

By: Carona
(S. Davis of Harris)

S.B. No. 848

A BILL TO BE ENTITLED

AN ACT

relating to assignment of rents to holders of certain security interests in real property.

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

SECTION 1. Subdivisions (1), (3), (4), and (9), Section 64.001, Property Code, as added by Chapter 636 (S.B. 889), Acts of the 82nd Legislature, Regular Session, 2011, are amended to read as follows:

(1) "Assignee" means a person entitled to enforce a security instrument [~~an assignment of rents~~].

(3) "Assignor" means a person [~~an owner of real property~~] who makes a security instrument that creates an assignment of rents arising from real [~~the~~] property or that person's [~~owner's~~] successor in interest with respect to the real property.

(4) "Cash proceeds" means proceeds that are money, checks, deposit accounts, or the like [~~similar legal tender~~].

(9) "Rents" means [~~+~~]
[~~(A)~~] consideration payable for the right to possess or occupy, or for possessing or occupying, real property,
[~~+~~

[~~(B)~~] consideration payable to an assignor under a policy of rental interruption insurance covering real property,
[~~+~~

1 [~~(C)~~] claims arising out of a default in the
2 payment of consideration payable for the right to possess or occupy
3 real property, +

4 [~~(D)~~] consideration payable to terminate an
5 agreement to possess or occupy real property, +

6 [~~(E)~~] consideration payable to an assignor for
7 payment or reimbursement of expenses incurred in owning, operating,
8 and maintaining, or constructing or installing improvements on,
9 real property, + or

10 [~~(F)~~] any other consideration payable under an
11 agreement relating to the real property that constitutes rents
12 under a law of this state other than this chapter. The term does not
13 include consideration payable under an oil and gas lease, mineral
14 lease, or other conveyance of a mineral estate.

15 SECTION 2. Section 64.002, Property Code, as added by
16 Chapter 636 (S.B. 889), Acts of the 82nd Legislature, Regular
17 Session, 2011, is amended to read as follows:

18 Sec. 64.002. MANNER OF GIVING [~~PROVIDING~~] NOTICE. (a) A
19 person may give [~~provide a~~] notice under this chapter:

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

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

27 (3) by transmitting the notice to the intended

1 recipient by any means agreed to by the intended recipient.

2 (b) The following rules determine the address for notices
3 under Subsection (a):

4 (1) the address for notices [~~Except as agreed under~~
5 ~~Subsection (a)(3), notice~~] to an assignee is [~~must be sent to~~] the
6 [~~assignee's~~] address of the assignee agreed [~~as provided~~] in the
7 [~~relevant~~] security instrument or other [~~another~~] document between
8 the parties as the address for notices to [~~entered into for the~~
9 ~~purposes of this section by~~] the assignee [~~and the person sending~~
10 ~~the notice~~], unless a more recent address for notices [~~notice~~] has
11 been given [~~in a manner provided by Subsection (a)~~] by the assignee
12 to the person giving [~~sending~~] the notice in accordance with
13 Subsection (a) or as agreed in a security instrument or other
14 document signed by the assignee; [~~—~~]

15 (2) the address for notices [~~(c) Except as agreed~~
16 ~~under Subsection (a)(3), notice~~] to an assignor is [~~must be sent to~~]
17 the [~~assignor's~~] address of the assignor agreed [~~as provided~~] in
18 the [~~relevant~~] security instrument or other [~~another~~] document
19 between the parties as the address for notices to [~~entered into for~~
20 ~~the purposes of this section by~~] the assignor or as provided in [~~and~~
21 ~~the person sending the notice or an address for the assignor to~~
22 ~~which a notice of default under~~] Section 51.002 [~~is properly sent~~],
23 unless a more recent address for notices [~~notice~~] has been given [~~in~~
24 ~~a manner provided by Subsection (a)~~] by the assignor to the person
25 giving [~~sending~~] the notice in accordance with Subsection (a) or as
26 agreed in a security instrument or other document signed by the
27 assignor; and [~~—~~]

1 (3) for notices [~~(d) Except as agreed under~~
2 ~~Subsection (a)(3), notice]~~ to a tenant [~~must be sent to~~]:

3 (A) if there is [~~(1)]~~ an address for notices
4 [~~notice]~~ to the tenant [~~provided]~~ in a signed document between
5 [~~entered into by]~~ the tenant and the person giving [~~providing]~~ the
6 notice, the person giving the notice shall use that address unless a
7 more recent address for notices [~~notice]~~ has been given by the
8 tenant in accordance with that document;

