

## SECURITY DEPOSIT REFORM: TO PROVIDE PROTECTION FOR THOSE WHO PROTECT US

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Imagine this hypothetical situation. Sergeant John Smith (“SGT Smith”) is married with two kids. He has served as an enlisted Soldier in the Army for four years. The Army has just relocated SGT Smith and his family from their first duty station at Fort Hood, Texas to Fort Lewis, Washington. While stationed at Fort Hood, SGT Smith leased an apartment off post.<sup>1</sup> He paid an \$800 security deposit when he moved in. SGT Smith conducted a move-out inspection with a manager of the rental company who told him everything seemed to be in order. After establishing his new residence at Fort Lewis, SGT Smith sent the company his new address so he could receive his security deposit back. Much to his surprise, SGT Smith received a letter from the company saying he actually owed them \$200 because his security deposit did not cover the repairs and maintenance to the apartment. SGT Smith calls the rental company to discuss the issue and he is told that if he does not pay the \$200, then they will be forced to report him to the Credit Bureau. His monthly salary is \$2,555.10, and he was counting on the refunded security deposit to help cover the cost of the move.<sup>2</sup> SGT Smith and his family are now over 2,000 miles away, and he has already begun his new job. SGT Smith is a hypothetical individual, however, his situation is a very real situation many members of the military face.

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<sup>1</sup>On-post housing is not available for all Soldiers at Fort Hood. *See Estimated Waiting Times for Housing*, FORT HOOD FAMILY HOUSING: A LEND LEASE COMMUNITY (Mar. 1, 2015), <http://www.forthoodfh.com/Become-a-Resident/Apply-for-a-Home/Waitlist/Waitlist>. There is a waiting list for those who wish to live on-post. *See id.* Additionally, many Soldiers choose to live off post in an attempt to save money or to secure a higher-quality residence.

<sup>2</sup>2014 Pay Chart, [http://www.stripes.com/polopoly\\_fs/1.262381.1389879123!/menu/standard/file/MilPayTable2014.pdf](http://www.stripes.com/polopoly_fs/1.262381.1389879123!/menu/standard/file/MilPayTable2014.pdf) (last visited April 5, 2015).

The government relocates active duty military personnel on a regular basis, typically every three years.<sup>3</sup> These moves are usually out of state, and sometimes even out of country.<sup>4</sup> According to the U.S. Census Bureau, there were 131,548 active military personnel stationed in Texas as of September 30, 2009.<sup>5</sup> Texas has more active duty military stationed within its borders than any other state.<sup>6</sup> Therefore, not only are servicemembers more likely to incur problems similar to those presented in the hypothetical above, but these problems are most likely to occur in Texas. Because of this, the Texas Legislature has an obligation to ensure these individuals are adequately protected.

First, this article will briefly discuss the history and current status of Texas statutes addressing security deposits. Next, this article brings to light the ways landlords can still exploit tenants, specifically active duty military, under the current statutes. Finally, this article offers a solution to allow adequate protection for military and ways to modernize the law.

## I. SECURITY DEPOSIT STATUTES

Over the last 50 years, there have been drastic changes to the landlord-tenant relationship.<sup>7</sup> Many states, including Texas, began to view leases as contracts and moved away from pure property law principles.<sup>8</sup> Tenants' rights have also increased with the ongoing changes.<sup>9</sup> "The residential tenant, long the stepchild of the law, has now become its ward and darling."<sup>10</sup> Texas is no exception to these changes.

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<sup>3</sup>Haley Crum, *Frequent Moves May Be the Biggest Obstacle for Military Families* (June 23, 2011, 7:00 AM), [http://www.washingtonpost.com/blogs/federal-eye/post/frequent-moves-may-be-the-biggest-obstacle-for-military-families/2011/06/22/AGp6jOgH\\_blog.html](http://www.washingtonpost.com/blogs/federal-eye/post/frequent-moves-may-be-the-biggest-obstacle-for-military-families/2011/06/22/AGp6jOgH_blog.html).

<sup>4</sup>*Id.*

<sup>5</sup>US Census Bureau, *Table 509. Military Personnel on Active Duty by Location: 1980 to 2010* (Sept. 30 2012), <https://www.census.gov/compendia/statab/2012/tables/12s0509.pdf>.

<sup>6</sup>*Id.*

<sup>7</sup>See Tom G. Geurts, *The Historical Development of the Lease in Residential Real Estate*, 32 REAL EST. L. J. 356, 364–65 (2004).

<sup>8</sup>*Id.* at 366–67.

<sup>9</sup>E.H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 519 (1983–84).

<sup>10</sup>*Id.*

### A. A History of the Statutes

Texas first passed legislation concerning security deposits in 1973.<sup>11</sup> The Legislature passed the bill in response to the “wide spread [sic] practice of landlords to require . . . security deposits and there have been widespread abuses in connection with returning the security deposits to tenants.”<sup>12</sup> The Legislature’s purpose for the bill was “[t]o establish the right of tenants to the return of security deposits, to provide a procedure by which the tenant may obtain his refund, to provide penalties for unreasonable withholding of security deposits, and to establish the minimum age for entering in to rental agreements.”<sup>13</sup>

The statutes covering security deposits have remained substantially the same since 1973. In 1984, the Legislature formed the Property Code, with the provisions covering security deposits organized in chapter 92.<sup>14</sup> The majority of sections remained unchanged and were simply reorganized within the new Property Code.<sup>15</sup>

### B. The Current Security Deposit Statutes

Chapter 92, subchapter C, of the Texas Property Code covers security deposits for residential leases.<sup>16</sup> The Code defines a security deposit as “any advance of money, other than a rental application deposit or an advance payment of rent, that is intended primarily to secure performance under a lease of a dwelling that has been entered into by a landlord and a tenant.”<sup>17</sup> Nonrefundable painting and cleaning fees charged under the lease have been held not to be a “security deposit,” and, therefore, are not refundable upon termination of the lease.<sup>18</sup>

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<sup>11</sup>Act of May 24, 1973, 63d Leg., R.S., ch. 433, 1973 Tex. Gen. Laws 1182, 1185 (current version at TEX. PROP. CODE ANN. §§ 92.101–109 (West 2014)).

