing or brings the personal property to the court. *Property Code § 24A.0021(c).*

## **6. How is the Writ Executed?**

If a writ of retrieval is granted, a peace officer must accompany and assist the applicant in making the authorized entry and retrieving the personal property listed in the application. *Property Code § 24A.003(a)*.

If the current occupant is present at the time of the entry, the peace officer must provide the occupant with a copy of the writ authorizing the entry and retrieval. *Property Code § 24A.003(b)*.

Before removing the property from the residence, the applicant must give the property to the peace officer who must create an inventory listing the items taken from the residence. The officer must give a copy of the inventory to the applicant and the occupant, if there, or leave a copy for the occupant in a conspicuous place in the residence if the occupant is not there. The officer must file the original inventory with the court. *Property Code § 24A.003(c)*.

A person commits an offense (a Class B misdemeanor) if the person interferes with a person or a peace officer entering a residence and retrieving personal property under the authority of a writ of retrieval. It is a defense to prosecution if the person did not receive a copy of the writ or other notice that the entry and retrieval was authorized. *Property Code § 24A.005*.

A landlord who permits or facilitates entry into a residence under a writ of retrieval is not civilly or criminally liable for an act or omission that arises in connection with permitting or facilitating the entry. *Property Code § 24A.004*.

## **7. Hearing Requested by Occupant**

The occupant may file a complaint, not later than the 10<sup>th</sup> day after the date of the authorized entry, in the court that issued the writ alleging that the applicant took property belonging to the occupant or the occupant's dependent. The court must promptly hold a hearing on the complaint and rule on the disposition of the disputed property. *Property Code § 24A.006*.

## **8. Fees**

An applicant requesting a writ of retrieval must pay the standard filing fee in a civil case (\$46 in most counties). Many counties have also set a fee for execution of a writ of retrieval under Local Government Code § 118.131 (ranging from \$85 to \$200). An applicant who cannot afford the fees may file a Statement of Inability to Afford Payment of Court Costs.

## 9. Forms

Numerous forms relating to writs of retrieval may be found on the TJCTC website by clicking on the “Evictions and Landlord-Tenant” button at the following link:

<http://www.tjctc.org/tjctc-resources/forms.html>

## B. Writ of Re-Entry

### 1. What is a Writ of Re-Entry?

A writ of re-entry is an ex parte order requiring a landlord to let a tenant back into the premises after the landlord has locked the tenant out in violation of Section 92.0081 of the Property Code (for a residential tenant) or Section 93.002 of the Property Code (for a commercial tenant).

If the tenant has a manufactured home tenancy under Ch. 94 of the Property Code, the same rights and procedures will apply as for a residential tenant. This is because the provisions in Ch. 92 apply to “relationships between landlords and tenants of residential rental property,” and a lot in a manufactured home community could be considered “residential rental property.” *Property Code § 92.002.*



*A landlord may exercise lockout rights and also pursue an eviction case at the same time. The rights of a landlord or a tenant in an eviction suit are not affected by the writ of re-entry procedures.*

*Property Code §§ 93.003(m), 92.009(m), 92.0081(l).*

### 2. Landlord’s Lockout Rights for a Residential/Manufactured Home Tenant

#### **When May Lockout:**

A landlord has a right to lock out a residential tenant in certain situations but this right is quite limited and subject to important statutory protections for the tenant. This is in contrast to a landlord’s right to lock out a commercial tenant, which is much more extensive and discussed in the Section 3 below.

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

- bona fide repairs, construction, or an emergency;
- removing the contents of premises abandoned by a tenant (*see page 105–106*); or
- changing the door locks on the door to the tenant’s individual unit of a tenant who is delinquent in paying at least part of the rent.

*Property Code § 92.0081(b).*

#### **Procedures for Lockout for Delinquent Rent:**

A landlord **may not** change the door locks, or otherwise intentionally prevent a tenant from entering the leased premises based on **delinquent rent** UNLESS:

- the landlord’s right to change the locks because of the tenant’s failure to timely pay rent is placed in the lease;
- the tenant is delinquent in paying all or part of the rent; and
- the landlord has mailed (at least 5 days before locks changed) or hand-delivered or posted on the inside of the tenant’s main entry door (at least 3 days before locks are changed) a written notice stating:
  - the earliest date the landlord proposes to change the door locks;
  - the amount of rent the tenant must pay to prevent changing of the door locks;
  - the name and street address of the individual to whom, or the location of the on-site management office at which, the delinquent rent may be discussed or paid during the landlord’s normal business hours; and
  - in underlined or bold print, the tenant’s right to receive a key to the new lock at any hour, **regardless of whether the tenant pays the delinquent rent.**

*Property Code § 92.0081(d).*

A landlord also **may not** change the locks if the tenant is delinquent in paying the rent:

- when the tenant or any other legal occupant is in the dwelling;
- more than once during a rental payment period; or
- on a day, or on a day immediately before a day, on which the landlord or other designated individual is not available, or any on-site management office is not open, for the tenant to pay the delinquent rent.

*Property Code § 92.0081(e), (k).*

## REMOVAL OF FIXTURES

A landlord (of either a commercial or a residential tenant) also may not remove a door, window, or attic hatchway cover or a lock, latch, hinge, hinge pin, doorknob, or other mechanism connected to a door, window, or attic hatchway cover from premises leased to a tenant or remove furniture, fixtures, or appliances furnished by the landlord from premises leased to a tenant unless the landlord removes the item for a bona fide repair or replacement.  
*Property Code § 92.081(a), 93.002(b).*

A landlord who changes the locks of a tenant may not prevent the tenant from entering a common area of residential rental property (like a gym, pool area, etc.). *Property Code § 92.0081(e-1)*.



**Notice and Procedures for Tenant to Get the New Key:**

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A landlord who changes the door locks of a tenant **must provide the tenant with a key to the changed lock** on the dwelling **whether or not the tenant pays the delinquent rent**. *Property Code § 92.0081(f)*.

If a landlord changes the door lock of a residential tenant who is delinquent in paying rent, the landlord must place a written notice on the tenant’s front door stating:

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

*Property Code § 92.0081(c)*.

If a landlord comes to a tenant’s dwelling in a timely manner in response to a tenant’s call and the tenant is not present to receive the key to the changed lock, the landlord must leave a notice on the front door of the dwelling stating the time the landlord arrived with the key and the street address to which the tenant may go to obtain the key during the landlord’s normal office hours. *Property Code § 92.0081(g)*.

**Remedies (Other than the Writ of Re-entry) if Lock Out Procedures Are Not Followed:**

If a landlord violates this statute, the tenant may:

- either recover possession of the premises or terminate the lease; and
- recover from the landlord a civil penalty of one month’s rent plus \$1,000, actual damages, court costs and reasonable attorney’s fees in an action to recover property damages, and/or actual expenses, or civil penalties, less any delinquent rent or other sums for which the tenant is liable to the landlord.

*Property Code § 92.0081(h)*.

In addition to these remedies, if the landlord does not provide the tenant with a key after changing the door locks – even if the tenant does not pay the delinquent rent – the tenant may recover an additional civil penalty of one month’s rent. *Property Code § 92.0081(i)*.



**No Waiver of Rights/Remedies:**

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These rights and remedies **may not be waived for a residential tenant** (unlike for a commercial tenant). Section 92.0081(j) provides: “A provision of a lease that purports to waive a right or exempt



a party from a liability or duty under this section is **void**.” This means that a tenant cannot agree in a lease to waive any of the rights or remedies. Any agreement of this nature is not valid.

### 3. Landlord’s Lockout Rights for a Commercial Tenant

#### When Landlord May Lock Out:

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

- bona fide repairs, construction, or an emergency;
- removing the contents of premises abandoned by a tenant (*see page 105-106*); or
- changing the door locks of a tenant who is delinquent in paying at least part of the rent.

*Property Code § 93.002(c).*

#### Procedures for Lockout for Delinquent Rent:

But the rights of a commercial tenant who has been locked out because he is delinquent in paying rent are far less extensive than the rights of a residential tenant.

If a landlord locks out a commercial tenant who is delinquent in paying rent, the landlord must place a written notice on the tenant's front door stating the name and the address or telephone number of the individual or company from which a new key may be obtained.



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But the new key is required to be provided only during the tenant's regular business hours and **only if the tenant pays the delinquent rent**. *Property Code § 93.002(f)*. As discussed above, this is not the case with a residential tenant who is entitled to a new key even if he remains delinquent in paying the rent. *See page 71*.

#### Remedies (Other than the Writ of Re-entry) if Lock Out Procedures Not Followed:

If a landlord violates this statute, the tenant may:

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

*Property Code § 93.002(g).*



#### May Waive Rights/Remedies:

Unlike a residential tenant, a commercial tenant **may waive** their rights and remedies for a wrongful lockout by agreeing to something different in the lease. Section 93.002(h) provides: “A lease supersedes this section to the extent of any conflict.”

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## 4. Writ of Re-Entry Procedures



If a landlord has locked out a residential tenant in violation of Section 92.0081, or a commercial tenant (who has not waived their rights or remedies for unlawful lockouts) in violation of Section 93.002, **the tenant may recover possession of the premises through the issuance of an ex parte writ of re-entry.** *Property Code § 92.009; 93.003(a).*

The procedures for issuance of and a hearing on a writ of re-entry are exactly the same for a commercial tenant and a residential tenant. The procedures are also identical to those for issuance of a writ of restoration for a residential tenant.

### **Sworn Statement and Testimony:**

The tenant must file a sworn complaint for re-entry with the justice court in the precinct in which the rental premises are located, stating the facts of the alleged unlawful lockout. The tenant must also state orally under oath to the judge the facts of the alleged unlawful lockout. *Property Code §92.009(b); 93.003(b).*

### **Issuing Ex Parte Writ:**

If the judge reasonably believes an unlawful lockout has occurred, the judge may issue ex parte a writ of re-entry that entitles the tenant to immediate and temporary possession of the premises, pending a final hearing on the tenant's sworn complaint for re-entry. *Property Code § 92.009(c); 93.003(c).* The writ of re-entry must be served on the landlord or the landlord's management company, on-premises manager or rent collector in the same manner as a writ of possession in an eviction suit. A sheriff or constable may use reasonable force in executing a writ of re-entry. *Property Code § 92.009(d); 93.003(c).*

If the judge denies the ex parte writ, the decision is final. There is no method for appealing this decision.

### **Hearing:**

The landlord is entitled to a hearing on the tenant's sworn complaint for re-entry. The writ of re-entry must notify the landlord of the right to a hearing.

The hearing must be held not earlier than the first day and not later than the seventh day after the date the landlord requests a hearing. *Property Code § 92.009(e); 93.003(e).* If the landlord fails to request a hearing before the eighth day after service of the writ of re-entry on the landlord, a judgment for court costs may be rendered against the landlord. *Property Code § 92.009(f); 93.003(f).*

A party may appeal from the court's judgment at the hearing on the sworn complaint for re-entry in the same manner as in an eviction suit. *Property Code § 92.009(g); 92.003(g).*



### **If Writ of Possession Issued in Meantime:**

If a writ of possession is issued, it supersedes the writ of re-entry. *Property Code § 92.009(h); 92.003(h).*

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This means that the tenant will not be allowed back in to the premises, and the landlord now has possession of the premises as a result of the writ of possession.

## **5. Landlord's Failure to Comply with Writ of Re-entry**

### **Grounds for Contempt:**

If the landlord or the person on whom a writ of re-entry is served fails to immediately comply with the writ or later disobeys the writ, it is grounds for contempt of court under Government Code § 21.002. *Property Code § 92.009(i); 93.003(i).*

### **Affidavit and Hearing:**

If the writ is disobeyed, the tenant may file an affidavit stating the name of the person who has disobeyed the writ and describing the acts or omissions that show how they disobeyed. On receipt of the affidavit, the judge must issue a show cause order directing the person to appear on a designated date and show cause why he should not be held in contempt of court. *Property Code § 92.009(i); 93.003(i).*

### **If Disobeyed at First, but Started Complying Before Hearing:**

If the judge finds that the person has directly or indirectly disobeyed the writ, but complied with the writ after receiving the show cause order, the judge may find the person in contempt and assess punishment under Government Code § 21.002(c) (fine of up to \$100 and/or up to three days in jail). *Property Code § 92.009(i); 93.003(i).*

### **If Still Disobeying the Writ:**

If the judge finds that the person has directly or indirectly disobeyed the writ (and is still not complying), the judge may commit the person to jail without bail **until the person complies with the writ or otherwise purges himself of the contempt in a manner and form as the justice may direct.** *Property Code § 92.009(i); 93.003(i).* So basically, the person can stay in jail until they do as ordered.

### **Fees:**

- The fee for filing a sworn complaint for re-entry is the same as for filing a civil action in justice court.
- The fee for service of a writ of re-entry is the same as for service of a writ of possession.
- The fee for service of a show cause order is the same as for service of a civil citation.

*Property Code § 92.009(l).*

The judge may defer payment of the tenant's filing fees and service costs for the sworn complaint for re-entry and writ of re-entry (to be determined and taxed against the appropriate party later), but court costs may be **waived** only if the tenant files a Statement of Inability to Afford Payment of Court Costs. *Property Code § 92.009(l); 93.003(l).*

**Pursuing Other Remedies:**

These procedures do not affect a tenant's right to pursue a separate cause of action under Property Code § 92.0081 (residential) or 93.002 (commercial), which entitles the tenant to recover damages and civil penalties, reasonable attorney's fees and court costs. *Property Code § 92.009(j); 93.003(j).*

**6. Bad Faith Filing of Sworn Complaint for Re-entry**

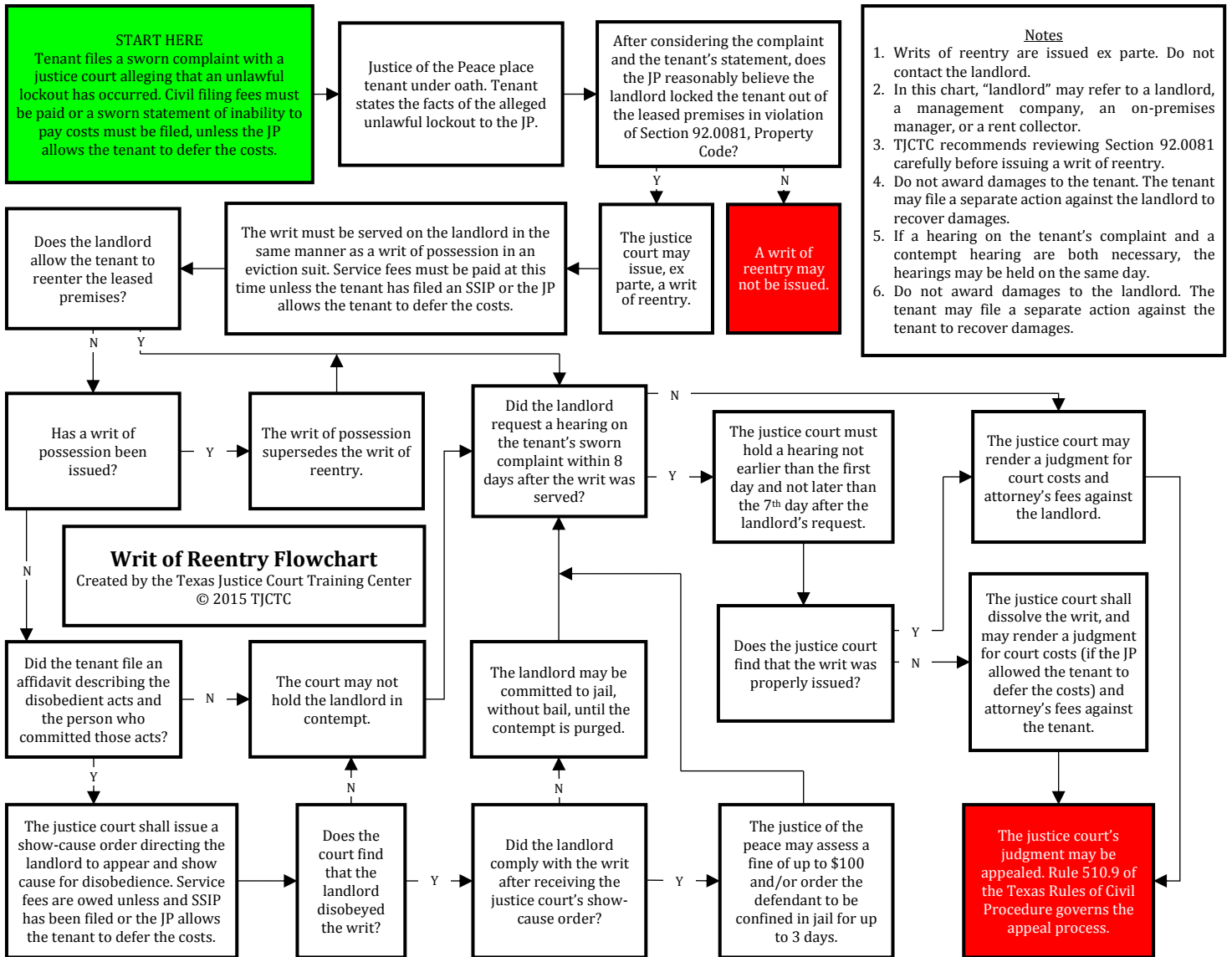
If a tenant files a sworn complaint for re-entry in bad faith resulting in a writ of re-entry being served on the landlord, the landlord may recover from the tenant in a separate cause of action:

- actual damages;
- one month's rent or \$500, whichever is greater;
- reasonable attorney's fees and court costs;
- less any sums for which the landlord is liable to the tenant.

