Wait a Minute:
Slowing Down Minnesota Criminal Activity Eviction Cases to Find the Truth

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Table of Contents

I. Introduction

A. Defending evictions claiming criminal activity in public and subsidized housing reached a new urgency following the decision in *Department of Housing and Urban Development v. Rucker*, 122 S. Ct. 1230 (2002). While some argue that tenants facing such claims have no choice but to move, tenants have many available defenses from federal, state, and local law which are easy to overlook.

B. This outline discusses the required eviction elements for private housing and each federally subsidized program and relevant defenses, and efforts at federal, state, and local levels to develop more appropriate eviction policies.

C. For background on eviction actions in Minnesota, *see* L. MCDONOUGH, RESIDENTIAL UNLAWFUL DETAINER AND EVICTION DEFENSE (2000) and 2003 SUPPLEMENT are available at http://www.povertylaw.homestead.com under readings.

D. Unreported lower court decisions with appendix numbers are available from www.projusticemn.org, formerly www.probono.net/mnProbono.net, after registering, under civil law, library, housing law, eviction defense, and unreported cases. Cases without appendix numbers are available by fax by the author.

E. Thanks to the following persons:

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8. All of the National Housing Law Project staff, 614 Grand Ave., Ste. 320, Oakland, CA 94610, 510-251-9400, Fax 510-451-2300, nhlp@nhlp.org (email), www.nhlp.org (web).

II. LSC Regulations

A. Legal Services Corporation funded attorneys may not represent in public housing evictions persons convicted of or charged with drug crimes when the evictions are based on threats to health or safety of public housing residents or employees. 45 C.F.R. § 1633.

B. LSC attorneys may represent a person facing eviction because a family member was convicted of or charged with drug crimes.

C. The LSC prohibition on representation is limited to public housing and does not apply to Section 8 voucher, federally subsidized, or private evictions.

D. Alan W. Houseman and Linda E. Perle, *What You May and May Not Do Under the Legal Services Corporation Restrictions*, POVERTY LAW MANUAL FOR THE NEW LAWYER, http://www.povertylaw.org/legalresearch/manual/foreword.pdf (web).

III. The Minnesota Illegal Activity Statute

A. Covenant of landlords and tenants: MINN. STAT. § 504B.171 (formerly § 504.181)

1. When first enacted, the tenant covenanted that the tenant will not unlawfully allow controlled substances in the premises, and that common areas will not be used by the tenant or others under the tenant's control to carry out activities that are a violation of controlled substances laws. In 1997 the drug covenant was expanded to cover other types of unlawful activity, and to cover landlords as well as tenants. MINN. STAT. § 504.181 (now § 504B.171). Now, both the tenant and the landlord, as well as the licensor and licensee, covenant that neither will (1) unlawfully allow illegal drugs on the premises, the common area or curtilage, (2) allow prostitution or prostitution related activity to occur in the premises,

common area or curtilage, or (3) allow the unlawful use or possession of certain firearms in the premises, common area, or curtilage. The parties also covenant that the common area and curtilage will not be used by them or persons acting under their control to carry out activities in violation of illegal drug laws.

2. Neither of the *drug* covenants are violated if someone other than one of these parties possesses or allows illegal drugs on the property, unless the party knew or had reason to know of the activity. The Legislature did not extend this part of the statute to the prostitution and firearms covenants. It is unclear whether that was intention or a drafting oversight. However, the fact that each of the covenants uses the word (allow) suggests that the test for liability is whether the party was directly involved or acquiesced in the conduct of others.

3. A breach of the covenant voids the lessee's right to possession of the premises, but all other provisions of the lease remain in effect until the lease is terminated by the terms of the lease or operation of law. The parties may not waive nor modify the covenant. The landlord may assign to the county attorney the right to bring the action.

4. The tenant can enforce the covenant in a tenant remedies, rent escrow or emergency action. The extension of liability under the covenant to landlords probably does not provide a defense to the tenant that the landlord's violation of the covenant excuses the tenant's violation of the covenant. A landlord's violation of the covenant may give rise to defenses in nonpayment of rent and notice to quit cases.

B. Cases

1. The plaintiff must prove a violation of the covenant by preponderance of the evidence. See Boone v. Huff, No. UD-1940509508 (Minn. Dist. Ct. 4th Dist. May 24, 1994) (Appendix 69) (plaintiff failed to prove drugs were found on premises of the defendant).

2. *Brogdon Properies, LLC v. _____,* No. 1030826501 (Minn. Dist. Ct. 4th Dist. Sep. 4, 2003) (dismissed for lack of specific allegations of illegal activity).

3. *D. H. Gustafson Co. v. Rasmussen*, No. C2-00-540, 2000 WL 1742111 (Minn. Ct. App. 2000) (unpublished: MINN. STAT. § 504B.171 on illegal activity applies to manufactured home park lot rental, and does not require notice under § 327C.09).

4. In Minneapolis Public Housing Authority v. Greene, 463 N.W.2d 558, 561-62 (Minn. Ct. App. 1990), the court affirmed the trial court's decision that seizure of cocaine from a public housing unit constituted good cause for termination of the lease.