<sup>12</sup>House Comm. on Judiciary, Bill Analysis, Tex. H.B. 877, 63d Leg., R.S. (1973).

<sup>13</sup>*Id.*

<sup>14</sup>Act of May 26, 1983, 68th Leg., R.S., ch. 576, 1983 Tex. Gen. Laws 3639 (current version at TEX. PROP. CODE ANN. §§ 92.101–109). One change the Legislature made was to add the language, “[e]xcept as provided by Section 92.107. . .” to begin § 92.103, which covers the landlord’s obligation to refund. *Id.* The significance of the addition is discussed in the next section.

<sup>15</sup>*Id.*

<sup>16</sup>TEX. PROP. CODE ANN. § 92.101.

<sup>17</sup>*Id.* § 92.102.

<sup>18</sup>*See* Holmes v. Canlen Mgmt. Corp., 542 S.W.2d 199, 201–02 (Tex. Civ. App.—El Paso 1976, no writ). This holding seems to go against the statute, which at the time stated, “[a]ny

The landlord is required to refund the security deposit on or before the 30th day after the tenant surrenders the premises.<sup>19</sup> However, this section is prefaced by the phrase, “Except as provided by § 92.107. . . .”<sup>20</sup> Section 92.107 provides that “[t]he landlord is not obligated to return a tenant’s security deposit or give the tenant a written description of damages and charges until the tenant gives the landlord a written statement of the tenant’s forwarding address for the purpose of refunding the security deposit.”<sup>21</sup> It is not entirely clear how the Legislature intended for these two sections to be interpreted. Shortly after the Legislature reorganized the statutes covering security deposits from the Revised Civil Statutes into the Property Code in 1983,<sup>22</sup> a Texas Court of Appeals case addressed this very matter.<sup>23</sup> In *Minor v. Adams*, the court held that §§ 92.103 and 92.107 should be construed “together to mean that the landlord has no more than 30 days after receiving the forwarding address to refund the deposit.”<sup>24</sup>

Section 94.104 addresses retention of security deposits. “[T]he landlord may deduct from the deposit damages and charges for which the tenant is legally liable under the lease agreement or as a result of breaching the lease.”<sup>25</sup> However, “[t]he landlord may not retain any portion of a security deposit to cover normal wear and tear.”<sup>26</sup> The landlord is also obligated to provide an itemized list with a description for all deductions made from the security deposit, unless the tenant is deficient on rent and there is no dispute

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provision of an oral or written rental agreement between the landlord and tenant which purports to exempt the landlord or tenant from any liability or duty imposed by this Act or which purports to waive the rights and liabilities granted under this Act, is void and unenforceable.” Act of May 24, 1973, 63d Leg., R.S., ch. 433, 1973 Tex. Gen. Laws 1182, Sec. 7 (current version at TEX. PROP. CODE ANN. §§ 92.102). The current language of the statute reads, “[a] landlord’s duty or a tenant’s remedy concerning security deposits . . . may not be waived.” TEX. PROP. CODE ANN. § 92.006. The security deposit is meant to cover any potential cleaning or painting costs the landlord may incur at the conclusion of the rental period, and any agreement to pay this money up front would appear to be a waiver. *See id.* § 92.104(b).

<sup>19</sup>TEX. PROP. CODE ANN. § 92.103(a).

<sup>20</sup>*Id.*

<sup>21</sup>*Id.* § 92.107(a).

<sup>22</sup>Act of May 26, 1983, 68th Leg., R.S., ch. 576, 1983 Tex. Gen. Laws 3639 (current version at TEX. PROP. CODE ANN. §§ 92.101–109).

<sup>23</sup>*Minor v. Adams*, 694 S.W.2d 148, 151 (Tex. App.—Houston [14th Dist.] 1985, no writ).

<sup>24</sup>*Id.*

<sup>25</sup>TEX. PROP. CODE ANN. § 92.104(a).

<sup>26</sup>*Id.* § 92.104(b).

over the amount of rent owed.<sup>27</sup> Section 92.107, as stated above, requires the tenant to provide a forwarding address before the landlord becomes obligated to provide an itemized list of deductions.<sup>28</sup> Again, the landlord's obligation hinges on the tenant's ability to provide a forwarding address.<sup>29</sup> The statute also places the duty on the landlord to keep the records for all security deposits.<sup>30</sup>

The statute provides a remedy for a tenant if a landlord wrongfully retains a security deposit.<sup>31</sup> A tenant may bring action for unlawful retention of his or her security deposit.<sup>32</sup> Similar to the Deceptive Trade Practice Act,<sup>33</sup> a tenant may recover "an amount equal to the sum of \$100, three times the portion of the deposit wrongfully withheld, and the tenant's reasonable attorney's fees" if the landlord retained the deposit in bad faith.<sup>34</sup> A landlord is presumed to have acted in bad faith if he or she fails to refund the security deposit or provide written accounting for deductions within 30 days following the tenant surrendering possession of the premises.<sup>35</sup> The courts have interpreted the term bad faith to imply an intention to deprive the tenant of the refund lawfully due.<sup>36</sup> If a landlord in bad faith fails to provide a written description and itemized list of damages, then he or she forfeits the right to any portion of the deposit, is barred from filing suit to recover for damages to the premises, and must pay the tenant's attorney's

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<sup>27</sup> *Id.* § 92.104(c).