*Property Code § 92.009(k); 93.003(k).*

## 7. Writ of Re-Entry Flow Chart

Here is a flowchart for a writ of re-entry:



## 8. Forms

Forms relating to writs of re-entry may be found on the TJCTC website by clicking on the "Evictions and Landlord-Tenant" button at the following link:

<http://www.tjctc.org/tjctc-resources/forms.html>

## C. Writ of Restoration

### 1. What is a Writ of Restoration?

A writ of restoration is an ex parte writ ordering a landlord who has interrupted (shut off) utility service to a **residential** tenant in violation of Section 92.008 of the Property Code to restore the utility service.



A writ of restoration is NOT available in commercial tenancies.

#### COMMON PITFALL

If the tenant has a manufactured home tenancy under Ch. 94 of the Property Code, the same rights and procedures will apply as for a residential tenant. This is because the provisions in Ch. 92 apply to “relationships between landlords and tenants of residential rental property,” and a lot in a manufactured home community could be considered “residential rental property.” *Property Code § 92.002.*

### 2. Interruption of Utility Service

#### When May Landlord Shut Off Utilities:

A landlord (or his agent) may not interrupt (shut off) or cause the interruption of utility service paid for directly to the utility company by a residential tenant unless the interruption results from:

- bona fide repairs,
- construction, or
- an emergency.

*Property Code § 92.008(a).*

A landlord also may not interrupt or cause the interruption of water, wastewater, gas, or electric service **furnished to a residential tenant by the landlord** as an incident of the tenancy or by other agreement unless the interruption results from:

- bona fide repairs,
- construction, or
- an emergency.

*Property Code § 92.008(b).*

## COMMERCIAL TENANT

A landlord of a commercial tenant also may not interrupt or cause the interruption of utility service paid for directly to the utility company by a tenant unless the interruption results from bona fide repairs, construction, or an emergency. *Property Code § 93.002(a).*

**However**, there is no writ of restoration procedure for a commercial tenant as there is for a residential tenant.

### **Remedies (Other than the Writ of Restoration):**

If a landlord (or his agent) violates this statute, the tenant may:

- Either recover possession of the premises or terminate the lease; and
- Recover from the landlord:
  - the tenant's actual damages;
  - one month's rent or \$500, whichever is greater;
  - reasonable attorney's fees and court costs;
  - less any delinquent rents or other sums for which the tenant is liable to the landlord.

*Property Code § 92.008(f).*



### **No Waiver of Rights or Remedies:**

These rights and remedies **may not be waived by a residential tenant**. A provision of a lease that purports to waive a right or exempt a party from a liability or duty under this section is **void**. *Property Code § 92.008(g)*. This means that a tenant cannot agree in a lease to waive any of the rights or remedies. Any agreement of this nature is not valid.

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## **3. Writ of Restoration**



KEY  
POINT

If a landlord has shut off utility service in violation of Section 92.008, a residential tenant may obtain relief through the issuance of an ex parte writ of restoration. *Property Code § 92.0091(a)*.

The procedures for issuance of a writ of restoration are identical to those for issuance of a writ of re-entry.

### **Sworn Statement and Testimony:**

To obtain the writ the tenant must file a sworn complaint with the justice court in the precinct in which the rental premises are located, specifying the facts of the alleged unlawful utility disconnection by the landlord (or his agent). The tenant must also state orally under oath to the judge the facts of the alleged unlawful utility disconnection. *Property Code §92.0091(b)*.

### **Issuing Ex Parte Writ:**

If the judge reasonably believes an unlawful utility disconnection has occurred, the judge may issue ex parte a writ of restoration of utility service that entitles the tenant to immediate and temporary restoration of the disconnected utility service pending a final hearing on the tenant's sworn complaint *Property Code § 92.0091(c)*.

The writ of restoration must be served on the landlord or the landlord's management company, on-premises manager or rent collector in the same manner as a writ of possession in a forcible detainer action. *Property Code § 92.0091(d)*.

If the judge denies the ex parte writ, the decision is final. There is no method for appealing this decision.

**Hearing:**

The landlord is entitled to a hearing on the tenant's sworn complaint for restoration of utility service. The writ of restoration must notify the landlord of the right to a hearing.

The hearing must be held not earlier than the first day and not later than the seventh day after the date the landlord requests a hearing. *Property Code § 92.0091(e)*. If the landlord fails to request a hearing on the tenant's sworn complaint for restoration of utility service before the eighth day after service of the writ of restoration on the landlord, a judgment for court costs may be rendered against the landlord. *Property Code § 92.0091(f)*.

A party may appeal from the court's judgment at the hearing on the sworn complaint for restoration of utility service in the same manner as in a forcible detainer suit. *Property Code. § 92.0091(g)*.

**If Writ of Possession Issued in Mean Time:**

If a writ of possession is issued, it supersedes the writ of restoration. *Property Code § 92.0091(h)*. This means that the landlord does not have to turn any utilities back on, and now has possession of the premises as a result of the writ of possession.

**4. Landlord's Failure to Comply with Writ of Restoration**

**Grounds for Contempt:**

If the landlord or the person on whom a writ of restoration is served fails to immediately comply with the writ or later disobeys the writ, it is grounds for contempt of court under Government Code § 21.002. *Property Code § 92.0091(i)*.

**Affidavit and Hearing:**

If the writ is disobeyed, the tenant may file an affidavit stating the name of the person who has disobeyed the writ and describing the acts or omissions that show how they disobeyed. On receipt of the affidavit, the judge must issue a show cause order directing the person to appear on a designated date and show cause why he should not be held in contempt of court. *Property Code § 92.0091(i)*.

**If Disobeyed at First, but Started Complying Before Hearing:**

If the judge finds that the person has directly or indirectly disobeyed the writ, but complied with the writ after receiving the show cause order, the judge may find the person in contempt and assess punishment under Government Code § 21.002(c) (fine of up to \$100 and/or up to three days in jail). *Property Code § 92.0091(i)*.



### **If Still Disobeying the Writ:**

If the judge finds that the person has directly or indirectly disobeyed the writ (and is still not complying), the judge may commit the person to jail without bail **until the person complies with the writ or otherwise purges himself of the contempt in a manner and form as the justice may direct.** *Property Code § 92.0091(i).* So basically, the person can stay in jail until they do as ordered.

### **Fees:**

- The fee for filing a sworn complaint for restoration is the same as for filing a civil action in justice court.
- The fee for service of a writ of restoration is the same as for service of a writ of possession.
- The fee for service of a show cause order is the same as for service of a civil citation.

*Property Code § 92.0091(k).*

The judge may defer payment of the tenant's filing fees and service costs for the sworn complaint for re-entry and writ of re-entry (to be determined and taxed against the appropriate party later), but court costs may be **waived** only if the tenant files a Statement of Inability to Afford Payment of Court Costs. *Property Code § 92.0091(k).*

## **5. Bad Faith Filing of Sworn Complaint for Writ of Restoration**

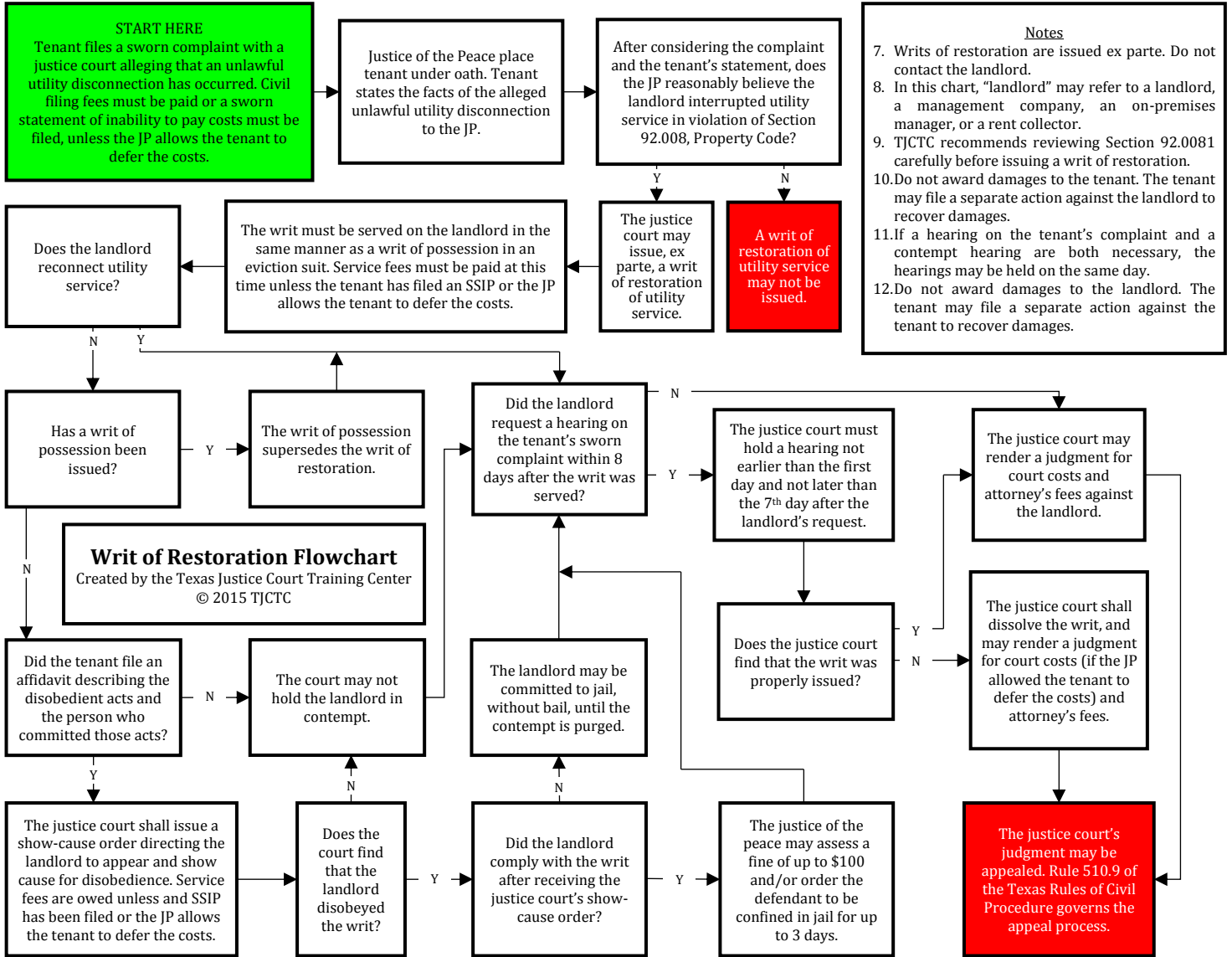
If a tenant files a sworn complaint for restoration in bad faith resulting in a writ of restoration being served on the landlord, the landlord may recover from the tenant in a separate cause of action.

- actual damages;
- one month's rent or \$500, whichever is greater;
- reasonable attorney's fees and court costs;
- less any sums for which the landlord is liable to the tenant.

*Property Code § 92.0091(j).*

## 6. Writ of Restoration Flow Chart

Here is a flow chart for a writ of restoration:



## 7. Forms

Forms relating to writs of restoration may be found on the TJCTC website by clicking on the "Evictions and Landlord-Tenant" button at the following link:

<http://www.tjctc.org/tjctc-resources/forms.html>

## CHAPTER 10: REPAIR AND REMEDY CASES

Landlords have a duty under Subchapter B of Chapter 92 of the Property Code to repair or remedy certain conditions in residential rental property. If a landlord violates this duty, a tenant has certain non-judicial and judicial remedies, including repair and deduct remedies and filing a suit under Rule 509 of the Texas Rule of Civil Procedure to enforce the landlord's duty to repair and remedy a condition materially affecting the health or safety of an ordinary tenant. *Rule 509.1.*

Nearly identical duties and remedies exist for manufactured home communities under Subchapter D of Chapter 94 of the Property Code, with a couple of important differences.



There are no equivalent duties or remedies for commercial tenancies.

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### A. Landlord's Duty to Repair or Remedy Conditions of the Premises



#### Duty to Repair:

KEY  
POINT

A landlord must make a diligent effort to repair or remedy a condition that:

- materially affects the physical health or safety of an ordinary tenant; or
- arises from the landlord's failure to provide and maintain in good operating condition a device to supply hot water at a minimum temperature of 120 degrees

#### IF:

- the tenant specifies the condition in a notice to the person or place where rent is normally paid (must be in writing only if the lease is in writing and requires written notice; otherwise the tenant may give oral notice); and
- the tenant is not delinquent in the payment of rent at the time of the notice.

*Property Code § 92.052(a),(d).*

Unless the condition was caused by normal wear and tear, a landlord does not have a duty to repair or remedy a condition caused by:

- the tenant;
- a lawful occupant in the tenant's dwelling;
- a member of the tenant's family; or
- a guest or invitee of the tenant.

*Property Code § 92.052(b).*

A landlord also does not have to furnish:

- utilities from a utility company if the utility lines of the company are not reasonably available; or
- security guards.