5. In Minneapolis Public Housing Authority v. Folger, No. UD-1971114532 (Minn. Dist. Ct. 4th Dist. Jan. 23, 1998) (Appendix 346A), the tenant's guest consumed drugs and died of an overdose while the tenant was sleeping. The Court concluded that the public housing authority did not prove that the tenant violated the lease, as the tenant did not "allow" his guest to use drugs or engage in criminal activity, and the tenant did not violate MINN. STAT. § 504.181 (now § 504B.171) because the tenant did not know or have reason to know of his guest's prohibited activity. The decision was affirmed on judge review (Minn. Dist. Ct. 4th Dist. Apr. 13, 1998) (Appendix 346B) (Oleisky, J.). *See* Minneapolis Public Housing Authority v. Jivens, No. UD-1920720559 (Minn. Dist. Ct. 4th Dist. Sept. 9, 1992) (Appendix 18.M) (public housing, tenant not responsible for illegal drugs on the premises brought by a person who was on the premises without the tenant's knowledge or consent, but with the consent of a guest of the tenant)

6. The landlord may waive violation of a drug covenant in the lease by acceptance of rent with knowledge of the breach. *Southgate Mobile Village v. _____,* No. HC-0205315400 (Minn. Dist Ct. 4th Dist. July 2, 2002).

7. For more cases, *see* L. MCDONOUGH, RESIDENTIAL UNLAWFUL DETAINER AND EVICTION DEFENSE (2000) and 2003 SUPPLEMENT are available at http://www.povertylaw.homestead.com under readings.

IV. The Federal Criminal Activity Statute and the *Rucker* Decision

A. *Department of Housing and Urban Development v. Rucker*, 122 S. Ct. 1230 (2002)

1. At issue was the effect of a federal statute:

a. "Each public housing agency shall utilize leases which ... require the public housing agency to give adequate written notice of termination of the lease ... in the event of any drug-related or violent criminal activity or any felony conviction." 42 U.S.C.A. § 1437d(*l*)4(A)(ii).

b. The lease also shall "provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug- related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy." § 1437d(*l*)(6).

c. Regulations: 24 C.F.R. § 966.4.

2. What did *Rucker* hold:

a. Held that the statute "*requires* lease terms that vest local public housing authorities with the discretion to evict tenants for the drug-related activity of household members and guests whether or not the tenant knew, or should have known, about the activity."

b. The Court rejected that the statute included a tenant knowledge requirement.

c. However, the public housing authority *is not required to evict* even when the tenant violates the lease provision.

(1) "The statute does not *require* the eviction of any tenant who violated the lease provision.

(2) Instead, it entrusts that decision to the local public housing authorities, who are in the best position to take account of, among other things,

(a) the degree to which the housing project suffers from 'rampant drug- related or violent crime,'

(b) 'the seriousness of the offending action,' and

(c) 'the extent to which the leaseholder has ... taken all reasonable steps to prevent or mitigate the offending action.'"

(d) *Rucker*, citing 42 U.S.C. § 11901(2) and 66 Fed. Reg., at 28803.

B. HUD discussion of *Rucker*

1. Letter from Mel Martinez, Secretary of HUD (April 16, 2002) (urges PHAs to be guided by compassion and common sense and to apply the one strike rule responsibly not rigidly), available from http://www.nhlp.org/html/pubhsg/Martinez%204-16-02%20ltr.pdf

2. Letter of Michael Liu, Assistant Secretary of HUD (June 6, 2002) (reminds PHAs in applying one-strike rule that they are not required to evict for every lease violation and may evict just the wrongdoer), available from http://www.hud.gov/offices/pih/regs/rucker6jun2002.pdf

3. Letter of Carole W. Wilson, HUD Associate General counsel for Litigation (Aug. 15, 2002) (HUD legal opinion issued to the PHA for Yonkers, NY regarding Rucker and HUD regulations. In the opinion, HUD repeats its position that a PHA is not required to apply or consider the discretionary factors, but is free to do so if it wishes to do so), available from http://www.hud.gov/offices/pih/regs/rucker15aug2002.pdf

C. Housing Law Bulletins discussing *Rucker*

1. March/April 2002
2. May/June 2002
3. September 2002

V. Focus on the elements

A. Covenant of landlords and tenants: MINN. STAT. § 504B.171 (formerly § 504.181)

1. Private Housing

a. The tenant, landlord, licensor and licensee

(1) unlawfully allows

(a) illegal drugs
(b) on the premises, the common area or curtilage

(2) allows

(a) prostitution or prostitution related activity
(b) to occur in the premises, common area or curtilage,

or

(3) allows

(a) the unlawful use or possession
(b) of certain firearms
(c) in the premises, common area, or curtilage.

(4) allows

(a) the common area and curtilage
(b) to be used by them or persons acting under their control
(c) to carry out activities in violation of illegal drug laws.

b. Neither of the *drug* covenants are violated if

(1) someone other than one of these parties
(2) possesses or allows illegal drugs on the property,
(3) unless the party knew or had reason to know of the activity.

c. *See* Cases, *supra*.

2. Application to Public and Subsidized Housing

a. The statute has been applied to numerous public and subsidized housing cases. *See* Cases, *supra*. *See also* L. MCDONOUGH, RESIDENTIAL UNLAWFUL DETAINER AND EVICTION DEFENSE (2000) and 2003 SUPPLEMENT discussing breach of lease cases and unlawful activity claims, available at http://www.povertylaw.homestead.com under readings.

b. Federal law does not preempt application of the statute to public and subsidized housing. *See* Preemption, *infra*.

