

BILL ANALYSIS

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S.B. 848
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AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

Lenders secure their interest in a borrower's collateral so that in the event of a default, the lender has a legal right to the collateral. For years, the standard practice in a commercial lease transaction was for a lender to obtain a security interest in both the property being purchased and the rent or other proceeds that the property generated. However, a 1981 Texas Supreme Court ruling complicated this process by holding that a lender's security interest is not established, or perfected, until the lender takes some proactive action to collect the proceeds from the property following a default by the property owner. As a result, the lender's security interest could potentially be subordinate to another party's security interest if that other party is able to establish its lien before the lender.

In 2011, the Texas Legislature passed the Assignment of Rents Act, S.B. 889, which clarified and made conforming changes to the law on perfecting a lien on proceeds from property. However, the Assignment of Rents Act requires clarification regarding the law's applicability to mineral interests and other technical changes conforming the law to the Property Code.

S.B. 848 clarifies that the Assignment of Rents Act does not apply to mineral interests in real property. S.B. 848 also makes a number of technical corrections to the existing law so that it is uniform and consistent.

As proposed, S.B. 848 amends current law relating to assignment of rents to holders of certain security interests in real property.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Sections 64.001(1), (3), (4), and (9), Property Code, as added by Chapter 636 (S.B. 889), Acts of the 82nd Legislature, Regular Session, 2011, to redefine "assignee," "assignor," "cash proceeds," and "rents."

SECTION 2. Amends Section 64.002, Property Code, as added by Chapter 636 (S.B. 889), Acts of the 82nd Legislature, Regular Session, 2011, as follows:

Sec. 64.002. New heading: MANNER OF GIVING NOTICE. (a) Authorizes a person to give notice, rather than provide a notice, under this chapter only in a certain manner.

(b) Provides that the following rules determine the address for notices under Subsection (a):

(1) the address for notices to an assignee is the address of the assignee agreed in the security instrument or other document between the parties as the address for notices to the assignee, unless a more recent address for notice has been given by the assignee to the person giving the notice in accordance with Subsection (a) or as agreed in a security instrument or

other document signed by the assignee, rather than except as agreed under Subsection (a)(3) (relating to the authorization of a person to give notice by transmitting the notice to the intended recipient by any means agreed to by the intended recipient), notice to an assignee is required to be sent to the assignee's address as provided in the relevant security instrument or another document entered into for the purpose of this section by the assignee and the person sending the notice, unless a more recent address for notice has been given in a manner provided by Subsection (a) by the assignee to the person sending the notice or in a security instrument or other document signed by the assignee;

(2) the address for notices to an assignor is the address of the assignor agreed in the security instrument or other document between the parties as the address for notices to the assignor or as provided in Section 51.002 (Sale of Real Property Under Contract Lien), unless a more recent address for notices has been given by the assignor to the person giving the notice in accordance with Subsection (a) or as agreed in a security instrument or other document signed by the assignor, rather than except as agreed under Subsection (a)(3), notice to an assignor must be sent to the assignor's address as provided in the relevant security instrument or another document entered into for the purposes of this section by the assignor and the person sending the notice or an address for the assignor to which a notice of default under Section 51.002 is properly sent, unless a more recent address for notice has been given in a manner provided by Subsection (a) by the assignor to the person sending the notice or in a security instrument or other document signed by the assignor; and

(3) for notices to a tenant, rather than requires notice to a tenant, except as agreed under Subsection (a)(3), to be:

(A) if there is an address for notices to the tenant in a signed document between the tenant and the person giving the notice, the person giving the notice is required to use that address unless a more recent address for notices has been given by the tenant in accordance with that document;

(B) if an address for notice described by Paragraph (A) does not exist, but the tenant's agreement with the assignor has an address for notices to the tenant and the person giving the notice has received a copy of that document or has actual knowledge of the address for notices specified in that document, the person giving the notice is required to use that address; or

(C) if an address for notices described by Paragraph (A) or (B) does not exist, the person giving the notice is required to use the tenant's address at the real property covered by the security instrument.