*Property Code § 92.052(c).*

**If Premises are totally or Partially Unusable:**

If the premises are totally unusable for residential purposes after a casualty loss (like hurricane, fire, etc.) and the loss is not caused by the tenant or the tenant's family member, guest or invitee, then either the landlord or the tenant may terminate the lease by giving written notice to the other at any time before the repairs are completed. *Property Code § 92.054(b).*

If the premises are partially unusable after a casualty loss (like smoke, hail, etc.) and the loss is not caused by the tenant or the tenant's family member, guest or invitee, then the tenant is entitled to a proportionate reduction in rent (but only on a judgment of a county or district court). But a landlord and a tenant may agree otherwise in a written lease. *Property Code § 92.054(c).*

**Closing of Rental Premises:**

A landlord has the option of closing rental premises at any time by giving written notice by certified mail, return receipt requested, to the tenant and the local health office and building inspector stating that he is terminating the tenancy and will no longer use the unit for residential purposes or will demolish it. *Property Code § 92.055(a).*

If a landlord chooses to do this, he may not allow re-occupancy or reconnection of utilities by separate meter within six months after the date the tenant moves out. *Property Code § 92.055(b)(2).*

If the landlord closes the rental unit after receiving a notice to repair, and the tenant moves out on or before the end of the rental term, the landlord must:

- pay the tenant's actual and reasonable moving expenses;
- refund a prorated portion of the tenant's rent from the date the tenant moves out; and
- if otherwise required, return the tenant's security deposit.

*Property Code § 92.055(d).*

A landlord who fails to pay the amounts due to the tenant or who allows re-occupancy or utility reconnection sooner than six months, is liable to the tenant for an amount equal to the total of one month's rent plus \$100 and attorney's fees. *Property Code § 92.055(e).*

## **B. Modification or Waiver of Landlord's Duty to Repair or Remedy**

A landlord and tenant may mutually agree for the tenant to repair or remedy, **at the landlord's expense, any condition** of the dwelling, regardless of whether it materially affects the health or safety of an ordinary tenant. *Property Code § 92.0561(g)*.

A landlord and tenant may also agree for the tenant to repair, **at the tenant's expense**, any condition that materially affects the physical health or safety of an ordinary tenant but only IF all of the following conditions are met:

- At the beginning of the lease term **the landlord owns only one rental dwelling**;
- At the beginning of the lease term the dwelling is free from any condition which would materially affect the physical health or safety of an ordinary tenant;
- At the beginning of the lease term the landlord has no reason to believe that any condition materially affecting the physical health or safety of an ordinary tenant is likely to occur or recur during the tenant's lease term or during a renewal or extension;
- The lease is in writing;
- The agreement for repairs by the tenant is either underlined or printed in boldface in the lease or in a separate written addendum;
- The agreement is specific and clear; and
- The agreement is made knowingly, voluntarily and for consideration.

*Property Code § 92.0561(g), 92.006(e)*.

A landlord and tenant may also agree that, except for conditions caused by the negligence of the landlord, the **tenant has a duty to pay for repairs of the following conditions**:

- Damage from wastewater stoppages caused by foreign or improper objects in lines that exclusively serve the tenant's dwelling;
- Damage to doors, windows or screens; and
- Damage from windows or doors left open.

*Property Code § 92.006(f)*.

Such an agreement must be in writing, underlined or printed in boldface, specific and clear, and made knowingly, voluntarily and for consideration. *Property Code § 92.006(f)*. And it cannot affect the landlord's duty to repair or remedy, at the landlord's expense, wastewater stoppages or backups caused by deterioration, breakage, roots, ground conditions, faulty construction, or malfunctioning equipment. *Property Code § 92.006(f)*.

A landlord who knowingly violates Section 92.006 by **contracting orally or in writing with a tenant to waive the landlord's duty to repair** under Subchapter B of Chapter 92 **is liable** to the tenant for:

- actual damages;

- a civil penalty of one month's rent plus \$2,000; and
- reasonable attorney's fees.

*Property Code § 92.0563(b).*

## C. Landlord's Liability for Failure to Repair or Remedy Conditions

### Liability:

A landlord is liable to a tenant for not repairing or remedying conditions of the premises (for which the landlord has a duty to repair) **if**:

- The condition was not an insured casualty loss;
- Except for normal wear and tear; the condition was not caused by the tenant (or a lawful occupant or tenant's family member, guest, or invitee);
- The tenant has given the landlord notice to repair or remedy the condition by giving the notice to the person or place where rent is normally paid;
- The condition **materially affects the physical safety or health of an ordinary** tenant;
- The tenant either sent the notice by certified mail, return receipt requested, or registered mail, or gave the landlord a second written notice after he had a reasonable time to repair and remedy the condition following the first notice;
- The landlord has had a **reasonable time to repair or remedy the condition after receiving the tenant's notice**;
- The landlord **has not made a diligent effort** to repair or remedy the condition after receiving the tenant's notice; and
- The tenant was **not delinquent in the payment of rent** at the time any required notice was given.

*Property Code § 92.056.*

### Time for Repair:

What is a **reasonable** time for a landlord to repair or remedy a condition? The Property Code states that there is a rebuttable presumption that **seven days** is a reasonable time. *Property Code § 92.056(d)*. This means that the default is seven days unless evidence is provided as to why it should be a different amount of time. Factors that must be considered are:

- the date on which the landlord received the tenant's notice,
- the severity and nature of the condition, and
- the reasonable availability of materials and labor and of utilities from a utility company.

*Property Code § 92.056(d).*

A landlord is deemed to have received the notice when the landlord or the landlord's agent or employee has actually received the notice or when the U.S. Postal Service has **attempted** to deliver the notice to the landlord. *Property Code § 92.056(c)*.



If a condition results from an insured casualty loss, such as fire, smoke, hail or explosion, the period for repair does not begin until the landlord receives the insurance proceeds. *Property Code § 92.054(a)*.



### **Burden of Proof**

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**Tenant:** If the tenant files a court case, the tenant generally has the burden of proof. This means that the tenant has to prove that the landlord failed to make a diligent effort to repair or remedy a condition (that he had a duty to repair) in a reasonable amount of time from receiving notice.

**Landlord:** But the burden moves to the landlord and he has to prove that he DID make a diligent effort to repair in a reasonable time (or that a reasonable time for repair has not elapsed) IF:

- the landlord received a written demand from the tenant for an explanation for delay in performing a duty to repair or remedy a condition; and
- did not provide the written explanation for delay on or before the 5<sup>th</sup> day after receiving the demand.

*Property Code § 92.053.*

### **Remedies:**

If a landlord is liable to the tenant for failing to repair or remedy conditions of the premises as provided in Section 92.056, then the tenant has certain specified remedies some of which are non-judicial and some of which are judicial. These remedies are discussed below.

## **D. Tenant's Remedies against Landlord**

A tenant to whom a landlord is liable for failure to repair or remedy a condition that materially affects the physical health or safety of an ordinary tenant under Property Code § 92.056(b) has the following remedies:

- Terminate the lease;
- Have the condition repaired or remedied and deduct the cost of the repair from a subsequent rent payment according to Section 92.0561 (**without the necessity of judicial action**); and
- Obtain judicial remedies according to Section 92.0563 and Rule 509 of the Texas Rules of Civil Procedure.

*Property Code § 92.056(e)*.

A lease must contain language in underlined or bold print that informs the tenant of these remedies.

*Property Code § 92.056(g)*.

## 1. Lease Termination

A tenant who elects to terminate the lease:

- Is entitled to a prorated refund of rent from the date of termination or the date the tenant moves out, whichever is later.
- May deduct the tenant's security deposit from the tenant's rent without the necessity of a lawsuit or may obtain a refund of the security deposit.
- May NOT pursue the remedies under Section 92.0563(a)(1) and (2) (an order directing the landlord to make repairs or remedy a condition or an order reducing rent due to the condition).

*Property Code § 92.056(f)(1)-(3).*

## 2. Tenant's Repair and Deduct Remedies

### a. General Procedures

If the landlord is liable to the tenant under Section 92.056(b) for failing to repair or remedy a condition, the tenant may have the condition repaired or remedied and may deduct the cost from a subsequent rent payment if he follows certain procedures.

#### **How Much and How Often:**

The tenant's deduction may not exceed the amount of one month's rent under the lease or \$500, whichever is greater. *Property Code § 92.0561(a) and (b).*

Repairs and deductions may be made as often as necessary so long as the total repairs and deductions in any one month do not exceed one month's rent or \$500, whichever is greater. *Property Code § 92.0561(c).*

#### **Conditions:**

The tenant may have repairs made under Section 92.0561 only if all of the following conditions have been met:

- The landlord has a duty to repair which has not been waived by the tenant in a written lease. *(See Modification or Waiver of Landlord's Duty to Repair or Remedy section above);*

## GOVERNMENT SUBSIDIZED RENT

If the tenant's rent is subsidized by a government agency, the deduction limitation of one month's rent is based on the fair market rent for the dwelling and not the rent that the tenant pays. The fair market rent is to be determined by the governmental agency subsidizing the rent, or in the absence of such a determination, it is to be a reasonable amount of rent under the circumstances.

*Property Code § 92.0561(b).*



- The tenant has given notice to the landlord as provided in Section 92.0561(b)(1), and if required, a second notice as provided in Section 92.0561(b)(3), stating the tenant intends to repair or remedy the condition and containing a reasonable description of the repair or remedy to be done; and
- One of the following events has occurred:
  - The landlord has failed to remedy the backup or overflow of raw sewage or flooding from broken pipes or natural drainage inside the tenant’s dwelling;
  - The landlord has agreed in the lease to provide potable water to the dwelling and water service has totally ceased;
  - The landlord has agreed in the lease to furnish heating or cooling equipment which is producing inadequate heat or cooled air and the landlord has been notified in writing by the local housing, building or health official (or other official having jurisdiction) that the lack of heat or cooling materially affects the health or safety of an ordinary tenant; or
  - The landlord has been notified in writing by the appropriate local housing, building or health official (or other official having jurisdiction) that the condition materially affects the health or safety of an ordinary tenant.

*Property Code § 92.0561(d).*

**Timeline for Making Repairs:**

If the above conditions are met, then the tenant may have repairs made:

- **Immediately following** the tenant’s notice of intent to repair if the condition involves sewage or flooding as referred to in Section 92.0561(d)(3)(A);
- **Three days after** the tenant’s notice of intent to repair if the condition involves cessation of potable water as referred to in Section 92.0561(d)(3)(B) or inadequate heating or cooling as referred to in Section 92.0561(d)(3)(C);
- **Seven days after** the tenant’s notice of intent to repair if the condition involves something else and affects the physical health or safety of an ordinary tenant as referred to in Section 92.0561(d)(3)(D).

*Property Code § 92.0561(e).*



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**Limits on who may make the Repairs and What Repairs may be Made:**

Repairs **must** be made by a company, contractor or repairman listed in the yellow or business pages of the telephone directory or in the classified advertising section of a newspaper of the local city or county or an adjacent county at the time of the tenant’s notice of intent to repair. *Property Code § 92.0561(f).*

Unless the landlord and tenant agree otherwise in accordance with Section 92.0561(g), repairs **may not** be made by the tenant, the tenant’s immediate family, the tenant’s employer or employees, or a company in which the tenant has an ownership interest. *Property Code § 92.0561(f).*

If a building contains two or more dwelling units, repairs **may not** be made to the **foundation** or **load-bearing** structural elements. *Property Code § 92.0561(f)*.

### ***b. Landlord's Affidavit of Delay***

#### **Requirements of Affidavit:**

A tenant **must delay contracting for repairs** on their own under Section 92.0561 if, **before** the tenant contracts for the repairs, the landlord delivers to the tenant an affidavit:

- Signed and sworn to under oath by the landlord or his authorized agent;
- Summarizing the reasons for the delay and the diligent efforts made by the landlord up to the date of the affidavit to get the repairs done;
- Stating facts that show that the landlord has made and is making diligent efforts to repair the conditions; and
- Contain dates, names, addresses and telephone numbers of contractors, suppliers, and repairmen contacted by the owner.

*Property Code § 92.0562(a) and (b)*.

#### **Length of Delay and Grounds for Affidavit:**

Such an affidavit may delay repairs by the tenant for:

- 15 days if the landlord's failure to repair is caused by a delay in obtaining necessary parts for which the landlord is not at fault;
- 30 days if the landlord's failure to repair is caused by a general shortage of labor or materials following a natural disaster such as a hurricane, tornado, flood, extended freeze or widespread windstorm.

*Property Code § 92.0562(c)*.

Affidavits on any other grounds are unlawful and, if used, are of no effect. *Property Code § 92.056(d)*.

A landlord may file subsequent affidavits provided that the total delay of the repair or remedy extends no longer than six months from the date the landlord delivers the first affidavit to the tenant. *Property Code § 92.056(d)*.

#### **Delivery of Affidavit:**

The affidavit must be delivered by personal delivery to the tenant, by certified mail, return receipt requested, to the tenant, or by leaving the affidavit inside the dwelling in a conspicuous place if notice in that manner is authorized in a written lease. *Property Code § 92.0562(e)*.

#### **Good Faith Requirement:**

An affidavit must be submitted in good faith and after delivery of the affidavit the landlord must continue diligent efforts to repair or remedy the condition. There is a rebuttable presumption



(assumption that can be proven wrong) that the landlord acted in good faith and with continued diligence for the first affidavit; but for subsequent affidavits, the landlord has the duty of pleading and proving good faith and continued diligence.

If the landlord violates his obligations with respect to an affidavit of delay, he is liable to the tenant for all judicial remedies under Section 92.0563 except that the civil penalty under Section 92.0563(a)(3) is one month's rent plus \$1,000 rather than one month's rent plus \$500. *Property Code § 92.0562(f)*.

### ***c. Landlord's Remedy for Tenant Violation of Repair and Deduct Remedy***

If a tenant withholds rent, causes repairs to be performed, or makes rent deductions for repairs in violation of Subchapter B of Chapter 92 of the Property Code, the landlord may recover actual damages from the tenant. *Property Code § 92.058*.

If the landlord notifies the tenant in writing of the illegality of the tenant's withholding of rent or proposed repair and the penalties under Subchapter B, and the tenant proceeds to withhold rent or causes repairs to be performed or makes rent deductions for repairs in bad faith violation of Subchapter B, then the landlord may recover a civil penalty from the tenant of one month's rent plus \$500. *Property Code § 92.058*. The landlord's notice must be in writing and may be delivered in person, by mail or by delivery to the premises. *Property Code § 92.058*.

## **3. Repair and Remedy Suit under Rule 509**

### ***a. Available Judicial Remedies***

A tenant's judicial remedies against a landlord who is liable under Section 92.056 include:

- An order directing the landlord to take reasonable action to repair or remedy the condition;
- An order reducing the tenant's rent from the date of the first repair notice until the condition is repaired or remedied in proportion to the reduced rental value resulting from the condition;
- A judgment against the landlord for a civil penalty of one month's rent plus \$500;
- A judgment against the landlord for the amount of the tenant's actual damages; and
- Court costs and attorney's fees, excluding any attorney's fees for a cause of action for damages relating to a personal injury.

*Property Code § 92.0563(a)*.

Justice courts have jurisdiction in actions to enforce tenant's judicial remedies, including ordering a landlord to take reasonable action to repair or remedy a condition that materially affects the physical health or safety of an ordinary tenant under Subchapter B of Chapter 92. *Property Code § 92.0563(c)*.



KEY  
POINT

A justice court may not award a judgment – including an order of repair – that exceeds \$10,000, excluding interests and court costs. *Property Code § 92.0563(e)*.

