

Commercial Eviction (TX)

A Lexis Practice Advisor® Practice Note by Karen Hart, Bell Nunnally & Martin LLP



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This practice note provides an overview of the commercial eviction process in Texas and explains both unlawful detainer actions and tenant lockouts. This practice note does not cover residential evictions and related notices, which have their own distinct requirements and considerations under Texas law. Although eviction is a landlord-driven process, this practice note provides guidance to counsel for both landlords and tenants.

For guidance on residential eviction in Texas, see [Residential Evictions \(TX\)](#).

For general guidance on commercial leasing in Texas, see [Commercial Leasing \(TX\)](#). For commercial lease forms, see [Office Lease Agreement \(TX\)](#), [Office Lease Agreement \(Short Form\) \(TX\)](#), [Retail Lease Agreement \(TX\)](#), and [Retail Lease Agreement \(Short Form\) \(Pro-Landlord\) \(TX\)](#).

Overview

Commercial leases can be long and difficult to follow. Default provisions, in particular, can be vexing to landlords, tenants, and lawyers alike. The most important thing a landlord, a tenant, or a lawyer for either can do is read the lease. For example, commercial leases often require notice of default and provide for a cure period. The appropriate written notices and cure periods under a written lease must be

complied with to meet conditions for actual default and breach and to ensure that the noticing party is in compliance with the lease. In addition to contractual lease requirements, applicable Texas statutory law must also be followed.

Texas landlords have a unique statutory right to lockout their commercial tenants who are delinquent in paying rent. Some other jurisdictions do not allow landlords this legal luxury, and often require formal eviction proceedings to remove tenants, including commercial occupants. Texas landlords, however, need to be sure they post the required lockout notices to avoid violating the law and engaging in a wrongful lockout, which can result in procedural maneuvering, increased fees, exposure to liability, as well as the loss of rents and contractual rights.

Even though Texas landlords have statutory lockout rights, a lockout may not be feasible or appropriate, and eviction proceedings may be unavoidable, even in the commercial context. For example, a tenant may force a landlord into a forcible detainer lawsuit with a writ of reentry, and the parties' rights to possess the premises may have to be decided through the judicial process.

Tenant Notices

Regardless of whether the landlord plans to commence an eviction action or institute a tenant lockout, it is important to comply with all notice requirements imposed by the lease and/or statute.

Notice of Default and Demand for Payment

After reading the lease and determining contractual notice requirements, in the face of a default of a lease provision (e.g., failure to timely pay rent), a landlord typically begins

by providing the tenant with written notice of default. Commercial leases in Texas often require written notice of default and a time period (e.g., 10 days, 30 days, etc.) for cure. However, such notice periods are also negotiable, and a lease may not contain any notice and cure rights, including for monetary defaults. If the required notices and cure periods are not followed, a landlord may set itself up for trouble later when it decides to lockout or evict a tenant, who may then have a defense to eviction and potential claims for wrongful lockout or wrongful eviction against the landlord.

For a sample notice of default, see [Notice of Default \(Commercial Eviction\) \(TX\)](#). If the lease has a guarantor, the guarantor should also be given notice.

Notice of Termination of Tenant's Right of Possession or Termination the Lease

If the tenant has defaulted for a failure to pay rent and has failed to cure, typically the next step is to terminate the tenant's right of possession to lay the foundation for a proper lockout in which notice to vacate may be provided in the same or separate written correspondence. If the tenant has abandoned the leased premises, the landlord must still abide by the lease notice and cure provisions, as applicable, and then the landlord must decide how to handle the lease, which will impact the landlord's ability to seek damages going forward.

Regardless, under Texas law, landlords have a duty to undertake reasonable efforts to mitigate their damages. See *Austin Hill Country Realty, Inc. v. Palisades Plaza, Inc.*, 948 S.W.2d 293, 299 (Tex. 1997); Tex. Prop. Code § 91.006. ("A landlord has a duty to mitigate damages if a tenant abandons the leased premises in violation of the lease.")

Traditionally, under Texas common law, a landlord has four options for pursuing rent damages in the face of a breaching tenant. They are:

- The landlord can maintain the lease and sue for rent as it becomes due.
- The landlord can treat the breach as an anticipatory repudiation, repossess, and sue for the present value of future rentals reduced by the reasonable cash market value of the property for the remainder of the lease term.
- The landlord can treat the breach as anticipatory, repossess, release the property, and sue the tenant for the difference between the contractual rent and the amount received from the new tenant.
- The landlord can declare the lease forfeited (if the lease so provides) and relieve the tenant of liability for future rent.

See *Austin Hill Country Realty, Inc.*, 948 S.W.2d at 300. Also see *GKG.Net, Inc. v. Mitchell Rudder Props., L.P.*, 330 S.W.3d 426, 430 (Tex. App. 2010, no pet.).

Commercial leases in Texas often give the landlord the option, following a tenant default, to terminate the tenants' right of possession, terminate the lease, or maintain the lease and sue for rent as it becomes due, which may include failure to pay rent or abandonment or both. Thus, under the contract or the common law, the landlord must choose its course of action carefully, and it must be mindful of the ramifications of terminating the lease. If the landlord terminates the lease or declares the lease forfeited, the tenant's liability for future rent may be cut off, reducing the landlord's future damages claim under the lease, which may have significant time remaining on the term at the point of the tenant's default. See *Austin Hill Country Realty, Inc.*, 948 S.W.2d at 300. Repossessing the premises and terminating the tenant's right of possession (without terminating the lease) works to preserve the landlord's claim to future rentals under the lease, and may be the preferred course, depending on the situation and the terms of the lease.

For a sample notice of termination of right of possession, see [Notice of Termination of Right of Possession \(Commercial Eviction\) \(TX\)](#). Any lease guarantor should also be copied on this correspondence.