Makes conforming and nonsubstantive changes.

(c) Redesignates existing Subsection (e) as Subsection (c). Provides that notice given in accordance with this chapter, rather than section, is considered received on the earliest of:

(1) the date the notice is received by the person to whom the notice is given;

(2) the fifth day after the date the notice is given in accordance with Subsection (a)(2) (relating to the authorization of a person to give notice

by depositing the notice under certain conditions with the United States Postal Service or a commercially reasonable delivery service); or

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

Makes nonsubstantive changes.

(d) Requires that a notice under this chapter be a document.

SECTION 3. Amends Sections 64.051(a) and (b), Property Code, as follows:

(a) Provides that an enforceable security instrument creates an assignment of rents arising from real property described in that security instrument, rather than arising from real property securing an obligation under the security instrument, unless the security instrument provides otherwise or the security instrument is governed by Section 50(a)(6) (relating to the protection of the homestead from forced sale for the payments of all debts except for certain extensions of credit), (7) (relating to the protection of the homestead from forced sale for the payments of all debts except a reverse mortgage), or (8) (relating to the protection of the homestead from forced sale for the payments of all debts except for the conversion and refinance of a personal property lien under certain conditions), Article XVI (General Provisions), Texas Constitution.

(b) Provides that an assignment of rents creates a presently effective security interest in all accrued and unaccrued rents arising from the real property described in the security instrument creating the assignment, regardless of whether the security instrument is in the form of an absolute assignment, an absolute assignment conditioned on default or other event, an assignment as additional security, or any other form, rather than providing that an assignment of rents creates a presently effective security interest in all accrued and unaccrued rents arising from the real property described in the document creating the assignment, regardless of whether the document is in the form of an absolute assignment, an absolute assignment conditioned on default or another event, an assignment as additional security, or any other form.

SECTION 4. Amends Sections 64.052(a), (b), and (d), Property Code, as follows:

(a) Authorizes a security instrument, rather than document, creating an assignment of rents to be recorded in the county in which any part of the real property is located in accordance with this code. Makes a conforming change.

(b) Provides that on recordation of a security instrument creating an assignment of rents, the security interest in the rents is perfected. Provides that this subsection prevails over a conflicting provision in the security instrument creating the assignment of rents or a law of this state other than this chapter that prohibits or defers enforcement of the security interest until the occurrence of a subsequent event, rather than such as, including a subsequent default of the assignor, the assignee's obtaining possession of the real property, or the appointment of a receiver. Makes conforming changes.

(d) Provides that an assignee with, rather than of, a perfected security interest in rents has the same priority over the rights of a person described by Subsection (c) with respect to future advances as the assignee has with respect to the assignee's security interest in the real property from which the rents arise.

SECTION 5. Amends Section 64.053, Property Code, as follows:

Sec. 64.053. ENFORCEMENT OF SECURITY INTEREST IN RENTS GENERALLY.

(a) Authorizes an assignee to enforce an assignment of rents using one or more of the methods provided by Section 64.054 or 64.055 or any other method sufficient to enforce an assignment of rents under a law of this state other than this chapter.

(b) Entitles the assignee, on and after the date on which an assignee begins to enforce an assignment of rents to collect all rents that have accrued, rather than accrued before, but remain unpaid on that date and accrue on or after that date. Makes nonsubstantive changes.

SECTION 6. Amends Sections 64.054(a) and (b), Property Code, as added by Chapter 636 (S.B. 889), Acts of the 82nd Legislature, Regular Session, 2011, to make conforming changes.