<sup>28</sup> *Id.* § 92.107(a).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* § 92.106.

<sup>31</sup> *Id.* § 92.109(a).

<sup>32</sup> *Id.*

<sup>33</sup> Under the Deceptive Trade Practices-Consumer Protection Act, a consumer may recover up to three times the amount of mental anguish and economic damages by proving the defendant's conduct was intentional. TEX. BUS. & COM. CODE ANN. § 17.50 (West 2011). Similarly, a tenant may recover three times the amount of the security deposit by proving the landlord withheld the deposit in bad faith. TEX. PROP. CODE ANN. § 92.109(a) (West 2014).

<sup>34</sup> TEX. PROP. CODE ANN. § 92.109(a).

<sup>35</sup> *Id.* § 92.109(d).

<sup>36</sup> *See, e.g.,* Wilson v. O'Connor, 555 S.W.2d 776, 780 (Tex. Civ. App.—Dallas 1977, writ dismissed); Johnson v. Huie Properties, 594 S.W.2d 488, 490 (Tex. Civ. App.—Dallas 1979, no writ); Alltex Constr., Inc. v. Alareksoussi, 685 S.W.2d 93, 94 (Tex. App.—Dallas 1984, writ refused); Southmark Mgmt. Corp. v. Vick, 692 S.W.2d 157, 160 (Tex. App.—Houston [1st Dist.] 1985, writ refused); Leskinen v. Burford, 892 S.W.2d 135, 136 (Tex. App.—Houston [14th Dist.] 1994, no writ); Pulley v. Milberger, 198 S.W. 3d 418, 428 (Tex. App.—Dallas 2006, pet. denied).

fees.<sup>37</sup> Additionally, the landlord bears the burden to prove that retention of the security deposit was reasonable.<sup>38</sup> In Texas, tenants also have the advantage of justice courts.<sup>39</sup> A tenant can file a claim against a landlord for wrongfully withholding a security deposit without the assistance of an attorney.<sup>40</sup> While this cause of action provides a favorable remedy, it does not sufficiently protect everyone.

## II. THE WAYS LANDLORDS CAN STILL EXPLOIT TENANTS

While the statute provides several tenant-friendly provisions, there are still several ways that landlords can take advantage of tenants. The next section will address three ways in which landlords can still take advantage of tenants, which include the forwarding address requirement, the ambiguity left in the meaning of “normal wear and tear,” and the use of a carpet cleaning clause in leases.<sup>41</sup>

### A. *The Forwarding Address Requirement*

As shown in the previous section, the forwarding address requirement is an essential step toward refunding a security deposit.<sup>42</sup> The statute states that the landlord has 30 days from the date the tenant surrenders possession before bad faith is presumed.<sup>43</sup> This language suggests that the clock begins to run as soon as the tenant moves out. However, this is not how Texas courts have interpreted that statute. The court in *Ackerman v. Little* held that the landlord has 30 days from the date the residential tenant provides written notice of his or her forwarding address to refund the security deposit or provide an itemized list of deductions before bad faith will arise.<sup>44</sup>

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<sup>37</sup>TEX. PROP. CODE ANN. § 92.109(b).

<sup>38</sup>*Id.* § 92.109(c).

<sup>39</sup>TEX. GOV'T CODE ANN. § 27.031 (West 2004 & Supp. 2014).

<sup>40</sup>*See* TEX. PROP. CODE ANN. § 92.109.

<sup>41</sup>*See infra* Part III.A–C.

<sup>42</sup>*See infra* Part II.B.

<sup>43</sup>TEX. PROP. CODE ANN. § 92.109(d).

<sup>44</sup>679 S.W.2d 70, 75 (Tex. App.—Dallas 1984, no writ). Note: While the opinion came after the Legislature re-codified the security deposit statutes in the Property Code, the dispute arose under the Revised Civil Statutes. However, the relevant statutes remained largely unchanged. *See* Act of May 26, 1983, 68th Leg., R.S., ch. 576, 1983 Tex. Gen. Laws 3639 (current version at TEX. PROP. CODE ANN. §§ 92.101–109); Act of May 24, 1973, 63d Leg., R.S., ch. 433, 1973 Tex. Gen. Laws 1182 (current version at TEX. PROP. CODE ANN. §§ 92.101–109).

Therefore, the landlord is essentially blocked from liability until the former tenant is able to provide a forwarding address. For many tenants, this may be a simple requirement. However, for military tenants it is a little more complicated.

Consider SGT Smith's situation. By the time he realized the rental company was not going to return his security deposit, he had already moved across the country. He had already begun his new job. Commanders typically do not allow a Soldier to take leave if they have just arrived to a unit unless it is an emergency. In order to resolve the dispute he will have to hire an attorney. While he can obtain legal advice from a military attorney, that attorney will not be able to represent the servicemember in court without authorization.<sup>45</sup>

In Texas, the statute does provide for recovery of attorney fees, but a person must still have the money to hire the attorney upfront and also find someone willing to handle such a small dispute.<sup>46</sup> Additionally, if no bad faith is present, then there is no recovery of attorney's fees.<sup>47</sup> Many Soldiers in SGT Smith's situation give up on trying to recover their deposit and pay any additional money the company says they owe simply due to the logistical and financial difficulties.