There may be instances, however, when the parties have determined that terminating the lease is beneficial, including based upon the terms of any applicable lease agreement and available damages formulas that may be specified therein. The landlord may have a replacement tenant ready, or wish to simply move on, or it may want to avoid becoming entangled in a tenant's looming bankruptcy, for example.

Additional Statutory Notices

Depending upon the type of tenancy created in a given situation, and in the absence of written contractual provisions, including specifically for notice of termination, statutory termination notice provisions may be implicated. See Tex. Prop. Code § 91.001(e). A monthly tenancy or a tenancy from month-to-month may be terminated by the tenant or the landlord giving notice of termination to the other. Tex. Prop. Code § 91.001(a). If such notice of termination is provided and the rent pay period is at least one month, the tenancy then terminates on the later of (1) the day given in the notice for termination, or (2) one month after the day on which the notice is given. Tex. Prop. Code § 91.001(b). If the rent-paying period is less than a month, then the tenancy terminates on the later of (1) the day given in the notice for termination, or (2) the day following the expiration

of the period beginning on the day on which notice is given and extending for a number of days equal to the number of days in the rent-paying period. Tex. Prop. Code § 91.001(c). If a tenancy terminates on a day that does not correspond to the beginning or end of a rent-paying period, the tenant is liable for rent only up to the date of termination. Tex. Prop. Code § 91.001(d). If there is a written agreement providing a different notice scheme for termination or providing that no notice is required, these provisions do not apply, and they do not apply in the face of a breach of contract. Tex. Prop. Code § 91.001(e).

Notice to Vacate

Unless a shorter or longer notice period has otherwise been contracted, a landlord is required to give a tenant at least three days' written notice to vacate before filing a forcible detainer (or eviction) suit. Tex. Prop. Code § 24.005(a). ("If the occupant is a tenant under a written lease or oral rental agreement, the landlord must give a tenant who defaults or holds over beyond the end of the rental term or renewal period at least three days' written notice to vacate the premises before the landlord files a forcible detainer suit, unless the parties have contracted for a shorter or longer notice period in a written lease or agreement.")

If the lease does not provide for an award of attorneys' fees to the landlord, notice to vacate and demand for possession must be provided to the tenant at least 11 days before filing suit to evict. Tex. Prop. Code § 24.006. ("[unless fees are provided by lease], to be eligible to recover attorney's fees in an eviction suit, a landlord must give a tenant who is unlawfully retaining possession of the landlord's premises a written demand to vacate the premises. The demand must state that if the tenant does not vacate the premises before the 11th day after the date of receipt of the notice and if the landlord files suit, the landlord may recover attorney's fees. The demand must be sent by registered mail or by certified mail, return receipt requested, at least 10 days before the date the suit is filed.")

Notice to vacate should be absolute and unequivocal, meaning it must clearly state in so many words that the tenant has to leave the premises. See *Johnson v. Golden Triangle Corp.*, 404 S.W.2d 44 (Tex. Civ. App. 1966, no writ); *Schecter v. Folsom*, 417 S.W.2d 180 (Tex. Civ. App. 1967, no writ). A notice to "pay up or move out" or a notice of nonrenewal does not constitute a clear and unequivocal notice to vacate. *Id.*

For Texas commercial tenancies, the notice to vacate originates in the statutory provisions governing forcible detainer actions in the Texas Property Code. See Tex. Prop.

Code § 24.001 et seq. The notice must be provided in accordance with the statute, unless otherwise contracted, to lay the foundation for an eviction suit, if the landlord must pursue judicial eviction. The statutory provisions governing commercial tenant lockouts do not address prior notice requirements, which is in contrast to the statutory notice requirements for residential tenancies prior to lockout.

Pre-lockout notices for commercial tenancies are not required by the Texas Property Code, other than the requirements for forcible detainer actions, which will typically be necessary if a lockout is insufficient or inappropriate or if a commercial tenant regains possession through a writ of reentry. See Tex. Prop. Code § 93.002. The notice to vacate gives the landlord the choice between lockout and forcible detainer and eliminates further delay in filing a forcible detainer suit, if one becomes necessary. The notice to vacate also permits the tenant to vacate the premises in an orderly fashion, allowing for the removal of items from the premises that are not subject to a landlord's lien or that the landlord may not have an interest in dealing with, even if subject to a landlord's lien. Of course, the notice may also encourage a tenant to remove property that may be subject to the landlord's lien and that may be valuable in applying against rent and/or damages under the lease. Therefore, circumstances, and lease requirements, should be evaluated when drafting and providing a notice to vacate.

For a sample notice to vacate, see [Notice to Vacate \(Commercial Eviction\) \(TX\)](#). The notice to vacate may be provided on its own or along with the termination of the right of possession notice. As stated, the guarantor, if there is one, should also be copied.

Commercial Lockouts

As noted above, Texas landlords have a unique statutory right to lockout their commercial tenants who are delinquent in paying rent.

Commercial Lockout Notice

Pursuant to the Texas Property Code, a landlord "may not intentionally prevent a tenant from entering the leased premises except by judicial process unless the exclusion results from (1) bona fide repairs, construction, or an emergency; (2) removing the contents of premises abandoned by a tenant; or (3) changing the door locks of a tenant who is delinquent in paying at least part of the rent." Tex. Prop. Code § 93.002(c). Significantly, statutory lockouts are only available to the landlord where a tenant failed to pay rent; statutory lockouts are not permissible for nonmonetary

defaults. The applicable written lease agreement, if there is one, should be consulted for remedies available to the landlord in the face of a nonmonetary default by the tenant.