### ***b. Contents of the Petition***

A repair and remedy suit begins by the filing of a written petition with the court. The petition must include the following:

- The street address of the residential rental property;
- A statement indicating whether the tenant has received in writing the name and business address of the landlord and landlord’s management company;
- To the extent known, the name, business street address, and telephone number of the landlord and the landlord’s management company, on-premises manager and rent collector serving the residential rental property;
- Information concerning any notices the tenant gave to the landlord requesting that the condition be repaired or remedied, including the date of the notice, the name of the person to whom or place where it was given, whether the lease is in writing and requires written notice, whether the notice was in writing or oral, whether it was given by certified mail, return receipt requested, or registered mail, and whether the rent was current or had been timely tendered at the time notice was given;
- A description of the property condition materially affecting the health or safety of an ordinary tenant that the tenant seeks to have repaired or remedied;
- A statement of the relief requested by the tenant, including an order to repair or remedy a condition, a reduction in rent, actual damages, civil penalties, attorney’s fees, and court costs;
- If the petition includes a request to reduce the rent, the amount of rent paid by the tenant, the amount of rent paid by the government, if known, the rental period and when the rent is due, and the amount of the requested rent reduction and when it should begin;
- A statement that the total relief requested does not exceed \$10,000, excluding interest and court costs but including attorney’s fees; and
- The tenant’s name, address and telephone number.

*Rule 509.2(a)*.

The tenant must provide the court with copies of the petition and any attachments for service on the landlord. *Rule 509.2(b)*.

A petition substantially in the form issued by the Supreme Court is sufficient. A suit may not be dismissed due to a defect in the petition unless the tenant is given an opportunity to correct the defect and does not promptly correct it. *Rule 509.2(c)*.

A copy of the petition form issued by the Supreme Court is available on the TJCTC website. *For more information, see page 98.*

### ***c. Citation and Appearance Date***

After the petition is filed the judge must immediately issue a citation directed to the landlord and commanding him to appear before the judge not less than **ten days** nor more than **21 days** after the petition is filed. *Rule 509.3.*

The appearance date is the trial date. The landlord may, but is not required to, file an answer before the appearance date. *Rule 509.3.*

### ***d. Service of the Citation***

#### **Service and Return:**

The citation may be served by a sheriff, constable or “other person authorized by Rule 501.2,” (a private process server or other person authorized by the court), by delivering it to the landlord at least **six days before** the appearance date. The citation “must be issued, served, and returned in like manner as ordinary citations from a justice court.” *Rule 509.4(a).*

#### **Alternative Service:**

##### ***First Alternative Method:***

If the petition does not include the landlord’s name and business street address, or if the person serving the citation is unable to serve it successfully by delivering it to the landlord after making diligent efforts on at least two occasions, then the person serving the citation must serve it by delivering a copy of it, along with the petition and any attachments, to:

- The landlord’s management company if the tenant has received written notice of the name and business street address of the landlord’s management company; or
- The landlord’s authorized agent for service of process, which may be the landlord’s management company, on-premises manager or rent collector serving the residential property.

*Rule 509.4(b)(1).*

##### ***Second Alternative Method:***

If the person serving the citation is unable to serve it successfully by delivering it to the landlord’s management company or authorized agent, after making diligent efforts on at least two occasions, then he must execute and file in the justice court a sworn statement:

- Stating that he made diligent efforts to serve the citation on at least two occasions at all available business street addresses of the landlord and on the landlord’s management company, on premises manager and rent collector; and



- Providing the times, dates and places of each attempted service.

*Rule 509.4(b)(2).*

The judge may then authorize the person to serve the citation by:

- Delivering a copy of the citation, petition and any attachments to someone over the age of 16 at any business street address listed in the petition, OR if no one answers the door at a business street address:
  - Placing the citation, petition and attachments through a door mail chute or under the front door; or
  - Affixing them to the front door or main entry to the business street address;
- Within 24 hours of delivery to the premises, mailing a copy of the citation, petition and attachments to the landlord at the landlord’s business street address by first class mail; and
- Noting on the return of citation the date of delivery to the premises and the date of mailing.

*Rule 509.4(b)(2).*

The delivery and mailing to the business street address must occur **at least six days** before the appearance date. At least **one day before the appearance date**, a return of service must be filed with the court that issued the citation. It is not necessary for the tenant to request any of the alternative service methods authorized by Rule 509.4. *Rule 509.4(b)(2).*

### ***e. Representation of Parties***



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Parties may represent themselves or be represented by an attorney. Unlike an eviction case, a party may not be represented by an authorized agent. *Rule 500.4.*

### ***f. Trial***

**A repair and remedy case “must be docketed and tried as other cases.”** *Rule 509.5(a).* And the rules expressly provide that the “judge may develop the facts of the case in order to ensure justice.” *Rule 509.5(a).*

If the tenant appears at trial and the landlord has been served and fails to appear at trial, the justice may proceed to hear the evidence. And if the tenant establishes that he is entitled to recover, the judge must render judgment against the landlord in accordance with the evidence. *Rule 509.5(b).* On the other hand, if the tenant fails to appear for trial, the judge may dismiss the suit. *Rule 509.5(b).*

A party may file a motion for a continuance of the trial of a repair and remedy case under Rule 503.3(b) and the judge “for good cause, may postpone the trial for a reasonable time.”

## ***g. Judgment***

### **Limit of Judgment:**

A judgment may be rendered against the landlord for failure to repair or remedy a condition at the residential rental property **if the total judgment does not exceed \$10,000** (excluding interest and court costs but including attorney's fees). *Property Code § 92.0563(e); Rule 509.6(a).*

### **Attorney's Fees and Court Costs:**

A party who prevails in a repair and remedy suit may recover the party's court costs and reasonable attorney's fees as allowed by law. *Rule 509.6(a).*

### **Contents of Judgment:**

The judgment must be in writing, signed and dated, and must include the names of the parties and the street address of the residential rental property where the condition is to be repaired or remedied. *Rule 509.6(b)(1).*

The judgment may:

1. order the landlord to take reasonable action to repair or remedy the condition;
2. order a reduction in the tenant's rent, from the date of the first repair notice, in proportion to the reduced rental value resulting from the condition until the condition is repaired or remedied;
3. award a civil penalty of one month's rent plus \$500;
4. award the tenant's actual damages; and
5. award court costs and attorney's fees, excluding any attorney's fees for a cause of action for damages relating to a personal injury.

*Rule 509.6(b)(2).*



KEY  
POINT

**If the judge orders the landlord to repair or remedy a condition, the judgment must include **in reasonable detail:****

1. the actions the landlord must take to repair or remedy the condition; and
2. the date when the repair or remedy must be completed.

*Rule 509.6(b)(3).*

**If the justice orders a reduction in the tenant's rent, the judgment must state:**

1. the amount of the rent the tenant must pay, if any;
2. the frequency with which the tenant must pay the rent;
3. the condition justifying the reduction of rent;
4. the effective date of the order reducing rent;
5. that the order reducing rent will terminate on the date the condition is repaired or remedied; and

6. that on the day the condition is repaired or remedied, the landlord must give the tenant written notice, served in accordance with Rule 501.4, that the condition justifying the reduction of rent has been repaired or remedied and the rent will revert to the rent amount specified in the lease.

*Rule 509.6(b)(4).*

#### **Service of Judgment on Landlord:**

The judgment may be served on the landlord in open court or by any means provided in Rule 501.4 at:

- An address listed in the citation:
- The address listed on any answer; or
- Such other address as the landlord provides to the court in writing.

Unless the judge serves the landlord in open court or as provided in Rule 501.4, the sheriff, constable, or other authorized person who serves the landlord must **promptly file a certificate of service** in the justice court. *Rule 509.6(c).*

#### **Landlord Failure to Comply:**

If the landlord fails to comply with an order to repair or remedy a condition or reduce the tenant's rent, it is grounds for citing the landlord for contempt of court under Government Code § 21.002. *Rule 509.6(d).*

#### ***h. No Counterclaims***



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Counterclaims and suits against third parties are not permitted in repair and remedy cases. A compulsory counterclaim may be brought in a separate suit and any potential causes of action, including a compulsory counterclaim, that are not asserted because of this rule are not precluded. *Rule 509.7.*

#### ***i. Appeal***

##### **Deadline:**

Either party may appeal the decision of the justice court by filing a written notice of appeal with the justice court **within 21 days** after the date the judge signs the judgment. *Rule 509.8(a).* If the judgment is amended in any respect, any party has the right to appeal **within 21 days** after the date the judge signs the new judgment in the same manner as an appeal of an original judgment. *Rule 509.8(a).*



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##### **No Appeal Bond:**

An appeal bond is **not** required in a repair and remedy case. *Rule 509.8(b).* Instead, the appeal is considered perfected with the filing of a notice of appeal. *Rule 509.8(b); Property Code § 92.0563(f).*



**Judgment May Not Be Enforced:**

The timely filing of a notice of appeal stays (stops) the enforcement of any order to repair or remedy a condition or reduce the tenant’s rent, as well as any other actions. *Rule 509.8(c)*.

**Filing Fee in County Court Must Be Paid To Maintain Perfected Appeal:**

The appellant must pay the costs on appeal to a county court in accordance with Rule 143a. *Rule 509.8(d)*. This means that if they do not pay the county court filing fee, their appeal will be deemed not perfected and the justice court judgment will be valid again. *See page 48 for more information.*

**Trial de Novo:**

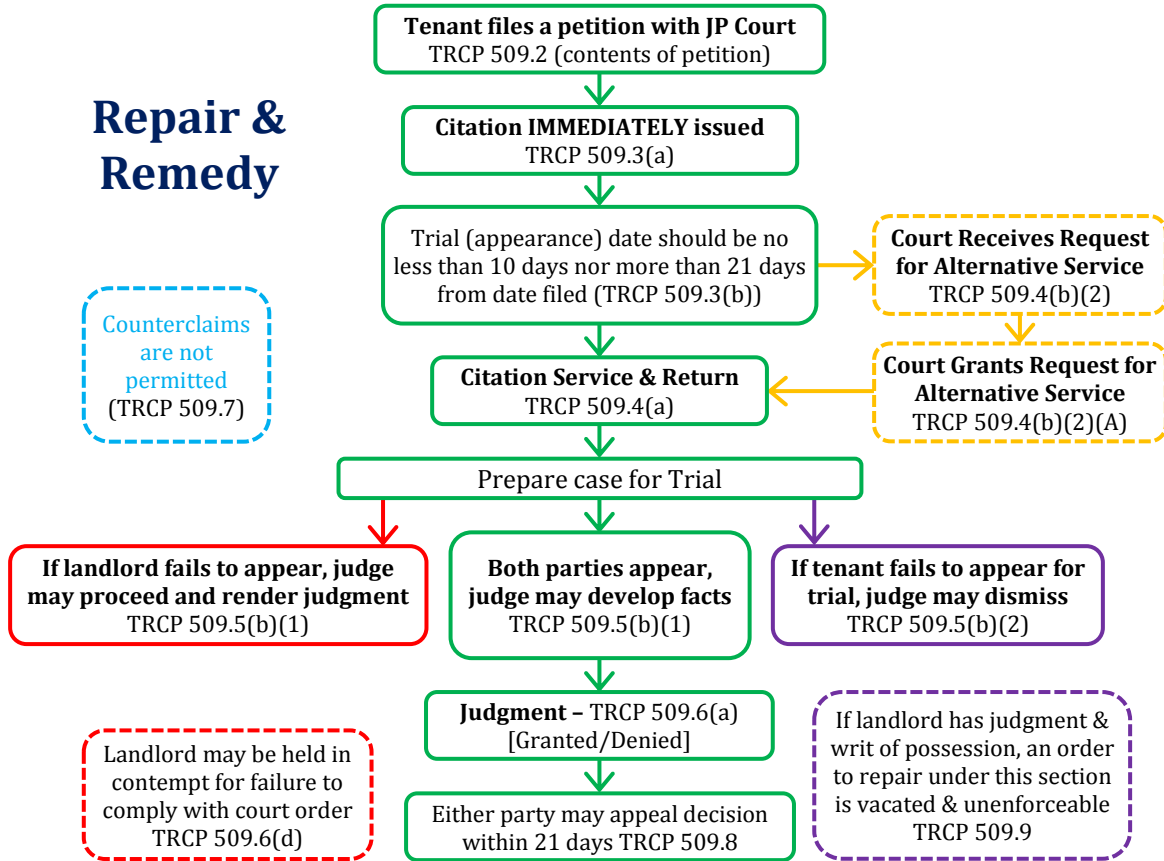
The appeal is by **trial de novo**. A trial de novo is a new trial in which the entire case is presented as if there had been no previous trial. An appeal of a judgment of a justice court takes precedence in the county court and may be held at any time after the eighth day after the date the transcript is filed in the county court. *Rule 509.8(e); Property Code § 92.0563(f)*.

***j. Effect of Judgment for Possession in Eviction Case***

If the landlord is awarded a final judgment for possession of the residential rental property, any order to repair or remedy a condition is vacated and unenforceable. Note that this is NOT the same thing as a writ of possession, which may only be requested after a judgment has been entered. *Rule 509.9*.

**k. Flow Chart**

Here is a flow chart in a repair and remedy case under Rule 509:



**E. Repair and Deduct Remedies in Manufactured Home Tenancies**



A tenant of a manufactured home lot has repair and deduct remedies under Chapter 94 that are essentially identical to the repair and deduct remedies for a residential tenant under Chapter 92 (with several important differences). *Compare Property Code §§ 94.152-94.162 with Property Code §§ 92.051-92.061.*

In a nutshell a landlord may be liable to a tenant if the tenant gives proper notice to the landlord to repair or remedy a condition that materially affects the health or safety of an ordinary tenant, the landlord has had a reasonable time to repair or remedy the condition but has not made a diligent effort to do so, and the tenant was not delinquent in the payment of rent at the time any required notice was given. *Property Code § 94.156(b).*

If the landlord is liable to the tenant for failing to repair or remedy a condition, then the tenant may:

- Terminate the lease;
- Have the condition repaired or remedied and deduct the cost from a subsequent rent payment in accordance with the requirements of Section 94.157; and
- Obtain judicial remedies under Section 94.159, including:
  - An order directing the landlord to repair or remedy the condition (only a district or county court may order this),
  - An order reducing the tenant's rent until the condition is repaired or remedied,
  - A judgment against the landlord for a civil penalty of one month's rent plus \$500,
  - A judgment against the landlord for the tenant's actual damages, and
  - Court costs and attorney's fees.

*Property Code §§ 94.156(e) and 94.159.*

The requirements for a tenant to establish the right to exercise any of these remedies are discussed in detail above.



#### **Differences from Repair and Remedy for Residential Tenants:**

Rule 509 only applies to a repair and remedy case brought under Chapter 92 (residential tenancies), and not to a case brought under Chapter 94 (specific to manufactured home tenancies). *Rule 509.1.*

COMMON  
PITFALL

In a manufactured home case a justice of the peace may **not order the landlord to take reasonable action to repair or remedy the condition**. *Property Code § 94.159(c)*. Only a **county or district court** may make such an order in a manufactured home case. *Property Code § 94.159(c)*.

## **F. Forms**

Forms relating to repair and remedy cases may be found on the TJCTC website by clicking on the "Repair and Remedy" button at the following link:

<http://www.tjctc.org/tjctc-resources/forms.html>

# CHAPTER 11: SECURITY DEPOSITS

## A. Residential and Manufactured Home Leases

Subchapter C (“Security Deposits”) of Chapter 92 of the Property Code, applies to all residential leases. *Property Code § 92.101*. Subchapter C (“Security Deposit”) of Chapter 94 of the Property Code, applies specifically to all manufactured home leases. These two subchapters are nearly identical to each other.

