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TJCTC

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TEXAS JUSTICE COURT TRAINING CENTER

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3 DAYS, 10 DAYS, 30 DAYS, 90 DAYS: THE INS AND OUTS OF PROPER NOTICES IN EVICTION CASES

By Bronson Tucker
General Counsel

We have gotten lots of questions and also some comments in classes indicating a level of confusion as to what the appropriate length of a notice to vacate for an eviction should be, and also some confusion between a notice to vacate and a termination notice. This article attempts to clear up some common misconceptions and get everyone on the same page.

The most important thing to remember, though, is that this guide is provided so that the court can correctly rule on the matter in court. The court **should not** provide legal advice when a landlord comes in and asks how many days notice he needs to give a tenant. In that situation, the best response is for the landlord to consult either an attorney or the Property Code.

The proper term for a notice to vacate depends on what type of tenancy there is, and also can depend on what is contained in the lease. The basic, or default, assumption, is that at least a three day notice to vacate is what is proper. However, the parties may agree in a written lease agreement (not orally) to a shorter or longer notice period. *Property Code 24.005 (a).* Note that this period applies **regardless** of whether the breach is nonpayment of rent, or some other breach of the lease. Many courts are under the impression that any other violation (unauthorized pets, for example) requires a 30 day notice. This is **not true**. Many standard leases will stipulate a 24 hour notice period.

But what about situations where there is no written lease agreement? Property Code 24.005 (b) describes the process for tenants at will and tenants at sufferance. A tenant at will is someone who is occupying the premises of another without definite terms or conditions, but with the permission of the owner. A common example would be someone's adult child living in that person's garage apartment. A tenancy at will may be terminated at any time by either the owner or the tenant, but the tenant is entitled to a three day notice to vacate. A tenant at sufferance is someone who came into possession in a lawful way, but their right to the property has ended, and they haven't left yet. The most common ways your court will see these cases is people who hold over after their lease has ended, and people who have been foreclosed upon, but who have not left the premises. A tenant at sufferance is also generally entitled to a three day notice to vacate.

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INSIDE THIS ISSUE

Update from the General Counsel

By Bronson Tucker

Hello again, and welcome to the Summer Edition of our TJCTC Newsletter. We are currently working on wrapping up the 2013-14 academic year with a few more seminars from El Paso to Tyler to Laredo to San Marcos! In the midst of that, we are also working on our deskbook and forms project. It is very time-consuming, and we know how much you are all looking forward to the finished product, as are we!

One new item that is available now that should help you find the info that you need is the new search engine for the Legal Questions section of our website, tjctc.org. Previously, you could only search for individual words or phrases. Now, you can search for multiple words throughout a question and answer, without them having to be next to each other. For example, with the old engine if you searched for eviction appeal, it would only return a result if it contained the exact phrase "eviction appeal". Now, it will return all results that contain the words 'eviction' and 'appeal', even if one is in the question and one is in the answer. If you wish to only get results with a specific phrase, simply insert it into quotation marks, so you could search for "eviction appeal" and get only those results with that exact phrase appearing in the question or answer.

Additionally, we have fixed a glitch that prevented all of a question from being displayed if it contained quotation marks. If you noticed questions that appeared truncated on the board, this was the culprit. The problem has been solved, and we are going back and fixing the questions that we still have access to (from Feb 2014 forward).

We hope these changes will assist you in locating information that will help you in your day to day work!

Until next time,

Bronson

EVICTION NOTICES (CONT. FROM P. 1)

Post-foreclosure evictions carry a separate set of notice requirements if the person being removed is not the person who was foreclosed upon. Under Texas law, if the building is foreclosed at a tax sale or upon foreclosure of a lien superior to the tenant's lease, then the tenant is entitled to a 30 day notice to vacate, provided that they are current in rent, either to their previous landlord, or to the purchaser at the tax sale. But under federal law, the Protecting Tenants at Foreclosure Act, a bona fide tenant is entitled to finish their lease if the purchaser is not going to use the building as their primary residence. Of course, they must continue to meet their rental obligations, paying any monies due to the purchaser. If the purchaser is going to use the building as their primary residence, the tenant is entitled to a 90 day notice to vacate. In practice, many times the purchaser will enter into a 'cash for keys' exchange to get the tenant out of the building sooner.

