

RENTAL HOUSING OWNERS' RIGHTS AND LEGAL RESPONSIBILITIES AFTER A NATURAL DISASTER OR OTHER CATASTROPHE

This article outlines the most important laws relating to the rights and duties of owners and residents in the wake of a natural disaster such as a hurricane, tornado, flood, fire or other types of catastrophes. The article is for TAA owner and manager members and is NOT meant for distribution to residents.

A sample notice you may send to your residents after a catastrophe, which should help you both understand the rights and legal obligations of the respective parties before and after a catastrophe.

Applicable TAA Lease Contract provisions

Repairs and rent abatement. Paragraph 26 of the TAA Lease Contract imposes a duty on the rental property owner to "act with customary diligence to make repairs and reconnections, taking into consideration when casualty insurance proceeds are received." It also states, "Rent will not abate in whole or in part." Of course, you are not precluded from voluntarily abating all or part of the rent as a gesture of goodwill and compassion. The last part of paragraph 26 can prove helpful if a resident refuses to comply with your request that he vacate the premises so you can repair the unit. Paragraph 26.5 is the owner's contractual right to terminate. It states:

"If we believe that fire or catastrophic damage is substantial, or that performance of needed repairs poses a danger to you, we may terminate this Lease by giving you at least 5 days' written notice. We also have the right to terminate this Lease during the Lease term by giving you at least 30 days' written notice of termination if we are demolishing your apartment or closing it and it will no longer be used for residential purposes for at least six months. If the Lease is so terminated, we'll refund prorated rent and all deposits, less lawful deductions. We may also remove personal property if it causes a health or safety hazard."

Other owner maintenance obligations. Paragraph 31 discusses an owner's duties and summarizes the habitability statute requirements. It requires owners to keep common areas reasonably clean; maintain fixtures, furniture, hot water, heat and a/c; substantially comply with applicable laws; and make reasonable repairs. If the owner does not comply, then the resident can terminate the lease under the habitability statute if: (1) the resident gives two separate notices to the owner (the second of which must be in writing) or the resident gives a single written notice by certified mail; and (2) after receipt of those notices, the owner fails to repair or remedy in a reasonable time.

Insurance and liability. Paragraph 24 (in the "casualty loss" subparagraph) states that the rental housing owner is not liable to any resident, guest or occupant for personal injury or damage or loss of personal property from flood and several other causes. The rental property owner's property casualty insurance does not and cannot insure the resident's personal belongings. This is because rental housing owners do not have an "insurable interest" in the resident's property because the property belongs to the resident-and rental housing owners may only insure items that they have an ownership interest in as a general rule.

Some residents may demand that you pay for their damaged clothes, furniture, etc. You should direct them to paragraph 8 of the lease, which states that the owner's insurance does not cover loss to personal property and gives them check boxes to indicate whether or not they are required to buy renter's insurance. If neither box is checked, the default is that they are not required to obtain insurance coverage but are encouraged to do so.

When insurance doesn't cover damage. If you do not have insurance or if your policy doesn't cover the damage, you are under an obligation to begin repairs as soon as reasonably possible to the property. If the property is totally uninhabitable, you will need to make a business decision about whether you should exercise your right to terminate the leases to the property in order to expedite the repair process rather than try and hold the residents to the terms of the lease while the property is uninhabitable. (See paragraph Resident termination because of totally unusable premise).

Applicable statutes Mold licensure statute. Catastrophes such as flooding may result in mold. Chapter 1958 of the Texas Occupations Code requires licensure for anyone who does mold assessment or mold remediation, with a few exemptions benefiting the rental housing industry. The exemptions in the statute include: (1) anyone owning 10 or less dwelling units, and (2) any area of mold contamination of 25 contiguous square feet or less. The Texas Department of State Health Services adopted rules to implement the statute.

Habitability statute requirements. Under Texas Property Code Section 92, an owner has a duty to remedy a condition if the condition materially affects the physical health or safety of an ordinary resident. In TAA's judgment, water-stained walls or a lack of carpet in a unit (if you have to temporarily pull up carpet in order to dry it, clean it and disinfect it, or replace it) do not materially affect the physical health or safety of an ordinary resident. However, other consequences of a catastrophe can under some circumstances affect the material health or safety of a resident—such as inoperable toilets, the continued presence of water or mud that could harbor bacteria or mold in the unit, or the failure to commence to repair or remedy the conditions within the statutory "reasonable period of time," taking into consideration the receipt of insurance proceeds and the availability of labor, materials and utilities.

