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ARTICLE 5236e—THE VANISHING PANACEA

PATRICK K. SHEEHAN*

The burgeoning growth of consumer oriented legislation has led to the creation of a statutory framework governing "security deposits" forwarded by tenants to landlords.[1] Landlords have often overreached tenants by retaining the security deposit after expiration of the lease, claiming a failure of performance in an attempt to avoid their obligation to return the deposited funds. In the absence of legislative assistance, the cost of bringing an action, the burden of proof, and the limited potential for significant monetary recovery discouraged adequate recourse by the tenant. Effective September 1, 1973, the Texas Legislature enacted article 5236e[2] which has as its underlying purpose the curbing of abuses common in the security deposit arena.[3] While the statutory format grants the landlord limited relief against the misconduct of unscrupulous and evasive tenants,[4] the tenor of the statute makes it clear that the tenant is the party intended to be protected.[5] The perplexing problem still confronting the tenant, however, is whether or not article 5236e has accomplished the task it was created to achieve.

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1. *See* TEX. REV. CIV. STAT. ANN. art. 5236e (Vernon Supp. 1978). "Security deposit" is defined in section 1 (1) of the Act as "any advance or deposit of money, regardless of denomination, the primary function of which is to secure full or partial performance of a rental agreement for a *[sic]* residential premises." *Id.* § 1 (1).

2. 1973 Tex. Gen. Laws, ch. 433, at 1182 (codified at TEX. REV. CIV. STAT. ANN. art. 5236e (Vernon Supp. 1978)).

3. *See id.* (Landlord and Tenant—Security Deposits) (act establishes rights, remedies, and duties). *See generally* Sohns & Fuller, *Texas Landlord-Tenant Law and the Sixty-Fifth Legislature*, 19 S. TEX. L.J. 497, 501-03 (1977).

4. *See* TEX. REV. CIV. STAT. ANN. art. 5236e, § 6 (b) (Vernon Supp. 1978) (penalties imposed for tenant's failure to abide by requirements of this section).

5. *See id.* § 2(a) & (b) (refund obligation); *id.* § 4(a), (b), (c) (penalties); *id.* § 7 (waiver of rights is void). *See generally* Comment, *The Residential Tenant's Security Deposit—A Protected Interest Worth Litigating*, 8 ST. MARY'S L.J. 829 (1977). The 1973 Texas Legislature was known as the "reform legislature" because of the consumer-oriented legislation it passed. *See* Sohns & Fuller, *Texas Landlord-Tenant Law and the Sixty-Fifth Legislature*, 19 S. TEX. L.J. 497, 501 (1977). *See generally* Maxwell, *Public and Private Rights and Remedies Under the Deceptive Trade Practices—Consumer Protection Act*, 8 ST. MARY'S L.J. 617, 618-20 (1977). *See also* Hill, *Introduction to Consumer Protection Symposium*, 8 ST. MARY'S L.J. 609, 612 (1977).

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THE STATUTORY FRAMEWORK

Article 5236e requires that the security deposit or an itemized list of deductions be forwarded by the landlord to the tenant within thirty days after the tenant surrenders the premises.[6] Section 4(a) imposes a penalty of $100 plus treble the amount of the security deposit wrongfully withheld and reasonable attorney's fees on a landlord who, in "bad faith," retains a security deposit in violation of the statutory guidelines.[7] Thus, there can be no question about the applicable measure of damages in those situations where the landlord has withheld the security deposit in "bad faith."[8] Numerous problems arise, however, in determining the instances where the landlord has acted in "bad faith" and in ascertaining which party has the burden of establishing to the satisfaction of the trier of fact that the landlord has acted in "bad faith" in retaining the security deposit.

Problems Inherent in the Statute

Section 4(c) of article 5236e reads as follows:

> In any court action brought by a tenant under this Act, *the landlord bears the burden of proving that his retention of the security deposit or any portion thereof was reasonable.* In this court action the landlord is not liable for the penalty, treble damages, or attorney's fees referred to in Subsections (a) and (b) of this section *unless the landlord is found to have acted in bad faith.* Failure to return a security deposit within 30 days or failure to provide a written description and itemization of deductions within 30 days is *prima facie evidence and a presumption that the landlord acted in bad faith.*[9]

The quoted portion of the statute is riddled with inconsistencies. The initial sentence of section 4(c) states that "the landlord bears the burden of proving that his retention . . . was reasonable."[10] The second sentence, however, indicates that before the tenant can re-

6. TEX. REV. CIV. STAT. ANN. art. 5236e, § 2(a), 3(a) (Vernon Supp. 1978). Actually, two separate duties arise. The first is the return of the security deposit to the tenant within 30 days of the termination of tenancy. *Id.* § 2(a). The second duty arises only in the event that a deduction will be made from the deposit. In that case, the landlord is required to refund the balance of the security deposit along with a written description and itemized list evidencing all deductions. *Id.* § 3(a).

7. *Id.* § 4(a), (b).

8. *See id.* § 4(a).

