

# Assessments of Charges Found in TEXAS LEASES

By Brian D. Womac

**E**ffective over a decade ago on September 1, 2001, Texas law required commercial landlords to spell out any possible tenant assessment charges in the lease. Generally, all leases list the monthly rents owed by the tenant. Most leases list the estimated common area charges, taxes, and insurance to be charged. But is that enough?

Texas law states that commercial landlords must set out the tenant's liability in the lease. Commercial leases require landlords to specifically set out any special charges by amount or method of computation before a tenant is liable for these charges. For example, if the tenant is liable for overtime heating and/or air-conditioning, the amount or computation for the amount must be listed in the lease. Likewise, if the tenant is liable for parking, special cleaning services, or maintenance, the amounts or computation for the amounts must be listed in the lease.

However, it is not enough to simply state that the tenant is liable for these charges. Somewhere in your lease document, the amount or method of calculation should be listed. Under the prior law, commercial landlords could rely on broad and sometimes vague wording to hold tenants liable for these charges. Now, commercial landlords have an obligation to set out the amounts or computation for the amounts. Many leases I review are not in compliance with this statute.

Here's how it reads in the Texas Property Code:

## **§93.012 ASSESSMENT OF CHARGES**

- (a) A landlord may not assess a charge, excluding a charge for rent or physical damage to the leased premises, to a tenant unless the amount of the charge or the method by which the charge is to be computed is stated in the lease, an exhibit or attachment to the lease.
- (b) This section does not affect a landlord's right to assess a charge or obtain a remedy allowed under a statute or common law.
- (c) (applies to governmental entity)

This statute requires all landlords and managers to review their current lease form for possible revisions. Many current forms today fail to list special charges that are charged to tenants. Whether the charge is for a particular tenant or an assessed charge such as a common area expense, the charge should be detailed in the lease. The reason for the requirement is to provide the tenant the charges that may occur during the tenancy. It is imperative that landlords and their management team make sure the lease form complies with this law.

The statute is clear on this issue. Seems simple, right? Here is the problem. Most commercial landlords are using leases that attempt to pass through all the common area expenses incurred in the operation of the subject property through long, drawn-out provisions. While most triple net leases have language to pass through the obvious taxes, insurance and maintenance charges, some old forms still have insufficient language to pass through all the expenses incurred.



Here is a typical pass through provision for common area maintenance costs found in some current lease forms:

**COMMON AREA MAINTENANCE COSTS.** Landlord agrees to maintain and repair throughout the term hereof the common areas and facilities of the Building, including, without limitation, the automobile entrances, exits, driveways, parking areas, pedestrian walks, landscaped areas, public toilets, meeting rooms, lighting facilities, service areas, and Building signs not otherwise the responsibility of Tenant as set out in this Lease (said areas hereinafter called the "Common Area"). Landlord's maintenance and repairs shall include all repairs and replacements and the supplies and materials therefore, which in Landlord's reasonable judgment are necessary to preserve the utility of the Common Area and facilities in the same condition as they were at the time of completion.

As used herein, the term "Common Area Maintenance Costs" shall mean all costs and expenses of every kind paid or incurred during the term of this Lease in connection with the operation and upkeep of the Common Area and facilities within the Building, and, where necessary, the cost of replacing any of said common facilities and the costs of policing and protecting same. In addition to the foregoing, the Common Area Maintenance Costs shall include, but are not limited to, maintenance and repair costs, management fees, wages and fringe benefits payable to employees of Landlord whose duties are connected with the operation and maintenance of the Building and common areas, all services, supplies, repairs, replacements, or other expenses for maintaining and operating the Building. Tenant's Pro Rata Share of the Common Area Maintenance Costs means that amount obtained by multiplying said Costs by a fraction, the numerator of which is the square foot area of the Leased Premises and the denominator of which is the gross leasable area of the Building. Tenant promises to pay Tenant's Pro Rata Share of Common Area Maintenance Costs monthly, in advance, on the first day of each calendar month in an amount estimated by Landlord as provided above. Landlord's failure to provide the statements shall not relieve Tenant of any liability hereunder.

**ANNUAL ADJUSTMENT.** Within thirty (30) days after the receipt of Landlord's statement showing the total amount paid in advance by Tenant and a copy of the Common Area Maintenance bills showing the actual monies paid or to be paid by Landlord, there shall be an adjustment between Landlord and Tenant. Tenant shall pay to Landlord on demand the difference between the amount paid by Tenant and the actual amount due. If the total amount paid by Tenant hereunder for any such calendar year shall exceed such actual amount due from Tenant for such calendar year, the excess shall be credited by Landlord against any amounts then due and owing by Tenant to Landlord and any remaining net surplus shall then be refunded by Landlord to Tenant. Failure of Tenant to pay Tenant's Common Area Maintenance Costs in the manner and time provided herein shall constitute an event of default hereunder.

Does the above provision pass muster? What if the landlord is passing through capital repairs to the elevator and/or resurfacing the parking lot? Can these types of

capital repairs/expenses be passed through with this provision? Every lease form is different. However, if the expenses to be passed through are not specifically listed, the lease violates the statute. Over the years, I have seen numerous violations of this statute by landlords in Houston. Most real estate attorneys know that if the charge has been passed through in violation of the statute, then the landlord is in breach of the lease.

Yet, many lease forms still fail to address this very important issue. Even some newer forms fail to address the special charges that landlords are passing through or spell out how much overtime air charges will be if used by the tenant. Nevertheless, the problem will arise during a tenant audit or during a lawsuit brought by the landlord for past due rents and expenses. Landlords have been getting away with these violations for years. Most tenants will not even be aware of the charges the landlords are passing through unless an audit is performed or discovery is conducted during litigation.

The annual reconciliation statement provided by most management companies does not specifically call out special repairs or expenses that would trigger a tenant to raise an objection. However, an increase in repair costs over the previous year might trigger an audit by the tenant. And sending the tenant a big bill for overtime air or special cleaning may alert the tenant to a possible violation.

There are not many cases in the books which help us with this statute. If the issue arises and the court finds the landlord to be in violation of this statute, the landlord may lose his or her case against the tenant and end up taking nothing against the tenant. Worse still, a violation of this statute could potentially make the landlord liable for the tenant's attorneys' fees incurred, which could be thousands of dollars.

So what is the solution? A landlord simply needs to confirm that all the charges found in the lease have a computation and/or any special charges that might be incurred are spelled out. Simply add this disclaimer to your lease form:

**CHARGES IN LEASE.** Landlord and Tenant agree that each provision of the Lease for determining charges, amounts, and expenses payable by Tenant is commercially reasonable and, as to each, such charge or amount constitutes a "method by which the charge is to be computed" for purposes of Section 93.012 of the Texas Property Code.

The lease form can be corrected with just a couple of small changes, which should be reviewed by your legal counsel. The above disclaimer is found in most lease forms. If the disclaimer is not found in your current lease form, then add it when the tenant renews or amends the lease. Realistically, this waiver is your last resort. The better practice is to draft a lease that is open and obvious with all the charges to be incurred by the tenant. **N**

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