

HOUSING-RELATED QUESTIONS AND ANSWERS FOR TEXAS DISASTER VICTIMS

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Preliminary Comments

This memorandum specifically addresses Texas statutes and Texas common law regarding residential leases and mortgages. Be wary of relying on resource materials that may include general statements of what the law usually is across the nation. In some cases, Texas law is quite different from the laws of other states, particularly regarding statutory landlord-tenant law. The authors believe that all of the answers below reflect the law in Texas.

The information provided here is general information. You should consult with an attorney if you have specific questions about your circumstances. You may be able to get legal help from your local legal aid program if you are low-income.

May I Terminate My Lease Because of the Disaster?

QUESTION: What are my rights if I want to terminate my lease on my dwelling, following the disaster?

ANSWER: Under the law, neither the landlord nor the tenant is given the right to terminate the lease because the property is *partially* unusable unless the lease gives the tenant this right. See Texas Property Code, Section 92.054(c). Therefore, you should check your lease.

However, if the dwelling is *totally* unusable as a result of a disaster like a fire or flood, either the landlord or the tenant can terminate the lease on those grounds. See Texas Property Code, Section 92.054(b). The person terminating the lease must give written notice to the other before repairs are completed. If the lease is so terminated, the tenant is entitled to a refund of any security deposit (less lawful deductions), plus a pro rata refund of any prepaid rent. The landlord must refund the security deposit and/or provide an accounting of any lawful deductions from the deposit within 30 days after the tenant moves out and provides written notice of a new address. See Texas Property Code, Section 92.101.

If the lease is lawfully terminated by either the landlord or the tenant because the dwelling is totally unusable, the landlord can't prevent the tenant from retrieving the tenant's personal property in the dwelling.

How Much Rent Do I Have To Pay?

QUESTION: If the premises are *totally* unusable because of the disaster and I don't want to

permanently move out, do I have to continue paying rent?

ANSWER: There is no provision in the law that entitles the tenant of a dwelling rendered *totally* unusable by a disaster to move out, keep the lease in force and totally abate the rent until the premises are repaired or restored by the landlord. There is nothing, however, that keeps the parties from mutually agreeing to do just that.

Most landlords should be willing to keep the lease in force and suspend all rent payments if the tenant does not stay in the dwelling while the landlord is trying to repair or restore the fire or flood damage. In major repair situations, the landlord usually wants the premises empty for efficient repair and avoidance of personal injury liability. Depending on the circumstances, the landlord may be willing to allow the tenant to stay in the dwelling rent-free until the premises are restored or repaired -- even if the premises normally would be considered *totally* unusable. If this is what you would like to do, you need to discuss it with your landlord right away.

The landlord's common duty to repair, the tenant's duty to pay rent, and the tenant's remedies for non-repair after a casualty loss have been preempted by the habitability statute --except in suits for personal injuries or property damage allegedly caused by the *fault* of the landlord. See Texas Property Code, Section 92.061.

QUESTION: If the premises are *partially* unusable because of the disaster and if I don't want to permanently move out, can my rent be partially abated (temporarily reduced)?

ANSWER: If the premises are *partially* unusable for residential purposes after the disaster, the tenant is entitled under the law to a *partial* rent abatement "to the extent the premises are unusable." See Texas Property Code, Section 92.054(c). If the premises are only partially unusable, neither the landlord nor the tenant can terminate the lease. The only exceptions are when: (1) the *lease itself* gives the landlord or the tenant the right to terminate when a disaster renders the dwelling partially unusable, or (2) the landlord and tenant mutually agree to terminate the lease. See Texas Property Code, section 92.054(c).

Whether the dwelling is *totally* or *partially* unusable is a fact question decided on a case-by-case basis. The law does not give either party the right to unilaterally decide how much the rent abatement should be. Obviously, before paying less than the full rent, the tenant should talk to the landlord and try to reach a mutual agreement on any rent abatement that is justified because a disaster has rendered the premises unusable.

If the landlord and the tenant cannot agree on the appropriate amount of the reduction, the tenant must sue and have a court decide the amount. The tenant cannot unilaterally reduce the rent.

QUESTION: May I withhold payment of rent because of the disaster or because the landlord has failed to timely repair the dwelling after the disaster?

