TENANT REMEDIES

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I. INTRODUCTION

A. Landlord Remedies and Tenant Remedies.

As all real estate practitioners know, most leases are replete with provisions about the remedies available to a landlord upon a breach by the tenant. Many treatises have been written on the subject of tenant default and landlord remedies. However, such is not the case with respect to tenant remedies. Believe it or not, tenants do have some remedies on landlord default.

This paper is an update of a presentation given in September 2001 at the 10th Annual Conference for Attorneys and Real Estate Professionals – Negotiating Commercial Leases. In writing this paper originally, I relied heavily on Robert Callaway’s paper on this subject entitled “Tenant Remedies When the Landlord Defaults or in Other Actionable Circumstances” (hereinafter, “Callaway” and “Callaway’s Paper”) given in March of 1999 at the SMU School of Law Seminar – Real Estate Law: Leases in Depth. Mr. Callaway’s Paper is still cited extensively in this paper. Also, I wish to thank Theresa Nassif, who performed the work necessary to update the research on this paper.

B. Scope of Presentation.

This presentation is limited to remedies available to a tenant upon breach of a commercial lease by a landlord. This presentation will not discuss defenses available to the tenant, except to the extent applicable to a breach by the landlord. Therefore, the landlord’s obligation to mitigate damages will not be discussed. Further, hardly any mention will be made of the law relating to residential tenancies.

II. PREREQUISITE TO TENANT REMEDIES – LANDLORD DEFAULT

There are a few basic similarities between landlord’s remedies and tenant’s remedies. For example, a landlord who desires to enforce a landlord remedy must first prove a tenant default. Likewise, before exercising any tenant remedies, the tenant must first establish that the landlord has done something it shouldn’t have done or failed to do something it should have done. Before discussing any remedies available to the tenant for landlord default, I will first identify those actions or inactions which could lead to redress by the tenant. I have attempted to categorize below the types of landlord default into three categories:

A. Breach of Contract,
B. Breach of Statutory Obligation, and
C. Other.

A. Breach of Contract.

A landlord may expose itself to remedies of a tenant in several different ways. The first of those ways is the violation of an obligation placed upon the landlord under
common law, which may include the breach of express covenants in a lease or implied covenants under the law.

1) **Express Covenants.**

Of course, most landlords try to avoid any express obligations under a lease, but normally, landlords will agree to do some or all of the following, to name a few examples:

   (a) provide tenant undisturbed possession of the premises so long as the tenant complies with its obligations under the lease (covenant of quiet enjoyment);

   (b) furnish services to the premises, such as utilities, HVAC, janitorial and security;

   (c) not unreasonably withhold consent to a sublease or assignment;

   (d) not lease other property of the landlord to someone in competition with the tenant; and

   (e) repair certain portions of the premises within landlord’s control.


2) **Implied Covenants.**

Even though a lease contract between a landlord and a tenant may not by its terms expressly require the landlord to do anything, in at least two situations, the courts have implied landlord obligations stemming from the landlord-tenant relationship. Those two implied obligations are the implied covenant of quiet enjoyment and the implied warranty of suitability.

   (a) **Implied Covenant of Quiet Enjoyment.** The first implied obligation has been recognized for quite some time. In the case of *L-M-S Inc. v. Blackwell*, 233 S.W.2d 286 (Tex. 1950), the Texas Supreme Court stated: “It is now generally accepted that every lease of land, in the absence of express language to the contrary, raises an implied covenant that the lessee shall have the quiet and peaceful enjoyment of the leased premises.” *[Id.* at 289; *see also Four
What is the covenant of quiet enjoyment? Or more importantly, what constitutes a breach of the covenant of quiet enjoyment? “For there to be a breach of this covenant, there must be an eviction, actual or constructive, brought about by the acts of the landlord or those acting for him or with his permission.” Richker v. Georgandis, 323 S.W.2d 90, 95 (Tex. Civ. App.—Houston 1959, writ ref’d n.r.e.); see also Ghanbari v. Tran, 2007 Tex. App. LEXIS 2788 (Tex. App.—Beaumont Apr. 12, 2007); South Loop v. Health Home Care, 201 S.W.3d 349, 358, fn. 7 (Tex. App.—Houston [14th Dist.] 2006, no pet.). It has been held that the elements that establish a breach of quiet enjoyment are the same that establish constructive eviction. Goldman v. Alkek, 850 S.W.2d 568, 571-72 (Tex. App.—Corpus Christi 1993, no writ). As pointed out by Callaway in his discussion on this subject, “The tenant must establish the landlord’s breach of the covenant of quiet enjoyment by satisfying the four elements of “constructive eviction” as specifically set forth in Stillman v. Youmans, 266 S.W.2d 913, 916 (Tex. Civ. App.—Galveston 1954, no writ) as follows (hereinafter, the “Stillman test”):

(i) An intention on the part of the landlord that the tenant shall no longer enjoy the premises, which intention may be inferred by the circumstances proven;

(ii) A material act by the landlord or those acting for him or with his permission that substantially interferes with the use and enjoyment of the premises for the purpose for which they are let;

(iii) The act must permanently deprive the tenant of the use and enjoyment of the premises; and

(iv) The tenant must abandon the premises within a reasonable time after the commission of the act.”


While each of the elements stated above may have their own proof problems, it seems that the courts have been particularly ambiguous about the requirement of abandonment. As stated above, Texas courts usually require proof
of abandonment to establish a breach of the covenant of quiet enjoyment. The theory behind this requirement is that the abandonment demonstrates a casual connection between the landlord’s acts and the tenant’s loss. However, in Goldman v. Alkek, a case involving the breach of an express covenant of quiet enjoyment, the Corpus Christi Court of Appeals said that such cases do not necessarily control. Alkek, 850 S.W.2d at 572.

In Alkek, a 30-year lease provided that the tenant would develop the property as a “retail shopping center and office park.” After the shopping center demonstrated success, the landlord demanded the tenant perform obligations not required under the lease: maintaining a pre-existing building not specified in the lease and paying a percentage of gross revenues from stores other than the convenience store that was specified in the lease. Goldman also attempted to terminate the lease. Alkek did not abandon the property and counter-sued for damages, a declaration of the amount of rent due under the contract, and a determination that he was not in default. The court held that Goldman had breached the covenant of quiet enjoyment by subjecting Alkek to obligations not required under the lease and by subjecting Alkek to overreaching and malicious prosecution. Id. at 574.

The Alkek court further held that the tenant was “not required to prove the traditional elements of a breach of the warranty of quiet enjoyment” (including proof of abandonment) because sufficient legal and factual evidence existed to “show that the Goldmans breached the express warranty of this lease by hindering Alkek in his occupation and enjoyment of the property.” Id. Alkek demonstrates that the breach can occur without the tenant abandoning the premises.

Further, what constitutes a reasonable time to abandon is the subject of some dispute. From purely a timing standpoint with respect to a breach of the covenant of quiet enjoyment (and not necessarily constructive eviction), it appears that 17 months is too long, Metroplex Glass, 646 S.W.2d at 265-266, while 11 months is deemed to be a reasonable time within which to abandon, Downtown Realty, 748 S.W.2d at 311. The requirement of abandonment is discussed more fully in Section II. C. 2) (b) below relative to constructive eviction cases.

(b) **Implied Warranty of Suitability.** The implied warranty of suitability is a common-law warranty that was first recognized in the commercial leasing context in the well-known case of Davidow v. Inwood North Professional Group – Phase I, 747 S.W.2d 373 (Tex. 1988), wherein the Texas Supreme Court extended its holding in Kamarath v. Bennett, 568 S.W.2d 658 (Tex. 1978), a case finding an implied warranty of habitability in residential leases.

