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Texas Annotated Assignment of Rents

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INTRODUCTION

On June 17, 2011, loans secured by properties located in Texas became subject to the provisions of Chapter 64 of the Texas Property Code, *Assignment of Rents to Lienholders*. As a result of this new statute, all assignments of rents in loan documents from that date forward will be collateral assignment of rents and not absolute assignment of rents, regardless of any language in the loan documents purporting to create an absolute assignment.

The purpose of this updated Annotated Assignment of Rents is primarily to educate the reader as to the changes in the law resulting from the enactment of Chapter 64 of the Texas Property Code. Furthermore, we hope that this document can serve as a useful tool in revising existing forms of Assignment of Rents to comply with current Texas law. Also, this updated Annotated Assignment of Rents serves the broader purpose of providing the reader with a series of detailed annotations drawing upon statutory law, case law, practical observations and drafting concepts for use by practitioners and their clients in a commercial real estate practice in general. This presentation contains significant commentary from a number of lawyers in the firm's Litigation Section and Bankruptcy Section, contributing insights not normally available to real estate practitioners. These annotations are not intended to constitute a legal opinion and, while comprehensive, are not and cannot be dispositive of every issue or factual circumstance that a practitioner or party will encounter in the negotiation and preparation of an Assignment of Rents. It is our belief that this presentation can, at a minimum, provide the following:

- a. assistance in the preparation of assignments of rents and other loan documents;
- b. a valuable tool for counsel, whether representing the borrower or the lender, in negotiating an assignment of rents, and as an ancillary benefit to those negotiations, "educating" their respective clients as to the reasons for the inclusion or, where applicable, modification or exclusion, of the provisions contained in this Assignment of Rents;
- c. a resource for the preparation and negotiation of legal opinions in commercial lending transactions; and
- d. a valuable tool for the training of lawyers.

This Assignment of Rents should be used for the purposes described below in connection with the Annotated Promissory Note (cited in the annotations to this Assignment of Rents as the "Annotated Promissory Note"), the Annotated Deed of Trust (cited in the annotations to this Assignment of Rents as the "Annotated Deed of Trust"), and the Annotated Guaranty (cited in the annotations to this Assignment of Rents as the "Annotated Guaranty"), also authored by this firm, to which reference is often made herein. This form is intended for use in connection with loan documents that do not include assignments of rents. As with any generic form, the practitioner must tailor the instrument to the specific needs of the client and the factual context of the given loan transaction.

This Annotated Assignment of Rents, while primarily the effort of Lorin Williams Combs, Jeff Matthews, and Edward A. Peterson, has been a firm-wide effort. Many attorneys, both within and outside the Real Estate Section at Winstead, provided valuable insight and research assistance to the authors in producing this presentation. Our acknowledgment is inadequate thanks for their efforts, but we would like to acknowledge with gratitude the assistance of Jim Littlejohn (Banking) and John M. Nolan, Holly Magliolo, and Jerry L. Lott, Jr. (Real Estate). Without this "team" effort, the quality of the end product would not have been possible.

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ASSIGNMENT OF RENTS²

THIS ASSIGNMENT OF RENTS (this "Assignment") executed as of the _____ day of _____, 20____, by _____, a _____, having its address and principal place of business at _____, as assignor ("Borrower") to _____, a _____, having an address at _____,

¹ This notice must be placed on the first page of any "instrument" (defined as a deed or deed of trust) that transfers an interest in real property to or from an individual and must be in bold 12 point type or upper-case 12 point type. TEX. PROP. CODE ANN. § 11.08 (West 2012) [hereinafter "Property Code"]. Although § 11.08 of the Property Code does not specifically include an assignment of rents within the definition of "instrument", we believe it would be prudent to include this notice on a stand-alone assignment of rents for two practical reasons: (i) if the assignment of rents also includes an assignment of leases, the assignment arguably constitutes an instrument transferring an interest in real property and (ii) some county clerks apply § 11.08 liberally and require the inclusion of this notice on instruments that arguably fall outside the scope of § 11.08; inclusion of the notice could avoid rejection or a potential delay in filing of the assignment of rents.

² On June 17, 2011, Texas Senate Bill 889 was signed into law, creating a statutory process for creditors to take a security interest in the rental stream generated by residential and commercial property as security for an obligation. Chapter 64 of the Property Code ["Act"], which codifies Texas Senate Bill 889, provides a uniform process for creating and perfecting a security interest in rents. Of the many changes effectuated by the Act, one of the most striking is that the Act expressly negates the concept of an "absolute assignment of rents" and instead categorizes assignments of rent governed by the Act as a collateral assignment of rent. See Act § 64.051 ("An assignment of rents creates a presently effective security interest in all accrued and unaccrued rents arising from the real property . . . regardless of whether the document is in the form of an absolute assignment.").

The Act defines an assignment of rents as "a transfer of an interest in rents in connection with an obligation secured by real property from which the rents arise." TEX. PROP. CODE ANN. § 64.001(2) (West 2012). A lender's security interest in rents becomes perfected upon the recording of the assignment of rents in the county where any portion of the real property is located. TEX. PROP. CODE ANN. § 64.052(b) (West 2012). The provisions of the Act governing perfection of a security interest in rents prevail over: (i) any conflicting or contrary provisions elsewhere in the assignment of rents and (ii) any law that prohibits or defers enforcement of a security interest until the occurrence of a condition precedent, such as a borrower default, possession of the property or appointment of a receiver. *Id.*

A perfected security interest in rents has priority over the rights a person acquires, after the security interest is perfected: (i) a lien or other security interest in the rents or the real property from which the rents arise or (ii) an interest in the rents or real property from which the rents arise. TEX. PROP. CODE ANN. § 64.052(c) (West 2012). An assignee of a perfected security interest in rents has the same priority over the rights of a person described in § 64.052(c) with respect to future indebtedness as the assignee has with respect to the assignee's security interest in the real property from which the rents arise. TEX. PROP. CODE ANN. § 64.052(d) (West 2012). Parties may, however, subordinate their respective interests in rents. TEX. PROP. CODE ANN. § 64.062 (West 2012).

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