A residential tenant who is improperly denied a refund of his security deposit may bring a suit in justice court (provided the amount in controversy falls within the justice court’s jurisdiction) to recover the security deposit and civil penalties and attorney’s fees.

**Definition** (*Property Code §§ 92.102; 94.101*):

A “security deposit” is any advance of money (other than a rental application deposit or an advance payment of rent) that is intended primarily to secure performance under a lease of a dwelling or lot that has been entered into by a landlord and a tenant.

This means that a security deposit serves as potential compensation for a landlord in the case that a tenant fails to pay rent or is liable for other damages under the lease or for breaching the lease.

### Refund Required:

A landlord must keep accurate records of all security deposits. *Property Code § 92.106; 94.102(b)*.

The landlord must refund a security deposit to the tenant on or before the **30th day** after the date the tenant moves out (but only if the tenant gives the landlord a written statement of the tenant’s forwarding address). *Property Code §§ 92.103(a), 92.107(a), 94.103(a), 94.107*.

A requirement in a lease that a tenant give advance notice that they are moving out (typically 30 or 60 days) as a condition for refunding the security deposit, is effective only if the requirement is underlined or printed in conspicuous bold print in the lease. *Property Code § 92.103(b); 94.103(b); Minor v. Adams*. (*The statute indicates that the notice must be both conspicuous and in bold print (or underlined) and where it was neither underlined nor in bold print it was not effective*).

## SECURITY DEPOSIT SUIT

A security deposit suit must be filed as a separate cause of action from an eviction suit filed by a landlord since a tenant may not file a counterclaim in an eviction suit. *Hanks v. Lake Towne Apartments*.



**Retention/Deduction** (*Property Code §§ 92.104, 94.105*):

Before returning the security deposit, the landlord may deduct damages and charges for which the tenant is legally liable under the lease or as a result of breaching the lease.



The landlord **may not** retain any portion of the deposit to cover normal wear and tear.

COMMON  
PITFALL

If the landlord retains all or part of the security deposit, he must give the balance (if any) to the tenant and a written description and itemized list of all deductions; unless the tenant owes rent when he moves out and there is no dispute concerning the amount of rent owed. *Property Code §§ 92.104(c), 94.105(c)*.

**Retention/Deduction If Tenant Fails to Move In** (*Property Code §§ 92.1031, 94.104*):

If a tenant fails to move into a dwelling/lot as planned according to a lease, and the landlord secures a replacement tenant, the landlord may retain and deduct from a security deposit or rent prepayment either:

- A sum agreed to in the lease as a lease cancellation fee; or
- The actual expenses incurred by the landlord in getting the replacement tenant, including a reasonable amount for the landlord's time in securing the replacement.

But the landlord **may not** retain the security deposit or rent prepayment if:

- Either the tenant or the landlord gets a replacement tenant satisfactory to the landlord; and
- The replacement tenant occupies the dwelling **on or before** the date that the lease was supposed to start.

**Tenant May Not Withhold Rent** (*Property Code §§92.108, 94.108*):

A tenant may not withhold payment of any portion of the last month's rent on grounds that the security deposit is security for unpaid rent.

A tenant who does this is presumed to have acted in bad faith. A tenant who in bad faith violates this statute is liable to the landlord for three times the rent wrongfully withheld and the landlord's reasonable attorney's fees in a suit to recover the rent.

**Landlord Liability** (*Property Code §§ 92.109, 94.109*):

A landlord who in bad faith retains a security deposit in violation of the statute is liable for:

- \$100;
- three times the portion of the deposit wrongfully withheld; and
- the tenant's reasonable attorney's fees in a suit to recover the deposit.

A landlord who in bad faith does not provide a written description and itemized list of damages and charges in violation of the statute:

- forfeits the right to withhold any portion of the security deposit or to bring suit against the tenant for damages to the premises; and
- is liable for the tenant's reasonable attorney's fees in a suit to recover the deposit.

In an action brought by a tenant, the landlord has the burden of proving that the retention of any portion of the security deposit was reasonable.

A landlord is presumed to have acted in bad faith (but could provide evidence that it was not bad faith) if:

- The landlord does not (on or before the 30<sup>th</sup> day after the tenant moved out) either:
  - Return the security deposit in full; or
  - Provide a written description and itemization of deductions

**If Security Deposit Was Not Required By Lease** (*Property Code § 92.110*):

If a security deposit was not required by a residential lease and the tenant is liable for damages and charges on surrender of the premises, the landlord must notify the tenant in writing of the landlord's claim for damages before the landlord reports the claim to a consumer reporting agency or third-party debt collector.

If a landlord does not provide the notice to the tenant, the landlord forfeits the right to collect damages from the tenant. But a landlord is not required to provide the notice to the tenant if the tenant did not give the landlord the tenant's forwarding address.

Note that this section does not appear in Ch. 94 for manufactured home leases.

## **B. Commercial Leases**

**Refund Required:**

The landlord's and tenant's rights and obligations concerning a security deposit for a commercial lease are similar to those for a residential lease except that the landlord has 60 days, rather than 30 days, to return the tenant's security deposit after the date the tenant surrenders the premises. *Property Code § 93.005.*

But the landlord is not obligated to return a security deposit, or give a tenant a written description of damages and charges, until the tenant gives the landlord a written statement of the tenant's forwarding address. *Id. § 93.009.*



KEY  
POINT

**Retention/Deduction:**

As with a residential lease, the landlord may deduct damages and charges for which the tenant is legally liable under the lease or damages and charges that result from a breach of the lease,

A landlord may not retain any portion of a security deposit to cover normal wear and tear. "Normal wear and tear" means deterioration that results from the intended use of the commercial premises, including breakage or malfunction due to age or deteriorated condition, but it does not include deterioration that results from negligence, carelessness, accident, or abuse of the premises, equipment, or chattels by the tenant or by a guest or invitee of the tenant. *Property Code § 93.006.*

If the landlord retains all or part of a security deposit, he must give the tenant the balance (if any) and a written description and itemized list of all deductions. Again, a landlord is not required to give the tenant a description and itemized list of deductions if the tenant owes rent when the tenant moves out and no dispute exists concerning the amount of rent owed. *Property Code § 93.008(c).*

**Tenant's and Landlord's Liability:**

A commercial tenant's liability for wrongfully withholding the last month's rent, and a commercial landlord's liability for wrongfully refusing to either return a tenant's security deposit or provide a written description and itemized list within 60 days after the date the tenant moves out are **the same as for residential leases**. *Property Code §§ 93.010, 93.011; [EDG Property Management, Inc. v. Ratnani](#).*

## **CHAPTER 12: SPECIAL CIRCUMSTANCES CONCERNING A TENANT'S PERSONAL PROPERTY**

### **A. Notice of Rule or Policy Change Affecting Tenant's Personal Property**

This law applies only to the relationship between landlords and tenants of residential rental property. *Rule 92.002*. But keep in mind that if the tenant has a manufactured home tenancy under Ch. 94 of the Property Code, the same rights and procedures will apply as for a residential tenant. This is because the provisions in Ch. 92 apply to "relationships between landlords and tenants of residential rental property," and a lot in a manufactured home community could be considered "residential rental property." *Property Code § 92.002*.

A landlord must give prior written notice to a tenant regarding a rule or policy change that is not included in the lease agreement and that will affect any personal property owned by the tenant that is located outside the tenant's dwelling. *Property Code § 92.013(a)*.

In a multi-unit complex, a landlord must provide to the tenant a copy of any applicable vehicle towing or parking rules or policies and any changes to those rules or policies. *Property Code § 92.013(a)*.

A landlord who fails to give a notice of a rule or policy change is liable to the tenant for any expense incurred by the tenant as a result of the landlord's failure to give the notice. *Property Code § 92.013(c)*.

### **B. Personal Property and Security Deposit of Deceased Tenant**

This law applies only to the relationship between landlords and tenants of residential rental property (including a tenant who has a manufactured home tenancy under Ch. 94 of the Property Code). *Rule 92.002*.

If the landlord makes a written request, a tenant must:

- provide the landlord with the name, address, and telephone number of a person to contact in the event of the tenant's death; and
- sign a statement authorizing the landlord in the event of the tenant's death to:
  - grant that person access to the premises at a reasonable time and in the presence of the landlord or the landlord's agent;
  - allow that person to remove any of the tenant's property found at the leased premises; and
  - refund the tenant's security deposit, less lawful deductions, to that person.

*Property Code § 92.014(a)*.



A tenant may also provide this information to the landlord even if the landlord does not request it. *Property Code § 92.014(b)*.

In the event of the death of a tenant who is the sole occupant of a rental dwelling:

- the landlord may remove and store all property found in the tenant's leased premises;
- the landlord must turn over possession of the property to the person who was designated by the tenant or to any other person lawfully entitled to the property if a request is made prior to the property being discarded;
- the landlord must refund the tenant's security deposit, less lawful deductions, including the cost of removing and storing the property, to the person who was designated by the tenant or to any other person lawfully entitled to the refund;
- the landlord may require any person who removes the property from the tenant's leased premises to sign an inventory of the property being removed; and
- the landlord may discard the property removed by the landlord from the tenant's leased premises if:
  - the landlord has mailed a written request by certified mail, return receipt requested, to the person designated by the tenant, requesting that the property be removed;
  - the person fails to remove the property by the 30th day after the postmark date of the notice; and
  - the landlord, prior to the date of discarding the property, has not been contacted by anyone claiming the property.

*Property Code § 92.014(c)*.

A landlord and a tenant may agree in a written lease or other agreement to a different procedure for removing, storing, or disposing of the property of a deceased tenant. *Property Code § 92.014(d)*.



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If a tenant, after being provided with a copy of Subchapter A of Chapter 92 of the Property Code, knowingly violates his obligation to name a designated person or sign the authorization described above, then the landlord has no responsibility after the tenant's death for removal, storage, disappearance, damage, or disposition of property in the tenant's leased premises. *Property Code § 92.014(e)*.

If a landlord, after being furnished with a copy of Subchapter A of Chapter 92 of the Property Code, knowingly violates the obligations described above, the landlord is liable to the estate of the deceased tenant for actual damages. *Property Code § 92.014(f)*.

## C. Tenant's Abandonment of Premises and Landlord's Removal of Property

### 1. Commercial Tenant

A commercial 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.

*Property Code § 93.002(d).*

Once a commercial tenant abandons the premises, a landlord may remove and store any property of the tenant that remains on the premises that have been abandoned. *Property Code § 93.002(e).*

In addition to the landlord's other rights, the landlord may dispose of the stored property if the tenant does not claim the property within 60 days after the date the property is stored. The landlord must deliver a notice to the tenant by certified mail at the tenant's last known address 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. *Property Code § 93.002(e).*

These procedures would apply in the case of a storage locker which falls within the definition of a commercial lease since "commercial rental property" is rental property that is "not covered by Chapter 92 [Residential Tenancies]." *Property Code § 93.001(b).*

### 2. Residential/Manufactured Home Tenant

A landlord may enter and remove the contents of premises that have been abandoned by a tenant in residential and manufactured home tenancies. *Property Code §§ 54.044(d), 92.0081(b)(2), 94.004(c)(2).*

#### REMOVING FIXTURES IN COMMERCIAL PROPERTY

In the absence of an abandonment by the commercial tenant, a landlord may not remove furniture, fixtures or appliances furnished by the landlord from premises leased to a tenant unless the landlord removes the item for a bona fide repair or replacement, in which case the repair or replacement must be promptly done.  
*Property Code § 93.002(b).*



COMMON  
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There are no specific provisions, however, for when a tenant is presumed to have abandoned the premises as there are for commercial tenancies. If a court has to determine whether or not the premises were abandoned, the court will have to make a judgment call on a case by case basis.

There are also no provisions for what must be done with the property or when it may be disposed of. As such, the landlord does not have any specific rules to follow.

# CHAPTER 13: LANDLORD'S LIENS AND DISTRESS WARRANTS

## A. Building Landlord's Lien

### What is this?

A landlord who leases/rents all or part of a building for nonresidential use (in other words, a commercial landlord), has a preference lien on the property of the tenant/subtenant for:

- rent that is due; or
- rent that will become due during the 12-month period after the date that the rental agreement (or a renewal of the rental agreement) is made.

*Property Code §§ 54.021, 54.025.*

### When Lien is Unenforceable:

The lien is unenforceable for rent that is more than six months past due unless the landlord files a lien statement with the county clerk of the county in which the building is located. *Property Code § 54.022(a)*; [Maberry v. First Nat. Bank of Littlefield](#).

### Duration of Lien:

This lien exists “while the tenant **occupies the building and until one month** after the day that the tenant abandons the building.” *Property Code § 54.024*. [Webb v. Bergin](#).

### Distress Warrant:

A distress warrant is a means of protecting the landlord's interest in the tenant's property that is subject to the lien until the landlord is able to foreclose the lien to satisfy the tenant's obligation for the rent.

The distress warrant gives the landlord a “simple, inexpensive, speedy and effective way” to hold the tenant's property until the landlord can foreclose the lien on the tenant's property in the court having jurisdiction over that matter. [MCKee v. Sims](#); [Keep 'Em Eating Co. v. Hulings](#); [Webb v. Bergin](#); [Maberry v. First Nat. Bank of Littlefield](#).



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The justice of the peace has jurisdiction to issue a distress warrant even if, after execution, the warrant will be returned to another court having jurisdiction over the lien foreclosure. *Property Code § 54.025*.

The justice of the peace also has jurisdiction regardless of where the property subject to the lien is now located. [Gollehon v. Porter](#).

“The person to whom rent is payable under a building lease (or the person’s agent, attorney, assign, or other legal representative) may apply to the justice in the **precinct** in which the building is located for a distress warrant if the tenant:

- owes rent;
- is about to abandon the building; or
- is about to remove the tenant’s property from the building.”

*Property Code § 54.025; [Brown v Johnson](#).*

The procedure for issuance and service of a distress warrant and the related proceedings are discussed in Part D below.

## B. Agricultural Landlord’s Lien

### What is this?

A person who leases land or tenements (at will or for a term of years) has a preference lien for:

- rent that becomes due; and
- for the money and the value of property that the landlord furnishes (or causes to be furnished) to the tenant to grow a crop on the leased premises and to gather, store, and prepare the crop for marketing.

*Property Code § 54.001; Business & Comm. Code § 9.102(a)(5).*

This lien attaches to property on the leased premises that the landlord furnishes to the tenant to grow a crop **and to the crop grown** on the leased premises in the year that the rent accrues or the property is furnished. *Property Code § 54.002(a)*. However, if the landlord provides everything except labor, the lien attaches only to the crop grown in the year that the property is furnished.

*Property Code § 54.002(b)*.

A law exempting property from forced sale does not apply to an agricultural landlord’s lien on agricultural products, animals or tools. *Property Code § 54.002(d)*.

### When There Is NO Lien:

The lien does not attach to the goods of a merchant, trader, or mechanic if the tenant sells and delivers the goods in good faith in the regular course of business. *Property Code § 54.002(c)*.

## AGRICULTURAL TENANT

If a landlord files a suit to evict an agricultural tenant, procedures under Chapter 24 of the Property Code apply, with deference to the terms of the written lease agreement.

*See [Calhoun v. Kirkpatrick](#).*



The lien also does not arise if:

- a tenant provides everything necessary to cultivate the leased premises and the landlord charges rent of more than one-third the value of the grain and one-fourth the value of cotton grown on the premises; or
- a landlord provides everything except the labor and directly or indirectly charges rent of more than one-half of the value of the grain and cotton grown on the premises.

