

By: Carona

S.B. No. 889

A BILL TO BE ENTITLED

1 AN ACT
2 relating to assignment of rents to holders of certain security
3 interests in real property.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

5 SECTION 1. Section 9.109(d), Business & Commerce Code, is
6 amended to read as follows:

7 (d) This chapter does not apply to:

8 (1) a landlord's lien, other than an agricultural
9 lien;

10 (2) a lien, other than an agricultural lien, given by
11 statute or other rule of law for services or materials, but Section
12 9.333 applies with respect to priority of the lien;

13 (3) an assignment of a claim for wages, salary, or
14 other compensation of an employee;

15 (4) a sale of accounts, chattel paper, payment
16 intangibles, or promissory notes as part of a sale of the business
17 out of which they arose;

18 (5) an assignment of accounts, chattel paper, payment
19 intangibles, or promissory notes that is for the purpose of
20 collection only;

21 (6) an assignment of a right to payment under a
22 contract to an assignee that is also obligated to perform under the
23 contract;

24 (7) an assignment of a single account, payment

1 intangible, or promissory note to an assignee in full or partial
2 satisfaction of a preexisting indebtedness;

3 (8) a transfer of an interest in or an assignment of a
4 claim under a policy of insurance, other than an assignment by or to
5 a health care provider of a health-care-insurance receivable and
6 any subsequent assignment of the right to payment, but Sections
7 9.315 and 9.322 apply with respect to proceeds and priorities in
8 proceeds;

9 (9) an assignment of a right represented by a
10 judgment, other than a judgment taken on a right to payment that was
11 collateral;

12 (10) a right of recoupment or set-off, but:

13 (A) Section 9.340 applies with respect to the
14 effectiveness of rights of recoupment or set-off against deposit
15 accounts; and

16 (B) Section 9.404 applies with respect to
17 defenses or claims of an account debtor;

18 (11) the creation or transfer of an interest in or lien
19 on real property, including a lease or rents, as defined by Section
20 64.001, Property Code [~~thereunder~~], the interest of a vendor or
21 vendee in a contract for deed to purchase an interest in real
22 property, or the interest of an optionor or optionee in an option to
23 purchase an interest in real property, except to the extent that
24 provision is made for:

25 (A) liens on real property in Sections 9.203 and
26 9.308;

27 (B) fixtures in Section 9.334;

1 (C) fixture filings in Sections 9.501, 9.502,
2 9.512, 9.516, and 9.519; and

3 (D) security agreements covering personal and
4 real property in Section 9.604;

5 (12) an assignment of a claim arising in tort, other
6 than a commercial tort claim, but Sections 9.315 and 9.322 apply
7 with respect to proceeds and priorities in proceeds; or

8 (13) an assignment of a deposit account, other than a
9 nonnegotiable certificate of deposit, in a consumer transaction,
10 but Sections 9.315 and 9.322 apply with respect to proceeds and
11 priorities in proceeds.

12 SECTION 2. Subtitle B, Title 5, Property Code, is amended by
13 adding Chapter 64 to read as follows:

14 CHAPTER 64. ASSIGNMENT OF RENTS TO LIENHOLDER

15 SUBCHAPTER A. GENERAL PROVISIONS

16 Sec. 64.001. DEFINITIONS. In this chapter:

17 (1) "Assignee" means a person entitled to enforce an
18 assignment of rents.

19 (2) "Assignment of rents" means a transfer of an
20 interest in rents in connection with an obligation secured by real
21 property from which the rents arise. The term does not include a
22 contract for a charge authorized by Section 306.101, Finance Code,
23 or a true sale of rents.

24 (3) "Assignor" means an owner of real property who
25 makes an assignment of rents arising from the property or that
26 owner's successor in interest.

27 (4) "Cash proceeds" means proceeds that are money,

1 checks, deposit accounts, or similar legal tender.

2 (5) "Day" means a calendar day.

3 (6) "Deposit account" means a demand, time, savings,
4 passbook, escrow, or similar account maintained with a bank,
5 savings bank, savings and loan association, credit union, trust
6 company, or other person.

7 (7) "Document" means information that is inscribed on
8 a tangible medium or that is stored on an electronic or other medium
9 and is retrievable in perceivable form.

