RESIDENTIAL LEASE ADDENDUM

This addendum amends and is made a part of the foregoing Residential Lease Contract entered by and between _____ _____, herein known as the Tenant(s) or Lessee(s), and _____ _____, herein known as the Landlord or Lessor, on this _____ day of _____, 20___.

WHEREAS, effective January 1, 2008, all written residential lease agreement must contain the tenant's remedies as specified in Sections 92.056 and 92.0561of the Texas Property Code;

AND WHEREAS, the language must be underlined or placed in bold print to comply with the statutory requirements;

NOW THEREFORE, the following reproduces the two noted sections of the Property Code following by an explanation of each section taken from the Real Estate Center's publication entitled the *Landlords and Tenants Guide*.

Section 92.056 of the Texas Property Code:

The following material reproduces the current Section of 92.056 of the Texas Property Code.

Sign for identification and for acknowledgement of receipt of this Addendum on the dates indicated next to the signatures below.

_____ Date _____
(Tenant)

_____ Date _____
(Tenant)

_____ Date _____
(Landlord)

§ 92.056. Landlord Liability and Tenant Remedies; Notice and Time for Repair

(a) A landlord's liability under this **section** is subject to **Section** 92.052(b) regarding conditions that are caused by a tenant and **Section** 92.054 regarding conditions that are insured casualties.

(b) A landlord is liable to a tenant as provided by this subchapter if:

(1) the tenant has given the landlord notice to repair or remedy a condition by giving that notice to the person to whom or to the place where the tenant's rent is normally paid;

(2) the condition materially affects the physical health or safety of an ordinary tenant;

(3) the tenant has given the landlord a subsequent written notice to repair or remedy the condition after a reasonable time to repair or remedy the condition following the notice given under Subdivision (1) or the tenant has given the notice under Subdivision (1) by sending that notice by certified mail, return receipt requested, or by registered mail;

(4) the landlord has had a reasonable time to repair or remedy the condition after the landlord received the tenant's notice under Subdivision (1) and, if applicable, the tenant's subsequent notice under Subdivision (3);

(5) the landlord has not made a diligent effort to repair or remedy the condition after the landlord received the tenant's notice under Subdivision (1) and, if applicable, the tenant's notice under Subdivision (3); and

(6) the tenant was not delinquent in the payment of rent at the time any notice required by this subsection was given.

(c) For purposes of Subsection (b)(4) or (5), a landlord is considered to have received the tenant's notice when the landlord or the landlord's agent or employee has actually received the notice or when the United States Postal Service has attempted to deliver the notice to the landlord.

(d) For purposes of Subsection (b)(3) or (4), in determining whether a period of time is a reasonable time to repair or remedy a condition, there is a rebuttable presumption that seven days is a reasonable time. To rebut that

presumption, the date on which the landlord received the tenant's notice, the severity and nature of the condition, and the reasonable availability of materials and labor and of utilities from a utility company must be considered.

(e) Except as provided in Subsection (f), a tenant to whom a landlord is liable under Subsection (b) of this **section** may:

(1) terminate the lease;

(2) have the condition repaired or remedied according to **Section** 92.0561;

(3) deduct from the tenant's rent, without necessity of judicial action, the cost of the repair or remedy according to **Section** 92.0561; and

(4) obtain judicial remedies according to **Section** 92.0563.

(f) A tenant who elects to terminate the lease under Subsection (e) is:

(1) entitled to a pro rata refund of rent from the date of termination or the date the tenant moves out, whichever is later;

(2) entitled to deduct the tenant's security deposit from the tenant's rent without necessity of lawsuit or obtain a refund of the tenant's security deposit according to law; and

(3) not entitled to the other repair and deduct remedies under **Section** 92.0561 or the judicial remedies under Subdivisions (1) and (2) of Subsection (a) of **Section** 92.0563.

In common terms

As specified in the Center's *Landlords' and Tenants' Guide,* here is how the statutory language in Section 92.056 can be interpreted.

What conditions must be met before the landlord becomes liable for repairing or remedying conditions in the apartment dwelling?

If the tenant notifies the landlord in person or in writing, the landlord becomes liable to make repairs and remedy the condition when all of the following conditions are met:

(1) Notice of the condition was given to the person to whom the tenant normally pays rent or to the place rent payments are tendered.
(2) The condition materially affects the physical health or safety of an ordinary tenant.
(3) The tenant gave a second notice **in writing** to repair or remedy the condition after a **reasonable time** elapsed.
(4) The landlord had a **reasonable time** to repair or remedy the condition after receiving the second notice in writing.
(5) The landlord did not make a diligent effort to repair or remedy the condition after receiving the second notice.
(6) The tenant was not delinquent in rent at the time the notice(s) were given (Section 92.056[b]).