B. Public housing

1. Lease and eviction:

a. 42 U.S.C.A. § 1437d(*l*)
b. 24 C.F.R. § 966.4(f)(12)(I)

2. Criminal activity that

a. *constitutes a crime*

(1) certain offenses might not be crimes under state law

(a) petty misdemeanors: *Housing and Redevelopment Authority of Duluth, Inc. v. _____,* No. C7-99-601573 (Minn. Dist. Ct. 6th Dist. Sep. 13, 1999). The court concluded that since a crime is conduct prohibited by statute and for which the actor may be sentenced to imprisonment with or without a fine under MINN. STAT. 609.02, Subd. 1, municipal ordinance violations are not crimes because ordinances are not state statutes, and statutory petty misdemeanors are not crimes because of the limitation on sentencing. The court dismissed the action where petty misdemeanor drug charges against the tenant were dismissed, and the tenant pled guilty to an amended charge of assault under a municipal ordinance. The court added that there was no serious or repeated violation of a material term of the lease where the arrest took place one mile away from the premises, and the event did not constitute criminal activity.

(b) municipal ordinance violation: *see Housing and Redevelopment Authority of Duluth, Inc. v. _____, supra*.

(c) juvenile offenses: For example, under Massachusetts General Laws. Ch. 119, § 53, generally, juveniles under the age of 17 are to be treated "not as criminals, but as children in need of aid, encouragement, and guidance. Proceedings against children ...shall not be deemed criminal proceedings." *But see Cincinnati Metropolitan Housing Authority v. Browning*, 2002 WL 63491, 2002 Ohio App. LEXIS 155 (Ohio Ct. App. Jan. 18, 2002) (juvenile delinquent acts are "criminal" acts under state law for public housing eviction); *Housing Authority for Prince George's County v. Williams*, 141 Md. App. 89, 784 A.2d 621 (2001)

(while state juvenile delinquency hearing is not a criminal proceeding, the underlying conduct may still be criminal in nature for public housing eviction).

(2) elements of the crime:

(a) the landlord would have the burden of proof on all of the elements which makes the activity a crime.

(b) the tenant should have defenses available under criminal law.

(c) consult with criminal defense attorneys on the elements, proof needed, and defenses.

b. *which threatens* (present tense, not past tense)
c. *the health, safety, or right to peaceful enjoyment*

d. *of the premises* (as opposed to off of the premises)
e. *by other tenants* (regulation adds employees of the PHA)

f. *engaged in by the*

(1) the following persons:

(a) tenant

(b) member of the tenant's household

"Household, ... means the family and PHA-approved live-in aide." 24 C.F.R. § 5.100. *See Boston Housing Authority v. Bruno*, 2003 WL 21508355, 2003 Mass. App. LEXIS 733 (Mass. Ct. App. July 3, 2003) (tenant could not be evicted for drug activity of son listed on lease because evidence showed son had moved out of unit prior to the activity).

(c) guest

"means a person temporarily staying in the unit with the consent of a tenant or other member of the

household who has express or implied authority to so consent on behalf of the tenant." 24 C.F.R. § 5.100.

(d) other person under the tenant's control

"means that the person, although not staying as a guest (as defined in this section) in the unit, is, or was at the time of the activity in question, on the premises (as premises is defined in this section) because of an invitation from the tenant or other member of the household who has express or implied authority to so consent on behalf of the tenant. Absent evidence to the contrary, a person temporarily and infrequently on the premises solely for legitimate commercial purposes is not under the tenant's control. 24 C.F.R. § 5.100.

(2) *Who is not covered (i.e. who's criminal activity does <u>not</u> subject the tenant to eviction):*

(a) a visitor

i) invited by

a) a person who is not a member of the household

b) a member of the household who does not have express or implied authority to so consent on behalf of the tenant.

ii) who was not invited

(b) a stranger

(c) a person temporarily and infrequently on the premises solely for legitimate commercial purposes, absent evidence to the contrary.

3. Any drug-related activity (for definitions of persons, *see* discussion, *supra*, at <u>V.B.2.f.</u>)

a. committed by a public housing tenant, any member of the tenant's household, or any guest

(1) which is criminal activity, *see* discussion, *supra*, at V.B.2.
(2) on or off such premises

b. committed by another person

(1) under the tenant's control
(2) which is criminal activity, *see* discussion, *supra*, at V.B.2.
(3) *on the premises*

c. *activity not covered and not subject to eviction*

(1) drug-related activity which is not a crime

(2) drug-related activity committed off-site by a person under the tenant's control, *see* discussion, *supra*, at 5.

(3) drug-related activity committed *anywhere* by

(a) a visitor invited by a person who is not a member of the household, or invited by a member of the household who does not have express or implied authority to so consent on behalf of the tenant.
(b) a visitor who was not invited
(c) a stranger
(d) a person temporarily and infrequently on the premises solely for legitimate commercial purposes, absent evidence to the contrary.

4. Methamphetamine convictions. Eviction is required if any member of the household has ever been convicted of manufacture or production of methamphetamine *on the premises* of federally assisted housing. 24 C.F.R. § 966.4(l)(5)(i)(A).