The only time that a written notice to vacate is not necessary is when someone has taken possession by forcible entry, meaning they never had a lawful right to possession of the premises. Then, verbal and immediate notice to vacate is sufficient. *Property Code 24.005 (d).* This situation can also be handled as a criminal trespass, but many law enforcement agencies will not get involved, leaving the landlord the only option of filing an eviction suit to regain possession.

OTHER NOTICES

There are several other notices that landlords may give that are not pure 'notices to vacate.' The first I will discuss is a "pay or vacate" notice. With a regular NTV, a landlord can accept rent from the tenant after delivering the notice and still pursue the eviction. That surprises many courts, but remember that the tenant violated the terms of their contract by paying the rent late. Unless the landlord has verbally, or by their conduct, indicated that late payment is accepted or acceptable, they still can move forward with an eviction. Of course, no judgment for rent would be awarded, since it has been paid. However, if the landlord gives a "pay or vacate" notice, the tenant is protected from eviction as long as they pay the rent within the time specified in the notice. So why would a landlord offer this protection? Perhaps to give extra incentive for the tenant to pay, or to show willingness to work with a tenant who has otherwise been a good tenant.
(Cont. on P. 3)

EVICTION NOTICES (CONT. FROM PAGE 2)

The next special type of notice that can be given is one that may trigger attorney's fees. A landlord may always recover attorney's fees in an eviction case if a written lease provides that they can (and, of course, that they are represented by an attorney who offers evidence in court of reasonable and necessary fees). But without that lease provision, the only way to get attorney's fees is by delivering by registered mail or certified mail, return receipt requested, a notice demanding that the tenant vacate and stating that if they do not vacate by the 11th day after receipt and the landlord files suit, the landlord may recover attorney's fees. In any case where the landlord was entitled to attorney's fee (either by written lease or by special notice) a prevailing tenant would also be entitled to recover attorney's fees.

As you are likely aware, evictions in a manufactured home community have several special rules that must be followed, and one of them has to do with notices to vacate for nonpayment of rent. To be able to evict someone for nonpayment of rent or other amounts owed of at least one month's rent, the landlord must notify them in writing that the payment is delinquent, and the payment is not tendered in full by the 10th day after the day the tenant receives the notice. Note that this much different from the situation discussed above in a standard residential tenancy where the landlord can pursue eviction even if the tenant pays post-notice.

NOTICES OF TERMINATION

Another area which causes blurring of lines is notices of termination, as many courts (as well as landlords) mix up these notices and notices to vacate. A notice to vacate is proper when the tenant no longer has a right to occupy a premises (because their lease is up, because they violated the contract, because they have been foreclosed upon, etc.). A notice of termination is issued to notify the tenant when the date that they will no longer have the right to occupy the premises will be. In most leases, these are unnecessary. If I sign a lease that begins August 1, 2014 and ends on July 31, 2015, generally the landlord doesn't have to notify me that my lease terminates on July 15, because the terms of the lease itself serve that purpose. So if I am still in the premises on August 1, 2015, the landlord can go straight to the step of delivering me a notice to vacate. However, some leases **do** require notice of termination.

The most common example is a month-to-month tenancy. This is an arrangement where the end date is undetermined. The agreement continues on indefinitely until one side or the other gives notice that it will be terminated. Section 91.001 of the Property Code governs how these notices operate. For a tenancy where the rent-paying period is at least one month (so this includes month-to-month tenancies), the tenancy terminates on the **later** of (1) the day stated in the notice, or (2) one month after notice is given. So if a tenant (or landlord) gives notice on July 15, the earliest the tenancy could terminate would be August 15. Certainly they could give then notice on July 15 giving a termination date of, say, August 31, and then the tenancy would terminate on that date.