If the tenant **initially** notifies the landlord by certified mail, return receipt requested, or by registered mail, the landlord becomes liable for repairs when all of the following conditions are met. Basically, only one notice is required.

(1) The tenant notified the landlord to repair or remedy a condition by certified mail, return receipt requested or by registered mail.
(2) The notice was given to the person to whom the tenant normally pays rent or to the place rent payments are made.
(3) The condition materially affects the physical health or safety of an ordinary tenant.
(4) The landlord had a **reasonable time** to repair or remedy the condition after receiving the notice (by certified or registered mail).
(5) The landlord did not make a diligent effort to repair or remedy the condition after receiving the notice (by certified or registered mail).
(6) The tenant was not delinquent in rent at the time the notice was given (Section 92.056[b]).

Are there any new contact rules for emergencies effective Jan. 1, 2008?

Yes. Landlords who have an on-site management or superintendent's office for residential rental property must provide a 24-hour telephone number for reporting emergencies on the leased premises that materially affect the physical health or safety of an ordinary tenant. The number must be posted outside the management or superintendent's office (Sections 92.020[a]&[b]).

Landlords who do not have an on-site management or superintendent's office must provide tenants a telephone number for the purpose of reporting emergencies on the leased premises that materially affect the physical health or safety of an ordinary tenant (Section 92.020[d]. The means or method of providing the telephone number is not specified in the statute.

What is considered a *reasonable time* for making repairs?

A rebuttable presumption exists that **seven days is a reasonable time** to make repairs. Factors rebutting the presumption include the:

- date the landlord **receives** notice,
- severity and nature of the condition and
- the reasonable availability of materials and labor, and also the availability of utilities from the utility company (Section 92.056[c]).

When is the notice "*received*" for purposes of calculating the seven days?

Notice is deemed received by the landlord when the landlord's agent or employee physically receives it or when the U.S. Postal Service attempts to deliver it (Section 92.056[c]).

If the tenant satisfies the six requirements, are there exceptions when the landlord still does not have to repair or remedy the condition?

Yes. The landlord still has no obligation to repair or remedy a condition when the:

- condition was caused by the tenant or guests (Section 92.052[b]) or
- the landlord is awaiting the proceeds from an insured casualty loss (Section 92.054).

What are the tenant's legal remedies when the landlord fails to repair or remedy the conditions after the tenant satisfies all the prerequisites previously outlined, and no exceptions apply?

The tenant may:

- terminate lease,
- repair or remedy the condition according to Section 92.0561 and deduct the cost of the repair from the rent without the necessity of judicial action, or
- obtain judicial remedies as specified in Section 92.0653.

What judicial remedies are available to tenants under Section 92.0563?

The section lists as many as five possible judicial remedies a tenant may pursue. These include:

(1) a court order directing the landlord to take reasonable steps to repair the condition,
(2) a court order lowering the tenant's rent according to the reduced rental value caused by the condition, (the reduction is figured from the time the first repair notice was given until the condition is repaired),
(3) a judgment for one month's rent plus $500,
(4) a judgment for the amount of the tenant's actual damages, or
(5) court costs and attorneys' fees excluding those relating to recoveries for personal injury.

The tenant's petition may be filed in the justice, county or district courts, depending on the amount of the tenant's claim.

What limitations are imposed when the tenant elects to terminate the lease?

When the tenant elects to terminate the lease, the only other things the tenant is entitled to receive is:

- a pro rata refund of rent from the date of termination or the date the tenant moves out, whichever is later, and
- to deduct the tenant's security deposit from the tenant's rent without the necessity of a lawsuit.

Section 92.0561 of the Texas Property Code (better known as the Repair-and-Deduct Statute):

The following is a reproduction of the current Section 92.0561 of the Texas Property Code.

➡§ 92.0561. Tenant's Repair and Deduct Remedies

(a) If the landlord is liable to the tenant under Section 92.056(b), the tenant may have the condition repaired or remedied and may deduct the cost from a subsequent rent payment as provided in this section.