In Kamarath, the court tried to create a more contemporary solution to an old landlord-tenant problem. It recognized that in a residential lease, providing the tenant with a habitable dwelling was of primary importance, rather than merely creating a right of possession. Id. at 660. This case has since been superseded by a legislative enactment that created a limited landlord duty to repair

Davidow extended Kamarath to commercial leases. The court in Davidow reviewed the case law and literature and concluded that there was no reason to apply the implied warranty to residential leases as recognized in Kamarath and not to do so in commercial leases. *Davidow*, 747 S.W.2d at 376-77. The court held:

“[T]here is an implied warranty of suitability by the landlord in a commercial lease that the premises are suitable for their intended commercial purpose. This warranty means that at the inception of the lease there are no latent defects in the facilities that are vital to the use of the premises for their intended commercial purpose and that these essential facilities will remain in a suitable condition. If, however, the parties to a lease expressly agree that the tenant will repair certain defects, then the provisions of the lease will control.” *Id.* at 377.

So how does one determine whether a breach of an implied warranty exists? The court in Davidow went on to describe the test as follows:

“The existence of a breach of the implied warranty of suitability in commercial leases is usually a fact question to be determined from the particular circumstances of each case. Among the factors to be considered when determining whether there has been a breach of this warranty are:

- the nature of the defect;
- its effect on the tenant’s use of the premises;
- the length of time the defect persisted;
- the age of the structure;
- the amount of the rent;
- the area in which the premises are located;
- whether the tenant waived the defect; and
- whether the defect resulted from any unusual or abnormal use by the tenant.”
With so many factors to be considered, the facts of each case are very important. Often, the facts must show some egregious conduct by the landlord for the jury or court to find for the tenant, such as in Davidow. However, not all cases of poor treatment or neglect by the landlord lead a jury or court to find that this warranty has been breached. In Coleman v. Rotana, a restaurant complained that other tenants in the strip center were operating their businesses in a manner not permitted by their leases. 778 S.W.2d 867, 869 (Tex. App. – Dallas 1989, writ denied). As a result of this violation of their leases, the restaurant was experiencing parking problems. Despite the negative effect on the tenant, the court found that inadequate parking caused by co-tenants’ use of their premises in a manner not permitted by their leases, and the landlord’s inaction in enforcing the lease restrictions, did not give rise to the type of defect encompassed by the implied warranty of suitability. Id. at 871. The court held that the types of defects that are covered by the implied warranty of suitability are only “latent defects in the nature of physical or structural defect which the landlord has the duty to repair.” Id; see also McGraw v. Brown Realty Co., 195 S.W.3d 271, 276 (Tex. App.—Dallas 2006, no pet.).

The court in Coleman went on to read Davidow as saying that in order to find a breach of the implied warranty, “the ‘facility’ alleged to be defective must also be within the leased premises.” Id. In Coleman, under the terms of the lease, the parking lot was part of the “common area” to which the restaurant had non-exclusive use and not the “demised premises.” Id. Also, citing Exxon Corp. v. Atlantic Richfield, Co., 678 S.W.2d 944, 947 (Tex. 1984), the Coleman court said there can be no implied warranty as to matters the lease specifically covers. Id.

The Texas Supreme Court recently revisited the issue of the implied warranty of suitability in Gym-N-I Playgrounds v. Snider, 220 S.W.3d 905 (Tex. 2007), this time addressing the waiver of the warranty and holding that the implied warranty of suitability can be expressly waived by a tenant in a lease.

In Gym-N-I Playgrounds, the tenant brought suit against the landlord for damages after the building was destroyed by fire. The tenant alleged that the fire was caused by defective electrical wiring and the lack of a sprinkler system in the building, and filed causes of action for negligence, violation of the DTPA, breach of the implied warranty of suitability and fraud. Id. at 907 n. 5. In his defense, the landlord asserted that such claims by the tenant were barred by the “as is” clause and warranty disclaimers in the lease. Specifically, the lease between the parties stated:

“Tenant accepts the Premises “as is.” LANDLORD HAS NOT AND DOES NOT MAKE ANY REPRESENTATIONS AS TO THE COMMERCIAL SUITABILITY, PHYSICAL CONDITION, LAYOUT, FOOTAGE, EXPENSES,
The tenant argued that the court’s opinion in Davidow authorized a waiver of the implied warranty of suitability only when the lease makes the tenant responsible for certain specifically enumerated defects, and consequently a general “as is” provision could not waive the warranty. Id. at 909. The court did not agree with such a narrow interpretation; rather, the court recognized that an “as is” provision can waive claims based on a condition of the property. Id. at 912. This proposition, along with strong public policy in favor of the parties’ freedom of contract, supported the court’s conclusion that the implied warranty of suitability is waived when the lease expressly disclaims that warranty, as it did in this case. Id.

B. Breach of Statutory Obligation.

Aside from common law authority for alleging a breach by the landlord, at least three different statutes can be used by a tenant to claim wrongful conduct by the landlord.

1) Sections 91.004 and 93.002 of Texas Property Code.

The Texas Property Code contains a wealth of information regarding the rights and obligations between landlords and tenants. Unfortunately, of the 35 pages of text contained in Title 8, entitled “Landlord and Tenant,” roughly 32 of those pages deal with residential tenancies. However, the Property Code does provide some help to a commercial tenant who has been wronged. Section 91.004 of the Texas Property Code, entitled “Landlord’s Breach of Lease; Lien” grants remedies to a tenant (such remedies to be discussed later in this paper), if a landlord fails to comply with its lease agreement.

Further, Section 93.002 (which has been reprinted in its entirely in Schedule 1 attached to this paper) prohibits the following:

- interruption of utilities (§ 93.002(a));
- removal of security mechanisms, such as door hinges, locks or doorknobs (§ 93.002(b));
• removal of furniture, fixtures or appliances furnished by the landlord unless for bona fide repairs or replacement (§ 93.002(b));

• exclusion of the tenant from the premises except for:
  - bona fide repairs;
  - removing contents of abandoned premises; or
  - nonpayment of rent (§ 93.002(c));

• failing to give proper notices when: disposing property (§ 93.002(e)) or changing door locks (§ 93.002(f)).

However, a lease supersedes Section 93.002 to the extent of any conflict between the lease and that section (§ 93.002(h)).

2) Section 27.01, Texas Business and Commerce Code.

A provision of the Texas Business and Commerce Code which has always given practitioners pause in connection with real estate sale transactions is apparently also applicable to lease transactions. Section 27.01 of the Texas Business and Commerce Code (attached as Schedule 2), sometimes called the “Real Estate Fraud Statute,” prohibits the following:

(a) A false representation of a past or existing material fact, when the false representation is

(i) made to a person for the purpose of inducing that person to enter into a contract; and

(ii) relied on by that person in entering into that contract; or

(b) A false promise to do an act, when the false promise is

(i) material;

(ii) made with the intention of not fulfilling it;

(iii) made to a person for the purpose of inducing that person to enter into a contract; and

(iv) relied on by that person in entering into that contract.

The elements of statutory fraud under Section 27.01 are essentially identical to the elements of common law fraud (which are later discussed in this paper), except that this Section does not require proof of knowledge or recklessness as a prerequisite to the recovery of actual damages. Trinity Indus. v. Ashland, Inc., 53 S.W.3d 852, 867 (Tex. App.—Austin, 2001, pet. denied).
For a more detailed discussion of the application of this statutory provision to a lease, see the discussion in Callaway’s Paper at page 21, wherein he describes the case of *Kerrville HRH, Inc. v. City of Kerrville*, 803 S.W.2d 377 (Tex. App. – San Antonio 1990, writ denied).

As a helpful footnote, this statute also provides a warning to professionals and brokers counseling clients who may be less than truthful. Section 27.01(d) of the statute states:

“(d) A person who (1) has actual awareness of the falsity of a representation or promise made by another person and (2) fails to disclose the falsity of the representation or promise to the person defrauded, and (3) benefits from the false representation or promise commits the fraud described in Subsection (a) of this section and is liable to the person defrauded for exemplary damages. Actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness.”

This provision could be interpreted to require brokers, title agents, and attorneys (who arguably all benefit from the transaction itself if not necessarily the representation) to correct any known false representation made by a party to the transaction.