9 (B) [~~(2)]~~ if an address for notices [~~notice]~~
10 described by Paragraph (A) [~~Subdivision (1)]~~ does not exist, but
11 the tenant's [~~the address provided in a written]~~ agreement with
12 [~~between the tenant and]~~ the assignor has an address for notices to
13 the tenant and [~~if]~~ the person giving [~~sending]~~ the notice has
14 received a copy of that document [~~agreement]~~ or has actual
15 knowledge of the address for notices [~~notice]~~ specified in that
16 document, the person giving the notice shall use that address
17 [~~agreement]~~; or

18 (C) [~~(3)]~~ if an address for notices [~~notice]~~
19 described by Paragraphs (A) and (B) [~~Subdivision (1) or (2)]~~ does
20 not exist, the person giving the notice shall use the tenant's
21 address at the real property covered by the security instrument.

22 (c) [~~(e)]~~ Notice given [~~provided]~~ in accordance with this
23 chapter [~~section]~~ is deemed [~~considered]~~ received on the earliest
24 of:

25 (1) the date the notice is received by the person to
26 whom the notice is given [~~provided]~~;

27 (2) the fifth day after the date the notice is given

1 ~~[provided]~~ in accordance with Subsection (a)(2); or

2 (3) the date on which notice is deemed received
3 ~~[considered provided]~~ in accordance with an agreement made by the
4 person to whom the notice is given ~~[provided for the purposes of~~
5 ~~this section]~~.

6 (d) A notice under this chapter must be a document.

7 SECTION 3. Subsections (a) and (b), Section 64.051,
8 Property Code, are amended to read as follows:

9 (a) An enforceable security instrument creates an
10 assignment of rents arising from real property described in that
11 ~~[securing an obligation under the]~~ security instrument, unless the
12 security instrument provides otherwise or the security instrument
13 is governed by Section 50(a)(6), (7), or (8), Article XVI, Texas
14 Constitution.

15 (b) An assignment of rents creates a presently effective
16 security interest in all accrued and unaccrued rents arising from
17 the real property described in the security instrument ~~[document]~~
18 creating the assignment, regardless of whether the security
19 instrument ~~[document]~~ is in the form of an absolute assignment, an
20 absolute assignment conditioned on default or other ~~[another]~~
21 event, an assignment as additional security, or any other
22 form. The security interest in rents is separate and distinct from
23 any security interest held by the assignee in the real property from
24 which the rents arise.

25 SECTION 4. Subsections (a), (b), and (d), Section 64.052,
26 Property Code, are amended to read as follows:

27 (a) A security instrument ~~[document]~~ creating an assignment

1 of rents may be recorded in the county in which any part of the real
2 property is located in accordance with this code.

3 (b) On recordation of a security instrument [~~document~~]
4 creating an assignment of rents, the security interest in the rents
5 is perfected. This subsection prevails over a conflicting
6 provision in the security instrument [~~document~~] creating the
7 assignment of rents or a law of this state other than this chapter
8 that prohibits or defers enforcement of the security interest until
9 the occurrence of a subsequent event, including [~~such as~~] a
10 subsequent default of the assignor, the assignee's obtaining
11 possession of the real property, or the appointment of a receiver.

12 (d) An assignee with [~~of~~] a perfected security interest in
13 rents has the same priority over the rights of a person described by
14 Subsection (c) with respect to future advances as the assignee has
15 with respect to the assignee's security interest in the real
16 property from which the rents arise.

17 SECTION 5. Section 64.053, Property Code, is amended to
18 read as follows:

19 Sec. 64.053. ENFORCEMENT OF SECURITY INTEREST IN RENTS
20 GENERALLY. (a) An assignee may enforce an assignment of rents
21 using one or more of the methods provided by Section 64.054 or
22 64.055 or any other [~~another~~] method sufficient to enforce an [~~the~~]
23 assignment of rents under a law of this state other than this
24 chapter.

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

1 (1) have accrued [~~before~~] but remain unpaid on that
2 date; and

3 (2) accrue on or after that date.

4 SECTION 6. Subsections (a) and (b), Section 64.054,
5 Property Code, as added by Chapter 636 (S.B. 889), Acts of the 82nd
6 Legislature, Regular Session, 2011, are amended to read as follows:

7 (a) After default, or as otherwise agreed by the assignor,
8 the assignee may give [~~provide~~] the assignor a notice demanding
9 that the assignor pay the assignee the proceeds of any rents that
10 the assignee is entitled to collect under Section 64.053.

11 (b) For the purposes of Section 64.053, the assignee begins
12 enforcement under this section on the date on which the assignee
13 gives [~~provides~~] notice to the assignor in accordance with Section
14 64.002.