Before changing duty stations, each servicemember receives Permanent Change of Station orders ("PCS").<sup>48</sup> This typically occurs three to five months before the servicemember is scheduled to depart from his or her current duty station.<sup>49</sup> It provides the new unit's address, as well as the servicemember's report date.<sup>50</sup> It does not provide an actual mailing address for the servicemember.<sup>51</sup> Despite having the name of the military installation for the new unit, based on previous holdings, it seems likely that under the current law Texas courts will find the PCS orders as insufficient for satisfying the forwarding address requirement. In *Michaux v. Koebig*, the court held an address on a tenant's check was insufficient to comply

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<sup>45</sup>The Army Legal Assistance Program, Army Regulation 27-3, p. 16, Feb. 21, 1996.

<sup>46</sup>TEX. PROP. CODE ANN. § 92.109(a).

<sup>47</sup>*Id.* § 92.109(b)(2).

<sup>48</sup>See *Making Sense of Your Military Orders*, at 4, <http://www.cs.amedd.army.mil/bolc/FileDownloadpublic.aspx?docid=a70861a8-44c7-4c09-8565-4b5938fab3de> (last visited April 5, 2015).

<sup>49</sup>See *id.*

<sup>50</sup>See *id.*

<sup>51</sup>See *id.*

with the forwarding address requirement.<sup>52</sup> The check clearly provided the landlord with the former tenant's actual address; however, the court still found it to fall short of what was required by the statute.<sup>53</sup> The court's reasoning was the tenant's purpose for providing the check was to pay rent and not for purposes of providing written notice of a forwarding address to satisfy the statutory requirement to receive a security deposit refund.<sup>54</sup> A Texas court has also held that a written demand for return of the security deposit by the tenant's attorney was not sufficient when the letter failed to provide an address for the attorney or the tenant's forwarding address.<sup>55</sup> The court's reasoning was that the letter did not provide the landlord with any address to send the refund.<sup>56</sup> It seems likely that if an attorney's demand letter contains the attorney's name and law firm, it would be very easy for a landlord to ascertain an address for refunding the deposit. However, one could make a point that the address for the unit on a servicemember's PCS orders is even less precise than a check or demand letter. The orders have only the address for the new unit. It does not provide a specific address for the servicemember. The orders will also most likely contain a higher echelon than where the servicemember will end up. For example, in the Army context, a Soldier's order will most likely send him or her to specific brigade or battalion, but the Soldier may ultimately end up at the company level. For example, SGT Smith's PCS orders may say 4th Sustainment Brigade, Fort Hood, TX. However, once he is in-processed in the Brigade, the unit may send him to 207th Signal Company, Special Troops Battalion, 4th Sustainment Brigade. Additionally, the Soldier would not be providing the PCS orders for purposes of providing notice of his or her forwarding address, but rather to put the landlord on notice on when the lease will be terminated. Therefore, without a change to the law, it seems unlikely that PCS orders would meet the requirement for providing a forwarding address.

### *B. Ambiguity in the Meaning of "Normal Wear and Tear"*

Even if the servicemember can overcome the mailing address hurdle, there are other means of abuse by the landlord. As provided by statute, a landlord in Texas may not deduct any costs from a security deposit to cover

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<sup>52</sup> 555 S.W.2d 171, 175 (Tex. Civ. App.—Austin 1977, no writ).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> Johnson v. Huie Props., 594 S.W.2d 488, 492 (Tex. Civ. App.—Dallas 1979, no writ).

<sup>56</sup> *Id.*



normal wear and tear.<sup>57</sup> The Texas Property Code defines “normal wear and tear” as:

[D]eterioration that results from the intended use of a dwelling, including . . . breakage or malfunction due to age or deteriorated condition, but the term does not include deterioration that results from negligence, carelessness, accident, or abuse of the premises, equipment, or chattels by the tenant, by a member of the tenant’s household, or by a guest or invitee of the tenant.<sup>58</sup>

There has been very little case law to determine how the term truly applies. In *Pulley v. Milberger*, the court found sufficient evidence to support the trial court’s finding that the damage to the home was beyond normal wear and tear and that the retention of the security deposit was reasonable.<sup>59</sup> This case provides one of the most obvious cases of damages beyond normal wear and tear:

When the carpet, was pulled up, the smell was described as nauseating, the stains had permeated through the back of the carpet and the padding, and the padding was crusty from urine residue. As a result, the carpet and padding had to be scraped up with a shovel and replaced. In the master bathroom, the drywall beside the toilet was cleaned with bleach, but the urine stains could not be removed so the drywall had to be replaced. Also, the toilet had to be removed because it was so heavily encrusted with urine stains.<sup>60</sup>

While this is an obvious case of excessive damage, the *Orgain v. Butler* case falls at the other end of the spectrum.<sup>61</sup> In that case, the court found that the landlord could not deduct damage to a door and screen window in the absence of showing the damage was caused by the tenants or that it was more than ordinary wear and tear.<sup>62</sup>

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<sup>57</sup>TEX. PROP. CODE ANN. § 92.104(b) (West 2014).

<sup>58</sup>*Id.* § 92.001.