What if the rent-paying period is less than one month? Then the tenancy terminates on the later of (1) the date given in the notice, or (2) the day after the expiration of one rent-paying period, beginning on the day notice is given. So say a tenant pays weekly rent. If they give notice on Tuesday, Tuesday counts as day 1, and the tenancy could terminate as early as day 7, which would be the next Monday.

In either case, **a notice to vacate would still be required** in the event that the tenant did not vacate the premises on the date specified. They would be treated the same as any other holdover tenant, all of whom are entitled to a three day notice to vacate unless the lease specifies otherwise.

What happens if the tenancy is terminated in the middle of a rent-paying period? The tenant is liable for rent only up to the date of termination. *Property Code 91.001 (d).* Keep in mind that this is a different scenario than an eviction, where the landlord is evicting the tenant due to bad acts in violation of the contract. Here, either the landlord or the tenant has lawfully executed their option to set a date of termination of the tenancy, so the tenant shouldn't have to pay rent for a period of time that they are not obligated under a lease to pay.

Another statutorily-mandated notice arises in manufactured home communities. Here, a landlord is required to give notice no later than 60 days before the expiration of the notice, stating either that the lease will not be renewed, or offering to renew the lease, and laying out the terms of the renewal. If the tenant doesn't reply to the offer of renewal before the 30th day before the end of the lease, they are now bound to the terms offered by the landlord! Definitely a trap for the unwary.

We are hopeful that this discussion has helped to clarify some issues, specifically the differences between notices to **vacate** and notices of **termination**. And as mentioned, unless a lease specifies otherwise, the time period for a notice to vacate is not different if the violation is other than nonpayment of rent.

RV PARK LEGISLATIVE UPDATE & REVIEW

A review of changes to Texas law relating to recreational vehicle parks
By Rob Daniel
Program Attorney, TJCTC

During the 2013-2014 educational year, the Texas Justice Court Training Center staff has driven tens of thousands of miles across our great state to provide quality education to justices of the peace, constables, and court personnel. As we travel, we notice that there are some roadside features common to all parts of the state. From El Paso to Port Arthur, and from Dalhart to Brownsville, we find that we are almost always within 20 miles of a Dairy Queen, a barbecue joint, or an RV park. Because justices of the peace, constables, and court personnel have expressed little interest in knowing whether the TJCTC staff prefers Dilly Bars to Buster Bars or baby backs to spare ribs, this newsletter article is about recreational vehicle parks.

TJCTC has received several questions about RV parks over the past few months, with the most common being: "can an RV park owner remove a tenant (and his RV) from her property without going through the eviction process?" The answer depends on whether a landlord-tenant relationship has been established.

Many Texas RV parks operate like apartment complexes, offering written leases to tenants for periods of a year or more. If a lease establishes a landlord-tenant relationship, the tenant/RV owner has "the general and exclusive right to possession during the term of the lease." *Mobil Pipe Line Co. v. Smith, 860 S.W.2d 157, 159 (Tex. App.-El Paso 1993, writ dism'd w.o.j.).* A person who has an exclusive right to possession of real property cannot simply be thrown out of such property. Therefore, an RV park owner who wishes to remove a tenant from the leased premises must do so by filing an eviction lawsuit with a justice court.

Which set of eviction rules must an RV Park owner who wishes to evict a tenant follow? Prior to September 1, 2013, recreational vehicles were considered manufactured homes for purposes of Chapter 94 of the Property Code, which addresses manufactured home tenancies. Additionally, recreational vehicle parks which leased four or more spaces for recreational vehicles were considered to be manufactured home communities for purposes of Chapter 94. Because Chapter 94 covered RVs and most RV parks, most RV park owners who wished to evict a tenant prior to September 1, 2013 had to follow the specialized manufactured home eviction rules. However, legislation passed during the 83rd regular session of the Texas legislature (SB 1268) removed all references to recreational vehicles from Chapter 94 of the Property Code. Therefore, an RV park owner who wishes to file an eviction lawsuit to remove a tenant from his property must now comply with the residential eviction rules found in Chapter 24 of the Property Code and Rule 510 of the Texas Rules of Civil Procedure.