Many jurisdictions do not allow landlords to change the locks on delinquent tenants, and often require formal eviction proceedings in court to remove a commercial tenant from the premises. As noted, for commercial tenancies in Texas, the statute does not require pre-lockout notices, but the Texas Property Code does require posting of notice at the time of lockout. Pursuant to the statute, written notice must be posted on the tenant's front door stating the name and address or telephone number of the individual or company from which a new key may be obtained. Tex. Prop. Code § 93.002(f). A new key is only required to be provided during the tenant's regular business hours and only if the tenant pays. *Id.* All contractual notices of default must also be provided before taking steps to lockout a tenant. Always read the lease for any additional or different contractual requirements or conditions, since the lease will govern to the extent it conflicts with the statute. Tex. Prop. Code § 93.002(h). ("A lease supersedes this section to the extent of any conflict."). For a sample lockout notice see [Notice of Lockout \(Commercial Lease\) \(TX\)](#).

The point of the statutory lockout notice provision is to ensure that the tenant knows about the rent delinquency and where to find a replacement key. If a tenant has actual notice of how to remedy the situation and/or where to find the key, the failure to post the notice may be excused, or at least, claimed damages may not be supportable. See *Cole Chem & Distrib. v. Gowing*, 228 S.W.3d 684, 691 (Tex. App. 2005, no pet.); *Zinda v. McCann*, 178 S.W.3d 883, 890 (Tex. App. 2005, pet. denied).

Unlawful Lockout and Right of Reentry

Failure to provide the required statutory notice and/or otherwise improperly locking a tenant out of leased premises may result in procedural wrangling and increased costs for a landlord, and it may open a procedural avenue for a tenant to regain possession of the leased premises. With an *ex parte* writ of reentry proceeding, a tenant can force their way back into a space without prior notice. To have the tenant removed from the premises later will typically require a final hearing on the tenant's reentry claims and/or filing suit to evict the tenant from the premises, as discussed further below.

Unlawful Lockout Claims

Pursuant to the Texas Property Code, if a landlord fails to post the statutorily required notice and/or wrongfully locks a commercial tenant out of the leased premises (i.e., lockout

when rent had been paid), a tenant may "(1) either recover possession of the premises or terminate the lease; and (2) recover from the landlord an amount equal to the sum of the tenant's actual damages, one month's rent, or \$500, whichever is greater, reasonable attorney's fees, and court costs, less any delinquent rents or other sums for which the tenant is liable to the landlord." Tex. Prop. Code § 93.002(g) (emphasis supplied).

If a commercial tenant elects to terminate a lease in the face of a wrongful lockout, the tenant may escape liability for potentially significant future rent due under the lease, reducing the landlord's ultimate damages claim against the tenant. As stated in Section 93.002(g), in addition to seeking damages resulting from a wrongful lockout, a commercial tenant may also elect to seek to recover the possession of the premises through a suit for reentry under Section 93.003 of the Texas Property Code.

Suit for Reentry

The justice court in the precinct in which the premises are located has exclusive jurisdiction over the suit for reentry. Tex. Prop. Code § 93.003(b); *Kassim v. Carlisle Interests, Inc.*, 308 S.W.3d 537, 541 (Tex. App. 2010, no pet.). A claim for damages for wrongful lockout may be brought along with the suit for reentry, as long as the claim is within the jurisdictional limits of the justice court. Tex. Gov't Code 27.031(a)(1) (effective until September 1, 2010, "the justice court has original jurisdiction of (1) civil matters in which exclusive jurisdiction is not in the district or county court and in which the amount in controversy is not more than \$10,000, exclusive of interest" and after September 1, 2020, the justice court will have original jurisdiction over "civil matters in which exclusive jurisdiction is not in the district or county court and in which the amount in controversy is not more than \$20,000, exclusive of interest").

The claim for damages resulting from the wrongful lockout may be brought separately, and jurisdiction for such a claim is not limited to the justice courts. See Tex. Prop. Code § 93.003(j) ("This section does not affect a tenant's right to pursue a separate cause of action under Section 93.002."); see also *Warehouse Partners v. Gardner*, 910 S.W.2d 19, 27 (Tex. App. 1995, writ denied) (construing similar provisions under Chapter 92 of the Texas Property Code governing residential tenancies and stating "We construe these two sections as permitting a tenant to seek a writ of reentry in one suit and bring a cause of action for actual damages, attorney's fees, and court costs in a second suit.").

A tenant seeking reentry must file a sworn complaint for reentry, specifying the facts of the alleged unlawful lockout by the landlord or the landlord's agent. The tenant must also state orally under oath to the justice the facts of the alleged

unlawful lockout, which typically takes place at an ex parte hearing when the complaint is filed by the tenant and before it is even served. Tex. Prop. Code § 93.003(b). If the justice reasonably believes an unlawful lockout has likely occurred, the justice court may issue, ex parte, a writ of reentry that entitles the tenant to immediate, but temporary, possession of the premises, pending a final hearing on the tenant's sworn complaint for reentry. Tex. Prop. Code § 93.003(c).

The landlord is entitled to a hearing on the reentry complaint no later than seven days from the date it requests one. Tex. Prop. Code § 93.003(e). If the landlord fails to request a hearing before the eighth day following service of the writ, court costs may be rendered against the landlord. Tex. Prop. Code § 93.003(f). The writ 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 for possession for a forcible detainer, and the statute notes that a "sheriff or constable may use reasonable force in executing a writ of reentry." Tex. Prop. Code § 93.003(d).

If the writ of reentry is ignored or disobeyed, the landlord is subject to contempt proceedings under the statute, which may include jail time for the person disobeying the writ until the contempt is purged. Tex. Prop. Code § 93.003(i). An appeal from the judgment on the reentry complaint may be appealed as with forcible detainer suits to the county court. Tex. Prop. Code § 93.003(g); Tex. Civ. Prac. & Rem. Code § 51.001(a) ("In a case tried in justice court in which the judgment or amount in controversy exceeds \$250, exclusive of costs, or in which the appeal is expressly provided by law, a party to a final judgment may appeal to the county court.").