10 (8) "Proceeds" means personal property that is
11 received, collected, or distributed on account of an obligation to
12 pay rents.

13 (9) "Rents" means:

14 (A) consideration payable for the right to
15 possess or occupy, or for possessing or occupying, real property;

16 (B) consideration payable to an assignor under a
17 policy of rental interruption insurance covering real property;

18 (C) claims arising out of a default in the
19 payment of consideration payable for the right to possess or occupy
20 real property;

21 (D) consideration payable to terminate an
22 agreement to possess or occupy real property;

23 (E) consideration payable to an assignor for
24 payment or reimbursement of expenses incurred in owning, operating,
25 and maintaining, or constructing or installing improvements on,
26 real property; or

27 (F) any other consideration payable under an

1 agreement relating to the real property that constitutes rents
2 under a law of this state other than this chapter.

3 (10) "Secured obligation" means an obligation secured
4 by an assignment of rents.

5 (11) "Security instrument" means:

6 (A) a security instrument, as that term is
7 defined by Section 51.001; or

8 (B) an agreement containing an assignment of
9 rents.

10 (12) "Security interest" means an interest in property
11 that arises by agreement and secures an obligation.

12 (13) "Sign" includes to sign by an electronic
13 signature, as defined by Section 15.002.

14 (14) "Tenant" means a person who has an obligation to
15 pay for the right to possess or occupy, or for possessing or
16 occupying, real property.

17 Sec. 64.002. MANNER OF PROVIDING NOTICE. (a) A person may
18 provide a notice under this chapter:

19 (1) by transmitting the notice in the manner described
20 by Section 51.002(e);

21 (2) by depositing the notice with the United States
22 Postal Service or a commercially reasonable delivery service,
23 properly addressed to the intended recipient's address in
24 accordance with this section, with first class postage or other
25 cost of delivery paid; or

26 (3) by transmitting the notice to the intended
27 recipient by any means agreed to by the intended recipient.

1 (b) Except as agreed under Subsection (a)(3), notice to an
2 assignee must be sent to the assignee's address as provided in the
3 relevant security instrument or another document entered into for
4 the purposes of this section by the assignee and the person sending
5 the notice, unless a more recent address for notice has been given
6 in a manner provided by Subsection (a) by the assignee to the person
7 sending the notice or in a security instrument or other document
8 signed by the assignee.

9 (c) Except as agreed under Subsection (a)(3), notice to an
10 assignor must be sent to the assignor's address as provided in the
11 relevant security instrument or another document entered into for
12 the purposes of this section by the assignor and the person sending
13 the notice or an address for the assignor to which a notice of
14 default under Section 51.002 is properly sent, unless a more recent
15 address for notice has been given in a manner provided by Subsection
16 (a) by the assignor to the person sending the notice or in a
17 security instrument or other document signed by the assignor.

18 (d) Except as agreed under Subsection (a)(3), notice to a
19 tenant must be sent to:

20 (1) an address for notice to the tenant provided in a
21 signed document entered into by the tenant and the person providing
22 the notice, unless a more recent address for notice has been given
23 by the tenant in accordance with that document;

24 (2) if an address for notice described by Subdivision
25 (1) does not exist, the address provided in a written agreement
26 between the tenant and the assignor for notices to the tenant if the
27 person sending the notice has received a copy of that agreement or

1 has actual knowledge of the address for notice specified in that
2 agreement; or

3 (3) if an address for notice described by
4 Subdivision (1) or (2) does not exist, the tenant's address at the
5 real property covered by the security instrument.

6 (e) Notice provided in accordance with this section is
7 considered received on the earliest of:

8 (1) the date the notice is received by the person to
9 whom the notice is provided;

10 (2) the fifth day after the date the notice is provided
11 in accordance with Subsection(a)(2); or

12 (3) the date on which notice is considered provided in
13 accordance with an agreement made by the person to whom the notice
14 is provided for the purposes of this section.

15 [Sections 64.003-64.050 reserved for expansion]

16 SUBCHAPTER B. ASSIGNMENT OF RENTS

17 Sec. 64.051. SECURITY INSTRUMENT CREATES ASSIGNMENT OF
18 RENTS; ASSIGNMENT OF RENTS CREATES SECURITY INTEREST. (a) An
19 enforceable security instrument creates an assignment of rents
20 arising from real property securing an obligation under the
21 security instrument, unless the security instrument provides
22 otherwise or the security instrument is governed by Section
23 50(a)(6), (7), or (8), Article XVI, Texas Constitution.