However, keep in mind that not all RV parks operate like apartment complexes; some operate like hotels. The relationship between an innkeeper and his guests is different than the relationship between a landlord and his tenant. For example, a hotel guest expects his room to be cleaned on a daily basis, while an apartment renter would be disturbed if his landlord entered the apartment for the sole purpose of making up the bed. Recognizing this difference, Texas courts have found that the relationship between a hotel and its guests generally does not constitute a landlord-tenant relationship. *Mallam v. Trans-Texas Airways, 227 S.W.2d 344,346 (Tex. Civ. App.-El Paso 1949, no writ).* Rather, a hotel grants a guest a license to occupy the premises for a determined period of time, and use of the premises is non-exclusive. *Patel v. Northfield Ins. Co., 940 F. Supp. 995, 1002 (N.D. Tex. 1996).*

The owner of an RV park which functions as a hotel need not initiate eviction proceedings before removing the RV owner from the premises. The Eighth Court of Appeals has written that with respect to hotel-guest relationships "[the] remedy [of forcible detainer] is not applicable since the relation of landlord and tenant does not exist because of the absence of a contract with respect to realty. …[S]ince public inns are conducted for travelers and transient persons, it is not the duty of the innkeeper to keep one who has lost that status; that a person is not entitled to stay indefinitely, and on reasonable notice may be ejected without any other reason." *McBride v. Hosey, 197 S.W.2d 372 (Tex. App.—El Paso 1946).*

(Cont. on P. 5)

REVIEW OF NEW RV PARK LAWS FROM THE RECENT LEGISLATIVE SESSION (CONT. FROM P. 4)

However, a landlord who has the legal right to eject an RV owner who is not a tenant may find doing so to be difficult in practice. Using force to remove the tenant from the premises is inadvisable at best, and could lead to assault charges at worst. Towing an RV (or hiring a towing company to do so) may result in a tow hearing in justice court.

Some RV park owners who operate hotel-style RV parks have requested that peace officers assist them in removing guests who do not pay their bills, under the theory that such persons are violating the state's criminal trespass statute. *See Penal Code 30.05*. However, a 2008 attorney general opinion states that "even if an agreement between a proprietor of an RV park and a guest is determined to be a license, the law is not sufficiently clear to predict how the criminal trespass statute would apply in that instance. …[T]he criminal trespass statute is not entirely clear 'how local law enforcement can enforce the statute as it relates to RV Parks or similar entities.'" Att'y Gen. Op. GA-0606 (March 13, 2008). Although the criminal trespass statute has been amended multiple times since 2008 (including by SB 1268 in 2013), it is TJCTC's opinion that none of these changes clarify whether a guest who refuses to leave the premises of an RV park when the landowner alleges that the guest has breached the terms of the license commits the offense of criminal trespass. Therefore, until the Texas legislature further clarifies the criminal trespass statute, TJCTC advises constables and other peace officers to refrain from assisting hotel-style RV park owners in forcibly removing tenants from the premises.

Another question that TJCTC has received frequently over the past few months is: "can an RV park owner disconnect a guest's utilities for failure to pay a utility bill?" SB 1268 also gave some RV park owners (but not all RV park owners) the right to disconnect utility service if a guest fails to pay his or her utility bill. In order to be eligible for this remedy, the recreational vehicle park operated by the landlord must be "designed primarily for recreational vehicle transient guest use," and utility fees must be charged on a daily, weekly, or monthly basis. *Utilities Code 184.036.* The term "transient guest use" is not defined by statute. It is TJCTC's opinion that this language indicates that only RV parks which operate primarily as "hotel-style" RV parks may disconnect utility service. (However, the statutory language also indicates that a "mixed use" recreational vehicle park which leases 1/3 of its spaces and uses the other 2/3 of its spaces as "hotel" spaces could shut off power to either tenants or guests who fail to pay utility bills.) If utility service is disconnected, it must be reconnected upon payment of the tenant's or guest's utility bill. Id. If a landlord unlawfully disconnects a tenant's utility service, the tenant may file an application for a writ of restoration in a justice court. *Property Code 92.0091.*