(b) The tenant's deduction for the cost of the repair or remedy may not exceed the amount of one month's rent under the lease or $500, whichever

is greater. However, if the tenant's rent is subsidized in whole or in part by a governmental agency, the deduction limitation of one month's rent shall mean the fair market rent for the dwelling and not the rent that the tenant pays. The fair market rent shall be determined by the governmental agency subsidizing the rent, or in the absence of such a determination, it shall be a reasonable amount of rent under the circumstances.

(c) Repairs and deductions under this section may be made as often as necessary so long as the total repairs and deductions in any one month do not exceed one month's rent or $500, whichever is greater.

(d) Repairs under this section may be made only if all of the following requirements are met:

(1) The landlord has a duty to repair or remedy the condition under Section 92.052, and the duty has not been waived in a written lease by the tenant under **Subsection (e) or (f) of Section 92.006**.

(2) The tenant has given notice to the landlord as required by Section 92.056(b)(1), and, if required, a subsequent notice under Section 92.056(b)(3), and at least one of those notices states that the tenant intends to repair or remedy the condition. The notice shall also contain a reasonable description of the intended repair or remedy.

(3) Any one of the following events has occurred:

(A) The landlord has failed to remedy the backup or overflow of raw sewage inside the tenant's dwelling or the flooding from broken pipes or natural drainage inside the dwelling.

(B) The landlord has expressly or impliedly agreed in the lease to furnish potable water to the tenant's dwelling and the water service to the dwelling has totally ceased.

(C) The landlord has expressly or impliedly agreed in the lease to furnish heating or cooling equipment; the equipment is producing inadequate heat or cooled air; and the landlord has been notified in writing by the appropriate local housing, building, or health official or other official having jurisdiction that the lack of heat or cooling materially affects the health or safety of an ordinary tenant.

(D) The landlord has been notified in writing by the appropriate local housing, building, or health official or other official having jurisdiction that the condition materially affects the health or safety of an ordinary tenant.

(e) If the requirements of Subsection (d) of this section are met, a tenant may:

(1) have the condition repaired or remedied immediately following the tenant's notice of intent to repair if the condition involves sewage or flooding as referred to in Paragraph (A) of Subdivision (3) of Subsection (d) of this section;

(2) have the condition repaired or remedied if the condition involves a cessation of potable water as referred to in Paragraph (A) of Subdivision (3) of Subsection (d) of this section and if the landlord has failed to repair or remedy the condition within three days following the tenant's delivery of notice of intent to repair;

(3) have the condition repaired or remedied if the condition involves inadequate heat or cooled air as referred to in Paragraph (C) of Subdivision (3) of Subsection (d) of this section and if the landlord has failed to repair the condition within three days after delivery of the tenant's notice of intent to repair; or

(4) have the condition repaired or remedied if the condition is not covered by Paragraph (A), (B), or (C) of Subdivision (3) of Subsection (d) of this section and involves a condition affecting the physical health or safety of the ordinary tenant as referred to in Paragraph (D) of Subdivision (3) of Subsection (d) of this section and if the landlord has failed to repair or remedy the condition within seven days after delivery of the tenant's notice of intent to repair.

(f) Repairs made pursuant to the tenant's notice must be made by a company, contractor, or repairman listed in the yellow or business pages of the telephone directory or in the classified advertising section of a newspaper of the local city, county, or adjacent county at the time of the tenant's notice of intent to repair. Unless the landlord and tenant agree otherwise under Subsection (g) of this section, repairs may not be made by the tenant, the tenant's immediate family, the tenant's employer or employees, or a company in which the tenant has an ownership interest. Repairs may not be made to the foundation or load-bearing structural elements of the building if it contains two or more dwelling units.

(g) A landlord and a tenant may mutually agree for the tenant to repair or remedy, at the landlord's expense, any condition of the dwelling regardless of whether it materially affects the health or safety of an ordinary tenant. However, the landlord's duty to repair or remedy conditions covered by this subchapter may not be waived except as provided by **Subsection (e) or (f) of Section 92.006.**

(h) Repairs made pursuant to the tenant's notice must be made in compliance with applicable building codes, including a building permit when required.

(i) The tenant shall not have authority to contract for labor or materials in excess of what the tenant may deduct under this section. The landlord is not liable to repairmen, contractors, or material suppliers who furnish labor or materials to repair or remedy the condition. A repairman or supplier shall not have a lien for materials or services arising out of repairs contracted for by the tenant under this section.