5. Grievance bypass

a. 42 U.S.C.A. § 1437d(k) and 24 C.F.R. § 966.51.

b. A public housing authority (PHA) may exclude from the grievance process "any grievance concerning an eviction or termination of tenancy that involves

(1) any criminal activity

(a) that threatens
(b) the health, safety, or right to peaceful enjoyment
(c) of the premises
(d) of other tenants or employees of the public housing agency or

(2) any

(a) violent
(b) or drug-related
(c) criminal activity
(d) on or off such premises, or

(3) any activity resulting in a felony conviction."

c. Bypass is not automatic. A housing authority must elect whether it wants to exclude the full scope of excludable evictions from its grievance procedure or not (some may not go the whole way), and revise the grievance procedure to say this (with 30 day notice and comment opportunity by residents). 24 C.F.R §§ 966.4(l)(3)(v), 966.52(c). Review the PHA's grievance procedure.

d. Some state laws require grievance rights even where federal law wouldn't. *See* RI ST § 45-25-18.7 (Rhode Island); M.G.L. Ch. 121B, Section 32 (Mass.); *Spence v. Reeder*, 382 Mass. 398, 416 N.E.2d 914 (1981) (although federal law would have allowed PHA to skip providing grievance hearing, state law didn't). One example in Massachusetts is marijuana offenses, where you usually will get a grievance hearing under M.G.L.Ch. 121B, Section 32. HUD has made clear that it hasn't pre-empted those laws. *See* discussion of preemption, *infra*, at IX.B.

e. *Minneapolis Public Housing Authority v. _____,* No. HC020710513 (Minn. Dist. Ct. 4th Dist. Aug. 2, Sept. 16, 2002). The housing court decided that possession of a small amount of marijuana, which is a petty misdemeanor and not a crime under Minnesota law, is not drug related "criminal" activity, and not appropriate for or bypass of the grievance process. The MPHA appealed and requested a judge to review the referee's decision, but the judge affirmed the decision.

C. Section 8 Vouchers (*see* discussion of similar public housing issues, at V.B.)

1. Eviction:

a. Statute and regulation:

(1) 42 U.S.C. § 1437f(d)
(2) 24 C.F.R. § 982.310(c)

b. any criminal activity

(1) that threatens
(2) the health, safety, or right to peaceful enjoyment
(3) of the premises
(4) by other tenants,

c. any criminal activity

(1) that threatens
(2) the health, safety, or right to peaceful enjoyment
(3) of their residences
(4) by persons residing
(5) in the immediate vicinity of the premises,

d. any drug-related

(1) criminal activity
(2) on or near such premises (as opposed to on of off the premises)

e. engaged in

(1) by a tenant of any unit,
(2) any member of the tenant's household, or any guest or other person
(3) under the tenant's control

f. Methamphetamine convictions. Eviction is required if any member of the household has ever been convicted of manufacture or production of methamphetamine *on the premises* of federally assisted housing. 24 C.F.R. § 982.553(b)(1)(ii) (vouchers), § 882.518(c)(1)(ii) (moderate rehabilitation).

2. Subsidy termination:

a. PHA's *must* terminate assistance if the tenant is *evicted* for serious lease violations, 24 C.F.R. § 982.552(b)(2), and *may* terminate if evicted for other lease violations, 24 C.F.R. §§ 982.552(c)(l)(i), 982.551(e). An agreement to move might not be an *eviction*.

b. The PHA may terminate assistance where "a household member is *currently engaged* in any illegal use of a drug" or a "*pattern* of illegal use of a drug by any household member *interferes* with the health, safety, or right to peaceful enjoyment of the premises by other residents." 24 C.F.R. § 982.553(b)(1)(i) (emphasis added).

c. The PHA must terminate assistance if any member of the household has ever been convicted of manufacture or production of methamphetamine *on the premises* of federally assisted housing. 24 C.F.R. § 982.553(b)(1)(ii).

D. HUD Subsidized Projects (*see* discussion of similar public housing issues, at V.B.)

1. Statute and regulation:

a. Statutes: Various statutes.
b. 24 C.F.R. §§ 247.3, 5.858 and 5.859
c. *This section discusses the rules under the old HUD Handbook 4350.3, Ch. 4, and App. 19a-19e. Review the newly revised HUD Handbook 4350.3, Ch. 6, and App. 4, which were not reviewed for this outline.*

2. Any criminal activity that

a. threatens
b. the health, safety, or right to peaceful enjoyment
c. of the premises
d. by other residents

3. any criminal activity that

a. threatens
b. the health, safety, or right to peaceful enjoyment
c. of their residences

d. by persons residing
e. in the immediate vicinity of the premises

4. any criminal activity that

a. threatens
b. the health, or safety
c. of any on-site
d. property management staff
e. responsible for managing the premises

5. any drug-related

a. criminal activity
b. on or near such premises (as opposed to on of off the premises)

6. engaged in

a. by a resident,
b. any member of the resident's household, or any guest or other person
c. under the resident's control

7. Methamphetamine convictions. The regulations for public housing and §8 existing and moderate rehabilitation does not apply to other HUD subsidized projects. *See* discussion, *supra*, at V.B.4 and V.C.1.f.