The Texas DTPA is another statutory avenue for tenants seeking to find a “default” by the landlord under a lease. However, for DTPA to apply, the default needs to be something more malicious than a breach. The courts have held that a mere breach of contract does not constitute a violation of the act. *Riddick v. Quail Harbor Condo. Ass’n, Inc.*, 7 S.W.3d, 663, 670 (Tex. App.—Houston [14th Dist.] 1999, no pet.); *Quitta v. Fossati*, 808 S.W.2d 636, 644 (Tex. App.—Corpus Christi 1991, writ denied); *Group Hosp. Services, Inc. v. One and Two Brookriver Center*, 704 S.W.2d 886, 888-889 (Tex. App.—Dallas 1986, no writ); *Dura-Wood Treating Co. v. Century Forest Industries, Inc.*, 675 F.2d 745, 756 (5th Cir. 1982); *Ashford Development v. USLife Real Estate Services*, 661 S.W.2d. 933, 935 (Tex. 1983). It is therefore critical for tenants to differentiate a “mere breach of contract claim” from a breach which involves “something more” in the way of a misrepresentation or fraud claim to invoke the DTPA. *Riddick*, 7 S.W.3d at 670; *Quitta*, 808 S.W.2d at 644.

I again refer you to Callaway’s Paper and his discussion of *West Anderson Plaza v. Feyznia*, 876 S.W.2d 528 (Tex. App.—Austin 1994, no writ), discussing the test laid out for whether a landlord has violated the DTPA. Callaway states on page 25:

“The Austin Court of Appeals in *West Anderson Plaza* found that while “factual” misrepresentations are actionable under Section 17.46(b)(12) of the DTPA, disagreements over the “interpretation” of a contract with uncertain terms are not. The court determined it was appropriate to view the “totality of the circumstances” in a
particular case and, accordingly, it adopted a six question test to
decide whether a landlord had violated the DTPA. The six
questions are as follows:

• Whether the representation was clearly factual, clearly
interpretable, or some less clear combination of the two;

• Whether the relevant contractual language was ambiguous
or unambiguous;

• Whether the parties were in a substantially equal position of
knowledge and information;

• Whether there was evidence of overreaching or victimizing;

• Whether there was evidence of unconscionable conduct;

• Whether there was a confidential or fiduciary relationship
between the parties.”

Having laid out the test to determine a violation of the DTPA by a landlord, I have found
very few reported cases that actually find a violation by the landlord of the DTPA. See
Corum Management Co. v. Aguayo Enterprises, 755 S.W.2d 895, 899 (Tex. App.—San
Antonio 1988, writ denied); Miller v. Bynum 797 S.W.2d 51, 55 (Tex. App.—Houston

The misrepresentations made by landlord and its representatives in Miller v.
Bynum are an example of what courts consider to be a violation of the DTPA in a lease
breach context. In Miller, the landlord and its leasing agent represented to the tenant
that the commercial development was a “first class” establishment that was “almost fully
occupied” and that it had standardized tenant regulations, high quality construction and
good maintenance. Id. at 52. In reality, the development was poorly maintained, the
rules and restrictions were unevenly and inconsistently applied, and the center, which was
less than fully occupied, was not operated as a first-class establishment. Id. The court
found that the tenant would not have entered into the lease but for these representations,
which were false, misleading, or deceptive, and knowingly made in reckless disregard for
the truth. Id. at 53. The misrepresentations made by the landlord and its agent in this
case provide us with a practical example of the rule set forth above, and demonstrate the
“something more” the court is looking for to differentiate this from a mere breach of
contract claim and permit a cause of action under the DTPA.

C. Other Possible Defaults.

Aside from contractual defaults and statutory obligations, the tenant may also
resort to one fairly common cause of action, wrongful eviction, and two other less likely
and more difficult allegations of wrongdoing by the landlord, constructive eviction and
common law fraud.
1) **Wrongful Eviction.**

One of the more common reported causes of action by tenants against landlords relates to the tenant’s unjustified removal from the premises. The case of *McKenzie v. Carte*, 385 S.W.2d 520, 528 (Tex. Civ. App.—Corpus Christi 1965, writ ref’d n.r.e.) sets forth the requirements of proving wrongful eviction as follows:

“When the landlord wrongfully evicts the tenant, the latter shows a cause of action for damages by averring and proving the following facts: (1) the existence of an unexpired contract of renting; (2) occupancy of the premises in question by the tenant; (3) eviction or dispossession by the landlord; (4) damages attributable to such eviction.”

In *McKenzie*, a landlord leased its second floor premises to a tenant for the purpose of operating a private club. The club became a successful business until the landlord changed the lock on the premises, refusing to allow the then sublessee, Westover, to enter the premises, because the landlord “did not like the way Westover was operating the club.” *Id.* at 523. The *McKenzie* court affirmed the lower court ruling that the tenant had been wrongfully evicted.

2) **Constructive Eviction.**

As a general rule, depriving the tenant of the beneficial use or enjoyment of the whole or a material part of the demised premises by some intentional or permanent act or omission of the landlord constitutes an eviction. *See* Lucky v. Fidelity Union Life Ins. Co., 339 S.W.2d 956, 958 (Tex. App.—Dallas 1960, no writ), citing 52 C.J.S. Landlord and Tenant § 447. A constructive eviction is differentiated from an actual eviction, which occurs when a landlord removes or excludes the tenant from the premises by actual physical force or threat of violence. *See* Lucky, 339 S.W.2d at 958. Constructive eviction occurs when there is an intentional act or omission by the landlord, or its agent, that permanently deprives the tenant, without the tenant’s consent, of the enjoyment of the leased premises, in whole or in substantial part, and causes the tenant to abandon the premises. *See* Stillman v. Youmans, 266 S.W.2d 913, 916 (Tex. App.—Galveston 1954, no writ). Landlord action or inaction brings about constructive eviction, and this conduct makes the premises unusable for its intended purpose. In essence, the conduct “essentially terminates mutuality of obligation as to the lease terms, because the fundamental reason for the lease’s existence has been destroyed by the landlord’s conduct.” *Downtown Realty, Inc. v. 509 Tremont Bldg., Inc.*, 748 S.W.2d 309, 313 (Tex. App.—Houston [14th Dist.] 1988, no writ).

(a) **Elements.** Like the warranty of suitability (express or implied), the facts of the case are extremely important in establishing constructive eviction. In order to prove a claim of constructive eviction, four essential elements must be established. As stated earlier, the four elements are as follows:
(i) An intention on the part of the landlord that the tenant shall no longer enjoy the premises, which intention may be inferred from the circumstances;

(ii) A material act by the landlord or those acting for him or with his permission that substantially interferes with the use and enjoyment of the premises for the purpose for which they are let;

(iii) The act must permanently deprive the tenant of the use and enjoyment of the premises; and

(iv) The tenant must abandon the premises within a reasonable time after the commission of the act.

Downtown Realty, 748 S.W.2d at 311; see also Metroplex Glass Center v. Vantage Properties, 646 S.W.2d 263, 265 (Tex. App.—Dallas 1983, writ ref’d n.r.e.); Lazell v. Stone, 123 S.W.3d 6, 11-12 (Tex. App.—Houston [1st Dist.] 2003);

In Downtown Realty, Tremont, the tenant, entered into a five-year lease with Downtown Realty in July 1982 with two five-year options, exercisable at Tremont’s discretion. Tremont undertook remodeling so they could use the leased space as a rooming house. Substantial remodeling expenditures were undertaken with the idea that they would have fifteen years to recoup their expenses.

Tremont operated the rooming house at a profit during its first seven months. In May 1984, the heating and air conditioning system failed. Tremont discovered the cost to repair would be in excess of $20,000, and the lease provided that the landlord was to pay for the replacement of this equipment in excess of $2,000 in any one year of the lease. On several occasions throughout the summer, Tremont orally notified Downtown Realty of the problem and its willingness to pay its share of the cost. Tremont sent a written notification to Downtown Realty on September 4, 1984, as well as similar written notifications on November 9, November 30, and December 20, 1984. Downtown Realty never responded to any of these requests, and no repairs were made. Despite this and the fact that Tremont was now operating at a loss, they continued to pay rent. Finally, in March 1985, Tremont notified Downtown Realty that if the repairs were not made, they would have to abandon the premises. After receiving no response from Downtown Realty, Tremont notified them in April that they had been forced to abandon the premises and demanded payment for the losses they incurred.