SECTION 7. Amends Sections 64.055(a), (c), (d), and (e), Property Code, as follows:

(a) Authorizes the assignee, after default, or as otherwise agreed by the assignor, to give a tenant of real property that is subject to an assignment of rents a notice demanding that the tenant pay to the assignee all unpaid accrued rents and all unaccrued rents as they accrue. Requires the assignee to give a copy of the notice to the assignor in accordance with Section 64.002, rather than in the manner provided by Section 64.002.

(c) Provides that subject to Subsection (d) and any other claim or defense that a tenant has under a law of this state other than this chapter, after a tenant receives a notice under Subsection (a), the tenant has certain obligations, including the tenant is obligated to pay to the assignee all unpaid accrued rents and all unaccrued rents as they accrue, unless the tenant has previously received a notice under this section from another assignee of rents given, rather than from another assignee of rents provided, by that assignee in accordance with this section and the other assignee has not canceled that notice; and except as otherwise agreed in, rather than except as otherwise provided by, a document signed by the tenant, the tenant is not obligated to pay to an assignee rent that was prepaid to the assignor before the tenant received the notice under Subsection (a).

(d) Provides that a tenant who has received a notice under Subsection (a), except as otherwise agreed in a document signed by the tenant, rather than except as otherwise provided by a document signed by the tenant, is not in default for nonpayment of rents that accrue during the 30 days after the date the tenant receives the notice until the earlier of certain dates.

(e) Requires an assignee that has given, rather than has provided, a notice to a tenant under Subsection (a), on receiving a notice from another creditor who has priority under Section 64.052(c) (relating to a perfected security interest in rents as priority over the rights of a person who, after the security interest is perfected, acquires a certain lien or interest) that the creditor with priority has conducted a foreclosure sale of the real property from which the rents arise or is enforcing the creditor's interest in rents by notice to the tenant, to immediately give, rather than provide, another notice to the tenant canceling the earlier notice. Makes conforming and nonsubstantive changes.

SECTION 8. Amends Section 64.058, Property Code, as follows:

Sec. 64.058. APPLICATION OF PROCEEDS GENERALLY. Provides that an assignee who collects rents under this chapter or collects on a judgment in an action under Section 64.060, unless otherwise agreed, rather than unless otherwise agreed by the assignor, to apply the sums collected in the following order to reimbursement of any expenses incurred by the assignee to protect or maintain the real property that is subject to the assignment of rents. Deletes existing text providing that reimbursement of any expenses incurred by the assignee to protect or maintain the real property that is subject to the assignment of rents if the assignee elects or is required to apply the proceeds to those expenses under Section 64.059.

SECTION 9. Amends Section 64.059(b), Property Code, to provide that the right of the assignee to collect rents from the tenant, unless otherwise agreed by a tenant, is subject to the terms of any agreement between the assignor and tenant or, rather than and, any claim or defense of the tenant arising from the assignor's nonperformance of that agreement.

SECTION 10. Amends Sections 64.060(a) and (d), Property Code, as follows:

(a) Requires the assignor, if an assignor collects rents that the assignee is entitled to collect under this chapter, to turn over the proceeds to the assignee not later than the 30th day after the date the assignor receives notice from the assignee under Section 64.054 or within such other period agreed by the assignor and assignee in a security instrument or other document, less any amount representing payment of expenses agreed in that security instrument or other document.

Deletes existing text requiring the assignor, if an assignor collects rents that the assignee is entitled to collect under this chapter, to turn over the proceeds to the assignee not later than the 30th day after the date the assignor receives notice from the assignee under Section 64.054 or within another period prescribed by a security instrument or other document signed by the assignor and approved by the assignee, less any amount representing payment of expenses authorized by a security instrument or other document signed by the assignee.