It will be interesting to see whether the legislature revisits issues relating to hotel-style RV parks during the upcoming 2015 legislative session. (Yes, it's already that time; early bill filing begins in just a few months!) We'll be tracking any future changes relating to this issue and keeping you updated as the session progresses.

CODE SECTIONS EXPLAINED

By Thea Whalen, Program Attorney

The various code sections that are our Texas statutes are updated every two years by our legislature. But sometimes even code sections that have been on the books for some time require revisiting. Two that the Training Center have recently revisited are the criminal time payment fee and civil extension of a judgment.

CRIMINAL: TIME PAYMENT FEE

It was brought to the legal staff's attention this year that the time payment fee may be applied differently than we previously thought. In the past, we instructed that the time payment fee would not apply to a successfully completed Driver Safety Course or Deferred Disposition because there was not a 'conviction'. The time payment fee would only be triggered if a defendant had a show cause hearing, was convicted, and then failed to timely pay the court costs or fine. The applicable Local Government Code section reads:

133.103. TIME PAYMENT FEE. (a) A person convicted of an offense shall pay, in addition to all other costs, a fee of $25 if the person:
(1) has been *convicted* of a felony or misdemeanor; and
(2) pays any part of a fine, court costs, or restitution on or after the 31st day after the date on which a judgment is entered assessing the fine, court costs,or restitution. (emphasis added)

However, when you consider the controlling definitions for the chapter, the meaning of 'conviction' is different than the way we were presenting it in the past. Section 133.003 of the Local Government Code tells us that the whole chapter applies to various criminal fees, including, "the time payment fee imposed under Section 133.103," and part of that Chapter is Section 133.101, titled: MEANING OF CONVICTION. This code section states, "… a person is considered to have been convicted in a case if … the court *defers final disposition* of the case..."

When reading these sections together, it becomes clear that the time payment fee would apply to a DSC or Deferred Disposition. In both of these situations, the court defers the disposition. The time payment fee could be applied to the court costs that are assessed in a DSC or deferred disposition. The time payment fee would not be applied to a fine, because a fine would not yet have been assessed (it would instead be an administrative fee of $10 or a special expense fee not to exceed the potential fine).

What this means is that if you place a defendant on DSC or Deferred and they fail to pay the court costs by the 31st day, then the time payment fee of $25 would be assessed. The time payment fee can only be assessed once and cannot be assessed a second time should the defendant fail to complete a DSC or Deferred, be convicted and then fail to timely pay their fines. We have consulted with OCA on our interpretation and they are in agreement with these positions.

CIVIL: EXTENSION OF A JUDGMENT

Sometimes we are aware of all the applicable code sections, but the section does not seem to have a clear interpretation. This is true with the ability to extend a civil judgment and Civil Practice and Remedies Code 34.001.

Civil judgments are valid 10 years from that date they are signed by the Judge. CPRC 34.001(a). However, a judgment can be extended at any time during the 10 years by filing a Writ of Execution. Specifically, 34.001(b) of the Civil Practice and Remedies Code states, "If a writ of execution is issued within 10 years after rendition of a judgment but a second writ is not issued within 10 years after issuance of the first writ, the judgment becomes dormant. A second writ may be issued at any time within 10 years after issuance of the first writ." It is this language that was not clear: did the statute mean it could be extended once, twice, or indefinitely?