Importantly, if a writ of possession is issued in a forcible detainer suit, it supersedes a writ of reentry. Tex. Prop. Code § 93.003(h). Further, a landlord has recourse for actual damages or \$500, whichever is greater, less sums for which the landlord is liable to the tenant, as against a tenant who in bad faith files a sworn complaint resulting in a writ of reentry being served on the landlord or landlord's agent. Tex. Prop. Code § 93.003(k).

Eviction Suits

If a lockout is insufficient or inappropriate, or if the tenant succeeds in obtaining a writ of reentry, it may be necessary for a landlord to file an eviction suit to resolve possession of the commercial premises. Under the Texas Property Code, eviction suits encompass (1) suits for forcible entry and detainer, and (2) suits for forcible detainer. Tex. Prop. Code §§ 24.001, 24.002. Procedures for eviction suits in Texas

are the same regardless of whether eviction is sought based upon a tenant's monetary default (e.g., failure to pay rent) or a tenant's nonmonetary default of a lease agreement.

Forcible Entry and Detainer

Forcible entry and detainer occurs when a person acquires possession of real property without any legal authority and/or by force and refuses to surrender possession. Tex. Prop. Code § 24.001(a)-(b). Suit for forcible entry and detainer is typically brought as against a trespasser by a party who has the right of possession and typically does not involve a landlord-tenant relationship. Tex. Prop. Code § 24.001.

Forcible Detainer

Thus, to evict an existing commercial tenant, a commercial landlord should file a forcible detainer suit. Pursuant to the Texas Property Code, "a person who refuses to surrender possession of real property on demand commits a forcible detainer if the person:

- Is a tenant or a subtenant willfully and without force holding over after the termination of the tenant's right of possession
- Is a tenant at will or by sufferance, including an occupant at the time of foreclosure of a lien superior to the tenant's lease –or–
- Is a tenant of a person who acquired possession by forcible entry"

Tex. Prop. Code § 24.002.

Demand for possession must be made in writing and must comply with the statutory notice to vacate requirements discussed above. Tex. Prop. Code §§ 24.002(b) and 24.005.

Tenant at Will

A tenant at will is one who holds possession of a premises by permission of an owner, but without a fixed term. *Pandey v. Lee*, 880 S.W.2d 164, 169 (Tex. App. 1994, writ denied) (holding owner established landlord/tenant relationship as matter of law when record title owner of premises gave defendants right to possession by delivering premises keys to them and defendants were in possession of premises, and issue of whether occupancy obtained pursuant to lease agreement or agreement for sale was irrelevant). The Texas Supreme Court has defined a tenant at will as "a holdover tenant who 'holds possession with the landlord's consent but without fixed terms (as to duration or rent).'" *Coinmach Corp. v. Aspenwood Apartment Corp.*, 417 S.W.3d 909, 915 (Tex. 2013) (quoting *Black's Law Dictionary* 1604 (9th ed. 2009)).

Because tenants at will remain in possession with their landlords' consent, their possession is lawful, but it is for no fixed term, and the landlords can put them out of possession at any time. *Id.*

Tenant at Sufferance

Once a tenant's right to possession has been terminated by the landlord, the tenant ceases to be either a tenant at will or for term, and therefore becomes a tenant at sufferance. See *ICM Mortgage Corp. v. Jacob*, 902 S.W.2d 527, 530 (Tex. App. 1994, writ denied) ("A tenant at sufferance is one who wrongfully continues in possession of property after his right to possession has ceased and does not assert a claim to superior title."). The defining characteristic of a tenancy at sufferance is the lack of the landlord's consent to the tenant's continued possession of the premises. *Coinmach Corp.*, 417 S.W.3d at 915; see also *Tuttle v. Builes*, 572 S.W.3d 344, 354 (Tex. App. 2019, no pet.).

Jurisdiction in the Justice Courts

The justice courts have exclusive jurisdiction over forcible detainer actions. Tex. Prop. Code § 24.004 ("A justice court in the precinct in which the real property is located has jurisdiction in eviction suits. Eviction suits include forcible entry and detainer and forcible detainer suits."). The statutory forcible detainer proceedings are there to provide landlords with a fast, simple, and inexpensive method to regain possession of property from a tenant who refuses to relinquish possession. See *Marshall v. Housing Auth.*, 198 S.W.3d 782, 787 (Tex. 2006).

Immediate Possession, Rather Than Title, Determined

A forcible detainer action is the procedure used to determine the right to immediate possession of real property if there is no unlawful entry. *Hong Kong Dev., Inc. v. Nguyen*, 229 S.W.3d 415, 433 (Tex. App. 2007, no pet.). Forcible detainer suits solely resolve possession of the premises in question and do not resolve title issues concerning the property. Tex. R. Civ. P. 510.3(e); *Coinmach Corp.*, 417 S.W.3d at 919; *Villalon v. Bank One*, 176 S.W.3d 66, 70 (Tex. App. 2004, pet. denied).

To prevail in a forcible detainer action, the plaintiff is not required to prove title, but is required to show sufficient evidence of ownership to demonstrate a superior right of possession. *Villalon*, 176 S.W.3d at 70; see also *Goggins v. Leo*, 849 S.W.2d 373, 377 (Tex. App. 1993, no writ); *Powelson v. U.S. Bank Nat'l Ass'n*, 125 S.W.3d 810, 811 (Tex. App. 2004, no pet.).