E. Rural Housing and Community Development Service (formerly Farmers Home Administration) subsidized housing projects

1. The regulations for RHCDS programs contains the most protection for tenants facing criminal activity claims. 7 C.F.R. Part 1930, Subp. C, Exh. B, Ch. XIV, § A.2.c. (under revision)

2. Defenses include that

a. The tenant did not admit to and was not convicted for involvement with illegal drugs.

b. Illegal drug activity was not conducted by the tenant or someone under the tenant's control

c. The tenant took reasonable steps to prevent or control illegal drug

activity.

d. The tenant took steps to remove the person conducting illegal drug activity.

e. The innocent household members can remain in the unit.

VI. Proper notice still required

A. Public housing

1. *See generally*, National Housing Law Project manuals and newsletters, available from the National Housing Law Project, 614 Grand Ave., Ste. 320, Oakland, CA 94610, 510-251-9400, Fax 510-451-2300, nhlp@nhlp.org (email), www.nhlp.org (web).

2. 42 U.S.C. § 1437d(l)(3) and 24 C.F.R. § 966.4(l)(3).

3. Written notice

4. A reasonable amount of time. *New York City Housing Authority v. Harvell*, 731 N.Y.S.2d 919 (N.Y. Sup. Ct., App. Term, 1st Dept. 2001). There may be some debates about what period is "reasonable", whether the 30-day notice is required, or whether there is a state or local law that specifically provides for a shorter (but reasonable) notice period. *See* 24 C.F.R. § 966.4(l)(3)(i). *See also Housing Authority of Jersey City v. Myers*, 295 N.J. Super. 544, 695 A.2d 532 (1996); *Housing Authority of Decatur v. Brown*, 180 Ga. App. 483, 349 S.E.2d 501 (1986).

5. If the notice states that the tenant had the right to request a grievance hearing,

a. it must state all of the following:

(1) the specific grounds for termination, *Cuyahoga Metropolitan Housing Authority v. Younger*, 93 Ohio Ap.3d 819, 639 N.E.2d 1253 (1994).

(2) the right to reply to the letter; and

(3) the right to look at the landlord's documents. In addition to this being a potential notice defect, separate and apart from whatever state law rights to discovery, the tenant should

exercise this federal law right, and HUD regulations make clear that the PHA may not proceed with eviction if it isn't providing the documents requested which are directly relevant to the eviction. 24 C.F.R. § 966.4(m).

b. informal conference: 24 C.F.R. § 966.54; *Dial v. Star City Public Housing Authority*, 8 Ark. App. 65, 648 S.W.2d 806 (1983).

c. formal hearing: 24 C.F.R. §§ 966.55-966.57; *Edgecomb v. Housing Authority of the Town of Vernon*, 824 F. Supp. 312 (D. Conn. 1993) (interpreting similar regulations for §8 existing housing assistance termination hearings).

6. If the notice states that the tenant did not have the right to request a grievance hearing, the notice must state all of the following:

a. the landlord must file an eviction court case to evict the tenant;
b. HUD has determined that the eviction court case meets HUD requirements for due process;
c. whether the eviction is for criminal activity or drug-related criminal activity; and
d. the tenant's right to look at the landlord's documents.
e. *Housing Authority of City of Newark v. Raindrop*, 287 N.J. Super. 222, 670 A.2d 1087 (1996), where an eviction was dismissed because this information wasn't provided by the PHA.

B. Section 8 existing voucher program

1. Eviction

a. The landlord must give the eviction notice and/or the court papers to the housing authority. 24 C.F.R. § 982.310(e)(2)(ii).

2. Subsidy termination

a. If the housing authority decides to terminate the tenant's housing subsidy, the housing authority must give written notice to the tenant and the right to contest the termination at an informal hearing. 24 C.F.R. § 982.555.

b. In Carter v. Olmstead County Housing and Redevelopment Authority, 574 N.W. 2d 725 (Minn. Ct. App. 1998), the court closely reviewed the lay hearing officer's determination to

terminate the Section 8 voucher, and concluded that the findings were insufficient and that they failed to mention or explain the basis for failing to credit evidence in support of the tenant's claim, and that the housing authority failed to prove substantial evidence to sustain the termination.

C. HUD subsidized projects

1. *This section discusses written notice under the old HUD HANDBOOK No. 4350.3, ¶¶ 4.18 - 4.23 (under revision). Review the newly revised HUD Handbook 4350.3, Ch. 6, and App. 4, which were not reviewed for this outline.*

a. The notice must state all of the following:

(1) the date of termination,
(2) the grounds for termination with sufficient detail,
(3) that the tenant can defend the eviction in court, and
(4) that the tenant has 10 days to discuss it with the landlord.

b. The landlord must serve the notice personally and by mail (only for § 8 Set Aside and Property Disposition, § 202/8, § 236, § 221(d)(3), Rent Supplement, and Rent Assistance Programs).

c. The federal regulation includes identical requirements to the Handbook except for the ten day right to meet. 24 C.F.R. § 247.4.

d. There is no exception to the notice requirement. Sentinel Management Co. v. Kraft, No. UD-1920806546 at 3 (Minn. Dist. Ct. 4th Dist. Aug. 12, 1992) (Appendix 11.I.3).

e. The landlord must comply with both federal and state notice requirements. *Hedco, Ltd v Blanchette*, 763 A.2d 639 (RI 2000).

2. The meeting must be a meaningful opportunity to discuss the eviction with Plaintiff. *Gorsuch Homes, Inc. v. Wooten*, 597 N.E.2d 554 (Ohio Ct. App. 1992).

