

By: Carona

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. 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, 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,
[~~+~~

[~~(C)~~] claims arising out of a default in the

1 payment of consideration payable for the right to possess or occupy
2 real property, ~~+~~

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

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

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

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

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

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 notice has been given
11 [~~in a manner provided by Subsection (a)]~~ by the assignee to the
12 person giving [~~sending~~] the notice in accordance with Subsection
13 (a) or as agreed in a security instrument or other document signed
14 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 notice described by
10 Paragraph (A) [~~Subdivision (1)]~~ does not exist, but the tenant's
11 [~~the address provided in a written]~~ agreement with [~~between the~~
12 ~~tenant and]~~ the assignor has an address for notices to the tenant
13 and [~~if]~~ the person giving [~~sending]~~ the notice has received a copy
14 of that document [~~agreement]~~ or has actual knowledge of the address
15 for notices [~~notice]~~ specified in that document, the person giving
16 the notice shall use that address [~~agreement~~]; or

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

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

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

25 (2) the fifth day after the date the notice is given
26 [~~provided]~~ in accordance with Subsection (a)(2); or

27 (3) the date on which notice is considered received

1 ~~[provided]~~ in accordance with an agreement made by the person to
2 whom the notice is given ~~[provided]~~ for the purposes of this
3 section.

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

5 SECTION 3. Sections 64.051(a) and (b), Property Code, are
6 amended to read as follows:

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

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

23 SECTION 4. Sections 64.052(a), (b), and (d), Property Code,
24 are amended to read as follows:

25 (a) A security instrument ~~[document]~~ creating an assignment
26 of rents may be recorded in the county in which any part of the real
27 property is located in accordance with this code.

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

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

15 SECTION 5. Section 64.053, Property Code, is amended to
16 read as follows:

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

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

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

1 (2) accrue on or after that date.

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

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

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

13 SECTION 7. Sections 64.055(a), (c), (d), and (e), Property
14 Code, are amended to read as follows:

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

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

27 (1) the tenant is obligated to pay to the assignee all

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

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

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

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

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

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

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

25 (C) a signed document from the assignee canceling
26 the assignee's notice.

27 (d) Except as otherwise agreed in [~~provided by~~] a document

1 signed by the tenant, a tenant who has received a notice under
2 Subsection (a) is not in default for nonpayment of rents that accrue
3 during the 30 days after the date the tenant receives the notice
4 until the earlier of:

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

7 (2) the 30th day after the date the tenant receives the
8 notice.

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

16 SECTION 8. Section 64.058, Property Code, is amended to
17 read as follows:

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

23 (1) reimbursement of the assignee's expenses of
24 enforcing the assignee's assignment of rents, including, to the
25 extent provided for by agreement by the assignor and not prohibited
26 by a law of this state other than this chapter, reasonable
27 attorney's fees and costs incurred by the assignee;

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

5 (3) payment of the secured obligation;

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

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

12 SECTION 9. Section 64.059(b), Property Code, is amended to
13 read as follows:

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

19 SECTION 10. Sections 64.060(a) and (d), Property Code, are
20 amended to read as follows:

21 (a) If an assignor collects rents that the assignee is
22 entitled to collect under this chapter, the assignor shall turn
23 over the proceeds to the assignee not later than the 30th day after
24 the date the assignor receives notice from the assignee under
25 Section 64.054 or within such other [~~another~~] period agreed
26 [~~prescribed~~] by the assignor and assignee in a security instrument
27 or other document [~~signed by the assignor and approved by the~~

1 assignee], less any amount representing payment of expenses agreed
2 in that [~~authorized by a~~] security instrument or other document
3 [~~signed by the assignee~~].

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

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

6 SECTION 11. The legislature finds that Section 64.051(c),
7 Property Code, as added by Chapter 636 (S.B. 889), Acts of the 82nd
8 Legislature, Regular Session, 2011, was intended by the 82nd
9 Legislature to eliminate confusion arising from language in the
10 Texas Supreme Court's decision in Taylor v. Brennan, 621 S.W.2d 592
11 (Tex. 1981), to the effect that an absolute assignment of rents is a
12 pro tanto payment of a secured obligation. In accordance with
13 Section 64.051(c), Property Code, as added by Chapter 636 (S.B.
14 889), Acts of the 82nd Legislature, Regular Session, 2011, unless
15 the parties expressly agree otherwise, a secured obligation is
16 reduced only if and to the extent that the assignee collects rents
17 and applies the rents to the obligation. Simply taking an
18 assignment of rents does not reduce the secured obligation.

19 SECTION 12. (a) Except as otherwise provided by this
20 section, Chapter 64, Property Code, as added by Chapter 636 (S.B.
21 889), Acts of the 82nd Legislature, Regular Session, 2011, and
22 amended by this Act, governs the enforcement of an assignment of
23 rents, the perfection and priority of a security interest in rents,
24 and the attachment and perfection of a security interest in
25 proceeds regardless of whether the document creating the assignment
26 of rents was signed and delivered before the effective date of this
27 Act.

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

5 (c) Section 64.051(a), Property Code, as added by Chapter
6 636 (S.B. 889), Acts of the 82nd Legislature, Regular Session,
7 2011, and amended by this Act, applies only to a security instrument
8 signed and delivered on or after June 17, 2011. A security
9 instrument signed and delivered before that date is governed by the
10 law that applied to the instrument immediately before that date,
11 and the former law is continued in effect for that purpose.

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

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

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

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