(j) When deducting the cost of repairs from the rent payment, the tenant shall furnish the landlord, along with payment of the balance of the rent, a copy of the repair bill and the receipt for its payment. A repair bill and receipt may be the same document.

(k) If the landlord repairs or remedies the condition or delivers an affidavit for delay under **Section 92.0562** to the tenant after the tenant has contacted a repairman but before the repairman commences work, the landlord shall be liable for the cost incurred by the tenant for the repairman's trip charge, and the tenant may deduct the charge from the tenant's rent as if it were a repair cost.

What does Subsection (e) or (f) of Section 92.006 provide as referenced in Section 92.0561?

Here is the statutory copy of Sections 92.006(e)&(f). The section is entitled "**Waiver or Expansion of Duties and Remedies."**

(e) A landlord and a tenant may agree for the tenant to repair or remedy, at the tenant's expense, any condition covered by Subchapter B if all of the following conditions are met:

(1) at the beginning of the lease term the landlord owns only one rental dwelling;

(2) at the beginning of the lease term the dwelling is free from any condition which would materially affect the physical health or safety of an ordinary tenant;

(3) at the beginning of the lease term the landlord has no reason to believe that any condition described in Subdivision (2) of this subsection is

likely to occur or recur during the tenant's lease term or during a renewal or extension; and

(4) (A) the lease is in writing;

(B) the agreement for repairs by the tenant is either underlined or printed in boldface in the lease or in a separate written addendum;

(C) the agreement is specific and clear; and

(D) the agreement is made knowingly, voluntarily, and for consideration.

(f) A landlord and tenant may agree that, except for those conditions caused by the negligence of the landlord, the tenant has the duty to pay for repair of the following conditions that may occur during the lease term or a renewal or extension:

(1) damage from wastewater stoppages caused by foreign or improper objects in lines that exclusively serve the tenant's dwelling;

(2) damage to doors, windows, or screens; and

(3) damage from windows or doors left open.

This subsection shall not affect the landlord's duty under Subchapter B to repair or remedy, at the landlord's expense, wastewater stoppages or backups caused by deterioration, breakage, roots, ground conditions, faulty construction, or malfunctioning equipment. A landlord and tenant may agree to the provisions of this subsection only if the agreement meets the requirements of Subdivision (4) of Subsection (e) of this **section**.

What does Section 92.0562 provide as referenced in Section 92.0561?

Here is a copy of Section 92.0562**.** The section is entitled **"Landlord Affidavit for Delay."**

(a) The tenant must delay contracting for repairs under **Section** 92.0561 if, before the tenant contracts for the repairs, the landlord delivers to the tenant an affidavit, signed and sworn to under oath by the landlord or his authorized agent and complying with this **section**.

(b) The affidavit must summarize the reasons for the delay and the diligent efforts made by the landlord up to the date of the affidavit to get the repairs done. The affidavit must state facts showing that the landlord has made and

is making diligent efforts to repair the condition, and it must contain dates, names, addresses, and telephone numbers of contractors, suppliers, and repairmen contacted by the owner.

(c) Affidavits under this **section** may delay repair by the tenant for:

(1) 15 days if the landlord's failure to repair is caused by a delay in obtaining necessary parts for which the landlord is not at fault; or

(2) 30 days if the landlord's failure to repair is caused by a general shortage of labor or materials for repair following a natural disaster such as a hurricane, tornado, flood, extended freeze, or widespread windstorm.

(d) Affidavits for delay based on grounds other than those listed in Subsection (c) of this **section** are unlawful, and if used, they are of no effect. The landlord may file subsequent affidavits, provided that the total delay of the repair or remedy extends no longer than six months from the date the landlord delivers the first affidavit to the tenant.

(e) The affidavit must be delivered to the tenant by any of the following methods:

(1) personal delivery to the tenant;

(2) certified mail, return receipt requested, to the tenant; or

(3) leaving the notice inside the dwelling in a conspicuous place if notice in that manner is authorized in a written lease.

(f) Affidavits for delay by a landlord under this **section** must be submitted in good faith. Following delivery of the affidavit, the landlord must continue diligent efforts to repair or remedy the condition. There shall be a rebuttable presumption that the landlord acted in good faith and with continued diligence for the first affidavit for delay the landlord delivers to the tenant. The landlord shall have the burden of pleading and proving good faith and continued diligence for subsequent affidavits for delay. A landlord who violates this section shall be liable to the tenant for all judicial remedies under Section 92.0563 except that the civil penalty under Subdivision (3) of Subsection (a) of Section 92.0563 shall be one month's rent plus $1,000.