If the resolution of a title dispute is necessarily intertwined with the issue of possession, so that the right of possession

depends upon it, possession may not be adjudicated without determining title. *Dormady v. Dinero Land & Cattle Co.*, 61 S.W.3d 555, 557 (Tex. App. 2001, pet. dismissed w.o.j.). The justice court does not have jurisdiction to determine title, however, and only the district court can do so. However, a forcible detainer action is cumulative, and not exclusive of other remedies, including suit to try title and for damages. *Id.*; Tex. Prop. Code § 24.008 ("An eviction suit does not bar a suit for trespass, damages, waste, rent, or mesne profits."). Concurrent actions may be maintained in different courts, but if the resolution of the title dispute is a prerequisite to determining immediate possession, the justice court is deprived of jurisdiction. *Salaymeh v. Plaza Centro, LLC*, 264 S.W.3d 431, 435 (Tex. App. 2008, no pet.).

The existence of a landlord-tenant relationship provides a basis for the court to determine the right to immediate possession without resolving the question of title. *Villalon*, 176 S.W.3d at 71. Only when the right to possession depends upon the resolution of a question of title, is the justice court, and the county court on appeal, deprived of jurisdiction. *Mitchell v. Armstrong Capital Corp.*, 911 S.W.2d 169, 171 (Tex. App. 1995, writ denied); *Jelinis, LLC v. Hiran*, 557 S.W.3d 159, 166–67 (Tex. App. 2018, pet. denied) (finding that "a justice court is not deprived of jurisdiction merely by the existence of a title dispute; it is deprived of jurisdiction only if resolution of a title dispute is a prerequisite to determination of the right to immediate possession.>").

Importantly, because available remedies are cumulative, a judgment concerning possession in a forcible detainer suit will not bar later suits on other claims or issues the justice court could not decide under collateral estoppel or res judicata. *Lopez v. Sulak*, 76 S.W.3d 597, 606 (Tex. App. 2002, no pet.); see also Tex. Civ. Prac. & Rem. Code § 31.004(a), (b). Notably, given the overall limited preclusive effect of judgments in forcible detainer suits, a judgment awarding possession will not shield a landlord from a tenant's later claim for wrongful eviction in a subsequent suit. See Tex. Prop. Code § 24.008.

Prerequisites to Filing Forcible Detainer Action (Notice to Vacate and Demand for Possession)

As discussed above, notice to vacate must be provided in accordance with the Texas Property Code before a forcible detainer suit to evict a tenant is filed. By statute, the notice to vacate is considered a demand for possession as required by Section 24.002 governing forcible detainer actions. Tex. Prop. Code § 24.005(h).

Unless a shorter or longer notice period has otherwise been contracted, a landlord is required to give the tenant at least three days' written notice to vacate before filing a forcible detainer suit. Tex. Prop. Code § 24.005(a). Demand for rent may be included in the notice to vacate. Tex. Prop. Code § 24.005(i).

To Secure Landlord's Recovery of Attorney's Fees

In the absence of a lease providing for an award of attorney's fees to the landlord, notice to vacate and demand for possession must be provided to the tenant at least 11 days before filing suit to evict. Tex. Prop. Code § 24.006(a). If a three-day notice to vacate is provided, and the tenant secures reentry, to ensure recovery of fees, in the absence of a lease providing for recovery of fees, a second 11-day notice may be needed.

Section 24.006 provides an avenue for a prevailing landlord or, notably, a prevailing tenant to recover attorney's fees and court costs in an eviction proceeding. Tex. Prop. Code § 24.006. Section 24.006(b) provides that "If the landlord provides the tenant notice under Subsection (a) or if a written lease entitles the landlord to recover attorney's fees, a prevailing landlord is entitled to recover reasonable attorney's fees from the tenant." Tex. Prop. Code § 24.006(b). Section 24.006(c) goes on to provide that "If the landlord provides the tenant notice under Subsection (a) or if a written lease entitles the landlord or the tenant to recover attorney's fees, the prevailing tenant is entitled to recover reasonable attorney's fees from the landlord. A prevailing tenant is not required to give notice in order to recover attorney's fees under this subsection." Tex. Prop. Code § 24.006(c). Section 24.006(d) states that a prevailing party (landlord or tenant) is entitled to recover all costs of court. Tex. Prop. Code § 24.006(d). A landlord that does not prevail in the eviction proceedings it initiated against a tenant may be surprised to find that it is subject to statutory liability for the tenant's attorneys' fees and court costs.

Manner of Delivery

The notice to vacate must be given in person or by mail at the premises in question. Notice in person may be by personal delivery to the tenant or any person residing at the premises who is 16 years of age or older, or personal delivery to the premises and affixing the notice to the inside of the main entry door. Notice by mail may be by regular mail, by registered mail, or by certified mail, return receipt requested, to the premises in question. Tex. Prop. Code § 24.005(f). Generally, the notice period is calculated from the

day on which the notice is delivered; thus, personal delivery or posting is advisable, in addition to mailing the notice to the tenant. Tex. Prop. Code § 24.005(g).

Alternatively, if the dwelling has no mailbox and has a keyless bolting device, alarm system, or dangerous animal that prevents the landlord from entering the premises to leave the notice to vacate on the inside of the main entry door, or if the landlord reasonably believes that harm to any person would result from personal delivery to the tenant or a person residing at the premises, or from personal delivery to the premises by affixing the notice to the inside of the main entry door, the landlord may securely affix the notice on the outside of the main entry door. In this case, the notice must be in a sealed envelope on which is written the tenant's name, address, and in all capital letters, the words "IMPORTANT DOCUMENT" or substantially similar language. Further, not later than 5 p.m. of the same day, a copy of the notice must also be mailed to the tenant by depositing it in the mail in the same county in which the premises in question is located. Tex. Prop. Code § 24.005(f-1). Notice is considered in this instance to be delivered the date the envelope is affixed to the outside of the door and is deposited in the mail. Tex. Prop. Code § 24.005(f-2).

