

Texas Assignment of Rents Act (TARA)



Presented by Dan Hopper
TKREB CLE – April 22, 2014

TARA - Generally

- **Texas Assignment of Rents Act (a/k/a TARA)**
- **Chapter 64 of the Texas Property Code**
- **Effective June 17, 2011**
 - TARA applies to any “assignment of rents” (including provisions in a Deed of Trust), regardless of when executed
 - Automatic creation by Deeds of Trust - only if executed after June 17, 2011
 - TARA does not affect an action brought prior to June 17, 2011
- **Patterned after the Uniform Assignment of Rents Act (UARA)**
 - UARA promulgated in 2005 by the National Conference of Commissioners of Uniform State Laws
 - TARA is much shorter than UARA (e.g., TARA does not include UARA provisions regarding enforcement through receiverships)

TARA – Codification of Common Law

- Resolves conflict between “absolute” assignments vs. “collateral” assignments
- TARA codifies the following:
 - Creation
 - Perfection / Priority
 - Enforcement
 - “Collateral” assignment, regardless of form

History - “Collateral” Assignments

- **Collateral = security interest (Borrower still owns rents)**
- **Taylor v. Brennan, 621 S.W.2d 592 (Tex. 1981)**
 - **Collateral assignment “does not become operative [perfected] until the mortgagee obtains possession of the property, or impounds the rents, or secures the appointment of a receiver, or takes some other similar action”**
 - **Result: a senior lender with a recorded but unenforced assignment of rents would lose priority to a judgment lien creditor**
 - **Potential mortgagee-in-possession issues**

History – “Absolute” Assignments

- **Absolute = ownership (Lender owns the rents, but gives Borrower a revocable license to collect)**
- **Lenders would argue in Bankruptcy that the rents were not property of the estate**
- **Potential problem: rents collected by Borrower could be construed as a pro tanto reduction of the debt, even if not received by Lender / applied to the debt, since Lender “owns” the rents**
- **Much hand-wringing and tearing of garments by Lenders’ counsel, but no real adverse case law on this issue**

TARA – Creation of Assignment of Rents

- **An enforceable security instrument creates an assignment of rents arising from real property described in the security instrument. TPC § 64.051(a)**
 - Automatic; also, you don't even need assignment of rents language in Deed of Trust
 - Excludes certain security instruments governed by the Texas Constitution (home equity lines of credit, reverse mortgages, and manufactured homes)
 - No need for separate Assignment of Rents in addition to Deed of Trust
- **Definitions – TPC § 64.001:**
 - “security instrument” means:
 - a security instrument, as that term is defined by TPC § 51.0001 [deed of trust, mortgage, or other contract lien on real property]; or
 - an agreement containing an assignment of rents
 - “assignment of rents” means a transfer of an interest in rents in connection with an obligation secured by real property from which the rents arise

TARA – Creation (cont'd)

- **Collateral Assignment:** An assignment of rents creates a presently effective security interest in all accrued and unaccrued rents arising from the real property described in the security instrument creating the assignment, regardless of whether the security instrument is in the form of an absolute assignment, an absolute assignment conditioned on default or other event, an assignment as additional security, or any other form. TPC § 64.051(b)
- **Pro Tanto Fix:** An assignment of rents does not reduce the secured obligation except to the extent Lender collects rents and applies, or is obligated to apply, the collected rents to payment of the secured obligation. TPC § 64.051(b)
 - Specific note that this provision was included to eliminate confusion caused by dicta in Taylor v. Brennan re: pro tanto payment if absolute assignment

TARA – Perfection / Priority

- **Perfection**: Upon recordation in the real property records, the security interest in the rents is perfected. TPC § 64.052(b)
 - This section prevails over any conflicting provision in security instrument or any other law that prohibits enforcement until occurrence of a subsequent event, including default, obtaining possession of real property, or appointment of receiver.
- **Priority**: Perfected security interest in the rents has priority over the rights of any subsequently acquired interest in (or lien on) the rents or the real property. TPC § 64.052(c)

TARA – Enforcement (Generally)