Time requirements for repair after casualty under habitability statute. The habitability statute requires an owner to make repairs or remedy the condition in a "reasonable time" after the owner has been notified in writing by a resident of the condition. In order for a resident to exercise remedies such as lease termination, statutory civil penalties or "repair and deduct," the resident must notify you in writing of the condition that is in need of repair. The condition must be one that materially affects the resident's health or safety. The notice must be by either a single certified mail notice or two regular mail notices. After that notice is received, you have a "reasonable time to repair" the damage. However, as a practical matter, after a catastrophe, you should not wait until a resident makes a written request to begin undertaking post-catastrophe repairs and clean-up.

Section 92.054 of the Texas Property Code says that if the condition materially affecting an ordinary resident's health or safety results from a casualty loss such as a flood, the "reasonable time period for repair" begins when the owner receives the insurance proceeds, assuming of

course that the owner has flood insurance. However, common sense would indicate that you should move as quickly as possible (faster than required by statute) in making damage repairs. You should give first priority to those conditions that affect a resident's health or safety- regardless of insurance delays.

Resident termination because of totally unusable premises. Under Section 92.054(b) of the Texas Property Code (see below) if the premises are totally unusable after a catastrophe, the resident can terminate the lease. The owner can also terminate the lease if the premises are totally unusable. "Insurance delay" and "reasonable repair time" are not factors if the premises are totally unusable.

Section 92.054 of the Texas Property Code, entitled, "CASUALTY LOSS" states:

- a. (a) If a condition results from an insured casualty loss, such as fire, smoke, hail, explosion, or a similar cause, the period for repair does not begin until the landlord receives the insurance proceeds.
- b. (b) If after a casualty loss the rental premises are as a practical matter totally unusable for residential purposes and if the casualty loss is not caused by the negligence or fault of the tenant, a member of the tenant's family, or a guest or invitee of the tenant either the landlord or the tenant may terminate the lease by giving written notice to the other party any time before repairs are completed. If the lease is terminated, the tenant is entitled only to a pro rata refund of rent from the date the tenant moves out and to a refund of any security deposit otherwise required by law.
- c. (c) If after a casualty loss the rental premises are partially unusable for residential purposes and if the casualty loss is not caused by the negligence or fault of the tenant, a member of the tenant's family, or a guest or invitee of the tenant, the tenant is entitled to reduction in the rent in an amount proportionate to the extent the premises are unusable because of the casualty, but only on judgment of a county or district court. A landlord and tenant may agree otherwise in a written lease.

In summary, if the premises remain totally unusable after a catastrophe, the resident cannot be forced to stay and the resident can terminate the lease-even if the owner is making every effort to promptly repair the premises. Similarly, a resident cannot stop the owner from terminating the lease if the premises are totally unusable.

How do you terminate the lease when property is totally unusable? Use the form "Termination Notice Due to Natural Disaster" to terminate the lease. Paragraph 26 of the TAA Lease Contract as well as Section 92.054 of the Texas Property Code gives you the right to do so if the rental premises as a practical matter has become totally unusable for residential purposes after a casualty loss, and the casualty loss was not caused by the negligence of the resident, a member of the resident's family, or a guest or invitee of the resident. Paragraph 26 of the TAA Lease Contract says that you may terminate the lease "by giving you at least 5 days written notice." The form suggests that residents who have difficulty complying with the five-day period specified in the notice contact management about other arrangements. You could offer an additional five days to residents who have legitimate reasons, such as difficulty in returning to the property, when the residents contact you asking for additional time.

The Texas Property Code does not dictate how the notice should be delivered. It is likely that the residents will not be readily available at the property itself, therefore you should attempt to deliver the notice to the resident by the best available means that will allow you an opportunity to prove that notice was delivered. For example, you could call the emergency persons listed on the resident's rental application, the resident's employer, or other known telephone numbers for the resident and ask for current contact information for the resident. If you can reach the resident via telephone, you should first ask for contact information such as a fax number, mailing address, and email address. Once you have the information, you should inform the resident that due to the extensive damage to the property, you are forced to terminate the lease. You should then follow-up the telephone conversation with delivery of the written notice via fax or overnight mail. Email delivery of the notice should be used as a last resort because it is difficult to prove. Be sure to retain copies of transmission verification information for any delivery methods.

If you have no contact information for the resident, and the resident is unavailable, you may be left with no choice but to post notice on the unit's door. You could publish the notice in a local newspaper, but the additional proof of delivering notice would probably not justify the cost.

Partially unusable premises. Under Section 92.054(c), if the premises are partially unusable (i.e., only part of the premises are usable or the entire dwelling was unusable for a short period of time like a day or two because of high water, etc.), the resident cannot terminate the lease merely because the casualty is causing inconvenience or unsightliness-but the resident is entitled to a proportionate rent deduction unless otherwise agreed in a written lease. In paragraph 26 of the TAA Lease Contract, the lease language clearly states that rent will not abate under any circumstances, including a circumstance such as a flood. Therefore, owners have no legal duty under the Texas Property Code or the lease to give a rent reduction because of partially unusable premises. However, there is also nothing preventing owners from offering a deduction, if they wish to do so.