Petition for Forcible Detainer, Citation, and Alternate Service

On August 31, 2013, Texas implemented amended rules of civil procedure governing justice courts in Texas. Tex. R. Civ. P. 500 et seq. Specifically, the justice court rules govern eviction or forcible detainer actions in Texas, over which justice courts maintain exclusive jurisdiction. Tex. R. Civ. P. 500-507 and Tex. R. Civ. P. 510 et seq.; Tex. Prop. Code § 24.004. The amendments to the justice court rules, including the eviction rules, contained clarifications of existing procedures and case law developments that were designed to improve the justice court experience.

Petition

The requirements for a petition for forcible detainer or eviction are specified in Tex. R. Civ. P. 502.2 and 510.3. The petition for eviction must be sworn to by the plaintiff and must contain:

- A description, including the address, if any, of the premises that the plaintiff seeks possession of
- A description of the facts and the grounds for eviction
- A description of when and how the notice to vacate was delivered

- The total amount of rent due and unpaid at the time of filing, if any –and–
- A statement that attorney’s fees are being sought, if applicable

Tex. R. Civ. P. 510.3.

The petition for eviction must also meet the requirements of Rule 502.2, which generally requires that a petition filed before justice courts must contain (as applicable):

- The name of the plaintiff
- The name, address, telephone number, and fax number (if any) of the plaintiff’s attorney (if applicable), or the address, telephone number, and fax number(if any) of the plaintiff
- The name, address, and telephone number (if known) of the defendant
- The amount of money the plaintiff seeks (if any)
- A description and claimed value of any personal property the plaintiff seeks
- A description of any other relief requested
- The basis for the plaintiff’s claim against the defendant – and–
- If the plaintiff consents to email service of the answer and any other motions or pleadings, a statement consenting to email service and email contact information

Tex. R. Civ. P. 502.2. For a sample petition, see [Petition for Forcible Detainer \(Commercial Eviction\) \(TX\)](#).

Rule 510.3 clarifies that a claim for rent, within the justice court’s current jurisdictional limit, may be included with the eviction suit. Tex. R. Civ. P. 510.3(d). Rule 501.3 also further clarifies that the justice court should adjudicate possession only and not title issues and that counterclaims and third-party claims are not permitted in eviction suits:

Only Issue. The court must adjudicate the right to actual possession and not title. Counterclaims and the joinder of suits against third parties are not permitted in eviction cases. A claim that is not asserted because of this rule can be brought in a separate suit in a court of proper jurisdiction.

Tex. R. Civ. P. 510.3(e).

Citation

When the petition is filed, the justice court must immediately issue citation (similar to a summons). The citation is served on the defendant with a copy of the petition and must:

- Be styled “The State of Texas”
- Be signed by the clerk under seal of court or by the judge
- Contain the name, location, and address of the court
- State the date of filing of the petition
- State the date of issuance of the citation
- State the file number and names of parties
- State the plaintiff’s cause of action and relief sought
- Be directed to the defendant
- 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
- 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
- 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
- Inform the defendant that, upon timely request and payment of a jury fee no later than three days before the day set for trial, the case will be heard by a jury
- Contain all warnings required by Chapter 24 of the Texas Property Code –and–
- 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.”

Tex. R. Civ. P. 510.4(a).

Thus, the trial should be set for no less than 10 days and not more than 21 days after the petition is filed.

The warning notices required by Chapter 24 of the Texas Property Code that must be included on the citation are as follows:

(1) FAILURE TO APPEAR FOR TRIAL MAY RESULT IN A DEFAULT JUDGMENT BEING ENTERED AGAINST YOU.

(2) on the first page of the citation in English and in Spanish in conspicuous bold print:

SUIT TO EVICT

THIS SUIT TO EVICT INVOLVES IMMEDIATE DEADLINES. A TENANT WHO IS SERVING ON

ACTIVE MILITARY DUTY MAY HAVE SPECIAL RIGHTS OR RELIEF RELATED TO THIS SUIT UNDER FEDERAL LAW, INCLUDING THE SERVICEMEMBERS CIVIL RELIEF ACT (50 U.S.C. APP. SECTION 501 ET SEQ.), OR STATE LAW, INCLUDING SECTION 92.017, TEXAS PROPERTY CODE. CALL THE STATE BAR OF TEXAS TOLL-FREE AT 1-877-9TEXBAR IF YOU NEED HELP LOCATING AN ATTORNEY. IF YOU CANNOT AFFORD TO HIRE AN ATTORNEY, YOU MAY BE ELIGIBLE FOR FREE OR LOW-COST LEGAL ASSISTANCE.

Tex. Prop. Code § 24.0051.

Service / Alternate Service

The citation may only be served by a sheriff or constable, unless otherwise authorized by written court order. The constable, sheriff, or other person authorized by written court order receiving the citation, must execute it by delivering a copy with a copy of the petition attached to the defendant, or by leaving a copy with a copy of the petition attached with some person, other than the plaintiff, over the age of 16 years, at the defendant's usual place of residence, at least six days before the day set for trial. At least one day before the day set for trial, the constable, sheriff, or other person authorized by written court order must complete and file a return of service. Tex. R. Civ. P. 510.4(b); see Tex. R. Civ. P. 501.3. Thus, citation must be served on the defendant by only a sheriff, constable, or another court-ordered authorized person, at least six days before the trial date and a completed return of service must be filed at least one day before the trial date.

Alternative service by delivery of citation to the leased premises may be available if service is unsuccessful as provided by Rule 510.4(b) and if:

- The petition lists all 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–
- The constable, sheriff, or other person authorized files a sworn statement that it has made diligent efforts to serve such citation on at least two occasions at all addresses of the defendant in the county where the premises are located, stating the times and places of attempted service.