9. *Id.* § 4(c) (emphasis added).

10. *Id.* § 4(c).

cover a damage award beyond a mere return of the security deposit, the trier of fact must conclude that the landlord acted in "bad faith."[11] Thus, the second sentence seems to require an affirmative finding of "bad faith" before the tenant can recover the statutory penalties.[12] Since the party seeking an affirmative finding generally has the burden of proving the facts to support that finding,[13] there is an apparent conflict between the first and second sentences of section 4(c). These two sentences do not make clear where the burden of persuasion lies on the issue of bad faith.[14]

In attempting to resolve this ambiguity in section 4(c) primary reliance should be placed upon the final sentence of the section. This sentence states that the failure of the landlord to return either the deposit or an itemized list of deductions within thirty days "is prima facie evidence and a presumption that the landlord acted in bad faith."[15] Courts should look to this presumption when attempting to determine whether the intent of the legislature was for the landlord or the tenant to carry the burden of persuasion on the controlling issue of "bad faith."

Judicial Interpretation

The courts have been unable to resolve this statutory ambiguity.[16] In *Diamond Oaks Terrace Apartments v. Spraggins*[17] the Fort

11. *Id.* § 4(c) (landlord not liable for penalty, treble damages, or attorney's fees unless he acted in bad faith).

12. *Id.* § 4(c).

13. *See, e.g.*, Grieger v. Vega, 153 Tex. 498, 506, 271 S.W.2d 85, 89-90 (1954); Bradford v. Fort Worth Transit Co., 450 S.W.2d 919, 922 (Tex. Civ. App.—Fort Worth 1970, writ ref'd n.r.e.); Wilson v. Willbanks, 393 S.W.2d 649, 652 (Tex. Civ. App.—El Paso 1965, no writ).

14. *See* TEX. REV. CIV. STAT. ANN. art. 5236e, § 4(c) (Vernon Supp. 1978). In fact, unless the landlord's burden of establishing his reasonableness is equivalent to a burden of proving his lack of "bad faith," the statute appears to place a burden on both parties to come forward with evidence. *See id. See also* Diamond Oaks Terrace Apartments v. Spraggins, 561 S.W.2d 612, 613 (Tex. Civ. App.—Fort Worth 1978, no writ). To say that the landlord's burden of establishing his reasonableness encompasses a burden of showing his lack of "bad faith," however, would make the "bad faith" requirement of the second sentence needless. It is a well-established rule of construction that the legislature would not put a meaningless provision in a statute. *See, e.g.*, Barr v. Bernhard, 562 S.W.2d 844, 849 (Tex. 1978); Jessen Assocs., Inc. v. Bullock, 531 S.W.2d 593, 600 (Tex. 1975); Perkins v. State, 367 S.W.2d 140, 146 (Tex. 1963).

15. TEX. REV. CIV. STAT. ANN. art. 5236e, § 4(c) (Vernon Supp. 1978).

16. *Compare* Diamond Oaks Terrace Apartments v. Spraggins, 561 S.W.2d 612, 613 (Tex. Civ. App.—Fort Worth 1978, no writ) (landlord's only duty is to prove his reasonableness) *with* Wilson v. O'Connor, 555 S.W.2d 776, 781 (Tex. Civ. App.—Dallas 1977, writ dism'd) (landlord has burden of proving his good faith).

17. 561 S.W.2d 612 (Tex. Civ. App.—Forth Worth 1978, no writ).

Worth Court of Civil Appeals, after noting that the statute is indeed confusing,[18] held that the landlord's only burden was to prove that his retention was reasonable.[19] The court held that the landlord was not liable under the penalty provision of the statute unless there has been an affirmative finding of bad faith,[20] and reversed the judgment of the trial court which had placed the burden of proving this issue on the landlord.[21] The division of the burden of proof between the landlord and the tenant exemplifies the ambiguity inherent in section 4(c).

The Dallas Court of Civil Appeals has also been confronted with this statutory ambiguity. In *Wilson v. O'Connor,*[22] the court held that the trial court improperly construed article 5236e.[23] The trial court had held that once the tenant proved the landlord retained the security deposit beyond thirty days, the tenant was entitled to recover, as a matter of law, the statutory penalty, treble damages, and attorney's fees even though rebuttal evidence revealing "excuse" for retaining the deposit was tendered by the landlord.[24] The appellate court disagreed with this analysis and concluded that once the landlord offers rebuttal evidence the statutory presumption only establishes "an inference which *permits,* but does not compel, *a fact finding of bad faith.*"[25] Such language implies that the burden of

18. *Id.* at 613. The court said that the trial court's misplacing the burden of proof was "quite understandable from a reading of art. 5236e § 4(c)." *Id.* at 613.

19. *Id.* at 613.