(g) If the landlord is liable to the tenant under Section 92.056 and if a new landlord, in good faith and without knowledge of the tenant's notice of intent to repair, has acquired title to the tenant's dwelling by foreclosure, deed in lieu of foreclosure, or general warranty deed in a bona fide purchase, then the following shall apply:

(1) The tenant's right to terminate the lease under this subchapter shall not be affected, and the tenant shall have no duty to give additional notice to the new landlord.

(2) The tenant's right to repair and deduct for conditions involving sewage backup or overflow, flooding inside the dwelling, or a cutoff of potable water under Subsection (e) of Section 92.0561 shall not be affected, and the tenant shall have no duty to give additional notice to the new landlord.

(3) For conditions other than those specified in Subdivision (2) of this subsection, if the new landlord acquires title as described in this subsection and has notified the tenant of the name and address of the new landlord or the new landlord's authorized agent and if the tenant has not already contracted for the repair or remedy at the time the tenant is so notified, the tenant must deliver to the new landlord a written notice of intent to repair or remedy the condition, and the new landlord shall have a reasonable time to complete the repair before the tenant may repair or remedy the condition. No further notice from the tenant is necessary in order for the tenant to repair or remedy the condition after a reasonable time has elapsed.

(4) The tenant's judicial remedies under Section 92.0563 shall be limited to recovery against the landlord to whom the tenant gave the required notices until the tenant has given the new landlord the notices required by this section and otherwise complied with Section 92.056 as to the new landlord.

(5) If the new landlord violates this subsection, the new landlord is liable to the tenant for a civil penalty of one month's rent plus $2,000, actual damages, and attorney's fees.

(6) No provision of this section shall affect any right of a foreclosing superior lienholder to terminate, according to law, any interest in the premises held by the holders of subordinate liens, encumbrances, leases, or other interests and shall not affect any right of the tenant to terminate the lease according to law.

In common terms

As specified in the Center's *Landlords' and Tenants' Guide,* here is how the statutory language in Section 92.0561 can be interpreted in a series of questions and answers.

What is the repair-and-deduct option? What are its qualifications and limits?

The repair-and-deduct option allows the tenant to arrange and pay for repairs, then deduct the amount from rent payments. The statute qualifies the privilege to some degree.

First, the deductions for repairs for any month may not exceed one month's rent or $500, whichever is greater. However, if the tenant's rent is subsidized in whole or in part by a governmental agency, the deduction limitation means the fair market rent for the dwelling and not the amount of monthly rent that the tenant actually pays. The government agency subsidizing the rent makes the determination. Otherwise, fair market rent is a reasonable amount under the circumstances.

Second, the repair person or supplier **cannot** place a lien on the property for the materials or services contracted by the tenant under this remedy. The landlord is not personally liable for the repairs.

Third, the statute places the following restrictions on the option.

- Unless there is an agreement to the contrary, the tenant, the tenant's immediate family, the tenant's employer or employee of a company in which the tenant owns an interest cannot make the repairs.
- The repairs must be made by a company, contractor or repair person listed in the *Yellow Pages* or business section of the telephone directory. Alternatively, they may appear in the classified section of a local or county newspaper or in the newspaper in an adjacent county at the time the tenant gives the landlord notice of having selected the repair-and-deduct option.
- No repairs may be made to the foundation or load-bearing structure of a building containing two or more dwelling units.
- All repairs must be made in compliance with building codes, including building permits when required. (It is unclear whether the cost of the permits is included as part of the repair costs.)
- After the repairs are made, the tenant must furnish the landlord a copy of the repair bill and the receipt for payment with the balance of the next month's rent (Section 92.0561).

When can the tenant begin repairs?

This depends on the situation.

- When the condition involves the backup or overflow or raw sewage or the flooding from broken pipes or natural drainage inside the dwelling, the tenant may remedy the situation immediately after giving notice. There is no waiting period.
- When the condition involves the breach of an expressed or implied lease agreement to furnish potable water to the tenant's dwelling and the water service has ceased totally, the tenant must wait three days before making the repairs.
- When the condition involves an expressed or implied lease agreement to furnish heating or cooling equipment; the equipment is producing inadequate heat or cooled air; and the landlord has been notified in writing by the appropriate local housing, building or health officials or other official having jurisdiction that the lack of heat or cooling materially affects the health or safety of an ordinary tenant; then the tenant must wait three days before making repairs.
- After the landlord has received written notification from the appropriate local housing, building or health official or other official having jurisdiction that some other condition exists that materially affects the health or safety of an ordinary tenant, the tenant must wait seven days before making repairs (Sections 92.0561[d]&[e]).