ANSWER: No. Texas law prohibits a tenant from withholding rent on grounds of uninhabitability. See Texas Property Code, Section 92.058. If, after the disaster, neither the tenant nor the landlord has terminated the lease because the dwelling is totally unusable, the tenant may have a right to repair-and-deduct if the landlord does not timely repair (under some circumstances). See Texas Property Code, Section 92.0561. Timeliness of repair may depend on the availability of materials, labor and utilities and, in some cases, on when the landlord receives insurance proceeds from his or her insurance company. See Texas Property Code, Section 92.056(a)(3). The tenant may have other remedies under the statute, such as unilateral termination of the lease or court-ordered repair if the landlord fails to timely repair. See Texas Property Code, Section 92.056.

QUESTION: What can happen and what should I do if I can't pay the rent on my dwelling because of job or salary interruptions following the disaster?

ANSWER: Temporary government rent assistance may be available from the Federal Emergency Management Agency (FEMA) or other governmental agencies.

If your lease is terminated by your landlord because the premises are *totally* unusable, you must move out --regardless of whether you can or cannot pay the rent.

If you live in public or federally subsidized housing or receive Section 8 assistance, you are entitled, in most circumstances, to have your rent reduced when you suffer a loss in income. You must notify your landlord or the housing authority.

If the premises are only *partially* unusable and if you don't pay the abated (partially reduced) rent, you must move out if the landlord asks you to -- unless you and your landlord agree otherwise.

If the landlord is entitled to evict you and you do not move after the landlord has given you notice to vacate, you can be evicted only through a justice of the peace court eviction lawsuit.

Must I Move Out?

QUESTION: My landlord told me to move out because the dwelling is *totally* unusable after the disaster. Do I have to move out?

ANSWER: You must move out if the dwelling is *totally* unusable and the landlord has terminated your lease on that ground. Unless your lease says otherwise, the landlord has the right to terminate the lease if the dwelling is *totally* unusable as a result of a disaster such as a flood or fire. See Texas Property Code, Section 92.054. However, if you do not move after the landlord has demanded that you move, the landlord may evict you only by filing a suit in justice court.

QUESTION: My landlord told me to move out the next day because he wants the dwelling for his

daughter who lost her house in the flood. He told me if I didn't move out, he'd change the locks. Do I have to move out?

ANSWER: No. The landlord must honor the lease unless the dwelling is *totally* unusable or the lease contains an express provision allowing the landlord to terminate in event of a fire, flood, or similar casualty. If the landlord wants you out in order to move someone else in, then the premises are obviously not "totally unusable" and the landlord cannot terminate the lease.

If the landlord unlawfully locks you out, you should contact the justice of the peace about a writ of re-entry. This is an expedited process through which you can get back into your home the same day.

QUESTION: Are there any situations in which the landlord can lawfully change the locks and lock me out?

ANSWER: In Texas, the *only* times a landlord can change the locks during the lease term are when (1) the tenant requests it, (2) the landlord fixes or replaces a broken lock, or (3) the tenant has failed to pay rent on time. If the lockout is for (1) or (2) above, the landlord must furnish the tenant a key immediately, without being requested to do so.

If the landlord locks the tenant out for non-payment of rent under the lockout statute (Texas Property Code, Section 92.0081), the landlord must post the required notice on the front door and furnish the new key to the tenant upon the tenant's request at any time of the day or night. The landlord cannot refuse to furnish the key just because the tenant hasn't paid the rent. A landlord may lock out for non-payment of rent only after having given the tenant advance written notice that the landlord will lock out the tenant if the rent is not paid.

QUESTION: What should I do if I am served with an eviction lawsuit by the constable?

ANSWER: If an eviction lawsuit is served on you by a constable or deputy sheriff, you should carefully read the papers and find your deadline for filing an answer or appearing in court. You can defend yourself in court or you can call a legal services program for information or possible representation. Under some circumstances, you can be defended in court by a non-lawyer friend. See Texas Property Code, Section, 24.011.

Must I Make My Home Mortgage Payments?

QUESTION: My house was damaged and I can't live in it. Do I have to make my mortgage payments? What if I can't pay my mortgage because of job or salary interruptions following the disaster?

ANSWER: Most home loan documents require the homeowner to make mortgage payments even after a disaster -- even if your house is damaged and you can't live in it. However,

many lenders will allow the owner to delay mortgage payments for several months after a disaster (although interest may continue to be added). Many lenders will make loan modifications to allow the missed payments to be added to the loan, thereby lengthening the term of the mortgage. You need to communicate with your lender and tell the lender about the disaster and your temporary inability to pay. The lenders will nearly always work with you. If your mortgage is FmHA financed or FHA-insured and you fall behind in your payments because of circumstances beyond your control, you have special rights. See answer to next question.