20. *Id.* at 613. See cases cited note 13, *supra.* The court apparently recognized that the landlord's action could have been unreasonable, yet still not in bad faith. *See* Diamond Oaks Terrace Apartments v. Spraggins, 561 S.W.2d 612, 613 (Tex. Civ. App.—Fort Worth 1978, no writ). *But cf.* TEX. BUS. & COM. CODE ANN. § 2.103(a) (2) (Vernon 1968) (good faith defined as commercial reasonableness).

21. Diamond Oaks Terrace Apartments v. Spraggins, 561 S.W.2d 612, 614 (Tex. Civ. App.—Fort Worth 1978, no writ).

22. 555 S.W.2d 776 (Tex. Civ. App.—Dallas 1977, writ dism'd).

23. *Id.* at 778.

24. *Id.* at 781-82.

25. *Id.* at 780 (emphasis by the court). Initially, it should be noted that the court of civil appeals seems to align the landlord's burden to establish the reasonableness of the deductions as required by section 3(a) with the burden created by section 4(c), which often concerns the reasonableness of the retention per se. *Id.* at 780. The first sentence of section 4(c), however, should not be construed as merely reiterating the wording contained in the preceding section 3(a). The legislature must have intended that these two statutory sections create essentially different duties. *See* Barr v. Bernhard, 562 S.W.2d 844, 849 (Tex. 1978). In certain circumstances, an unreasonable deduction may be found in the absence of "bad faith" by the landlord, but this evidence will not have any connection with the reasonableness of any other deductions from the security deposit. As an example, a landlord may reasonably retain a portion of the security deposit in payment for damages suffered by the premises and

persuasion concerning "bad faith" remains with the tenant throughout the trial, but the court went on to conclude that:

> Mere retention of the deposit beyond thirty days or failure to furnish the itemized list within thirty days, even though intentional, does not establish the landlord's dishonest intention as a matter of law, although proof of such action constitutes prima facie evidence of bad faith and *casts on the landlord the burden of showing his good faith. If the landlord presents evidence of a reasonable excuse for the delay, then a fact issue is presented on which the landlord has the burden of proof.*[26]

While the wording chosen may have been unintentionally confusing, the court's holding indicates that once the tenant establishes a prima facie case, the burden devolves upon the landlord to receive a favorable fact finding concerning the issue of "good faith" or "reasonable" retention.[27] The conclusion that the burden of persuasion rests with the landlord, however, seems inconsistent with the court's judicial interpretation of the words "prima facie" and "presumption."[28] Thus, *Wilson* is another example of the ambiguity inherent in the wording of article 5236e.

Analysis of Presumptions in Texas

Since the words "presumption" and "prima facie" are employed by the legislature in the concluding sentence of section 4(c) of article 5236e, these terms must be analyzed in order to ascertain proper statutory interpretation. A presumption allows the existence of one fact to be inferred from the existence of another.[29] The existence of the presumed fact is created prima facie by the presumption.[30] Presumptions are established for several reasons including probability,[31] procedural convenience,[32] social policy,[33] and to more fairly

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still be required to defend against a lawsuit brought by the tenant alleging a "bad faith" failure to forward an itemized list of deductions within the thirty-day time period. The applicable evidentiary standard and burden vary in such circumstances.

26. Wilson v. O'Connor, 555 S.W.2d 776, 780-81 (Tex. Civ. App.—Dallas 1977, writ dism'd) (emphasis added).

27. *Id.* at 781. Good faith can be defined as the absence of bad faith. *See* Thrift v. Johnson, 561 S.W.2d 864, 867 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ).

28. *See* Wilson v. O'Connor, 555 S.W.2d 776, 780 (Tex. Civ. App.—Dallas 1977, writ dism'd).

29. 1 C. McCormick & R. Ray, Texas Law of Evidence § 50, at 57 (2d ed. 1956).

30. *See id.* § 55, at 68.

31. *See* Lobley v. Gilbert, 149 Tex. 493, 497, 236 S.W.2d 121, 123 (1951); Fox v. Grand Union Tea Co., 236 S.W.2d 561, 563 (Tex. Civ. App.—Austin 1951, mand. overr.). *See*

assist the party having the burden of persuasion by requiring the opposing party, who typically has superior access to proof, to come forward with pertinent evidence.[34] Texas courts accept the majority view governing the effect and meaning of "presumption"[35] and thus, once the presumption has been raised, the party favored by the presumption has not only produced sufficient evidence to avoid an adverse peremptory ruling, but generally is entitled to a directed verdict in the absence of rebuttal evidence.[36]

Under the "bursting bubble" theory of evidence employed by Texas courts, if rebuttal evidence is introduced by the opposing party to counteract the presumed fact, the presumption instantly vanishes.[37] Supposedly, this is because the presumption merely serves to administratively assist the trial court in allocating the burden of going forward with the evidence.[38] Once the presumption disappears, it has no other value in the trial, and the situation is the same as if the presumption had never been created.[39] Under this

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generally Ray, *Presumptions and the Uniform Rules of Evidence*, 33 TEXAS L. REV. 588, 590 (1955).