At trial, Downtown Realty acknowledged that it first received notification of the problem on September 4, 1984. The jury found that Downtown Realty breached the lease on September 20, 1984 because they failed to correct the problem within 15 days after receiving notice. While the lease did not provide that the landlord had 15 days to cure any default, it did provide that the tenant had
only 15 days to cure a default. The appeals court agreed with the trial court that it was reasonable for the jury to hold the landlord to the same standard to which the lease held the tenant. \textit{Id.} at 312.

\textbf{Downtown Realty} involved some egregious behavior by the landlord. A more recent and less clear case of constructive eviction is that of Columbia/HCA of Houston, Inc. v. Tea Cake French Bakery & Tea Room, 8 S.W.3d 18 (Tex. App.—Houston [14th Dist.] 1999, pet. denied). Here, the tenant, Tea Cake, operated a bakery that was located in a shopping center. HCA purchased the shopping center and made plans to demolish the center and construct a hospital. Beginning in September 1995, HCA attempted to negotiate an early termination of Tea Cake’s lease and offered to pay for Tea Cake’s relocation costs. The negotiations lasted several months, but the parties were unable to agree on a price. In October, architects determined that the shopping center would not need to be demolished until November of the following year, the same time Tea Cake’s lease ended. Despite assurances that they could remain in the shopping center until the expiration of their lease, Tea Cake wanted to leave, because the shopping center was virtually empty, but the parties could not reach an agreement.

While the trial court granted a directed verdict for the landlord, the appeals court found that a material fact issue existed as to the constructive eviction cause of action and reversed the trial court. \textit{Id.} at 22. The court found the landlord’s willingness to pay Tea Cake to leave was possible evidence of the landlord’s intent that Tea Cake not enjoy the premises. \textit{Id.} Further, the shopping center was vacant, except for Tea Cake, and since most of their business was walk-in, the tenant was greatly affected by all other tenants being gone from the center. The court struggled with the issue of whether Tea Cake had abandoned the premises and, if so, whether they did so within a reasonable time after the commission of the act. \textit{Id.} Tea Cake did leave before the expiration of the lease, but only a few weeks before the lease was up. Because of the early departure, the court couldn’t rule as matter of law that they did not abandon the lease. In addition, the court couldn’t say as matter of law that Tea Cake did not abandon the premises within a reasonable time, because Tea Cake presented evidence that it was unable to leave before it did. \textit{Id.}

(b) \textbf{Abandonment.} Abandonment occurs when a tenant moves out of the leased property prior to the expiration of the lease. See \textit{Tea Cake}, 8 S.W.3d at 22 (Tex. App.—Houston [14th Dist.] 1999, pet. denied). However, as this article examined earlier in the context of a breach of the covenant of quiet enjoyment, Texas courts have struggled in determining when it is reasonable for a tenant to abandon the premises for purposes of satisfying this element of the cause of action. While the Texas courts have not established a particular time period that constitutes “a reasonable time” to abandon the premises after the commission of an act by the landlord, many cases have considered the issue. The prevailing facts of each case define what may be “reasonable”. For example, the court in Briargrove Shopping Center v. Vilar, Inc., 647 S.W.2d 329, 335 (Tex. App.—Houston [1st Dist] 1982, no writ) found that three months was a reasonable time to
abandon where construction eliminated a parking lot used by a tenant to park cars from his auto repair shop. In Richker v. Georgandis, 323 S.W.2d 90, 96-97 (Tex. Civ. App.—Houston 1959, writ ref’d n.r.e.) nine months was found to be a reasonable amount of time where a construction barricade on the sidewalk in front of tenant’s restaurant impeded the access to tenant’s business.

Metroplex Glass Center, Inc. v. Vantage Properties, Inc., however, held that 17 months was not a reasonable amount of time where deficiencies existed at the time that tenant initially moved in and continued throughout the 17-month occupancy. 646 S.W.2d 263, 265-6. The deficiencies consisted of a rear-door lock that did not function properly, a malfunctioning water heater, partitions not made to specifications, and a leaky roof near a heater. Id. at 266. Citing Metroplex Glass, the 5th District Court of Appeals held, in a claim of breach of the covenant of quiet enjoyment action, that 20 months was not a reasonable time as a matter of law. Coleman v. Rotana, Inc., 778 S.W.2d 867 (Tex. App.—Dallas 1989, writ denied).

In Rust v. Eastex Oil, Inc., the court held that, as a matter of law, the landlord’s failure to repair the damaged building for five months did not constitute a constructive eviction where the tenant continued to hold and claim possession for five months after the building was damaged and not repaired. 511 S.W.2d 358, 361 (Tex. Civ. App.—Texarkana 1974, no writ). However, the court found that the landlord’s act of dismantling an adjacent building eight days before the tenant vacated the premises was sufficient to show an actionable eviction by the landlord. Id. The landlord’s continuing failure to repair and the dismantling of the building amounted to substantial interference that was injurious to the tenant’s beneficial use and enjoyment of the premises. This interference occurred close enough in time to the landlord’s declaration of forfeiture and demand for possession for the situation to fall under the rule of constructive eviction. Id. Ironically, however, the tenant did not prevail, because the building in question was not actually covered by the lease (even though the tenant was using it).

The court in Holmes v. P.K. Pipe also found that there was no constructive eviction because the tenant did not abandon the premises within a reasonable time. 856 S.W.2d 530, 539 (Tex. App.—Houston [1st Dist.] 1993, no writ). In this case, the landlord was silent regarding a waste disposal site on the leased premises. The failure to disclose was determined to be a material act that interfered with the tenant’s use and enjoyment. The tenant learned of landlord’s misrepresentation within a month after entering into the December 1984 lease. However, in light of these facts, the tenant’s abandonment of the premises in February 1987 was not considered to have been within a reasonable time. Despite learning of the waste site, the tenant did not promptly attempt to remedy the situation, and, in fact, even renewed their lease the following year. The court did, however, give relief to the tenant on other grounds. (See Section III. H. below.)

(c) The Act. Another interesting facet of constructive eviction is the nature of the landlord’s act that leads to a constructive eviction. The general rule
in Texas is that a third party, acting without the landlord’s consent, cannot cause a tenant to be constructively evicted. However, unlike the Coleman case cited above in my discussion of the breach of an implied warranty of suitability, one court has found that the failure to control third parties can lead to constructive eviction. In Fidelity Mutual Life Insurance Company v. Kaminsky, the court allowed a jury to view the landlord’s failure to act in controlling protestors to be a material omission that caused the tenant’s abandonment of the premises. 768 S.W.2d 818, 822 (Tex. App. – Houston [14th Dist.] 1989, no writ). Dr. Kaminsky was a gynecologist who performed elective abortions and had leased the space for the purpose of practicing medicine. About one year after moving into the office, anti-abortion protests began and continued for about six months, until Dr. Kaminsky abandoned the premises. Fidelity tried to remove the protestors by drafting a letter threatening them with trespass prosecutions. Fidelity also gave this letter to Dr. Kaminsky to distribute. The jury saw Fidelity’s response as insufficient, and the court found that there was a legally sufficient basis for the jury to conclude that Dr. Kaminsky abandoned the premises because of the landlord’s failure to act (not because of the acts of the protestors). Id.

3) **Common Law Fraud.**

Common law fraud is another landlord violation which does not categorize well into either a breach of contract or statutory violation. To successfully assert common law fraud, a plaintiff must assert that:

(a) a material representation was made;

(b) the representation was false;

(c) when the representation was made, the speaker knew it was false or made it recklessly without any knowledge of its truth and as a positive assertion;

(d) the speaker made the representation with the intent that it should be acted upon by the party;

(e) the party acted in reliance upon the representation; and

(f) the party thereby suffered injury.

In re FirstMerit Bank, 52 S.W.3d 749, 758 (Tex. 2001); Formosa Plastics Corp. v. Presidio Eng’rs & Contractors, Inc., 960 S.W.2d 41, 47-48 (Tex. 1998); Eagle Properties, Ltd. v. Scharbauer, 807 S.W.2d 714, 723 (Tex. 1990); Trenholm v. Ratcliff, 646 S.W.2d 927, 930 (Tex. 1983); Stone v. Lawyers Title Ins. Corp., 554 S.W.2d 183, 185 (Tex. 1977).