QUESTION: What should I do if I receive a notice that my lender is going to foreclose on my home for non-payment of the mortgage?

ANSWER: If you have received a written foreclosure notice as a result of a disaster-related financial hardship, you may be eligible for Federal Emergency Management Agency (FEMA) assistance to help you with your mortgage payments. You may file an application for FEMA benefits at a Disaster Assistance Center (DAC) site.

If your mortgage is FHA-insured or FmHA financed, you may be entitled to reduced or suspended payments. Your lender must notify you of this right and give you an opportunity to seek help before the lender begins foreclosure proceedings. But, you must meet the deadlines the lender will give you.

If you have income and you want to keep your house, you may be able to file a Chapter 13 bankruptcy. In this type of bankruptcy, the homeowner pays regular mortgage payments that accrue after the bankruptcy and all other living expenses and also pays an amount every month toward the mortgage installments, which were delinquent prior to the bankruptcy. If you think you may want to file a Chapter 13 bankruptcy, you should consult an attorney.

Can I Hold the Landlord or Previous Homeowner Responsible for Fraud or Negligence?

QUESTION: May I recover damages against my landlord for injuries or property damage I suffered as a result of the disaster?

ANSWER: When the injury or property damage results from a natural disaster and not from the landlord's negligence, the landlord is *not* liable for such injuries or property damage. However, the law does *not* prevent suits against the landlord under the common law for injuries or property damage resulting from the landlord's negligence. See Texas Property code, section 92.061. The landlord can therefore be sued if the landlord's negligence caused or contributed to the tenant's injuries or damage from the disaster.

QUESTION: I have suffered personal injuries or loss or damage to my personal belongings from the flood. May I recover damages against my landlord or the previous homeowner if they *knew* about the possibility of flooding and failed to inform me?

ANSWER: If an affirmative *misrepresentation* was made by the landlord or seller concerning the possibility of flooding, the tenant or buyer may be able to sue the landlord or seller both for fraud and under the Texas Deceptive Trade Practices Act to recover for property damages or personal injuries.

A more difficult situation arises when the landlord or seller says nothing about the possibility of flooding. Generally, the mere failure to disclose a fact known by the seller or landlord is not fraud. But failure to disclose the possibility of flooding may, under the circumstances, support a lawsuit against a landlord or seller who knew of past flooding or knew of the possibility of flooding. Active concealment of known past flooding (for example, painting over flood water marks on walls) may also be the basis for tenant recovery. See 37 Am. Jur. 2d, *Fraud and Deceit*, 144-146.

QUESTION: May I recover damages against my landlord or the previous homeowner if they *didn't* know about the possibility of flooding?

ANSWER: Probably not. As a general rule, the tenant or buyer cannot sue the landlord or previous owner for loss or damage from flooding if such landlord or previous owner knew nothing about past flooding or the possibility of flooding, and did not tell the tenant or buyer that the property was not subject to flooding.

Am I Covered by Insurance?

QUESTION: All my personal belongings were destroyed when the roof fell in on the place I rent. What help can I get from my insurance company?

ANSWER: If you had renter's insurance or homeowner's contents insurance at the time of the flood, contact your insurance company. If your situation is desperate, make sure you describe your situation to the insurance company. If the insurance company agrees that there is coverage, you can ask for advance payment to cover a part of your loss.

QUESTION: What should I do if I do not have insurance on my personal belongings?

ANSWER: If your losses are not covered by insurance, you may be able to get an Individual and Family Grant (IFG) from FEMA to replace necessary items of personal property. You may apply for these benefits at the FEMA DAC sites. You may also wish to contact the Red Cross, which may be able to help you.

QUESTION: If my personal belongings are lost or damaged as a result of the flood or other disaster, may I recover from my landlord under the landlord's hazard insurance policy?

ANSWER: No. The landlord has no "insurable interest" in the tenant's property, and therefore, the landlord's *hazard* insurance cannot (and does not) insure the tenant's personal

property.

However, if the damage or loss of the tenant's property is due in whole or in part to the landlord's negligence, the tenant may be able to sue the landlord and the loss may be covered by the landlord's *liability* insurance carrier.

QUESTION: Is flood damage to my home covered under my insurance policy?