32. *See* Watkins v. Prudential Ins. Co., 173 A. 644, 648 (Pa. 1934); Curtis Bldg. Co. v. Tunstall, 343 A.2d 389, 390 (Pa. Commw. Ct. 1975). *See generally* Ray, *Presumptions and the Uniform Rules of Evidence*, 33 TEXAS L. REV. 588, 590 (1955); Comment, *Presumptions in Texas: A Study in Irrational Jury Control*, 52 TEXAS L. REV. 1329, 1342, 1347-48 (1974).

33. *See* Neff v. Johnson, 391 S.W.2d 760, 763 (Tex. Civ. App.—Houston 1965, no writ); Byrd v. Travelers Ins. Co., 275 S.W.2d 861, 863 (Tex. Civ. App.—San Antonio 1955, writ ref'd n.r.e.). *See generally* Ray, *Presumptions and the Uniform Rules of Evidence*, 33 TEXAS L. REV. 588, 591 (1955); Comment, *Presumptions in Texas: A Study in Irrational Jury Control*, 52 TEXAS L. REV. 1329, 1342, 1350-51 (1974).

34. *See* Robertson Tank Lines, Inc. v. Van Cleave, 468 S.W.2d 354, 358 (Tex. 1971); Wheeler v. Nailling, 524 S.W.2d 552, 554 (Tex. Civ. App.—Texarkana 1975, no writ). *See generally* C. MCCORMICK, EVIDENCE § 343, at 806-07 (1974); Ray, *Presumptions and the Uniform Rules of Evidence*, 33 TEXAS L. REV. 588, 590 (1955).

35. *See* 1 C. MCCORMICK & R. RAY, TEXAS LAW OF EVIDENCE §§ 55-57 (2d ed. 1956).

36. *See* Sudduth v. Commonwealth County Mut. Ins. Co., 454 S.W.2d 196, 198 (Tex. 1970); Trammell v. Whitlock, 150 Tex. 500, 505, 242 S.W.2d 157, 159 (1951). *See generally* 1 C. MCCORMICK & R. RAY, TEXAS LAW OF EVIDENCE § 55 (2d ed. 1956).

37. *See, e.g.*, Robertson Tank Lines, Inc. v. Van Cleave, 468 S.W.2d 354, 358 (Tex. 1971); Empire Gas & Fuel Co. v. Muegge, 135 Tex. 520, 528, 143 S.W.2d 763, 767 (1940); Central Nat'l Bank v. Booher, 557 S.W.2d 563, 565 (Tex. Civ. App.—Beaumont 1977, writ ref'd n.r.e.). *See generally* C. MCCORMICK, EVIDENCE § 345 (2d ed. 1972). The rebuttal evidence offered should be sufficient to support a finding contrary to the presumed fact. *See id.* § 345, at 821.

38. *See, e.g.*, Empire Gas & Fuel Co. v. Muegge, 135 Tex. 520, 528, 143 S.W.2d 763, 767-68 (1940); Thompson v. B.B. Saxon Co., 472 S.W.2d 325, 328 (Tex. Civ. App.—San Antonio 1971, no writ); Hudiburgh v. Palvic, 274 S.W.2d 94, 98-99 (Tex. Civ. App.—Beaumont 1955, writ ref'd n.r.e.).

39. *See, e.g.*, White v. Smyth, 147 Tex. 272, 285, 214 S.W.2d 967, 974 (1948); Southland Life Ins. Co. v. Greenwade, 138 Tex. 450, 456-57, 159 S.W.2d 854, 857-58 (1942); Central Nat'l

analysis, it appears that the burden of persuasion concerning the issue of "bad faith" rests with the tenant throughout trial and that the burden of going forward with evidence concerning the existence of "bad faith" retention of the security deposit shifts back to the tenant upon the introduction of rebuttal evidence by the landlord. Thus, even assuming the tenant established a prima facie case, if the landlord produces sufficient evidence to support a finding that the presumed fact of "bad faith" does not exist, the tenant's statutorily created presumption disappears and can play no further role in the case.[40]

PROBLEMS CREATED BY STRICT APPLICATION OF THE "BURSTING BUBBLE" THEORY

"Bad faith" is arguably a harsh term;[41] and therefore, the fact-finder may be reluctant to find it existed even in seemingly deserving instances. This conclusion is substantiated by the recent opinion in *Wilson v. O'Connor*[42] where the court concluded that the test of "bad faith" was whether the landlord "acted in dishonest disregard" of the rights of the tenant and "dishonestly intended" to deprive the tenant of a refund lawfully due.[43] Obviously, the tenant confronts a difficult task in proving "dishonest intention" which in effect requires the production of evidence revealing intent to defraud.[44] While the burden on a party seeking treble damages should

Bank v. Booher, 557 S.W.2d 563, 565 (Tex. Civ. App.—Beaumont 1977, writ ref'd n.r.e.). *See generally* C. MCCORMICK, EVIDENCE § 345, at 821 (2d ed. 1972).