In most cases, the problem with asserting common law fraud lies in the difficulty of proving actual knowledge of the falsity of a statement or that the statement was made recklessly without knowledge of the truth but as a positive assertion. It appears that at
least one court in Texas is willing to extend help to a tenant plaintiff on this issue by finding that a landlord’s knowing failure to disclose the existence of hazardous waste located at a lease site is tantamount to a false representation for purposes of satisfying the tests described in (a) and (c) above. Holmes v. P.K. Pipe & Tubing, Inc., 856 S.W.2d 530 (Tex. App.—Houston [1st Dist.] 1993). Some Texas cases have attempted to soften the requirements set forth in (c) above, but the Texas Supreme Court has held that “[A] statement is not fraudulent unless the maker knew it was false when he made it or made it recklessly without knowledge of the truth.” Prudential Ins. Co. of Am. v. Jefferson Assoc., Ltd., 896 S.W.2d 156, 163 (Tex. 1995).

III. REMEDIES

Although somewhat difficult to divorce a remedy from the act leading to the remedy, I have attempted to segregate in the categories below the various remedies which may be available to tenants resulting from the foregoing list of landlord defaults. I have also attempted to set out the relevant damages available under those remedies.

A. Suit for Damages.

The most common remedy for landlord default is a suit for damages. That remedy is appropriate in a variety of situations.

1) Wrongful Eviction.

Probably the most common suit for damages by a tenant results from wrongful eviction. The cases in this area appear to offer primarily three different types of damages to a tenant for a wrongful eviction. In a few cases, the courts have made broad statements that a tenant, having been wrongfully evicted, is entitled to recover for any loss or injury which is a foreseeable consequence of the eviction. Charalambous v. Jean Lafitte Corp., 652 S.W.2d 521, 526 (Tex. App.—El Paso 1983, writ ref’d n.r.e.). Most courts will also allow a claim for special damages by a tenant who has been wrongfully evicted, including lost profits, where such loss is shown to be the natural and probable consequence of the act or omission complained of, but not where such profits are dependent on uncertain and changing conditions. Pederson v. Dillon, 623 S.W.2d 696, 698 (Tex. App.—Houston [1st Dist.] 1981, no writ). Other courts indicate that the proper measure of damages for wrongful eviction is the difference between market rental value of the leasehold for the unexpired term and the stipulated rentals set forth in the lease. Briargrove Shopping Center Joint Venture v. Vilar, Inc., 647 S.W.2d 329, 336 (Tex. App.—Houston [1st Dist.] 1982, no writ); McNabb v. Taylor Oil Field Rental Co., 428 S.W.2d 714, 716 (Tex. Civ. App. 1968, writ ref’d n.r.e.). The court in Briargrove also noted in a footnote, citing Birge v. Toppers Menswear, Inc., 473 S.W.2d 79 (Tex. Civ. App.—Dallas 1971, writ ref’d n.r.e.), that a wrongfully evicted tenant may not recover the difference between the market value of the property and the stipulated rentals when lost profits are also recovered. It appears, however, that such multiple awards are only impermissible when the overall award results in a double recovery of the same damages. Briargrove at 336.
2) **Failure to Maintain.**

Where the landlord has a duty to maintain a portion of the premises, the landlord will be liable to the tenant for damages for failure to repair. *McCreless Properties, Ltd. v. F. W. Woolworth Co.*, 533 S.W.2d 863 (Tex. Civ. App.—San Antonio 1976, writ ref’d n.r.e.). *Birge v. Toppers Menswear, Inc.*, 473 S.W.2d 79, 84. Tort liability may also accompany a landlord’s failure to properly maintain the portion of the premises for which it has retained contractual responsibility or control (such as common areas).

3) **Other.**

Damages have been granted by Texas courts in a number of other default type situations, including, without limitation, the following:

(a) wrongful removal of sign, *Pringle v. Nowlin*, 629 S.W.2d 154 (Tex. App.–Fort Worth 1982, writ ref’d n.r.e.);

(b) breach of covenant of quiet enjoyment, *Frazier v. Wynn*, 492 S.W.2d 54 (Tex. Civ. App.—Amarillo 1973, writ ref’d n.r.e.);

(c) constructive eviction, *Briargrove Shopping Ctr Joint Venture v. Vilar, Inc.*, 647 S.W.2d 329, 336 (Tex. App.—Houston [1st Dist.] 1982, no writ);

(d) unreasonably withholding consent to lease, *Mitchell’s, Inc. v. Nelms*, 454 S.W.2d 809 (Tex. Civ. App.—Dallas 1970, writ ref’d n.r.e.); and

(e) failure to deliver possession, *Fabrique Inc. v. Corman*, 796 S.W.2d 790 (Tex. App.—Dallas 1990, writ denied per curiam).

B. **Rescission.**

The equitable remedy of rescission is available to tenant, but only in limited circumstances, including the following:

1) **Fraud.**

Generally, rescission will not be available to a tenant due to a breach of the lease by a landlord in the absence of a finding of landlord fraud. *Freyer v. Michels*, 360 S.W.2d 559, 561 (Tex. Civ. App.—Dallas 1962, writ dism’d). This concept is generally based on the theory that a tenant has a remedy at law, namely a suit for damages. *Id*. Rescission is, however, available in a real estate setting if fraud can be proved. *Texas Indus. Trust, Inc. v. Luck*, 312 S.W.2d 324 (Tex. Civ. App.—San Antonio 1958, writ ref’d); *Adickes v. Andreoli*, 600 S.W.2d 939 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ dism’d).

2) **Breach of Warranty of Suitability.**

Although the court called it cancellation and not rescission, the case of *Henry S. Miller Management Corp. v. Houston State Assoc.*, 792 S.W.2d 128, 131 (Tex. App.—
Houston 1990, writ denied) held that the “equitable remedy” of cancellation is available upon a breach of the implied warranty of suitability.

3) **Mutual Mistake.**

Finally, at least one court has found that a mutual mistake will provide grounds for the cancellation of a lease. *Nelms v. Cox*, 327 S.W.2d 785, 787 (Tex. Civ. App.—Eastland 1959, writ ref’d n.r.e.). In *Nelms*, the landlord (Nelms) leased the premises to Cox to be operated as “a dance hall and beer tavern and not otherwise.” Subsequently both learned that a city ordinance prohibited the use of the premises as a dance hall. The court found that under these circumstances, there was such mutual mistake as would justify cancellation.

C. **Relief from Rent and Termination.**

Until *Davidow*, the general rule regarding lease covenants was that the covenant to pay rent was independent of the covenants of landlord to repair or otherwise perform obligations under the lease. *Edwards v. Ward Assoc., Inc.*, 367 S.W.2d 390, 393 (Tex. Civ. App.—Dallas 1963, writ ref’d n.r.e.); *Mitchell v. Weiss*, 26 S.W.2d 699, 700 (Tex. Civ. App.—El Paso 1930). However, some violations of the lease by the landlord will result in a total bar to tenant’s further obligations under the lease, including the obligation to pay rent.

1) **Constructive Eviction.**

The actions constituting constructive eviction of a tenant lead to a release of the tenant from its obligations under the lease. *Downtown Realty, Inc. v. 509 Tremont Building, Inc.*, 748 S.W.2d 309, 313 (Tex. App.—Houston [14th Dist.] 1988, no writ). This makes perfect sense, because the tenant has, for all practical purposes, been impliedly evicted from the premises and therefore cannot enjoy the benefit of the lease through no fault of its own.