Reasonable time to repair. If the resident is staying in the unit, before penalties and repair and deduct remedies will kick in under the statute you have a "reasonable time to repair" and your time-to-repair clock does not start until: (1) the resident has given you the two regular mail notices or one certified mail notice (or other trackable form of delivery) of the need for habitability repairs (Section 92.056); and (2) you have received your insurance proceeds (Section 92.054). If the premises are partially unusable, the resident is not entitled to a rent abatement under the TAA Lease Contract.

A resident might tell you that you have seven days to repair everything. However, this seven-day time period is only a presumption of a reasonable time period under state statute. Section 92.056(d) says that a reasonable time period for repairs is presumed to be seven days. However, this is a rebuttable presumption and several factors make it clear that you do not always have a seven-day deadline. Two of those factors are: (1) the section of the Texas Property Code which makes it clear that you do not have a duty to begin repairs until you receive the insurance proceeds; (2) the fact that there may be a general shortage of labor, materials or utilities for repair following a natural disaster or other catastrophe.

For example, a resident may argue that he wants to stay because he considers the dwelling only partially unusable. On the other hand, you may believe that it is totally unusable because of the danger of mold beginning to grow inside the walls, etc. It is often helpful to get a letter from a third party confirming that it is necessary for the entire unit to be vacated in order to make repairs and prevent a health hazard (such as mold) from developing inside the walls of the unit. In that regard, paragraph 26 of the lease (discussed earlier) can help.

If you are fortunate enough to have insurance coverage, waiting too long for insurance proceeds may create a greater deterioration of the property, such as unsanitary conditions that may quickly make an entire dwelling uninhabitable, giving the resident the right to terminate the lease. In such cases, it may be helpful to ask your insurance adjuster for a "partial advance" insurance payment immediately so you can get started with repairs. Many insurance companies will do so. Then a final payment settlement occurs when their adjusters and you have had time to fully evaluate the situation and settle on a final claim amount.

What if I need to remove a resident's personal possessions to begin repairs? If you need to remove the resident's personal possessions after a casualty loss, you may exercise your rights under paragraph 28 of the TAA Lease Contract, which allows entry into the unit according to the procedures set forth in the paragraph for reasonable business purposes, which would include reasons, such as removing health or safety hazards, such as wet items posing potential health and safety risks, or removing perishable foodstuffs if electricity is cut off. The lease does not give you the right to remove the resident's personal items that do not pose a potential health or safety threat.

If no one is in the dwelling, you may enter for any of the reasons listed in paragraph 28, but you must leave written notice of your entry in a conspicuous place in the dwelling immediately after you enter (preferably taped to the inside of the main entry door). Do not wait until you leave to post the notice.

Paragraph 8 of the TAA Lease Contract makes it clear that you are not liable for damage from a natural disaster to residents' personal possessions (unless of course your negligence was also a cause of the damage). You should nonetheless exercise reasonable caution while handling the residents' possessions during the course of any repair work-regardless of whether the items are left in the dwelling or removed from the dwelling because of health considerations.

You should try to obtain the resident's permission before removing such personal property by contacting, if possible: (1) the emergency persons listed on the resident's rental application; (2) the resident's employer; or (3) other known telephone numbers for the resident. If you have the resident's email address, try an email message to the resident. However, if the resident is unavailable due to a government evacuation or is simply missing and cannot be reached after reasonable efforts, you may lawfully remove the water-soaked items to begin the repair work as long as you use reasonable care while handling and storing the items. For example, you should store the items in a secure place if feasible. You have no obligation to dry the resident's personal property or otherwise mitigate damages from the water, but the resident may be grateful if you choose to do so.

If it becomes necessary to remove a resident's personal possessions from the dwelling, you should fill out and post the inventory of those possessions in the dwelling when you leave (again preferably on the inside of the main entry door.) You should keep a copy of the inventory in your files to avoid any future disputes regarding what items were removed. It would seem best to have a witness with you when making the inventory and removing such property. Taking photographs or video of the dwelling's interior condition and the resident's personal property is not legally necessary-but it certainly would seem to be the smart thing to do.

Mitigation duties. As a practical matter, you may be unable to stop one or more residents from simply walking out and abandoning their units. (See TAA Lease Contract paragraph 41 for the definition of "abandonment.") Even though abandonment would be a breach of the TAA Lease Contract by the resident, you still have mitigation duties under the TAA Lease Contract and under Texas Property Code Section 91.006. This means that you need to use reasonable efforts to relet the premises and mitigate the damages that a resident owes you. If a resident unlawfully abandons the unit, the resident is responsible under paragraph 14 of the TAA Lease Contract for all rent through the end of the lease term. However, if you are able to relet the premises, the breaching resident's liability is reduced by the amount of rent received from a future resident. Of course, if the resident terminates because the entire dwelling is unusable, the resident is not liable for rent after the termination date.