D. RHCDS (formerly FmHA) projects

1. 7 C.F.R. Part 1930, Subp. C, Exh. B, Ch. XIV (under revision)

2. The landlord must give the tenant a proper notice of lease violation before

giving a lease termination notice.

a. The notice must state all of the following:

(1) the relevant provisions in the lease,
(2) the grounds of the lease violation with sufficient detail,
(3) that the tenant would be expected to correct the lease violation,
(4) the deadline for correcting the lease violation,
(5) that the tenant could informally meet with the landlord to resolve the problem before the deadline,
(6) that if the violation was not corrected by the deadline, the could file an eviction court case, and
(7) the tenant could defend the eviction in court.

b. The landlord must serve the tenant with the notice by first class mail, delivery to an adult answering the door, or posting the notice or placing it under the door.

3. The landlord also must give the tenant a written lease termination notice before filing an eviction court case.

a. The notice must state all of the following:

(1) the grounds for termination with sufficient detail, and
(2) the location and regular offices hours when the tenant could review landlord's file and copy information from it.

b. The landlord must send a copy of the notice to the RHCDS/RECD (FmHA) district office. The district office must determine that the notice was improper.

VII. Proper search and seizure required

A. *Minneapolis Public Housing Authority v. _____,* No. HC000921508 (Minn. Dist. Ct. 4th Dist. Oct. 20, 2000). The court excluded evidence from a warrantless search of the apartment.

B. *See Should It Take a Thief?: Rethinking the Admission of Illegally Obtained Evidence in Civil Cases*, 2003 Texas Review of Litigation 625 (Summer 2003).

VIII. Other defenses not specific to criminal activity

A. Other federal law defenses

1. The landlord did not reasonably accommodate the tenant's disability. 42 U.S.C. § 3604(f)(3); 29 U.S.C. §§ 706, 794; 24 C.F.R. Parts 8, 100.

B. State common law defenses

1. Defenses to notice to quit and breach claims

2. Examples from Minnesota:

a. Waiver of the notice by accepting rent after the move out date. *Pappas v. Stark*, 123 Minn. 81, 83, 142 N.W. 1042, 1047 (1913).

b. Waiver of breach by acceptance of rent. *Southgate Mobile Village v. _____,* No. HC0205315400 (Minn. Dist. Ct. 4th Dist. July 2, 2002) (waiver of breach of state drug statute); *Cuyahoga Metropolitan Housing Authority v. Hairston*, 124 Ohio Misc.2d 1 (2003) (PHA waived right to evict public housing tenant for drug activity where it accepted rent for seven months after it became aware of the breach).

c. Forfeiting the home would be a great injustice, since the landlord's rights are adequately protected. *Naftalin v. John Wood Co.*, 263 Minn. 135, 147, 116 N.W.2d 91, 100 (1962).

d. The court may evict on member of the household while allowing the others to remain. Steven Scott Management, Inc. v. Scott, No. C7-98-2024 (Minn. Ct. App. June 8, 1999) (unpublished). *But see* Phillips Neighborhood Housing Trust v. Brown, 564 N.W.2d 573 (Minn. Ct. App. 1997).

C. State statutory defenses

1. Services and preconditions to relief defenses

2. Examples from Minnesota:

a. Plaintiff is not the person entitled to possession of the building or an authorized management agent. MINN. STAT. § 481.02, subd. 3(13); MINN. GEN. R. PRAC. 603.

b. The person suing on behalf of Plaintiff did not file a power of

authority. MINN. GEN. R. PRAC. 603.

c. Plaintiff or Plaintiff's management company is a corporation or a similar entity and must be represented by an attorney. *Nicollet Restorations, Inc. v. Turnham*, 486 N.W.2d 753 (Minn. 1992).

d. Plaintiff or Plaintiff's agent is engaging in unauthorized practice of law by charging a separate fee for representing the owner in this case. MINN. STAT. § 481.02, subd. 3(12-13).

e. The tenant did not know the names of the owner and manager of the building and addresses at which they could be served 30 days before filing this case. MINN. STAT. § 504B.181 (formerly 504.22).

f. Plaintiff is a business which did not register its trade name with the Secretary of State, entitling the tenant to a stay of prosecution until compliance, and an award of $250.00 in costs or by set off. MINN. STAT. §§ 333.001-333.06.

g. Plaintiff failed to state the facts which authorize recovery of the premises. MINN. STAT. § 504B.321 (formerly 566.05); MINN. GEN. R. PRAC. 604(a).

IX. State statutes and local ordinances providing more protection to tenants in drug and criminal activity cases

A. Examples

1. Minnesota:

a. MINN. STAT. § 504B.171 (formerly § 504.181)

(1) There was no unlawful activity on the property.
(2) The tenant did not know or have reason to know that there was unlawful activity on the property.

b. MINN. STAT. § 609.5317, subd. 3: The tenant could not prevent the illegal drugs from being brought on the property.

2. Massachusetts:

a. M.G.L. Ch.. 121B, § 32; *Spence v. Gormley*, 387 Mass. at 264,

265, 439 N.E.2d at 745, 746: innocent tenant defense.

3. Rhode Island:

a. RIGL § 34-18-24 (9), *Newport Housing Authority v. Reynolds*, No. ND2002-0290 (R.I. Sup. Ct. Aug. 26, 2002): tenant had no knowledge of drug transaction or intent to effectuate it.