2) **Breach of Warranty of Suitability.**

Likewise, the court in *Davidow v. Inwood North Professional Group – Phase I*, 747 S.W.2d 373, 377 (Tex. 1988), made it clear that a breach of implied warranty of suitability justifies the tenant’s abandonment of the leased premises and the discontinuation of further rental payments. *Id.* at 377. In fact, the court has stated that a tenant’s obligation to pay rent and a landlord’s implied warranty of suitability are mutually dependent. *Id.; McGraw v. Brown Realty Co.*, 195 S.W.3d 271, 276 (Tex. App.—Dallas 2006, no pet.). Similarly, the court in *Neuro-Developmental Associates of Houston v. Corporate Pines Realty Corp.*, 908 S.W.2d 26, 28 (Tex. App.—Houston [1st Dist] 1995, writ denied) stated:

“...a finding of breach of implied warranty of suitability alone, without a finding of producing cause of damages, is a complete defense to liability for past due rent.”
3) **Other.**

The related thread in all of the cases which excuse tenants from further obligations appears to be the inability of the landlord to deliver the premises for its intended purpose. A further chink in the landlord’s armor of independent covenants is represented by the case of Corman v. Fabrique, Inc., 806 S.W.2d 801, 802 (Tex. 1991), in which the Texas Supreme Court upheld a lower court finding that the failure to give up possession to a subsequent tenant assignee relieves such assignee of its rental obligations under the lease. In Corum Management Co., Inc. v. Aguayo Enterprises, Inc., 755 S.W.2d 895 (Tex. App.—San Antonio 1988, writ denied) the court upheld a jury finding that the tenant was not obligated to pay any rents to the landlord after a knowing misrepresentation by the landlord, if the misrepresentation caused the tenant to execute the lease in the first place. The court reasoned that the tenant should be relieved if, absent the misrepresentation, the tenant would not have signed the lease and, therefore, never would have been obligated under the lease. Id. at 900. And finally, the case of Regency Advantage Ltd. Partnership v. Bingo Idea – Watauga, Inc., 936 S.W.2d 275 (Tex. 1996) represents an interesting finding by the court. In Regency, the tenant leased space under an agreement which provided that if the tenant obtained necessary approvals for a bingo facility, the landlord would build out the premises within 45 days. The tenant obtained the permit and the landlord failed to build out the space within the allotted time period. The landlord (Texas American Bank) subsequently deeded its interest to Regency Advantage Limited Partnership. In finding the assignee landlord not liable because the breach occurred prior to the transfer, the Texas Supreme Court said:

“Our conclusion does not mean that Bingo was without any rights against Regency. As comment h to section 16.1 of the Restatement further explains, in situations in which the original lessor has breached a lease prior to transferring the lease to its assignee, the other party to the lease may be entitled to terminate the lease for the past breaches and if so the transferee’s position under the transfer may be affected accordingly. RESTATEMENT (SECOND) OF PROPERTY § 16.1 cmt. H (1977). In other words, while Regency was not liable to Bingo for TAB’s breach, Bingo may have had the right to terminate or a defense against payment of rent to Regency.”

Id. at 277-278. Although the court provides no other reasoning for its statement, their rationale must relate to the fact that the tenant was never able to occupy, because the landlord did not build out the premises.

Texas Jurisprudence also cites the case of Mazzie v. Wooly, 273 S.W. 642 (Tex. Civ. App.—Texarkana 1925) for the proposition that if a lease is conditioned on the landlord’s repair, and the landlord defaults on that obligation, the tenant may annul the agreement and vacate the premises at any time. 49 Tex. Jur. 265 § 101, Landlord and Tenant. However, in the Mazzie case, the tenant did not vacate the premises, but rather continued to use and occupy the premises despite the landlord’s failure to repair the premises. 273 S.W. at 643. Because of the tenant’s continued use of the premises, the
tenant could not escape liability for its failure to pay rent merely because the landlord did not perform the repairs on which the lease was conditioned. _Id._ Therefore, the outcome of the case does not fully support the proposition for which it is cited above.

D. **Contractual Provisions.**

Although it is uncommon to find cases in which a tenant is suing on a landlord default remedy set forth in a lease (probably due to the fact that tenants seldom are able to negotiate specific remedies in leases), some cases reflect that a court will enforce a remedy reserved to a tenant in the lease. _Lilac Variety Inc. v. Dallas Texas Co._, 383 S.W.2d 193 (Tex. Civ. App.—Dallas 1964, writ ref’d n.r.e.). In _Lilac_, the tenant reserved a right to terminate in the event the landlord failed to keep other tenants in the shopping center in which Lilac’s premises was located. The court upheld the tenant’s rights to terminate due to such failure. _Id._ at 195.

E. **Equitable Remedies.**

On page D-15 of his presentation, Callaway states:

“In reviewing its arsenal of weapons for use against a defaulting landlord, a tenant should not overlook the possibility of equitable relief, where appropriate. Since a commercial tenant will often have to continue paying rent while concurrently pursuing a lawsuit for damages against its defaulting landlord, circumstances may dictate that a tenant protect itself during the pendency of such a lawsuit by utilizing equitable remedies.”

Callaway goes on in his article to give a good overview of the equitable remedies of Injunction and Specific Performance. Without repeating much of what is said by Callaway, these remedies should not be overlooked. Texas courts find that the loss of rights in real property satisfies the requirement of irreparable injury, and this concept also applies in the case of a lease. _Rus-Ann Devel. Inc. v. ECGC Inc._, 222 S.W.3d 921, 927 (Tex. App.—Tyler 2007, no pet.). The Texas Supreme Court left the door open for a trial court to grant a temporary injunction to a tenant suing for breach of contract “if the applicant establishes a probable right on final trial to the relief sought, and a probable injury in the interim.” _Walling v. Metcalf_, 863 S.W.2d 56, 57 (Tex. 1993). With respect to specific performance, this remedy appears only to be available in a lease context where the lease also grants some kind of option to purchase.

F. **Set-Off.**

The law is somewhat unclear on whether a tenant is entitled to set-off against rent, amounts which may be owed by the landlord to the tenant. In the case of _Marlow v. Medlin_, 558 S.W.2d 933 (Tex. Civ. App. – Waco 1977, no writ), the court clearly indicates that a “…tenant is entitled to set off a debt owing to him by the landlord against the landlord’s claim for rent.” _Walker v. Amberg_, 284 S.W. 334, 335 (Tex. Civ. App. – Austin 1926, no writ); _Harris v. McGuffey_, 185 S.W. 1024 (Tex. Civ. App. – Texarkana 1916, no writ); 49 Tex. Jur. 3d 345, Landlord and Tenant, § 179. In _Marlow_, the tenant
had loaned the down payment for the boarding house to the landlord (a party in possession under a contract for deed), and then the tenant was induced to pay rent to the seller under the contract for deed by the seller’s statement that he, the seller, was entitled to the money. In concluding that the seller made a false statement to the tenant, the court first had to find that the tenant had a right of set-off against her landlord, which the court did. Id. at 938.

In a seemingly contradictory way, the court in Myers v. Ginsberg, 735 S.W.2d 600 (Tex. App. – Dallas 1987) found that a tenant was not entitled to a set-off for equipment which the landlord had taken. The court in Myers seems to be persuaded to find no right to set-off, because the claim for the furniture was not a liquidated debt. However, the court cautioned that its finding would not preclude a set-off for a judgment against the landlord. The court stated:

“The tenants’ right to a set-off or credit is based on their claim for damages arising from the independent causes of action that they have alleged in their counterclaim. The right to recover such damages does not have the legal effect of a payment or furnish a ground for the reduction, by way of recoupment or abatement, of the amounts due the landlord under the lease. Morriss-Buick Co. v. Davis, 91 S.W.2d 313, 314 (Tex. Civ. App. – 1936); Ammons v. Beaudry, 337 S.W.2d 323, 324 (Tex. Civ. App. – Fort Worth 1960, writ ref’d). …Myers and Davis have no right to an automatic offset or credit against the claim for rent but may be entitled to offset a judgment for the value of the equipment against the landlord’s judgment for rent should they prove a cause of action for damages as they have alleged.”

Id. at 603.

In my opinion, the current case law indicates that an existing debt of the landlord to the tenant not arising from the landlord and tenant relationship may be set-off against rent, and a subsequent judgment, even if arising out of the lease transaction, may be set-off against rent; but a claim against the landlord arising from the lease relationship will not permit a set-off against rents due under the lease. (See also, however, the ancient case of Coleman v. Bunce, 37 Tex. 171 (1873) and its discussion of “reconvention”.)