<sup>59</sup>198 S.W.3d 418, 433 (Tex. App.—Dallas 2006, no pet.).

<sup>60</sup>*Id.* at 424.

<sup>61</sup>*See* 478 S.W.2d 610, 615 (Tex. Civ. App.—Austin 1972, no writ).

<sup>62</sup>*Id.* (this case occurred prior to the Texas Legislature passing the first security deposit statutes in 1973).

A less extreme and more recent case involved the tenant repainting the walls a different color and damage to the carpet and pad from pet urine.<sup>63</sup> The charges included a \$25 cleaning fee, \$367.56 for carpet replacement, \$35 for pet treatment, and \$85.58 for new paint.<sup>64</sup> The landlord did discount the repair costs due to the carpet already having some wear prior to the tenant moving in and the tenant had attempted to do some of the cleaning on her own.<sup>65</sup> The court determined that the repairs were necessary and costs charged to the tenant were reasonable.<sup>66</sup> In *Alltex Construction, Inc. v. Alareksoussi*, the court of appeals upheld a jury's findings that charges made to the tenant for cleaning and carpet replacement were unreasonable.<sup>67</sup> The tenant and other witnesses testified that the carpet was stained when the tenant moved in.<sup>68</sup> The landlord, just as in *Johnson*, only charged the tenant for a portion of the cost to replace the carpet since there was some previous damage.<sup>69</sup> These cases demonstrate the uncertainty of results given the current definition provided by the statute. It is not clear what type of damage, outside of that found in the *Pulley* case, will exceed normal wear and tear.<sup>70</sup>

Ohio takes a different approach for determining what deductions a landlord may make from the security deposit. Ohio statute R.C. § 5321.05 lists the obligations of the tenant:

- (1) Keep that part of the premises that he occupies safe and sanitary;
- (2) Dispose of all rubbish, garbage, and other waste in a clean, safe and sanitary manner;
- (3) Keep all plumbing fixtures in the dwelling unit or used by him as clean as their condition permits;
- (4) Use and operate all electrical and plumbing fixtures properly;

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<sup>63</sup> *Johnson v. Waters at Elm Creek, LLC*, 416 S.W.3d 42, 48 (Tex. App.—San Antonio 2013, pet. denied).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 48–49.

<sup>66</sup> *Id.* at 49.

<sup>67</sup> 685 S.W.2d 93, 95 (Tex. App.—Dallas 1984, writ ref'd n.r.e.).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Pulley v. Milberger*, 198 S.W. 3d 418, 428 (Tex. App.—Dallas 2006, pet. denied).

- (5) Comply with the requirements imposed on tenants by all applicable state and local housing, health, and safety codes;
- (6) Personally refrain and forbid any other person who is on the premises with his permission from intentionally or negligently destroying, defacing, damaging, or removing any fixture, appliance, or other part of the premises;
- (7) Maintain in good working order and condition any range, refrigerator, washer, dryer, dishwasher, or other appliances supplied by the landlord and required to be maintained by the tenant under the terms and conditions of a written rental agreement;
- (8) Conduct himself and require other persons on the premises with his consent to conduct themselves in a manner that will not disturb his neighbors' peaceful enjoyment of the premises;
- (9) Conduct himself, and require persons in his household and persons on the premises with his consent to conduct themselves, in connection with the premises so as not to violate the prohibitions contained in Chapters 2925. and 3719. of the Revised Code, or in municipal ordinances that are substantially similar to any section in either of those chapters, which relate to controlled substances.<sup>71</sup>

The landlord can deduct from the security deposit for any violation by the tenant of one of these obligations. This is a more effective way of identifying what a landlord can deduct for than anything except damage due to "normal wear and tear." Ohio courts have held that if the damage at issue is not included in the statute or agreement, then the court will consider it normal wear and tear.<sup>72</sup> Therefore, instead of leaving it up to the landlord to make a determination of what he or she considers to be normal wear and tear, the Ohio statute affirmatively tells tenants their responsibilities. This allows tenants to understand what type of charges they can expect without

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<sup>71</sup> OHIO REV. CODE ANN. § 5321.16 (West 2004) ("a security deposit may be applied to the payment of past due rent and to the payment of the amount of damages that the landlord has suffered by reason of the tenant's noncompliance with section 5321.05 of the Revised Code or the rental agreement").

<sup>72</sup> See *Albrecht v. Chen*, 477 N.E.2d 1150, 1153 (Ohio Ct. App. 1983) (holding that if the lease or statute is not violated then deduction from security deposit is improper); *Mentor Lagoons, Inc. v. Mayor*, No. 10-180, 1985 WL 7807, at \*2 (Ohio Ct. App. March 1, 1985).

having to go to a lawyer to determine what “normal wear and tear” really means.

### C. *The Infamous Carpet Cleaning Clause*

As discussed previously, the *Holmes* case held that an upfront, non-refundable cleaning fee did not constitute a security deposit.<sup>73</sup> The tenant in that case entered into a month-to-month rental agreement for \$165 per month and agreed to pay “a non-refundable painting and cleaning fee in the sum of \$40.00.”<sup>74</sup> According to this holding, it seems a landlord could charge an upfront non-refundable fee for carpet cleaning.<sup>75</sup> The Texas Apartment Association’s 2009 sample apartment lease contract states: “If you don’t clean adequately, you’ll be liable for reasonable cleaning charges—including charges for cleaning carpets . . . that are soiled beyond normal wear . . . .”<sup>76</sup> A Soldier stationed at Fort Hood was told he must have his carpet cleaned after moving out. In order to save money, the Soldier rented a carpet-cleaning machine and cleaned the carpets himself. Once he cleaned the carpets and had the inspection completed, the landlord still charged him a carpet-cleaning fee because the Soldier was not able to provide a receipt from a professional carpet cleaner.