40. *E.g.*, First Nat'l Bank v. Thomas, 402 S.W.2d 890, 893 (Tex. 1965); Southland Life Ins. Co. v. Greenwade, 138 Tex. 450, 456, 159 S.W.2d 854, 857 (1942); City of Amarillo v. Atterbury, 303 S.W.2d 804, 806 (Tex. Civ. App.—Amarillo 1957, no writ); *see* Coward v. Gateway Nat'l Bank, 525 S.W.2d 857, 859 (Tex. 1975); Robertson Tank Lines, Inc. v. Van Cleave, 468 S.W.2d 354, 358 (Tex. 1971). While it is true that a legal presumption vanishes when positive contradictory evidence is admitted, it is equally true that the facts upon which the presumption is based remain in evidence to be accorded proper probative value. Sudduth v. Commonwealth County Mut. Ins. Co., 454 S.W.2d 196, 198 (Tex. 1970); Cimarron Ins. Co. v. Price, 409 S.W.2d 601, 607 (Tex. Civ. App.—Austin 1966, writ ref'd n.r.e.).

41. *See* Thrift v. Johnson, 561 S.W.2d 864, 867 (Tex. Civ. App.— Houston [14th Dist.] 1977, no writ); Fenner v. American Sur. Co., 97 S.W.2d 741, 745 (Tex. Civ. App.—Dallas 1936), *aff'd*, 133 Tex. 37, 125 S.W.2d 258 (1939).

42. 555 S.W.2d 776 (Tex. Civ. App.—Dallas 1977, writ dism'd).

43. *Id.* at 780-81; *see* Thrift v. Johnson, 561 S.W.2d 864, 867 (Tex. Civ. App.—Houston [14th Dist.] 1977, no writ).

44. To prove intent to defraud, a plaintiff must show either that a misrepresentation was made with knowledge that it was false or that a positive assertion was made recklessly without knowledge of its truth. The plaintiff also must show the statement was made with intent that it be acted upon by the plaintiff. *See, e.g.*, Roland v. McCullough, 561 S.W.2d 207, 210 (Tex. Civ. App.—San Antonio 1977, no writ); McCall v. Trucks of Texas, Inc., 535 S.W.2d 791, 794 (Tex. Civ. App.—Houston [1st Dist.] 1976, writ ref'd n.r.e.); Brady v. Johnson, 512 S.W.2d 359, 361 (Tex. Civ. App.—Austin 1974, no writ). *See generally* Hill, *Introduction to Consumer Protection Symposium*, 8 ST. MARY'S L.J. 609, 610 (1977).

generally be heavy,[45] given the protective tenor of article 5236e,[46] the legislature must not have intended that the tenant's burden be quite so onerous.[47]

The tenant encounters additional difficulties apart from the problems arising when attempting to establish the existence of "bad faith." If the tenant establishes that the security deposit was retained beyond thirty days and the landlord introduces no rebuttal evidence, the tenant is entitled to the statutory relief requested as a matter of law.[48] In a majority of instances, however, once the tenant establishes a prima facie case, the landlord will probably come forward with rebuttal evidence in an effort to prove that the retention of the security deposit was reasonable and in good faith.[49] As a general rule, if the rebuttal evidence offered is sufficient to support a finding contrary to the presumed fact, the court will not give an instruction on the presumption.[50] Thus, once sufficient rebuttal evidence is offered, the presumption of "bad faith" instantly vanishes, and the tenant's case is in no better posture than it was before the presumption appeared; it is as if the presumption never existed.[51] Since the presumption per se has no evidentiary

45. *See* Mallory v. Custer, 537 S.W.2d 141, 143 (Tex. Civ. App.—Austin 1976, no writ); Cape Conroe Ltd.v. Specht, 525 S.W.2d 215, 218-19 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ).

46. *See* TEX. REV. CIV. STAT. ANN. art. 5236e (Vernon Supp. 1978). See note 5 and accompanying text *supra*.

47. *See generally* Maxwell, *Public and Private Rights and Remedies Under the Deceptive Trade Practices—Consumer Protection Act*, 8 ST. MARY'S L.J. 617, 619-20 (1977); Sohns & Fuller, *Texas Landlord-Tenant Law and the Sixty-Fifth Legislature*, 19 S. TEX. L.J. 497, 501 (1977). *See also* Hill, *Introduction to Consumer Protection Symposium*, 8 ST. MARY'S L.J. 609, 612 (1977); Comment, *The Residential Tenant's Security Deposit—A Protected Interest Worth Litigating*, 8 ST. MARY'S L.J. 829 (1977).

48. *See* TEX. REV. CIV. STAT. ANN. art. 5236e, § 4 (Vernon Supp. 1978). *See generally* 1 C. MCCORMICK & R. RAY, TEXAS LAW OF EVIDENCE § 55 (2d ed. 1956). See note 36 and accompanying text *supra*.

49. It should be noted at this juncture that similar reasoning is applicable to the situation where the landlord retains a portion of the security deposit and fails to timely forward an itemized list of deductions. *See* TEX. REV. CIV. STAT. ANN. art. 5236e, § 4(b) (Vernon Supp. 1978).