ANSWER: Your homeowner's insurance policy (sometimes called a "casualty insurance policy," "hazard insurance policy," or "fire and extended coverage policy") normally does not cover flood damage. The policy may cover water damage inside the home *from direct or blowing rainfall*, but it normally does not cover damage from surface water or rising water. Windstorm insurance normally will be limited to greater-than-normal wind conditions. You should read your policy, talk to your insurance agent and consult an attorney if you have questions.

Flood insurance may be purchased from the federal government under the National Flood Insurance Program (NFIP). You can buy policies from any state-licensed local agent if your community is participating in the NFIP.

QUESTION: Does my automobile insurance cover the damage to my car resulting from the disaster?

ANSWER: Normally, disaster damage to an owner's vehicle will be covered under the owner's comprehensive auto coverage, although specific language in the policy and any express policy exclusions will control.

Even if there is a policy exclusion for damage caused by flood, wind, etc., coverage may still exist under a collision policy if the event causing the damage during the disaster could be construed as a collision. For example, if your car is damaged by being washed away by the flood and colliding into a tree or another person's car. Courts have reached mixed results on this issue. See 7 Am. Jur. 2d, *Automobile Insurance*, 167-171, 176-182.

Can I Recover Against Neighbors or Others?

QUESTION: May I recover damages against my neighbor whose property damaged my property during the disaster?

ANSWER: The general rule is that a person is not liable for injuries or damages caused by a disaster or "Act of God" where there is no fault of negligence on the part of the owner whose property caused damage to others during the disaster. Therefore, your neighbor is liable only when he or she was negligent and such negligence was a cause of the damage. See 1 Am. Jur. 2d, *Act of God*, 11, 15; and 57 Am Jur. 2d, *Negligence*, 181.

QUESTION: What can I do with someone else's property, which the disaster carried onto my land?

ANSWER: When personal property is carried away by flood, wind or explosion onto the land of another, such personal property still belongs to the original owner and the original owner may enter and retrieve it. If the landowner refuses to let the owner of the personal property enter, or if the landowner appropriates the property for the landowner's own use, the owner of the personal property can sue the landowner for the value of the property.

In the above situation, the landowner is an "involuntary bailee" and has the right to possession of the property against all others, except the true owner. The landowner may, if necessary, move the property to use the land, provided it is done in a reasonable manner. The landowner may not damage the property either intentionally or through gross negligence. See 1 Am. Jur. 2d, *Abandoned, Lost, Etc., Property*, 24-27.

QUESTION: May I recover damages against my neighbor who put up dikes, levees, buildings or other improvements that caused more water to flow onto my land?

ANSWER: Generally, a landowner is entitled to defend his or her land against the "common enemy" of surface water from an overflowing river, stream or other body of water. The landowner may act without liability for damages caused to other landowners, provided such action is taken with reasonable care. However, a natural water course may not be diverted, collected, or channeled so as to increase the rate of flow of natural drainage ways beyond their capacity, thereby causing damage to adjoining landowners. See 50 Am. Jur. 2d, *Levees and Flood Control*, 14, 17.

QUESTION: May I sue the local, state or federal government for damages caused by the disaster?

ANSWER: Under some circumstances, the government may have liability if its employees were negligent and caused the damages. However, under the doctrine of "sovereign immunity," governmental authorities are generally immune from liability for the negligent acts of their agents and employees. Texas statutes do allow recovery against local governments in some cases involving death or personal injury.

The doctrine of sovereign immunity normally applies to "governmental functions" such as crime prevention, flood control, fire fighting, preservation of health, etc.

Miscellaneous

QUESTION: Do state or local governments have the right to enact rent control and price controls to help curb the price gauging and scams that sometimes follow disasters?

ANSWER: Yes. Texas law provides, in Section 214.902 of the Texas Local Government Code

and Section 418.004 of the Texas Government Code, that the governor (for any part of the state) or a municipality (for areas within its city limits) can declare a state of emergency because of a disaster or civil disturbance. The governor or the city can thereafter impose rent and price controls for as long as the emergency exists. Otherwise, the state and local governments in Texas do not have rent and price control powers.

QUESTION: Must I continue paying rent for my commercial lease space (office, retail, mini-storage, etc.) even though it has been rendered totally or partially unusable by the disaster?

ANSWER: In commercial leases, the Texas common law has not been pre-empted by statute, but the answer to this question is usually addressed by the terms of the lease.

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