24 (b) An assignment of rents creates a presently effective
25 security interest in all accrued and unaccrued rents arising from
26 the real property described in the document creating the
27 assignment, regardless of whether the document is in the form of an

1 absolute assignment, an absolute assignment conditioned on default
2 or another event, an assignment as additional security, or any
3 other form. The security interest in rents is separate and distinct
4 from any security interest held by the assignee in the real property
5 from which the rents arise.

6 (c) An assignment of rents does not reduce the secured
7 obligation except to the extent the assignee collects rents and
8 applies, or is obligated to apply, the collected rents to payment of
9 the secured obligation.

10 Sec. 64.052. RECORDATION AND PERFECTION OF SECURITY
11 INTEREST IN RENTS; PRIORITY OF INTERESTS IN RENTS. (a) A document
12 creating an assignment of rents may be recorded in the county in
13 which any part of the real property is located.

14 (b) On recordation of a document creating an assignment of
15 rents, the security interest in the rents is perfected. This
16 subsection prevails over a conflicting provision in the document
17 creating the assignment of rents or a law of this state other than
18 this chapter that prohibits or defers enforcement of the security
19 interest until the occurrence of a subsequent event, such as a
20 subsequent default of the assignor, the assignee's obtaining
21 possession of the real property, or the appointment of a receiver.

22 (c) Except as provided by Subsection (d), a perfected
23 security interest in rents has priority over the rights of a person
24 who, after the security interest is perfected, acquires:

25 (1) a lien on or other security interest in the rents
26 or the real property from which the rents arise; or

27 (2) an interest in the rents or the real property from

1 which the rents arise.

2 (d) An assignee of a perfected security interest in rents
3 has the same priority over the rights of a person described by
4 Subsection (c) with respect to future advances as the assignee has
5 with respect to the assignee's security interest in the real
6 property from which the rents arise.

7 Sec. 64.053. ENFORCEMENT OF SECURITY INTEREST IN RENTS
8 GENERALLY. (a) An assignee may enforce an assignment of rents
9 using one or more of the methods provided by Section 64.054 or
10 64.055 or another method sufficient to enforce the assignment under
11 a law of this state other than this chapter.

12 (b) On and after the date on which an assignee begins to
13 enforce an assignment of rents, the assignee is entitled to collect
14 all rents that:

- 15 (1) accrued before but remain unpaid on that date; and
16 (2) accrue on or after that date.

17 Sec. 64.054. ENFORCEMENT BY NOTICE TO ASSIGNOR. (a) After
18 default, or as otherwise agreed by the assignor, the assignee may
19 provide the assignor a notice demanding that the assignor pay the
20 assignee the proceeds of any rents that the assignee is entitled to
21 collect under Section 64.053.

22 (b) For the purposes of Section 64.053, the assignee begins
23 enforcement under this section on the date on which the assignee
24 provides notice to the assignor in accordance with Section 64.002.

25 (c) An assignee may not enforce an assignment of rents under
26 this section if, on the date the security instrument was signed and
27 the date of prospective enforcement, the real property constitutes

1 the assignor's homestead on which is located a one- to four-family
2 dwelling.

3 Sec. 64.055. ENFORCEMENT BY NOTICE TO TENANT. (a) After
4 default, or as otherwise agreed by the assignor, the assignee may
5 provide to a tenant of real property that is subject to an
6 assignment of rents a notice demanding that the tenant pay to the
7 assignee all unpaid accrued rents and all unaccrued rents as they
8 accrue. The assignee shall provide a copy of the notice to the
9 assignor in the manner provided by Section 64.002. The notice must
10 substantially comply with the form prescribed by Section 64.056 and
11 be signed by the assignee or the assignee's authorized agent or
12 representative.

13 (b) For the purposes of Section 64.053(b), the assignee
14 begins enforcement under this section on the date on which the
15 tenant receives a notice complying with Subsection (a).