The answer is in a well stated federal case out of the Western District of Texas, San Antonio Division.* *TAPSS, L.L.C. v Nunez Company*, found at 368 B.R. 575, states, "[a] judgment will then remain active for ten (10) years following the most recent writ of execution." citing *Gartin v. Furgeson*, 144 S.W.2d 1114, 1115 (Tex.Civ.App.-Amarillo 1940, no writ). This means that there is **no limit** on the number of Writs of Execution that may extend a judgment. As long as the writ is issued within 10 years from the last writ, the judgment will remain active. Be mindful that the word used in the code is 'issued' not 'filed'. The writ must be signed and delivered to the Constable or Sheriff to be considered 'issued'.

As a reminder, an Abstract of Judgment is simply a lien based on a judgment. It does not extend a judgment. In fact, an Abstract is good for only 10 years. Even if the judgment is extended by a Writ of Execution, the Abstract must be renewed to remain valid. Property Code §52.001 and 52.006. Abstracts of judgment cease to exist if a judgment becomes dormant. *Sec. 52.006, Property Code.*

*This case is short, simple to read, and explains judgments, extension, and revivals well. We suggest you review it when you have the chance. If you have trouble getting a copy, please call us at the Training Center and we will be happy to forward you a copy.

PROPER ODL EFFECTIVE DATES

By Rob Daniel
Program Attorney

Over the past few months, we've heard from several justices of the peace who have started to receive occupational license petitions. We'd like to take this opportunity to remind you that certain petitioners who have DWI-related criminal history will be unable to immediately obtain an occupational license under Texas law, even if they are able to demonstrate an essential need to operate a motor vehicle.

If the petitioner has refused to provide a breath or blood sample following an arrest for driving while intoxicated (DWI) or boating while intoxicated (BWI) within the past five years, the occupational license order may not take effect before the 91st day after the effective date of the petitioner's current driver's license suspension. *Transportation Code 521.251*.

If the petitioner has provided a breath or blood specimen showing a BAC over .08 following an arrest for DWI within the past five years, the occupational license order may not take effect before the 91st day after the effective date of the petitioner's current driver's license suspension. *Id*.

If the petitioner's license has been suspended as the result of a conviction for BWI, DWI with a child passenger, or a DWI-equivalent offense in another state within the past five years, the occupational license order may not take effect before the 91st day after the effective date of the petitioner's current driver's license suspension. *Id*.

If the petitioner's driver's license has been suspended as a result of a conviction for DWI, intoxication assault, or intoxication manslaughter during the five years preceding the date of the person's arrest, the occupational license order may not take effect before the 181st day after the effective date of the petitioner's current driver's license suspension. *Id*.

If the petitioner's driver's license has been suspended, at any point in time, as a result of a second or subsequent conviction for DWI, intoxication assault, or intoxication manslaughter within five years of a prior conviction, the occupational license order may not take effect before one year after the effective date of the petitioner's current driver's license suspension. *Id*.

How will the court know whether the defendant has prior DWI-related history? The petitioner really should inform the court of such history when filing his or her petition. (The petition form created by TJCTC allows a petitioner to do so.) If the petitioner fails to include information regarding prior DWI-related history in his or her petition, we recommend setting the petition for a hearing in order to determine whether such history exists.

Occupational license orders can be tricky, and it's important to get the effective dates right. We recommend using the occupational license order forms found on the TJCTC website (under Resources, then New Forms) to help you determine the proper effective date to list on your order.

DWI BOND CONDITION SCHEMATIC PROGRAM

The Texas Justice Court Training Center's bond schematic program assists Texas counties in creating consistent conditions of bond in all DWI cases. TJCTC works with all stakeholders (including all criminal magistrates, prosecutors, and probation departments) in participating counties to establish a system for setting, monitoring, and enforcing appropriate conditions of bond. If you are interested in having your county participate in this program, please contact Rob Daniel at 512-347-9927.

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Our Mission Statement

"The mission of the Texas Justice Court Training Center is to provide quality education opportunities for justices of the peace, constables and court personnel, insuring the credibility of, and confidence in, the justice courts enabling them to better serve the people of The State of Texas."