In some situations, a local housing, building or health official must verify certain conditions materially affect the health or safety of an ordinary tenant before repairs can begin. This verification is not required when the condition involves raw sewage, flooding from broken pipes, natural drainage inside the dwelling, potable water or water service, or failure of the heating or air conditioning system. Otherwise, verification is needed before proceeding under the repair-and-deduct option.

How can the landlord delay the tenant’s option to repair and deduct with an Affidavit for Delay?

The tenant’s option to repair and deduct may be delayed by the landlord’s delivering a signed and sworn affidavit (Section 92.0562). The Affidavit for Delay, as it is called, must be delivered before the tenant contracts for the repairs. The affidavit may be executed by either the landlord or an authorized agent. It must be delivered to the tenant by one of three methods:

- in person,
- by certified mail, return receipt requested or

- left in a conspicuous place at the tenant's dwelling, if notice of delivery in such a manner is authorized in the written lease. The affidavit must be submitted in good faith and summarize the reasons for the delay. The affidavit must contain a sworn statement that diligent efforts have been and are being made to effect repairs. The dates, names, addresses and telephone numbers of the contacted contractors, suppliers and repair persons must be included. The affidavit will delay repairs only in two circumstances. If neither circumstance exists, the affidavit is ineffective.

First, the inability to obtain necessary parts will delay the landlord's repair obligation 15 days.

Second, the general shortage of labor or materials following a natural disaster such as a hurricane, tornado, flood, extended freeze or widespread windstorm will delay the landlord's obligation 30 days.

The landlord can file repeated affidavits as long as the total delay does not exceed six months. An Affidavit for Delay is effective only when necessary parts are unavailable or there is a shortage of labor or materials following a natural disaster. However, no affidavit is required and no repairs are necessary when the landlord is waiting for insurance proceeds following a casualty loss mentioned in Section 92.054.

The law presumes that the landlord acted in good faith and with continued due diligence for the first affidavit. This presumption may be refuted or disproven by the tenant. After that, there is a presumption to the contrary. If the landlord files a false affidavit or does not act with due diligence, the landlord is liable for all the judicial remedies described later except that the civil penalties shall be one month's rent plus $1,000. If the landlord repairs the condition or delivers an affidavit for delay after the tenant has contacted the repair person but before the repair person begins work, the landlord is liable for the repair person's trip charge. If the landlord does not reimburse the tenant for the charge, the tenant may deduct the charge from rent as if it were a repair cost.

How does change of landlords affect remedies?

The tenant's choice of remedies may be affected by an intervening change of ownership. If the tenant has opted to terminate the lease, an intervening change of ownership after proper notices have been given to the former landlord does not necessitate new notices to be given to the new landlord. Likewise, the tenant's right to repair and deduct for sewage backup, inside flooding or cutoff of potable water is not affected, and new notices are not

required. However, new notices must be given for any other repair-and deduct situation if the:

- tenant has not contracted for the repairs,
- landlord acquires title without knowledge of the tenant's notices to the prior landlord and
- acquiring landlord has notified the tenant of the new landlord's name and address or an agent's name and address.

If the tenant has chosen the third option (judicial remedies), any judicial remedy shall be limited to recovery against the former landlord if an intervening change of ownership occurs. By issuing new notices to the acquiring landlord, however, the new landlord becomes liable for the judicial remedies specified in Section 92.0563. If, however, the new landlord violates Section 92.0562, the new landlord is liable to the tenant for a civil penalty of one month's rent plus $2,000, actual damages and attorneys' fees. Exactly how a new landlord can violate Section 92.0562 is unclear. However, the new landlord's liability is twice that of the former landlord's for the same act.

What judicial remedies are available to tenants?

Section 92.0563 lists as many as five possible judicial remedies a tenant may pursue if the judicial option is chosen:

- a court order directing the landlord to take reasonable steps to repair the condition,
- a court order reducing the tenant's rent according to the reduced rental value resulting from the condition (the reduction is figured from the time the first repair notice was given until the condition is repaired),
- a judgment for one month's rent plus $500,
- a judgment for the amount of the tenant's actual damages, or
- court costs and attorneys' fees excluding those relating to recoveries for personal injury (the tenant's petition may be filed in the justice, county or district courts, depending on the amount of the tenant's claim).