G. Remedies under the Property Code.

I have set apart the remedies provided by the Texas Property Code, because they are all laid out neatly in the provisions of the code that contain the landlord prohibitions (See Schedule 1). As discussed earlier in Section II. B. 1), the Texas Property Code provides some relief to a tenant who has been wronged by its landlord.
Section 91.004 of the Texas Property Code provides as follows:

(a) If the landlord of a tenant who is not in default under a lease fails to comply in any respect with the lease agreement, the landlord is liable to the tenant for damages resulting from the failure.

(b) To secure payment of the damages, the tenant has a lien on the landlord’s nonexempt property in the tenant’s possession and on the rent due to the landlord under the lease.

One of the few cases citing this provision since its codification in 1983, is the case of Weber v. Domel, 48 S.W.3d 435 (Tex. App.—Waco, 2001 no pet). In this grazing-rights case, the court acknowledged that a landlord could breach a grazing lease by negligently destroying the grass on the leased premises. Citing Section 91.004 to support its award of damages, the court held that, even if “there was no express covenant in the lease for the landowner to preserve the grass, because the express purpose of the lease was for grazing, destruction of the subject of the contract by the landowner would be a breach of the lease.” Id. at 437.

Based on the little case law there is interpreting this Section, perhaps Section (a) of this provision merely means what it says, and if so, the provision does not change the common law. In referring to the two statements from which §91.004 was derived, the Revisor’s Note to Section 91.004 provides:

Neither statute has had a substantial case-law impact. Since the right of a tenant to damages on breach of a lease by a landlord is axiomatic, the heart of Article 5236 [the prior law] is the tenant’s lien. However, tenants have only infrequently attempted to enforce it.

Section 91.004(b) may just be an obscure right that will only be helpful to tenants in unusual and unique circumstances.

Sections 93.002 and 93.003.

I have previously summarized the prohibited conduct listed in the provisions of these two sections in Section II. B. 1) of this presentation. The remedy for failure to comply with the provisions of Section 93.002(a)-(f) are set out in Section 93.002 (g) as follows:

“(g) If a landlord or a landlord’s agent violates this section, the tenant may:

(1) either recover possession of the premises or terminate the lease; and
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.”

There are very few cases which have cited this statute, which provides us with little guidance as to the actual utility of this statute. However, the ability of a tenant to terminate under Section (g) (1) is a tool that certainly would not normally be available under the common law for violations of the type set forth in Section 93.002(a)-(f).

Section 93.003 deals specifically with unlawful lock out and sets forth the procedure by which tenant may recover possession due to such lock out. This statute has not been cited often by the courts either, and the few cases citing this provision provide us with little, if any, guidance as to how this statute should be interpreted. See Big State Pawn and Bargain Center No. 1 v. Garton, 833 S.W.2d 669 (Tex. App. – Eastland 1992), dealing with a technical matter of how the tenant may appeal, and Stewart v. C.L. Trammell Properties, Inc., 05-04-01027-CV (Tex. App.—Dallas 2005), citing the statute in relation to a jurisdictional issue.

H. Exemplary, Punitive and Treble Damages.

I was able to locate three separate instances where a tenant may be able to obtain a bonus to its claim for actual damages. Those three instances are (1) fraud, (2) constructive eviction coupled with a tort and (3) violation of the DTPA.

1) Fraud.

The general rule with respect to fraud cases is that exemplary damages may be awarded when the plaintiff has suffered actual damage as the result of fraud intentionally committed for the purpose of injuring him. Artripe v. Hughes, 857 S.W.2d 82, 87 (Tex. App.—Corpus Christi 1993, writ denied); Dennis v. Dial Finance & Thrift Company, 401 S.W.2d 803, 805 (Tex. 1966). The court in Holmes v. PK Pipe & Tubing, Inc., 856 S.W.2d 530, 543 (Tex. App. – Houston [1st Dist.] 1993) applied this rule in a lease context when it found that “exemplary damages are recoverable when the injury is tainted with fraud, malice or willful wrong.” In Holmes, a tenant suffered damage by reason of a landlord’s failure to disclose the existence of a buried hazardous waste site on the property being leased. Because of that failure, the tenant was forced by the Texas Water Commission to remove about 7,000,000 pounds of pipe it had stored on the premises. In finding a fraud “intentionally committed”, the court stated: “when the particular circumstances impose upon a person a duty to speak and he deliberately remains silent, his silence is equivalent to a false representation.” Id. at 542.

As discussed earlier, the Real Estate Fraud Statute (Section 27.01, Texas Business and Commerce Code) also provides the relief of exemplary damages to a party dealing with another who has violated the terms of that statute. Section 27.01(c) states:
“(c) A person who makes a false representation or false promise with actual awareness of the falsity thereof commits the fraud described in Subsection (a) of this section and is liable to the person defrauded for exemplary damages. Actual awareness may be inferred where objective manifestations indicate that the person acted with actual awareness.”

Tex. Bus. & Com Code Section 27.01 (Vernon 1987).

Although the Real Estate Fraud Statute was applied in a landlord/tenant setting in Kerrville HRH v. City of Kerrville, 803 S.W.2d 377, 385 (Tex. App. – San Antonio 1998), and the court upheld a jury verdict awarding actual damages, it appears that the facts of Kerrville did not support the requisite elements for an award of exemplary damages.

2) Constructive Eviction.

At least one court has found that, since constructive eviction is a tort claim, when that behavior is coupled with an eviction made in conscious indifference to a tenant’s rights, an award of exemplary damages will be upheld. Charalambous v. Jean Lafitte Corporation, 652 S.W.2d 521 (Tex. App. – El Paso 1983). In Charalambous, a restaurant tenant sued its landlord for wrongful eviction and other various breaches of the landlord’s obligations. At trial, the tenant recovered on all allegations and the jury awarded $100,000 in exemplary damages in addition to actual damages. However, the trial court upheld the defendant landlord’s motion to disregard the jury findings with respect to exemplary damages. On appeal, the court reinstated the award and stated:

“In the case before us, the trial court awarded the plaintiffs their actual damages from the eviction and has let stand Special Issue No. 9 and its answer, being that the defendants acted with conscious indifference to the rights of the plaintiffs in making the eviction…No attack has been made upon it and in this case, it is the foundation for the award of exemplary damages in this tort action. Here, the trial court disregarded the finding of $100,000.00 to Special Issue No. 10 under the defendants’ argument that the cause of action involved the breach of a commercial contract and that exemplary damages were not recoverable where an independent tort was neither alleged nor proven. Under our holding that the eviction cause of action was in tort and that the unchallenged Special Issue No. 9 became the foundation for the award of exemplary damages, we sustain the plaintiffs’ first point to the effect that the trial court erred in disregarding the jury finding of exemplary damages.”

Id. at 526-527.

A more seasoned case coming to a similar result is the case of Gonzalez v. Davila, 26 S.W.2d 718, 725 (Tex. Civ. App. – El Paso 1930, writ dism’d). In Gonzalez, the
jury’s finding of malicious intent in locking the gates to the premises was interpreted to be not merely a contract breach, but a tort, which if done maliciously, can sustain exemplary damages. See also the more recent case of Clark v. Summer, 559 S.W.2d 914 (Tex. Civ. App. – Waco 1977, no writ) for a similar outcome on somewhat unusual circumstances.

3) Violation of the DTPA.

As discussed in Section II.B.3) above, Texas courts have permitted tenants to make claims against landlords in appropriate circumstances under the Texas Deceptive Trade Practice and Consumer Protection Act. Section 17.50(b) of the DTPA states as follows:

“(b) In a suit filed under this section, each consumer who prevails may obtain:

(1) the amount of actual damages found by the trier of fact. In addition the court shall award two times that portion of the actual damages that does not exceed $1,000. If the trier of fact finds that the conduct of the defendant was committed knowingly, the trier of fact may award not more than three times the amount of actual damages in excess of $1,000;”

In Corum Management Co., Inc. v. Aguayo Enterprises, Inc., 755 S.W.2d 895 (Tex. App. – San Antonio 1988, writ denied) the court, in finding a knowing misrepresentation, upheld a lower court assessment of treble damages against the landlord. The landlord in Corum made the mistake of representing to the tenant that the use of the term “Sandwich Shop” in the use clause of the lease would be broad enough to encompass the sale of pizza, and then the landlord subsequently prohibited such sale. Id at 897. It is little wonder that the court upheld treble damages to appropriately punish the landlord’s attack on the American institution of pizza.