While there is still case law to support a landlord’s ability to potentially charge an upfront non-refundable fee for carpet cleaning, a landlord should not be able to automatically deduct a carpet-cleaning fee from the security deposit.<sup>77</sup> Texas does not have any case law addressing this issue. However, Ohio has several cases specifically addressing carpet-cleaning deductions from the security deposit.<sup>78</sup> A Texas court dealt with a carpet-cleaning rule that required an automatic deduction from the security deposit for professional cleaning, however, the court avoided making a determination on the validity of the rule since the landlord instituted it after the tenant

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<sup>73</sup>*Holmes v. Canlen Mgmt. Corp.*, 542 S.W.2d 199, 201–02 (Tex. Civ. App.—El Paso 1976, no writ).

<sup>74</sup>*Id.* at 200.

<sup>75</sup>*Id.* at 201–02.

<sup>76</sup>Texas Apartment Association, Official Statewide Form, [http://www.taa.org/images/assets/PDF/renter/2009apartmentlease\\_forweb.pdf](http://www.taa.org/images/assets/PDF/renter/2009apartmentlease_forweb.pdf) (last visited April 5, 2015).

<sup>77</sup>See *Holmes*, 542 S.W.2d at 201–02.

<sup>78</sup>See *Albrecht v. Chen*, 477 N.E.2d 1150, 1153 (Ohio Ct. App. 1983); *Chaney v. Breton Builder Co.*, 720 N.E.2d 941, 944 (Ohio Ct. App. 1998).

signed the lease.<sup>79</sup> In *Albreqt v. Chen*, the court found a unilateral deduction for carpet cleaning was improper without showing a specific need to clean the carpet.<sup>80</sup> The lease provided that the tenant would pay \$60 for cleaning the carpets upon surrendering the premises and that the charge would be deducted from the security deposit.<sup>81</sup> In *Chaney v. Breton Builder Co.*, the court held that an automatic deduction for shampooing carpet is inconsistent with the Ohio statute and is therefore unenforceable.<sup>82</sup> The lease in dispute stated:

Carpets are to be swept and SHAMPOOED with a steam cleaner. You may allow management to clean your carpet after you move-out (we actually prefer this—if you walk on wet carpet, you will mat it down and we will have to redo it or if it is not done properly.) The management is more than happy to return you[r] full deposit if the cleaning is done properly. Sorry, dirt does not qualify as normal wear tear.<sup>83</sup>

The court found “that the wording of appellant’s move-out checklist is such that a reasonable tenant would believe that if he did not shampoo the carpet himself to appellant’s satisfaction, appellant would automatically shampoo the carpet and deduct the charge from his security deposit.”<sup>84</sup> Citing to the *Albreqt* decision, another Ohio court held: “To the extent that the lease agreement requires carpet cleaning costs to be deducted from the security deposit, independent of any evidence of damage above ordinary wear and tear, this provision of the lease is unenforceable.”<sup>85</sup> If a landlord attempts to automatically withdraw a carpet-cleaning fee, the Texas courts should follow the Ohio courts’ reasoning and find the fee only acceptable when the damage is beyond normal wear and tear.

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<sup>79</sup> *Orgain v. Butler*, 478 S.W.2d 610, 615 (Tex. Civ. App.—Austin 1972, no writ). This holding does predate the passage of H.B. 877 which created the security deposit statutes; however, the court based its holding on contract principles and the statute would not change the outcome. *Id.* at 614.

<sup>80</sup> 477 N.E.2d at 1153.

<sup>81</sup> *Id.*

<sup>82</sup> 720 N.E.2d 941, 944 (Ohio Ct. App. 1998), *abrogated on other grounds by* *Parker v. I&F Insulation Co.*, 730 N.E.2d 972, 977 (Ohio 2000) (holding a homeowner is entitled to postjudgment interest on original award of attorney fees under the Consumer Sales Practices Act).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Weingarden v. Eagle Ridge Condos.*, 653 N.E.2d 759, 764 (Ohio Ct. App. 1995).

### III. THE SOLUTION TO PROTECTION THE MOST VULNERABLE

The previous section highlights just some of the ways in which landlords can take advantage of tenants, particularly those serving in the military. Current federal and state statutes carve out certain exceptions for servicemembers by allowing those with orders to get out of a lease before its expiration or in some cases allow a waiver for payment of a deposit all together.<sup>86</sup> However, there are no current statutes that assist a military tenant in obtaining a refund of his or her security deposit. The Texas Legislature should update the current security deposit statutes to provide more protection to tenants and provide an exception to the forwarding address requirement to servicemembers.

#### A. *The Current Solutions for the Military*

One of the current solutions Fort Hood has employed to protect members of the military is a drastic one.<sup>87</sup> That solution is to blacklist a company by ordering servicemembers not to do business with the company.<sup>88</sup> In June 2010, that is exactly what the Commander of Fort Hood did to a rental agency for overcharging Soldiers and withholding security deposits.<sup>89</sup> While this ensures protection of Soldiers in the future and sets an example for other businesses, it does not provide a permanent solution. It takes a pattern of unfair practices by a single company to reach this level. This solution also provides no protection or remedy for those Soldiers who were harmed leading up to the Commander blacklisting the company.<sup>90</sup>

The other current solution to protection the military is the Deposit Waiver Program.<sup>91</sup> Congress has given the Secretary of Defense the power to conduct a program that will allow landlords who choose to participate to waive security deposits for servicemembers in exchange for compensation from the government.<sup>92</sup> The statute allows for the Secretary of a military department to reach an agreement with a landlord to waive the member's

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<sup>86</sup> 50 U.S.C. § 535 (2012); TEX. PROP. CODE ANN. § 92.017 (West 2007).