15 SECTION 7. Subsections (a), (c), (d), and (e), Section
16 64.055, Property Code, are amended to read as follows:

17 (a) After default, or as otherwise agreed by the assignor,
18 the assignee may give [~~provide~~] to a tenant of real property that is
19 subject to an assignment of rents a notice demanding that the tenant
20 pay to the assignee all unpaid accrued rents and all unaccrued rents
21 as they accrue. The assignee shall give [~~provide~~] a copy of the
22 notice to the assignor in accordance with [~~the manner provided by~~]
23 Section 64.002. The notice must substantially comply with the form
24 prescribed by Section 64.056 and be signed by the assignee or the
25 assignee's authorized agent or representative.

26 (c) Subject to Subsection (d) and any other claim or defense
27 that a tenant has under a law of this state other than this chapter,

1 after a tenant receives a notice under Subsection (a):

2 (1) the tenant is obligated to pay to the assignee all
3 unpaid accrued rents and all unaccrued rents as they accrue, unless
4 the tenant has previously received a notice under this section from
5 another assignee of rents given [~~provided~~] by that assignee in
6 accordance with this section and the other assignee has not
7 canceled that notice;

8 (2) except as otherwise agreed in [~~provided by~~] a
9 document signed by the tenant, the tenant is not obligated to pay to
10 an assignee rent that was prepaid to the assignor before the tenant
11 received the notice under Subsection (a);

12 (3) unless the tenant occupies the premises as the
13 tenant's primary residence, the tenant is not discharged from the
14 obligation to pay rents to the assignee if the tenant pays rents to
15 the assignor;

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

19 (5) the tenant's obligation to pay rents to the
20 assignee continues until the earliest date on which the tenant
21 receives:

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

24 (B) a signed notice that a perfected security
25 instrument that has priority over the assignee's security interest
26 has been foreclosed; or

27 (C) a signed document from the assignee canceling

1 the assignee's notice.

2 (d) Except as otherwise agreed in [~~provided by~~] a document
3 signed by the tenant, a tenant who has received a notice under
4 Subsection (a) is not in default for nonpayment of rents that accrue
5 during the 30 days after the date the tenant receives the notice
6 until the earlier of:

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

9 (2) the 30th day after the date the tenant receives the
10 notice.

11 (e) On receiving a notice from another assignee [~~creditor~~]
12 who has priority under Section 64.052(c) that the assignee
13 [~~creditor~~] with priority has conducted a foreclosure sale of the
14 real property from which the rents arise or is enforcing the
15 [~~creditor's~~] interest in rents of the assignee with priority by
16 notice to the tenant, an assignee that has given [~~provided~~] a notice
17 to a tenant under Subsection (a) shall immediately give [~~provide~~]
18 another notice to the tenant canceling the earlier notice.

19 SECTION 8. Section 64.058, Property Code, is amended to
20 read as follows:

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

26 (1) reimbursement of the assignee's expenses of
27 enforcing the assignee's assignment of rents, including, to the

1 extent provided for by agreement by the assignor and not prohibited
2 by a law of this state other than this chapter, reasonable
3 attorney's fees and costs incurred by the assignee;

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

8 (3) payment of the secured obligation;

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

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

15 SECTION 9. Subsection (b), Section 64.059, Property Code,
16 is amended to read as follows:

17 (b) Unless otherwise agreed by a tenant, the right of the
18 assignee to collect rents from the tenant is subject to the terms of
19 any agreement between the assignor and tenant or [~~and~~] any claim or
20 defense of the tenant arising from the assignor's nonperformance of
21 that agreement.

22 SECTION 10. Subsections (a) and (d), Section 64.060,
23 Property Code, are amended to read as follows:

24 (a) If an assignor collects rents that the assignee is
25 entitled to collect under this chapter, the assignor shall turn
26 over the proceeds to the assignee not later than the 30th day after
27 the date the assignor receives notice from the assignee under

1 Section 64.054 or within such other [~~another~~] period agreed
2 [~~prescribed~~] by the assignor and assignee in a security instrument
3 or other document [~~signed by the assignor and approved by the~~
4 ~~assignee~~], less any amount representing payment of expenses agreed
5 in that [~~authorized by a~~] security instrument or other document
6 [~~signed by the assignee~~].