*Property Code § 54.003; [Green v. Prince](#).*

#### **Duration of Lien:**

The landlord's agricultural lien exists while the property to which it is attached **remains on the leased premises and until one month after the day that the property is removed** from the premises. *Property Code § 54.004.*

If the agricultural products to which the lien is attached are placed in a public or bonded warehouse before the 31<sup>st</sup> day after the day they are removed from the leased premises, the lien exists while they remain in the warehouse. *Property Code § 54.004.*

#### **Distress Warrant:**

As with a commercial landlord's lien, the person to whom rent or an advance is payable under an agricultural lease (or the person's agent, attorney, assign, or other legal representative) may apply to a justice court for a distress warrant if the tenant:

- owes any rent or an advance;
- is about to abandon the premises; or
- is about to remove the tenant's property from the premises."

*Property Code § 54.006.*

The application for the distress warrant must be filed with a justice of the peace:

- in the precinct in which the leasehold is located or in which the property subject to the landlord's lien is located; or
- who has jurisdiction of the cause of action.

*Property Code § 54.006.*

*The procedure for issuance and service of a distress warrant and the related proceedings are discussed in Part D below.*

## C. Single or Multifamily Residence Landlord's Lien

### What Is This?

A landlord of a **single or multifamily residence** has a lien for unpaid rent that is due. The lien attaches to **nonexempt property** that is in the residence or that the tenant has stored in a storage room. *Property Code § 54.041.*

This lien is not enforceable unless it is underlined or printed in conspicuous bold print in the lease agreement.

A provision of a lease that purports to waive or diminish a right, liability or exemption created by this statute is void. *Property Code § 54.043(a).*

### When Lien Does NOT Attach:

A residential landlord's lien does not attach to:

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

*Property Code § 54.042; [Causey v. Catlett](#)*

### Seizure of Property:

The landlord or the landlord's agent may not seize exempt property.

The landlord or the landlord's agent may seize nonexempt property only if it is authorized by a written lease and can be accomplished without a breach of the peace. *Property Code § 54.044(a).*

Immediately after seizing the property, the landlord or the landlord's agent must leave a written notice of entry and an itemized list of the items removed. The notice and list must be left in a conspicuous place within the dwelling. The notice must state the amount of delinquent rent and the name, address, and telephone number of the person the tenant may contact regarding the amount owed. The notice must also state that the property will be promptly returned on full payment of the delinquent rent. *Property Code § 54.044(b)*.

Unless authorized in a written lease, the landlord is not entitled to collect a charge for packing, removing, or storing property seized under this statute. If the tenant has abandoned the premises, the landlord or the landlord's agent may remove its contents. *Property Code § 54.044(c) and (d)*.

### **Sale of Seized Property:**

Property seized under this statute may **not** be sold or otherwise disposed of unless the sale or disposition is authorized in a written lease. *Property Code § 54.045(a)*. Before selling seized property, the landlord or the landlord's agent must give notice to the tenant:

- not later than the 30th day before the date of the sale;
- sent by both first-class mail and certified mail, return receipt requested, at the tenant's last known address; and
- containing:
  - the date, time, and place of the sale;
  - an itemized account of the amount owed by the tenant to the landlord; and
  - the name, address, and telephone number of the person the tenant may contact regarding the sale, the amount owed, and the right of the tenant to redeem the property.

*Property Code § 54.045(b)*.

Proceeds from the sale must be applied first to delinquent rents and, if authorized by the written lease, reasonable packing, moving, storage, and sale costs. *Property Code § 54.045(c)*. Any remaining proceeds of the sale must be mailed to the tenant at the tenant's last known address not later than the 30th day after the date of the sale. The landlord must provide the tenant with an accounting of all proceeds of the sale not later than the 30th day after the date on which the tenant makes a written request for the accounting. *Property Code § 54.045(d)*.

The tenant may redeem the property at any time before the property is sold by paying to the landlord or the landlord's agent all delinquent rents and, if authorized in the written lease, all reasonable packing, moving, storage, and sale costs. *Property Code § 54.045(e)*.

### **Landlord Liability:**

If a landlord or the landlord's agent willfully violates this statute, the tenant is entitled to:

- actual damages;



- return of any property seized that has not been sold;
- return of the proceeds of any sale of seized property;
- one month's rent + \$1,000, less any amount for which the tenant is liable; and
- reasonable attorney's fees.

*Property Code § 54.046.*

**NO Distress Warrant:**

Unlike a commercial or agricultural lien, a distress warrant is not an option. The lien is simply a summary procedure for the landlord to seize property and hold it until he can obtain a judgment and order for its sale. [\*Bourcier v. Edmondson\*](#).

**D. Procedure for Issuing a Distress Warrant**

As discussed above, a distress warrant is a means by which a landlord who has a building or agricultural lien may protect his interest in the property subject to the lien until he is able to foreclose the lien and sell the property to satisfy the commercial or agricultural tenant’s obligation to pay rent.



KEY  
POINT

A distress warrant may be issued only where there is a commercial or agricultural lease; a landlord does not have a right to a distress warrant in connection with a residential lease.

**1. Application for Distress Warrant**

**Who May Apply and Where to Apply:**

The person to whom rent is payable under a building lease or agricultural lease (or the person’s agent, attorney, assignee, or other legal representative) may apply to the justice of the peace for a distress warrant if the tenant has given the landlord one of the proper grounds discussed above. *Property Code § 54.025.*

A justice of the peace of the precinct where the building or premises are located may issue a distress warrant regardless of where the property to be seized is located and regardless of if they have jurisdiction over the lien foreclosure suit.

**When:**

Either at the commencement of a suit or at any time during its progress, the plaintiff may file an application for the issuance of a distress warrant with the justice of the peace. *Rule 610.*



**ASSIGNEE**

An assignee may apply for a distress warrant because a landlord has a right to assign a written obligation given for rent and that assignment carries with it the landlord's statutory lien. [\*McCollum v. Hammit\*](#).

The nature of the suit referred to in Rule 610 is not specified (an eviction suit or a suit to foreclose a lien) and it is possible that an application for a distress warrant may be filed before a suit to foreclose a lien is filed, since the application must be filed with a justice court and the suit to foreclose the lien will have to be heard in a district or county court if the amount of the lien exceeds the justice court's jurisdiction. *See page 115-116.*

The distress warrant need not be sought before the property has been removed from a rented building or the leased premises. A party has a right to have a distress warrant issued when any of the grounds listed in the statute occur, but a party is not required to exercise that right the very moment it is possible. It may be exercised at any time before the lien is lost. As noted above, the lien continues as long as the tenant occupies the leased premises and for one month thereafter. *Rule 610; [Webb v. Bergin](#).*

### **Support for Application:**

The application may be supported by affidavits of the plaintiff, his agent, his attorney, or other persons having knowledge of relevant facts, and shall:

- include a statement that the amount sued for is rent, or advances described by statute, or
- produce a writing signed by the tenant to that effect, and
- further swear that such warrant is not sued out for the purpose of vexing and harassing the defendant.

*Rule 610.*

If no rent or advances are due, the landlord cannot make the oath required by the rule for issuance of a distress warrant, and an officer would not be authorized to seize any of a tenant's property. *[Hunt v. Merchandise Mart, Inc.](#)*

## **2. Issuing the Distress Warrant**



KEY  
POINT

A distress warrant may not be issued before a final judgment of the lien foreclosure, **except on a written order of the justice of the peace after a hearing, which may be *ex parte*.** *Rule 610.*

In an order granting an application for a distress warrant, the justice of the peace must:

- make specific findings of fact to support the statutory grounds found to exist;
- specify the maximum value of the property that may be seized and the amount of the bond required of the plaintiff;
- command that the property be kept safe and preserved subject to further orders of the court having jurisdiction; and
- find in the order the amount of bond required to replevy which, unless the defendant exercises his options under Rule 614, shall be the amount of the plaintiff's claim, one year's accrual of interest if allowed by law on the claim, and the estimated court costs.

The order may direct the issuance of several warrants at the same time, or in succession, to be sent to different counties. *Rule 610.*

### 3. Plaintiff's Bond

No distress warrant shall issue before final judgment **until the plaintiff files a bond** with the justice of the peace.

The bond must be payable to the defendant in an amount approved by the justice with sufficient surety or sureties as provided by statute, conditioned that the plaintiff will prosecute his suit to effect and pay all damages and costs as may be ordered against him for wrongfully seeking the warrant.

After notice to the opposing party, either before or after the issuance of the warrant, the defendant or the plaintiff may file a motion to increase or reduce the amount of the bond, or question the sufficiency of the sureties, in a court having jurisdiction of the subject matter. *Rule 611.*

### 4. Issuance of Citation

At the time the justice issues the warrant, a citation shall also be issued to the defendant:

- If the justice of the peace has jurisdiction to finally try the case: Requiring the defendant to answer before such justice on the first day of the next succeeding term of court and stating the time and place).
- If the justice of the peace does **not** have jurisdiction to try the case: Requiring the defendant to answer before the court to which the warrant was made returnable at or before 10 a. m. of the Monday following the expiration of twenty days from the date of service (and stating the place). In this case, the citation shall be returned to that court. *See Section 6 below.*

*Rule 619.*

The citation shall be served in any manner allowed for service of citation, or as provided in Rule 21a, with a copy of the distress warrant, the application, accompanying affidavits, and orders of the justice of the peace as soon as practicable following the levy of the warrant. *Rule 613.*

A judgment of foreclosure of the landlord's lien is not sustainable if the justice has failed to issue a citation to the defendant at the time of issuing the warrant. [\*Martin Co. v. Cottrell.\*](#)

When the warrant is made returnable to the district or county court, the plaintiff shall file his petition in the appropriate court having jurisdiction of the lien foreclosure suit (if he has not already done so) within ten days from the date of the issuance of the distress warrant. *Rule 620.* This means the plaintiff has to file a petition in the district or county court where the warrant will be returned since the justice

court that issued the distress warrant will not hear the underlying foreclosure case because it exceeds the court's jurisdictional limit.

## 5. Requisites of the Warrant

A distress warrant is directed to the sheriff or any constable within the State of Texas. It commands the officer to attach and hold as much of the defendant's property in the approximate amount set by the justice of the peace, which is found in the officer's county unless that property is exempt by statute or replevied by the defendant. *Rule 612.*

A notice must be prominently displayed on the face of the warrant served on the defendant in 10-point type in a manner calculated to advise a reasonably attentive person of its contents, stating as follows:

To: \_\_\_\_\_, Defendant:

You are hereby notified that certain properties alleged to be owned by you have been seized.

If you claim any rights in such property, you are advised:

"YOU HAVE A RIGHT TO REGAIN POSSESSION OF THE PROPERTY BY FILING A REPLEVY BOND. YOU HAVE A RIGHT TO SEEK TO REGAIN POSSESSION OF THE PROPERTY BY FILING WITH THE COURT A MOTION TO DISSOLVE THIS WARRANT."

*Rule 613.*

If the defendant has removed from the county without service, the officer shall state this fact in his return on the citation, and the court shall proceed to try the case ex parte, and may enter judgment. *Rule 619.*

## 6. Court to Which the Warrant is Returnable

Although only a justice of the peace has the authority to issue a distress warrant, the warrant is returnable to, and the suit to foreclose the lien on the property seized under the warrant is tried in, **the court having jurisdiction of the amount in controversy.** *Rule 610.* If the amount in controversy is not within the justice court's subject matter jurisdiction, then the suit will be filed in a district or county court.

The "amount in controversy" is not determined by the value of the property seized, because the foreclosure of the lien is upon only so much of the property as is necessary to satisfy the debt. Instead, the amount in controversy is **the amount or value of the rent or advances sued for.** *Rule 610, 613;* [\*Western Flavor-Seal Co. v. Allison\*](#); [\*Small v. Rush\*](#).

In short, if the amount of back rent and other items included in calculating the amount in controversy, such as attorney's fees and court costs, is more than \$10,000, then the justice court will not have jurisdiction over the underlying suit to foreclose the lien – even though the justice court **does have jurisdiction to issue the distress warrant**.

If the justice court does **not** have jurisdiction of the amount in controversy, a distress warrant returnable to the justice court will be quashed and the property seized under it returned to the defendant. [\*Spann v. Trumpf\*](#).

Even if the court to which the warrant is returnable has jurisdiction of the plaintiff's claim, if the defendant files a counterclaim against the plaintiff for an amount in excess of the court's jurisdiction, the court has no jurisdiction of the counterclaim. [\*Armstrong v. Clayton\*](#).

## 7. Replevy Bond

### What Is This?

A replevy bond is a process where a defendant can get part or all of his or her property back by putting up a bond (at any time before judgment if the property has not been claimed or sold). If the property has been sold under an order of the court, the defendant may replevy the proceeds from the sale.

### Method and Amount:

The defendant replevies by giving a bond with sufficient surety or sureties as provided by statute.

The bond must be approved by a court having jurisdiction of the amount in controversy and be payable to the plaintiff in double the amount of the plaintiff's debt or, at the defendant's option, for not less than the value of the property sought to be replevied, plus one year's interest at the legal rate from the date of the bond.

### Conditions:

The bond shall be conditioned that the defendant shall satisfy (to the extent of the amount of the bond) any judgment which may be rendered against him in such action. *Rule 614*.

### Contest:

On reasonable notice to the opposing party, which may be less than three days, either party has the right to prompt judicial review by a court having jurisdiction of the underlying suit of:

- the amount of bond required;

## REPLEVY BOND

The replevy bond is **not a security for the debt sued on**; it binds the parties for the property or its value.

[\*Toland v. Swearingen & Smith\*](#).

Liability is not incurred until there has been a failure to deliver the goods or thing. Therefore, a judgment foreclosing the landlord's lien for the rent should not include the sureties on the bond.

[\*Weir v. Brooks\*](#).

- denial of bond;
- sufficiency of the sureties; and
- the estimated value of the property.

*Rule 614.*

The court's determination may be made on the basis of affidavits, if uncontroverted, setting forth such facts as would be admissible in evidence. But if the affidavits are controverted, the parties have to submit evidence.

The court hearing the contest shall then enter its order either approving or modifying the requirements of the order of the justice of the peace (if it was a different court), and that order replaces the prior order. *Rule 614.*

For example, if a commercial or agricultural landlord files for a distress warrant, and the justice of the peace grants it, the tenant may seek to replevy the property seized under the warrant. After the justice sets the amount of the replevy bond, either party may contest that amount. This is done in the court having jurisdiction of the underlying suit. If that court is not the justice court, then the contest of the amount of the replevy bond would be heard by the county or district court having jurisdiction of the case and the order of that court would replace the order of the justice court. *Rule 614.*

## **8. Substitution of Property**

On reasonable notice to the opposing party (which may be less than three days), the defendant also has the right to ask the court if they can substitute property of equal value for the property seized. The court may then authorize substitution of one or more items of the defendant's property for all or part of the property seized. *Rule 614.*

The court must first make findings as to the value of the property to be substituted. If property is substituted, the property released from seizure shall be delivered back to the defendant if it is personal property, and all liens upon that property from the original order of seizure are terminated *Rule 614.*

## **9. Sale of Perishable Property**

Whenever personal property which has been levied on under a distress warrant has not been claimed or replevied, the judge or justice of the peace to whose court the warrant is returnable may order the property to be sold if it appears:

- that the property is in danger of serious and immediate waste or decay; or

- that keeping the property until trial will involve such expense or deterioration in value that it will greatly decrease the amount likely to be received from its sale.