<sup>87</sup> Mark Wiggins, *Harker Heights Real Estate Business Blacklisted by Fort Hood* (Jun. 29, 2010, 7:17 P.M.), <http://www.kxxv.com/story/12730826/harker-heights-real-estate-business-blacklisted-by-fort-hood>.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> 10 U.S.C. § 1055 (2012).

<sup>92</sup> *Id.*

security deposit, and provides that “the Secretary . . . shall compensate the landlord for breach of the lease by the member and for damage to the rental unit caused by the member or by a guest or dependent of the member.”<sup>93</sup> The advantage to this arrangement is it would mean the landlord must pursue the government for payment, and not a service member, like SGT Smith, half way across the country with no means to defend him or herself.<sup>94</sup> The statute also states that the agreement must provide that the damages for breach of the lease “may not exceed an amount equal to the amount that the Secretary determines would have been required by the landlord as a security deposit in the absence of an agreement.”<sup>95</sup> This places a much-needed restriction on a landlords ability to charge unnecessary fees and repairs as discussed previously.<sup>96</sup> However, the greatest protection the statute provides is requiring the landlord to exhaust all available remedies before the Secretary can compensate the landlord for any breach or damages, “including submission to binding arbitration by a panel composed of military personnel and persons from the private sector.”<sup>97</sup>

Fort Hood currently offers the Deposit Waiver Program to Soldiers.<sup>98</sup> The way the program works is, after arriving to Fort Hood, a Soldier reports to the Fort Hood Family Housing Office (“Housing Office”).<sup>99</sup> The Soldier then requests to receive a waiver from the Housing Office, which waives deposits for utilities, telephone, and security deposits for off-post rentals.<sup>100</sup> The waiver is only applicable to those companies who choose to participate.<sup>101</sup> While the program generally follows the guidelines outlined in 10 U.S.C. § 1055, there are some exceptions that apply.<sup>102</sup> First, the landlord still retains the right to demand a security deposit in the future if the Soldier becomes delinquent on rent payments.<sup>103</sup> Additionally, if a

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<sup>93</sup> *Id.* § 1055(b)(1).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> See generally *Rental Deposit Waiver Program Fact Sheet* (September 15, 2006), <http://www.hood.army.mil/dpw/Housing/Files/Waiver.pdf> (providing information about the Fort Hood Deposit Waiver Program).

<sup>99</sup> *Id.* at 2.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 1.

<sup>102</sup> *Id.* at 1–2.

<sup>103</sup> *Id.*

Soldier becomes delinquent or fails to pay a debt, then the Housing Office will notify his or her chain of command.<sup>104</sup> The Housing Office also instructs landlords participating in the program not to accept a waiver from a Soldier who has poor credit or a bad rental history.<sup>105</sup> Therefore, landlords still have the freedom to choose when to allow a waiver, even after they choose to participate in the program.

While it has its advantages, this program still falls short of completely protecting servicemembers. First, it requires landlords to take an affirmative step to participate in the program.<sup>106</sup> While this program would be advantageous to a rental company who conducts business properly, it would hurt those companies who take advantage of the vulnerable servicemembers moving across country. Therefore, the type of landlords Congress had in mind when it passed this legislation would be the same ones discouraged from participating. Additionally, the program instilled at Fort Hood gives landlords even more freedom. It not only allows rental companies to decide whether or not to participate, but also the ability to decide on a case-by-case basis when to allow a waiver.<sup>107</sup> A rental company could advertise it participates in the program to draw business, but then ultimately deny a waiver request submitted by a Soldier.

This program is definitely a step in the right direction. It can significantly reduce the moving costs a Soldier incurs by eliminating the costly deposits due to rental, utility, and telephone companies. However, even Soldiers participating in this program are still at risk. Suppose a Soldier has a family emergency and fails to pay rent for one month. The Landlord, who previously provided a waiver, can now request the full security deposit. Now that Soldier could be left in the same situation as SGT Smith. There is a much simpler solution for Texas.

There are already tenant-friendly statutes in place to ensure people are protected.<sup>108</sup> The Legislature only needs to add an exception to accelerate the security deposit refund process in order to allow Soldiers the benefit of the law already in place.

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<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 2.

<sup>106</sup> *Id.* at 1.

<sup>107</sup> *Id.* at 1–2.

<sup>108</sup> TEX. PROP. CODE ANN. § 92.101–.109 (West 2014).



*B. The Legislature Must Amend the Security Deposit Statute*

The current solutions to protect servicemembers from dishonest landlords are not adequate. The Legislature must create an exception for military within the security deposit section in order for servicemembers in Texas to be able to take advantage of laws currently in place. The forwarding address requirement has become the trigger for the landlord's obligation to refund the security deposit or provide written accounting of deductions.<sup>109</sup> For those who are moving within Texas or even within the same city, this is not an issue. However, for those like SGT Smith in the military who are typically moving thousands of miles away, this becomes a major hindrance.<sup>110</sup> By the time a servicemember provides his or her forwarding address, it is no longer economically feasible to bring an action against the landlord. The cost of hiring an attorney or traveling back to Texas will most likely outweigh the amount of the security deposit. This is why the Texas Legislature should pass legislation which would allow a servicemember to present his PCS orders to his or her landlord to start the thirty-day clock for refunding the security deposit.