B. Preemption

1. The question: does the *Rucker* conclusion (that the federally mandated lease provision on criminal activity does not imply an innocent tenant defense) preempt states or localities from creating their own?

2. Preemption rules:

a. The party seeking preemption has the burden of proof, and the presumption is against preemption. *Cipollone v. Liggett Group*, Inc., 505 U.S. 504, 518 (1992).

b. Congress may expressly state that state law is preempted. *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977).

(1) Congress must manifest its intention clearly to preempt state law. *New York State Dept. of Social Services v. Dublino*, 413 U.S. 405, 413 (1973).

(2) Where state causes of action or defenses are involved, the federal courts are cautious in presuming any Congressional intent to preempt. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

(3) Congress did not state that the federal lease provision should be read to preempt state law or defenses available in a public housing eviction pursuant to state law.

(4) Elsewhere in the 1990 amendments to the public housing lease and grievance requirements, Congress did include a specific provision that preempted state law, regarding a tenant's ability to examine relevant documents related to the eviction prior to any hearing or trial, notwithstanding any state law provisions to the contrary. Pub. L. No. 101-625, Title V, § 503(b), 104 Stat. 4181 (Nov. 28, 1990), now

found at 42 U.S.C. § 1437d(l)(7).

(5) Express preemption in one section supports an inference that silence in other sections meant Congress did not intend preemption for the latter. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 550 (2001).

c. An intent to preempt the field may be inferred where the scheme of the federal legislation is so comprehensive that it creates the inference that Congress "left no room" for State regulation in that area. *California Fed. Sav. & Loan Ass'n. v. Guerra*, 479 U.S. 272, 281 (1987).

(1) "In understanding the preemptive effect of [a section], the court must turn first to HUD's own understanding of the preemption provision for guidance because and agency's interpretation of its own statute is controlling so long as not contrary to Congress's intent." *Williams-Ward v. Lorenzo Pitts, Inc.*, 908 F.Supp. 48, 53 (D.Mass. 1995).

(2) In *Kargman v. Sullivan* 552 F.2d 2, 13 (1977), the court held that there was no federal preemption of local rent control of federally subsidized housing, in part due to HUD's position of coexistence with local rent control boards and lack of "system-wide determination of the incompatibility of federal and local rent control."

(3) HUD issued regulations in 1988, 1991, and 2001 to implement the statutory provisions. In these regulations, HUD recognized that there would be dual federal and state regulation of public housing tenancies and evictions, and that defenses available under state law would not be affected by its regulations:

(a) "[T]he procedural and substantive law affecting a tenancy in the public housing program is compounded of elements established by both Federal and State law. State laws are binding without incorporation in a Federal rule, or in the Federally-required lease requirements. State tenant protections may be enforced through the State courts or other procedures available under State law, without any need to create a Federal right to State

law protections." 53 Fed. Reg. at 33,257 (1988).

(b) "The tenancy rights of a public housing tenant are governed by elements of both Federal and State law. The tenant has the set of rights vouchsafed by Federal law. The tenant may have additional rights afforded by State law which do not interfere with or contradict Federal law. The Federal law defines minimum protections for the Federally assisted public housing tenant, but does not preempt additional protections or rights provided by the State which do not violate the Federal law. ...[T]here is no need to prescribe the incidents of the State eviction process after the PHA has completed the termination notice and administrative hearing process required by Federal law." 56 Fed. Reg. at 51,565 (1991).

(c) In discussing why HUD retained the opportunity to present legal and equitable defenses as part of its regulatory elements of due process, HUD stated that this requirement "signifies that the tenant must be able to raise in the proceeding any defense which would defeat the landlord's eviction claim for possession as a matter of substantive law." 56 Fed. Reg. 6,248, 6,252 (Feb. 14, 1991). *See also* 56 Fed. Reg. 51,560, 51,573 (Oct. 11, 1991) (final rule)(emphasis added).

(d) HUD underscored that a public housing tenancy should be understood as a creature of "normal landlord-tenant law." 56 Fed. Reg. at 51,567 (1991).

(e) In 66 Fed. Reg. at 28,791 (2001), HUD explicitly declared that they did not "preempt State law within the meaning of Executive Order 13132," which can be found at 64 Fed. Reg. 43,255, § 4(a) (Aug. 14, 1999).

(f) Similarly, in 56 Fed. Reg. 51,575 (1991), HUD stated that the regulations would have no federalism implications under Executive Order No. 12,612, 52

Fed. Reg. 41,685, § 4(a) (October 26, 1987).

d. Federal law may preempt state law to the extent that it actually conflicts with the federal law, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963):

(1) where compliance with both state and federal regulations is physically impossible:

(a) In *Attorney General v. Brown*, 400 Mass. 826, 828-829, 511 N.E.2d 1103, 1105-1106 (1987), the federal statute gave the private landlord discretion to decide whether to rent to a Section 8 tenant, but a state statute limited that discretion. The Court held that Congress had not created a federal right to reject tenants, but it had merely imposed no federal duty not to reject them, and that state legislation that barred discrimination against Section 8 participants was therefore not barred. *See Housing Authority of the City of Everett v. Terry*, 789 P.2d 745 (Wash. 1990) (it was not impossible for public housing authority to comply with state statutory requirement of an opportunity to cure a lease default and federal eviction procedures).