16 (c) Subject to Subsection (d) and any other claim or defense
17 that a tenant has under a law of this state other than this chapter,
18 after a tenant receives a notice under Subsection (a):

19 (1) the tenant is obligated to pay to the assignee all
20 unpaid accrued rents and all unaccrued rents as they accrue, unless
21 the tenant has previously received a notice under this section from
22 another assignee of rents provided by that assignee in accordance
23 with this section and the other assignee has not canceled that
24 notice;

25 (2) except as otherwise provided by a document signed
26 by the tenant, the tenant is not obligated to pay to an assignee
27 rent that was prepaid to the assignor before the tenant received the

1 notice under Subsection (a);

2 (3) unless the tenant occupies the premises as the
3 tenant's primary residence, the tenant is not discharged from the
4 obligation to pay rents to the assignee if the tenant pays rents to
5 the assignor;

6 (4) the tenant's payment to the assignee of rents then
7 due satisfies the tenant's obligation under the tenant's agreement
8 with the assignor to the extent of the payment made; and

9 (5) the tenant's obligation to pay rents to the
10 assignee continues until the earliest date on which the tenant
11 receives:

12 (A) a court order directing the tenant to pay the
13 rents in a different manner;

14 (B) a signed notice that a perfected security
15 instrument that has priority over the assignee's security interest
16 has been foreclosed; or

17 (C) a signed document from the assignee canceling
18 the assignee's notice.

19 (d) Except as otherwise provided by a document signed by the
20 tenant, a tenant who has received a notice under Subsection (a) is
21 not in default for nonpayment of rents that accrue during the 30
22 days after the date the tenant receives the notice until the earlier
23 of:

24 (1) the 10th day after the date the next regularly
25 scheduled rental payment would be due; or

26 (2) the 30th day after the date the tenant receives the
27 notice.

1 (e) On receiving a notice from another creditor who has
2 priority under Section 64.052(c) that the creditor with priority
3 has conducted a foreclosure sale of the real property from which the
4 rents arise or is enforcing the creditor's interest in rents by
5 notice to the tenant, an assignee that has provided a notice to a
6 tenant under Subsection (a) shall immediately provide another
7 notice to the tenant canceling the earlier notice.

8 Sec. 64.056. FORM OF NOTICE TO TENANT. The following form
9 of notice, when properly completed, satisfies the requirements of
10 Section 64.055(a):

11 NOTICE TO PAY RENTS TO PERSON OTHER THAN LANDLORD

12 Tenant: [Name of tenant]

13 Property Occupied by Tenant (the "Premises"): [Address]

14 Landlord: [Name of landlord]

15 Assignee: [Name of assignee]

16 Address of Assignee and Telephone Number of Contact Person:

17 [Address of assignee] [Telephone number of person to contact]

18 1. Assignee is entitled to collect rents on the Premises
19 under [Name of Document] (the "Assignment of Rents") dated [Date of
20 Assignment of Rents], and recorded at [Recording Data] of [Name of
21 County] County, Texas. You may obtain additional information about
22 the Assignment of Rents and the Assignee's right to enforce it at
23 the address of the Assignee.

24 2. A default exists under the Assignment of Rents or related
25 documents between the Landlord and the Assignee. The Assignee is
26 entitled to collect rents from the Premises.

27 3. This notice affects your rights and obligations under the

1 agreement under which you occupy the Premises (your "Lease
2 Agreement"). Unless you have otherwise agreed in a document signed
3 by you, if your next scheduled rental payment is due within 30 days
4 after you receive this notice, you will not be in default under your
5 Lease Agreement for nonpayment of that rental payment until the
6 10th day after the due date of that payment or the 30th day
7 following the date you receive this notice, whichever occurs first.

8 4. You may consult a lawyer at your expense concerning your
9 rights and obligations under your Lease Agreement and the effect of
10 this notice.

11 5. You must pay to the Assignee at the Address of the
12 Assignee all rents under your Lease Agreement that are due and
13 payable on the date you receive this notice and all rents accruing
14 under your Lease Agreement after you receive this notice.

15 6. If you pay rents to the Assignee after receiving this
16 notice, the payment will satisfy your rental obligation to the
17 extent of that payment.

18 7. If you pay any rents to the Landlord after receiving this
19 notice, your payment to the Landlord will not discharge your rental
20 obligation, and the Assignee may hold you liable for that rental
21 obligation notwithstanding your payment to the Landlord, unless you
22 occupy the Premises as your primary residence.