- Lender may enforce the assignment of rents by § 64.054 (notice to Borrower), § 64.055 (notice to Tenant), or any other method allowed by law. TPC § 64.053(a)
- On and after the date Lender begins to enforce the assignment of rents, Lender is entitled to collect all accrued but unpaid rents as of that date, and all rents that accrue on or after that date. TPC § 64.053(b)

TARA – Enforcement (Notice to Borrower)

- After default, Lender may give Borrower a notice demanding that Borrower pay to Lender the proceeds of any rents that Lender is entitled to collect. TPC § 64.054(a)
- For purposes of date of enforcement, Lender begins enforcing on the date Lender gives notice to Borrower. TPC § 64.054(b)
- Method of Notice (TPC § 64.002(a)):
 - Certified mail, postage prepaid (as set forth in § 51.002(e));
 - USPS or commercially reasonable delivery service, properly addressed, with postage/delivery prepaid; or
 - Any means agreed to by the recipient.
- Notice Address for Borrower: use the Deed of Trust or a more recent address. TPC § 64.002(b)(2)

TARA – Enforcement (Notice to Tenant)

- After default, Lender may give notice to a tenant demanding that the tenant pay to Lender all unpaid accrued rents and all unaccrued rents as they accrue. TPC § 64.054(a)
 - Must give Borrower a copy of the notice to the tenant
 - Must substantially comply with promulgated form of notice (see below)
- For purposes of date of enforcement, Lender begins enforcing on the date Tenant receives notice from Lender. TPC § 64.054(b)
 - Method of notice is same as above; notice is deemed received on earliest of (1) actual receipt, (2) five days after notice is given, (3) deemed received in agreement made by addressee. TPC §64.002(c)
- Notice Address for Tenant -- use in this order: (A) document between tenant and Lender (ex. SNDA), (B) the lease, if available or knowledge, or (C) the Property address. TPC § 64.002(b)(2)

TARA – Enforcement (Notice to Tenant cont'd)

- **Subject to Tenant's defenses, after Tenant receives notice (TPC § 64.055(c)):**
 - (1) Tenant is obligated to pay to Lender all unpaid accrued rents and unaccrued rents as they accrue (subject to any prior notice received);
 - (2) except as otherwise agreed (ex. SNDA), tenant is not obligated to pay to Lender rent that was prepaid to Borrower;
 - (3) Tenant is not discharged from obligation to pay rents to Lender if Tenant pays rents to Borrower (unless primary residence);
 - (4) Tenant's payment to Lender satisfies tenant's obligation to Borrower under the lease; and
 - (5) Tenant's obligation to Lender continues until court order, foreclosure of higher priority security instrument; or cancellation notice from Lender
- **Tenant is not in default for non-payment of rents that accrue during next 30 days until the earlier of (i) 10th day after next due date or (ii) 30 days after receipt of notice. TPC § 64.055(d)**

TARA – Notice to Tenant - Form - TPC § 64.056

NOTICE TO PAY RENTS TO PERSON OTHER THAN LANDLORD

Tenant: [Name of tenant]

Property Occupied by Tenant (the "Premises"): [Address]

Landlord: [Name of landlord]

Assignee: [Name of assignee]

Address of Assignee and Telephone Number of Contact Person: [Address of assignee] [Telephone number of person to contact]

1. Assignee is entitled to collect rents on the Premises under [Name of Document] (the "Assignment of Rents") dated [Date of Assignment of Rents], and recorded at [Recording Data] of [Name of County] County, Texas. You may obtain additional information about the Assignment of Rents and the Assignee's right to enforce it at the address of the Assignee.
2. A default exists under the Assignment of Rents or related documents between the Landlord and the Assignee. The Assignee is entitled to collect rents from the Premises.
3. This notice affects your rights and obligations under the agreement under which you occupy the Premises (your "Lease Agreement"). Unless you have otherwise agreed in a document signed by you, if your next scheduled rental payment is due within 30 days after you receive this notice, you will not be in default under your Lease Agreement for nonpayment of that rental payment until the 10th day after the due date of that payment or the 30th day following the date you receive this notice, whichever occurs first.
4. You may consult a lawyer at your expense concerning your rights and obligations under your Lease Agreement and the effect of this notice.
5. You must pay to the Assignee at the Address of the Assignee all rents under your Lease Agreement that are due and payable on the date you receive this notice and all rents accruing under your Lease Agreement after you receive this notice.
6. If you pay rents to the Assignee after receiving this notice, the payment will satisfy your rental obligation to the extent of that payment.
7. If you pay any rents to the Landlord after receiving this notice, your payment to the Landlord will not discharge your rental obligation, and the Assignee may hold you liable for that rental obligation notwithstanding your payment to the Landlord unless you occupy the Premises as your primary residence.
8. If you have previously received a notice from another person who also holds an assignment of the rents due under your Lease Agreement, you should continue paying your rents to the person that sent that notice until that person cancels that notice. Once that notice is canceled, you must begin paying rents to the Assignee in accordance with this notice.