50. *See, e.g.*, Empire Gas & Fuel Co. v. Muegge, 135 Tex. 520, 528, 143 S.W.2d 763, 768 (1940); Hailes v. Gentry, 520 S.W.2d 555, 559 (Tex. Civ. App.—El Paso 1975, no writ); Armstrong v. West Texas Rig Co., 339 S.W.2d 69, 74 (Tex. Civ. App.—El Paso 1960, writ ref'd n.r.e.). *See generally* 1 C. MCCORMICK & R. RAY, TEXAS LAW OF EVIDENCE § 57 (Supp. 1975).

51. *E.g.*, White v. Smyth, 147 Tex. 272, 285, 214 S.W.2d 967, 974 (1948); Southland Life Ins. Co. v. Greenwade, 138 Tex. 450, 456-57, 159 S.W.2d 854, 857-58 (1942); Central Nat'l Bank v. Booher, 557 S.W.2d 563, 565 (Tex. Civ. App.—Beaumont 1977, writ ref'd n.r.e.).

value, under a strict application of the "bursting bubble" rule,[52] the jury may not even be instructed as to the existence of the statutory presumption which temporarily favored the tenant. Consequently, even if the jury chose to give little credence to the landlord's rebuttal evidence or, considered the landlord to be lying, they would not have the benefit of an instruction concerning the existence of the presumption of "bad faith" favoring the tenant. This harsh rule has been critized, however, as giving a presumption too slight an effect.[53] Recognizing this weakness, courts have created exceptions to this rule when policy reasons so dictate,[54] or where the presumption is statutorily required.[55]

As a practical matter, with strict statutory constructions and the automatic disappearance of the presumption of "bad faith" upon the introduction of minimal rebuttal evidence by the landlord, the penalty, treble damage, and attorney's fee provisions of the statute rapidly fade into obscurity and can have little real impact. It is necessary, therefore, to find a means to insure that the legislature's intent to provide the tenant with a practical means of recovering a wrongfully withheld security deposit will be realized.

SUGGESTED SOLUTION

In the future, the legislature might reformulate the statute to affirmatively place the burden of persuasion upon the landlord to

52. *See, e.g.*, Empire Gas & Fuel Co. v. Muegge, 135 Tex. 520, 528, 143 S.W.2d 763, 768 (1940); Hailes v. Gentry, 520 S.W.2d 555, 559 (Tex. Civ. App.—El Paso 1975, no writ); Armstrong v. West Texas Rig Co., 339 S.W.2d 69, 74 (Tex. Civ. App.—El Paso 1960, writ ref'd n.r.e.). *See generally* 1 C. MCCORMICK & R. RAY, TEXAS LAW OF EVIDENCE § 57 (2d ed. 1956) (Supp. 1975).

53. *See* C. MCCORMICK, EVIDENCE § 345, at 822 (2d ed. 1972); Morgan & Maguire, *Looking Backward & Forward at Evidence*, 50 HARV. L. REV. 909, 913 (1937). In order to give a presumption full effect, Morgan and Maguire suggest that a presumption should place the burden of persuading the trier of fact of the nonexistence of the presumed fact on the opposing party. *Id.* at 913. *See also* Irwin v. Atlas Truck Line, Inc., 517 S.W.2d 637, 640 (Tex. Civ. App.—Houston [14th Dist.] 1974, writ ref'd n.r.e.).

54. *See* Byrd v. Travelers Ins. Co. 275 S.W.2d 861, 863 (Tex. Civ. App.—San Antonio 1955, writ ref'd n.r.e.). *See generally* Comment, *Presumptions in Texas: A Study in Irrational Jury Control*, 52 TEXAS L. REV. 1329, 1381 (1974). *See also* C. MCCORMICK, EVIDENCE § 345, at 824 (2d ed. 1972).

55. *See* Walker v. Rabke, 550 S.W.2d 168, 170 (Tex. Civ. App.—Fort Worth 1977, no writ); *cf.* Irwin v. Atlas Truck Line, Inc., 517 S.W.2d 637, 640 (Tex. Civ. App.—Houston [14th Dist.] 1974, writ ref'd n.r.e.) (instructions on presumptions allowed under Rules of Civil Procedure). *But see* Hailes v. Gentry, 520 S.W.2d 555, 559 (Tex. Civ. App.—El Paso 1975, no writ). One court has already given an instruction based on the presumption in section 4(c). *See* Walker v. Rabke, 550 S.W.2d 168, 170 (Tex. Civ. App.—Fort Worth 1977, no writ).

prove "good faith" or reasonable retention of the security deposit once the tenant has established his prima facie case. A valid argument can be made that the actual burden of persuasion ought to be placed upon the landlord in such a situation since he is the party who has ready access to necessary proof and since such a resolution would clearly serve to effectuate the legislative purpose of protecting the tenant. Presumably, this would not militate against a fair hearing and would comply with due process as the burden must inevitably be placed upon one party or the other.[56] Pragmatic considerations dictate, however, that in the absence of such legislative direction, courts will be extremely reluctant to place the burden of persuasion directly upon the defendant.[57] Consequently, an acceptable balance must be established. The suggested mode of attaining a creditable and immediate solution to this problem is through the use of jury instructions to assist the jury to function more effectively.[58]