23 8. If you have previously received a notice from another
24 person who also holds an assignment of the rents due under your
25 Lease Agreement, you should continue paying your rents to the
26 person that sent that notice until that person cancels that notice.
27 Once that notice is canceled, you must begin paying rents to the

1 Assignee in accordance with this notice.

2 Name of assignee: _____

3 By: [Officer/authorized agent of assignee]

4 Sec. 64.057. EFFECT OF ENFORCEMENT. The enforcement of an
5 assignment of rents by a method provided by Section 64.054 or
6 64.055, the application of proceeds by the assignee under Section
7 64.059 after enforcement, the payment of expenses under Section
8 64.058, or an action under Section 64.060 does not:

9 (1) make the assignee a mortgagee in possession of the
10 real property from which the rents arise;

11 (2) make the assignee an agent of the assignor;

12 (3) constitute an election of remedies that precludes
13 a later action to enforce the secured obligation;

14 (4) make the secured obligation unenforceable;

15 (5) limit any right available to the assignee with
16 respect to the secured obligation; or

17 (6) bar a deficiency judgment under any law of this
18 state governing or relating to deficiency judgments following the
19 enforcement of any encumbrance, lien, or security interest.

20 Sec. 64.058. APPLICATION OF PROCEEDS GENERALLY. Unless
21 otherwise agreed by the assignor, an assignee who collects rents
22 under this chapter or collects on a judgment in an action under
23 Section 64.060 shall apply the sums collected in the following
24 order to:

25 (1) reimbursement of the assignee's expenses of
26 enforcing the assignee's assignment of rents, including, to the
27 extent provided for by agreement by the assignor and not prohibited

1 by a law of this state other than this chapter, reasonable
2 attorney's fees and costs incurred by the assignee;

3 (2) reimbursement of any expenses incurred by the
4 assignee to protect or maintain the real property that is subject to
5 the assignment of rents if the assignee elects or is required to
6 apply the proceeds to those expenses under Section 64.059;

7 (3) payment of the secured obligation;

8 (4) payment of any obligation secured by a subordinate
9 security interest or other lien on the rents if, before
10 distribution of the proceeds, the assignee receives a signed notice
11 from the holder of the interest or lien demanding payment of the
12 proceeds; and

13 (5) payment of any excess proceeds to the assignor.

14 Sec. 64.059. APPLICATION OF PROCEEDS TO EXPENSES OF
15 PROTECTING REAL PROPERTY; CLAIMS AND DEFENSES OF TENANT. (a)
16 Unless otherwise agreed by the assignee, an assignee that collects
17 rents following enforcement under Section 64.054 or 64.055 is not
18 obligated to apply the collected rents to the payment of expenses of
19 protecting or maintaining the real property subject to an
20 assignment of rents.

21 (b) Unless otherwise agreed by a tenant, the right of the
22 assignee to collect rents from the tenant is subject to the terms of
23 any agreement between the assignor and tenant and any claim or
24 defense of the tenant arising from the assignor's nonperformance of
25 that agreement.

26 Sec. 64.060. TURNOVER OF RENTS; LIABILITY OF ASSIGNOR. (a)
27 If an assignor collects rents that the assignee is entitled to

1 collect under this chapter, the assignor shall turn over the
2 proceeds to the assignee not later than the 30th day after the date
3 the assignor receives notice from the assignee under Section 64.054
4 or within another period prescribed by a security instrument or
5 other document signed by the assignor and approved by the assignee,
6 less any amount representing payment of expenses authorized by a
7 security instrument or other document signed by the assignee.

8 (b) In addition to any other remedy available to the
9 assignee under a law of this state other than this chapter, if an
10 assignor does not turn over proceeds to the assignee as required by
11 Subsection (a), the assignee may recover from the assignor in a
12 civil action:

13 (1) the proceeds, or an amount equal to the proceeds,
14 that the assignor was obligated to turn over under Subsection (a);
15 and

16 (2) reasonable attorney's fees and costs incurred by
17 the assignee to the extent provided for by an agreement between the
18 assignor and assignee and not prohibited by a law of this state
19 other than this chapter.

20 (c) The assignee may maintain an action under Subsection (b)
21 with or without taking action to foreclose any security interest
22 that the assignee has in the real property.