Name of assignee: _____

By: [Officer/authorized agent of assignee]

TARA – Enforcement - No MIP Issues

- **Enforcement of an assignment of rents (by notice to Borrower / Tenants per TARA), the application of proceeds, the payment of expenses, or an action against Borrower does not:**
 - **make Lender a mortgagee in possession of the real property;**
 - **make Lender an agent of Borrower;**
 - **constitute an election of remedies that would preclude a later action to enforce the secured obligation;**
 - **make the secured obligation unenforceable;**
 - **limit any right available to Lender with respect to the obligation;**
or
 - **bar a deficiency judgment. TPC § 64.057**

TARA – Enforcement (Miscellaneous)

- **Turnover of Rents by Borrower:**
 - If Borrower collects rents that Lender is entitled to collect, Borrower shall turn over the proceeds to Lender not later than the 30th day after the date Borrower receives notice. TPC § 64.060(a)
- **Liability of Borrower:**
 - If Borrower does not turn over proceeds to Lender as required above, Lender may bring a civil action (with or without foreclosure) to recover the proceeds (and reasonable attorneys' fees and costs incurred, to extent provided for in the Deed of Trust). TPC § 64.060(b),(c)
 - No specific section for bringing an action against tenants, but since Lender is “entitled to collect” from tenants, it would follow that Lender may sue the tenants if the rents are not paid to Lender.
- **Application of Proceeds:**
 - Unless otherwise agreed, Lender shall apply collected rents to (1) reimbursement of Lender's expenses, (2) expenses incurred by Lender to protect or maintain the real property, (3) payment of the secured obligation, (4) payment to subordinate lender, and (5) excess to Borrower. TPC § 64.058
 - Unless otherwise agreed, Lender is not obligated to apply rents collected following notice to Borrower or Tenant to the payment of expenses of protecting or maintaining the property. TPC § 64.059(a)

TARA – Application in Bankruptcy

- **In re MRI Beltline Indus., L.P., 476 B.R. 917 (N.D. Tex 2012)**
 - Lender tried to argue assignment of rents was “absolute”, so not subject to automatic stay
 - TARA applied (assignment executed pre-June 2011, but action brought post-June 2011) – held to be collateral assignment
- **In re Lack's Stores, 2012 Bankr. LEXIS 3439 (S.D. Tex 2012)**
 - Tenant filed BK, Lender claimed right to lease rejection damages as “absolute” assignment, even though Borrower not in default
 - Court discussed TARA, but proofs of claim were filed pre-June 2011 so TARA did not apply

TARA - Conclusions

- In the initial demand letter to Borrower after payment default, include a demand for payment of rents pursuant to TPC § 64.054
 - Sets up an excellent claim against Guarantor under the non-recourse carveout for “misapplication / misappropriation” of rents
- Separate Assignment of Rents is not necessary (Deed of Trust is sufficient, even if it does not include an Assignment of Rents provision). TPC § 64.051(a)
- Bonus (nothing to do with TARA):
 - Separate UCC1 Fixture Filing is not necessary (Texas Bus. Comm. Code § 9.502)
 - “All assets” or “all personal property” is sufficient in the UCC collateral description (Texas Bus. Comm. Code § 9.504)

TARA – Questions?

- Questions?
- Dan Hopper, (214) 969-1275, dan.hopper@tklaw.com