*Rule 615.*

In determining whether the property is perishable, and the necessity or advantage of ordering a sale, the judge or justice of the peace may act upon affidavits in writing or on oral testimony. He may then enter on the record a preliminary order with or without notice to the parties directing the sheriff or constable to sell the property at public auction for cash; and the sheriff or constable shall then sell it *Rule 616; [Rule v. Richards](#).*

## **10. Dissolution or Modification of the Warrant**

A defendant whose property has been seized or any intervening claimant who claims an interest in the property, may by sworn written motion, seek to vacate, dissolve, or modify the seizure on any ground.

### **Requirements of and Time to Hear Motion:**

The motion must admit or deny each finding of the order directing the issuance of the warrant except where the movant is unable to admit or deny the finding, in which case the movant must state the reasons why he cannot admit or deny. Unless the parties agree to an extension of time, the motion shall be heard promptly, after reasonable notice to the plaintiff, and the issue shall be determined not later than 10 days after the motion is filed.

### **Stay of Further Proceedings:**

The filing of the motion stays any further proceedings under the warrant until a hearing is held, except for any orders concerning the care, preservation, or sale of any perishable property.

### **Hearing and Orders:**

The warrant must be dissolved unless at the hearing the plaintiff proves the specific facts alleged and the grounds relied on for its issuance. The court may modify the order of the justice of the peace granting the warrant and the warrant itself.

The movant has the burden to prove that the reasonable value of the property seized exceeds the amount necessary to secure the debt, interest for one year, and probable costs.

The court's determination may be made on the basis of affidavits setting forth such facts as would be admissible in evidence, but additional evidence, if tendered by either party shall be received and considered.

The court may make all such orders, including orders concerning the care, preservation, or disposition of the property (or the proceeds if the same has been sold), as justice may require.

If the movant has given a replevy bond, an order to vacate or dissolve the warrant shall vacate the replevy bond and discharge the sureties thereon. If the court modifies the order or the warrant, it shall make such further orders with respect to the bond as may be consistent with its modification. *Rule 614(a)*.



## CHAPTER 14: TENANT'S LIEN UPON LANDLORD'S BREACH OF LEASE

If the landlord of a tenant who is not in default under a lease fails to comply in any respect with the lease agreement, the landlord is liable to the tenant for the resulting damages. *Property Code § 91.004(a)*.



### KEY POINT

To secure payment of these damages, the tenant has a lien on the landlord's nonexempt property in the tenant's possession and on the rent due to the landlord under the lease. *Property Code § 91.004(b)*.

This lien exists in all types of tenancies—residential, manufacture home, and commercial. (There is no language limiting this provision to a particular type of tenancy; it is found in Chapter 91 of the Property Code, which contains provisions generally applicable to landlords and tenants).

## CHAPTER 15: ADDITIONAL RIGHTS AND OBLIGATIONS IN RESIDENTIAL TENANCIES

Chapter 92 of the Property Code contains various rights and obligations that apply to tenants and landlords under residential tenancies.

Please keep in mind that if the tenant has a manufactured home tenancy under Ch. 94 of the Property Code, the same rights and procedures will apply as for a residential tenant. This is because the provisions in Ch. 92 apply to “relationships between landlords and tenants of residential rental property,” and a lot in a manufactured home community could be considered “residential rental property.” *Property Code § 92.002. For information regarding additional rights and obligations that apply only to manufactured home tenancies, see page 52-55.*

Suits to enforce these rights and obligations must often be brought outside an eviction suit since the only issue in an eviction suit is the right of possession and back rent.

But suits to enforce rights and obligations under Chapter 92 may still be brought in justice court as long as they are within the \$10,000 jurisdictional limit of the justice court and do not fall within an exception to justice court jurisdiction (such as a suit for an injunction or a suit to determine title to land).

Venue for such an action is in the county in which all or a part of the real property is located unless mandatory venue is prescribed under another statute that applies to that case. *Property Code § 92.007; Civil Practice & Remedies Code § 15.0115.*

Certain of these rights and obligations are discussed below. We note that this discussion is not exhaustive and that Chapter 92 of the Property Code should be carefully reviewed and considered for any claims raised under it in a suit filed in justice court.

### A. Waiver or Expansion of Duties or Remedies under Chapter 92 of the Property Code

A landlord's duty or a tenant's remedy concerning security deposits, security devices, the landlord's disclosure of ownership and management, or utility cutoffs, as provided by Subchapters C, D, E or G respectively of Chapter 92 of the Property Code, **may not be waived**. *Property Code § 92.006(a).*

A landlord's duty to install a smoke detector under Subchapter F **may not be waived**, nor may a tenant waive a remedy for the landlord's noninstallation or waive the tenant's limited right of

installation and removal. *Property Code § 92.006(a)*.

The landlord's duty of inspection and repair of smoke detectors under Subchapter F **may be waived** only by written agreement. *Property Code § 92.006(a)*.

A landlord's duties and the tenant's remedies concerning security devices, the landlord's disclosure of ownership and management, or smoke detectors, as provided by Subchapter D, E, or F, respectively, **may be enlarged** only by specific written agreement. *Property Code § 92.006(b)*.

A landlord's duties and the tenant's remedies under Subchapter B, which covers conditions materially affecting the physical health or safety of an ordinary tenant, **may not be waived** except as discussed on [page 84-85](#).

A tenant's right to vacate a dwelling and avoid liability under Section 92.016 or 92.017 **may not be waived** by a tenant or a landlord, except as provided by those sections. *Property Code § 92.00(g)*.

A tenant's right to a jury trial in an action brought under Chapter 92 of the Property Code **may not be waived** in a lease or other written agreement. *Property Code § 92.00(h)*. Keep in mind that an eviction suit is brought under Chapter 24 of the Property Code, not under Chapter 92. Therefore, this non-waiver provision arguably does not apply to eviction suits but only to suits brought under Chapter 92, which would include repair and remedy cases, return of a security deposit, and other miscellaneous actions.

## B. Tenant's Right to Summon Police or Emergency Assistance



KEY  
POINT

A landlord may not:

- prohibit or limit a residential tenant's right to summon police or other emergency assistance based on the tenant's reasonable belief that an individual is in need of intervention or emergency assistance; or
- impose monetary or other penalties on a tenant who summons police or emergency assistance if the assistance was requested or dispatched based on the tenant's reasonable belief that an individual was in need of intervention or emergency assistance.

*Property Code § 92.015(a)*.

In addition to other remedies provided by law, if a landlord violates Section 92.015, a tenant is entitled to recover from or against the landlord:

- a civil penalty in an amount equal to one month's rent;
- actual damages suffered by the tenant as a result of the landlord's violation;
- court costs;

- injunctive relief (this must be sought in a district or county court); and
- reasonable attorney's fees incurred by the tenant in seeking enforcement.

*Property Code § 92.015 (c).*

A provision in a lease is **void** if it purports:

- to waive a tenant's right to summon police or other emergency assistance based on the tenant's reasonable belief that an individual is in need of intervention or emergency assistance; or
- to exempt a party from a liability or a duty under Section 92.015.

*Property Code § 92.015(b).*

## C. Tenant's Right to Terminate Lease and Avoid Liability Following Certain Events

### 1. Family Violence



KEY  
POINT

A tenant may terminate the tenant's rights and obligations under a lease and vacate the dwelling before the end of the lease term (and avoid liability for future rent and any other sums due under the lease) once all of the following occur:

- a judge signs one of the following orders protecting the tenant or an occupant from family violence AND the tenant provides the landlord with a copy:
  - a temporary injunction issued under Subchapter F, Chapter 6, Family Code;
  - a temporary ex parte order issued under Chapter 83, Family Code; or
  - a protective order issued under Chapter 85, Family Code;
- the tenant provides written notice of termination of the lease to the landlord on or before the 30th day before the date the lease terminates (but if the family violence is committed by a cotenant or occupant of the dwelling, a tenant is not required to provide the 30 day notice);
- the 30th day after the date the tenant provided the notice of termination expires (unless the family violence was committed by a cotenant or occupant of the dwelling); and
- the tenant vacates the dwelling.

*Property Code § 92.016(b),(c),(c-1).*

### DEFINITIONS

"Family violence" has the meaning assigned by Family Code § 71.004.

"Occupant" means a person who has the landlord's consent to occupy a dwelling but has no obligation to pay the rent for the dwelling.

*Property Code § 92.016.*



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### **Tenant Responsibility for Unpaid Rent Prior to Termination:**

A tenant's right to terminate the lease does not affect the tenant's liability for delinquent, unpaid rent or other sums owed to the landlord before the lease was terminated by the tenant. *Property Code § 92.016(d)*.

However, a tenant is released from all liability for any delinquent, unpaid rent owed to the landlord by the tenant on the effective date of the lease termination if the lease does not contain language substantially equivalent to the following:

*"Tenants may have special statutory rights to terminate the lease early in certain situations involving family violence or a military deployment or transfer."*

*Property Code § 92.016(f)*.

### **Landlord Liability:**

A landlord who violates these provisions is liable to the tenant for:

- actual damages;
- a civil penalty equal in amount to the amount of one month's rent plus \$500; and
- attorney's fees.

*Property Code § 92.016(e)*.

### **No Waiver:**

A tenant's right to terminate a lease before the end of the lease term, vacate the dwelling, and avoid liability under these provisions may not be waived by a tenant. *Property Code § 92.016(g)*.

## **2. Certain Sex Offenses or Stalking**



KEY  
POINT

A tenant may terminate the tenant's rights and obligations under a lease and may vacate the dwelling before the end of the lease term (and avoid liability for future rent and any other sums due under the lease) once all of the following events have occurred:

- The tenant is a victim (or the parent or guardian of a victim) of:
  - sexual assault, aggravated sexual assault, indecency with a child, sexual performance by a child, continuous sexual abuse of a child, or an attempt to commit any of those offenses; or
  - stalking, that takes place within the preceding six month period on the premises;
- the tenant provides a copy of the relevant documentation described below to the landlord;
- the tenant provides written notice of termination of the lease to the landlord on or before the 30th day before the date the lease terminates;
- the 30th day after the date the tenant provided notice expires; and
- the tenant vacates the dwelling.

*Property Code § 92.0161(b),(d)*.

**Documentation for a Sex Offense:**

If the reason for the lease termination is a sexual offense, the tenant must provide to the landlord or the landlord's agent a copy of ONE of the following:

- documentation of the assault or abuse, or attempted assault or abuse, of the victim from a licensed health care services provider who examined the victim;
- documentation of the assault or abuse, or attempted assault or abuse, of the victim from a licensed mental health services provider who examined or evaluated the victim;
- documentation of the assault or abuse, or attempted assault or abuse, of the victim from an individual authorized under Chapter 420, Government Code, who provided services to the victim; or
- documentation of a protective order issued under Chapter 7A, Code of Criminal Procedure, except for a temporary ex parte order.

*Property Code § 92.0161(c).*

**Documentation for Stalking:**

If the reason for the lease termination is stalking, the tenant must provide to the landlord or the landlord's agent a copy of:

- documentation of a protective order issued under Chapter 7A or Article 6.09, Code of Criminal Procedure, except for a temporary ex parte order; or
- documentation of the stalking from a provider of services described in one of the first three bullet points in the Documentation for a Sex Offense section, AND:
  - a law enforcement incident report or, if a law enforcement incident report is unavailable, another record maintained in the ordinary course of business by a law enforcement agency; and
  - if the report or record identifies the victim by means of a pseudonym, as defined by Article 57A.01, Code of Criminal Procedure, a copy of a pseudonym form completed and returned under Article 57A.02.

*Property Code § 92.0161(c-1).*



COMMON  
PITFALL

**Tenant Responsibility for Unpaid Rent Prior to Termination:**

A tenant's right to terminate the lease does not affect the tenant's liability for delinquent, unpaid rent or other sums owed to the landlord before the lease was terminated by the tenant. *Property Code § 92.016(d).*

However, a tenant is released from all liability for any delinquent, unpaid rent owed to the landlord by the tenant on the effective date of the lease termination if the lease does not contain language substantially equivalent to the following:

*"Tenants may have special statutory rights to terminate the lease early in certain situations involving certain sexual offenses or stalking."*

*Property Code § 92.0161(e) and (g).*

**Landlord Liability:**

A landlord who violates these provisions is liable to the tenant for:

- actual damages;
- a civil penalty equal in amount to the amount of one month's rent plus \$500; and
- attorney's fees.

*Property Code § 92.0161(f).*

**No Waiver:**

A tenant may not waive the tenant's right to terminate a lease before the end of the lease term, vacate the dwelling, and avoid liability on these grounds. *Property Code § 92.0161(h).*

**3. Military Service (Servicemembers Civil Relief Act)**

Section 92.017 implements provisions of the Servicemembers Civil Relief Act which protect service members who are transferred or deployed. *See page 58-60 for additional information regarding the SCRA and how similar lease termination provisions apply in types of tenancies other than residential tenancies.*

**DEFINING TERMS**

The terms “dependent,” “military service,” and “servicemember” have the meanings assigned by 50 U.S.C. § 3911 (the SCRA). *Property Code § 92.017(a).*



A tenant who is a service member or a dependent of a service member may terminate a lease and vacate the dwelling before the end of the lease term (and avoid liability for future rent and all other sums due under the lease) if:

- the lease was executed by or on behalf of a person who, after executing the lease or during the term of the lease, enters military service; or
- a servicemember, while in military service, executes the lease and after executing the lease receives military orders:
  - for a permanent change of station; or
  - to deploy with a military unit for a period of 90 days or more.

*Property Code § 92.017(b).*

**Documentation:**

A tenant who terminates a lease under these provisions must deliver to the landlord:

- a written notice of termination of the lease; and
- a copy of an appropriate government document providing evidence of the tenant's entrance into military service or a copy of the service member's military orders.

*Property Code § 92.017(c).*

### When Termination is Effective:

Termination of a lease is effective:

- If the lease provides for monthly payment of rent: On the 30th day after the first date on which the next rental payment is due after the date the notice of termination is delivered; or
- If the lease provides for anything other than monthly payment of rent: On the last day of the month following the month in which the notice of termination is delivered.

*Property Code § 92.017(d).*



### Tenant Responsibility for Unpaid Rent Prior to Termination:

These provisions do not affect a tenant's liability for delinquent, unpaid rent or other sums owed to the landlord before the lease was terminated by the tenant. *Property Code § 92.017(f).*

COMMON  
PITFALL

However, a tenant is released from all liability for any delinquent, unpaid rent owed to the landlord by the tenant on the effective date of the lease termination if the lease does not contain language substantially equivalent to the following:

*“Tenants may have special statutory rights to terminate the lease early in certain situations involving family violence or a military deployment or transfer.”*

*Property Code § 92.017(g).*

### Landlord Liability:

A landlord who violates these provisions is liable to the tenant for:

- actual damages;
- a civil penalty in an amount equal to the amount of one month's rent plus \$500; and
- attorney's fees.

*Property Code § 92.017(h).*

### Waiver:

A tenant's right to terminate a lease before the end of the lease term, vacate the dwelling, and avoid liability under these provisions **may not** be waived by a tenant. *Property Code § 92.017(i).*

**However**, a tenant and a landlord **may agree** that the tenant waives the tenant's rights under these provisions if the tenant or any dependent living with the tenant moves into base housing or other housing within 30 miles of the dwelling.

A waiver under this section must be signed and in writing in a document separate from the lease and must comply with federal law. A waiver under this section does not apply if:

- the tenant or the tenant's dependent moves into housing owned or occupied by family or relatives of the tenant or the tenant's dependent; or
- the tenant and the tenant's dependent move, wholly or partly, because of a significant financial loss of income caused by the tenant's military service.