Can tenants retaliate by withholding rent?

The tenant is prohibited from withholding rents, causing repairs to be performed or deducting repair costs from rent in violation of Section 92.058. If the tenant breaches this rule, the landlord may recover actual damages. However, the penalties are more severe if the tenant undertakes any or all three of the same acts, in bad faith, after the landlord has informed the tenant in writing that the acts are in breach of the subchapter and stated the penalties for the breach.

Under these circumstances, the landlord may recover a civil penalty of one month's rent plus $500 and reasonable attorneys' fees. However, the landlord must prove by clear and convincing evidence that the written notice was given to the tenant in person, by mail or delivered to the premises and the tenant acted in bad faith.

Note. The tenant cannot take matters in hand but must follow precisely the procedures prescribed in the statute. If the steps are not followed exactly, the tenant, not the landlord, will be liable.

Where does tenant send or deliver notices?

A managing agent, leasing agent or resident manager is the agent of the landlord for purposes of notice of repair for Section 92.060 or other communication required or permitted by the subchapter. It is unclear whether Section 92.060 contradicts Section 92.052 discussed earlier.

Section 92.052 requires the tenant to give notice of a condition to the person to whom or to the place rent is normally paid. Such a person or place may not be the managing agent, leasing agent or resident manager as specified in Section 92.060. If they are not the same person or place, the tenant should send two notices, one in compliance with each section.

The duties of a landlord and the remedies of a tenant under Section 92.061 are in lieu of existing case law or other statutory law, warranties and duties of landlords for maintenance, repair, security, habitability and nonretaliation and remedies of tenant for a violation of those warranties and duties. In other words, Subchapter B represents the tenant's sole legal means to prompt a residential landlord to make repairs and the sole legal means for a judicial recovery in the event of the landlord's noncompliance.

Are waivers permitted for the Deduct-and-Repair Option?

The landlord is prohibited from waiving any duty to repair the premises except in four instances. Three are found in Subchapter A of Chapter 92 of the Texas Property Code, the other in Subchapter B. Some general facts about the landlord's duty to repair will help explain the statutes.

The law imposes two elements on the landlord. The first is to make the repairs; the second is to make repairs at the landlord's expense. The statutes place the two elements in separate categories.

The first category permits waivers when the **tenant** makes the repairs **at the landlord's expense.** This is somewhat akin to the repair-and-deduct option but without the limitations and restrictions of one month's rent. The second category permits waivers when the tenant makes the repairs **at the tenant's expense.** Obviously, the second category is nearly opposite of the first. Hence, the formalities for this type of waiver are quite extensive.

When may tenants pay for repairs?

Two waivers apply in the second, more restrictive, category (Sections **92.006[e]** and **92.006[f]).** The landlord and tenant may agree for the tenant to repair, at the tenant's expense (Section 92.006[e]), any condition that materially affects the physical health or safety of an ordinary tenant if the following eight conditions are met in the lease:

- The residential lease must have been entered into or renewed after August 31, 1989.
- At the beginning of the lease term, the landlord must own only one rental dwelling.
- At the beginning of the lease term, the dwelling (premises) must be free from any condition that would materially affect the physical health or safety of an ordinary tenant.
- At the beginning of the lease term, the landlord must have no reason to believe any condition that materially affects the physical health or safety of an ordinary tenant is likely to occur or recur during the tenant's lease term or during a renewal or extension.
- The lease must be in writing.
- The agreement for the tenant's repairs must be either underlined or printed in boldface in the lease or in an attached, written addition (addendum).
- The agreement must be specific and clear (unambiguous).
- The agreement must be made knowingly, voluntarily and for consideration (money).

It is unclear **when** or **why** a tenant would agree to such an arrangement unless the consideration was rent reduction equal to the repair costs or a reimbursement equal to the cost of a third party making the repairs. The landlord and tenant may agree (Section 92.006[f]) that the tenant has the duty to pay for repairs for:

- damage from wastewater stoppages caused by foreign or improper objects in lines serving the rental unit exclusively;
- damage to doors, windows or screens; and
- damage from windows or doors left open.

How are Section 92.006(f) waivers implemented?