Interruption of utilities. Under state statute (Texas Property Code, Section 92.008), it is permissible for an owner to interrupt utilities (temporarily cut off water, electricity, etc.) if the need for the interruption is for bona fide repairs, construction or an emergency situation. Additionally, paragraph 26 of the TAA Lease Contract specifically states that the owner has the right to turn off utilities as needed to avoid property damage or to perform work.

However, if the utilities have been cut off for an extended period of time due to a natural disaster, there is no simple answer. Neither the TAA Lease Contract, the statutes, nor the common law give guidance on this issue. The answer may depend in large part on the actual or anticipated duration of the lack of utilities.

- The TAA Lease Contract. Nothing in the lease addresses owner duties or residents' rights when utilities are unavailable because of utility company problems.
- Limited scope of the habitability statute. If a dwelling becomes uninhabitable because of damage to the dwelling from a casualty loss such as fire, smoke, hail or explosion, the Texas habitability statute (Texas Property Code, Section 92.051 et seq) contains specific duties and rights of the owner and residents regarding lease termination and rent abatement. For example, the statute gives either party the right to terminate the lease if the entire premises are uninhabitable because of such casualty damage to the premises. Lease termination notice may be given any time "before repairs [to the dwelling] are complete." If the premises are only partially uninhabitable from the casualty damage to the dwelling, neither party has the right to terminate the lease; but the resident is entitled to a partial rent abatement and the owner has a duty of repair, as provided in the statute.
- The statute, however, simply does not address uninhabitability because of the government's or utility company's inability to get the utilities back on after major equipment breakdowns or malfunctions, regardless of the cause. If the statute were to be

interpreted to cover such utility interruptions, it would have rather ridiculous and unfair results, i.e., owners could use a one-day utility interruption to terminate the resident's lease and the resident could move out with impunity if the premises were uninhabitable for one day due to a power interruption or water plant break down.

The statute does not give either party the right to terminate the lease when uninhabitability results from utility problems that are not the fault of the owner and that cannot be repaired by the owner. Nor does it give the resident the right to a rent abatement in such situations.

The common law. TAA is unaware of any reported case decisions under the common law dealing with uninhabitability of a rental premises due to utility company inability to restore utilities for an extended period of time. In TAA's opinion, it is likely that a judge would interpret the common law to allow either party to terminate the lease if the dwelling lacks utilities for an extended period of time. What is an "extended period of time"? Is it one, two or three days? Probably not. Is it three, four or five weeks? Maybe yes. But it is anyone's guess since there is no case law on the subject. Therefore, if a resident asks to terminate a lease due to total interruption of utilities, the owner's business decision to grant or deny the request needs to take into consideration this ambiguity and unsettled nature of the law in this area. The same practical approach needs to be taken by the resident when considering an offer of rent abatement from the owner.

- Some practical solutions. An owner could offer to abate the rent during the time the dwelling is without utilities due to utility company problems. Such a gesture would give the owner maximum opportunity to retain residents who otherwise might insist on leaving the property permanently, and it would promote goodwill throughout the community. On the other hand, it might break the typical owner to give a three- or four-week rent abatement to all residents in a large community since the expenses of the project continue, such as employee salaries, insurance, repairs and maintenance, office overhead, mortgage payments, etc. It would seem wise that if an extended rent abatement is contemplated, the owner should contact his mortgagee and ask that payment of the mortgage for that month be postponed for some period of time. It would also be wise to discuss the rent abatement under these circumstances with the owner's insurance agent.

Security deposit refund. Regardless of whether the resident unlawfully abandons or surrenders the dwelling or whether the resident lawfully terminates the lease because the premises are totally unusable or the owner failed to act timely to remedy partial unusability, the "30 day security deposit refund" clock starts ticking under Texas Property Code Section 92.103 when the resident moves out. Under that statute in nearly every case, you have 30 days after move-out to refund any portion of the security deposit that is refundable and to provide an accounting. It is doubtful that a resident who has unlawfully abandoned his unit will be entitled to a security deposit refund because he will owe: (1) a reletting fee under paragraph 11 of the TAA Lease Contract; (2) all future rents that have been accelerated; and (3) any damages which have been caused by the resident and which are in excess of normal wear and tear; and (4) any other delinquent amounts such as NSF fees, etc. However, you do have the duty to provide this

accounting to the resident within 30 days in order to avoid the presumption that you are acting in bad faith and thus subject to penalties under the refund statutes.

Emergency post-disaster/post-catastrophe notice to residents. It is very important to notify and educate your residents regarding the health hazards often associated with natural disasters. See sample form for this purpose.