IV. CONCLUSION

Although the negotiating leverage between a landlord and tenant may often result in a tenant being unable to obtain express remedies in a lease for landlord default, a tenant is certainly not without assistance through statute and common law. A creative attorney representing a tenant in a landlord default situation should be able to explore a number of avenues to protect the client’s rights. My own view of the case law is that courts have recently moved towards a more tenant friendly approach when dealing with bad landlord behavior, withdrawing from the independent covenant concept and expanding the remedies available to tenants.
Schedule 1

Texas Property Code § 91.004

§ 91.004. Landlord’s Breach of Lease; Lien

(a) If the landlord of a tenant who is not in default under a lease fails to comply in any respect with the lease agreement, the landlord is liable to the tenant for damages resulting from the failure.

(b) To secure payment of the damages, the tenant has a lien on the landlord’s nonexempt property in the tenant’s possession and on the rent due to the landlord under the lease.

§ 93.002. Interruption of Utilities, Removal of Property, and Exclusion of Commercial Tenant

(a) A landlord or a landlord's agent may not interrupt or cause the interruption of utility service paid for directly to the utility company by a tenant unless the interruption results from bona fide repairs, construction, or an emergency.

(b) A landlord may not remove a door, window, or attic hatchway cover or a lock, latch, hinge, hinge pin, doorknob, or other mechanism connected to a door, window, or attic hatchway cover from premises leased to a tenant or remove furniture, fixtures, or appliances furnished by the landlord from premises leased to a tenant unless the landlord removes the item for a bona fide repair or replacement. If a landlord removes any of the items listed in this subsection for a bona fide repair or replacement, the repair or replacement must be promptly performed.

(c) 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.

(d) A tenant is presumed to have abandoned the premises if goods, equipment, or other property, in an amount substantial enough to indicate a probable intent to abandon the premises, is being or has been removed from the premises and the removal is not within the normal course of the tenant's business.

(e) A landlord may remove and store any property of a tenant that remains on premises that are abandoned. In addition to the landlord's other rights, the landlord may dispose of the stored property if the tenant does not claim the property within 60 days after the date the property is stored. The landlord shall deliver by certified mail to the tenant at the tenant's last known address a notice stating that the landlord may dispose of the tenant's property if the tenant does not claim the property within 60 days after the date the property is stored.

(f) If a landlord or a landlord's agent changes the door lock of a tenant who is delinquent in paying rent, the landlord or agent must place a written notice on the tenant's front door stating the name and the address or telephone number of the individual or company from which the new key may be obtained. The new key is required to be provided only during the tenant's regular business hours and only if the tenant pays the delinquent rent.

(g) If a landlord or a landlord's agent violates this section, the 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.

(h) A lease supersedes this section to the extent of any conflict.


Acts 1989, 71st Leg., ch. 687, § 2 added “[Section 93.002 reserved].”
§ 93.003. Commercial Tenant’s Right of Reentry After Unlawful Lockout

(a) If a landlord has locked a tenant out of leased premises in violation of Section 93.002, the tenant may recover possession of the premises as provided by this section.

(b) The tenant must file with the justice court in the precinct in which the rental premises are located 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.

(c) If the tenant has complied with Subsection (b) and if the justice reasonably believes an unlawful lockout has likely occurred, the justice may issue, ex parte, a writ of reentry that entitles the tenant to immediate and temporary possession of the premises, pending a final hearing on the tenant’s sworn complaint for reentry.

(d) The writ of reentry must be served on either the landlord or the landlord’s management company, on-premises manager, or rent collector in the same manner as a writ of possession in a forcible detainer action. A sheriff or constable may use reasonable force in executing a writ of reentry under this section.

(e) The landlord is entitled to a hearing on the tenant’s sworn complaint for reentry. The writ of reentry must notify the landlord of the right to a hearing. The hearing shall be held not earlier than the first day and not later than the seventh day after the date the landlord requests a hearing.

(f) If the landlord fails to request a hearing on the tenant’s sworn complaint for reentry before the eighth day after the date of service of the writ of reentry on the landlord under Subsection (d), a judgment for court costs may be rendered against the landlord.

(g) A party may appeal from the court’s judgment at the hearing on the sworn complaint for reentry in the same manner as a party may appeal a judgment in a forcible detainer suit.

(h) If a writ of possession is issued, it supersedes a writ of reentry.

(i) If the landlord or the person on whom a writ of reentry is served fails to immediately comply with the writ or later disobeys the writ, the failure is grounds for contempt of court against the landlord or the person on whom the writ was served, under Section 21.002, Government Code. If the writ is disobeyed, the tenant or the tenant’s attorney may file in the court in which the reentry action is pending an affidavit stating the name of the person who has disobeyed the writ and describing the acts or omissions constituting the disobedience. On receipt of an affidavit, the justice shall issue a show cause order, directing the person to appear on a designated date and show cause why he should not be adjudged in contempt of court. If the justice finds, after considering the evidence at the hearing, that the person has directly or indirectly disobeyed the writ, the justice may commit the person to jail without bail until the person purges himself of the contempt in a manner and form as the justice may direct. If the person disobeyed the writ before receiving the show cause order but has complied with the writ after receiving the order, the justice may find the person in contempt and assess punishment under Section 21.002(c), Government Code.

(j) This section does not affect a tenant’s right to pursue a separate cause of action under Section 93.002.

(k) If a tenant in bad faith files a sworn complaint for reentry resulting in a writ of reentry being served on the landlord or landlord’s agent, the landlord may in a separate cause of action recover from the tenant an amount equal to actual damages, one month’s rent or $500, whichever is greater, reasonable attorney’s fees, and costs of court, less any sums for which the landlord is liable to the tenant.

(l) The fee for filing a sworn complaint for reentry is the same as that for filing a civil action in justice court. The fee for service of a writ of reentry is the same as that for service of a writ of possession. The fee for service of a show cause order is the same as that for service of a civil citation. The justice may defer payment of the tenant’s filing fees and service costs for the sworn complaint for reentry and writ of reentry. Court costs may be waived only if the tenant executes a pauper’s affidavit.

(m) This section does not affect the rights of a landlord or tenant in a forcible detainer or forcible entry and detainer action.

CHAPTER 27. FRAUD

Section
27.01. Fraud in Real Estate and Stock Transactions.
27.02. Certain Insurance Claims for Excessive Charges.

§ 27.01. Fraud in Real Estate and Stock Transactions

(a) Fraud in a transaction involving real estate or stock in a corporation or joint stock company consists of

(1) false representation of a past or existing material fact, when the false representation is
   (A) made to a person for the purpose of inducing that person to enter into a contract; and
   (B) relied on by that person in entering into that contract; or

(2) false promise to do an act, when the false promise is
   (A) material;
   (B) made with the intention of not fulfilling it;
   (C) made to a person for the purpose of inducing that person to enter into a contract; and
   (D) relied on by that person in entering into that contract.

(b) A person who makes a false representation or false promise commits the fraud described in Subsection (a) of this section and is liable to the person defrauded for actual damages.

(c) A person who makes a false representation or false promise with actual awareness of the falsity thereof commits the fraud described in Subsection (a) of this section and is liable to the person defrauded for exemplary damages. Actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness.

(d) A person who (1) has actual awareness of the falsity of a representation or promise made by another person and (2) fails to disclose the falsity of the representation or promise to the person defrauded, and (3) benefits from the false representation or promise commits the fraud described in Subsection (a) of this section and is liable to the person defrauded for exemplary damages. Actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness.

(e) Any person who violates the provisions of this section shall be liable to the person defrauded for reasonable and necessary attorney’s fees, expert witness fees, costs for copies of depositions, and costs of court.