7 (d) Unless otherwise agreed, if [~~by~~] an assignee who [~~that~~]
8 has a security interest in rents that is subordinate to the security
9 interest of another assignee [~~priority~~] under Section 64.052
10 enforces the [~~a~~] subordinate assignee's [~~creditor that has~~
11 ~~enforced the subordinate creditor's~~] interest under Section 64.054
12 or 64.055 before the [~~priority~~] assignee with [~~enforces the~~]
13 priority enforces the [~~assignee's~~] interests in rents of the
14 assignee with priority, the subordinate assignee is not obligated
15 to turn over any proceeds that the subordinate assignee [~~creditor~~]
16 collects before the subordinate assignee [~~creditor~~] receives a
17 signed notice from the [~~priority~~] assignee with priority informing
18 the subordinate assignee [~~creditor~~] that the [~~priority~~] assignee
19 with priority is enforcing the [~~priority assignee's~~] interest in
20 rents of the assignee with priority. The subordinate assignee
21 [~~creditor~~] shall turn over to the [~~a priority~~] assignee with
22 priority any proceeds that the subordinate assignee [~~creditor~~]
23 collects after the subordinate assignee [~~creditor~~] receives the
24 notice from the [~~priority~~] assignee with priority that the
25 [~~priority~~] assignee with priority is enforcing the [~~priority~~
26 ~~assignee's~~] interest in rents of the assignee with priority not
27 later than the 30th day after the date the subordinate assignee

1 ~~[creditor]~~ receives the notice or as otherwise agreed between the
2 ~~[priority]~~ assignee with priority and the subordinate assignee
3 ~~[creditor]~~. Any proceeds subsequently collected by the subordinate
4 assignee ~~[creditor]~~ shall be turned over to the ~~[priority]~~ assignee
5 with priority not later than the 10th day after the date the
6 proceeds are collected or as otherwise agreed between the
7 ~~[priority]~~ assignee with priority and the subordinate assignee
8 ~~[creditor]~~.

9 SECTION 11. The legislature finds that Subsection (c),
10 Section 64.051, Property Code, as added by Chapter 636 (Senate Bill
11 No. 889), Acts of the 82nd Legislature, Regular Session, 2011, was
12 intended by the 82nd Legislature to eliminate confusion arising
13 from language in the Texas Supreme Court's decision in Taylor v.
14 Brennan, 621 S.W.2d 592 (Tex. 1981), to the effect that an absolute
15 assignment of rents is a pro tanto payment of a secured obligation.
16 In accordance with Subsection (c), Section 64.051, Property Code,
17 as added by Chapter 636 (Senate Bill No. 889), Acts of the 82nd
18 Legislature, Regular Session, 2011, unless the parties expressly
19 agree otherwise, a secured obligation is reduced only if and to the
20 extent that the assignee collects rents and applies the rents to the
21 obligation. Simply taking an assignment of rents does not reduce
22 the secured obligation.

23 SECTION 12. (a) Except as otherwise provided by this
24 section, Chapter 64, Property Code, as added by Chapter 636 (Senate
25 Bill No. 889), Acts of the 82nd Legislature, Regular Session, 2011,
26 and amended by this Act, governs the enforcement of an assignment of
27 rents, the perfection and priority of a security interest in rents,

1 and the attachment and perfection of a security interest in
2 proceeds regardless of whether the document creating the assignment
3 of rents was signed and delivered before the effective date of this
4 Act or before June 17, 2011.

5 (b) Chapter 64, Property Code, as added by Chapter 636
6 (Senate Bill No. 889), Acts of the 82nd Legislature, Regular
7 Session, 2011, and amended by this Act, does not affect an action or
8 other proceeding commenced before June 17, 2011.

9 (c) Subsection (a), Section 64.051, Property Code, as added
10 by Chapter 636 (Senate Bill No. 889), Acts of the 82nd Legislature,
11 Regular Session, 2011, and amended by this Act, does not apply to a
12 security instrument signed and delivered before June 17, 2011.

13 (d) Chapter 64, Property Code, as added by Chapter 636
14 (Senate Bill No. 889), Acts of the 82nd Legislature, Regular
15 Session, 2011, and amended by this Act, does not affect:

16 (1) the enforceability of an assignee's security
17 interest in rents or proceeds if, immediately before June 17, 2011,
18 that security interest was enforceable;

19 (2) the perfection of an assignee's security interest
20 in rents or proceeds if, immediately before June 17, 2011, that
21 security interest was perfected; or

22 (3) the priority of an assignee's security interest in
23 rents or proceeds with respect to the interest of another person if,
24 immediately before June 17, 2011, the interest of the other person
25 was enforceable and perfected and that priority was established.

26 SECTION 13. This Act takes effect immediately if it
27 receives a vote of two-thirds of all the members elected to each

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1 house, as provided by Section 39, Article III, Texas Constitution.
2 If this Act does not receive the vote necessary for immediate
3 effect, this Act takes effect September 1, 2013.