The court may authorize alternative service to the premises upon its prompt consideration of a foregoing sworn statement, and the plaintiff is not required to file a motion for alternative service. If the court authorizes alternative

service, the constable, sheriff, or other authorized person, 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 placing it through a door mail chute or slipping it under the front door, or if neither method is possible, the officer may securely affix the citation to the front door or main entry to the premises; and (2) deposit in the mail a copy of the citation with a copy of the petition attached, addressed to defendant at the premises, and sent by first class mail. The constable, sheriff, or other person authorized by written court order must note on the return of service the date the citation was delivered and the date it was deposited in the mail. Tex. R. Civ. P. 510.4(c).

Possession Bond

The plaintiff may, at the time of filing the petition or at any time prior to final judgment, file a possession bond to be approved by the judge in the probable amount of costs of suit and damages that may result to defendant in the event that the suit has been improperly instituted, and conditioned that the plaintiff will pay defendant all such costs and damages that are adjudged against plaintiff. Tex. R. Civ. P. 510.5(a). The court must notify a defendant that the plaintiff has filed a possession bond. Tex. R. Civ. P. 510.5(b). The notice must be served in the same manner as service of citation and must inform the defendant that if the defendant does not file an answer or appear for trial, and judgment for possession is granted by default, an officer will place the plaintiff in possession of the property on or after the seventh day after the date defendant is served with the notice.

If judgment for possession is rendered by default and a possession bond has been filed, approved, and served, a writ of possession must issue immediately upon demand and payment of any required fees. Tex. R. Civ. P. 510.5(c). The writ must not be executed before the seventh day after the date the defendant is served with notice. *Id.* If the defendant files an answer or appears at trial, no writ of possession may issue before the sixth 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. Tex. R. Civ. P. 510.5(d).

Answer, Default, and Trial

An eviction case is docketed and tried as other cases. Tex. R. Civ. P. 510.7(a). No eviction trial may be held less than six days after service under Rule 510.4 has been obtained. *Id.*

The defendant must appear for trial on the day set for trial in the citation. The defendant may, but is not required to, file a written answer with the court on or before the day set for trial in the citation. Tex. R. Civ. P. 510.6(a). If the defendant fails to appear at trial and fails to file an answer before the case is called for trial, and proof of service has been filed in accordance with Rule 510.4, the allegations of the complaint must be taken as admitted and judgment by default rendered accordingly. If a defendant who has answered fails to appear for trial, the court may proceed to hear evidence and render judgment accordingly. Tex. R. Civ. P. 510.6(b). When a default judgment is signed, the clerk must immediately mail written notice of the judgment by first class mail to the defendant at the address of the premises. Tex. R. Civ. P. 510.6(c). The court shall notify a tenant in writing of a default judgment for possession by sending a copy of the judgment to the premises by first class mail not later than 48 hours after the entry of the judgment. Tex. Prop. Code § 24.0061(c).

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 a jury fee or by filing a sworn statement of inability to pay the jury fee. If a jury is demanded by either party, the jury 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 no jury is timely demanded by either party, the judge will try the case. Tex. R. Civ. P. 510.7.

The parties may represent themselves or be represented by their authorized agents or attorneys in eviction proceedings in justice court. Tex. R. Civ. P. 500.4; Tex. Prop. Code § 24.011. It should also be noted that corporations or other entities do not need to be represented by an attorney in an eviction proceeding in justice court. Tex. R. Civ. P. 500.4; Tex. Gov't Code § 27.031(d).

Judgment and Writ of Possession

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, judgment notwithstanding the verdict. 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 judgment, if any, and attorney's fees if recoverable by law. Tex. R. Civ. P. 510.8; Tex. Prop. Code § 24.0061(a). In awarding judgment of possession in favor of the plaintiff, the judgment should order the clerk to issue a writ of possession upon demand by the plaintiff. The writ of possession, as discussed below, directs a sheriff or constable to enforce the court's judgment of possession and empowers the serving officer to remove

the defendant from the premises accordingly, if the defendant refuses to voluntarily relinquish possession as ordered by the court. Tex. R. Civ. P. 510. A writ of possession must not issue if an appeal is perfected and, if applicable, rent is paid into the registry, as required. Significantly, no motion for a new trial may be filed. Tex. R. Civ. P. 510.8. 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.

Except as provided by Rule 510.5, no writ of possession may issue before the sixth 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. Tex. R. Civ. P. 510.8; Tex. Prop. Code § 24.0061(b) ("A writ of possession may not be issued before the sixth day after the date on which the judgment for possession is rendered, unless a possession bond has been filed and approved and judgment for possession is thereafter granted by default."). A writ of possession may not issue more than 60 days after a judgment for possession is signed. For good cause, the court may extend the deadline for issuance to 90 days after a judgment for possession is signed. Tex. R. Civ. P. 510.8.

Pursuant to the writ of possession, the officer executing the writ must post a written warning of at least 8 1/2 by 11 inches on the exterior of the front door of the premises notifying the tenant that the writ has been issued and will be served on or after a specific date and time stated not sooner than 24 hours after the warning is posted. Upon execution of the writ, the officer will deliver the premises to the landlord, instruct the tenant and all persons claiming under the tenant to leave, and if they fail to comply, physically remove them, and instruct the tenant to remove or allow the landlord to remove all personal property from the unit. Tex. Prop. Code § 24.0061(d).

Pursuant to the writ, the officer may also place, or have an authorized person place, the removed personal property outside the premises at a nearby location, but not blocking a public sidewalk, passageway, or street and not while it is raining, sleeting, or snowing, except as allowed in a portable, closed container, provided by a municipality without charge, into which removed personal property may be placed. Tex. Prop. Code § 24.0061(d), (d-1). The municipality may remove the container from the location 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. Tex. Prop. Code § 24.0061(d-1).