23 (d) Unless otherwise agreed by an assignee that has priority
24 under Section 64.052, a subordinate creditor that has enforced the
25 subordinate creditor's interest under Section 64.054 or 64.055
26 before the priority assignee enforces the priority assignee's
27 interests in rents is not obligated to turn over any proceeds that

1 the subordinate creditor collects before the subordinate creditor
2 receives a signed notice from the priority assignee informing the
3 subordinate creditor that the priority assignee is enforcing the
4 priority assignee's interest in rents. The subordinate creditor
5 shall turn over to a priority assignee any proceeds that the
6 subordinate creditor collects after the subordinate creditor
7 receives the notice from the priority assignee that the priority
8 assignee is enforcing the priority assignee's interest in rents not
9 later than the 30th day after the date the subordinate creditor
10 receives the notice or as otherwise agreed between the priority
11 assignee and the subordinate creditor. Any proceeds subsequently
12 collected by the subordinate creditor shall be turned over to the
13 priority assignee not later than the 10th day after the date the
14 proceeds are collected or as otherwise agreed between the priority
15 assignee and the subordinate creditor.

16 Sec. 64.061. ATTACHMENT, PERFECTION, AND PRIORITY OF
17 ASSIGNEE'S SECURITY INTEREST IN PROCEEDS. (a) An assignee's
18 security interest in rents attaches to identifiable proceeds.

19 (b) If an assignee's security interest in rents is
20 perfected, the assignee's security interest in identifiable cash
21 proceeds is perfected.

22 (c) Except as provided by Subsection (b), the provisions of
23 Chapter 9, Business & Commerce Code, or the comparable Uniform
24 Commercial Code provisions of another applicable jurisdiction,
25 determine:

26 (1) whether an assignee's security interest in
27 proceeds is perfected;

1 (2) the effect of perfection or nonperfection;
2 (3) the priority of an interest in proceeds; and
3 (4) the law governing perfection, the effect of
4 perfection or nonperfection, and the priority of an interest in
5 proceeds.

6 (d) For purposes of this chapter, cash proceeds are
7 identifiable if they are maintained in a segregated deposit account
8 or, if commingled with other funds, to the extent they can be
9 identified by a method of tracing, including application of
10 equitable principles, that is permitted under a law of this state
11 other than this chapter with respect to commingled funds.

12 Sec. 64.062. PRIORITY SUBJECT TO SUBORDINATION. This
13 chapter does not preclude subordination by agreement by a person
14 entitled to priority.

15 SECTION 3. (a) Except as otherwise provided by this
16 section, Chapter 64, Property Code, as added by this Act, governs
17 the enforcement of an assignment of rents, the perfection and
18 priority of a security interest in rents, and the attachment and
19 perfection of a security interest in proceeds regardless of whether
20 the document creating the assignment of rents was signed and
21 delivered before the effective date of this Act.

22 (b) Chapter 64, Property Code, as added by this Act, does
23 not affect an action or other proceeding commenced before the
24 effective date of this Act.

25 (c) Section 64.051(a), Property Code, as added by this Act,
26 applies only to a security instrument signed and delivered on or
27 after the effective date of this Act. A security instrument signed

1 and delivered before the effective date of this Act is governed by
2 the law that applied to the instrument immediately before that
3 date, and the former law is continued in effect for that purpose.

4 (d) Chapter 64, Property Code, as added by this Act, does
5 not affect:

6 (1) the enforceability of an assignee's security
7 interest in rents or proceeds if, immediately before the effective
8 date of this Act, that security interest was enforceable;

9 (2) the perfection of an assignee's security interest
10 in rents or proceeds if, immediately before the effective date of
11 this Act, that security interest was perfected; or

12 (3) the priority of an assignee's security interest in
13 rents or proceeds with respect to the interest of another person if,
14 immediately before the effective date of this Act, the interest of
15 the other person was enforceable and perfected and that priority
16 was established.

17 SECTION 4. This Act takes effect immediately if it receives
18 a vote of two-thirds of all the members elected to each house, as
19 provided by Section 39, Article III, Texas Constitution. If this
20 Act does not receive the vote necessary for immediate effect, this
21 Act takes effect September 1, 2011.