

**DRAFTING TEXAS SECURITY INSTRUMENTS TO  
ACCOMMODATE THE TARA AND RELATED MORTGAGE  
OPINION LETTER DRAFTING CONSIDERATIONS**

**PRESENTED BY**  
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### **EDUCATION**

#### **SOUTHERN METHODIST UNIVERSITY, DEDMAN SCHOOL OF LAW**

- J.D. 2001
- Articles Editor, *International Law Review*

#### **UNIVERSITY OF ARKANSAS**

B.A. Political Science, French and European Studies, 1998

- University Scholarship Recipient
- French Honors Program

### **PROFESSIONAL BACKGROUND**

- Winstead PC, Shareholder *2008 – present*  
(Real Estate Development and Investments – Austin, Texas)
- Powell Goldstein LLP, Associate *May 2004 – 2007*  
(Real Estate and Finance – Washington, DC)
- Andrews Kurth LLP, Associate (Business Transactions – Dallas, Texas) *September 2001 – May 2004*

- **PROFESSIONAL AND CIVIC ACTIVITIES AND AWARDS**

- State Bar of Texas (member Austin Bar Real Estate Section)
- District of Columbia Bar (Real Estate, Housing and Land Use Section)
- Real Estate Council of Austin; LDC 2012; Co-Chair Membership Committee; Board Member (Current) and Co-Chair Leadership Development Class Oversight Committee (Current)
- Board Member Capital Area Council -- Boy Scouts of America (Current)
- American Heart Association – Circle of Red Member 2011-2012
- CREW (Washington DC); membership co-chair (2006-2008)
- Nominee *Austin Business Journal*, Profiles in Power (2013)
- 2013 Texas Rising Star *Texas Monthly*

## **I. INTRODUCTION<sup>1</sup>**

### **A. Background**

This article focuses on how Chapter 64 of the Texas Property Code, having the official title of the "Assignment of Rents Act"<sup>2</sup> impacts drafting certain agreements granting security interests or collateral interests in real property and the improvements thereon, together with and including personal property used in connection therewith and stream of income or revenue derived therefrom. This article does not, however, provide background for an argument or discussion surrounding the "absolute assignment" of rents or the "collateral" assignment of rents, as this subject has been and will continue to be the subject of articles and presentations; provided, however, it is helpful to provide a brief historical overview of drafting deeds of trust and assignment of rents and leases before TARA in order to fully appreciate the changes in the language resulting from TARA's enactment.

In conjunction with your review of this article and the attachments hereto, I would like to call your attention to Winstead PC's updated Texas Annotated Assignment of Rents (the "Annotated Assignment"). The Annotated Assignment was presented by Lorin Williams Combs and Jeff Matthews at the 46<sup>th</sup> Annual William W. Gibson, Jr. Mortgage Lending Institute. The Annotated Assignment was prepared for use

with the Annotated Promissory Note prepared by Winstead PC and sited in the Annotated Assignment, the Annotated Deed of Trust prepared by Winstead PC and sited in the Annotated Assignment, and the Annotated Guaranty prepared by Winstead PC and cited in the Annotated Assignment. In addition to the primary contributions of Lorin Williams Combs, Edward A. Peterson, and Jeffrey Matthews, the Annotated Assignment contains significant commentary from a number of lawyers in Winstead PC's Litigation Section, Bankruptcy Section, Banking and Finance Section, as well as the firm's Real Estate Development and Investment Section. This article would not have been possible without the effort of the other Winstead attorneys and their continued efforts with respect to the Annotated Assignment and other annotated loan documents. In addition, I presented this paper at the Advanced Real Estate Drafting Course in Dallas, Texas, on March 6, 2014.