To implement this waiver, the following eight conditions must be met:

- The residential lease must have been executed or renewed before March 1, 1990.
- The condition occurred during the lease term or a renewal or extension.
- The condition was not caused by the landlord's negligence.
- The agreement does not relieve the landlord's duty to repair wastewater stoppage or backups caused by deterioration, breakage, roots, ground conditions, faulty construction or malfunctioning equipment.
- The lease must be in writing.
- The agreement for the tenant's repairs must be either underlined or printed in boldface in the lease or in an attached, written addition (addendum).
- The agreement must be specific and clear (unambiguous).
- The agreement must be made knowingly, voluntarily and for consideration (money).

The last four requirements for this waiver are identical with the requirements for Section 92.006(e). Finally, this waiver requires the tenant to **pay** for repairs. It says nothing about the tenant **making** the repairs.

How may landlords be penalized for waiver violations?

If a landlord knowingly violates either of the last two waivers by contracting orally or in writing to waive the landlord's duty to repair, severe statutory remedies are mandated.

The tenant may recover actual damages, a civil penalty of one month's rent, $2,000 and reasonable attorneys' fees (Section 92.0563[b]). The tenant has the burden of pleading and proving the landlord breached the statute knowingly. If the lease is in writing and in compliance with Section 92.006, the tenant's proof must be clear and convincing.

Although the penalties are intended to keep a landlord from violating the waivers, it is difficult to imagine how a waiver made in compliance with Section 92.006 can be violated knowingly. Two of the four requirements for either of the last two waivers are for them to be underlined or in boldface print and to be made knowingly, voluntarily and for consideration. However, to make sure the tenant is aware of any such waivers in the lease, the landlord should have the tenant initial and date the provision.

Significant changes were made to Subchapter B of the Texas Property Code in 1989. As with any new law, it will take time for the courts to construe and clarify their meaning. In the meantime, landlords and tenants must puzzle over what repairs materially affect the physical health or safety of an ordinary tenant.

Also, some concept of what constitutes an ordinary tenant must be formulated. Are babies and the physically handicapped "ordinary tenants?" Obviously, conditions that would affect their health and safety might not affect the health of others.

What lease provisions are important?

Tenants and landlords also should be aware of how the lease agreement can affect the landlord's duty to repair. Tenants may unwittingly give up (or even gain) certain rights when they sign the lease. Here is a list of the relevant lease provisions mentioned in Subchapter B.

- The landlord and tenant can agree that the tenant will make all the repairs at the landlord's expense. This may be placed in the lease or made orally (Sections 92.006[d] and 92.0561[g]).
- The landlord and tenant can agree that the tenant will make all repairs that materially affect the physical health and safety of an ordinary tenant at the tenant's expense. This waiver must meet the eight requirements previously outlined (Section 92.006[e]).
- The lease agreement may address whether the first notice to repair must be in writing (Section 92.052).
- The landlord and tenant may agree to a proportionate reduction in rent if a casualty loss renders the unit partially unusable (Section 92.054).
- The landlord and tenant may agree that the tenant, the tenant's immediate family, the tenant's employer or employee of a company in which the tenant owns an interest can make the repairs under the repair-and-deduct option (Section 92.0561).
- The landlord may waive any expressed or implied duty to furnish heating and cooling equipment (Section 92.0561).
- The tenant may agree (or refuse to allow) the landlord to give effective notices by leaving the notice in the tenant's dwelling in a conspicuous place. This affects whether a notice may be given by leaving an Affidavit of Delay at the tenant's dwelling (Section 92.0562). It may affect whether the landlord can give notice to the tenant concerning the withholding of rent, causing repairs to be performed or deducting repair costs from rent in breach of Subchapter B (Section 92.058).

It is imperative that both the landlord and tenant know and understand Subchapter B of the Texas Property Code. From the landlord's perspective, it is important to know what items must be repaired and when the tenant has taken the appropriate steps (notices) to prompt their repair.

From the tenant's perspective, knowledge of Subchapter B is important in taking advantage of the available remedies. Tenants who attempt self-help measures or improperly attempt to invoke Subchapter B remedies may be liable to the landlord, according to Section 92.058.

Most tenants may know that a notice must be given before the landlord's repair duty arises. However, few may realize that at least two, and possibly three, notices are necessary.

Likewise, tenants may not know when the notices must be given nor **what they must say.**

Finally, tenants must know that the landlord has a duty to repair only conditions that materially affect the physical health and safety of an ordinary tenant. Even then, those conditions caused by the tenant, a member of the tenant's family, a tenant's guest or a lawful occupant of the dwelling are not covered.

Third party verification by health officials may be required in some instances.