- “Significant financial loss of income” means a reduction of 10 percent or more of the tenant's household income caused by the tenant's military service. A landlord is entitled to verify the significant financial loss of income in order to determine whether a tenant is entitled to terminate a lease. *Property Code § 92.017(k)*.

*Property Code § 92.017(j)*.

## **D. Late Payment of Rent**

A landlord may not charge a tenant a late fee for failing to pay rent unless:

- notice of the fee is included in a written lease;
- the fee is a reasonable estimate of uncertain damages to the landlord that are incapable of precise calculation and result from late payment of rent; and
- the rent has remained unpaid **one full day after** the date the rent was originally due.

*Property Code § 92.019(a)*.

A late fee under this section may include an initial fee and a daily fee for each day the rent continues to remain unpaid. *Property Code § 92.019(b)*.

### **Landlord Liability:**

A landlord who violates this provision is liable to the tenant for:

- \$100;
- three times the amount of the late fee charged in violation of this provision; and
- reasonable attorney's fees.

*Property Code § 92.019(c)*.

### **Landlord's Rights:**

This provision does not affect the landlord's right to terminate the lease or take other action permitted by the lease or other law. *Property Code § 92.019(e)*.

### **No Waiver:**

Payment of the fee, charge, or other sum of money by a tenant does not waive the right or remedies provided by this statute. *Property Code § 92.019(e)*.

A provision of a lease that purports to waive a right or exempt a party from a liability or duty under this statute is void. *Property Code § 92.019(d)*.

## **E. Emergency Phone Number**

### **If On-Site Management Office:**

A landlord who has an on-site management office for residential rental property must give a tenant a telephone number that is answered 24 hours a day for the purpose of reporting emergencies related to a condition of the leased premises that materially affects the physical health or safety of an ordinary tenant. The landlord must post the phone number prominently outside the management office. *Property Code § 92.020(a),(b).*

### **If NO On-Site Management Office:**

A landlord who does not have an on-site management office must still give a tenant a telephone number for the purpose of reporting emergencies related to a condition of the premises that materially affects the physical health or safety of an ordinary tenant, but the number is not required to be answered 24 hours a day. *Property Code § 92.020(d).*

## **F. Minimum Habitability Standards for Certain Multi-Family Rental Buildings**

### **Definition of “Multi-Family Rental Building”:**

A “Multi-family rental building” means a building that has three or more single-family residential units. *Local Government Code § 214.219(b).* “Unit” means one or more rooms rented for use as a permanent residence under a single lease to one or more tenants. *Local Government Code § 214.219(b).*

### **Required Municipal Ordinance and Program:**

A municipality with a population of **1.7 million or more** must adopt an ordinance to establish minimum habitability standards for multi-family rental buildings. *Local Government Code § 214.219(c).* The municipality must also establish a program for the inspection of multi-family rental buildings to determine if the buildings meet the minimum required habitability standards. *Local Government Code § 214.219(e).*

### **Violation by Owner:**

The owner of a multi-family rental building commits a Class C misdemeanor if the owner violates this ordinance. Each day the violation continues constitutes a separate offense. *Local Government Code § 214.219(g).* A municipality may also impose a civil penalty for a violation of this statute. *Local Government Code § 214.219(h).*

### **Closure:**

A municipality may not order the closure of a multi-family rental building due to a violation of an ordinance adopted by the municipality relating to habitability unless the municipality makes a good

faith effort to locate housing with comparable rental rates in the same school district for the residents displaced by the closure. *Local Government Code § 214.219(f)*.

## CHAPTER 16: APPENDIX OF CASES

*Aguilar v. Weber*, 72 S.W.3d 729, 732 (Tex. App.—Waco 2002, no pet.)  
*AMC Mortg. Services, Inc. v. Shields*, 2007 WL 1366048, at \*1 (Tex. App.—Dallas May 9, 2007, no pet.)  
*American Nat. Property and Cas. Co. v. Patty*, 2001 WL 914990 (Tex. App.—Dallas 2001, pet. denied)  
*American Spiritualist Ass'n v. Ravkind*, 313 S.W.2d 121, 124-25 (Tex. Civ. App.—Dallas 1958, writ ref'd n.r.e.)  
*Armstrong v. Clayton*, 255 S.W. 1015 (Tex. Civ. App.—El Paso 1923, no writ)  
*B.F. Avery & Sons v. Kennerly*, 12 S.W.2d 140 (Tex. Comm'n App.1929, judgm't adopted)  
*Bourcier v. Edmondson*, 58 Tex. 675, 1883 WL 9089 (Tex. 1883)  
*Brown v Johnson*, 118 Tex. 143, 12 S.W. 2d 543, 545 (Tex. Com. App. 1929, writ ref'd.)  
*Burden v. Burden*, No. 06-13-00089-CV, 2014 WL 3535066 (Tex. App.—Texarkana July 17, 2014, no pet.)  
*Byrd v. Fielding*, 238 S.W.2d 614 (Tex. Civ. App.—Amarillo 1951, no writ)  
*Calhoun v. Kirkpatrick*, 155 S.W. 686, 687-88 (Tex. Civ. App.—San Antonio 1913, n.w.h.).  
*Carlson's Hill Country Beverage, L.C. v. Westinghouse Road Joint Venture*, 957 S.W.2d 951, 954 (Tex. App.—Austin 1997, no pet.)  
*Causey v. Catlett*, 605 S.W.2d 719, 720 (Tex. Civ. App.—Dallas 1980, n.w.h)  
*Cavazos v. Hancock*, 686 S.W.2d 284, 287 (Tex. App.—Amarillo 1985, no writ)  
*Charalambous v. Jean Lafitte Corp.*, 652 S.W.2d 521, 526 (Tex. App.—El Paso 1983, writ ref'd n.r.e.)  
*Coinmach Corp. v. Aspenwood Apartment Complex*, 417 S.W.3d 909 (Tex. 2013)  
*Continental Coffee Prods. v. Cazarez*, 937 S.W.2d 444, 449 (Tex. 1996)  
*Cook v. Comm'r of Soc. Sec.*, 480 F.3d 432, 436 (6th Cir. 2007)  
*EDG Property Management, Inc. v. Ratnani*, 279 S.W.3d 905 (Tex. App.—Dallas 2009, n.w.h.)  
*Fandey v. Lee*, 880 S.W.2d 164, 169 (Tex. App.—El Paso 1994, writ denied)  
*Flynt v. Garcia*, 587 S.W.2d 109, 110 (Tex. 1979)  
*French v. Moore*, 169 S.W.3d 1 (Tex. App.—Houston [1<sup>st</sup> Dist.] 2004, n.w.h.)  
*Garcia v. Perrett*, No. 01-13-00237-CV, 2014 WL 3928566 (Tex. App.—Houston [1<sup>st</sup> Dist.] Aug. 12, 2014, no pet.)  
*Glaption v. AH4R I TX, LLC*, No. 14-13-00705-CV, 2014 WL 2158161, at \*2 (Tex. App.—Houston [14<sup>th</sup> Dist.] May 22, 2014, no pet.)(mem. op.)  
*Goggins v. Leo*, 849 S.W.2d 373, 377 (Tex.App.—Houston [14<sup>th</sup> Dist.] 1993, no writ)  
*Gollehon v. Porter*, 161 S.W.2d 134, 136 (Tex. Civ. App.—Amarillo 1942, writ ref'd w.o.m.)  
*Gore v. Homecoming Financial Networks, Inc.*, 2008 WL 256830, at \*2 (Tex. App.—Dallas Jan. 31, 2008, no pet.)  
*Green v. Prince*, 201 S.W. 200, 203 (Tex. Civ. App.—Austin 1918, n.w.h.)  
*Haginas v. Malbis Memorial Foundation*, 163 Tex. 274, 354 S.W.2d 368, 371 (Tex. 1962)  
*Haith v. Drake*, 596 S.W.2d 194, 196 (Tex. Civ. App.—Houston [1<sup>st</sup> Dist.] 1980, writ ref'd n.r.e.)  
*Hanks v. Lake Towne Apartments*, 812 S.W.2d 625, 626 (Tex. App.—Dallas 1991, writ den.)

*Holcombe v. Lorino*, 124 Tex. 446, 79 S.W.2d 307,309 (Tex. 1935)

*Hunt v. Merchandise Mart, Inc.*, 391 S.W.2d 141 (Tex. Civ. App.—Dallas 1965, writ ref. n.r.e.).

*ICM Mortgage Corp. v. Jacob*, 902 S.W.2d 527, 530 (Tex. App.—El Paso 1994, writ denied)

*In re A.J.'s Wrecker Service of Dallas*, 2002 WL 497021 at \*1 (Tex. App.—Dallas Apr. 3, 2002, no writ)

*In re Garza*, 990 S.W.2d 372, 374 (Tex. App.—Corpus Christi 1999, no pet.)

*Johnson v. Mohammed*, No. 03-10-00763-CV, 2013 WL 1955862, \*7 (Tex. App. – Austin May 10, 2013, pet. dismiss'd w.o.j.) (mem. op.)

*Kazmir v. Benavides*, 288 S.W.3d 557, 564 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2009, no pet.)

*Keep 'Em Eating Co. v. Hulings*, 165 S.W. 2d 211, 213 (Tex. Civ. App.—Austin 1942, n.w.h)

*Kendziorski v. Saunders*, 191 S.W.3d 395, 409-410 (Tex. App.—Austin 2006, no pet.)

*King v. Bank of New York*, 2008 WL 2764523 (Tex. App.—Corpus Christi 2008, n.p.h.)

*Lindemood v. Comm'r of Internal Revenue*, 566 F.2d 646, 647 (9th Cir. 1977)

*Maberry v. First Nat. Bank of Littlefield*, 351 S.W.2d 96, 99, 100 (Tex. Civ. App.—Amarillo 1961, n.w.h.)

*Malatesta v. Dove Meadows Homeowners Assoc.*, 2009 WL 5064579 (Tex. App.—Houston [1<sup>st</sup> Dist.] Dec. 22, 2009, no pet.) at \*1

*Martin Co. v. Cottrell*, 142 S.W. 48 (Tex. Civ. App.—Fort Worth 1911, no writ)

*Martinez v. Ball*, 721 S.W.2d 580, 581 (Tex. App.—Corpus Christi 1986, no pet.)

*Maxwell v. U.S. Bank Nat'l Ass'n*, No. 14-12-00209-CV, 2013 WL 3580621, at \*2-3 (Tex.App.—Houston [14<sup>th</sup> Dist.] July 11, 2013, pet. dismiss'd w.o.j.)(mem. op.)

*McCollum v. Hammit*, 279 S.W. 881, 882 (Tex. Civ. App.—Eastland 1925, n.w.h.)

*McDonald v. Claremore Apartment Homes*, 2010 WL 26332, at \*1 (Tex. App.—San Antonio Jan. 6, 2010, rev. dismiss'd w.o.j.)

*McKee v. Sims*, 45 S.W. 564, 565 (Tex. 1898)

*Mendez v. Knowles*, 556 F.3d 757, 765 (9th Cir. 2009)

*Minor v. Adams*, 694 S.W.2d 148, 150 (Tex. App.—Houston [14<sup>th</sup> Dist.] 1985, no writ)

*Mitchell v. Armstrong Capital Corp.*, 911 S.W.2d 169, 171 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1995, writ denied)

*Mullins v. Coussons*, 745 S.W.2d 50 (Tex. App.—Houston [14<sup>th</sup> Dist.] 1987, no writ)

*Peek v. Equipment Serv.*, 779 S.W.2d 802, 804 (Tex. 1989)

*Pinnacle Premier Props., Inc. v. Breton*, 447 S.W.3d 558, 564-65 (Tex. App.— Houston [14<sup>th</sup> Dist.] 2014, no pet. h.)(op. on reh'g)

*Poole v. Goode*, 442 S.W.2d 810, 812 (Tex. Civ. App.—Houston [14<sup>th</sup> Dist.] 1969, writ ref'd n.r.e.)

*Powell v. Mel Powers Inv. Builder*, 590 S.W.2d 837 (Tex. Civ. App.—Houston [14<sup>th</sup> Dist.] 1979, n.w.h.)

*Reeder v. Curry*, 294 S.W.3d 851, 856 (Tex. App.—Dallas 2009, pet. denied)

*Rice v. Pinney*, 51 S.W.3d 705, 712-13 (Tex. App.—Dallas 2001, no pet.)

*Rodriguez v. Sullivan*, 484 S.W.2d 592, 593 (Tex. Civ. App.—El Paso 1972, no writ)

*Rule v. Richards*, 149 S.W. 1073, 1075 (Tex. Civ. App.—Amarillo 1912, no writ)

*Saihat Corp. v. Miller*, No. 01-11-00119-CV, 2013 WL 4634814, \*4-7 (Tex. App. — Houston [1<sup>st</sup> Dist.] Aug. 27, 2013, no pet.)

*Sharp v. Smith*, 2008 WL 257237 (Tex. App.—Tyler 2008, no pet.)

*Small v. Rush*, 132 S.W. 874, 876 (Tex. Civ. App. 1910, writ ref'd)  
*Spann v. Trumpf*, 83 S.W. 2d 1043, 1045 (Tex. Civ. App.—Dallas 1935, no writ)  
*Stevenson v. Lohman*, 218 S.W.2d 311, 313 (Tex. Civ. App.—Beaumont 1949, writ re'fd)  
*Stroman v. Martinez*, No. 14-13-01143-CV, 2015 WL 2090497 (Tex. App. – Houston [14th Dist.] May 5, 2015, no pet.)  
*Toland v. Swearingen & Smith*, 39 Tex. 447, 1873 WL 7581 (1873)  
*Trimble v. Federal National Mortgage Association*, 2016 WL 7368060 at \*3 (Tex. App.—Houston [1st Dist.] Dec. 20, 2016, no writ)  
*Twelve Oaks Tower I, LTD. v. Premier Allergy Inc.*, 938 S.W.2d 102 at 108 (Tex.App.—Houston[14th] 1996)  
*Villalon v. Bank One*, 176 S.W.3d 66, 71 (Tex. App.—Houston [1st Dist.] 2004, pet. denied)  
*Virani v. Syal*, 836 S.W.2d 749, 751-52 (Tex. App.--Houston [1st Dist.] 1992, writ denied)  
*Wattley v. Turner*, 1998 WL 348305 at \*2 (Tex. App.—Dallas July 1, 1998, no pet.)  
*Webb v. Bergin*, 38 S.W. 2d 841, 842 (Tex. Civ. App.—Waco 1931, writ dism'd w.o.j.)  
*Weir v. Brooks*, 17 Tex. 638, 1856 WL 5072 (1856)  
*Western Flavor-Seal Co. v. Allison*, 389 S.W. 2d 521, 522 (Tex. Civ. App.—San Antonio 1965, no writ)  
*Wetsel v. Fort Worth Brake, Clutch & Equipment, Inc.*, 780 S.W.2d 952, 954 (Tex. App.—Fort Worth 1989, no writ)  
*Whitehurst v. Estes*, 185 S.W.2d 154 (Tex. Civ. App.—Dallas 1944, writ ref'd)  
*Williams v. Schneiber*, 148 S.W.3d 581 (Tex. App.—Fort Worth 2004, no pet.)  
*Yarbrough v. Household Finance Corp. III*, 455 S.W.3d 277, 280-81 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2015, no pet.)