By enacting TARA, the 82<sup>nd</sup> Texas Legislature settled the following question that has been the subject of debate for several decades: is it possible to create an absolute assignment of rents. The answer to this question is important to lenders that make loans secured by real property (including the income stream produced from such property) because these lenders want to know with certainty that that income (or, in the case of real property improvements that are leased to third parties such as office buildings, shopping centers, and apartment complexes, "rents") is the property of the lender and will automatically belong to the lender upon the occurrence of a certain, stated event, such as an event of default. Further, real estate lenders needed to make sure that intervening creditors (in Bankruptcy proceedings or otherwise) do not have any prior rights to those rents or income streams. Therefore, prior to the enactment of

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<sup>1</sup> The opinions expressed in this article are those of the author and not those of the State Bar of Texas, the Real Property, Probate and Trust Law Section, the Committee that drafted the proposed version of TARA, or the author's firm.

<sup>2</sup> Chapter 64 of the Texas Property Code ("TARA") consisting of Secs. 64.001 to 64.062, was added by Acts 2011, 82<sup>nd</sup> Leg., R.S., Ch. [636](#), Sec. 2.

TARA, real estate attorneys and their lender clients pushed for Texas courts to recognize the "absolute" or "automatic" assignments of rents. TARA establishes that, notwithstanding anything contained in the assignment of rents, the deed of trust or any other loan document, an assignment, pledge, transfer, or grant of security interest in "rents" or other revenue is a collateral assignment and grant of security interest and not an absolute assignment with a license back.

TARA not only clarifies that a security interest in rents is not "absolute", it contains the default provisions dictating how the lender may use and collect rents (absent an agreement between lender and borrower). For example, each of the following sections in TARA includes language permitting the parties to agree to a position that is contrary to the "default" TARA provisions:

- (a) Section 64.002(a)(3) allows for notice to be given pursuant to and in accordance with a separate agreement between the parties.
- (b) Sections 64.002(b)(1)-(3) allow the address for notices to be as specified in a security agreement or other document agreed to by the parties.
- (c) Section 64.055(c)(2) states that "except as otherwise agreed in a document signed by the tenant, the tenant is not obligated to pay to an assignee rent that was prepaid to the assignor before the tenant received" the enforcement notice pursuant to Section 64.055(a) of TARA.
- (d) Sections 64.058 and 64.059 set forth default provisions for application of received rents unless the parties have otherwise agreed in writing.
- (e) Section 64.060(d) deals with a situation in which more than one party has a security interest in rents. This subsection allows for an intercreditor agreement to override the default

provisions in this subsection relating to competing security interests and collection of rents.

- (f) Section 64.062 permits subordination by one party of its interests in rents pursuant to a written agreement.

Because TARA does allow for third party agreements to alter the default provisions, it is important for parties to become familiar with TARA and the alternatives that can be constructed through drafting. The purpose of this article is to provide potential lenders and borrowers and their respective counsel with analysis surrounding drafting considerations and specific mortgage loan documents.

## **B. Before TARA**

By way of background, prior to the enactment of TARA, real estate practitioners in Texas debated the use of a conditional (*i.e.*, collateral) or absolute assignment of Rents. Many practitioners believed, because of the specific language in Taylor v. Brennan, 621 S.W.2d 592 (Tex. 1981), that it was not possible to draft an absolute assignment of rents that would be enforceable under Taylor. The rationale against "absolute" assignments is outlined by the Court in Taylor as follows: (1) Texas is a lien theory state and therefore the beneficiary does not have title to the mortgaged property and is not entitled to rents prior to foreclosure, absent an agreement to the contrary; (2) if the beneficiary obtains an unconditional absolute assignment of the rents, such beneficiary would have the right to the rents prior to foreclosure; and (3) if such beneficiary's assignment of rents is conditional (*i.e.*, not effective unless some affirmative act is taken by such beneficiary) then such beneficiary has no right to the rents until such beneficiary obtains possession of the mortgaged property, impounds the rents, has a receiver appointed, or

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Also available as part of the eCourse

[Loan Documents: Forging Peace Negotiations; Unusual Terms and Documents; plus Drafting after TARA](#)

First appeared as part of the conference materials for the  
48<sup>th</sup> Annual William W. Gibson, Jr. Mortgage Lending Institute session  
"Drafting Security Documents and Legal Opinions after Enactment of the Texas  
Assignments of Rent Act (TARA)"