(d) Provides that, unless otherwise agreed, an assignee who has, if an assignee who has a security interest in rents that is subordinate to the security interest of another assignee under Section 64.052 enforces the subordinate assignee's interest under Section 64.054 or 64.055 before the assignee with priority enforces the interests in rents of the assignee with priority, the subordinate assignee is not obligated to turn over any proceeds that the subordinate assignee collects before the subordinate assignee receives a signed notice from the assignee with priority informing the subordinate assignee that the assignee with priority is enforcing the interest in rents of the assignee with priority. Requires the subordinate assignee to turn over to the assignee with priority any proceeds that the subordinate assignee collects after the subordinate assignee receives the notice from the assignee with priority that the assignee with priority is enforcing the interest in rents of the assignee with priority not later than the 30th day after the date the subordinate assignee receives the notice or as otherwise agreed between the assignee with priority and the subordinate assignee. Requires any proceeds subsequently collected by the subordinate assignee to be turned over to the assignee with priority not later than the 10th day after the date the proceeds are collected or as otherwise agreed between the assignee with priority and the subordinate assignee.

Deletes existing text providing that, unless otherwise agreed by an assignee that has priority under Section 64.052, a subordinate creditor that has enforced the subordinate creditor's interest under Section 64.054 or 64.055 before the priority assignee enforces the priority assignee's interests in rents is not obligated to turn over any proceeds that the subordinate creditor collects before the subordinate creditor receives a signed notice from the priority assignee informing the subordinate creditor that the priority assignee is enforcing the priority assignee's interest in rents. Deletes existing text requiring the subordinate creditor to turn over to a priority assignee any proceeds that the subordinate creditor collects after the subordinate creditor receives the notice from the priority assignee that the priority assignee is enforcing the priority assignee's interest in rents not later than the 30th day after the date the subordinate creditor receives the notice or as otherwise agreed between the priority assignee and the subordinate creditor. Deletes existing text requiring any proceeds subsequently collected by the subordinate creditor to be turned over to the priority assignee not later than the 10th day after the date the proceeds are collected or as otherwise agreed between the priority assignee and the subordinate creditor.

SECTION 11. Provides that the legislature finds that Section 64.051(c), Property Code, as added by Chapter 636 (S.B. 889), Acts of the 82nd Legislature, Regular Session, 2011, was intended by the 82nd Legislature to eliminate confusion arising from language in the Texas Supreme Court's decision in *Taylor v. Brennan*, 621 S.W.2d 592 (Tex. 1981), to the effect that an absolute assignment of rents is a pro tanto payment of a secured obligation. Provides that in accordance with Section 64.051(c), Property Code, as added by Chapter 636 (S.B. 889), Acts of the 82nd Legislature, Regular Session, 2011, unless the parties expressly agree otherwise, a secured

obligation is reduced only if and to the extent that the assignee collects rents and applies the rents to the obligation. Provides that simply taking an assignment of rents does not reduce the secured obligation.

SECTION 12. (a) Provides that Chapter 64, Property, as added by Chapter 636 (S.B. 889), Acts of the 82nd Legislature, Regular Session, 2011, and amended by this Act, except as otherwise provided by this section, governs the enforcement of an assignment of rents, the perfection and priority of a security interest in rents, and the attachment and perfection of a security interest in proceeds regardless of whether the document creating the assignment of rents was signed and delivered before the effective date of this Act.

(b) Provides that Chapter 64, Property Code, as added by Chapter 636 (S.B. 889), Acts of the 82nd Legislature, Regular Session, 2011, and amended by this Act, does not affect an action or other proceeding commenced before the effective date of this Act.

(c) Provides that Section 64.051(a), Property Code, as added by Chapter 636 (S.B. 889), Acts of the 82nd Legislature, Regular Session, 2011, and amended by this Act, applies only to a security instrument signed and delivered on or after June 17, 2011. Provides that a security instrument signed and delivered before that date is governed by the law that applied to the instrument immediately before that date, and the former law is continued in effect for that purpose.

(d) Provides that Chapter 64, Property Code, as added by Chapter 636 (S.B. 889), Acts of the 82nd Legislature, Regular Session, 2011, and amended by this Act, does not affect:

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

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

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

SECTION 13. Effective date: upon passage, or September 1, 2013.