The writ of possession will authorize the officer, at the officer's discretion, to engage the services of a bonded or insured warehouseman to remove and store, subject to

applicable law, part or all of the property at no cost to the landlord or the officer executing the writ. Tex. Prop. Code § 24.0061(e). The officer may not require the landlord to store the property. Tex. Prop. Code § 24.0061(f).

A sheriff or constable may use reasonable force in executing a writ of possession. Tex. Prop. Code § 24.0061(h).

Appeal

Either party to a forcible detainer action may appeal the final judgment entered by the justice court. Tex. R. Civ. P. 510.9(a). The appeal is to the county court (or county court at law) of the county in which the judgment is rendered and is perfected by (1) filing an appeal bond or making a cash deposit with the justice court within five days after the judgment is signed, or (2) filing and obtaining approval of a Statement of Inability to Afford Payment of Court Costs within five days after the judgment is signed. Tex. R. Civ. P. 510.9 (a), (f). Within five days of filing a bond or making a cash deposit, an appellant must serve written notice of the appeal on all other parties. Tex. R. Civ. P. 510.9(d).

The justice court judge will set the amount of the bond or cash deposit to include the items enumerated in Rule 510.11. The bond or cash deposit must be payable to the appellee and must be conditioned on the appellant's prosecution of its appeal to effect and payment of any judgment and all costs rendered against it on appeal. Tex. R. Civ. P. 510.9(b). Rule 510.11 addresses items that may be recoverable as damages by the prevailing party on appeal, which include lost rentals and attorney's fees. Tex. R. Civ. P. 510.11.

County Court Proceedings following Appeal

When an appeal has been perfected, the justice court judge must stay all further proceedings on the judgment and must 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. Tex. R. Civ. P. 510.10(a). The county clerk must docket the case and must immediately notify the parties of the date of receipt of the transcript and the docket number of the case. The notice must advise the defendant that it must file a written answer in the county court within eight days if one was not filed in the justice court. Importantly, the case must be tried de novo in the county court. A trial de novo is a new trial in which the entire case is presented as if there had

been no previous trial. The trial, as well as any hearings and motions, is entitled to precedence in the county court. Tex. R. Civ. P. 510.10(b).

An eviction case appealed to county court is subject to trial at any time after the expiration of eight days after the date the transcript is filed in the county court. If the defendant has filed a written answer in the justice court, it must be taken to constitute the defendant's appearance and answer in the county court and may be amended as in other cases. If the defendant made no answer in writing in the justice court and 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 admitted and judgment by default may be entered accordingly. Tex. R. Civ. P. 510.12.

At the trial in the county court, in addition to the issue of possession and any unpaid rent claims within jurisdictional limits of the justice court, the parties are permitted to plead and prove their damages, if any, suffered for withholding or defending possession of the premises during the pendency of the appeal. Tex. R. Civ. P. 510.11; *Garza v. Chavarria*, 155 S.W.3d 252, 255, 258 (Tex. App. 2004, no pet.) (stating appellate jurisdiction of county court at law confined to the jurisdictional limits of the justice court); *Color Tile, Inc. v. Ramsey*, 905 S.W.2d 620, 622 (Tex. App. 1995, no writ) (same). Such damages under Rule 510.11 include loss of rentals during the pendency of the appeal and reasonable attorneys' fees as provided under Section 24.006 of the Texas Property Code. Tex. R. Civ. P. 510.11. Unlike unpaid rent claims, damages under Rule 510.11 are not limited to the jurisdiction cap of the justice court. *Volume Millwork, Inc. v. West Houston Airport Corp.*, 218 S.W.3d 722, 727-28 (Tex. App. 2006, pet. denied). Only the prevailing party is entitled to damages and cost, and if a bond has been posted, the prevailing party is entitled to recover against the sureties, where applicable. Tex. R. Civ. P. 510.11. Following judgment, a writ of possession or execution or both are issued by the county court, and the sheriff or constable executes same. Tex. R. Civ. P. 510.13.

A writ of possession shall not be suspended or superseded by appeal from the judgment in the county court, unless the premises are being used as the principal residence of a party. Significantly, for commercial evictions, the issue of possession is finally decided at the county court and is not subject to appeal to the court of appeals. See Tex. Prop. Code § 24.007; *Hong Kong Dev., Inc. v. Nguyen*, 229 S.W.3d 415, 431 (Tex. App. 2007, no pet.). An appeal on issues other than possession may be appealed, as provided by the Texas Property Code as follows:

A judgment of a county court may not under any circumstances be stayed pending appeal unless, within 10 days of the signing of the judgment, the appellant files a supersedeas bond in an amount set by the county court. In setting the supersedeas bond the county court shall provide protection for the appellee to the same extent as in any other appeal, taking into consideration the value of rents likely to accrue during appeal, damages which may occur as a result of the stay during appeal, and other damages or amounts as the court may deem appropriate.

Tex. Prop. Code § 24.007.

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Karen Hart is a business attorney with over 17 years of experience litigating commercial disputes. Karen counsels clients on real estate and landlord-tenant matters as well as various contract and business disputes. She is a tireless advocate for her clients, providing guidance on business legal matters, such as lease, purchase and sale, brokerage and property management disputes, specific performance claims, commercial evictions, lis pendens, lien and bond claims, lien priority disputes, promissory note claims, commercial foreclosures, bankruptcy claims, professional ethics and liability matters, bills of review, confidentiality, non-competition and non-solicitation agreements and related disputes and injunctive proceedings, and business tort claims, including tortious interference with contracts and business relationships, civil theft, fraud, and misappropriation of trade secret claims.

With a growing global client base, Karen also handles international dispute resolution, including international litigation, arbitration, and mediation. Karen uses creative pre-litigation negotiation and risk management techniques to keep her clients out of court. She also employs innovative asset investigation and preservation and judgment enforcement tactics, including domestications and international enforcement of judgments and arbitral awards.

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