The statutory presumption created by section 4(c) should be treated as an exception to the "bursting bubble" rule where once rebuttal evidence is offered by the landlord, the presumption of bad faith has vanished and nothing remains about which to instruct the jury. While in a technical sense, presumptions typically operate in this manner, it need not be controlling since it is certainly a mechanistic rather than a pragmatic resolution.[59] As stated by the eminent scholar, Charles T. McCormick, "this practice of keeping silent about the relevant presumptions in a case, where the facts are disputed and must be submitted to a jury abandons one of the judge's useful opportunities for wise guidance of the trial, and runs counter to the traditions of the trial courts in most states."[60] In Texas, juries receive instructions about the significance of *res ipsa*

56. *See* TEX. R. CIV. P. 277.

57. *See, e.g.*, Greiger v. Vega, 153 Tex. 498, 506-507, 271 S.W.2d 85, 90 (1954); Bradford v. Forth Worth Transit Co., 450 S.W.2d 919, 922 (Tex. Civ. App.—Fort Worth 1970, writ ref'd n.r.e.). *See generally*, C. MCCORMICK, EVIDENCE § 337, at 786 (2d ed. 1972).

58. *See* Walker v. Rabke, 550 S.W.2d 168, 170 (Tex. Civ. App.—Fort Worth 1977, no writ). It has been suggested that amended rule 277 permits explanatory instructions on presumptions. *See* Irwin v. Atlas Truck Line, Inc., 517 S.W.2d 637, 640 (Tex. Civ. App.—Houston [14th Dist.] 1974, writ ref'd n.r.e.) (amended rule should be liberally construed to permit instructions on presumptions). *But see* Hailes v. Gentry, 520 S.W.2d 555, 559 (Tex. Civ. App.—El Paso 1975, no writ) (takes no notice of amendment to rule 277). *See generally* 3 R. MCDONALD, TEXAS CIVIL PRACTICE § 12.17.1 (1970).

59. *See* C. MCCORMICK, EVIDENCE § 345, at 821 (2d ed. 1972).

60. C. MCCORMICK, EVIDENCE § 314, at 664 (1954).

loquitur[61] and other such doctrines, and there is no compelling reason why they should not be similarly instructed concerning the presumption of "bad faith" arising under article 5236e.

Using Instructions

Initially, if the landlord disputed the fact that the security deposit had not been refunded within the allowable thirty-day time span, his evidence would be limited to contradicting the basic facts of the presumption. He would not offer any evidence concerning reasonable or good faith retention of the security deposit. The prefatory jury issue, therefore, would concern whether or not the security deposit had actually been refunded by the landlord. Even assuming the jury found that the landlord had retained the security deposit, presumably the court would not enter an instructed verdict on the issue of "bad faith" since the landlord could have been honestly mistaken regarding the return of the security deposit. The jury should be instructed on the existence of the statutory presumption of "bad faith" should they find that the landlord retained the security deposit beyond the thirty-day time period as this instruction would serve to further assist the jury in its deliberations concerning the element of "bad faith."

From an alternative view, suppose the counter-evidence offered by the landlord goes directly to disputing the presumed fact itself—"bad faith." This situation would arise if the landlord admitted retaining the security deposit but attempted to prove that his retention beyond thirty days was in good faith or reasonble. The use of an instruction concerning the existence of the presumption of "bad faith" would prove even more valuable in this situation. In at least one Texas case, the trial court adopted this logical and pragmatic approach.[62] In *Walker v. Rabke,*[63] the tenant was awarded judgment against the landlord for treble damages, the statutory penalty, and attorney's fees.[64] The critical issues on appeal concerned whether the trial court misstated the law in the instruction

61. *See, e.g.,* Mobil Chem. Co. v. Bell, 517 S.W.2d 245, 256-57 (Tex. 1974); Smith v. Koenning, 398 S.W.2d 411, 415 (Tex. Civ. App.—Corpus Christi 1965, writ ref'd n.r.e.); Gandy v. Southwestern Bell Tel. Co., 341 S.W.2d 554, 555 (Tex. Civ. App.—San Antonio 1960, no writ).

62. *See* Walker v. Rabke, 550 S.W.2d 168, 170 (Tex. Civ. App.—Fort Worth 1977, no writ).

63. 550 S.W.2d 168 (Tex. Civ. App.—Fort Worth 1977, no writ).