PCS orders are official documents that both federal and Texas statutes use for applying military exceptions.<sup>111</sup> The Servicemembers Civil Relief Act provides for the termination of residential leases by servicemembers at the lessee's option after the lessee receives military orders requiring a permanent change of station or deployment for a period not less than 90 days.<sup>112</sup> Texas has codified the same provision within the Property Code which states:

A tenant who is a servicemember or a dependent of a servicemember may vacate the dwelling leased by the tenant and avoid liability for future rent and all other sums due under the lease for terminating the lease and vacating the dwelling before the end of the lease term if . . . a servicemember, while in military service, executes the lease and after executing the lease receives military orders . . . for a permanent change of station . . . .<sup>113</sup>

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<sup>109</sup> *Id.* § 92.107.

<sup>110</sup> *See supra* Part III.A.

<sup>111</sup> *See* 50 U.S.C. § 535(a)(1) (2012); TEX. PROP. CODE ANN. § 92.017.

<sup>112</sup> *See* 50 U.S.C. § 535(a)(1) (2012); TEX. PROP. CODE ANN. § 92.017.

<sup>113</sup> TEX. PROP. CODE ANN. § 92.017.

Thus, it would be consistent with this real estate exception for the Legislature to use PCS orders to create an additional exception in the Property Code for servicemembers.

An additional change the Legislature needs to make is to update the \$100 penalty for landlords who retain a security deposit in bad faith. The original language from the 1973 version of the statute stated the following:

A landlord who in bad faith retains a security deposit in violation of this Act is liable for \$100 plus treble the amount of that portion of the deposit which was wrongfully withheld from the tenant, and shall be liable for reasonable attorneys fees in a lawsuit to recover the security deposit.<sup>114</sup>

Today, § 92.109 reads as follows: “A landlord who in bad faith retains a security deposit in violation of this subchapter is liable for an amount equal to the sum of \$100, three times the portion of the deposit wrongfully withheld, and the tenant’s reasonable attorney’s fees in a suit to recover the deposit.”<sup>115</sup> Thus, despite the Legislature slightly changing the language, this section has remained completely the same since its original enactment in 1973. The \$100 fine has not even been updated with the times. According to the Bureau of Labor Statistics, \$100 in 1973 has the same buying power as \$533.19 in 2014.<sup>116</sup> The Bureau based its calculation on the changes of prices for all goods and services purchased for household consumption.<sup>117</sup> A \$100 fine simply does not have the same deterrence factor in 2014 as it did in 1973. During testimony before the committee, Rep. John R. Bingham, one of the authors of the Bill, stated that:

[T]he reason I think they had \$100 in here because a lot of times if there is a \$50 deposit there is a hesitancy to even take it to court or a \$25 deposit and the landlord may say well they are not going to take it to court so why fight it,

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<sup>114</sup> Act of May 24, 1973, 63d Leg., R.S., ch. 433, 1973 Tex. Gen. Laws 1182 (current version at TEX. PROP. CODE ANN. §§ 92.101–109).

<sup>115</sup> TEX. PROP. CODE ANN. § 92.109(a).

<sup>116</sup> CPI Inflation Calculator, [http://www.bls.gov/data/inflation\\_calculator.htm](http://www.bls.gov/data/inflation_calculator.htm) (last visited April 5, 2015).

<sup>117</sup> *Id.*

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but if he is out a minimum \$100 fine, well then he is going to think twice.<sup>118</sup>

As shown by Rep. Bingham's own words, the purpose of the fine was to deter landlords from unreasonably retaining a security deposit. While a \$100 fine may have caused a landlord to think twice in 1973, it no longer has the same affect in 2014. Other statutes within the Property Code use \$500 as the amount for a penalty.<sup>119</sup> The Legislature should increase the amount of the fine for landlords who act in bad faith to an amount that will not only discourage landlords from unlawful retention, but also to entice more attorneys to take a tenant's case.

#### IV. CONCLUSION

Texas' statutory provisions covering security deposits have become antiquated. Just as any statute that remained relatively unchanged for over forty years, the Texas security deposit statutes require updating. The two main legislative objectives of the statutes were to give tenants a procedure for getting back his or her deposit and to penalize landlords who unreasonably withhold the deposit.<sup>120</sup> As shown by this article, the current statute falls short of both objectives. The law no longer provides effective protection to tenants, especially those serving on active duty. Landlords have found ways to exploit vulnerable people and use the security deposit as another source of income. The Legislature must respond. The changes suggested in this article will not have any effect on landlords who are not violating the law. Additionally, the changes made specifically for the military would just merely be an expansion of similar laws already in place to protect servicemembers. The other recommended change, updating the fine, is an update the Legislature must make to keep up with the times.

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<sup>118</sup>*Hearing Before the H. Judiciary Comm.*, 63d Leg., R.S. (Mar. 14, 1973) (statement of Rep. John R. Bingham).

<sup>119</sup>TEX. PROP. CODE ANN §§ 92.333, 94.254–55, 94.301–02, 94.160.

<sup>120</sup>*See* H. Comm. on Judiciary, Bill Analysis, Tex. H.B. 877, 63d Leg., R.S. (1973).