(b) Under the federal lease and *Rucker*, compliance simply means using the federal lease. *Rucker* does not require enforcement of the lease, and does not require the landlord to evict for a violation of it.

(c) The federal statute does *not create a federal right to evict regardless of state law*, but merely imposes *no federal duty not to evict* based on the tenant's ignorance of wrongful activity.

(2) where the state statute stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress:

(a) Courts are usually reluctant to find that a state law stands as an obstacle to the "full purposes and objectives of Congress." *CTS Corp. v. Dynamics Corp.*, 481 U.S. 69 (1987).

(b) "[T]he mere potential for conflict . . . is not enough to justify a court in concluding that federal power precludes an otherwise valid exercise of state sovereignty. On the contrary, we think that an assertion of preemption directed to such a purely local situation must be accompanied by pleading and proof of actual, significant frustration of federal purpose." *Kargman, supra*, 552 F.2d at 13.

(c) When a system of dual regulation is in place, the Court has stated that "the proper approach is to 'reconcile the operation of both statutory schemes with one another rather than holding one completely ousted.'" *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117, 127 (1973), quoting *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963).

(d) *See Housing Authority of the City of Everett v. Terry*, 789 P.2d 745 (Wash. 1990) (in leaving eviction proceedings to the states for enforcement, Congress necessarily relied upon existing state substantive law).

3. Post *Rucker* preemption decisions:

a. *Maryland Park Apartments v. _____,* No. CX-02-4044 (Minn. Dist. Ct. 2nd Dist. June 17, 2002): federal law and *Rucker* do not preclude Minnesota statute with greater tenant protection.

b. *Newport Housing Authority v. Reynolds*, No. ND2002-0290 (R.I. Sup. Ct. Aug. 26, 2002): *Rucker* does not preempt application of Rhode Island statute which provides greater protection than federal law.

c. *Oakwood Plaza Apartments v. Smith*, 352 N.J. Super. 467, 800 A.2d 265 (2002): *Rucker* applies in interpretation of New Jersey "innocent tenant" statutory defense under its Anti-Eviction Act, which limits the circumstances under which an owner may evict a tenant, and this statute is applicable to housing authorities. However, since 1997 the New Jersey statute has specifically incorporated federal public housing guidelines as the standard for

eviction. N.J. Stat. § 2A:18-61.1(e)(2), as added by Chapter 228 of the Acts of 1997. Therefore, New Jersey law does not raise issues regarding a separate statutory "innocent tenant" defense in federal public housing. The court recognized that *Rucker* does not mandate eviction and is therefore not inconsistent with an individualized evaluation by the trial court of the specific circumstances of each case. The court remanded the case to the trial court for consideration of whether eviction was warranted on the facts of that particular case.

d. In a pre-*Rucker* case, *City of South San Francisco Housing Authority v. Guillory*, 41 Cal. App.4th Supp. 13, 49 Cal Rptr. 2d 367 (1995), there was a general "cause" requirement imposed by state statute for evictions from federal public housing, but the state courts had never construed what was required by that statute. The tenant claimed that this state statutory standard meant that there was no cause for eviction unless the tenant knew or had reason to know about the wrongful activity before she could be evicted. The California appellate court disagreed, finding that imposition of such a "cause" standard into the housing authority's *prima facie* case would conflict with federal law, and therefore the standard was preempted. The court did not confront the issue of whether the tenant could assert an affirmative defense of showing "special circumstances" once the housing authority had put in its *prima facie* case. The court recognized that available state legal or equitable defenses could be considered in a federal public housing eviction.

X. Local efforts to provide more protection for tenants

A. Enact statutes and ordinances like those from Minnesota, Boston, and Rhode Island discussed above.

B. Work with public housing authorities to provide more protection for tenants, and to have executive directors and board members appointed who are concerned about tenant protection.

1. In Charlottesville, Virginia, the Charlottesville Redevelopment and Housing Authority (CRHA) Board, which includes members concerned about tenant protection, is considering amendments to its policies. Some outside of the CRHA thought that it was inconsistent in how it treated tenants, believing that some tenants received preferential treatment while others were unduly targeted. CRHA staff believed that they had been

consistent, but they were unable and prefer not to disclose private information on individual tenants which staff believe would show that they trat tenants consistently. Everyone thought it was important to consider the circumstances in eviction so as to evict only those tenants who are causing the biggest problems and are unwilling to make changes. The Board is considering a list of eviction factors to be balanced, and a limitation of bypass to activity which actually threatens the health, safety, or security of residents or staff.

2. Reed Williams, *Eviction Policy Being Re-examined: Families of Accused Can Lose Homes*, Charlottesville Daily Progress, Jan 27, 2003, http://www.dailyprogress.com/news/archive/MGBHCG1ZFBD.html (web).

3. Reed Williams, *Lawyer Proposes New Eviction Policy*, Charlottesville Daily Progress, Jan 28, 2003, http://www.dailyprogress.com/news/MGBANRYDHBD.html (web).

XI. Websites

A. NHLP: www.nhlp.org
B. HUD regulations and handbooks: www.hudclips.org
C. www.projusticemn.org, formerly www.probono.net/mnProbono.net: Minnesota on line library containing eviction defense manual, answer forms, and scanned unreported decisions.