64. *Id.* at 169.

given with special issue number one and whether the instruction constituted an improper comment on the weight of the evidence.[65] The instruction given the jury was as follows:

> Under our law, a failure of a landlord to return a security deposit to a tenant within 30 days or within that time to provide a written description and itemization of deductions from such deposit may, but not necessarily must be, considered sufficient evidence that the landlord acted in bad faith in failing to return the deposit within such time.[66]

The court of civil appeals expressly approved this instruction concerning "bad faith" stating that it "fairly paraphrases" sections 4(c) and 6(a) of article 5236e.[67]

A review of all appellate opinions written to date which analyze security deposit actions reveals that tenants have in few instances emerged victorious in their disputes with the landlord.[68] Obviously, discovery by the tenant is limited by the expense necessarily incurred in seeking to ascertain the existence of circumstantial evidence sufficient to support a jury finding of "bad faith" by the landlord. Since the landlord typically has a stronger bargaining position and superior access to the proof required to establish the reasonableness of his own conduct, it does not seem inappropriate to effectively place the burden on him to reveal that his retention of the security deposit was in good faith or reasonable.[69] Further, if

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65. *Id.* at 170.

66. *Id.* at 170.

67. *Id.* at 170.

68. *See* Diamond Oaks Terrace Apartments v. Spraggins, 561 S.W.2d 612, 613-14 (Tex. Civ. App.—Fort Worth 1978, no writ); Wilson v. O'Connor, 555 S.W.2d 776, 782 (Tex. Civ. App.—Dallas 1977, writ dism'd); Michaux v. Koebig, 555 S.W.2d 171, 178 (Tex. Civ. App.—Austin 1977, no writ). *But see* Walker v Rabke, 550 S.W.2d 168, 171 (Tex. Civ. App.—Fort Worth 1977, no writ).

69. Assuming the court adopted the instruction approach suggested in this article, the nature of the definitions, instructions and special issues to be employed by the tenant-plaintiff in a security deposit action would be as follows:

Special Issue Number One:

Do you find from a preponderance of the evidence that the Defendant retained the Plaintiff's security deposit beyond thirty (30) days after Plaintiff had given Defendant his forwarding address?

ANSWER: We Do_____

We Do Not_____

If you have answered Special Issue Number One "We Do," and only in that event, then proceed to answer Special Issue Number Two.

Special Issue Number Two

Do you find from a preponderance of the evidence that the Defendant acted in

the judge is the trier of fact, he is certainly aware of the existence of the presumption of "bad faith" and must give it some consideration in rendering a final decision. Arguably, a jury has even greater need of such guidance.[70] If the jury chooses to disbelieve the landlord and to conclude that he improperly withheld the security deposit, they should not be put to the onerous task of finding that the landlord acted in "dishonest disregard" of the tenant's rights without the benefit of an instruction as to the existence of the presumption of "bad faith."

CONCLUSION

The use of an instruction concerning the presumption of "bad faith" gives the statutory presumption the vitality and the effect the legislature must have intended. An instruction of this nature is by no means conclusive nor directory since it merely assists the jury in appreciating the legal recognition of a policy or probability as the reason for placing this particular burden on the landlord. Such an instruction subtly and effectively shifts the burden of persuasion to the landlord against whom it operates to satisfy the jury that the presumed inference is inaccurate. This approach is more understandable, effective, and easier to accept than placing the burden of persuasion directly upon the landlord in the charge to the jury.

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bad faith in retaining the Plaintiff's security deposit?
ANSWER: We Do_____
We Do Not_____

Plaintiff's Requested Definition:

BAD FAITH: In determining whether the Defendant acted in bad faith, you are instructed that the term "bad faith" is defined to mean that the Defendant intended to deprive the Plaintiff of a refund lawfully due and intentionally acted in dishonest disregard of the rights of the Plaintiff. (NOTE: Of course, Plaintiff's counsel would be well advised at the trial level to attempt to persuade the court to give a less severe and restrictive definition of the term "bad faith.")

Plaintiff's Requested Instruction:

You are instructed that under Texas law, a failure of a landlord to return a security deposit to a tenant within thirty (30) days (or within that time to provide a written description and itemization of deductions from such deposit) may, but not necessarily must be, considered sufficient evidence that the landlord acted in bad faith in failing to return the security deposit within such time.

The jury issues and instructions set forth exclude potential factual disputes concerning whether or not the security deposit was actually refunded by the landlord, whether a written forwarding address was given to the landlord by the tenant, the amount of the security deposit actually retained, the reasonableness of any deductions, whether an itemized list of deductions was given to the tenant and the amount of reasonable attorney's fees incurred.

70. *See generally* Comment, *Presumptions in Texas: A Study in Irrational Jury Control,* 52 TEXAS L. REV. 1329, 1381-82 (1974).

In the final analysis, given the tenor of article 5236e, it makes little sense to allow the presumption of "bad faith" to instantly vanish the moment the landlord introduces one iota of evidence in rebuttal of the tenant's prima facie case. The teeth of this protective statute should not be so easily extracted. The use of an instruction concerning the presumption of "bad faith" serves to place the jury on equal footing with the trial judge when acting in a fact finding capacity, allows them to more intelligibly fulfill their role, and effectuates the obvious purpose of the legislature.