Defending Families and Individuals threatened with Eviction from Federally Subsidized Housing, HOME-Funded Properties, § 515 Rural Rental Housing, § 8 Moderate Rehabilitation, Shelter Plus Care Housing, Supportive Housing for the Elderly and Persons with Disabilities, Continuum of Care Housing, HOPWA, Tax Credit Housing, Section 8 Housing Choice Voucher Program, Public Housing, Project-Based Voucher Program, and Section 811 Project Rental Assistance

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Note: This article presents a brief overview on defending evictions of tenants from the primary federal housing programs. Any errors are solely my responsibility. It is intended only as a quick introduction. This outline does not purport to cite anywhere near all of the cases on the topics discussed. Thus, advocates must Shepardize cases when using this outline. For a more detailed and comprehensive discussion of defending such evictions, refer to the "Greenbook" published by the National Housing Law Project ("NHLP") titled *HUD Housing Programs: Tenants' Rights (*4th ed. 2012) and the 2014 Supplement. NHLP's telephone number is 415-546-7000. The fax number is 415-546-7007. The e-mail address for NHLP is: nhlp@nhlp.org, and the website is www.nhlp.org

Note: Our law firm switched to Westlaw from Lexis in 2014. Thus, more recent cases are cited to Westlaw.

I have highlighted the discussion of new cases in red font.

TABLE OF CONTENTS

I. Introduction.

This article is intended as a primer on the rights of tenants threatened with eviction from (1) rental housing programs funded by HUD, (2) rental housing funded with tax credits through the Internal Revenue Service Code, and (3) rental housing funded through the Department of Agriculture.

II. Evictions from Multi-Family Subsidized Apartments receiving Project-Based Section 8 housing assistance payments, or a subsidy in the form of below-market interest rates under section 221(d)(3) and (5), or interest reductions payments under section 236 of the National Housing Act, or below market interest rate direct loans under section 202 of the Housing Act of 1959.

This section of the article applies to evictions from multi-family apartment complexes that receive the benefit of rental subsidy in the form of (1) below-market interest rates under section 221(d)(3) of the National Housing Act;[1] (2) interest reduction payments under section 236 of the National Housing Act;[2] (3) below-market interest rate direct loans under section 202 of the Housing Act of 1959;[3] and apartment complexes receiving project-based housing assistance payments under Section 8.[4] Much of this discussion in Section II also applies to evictions from housing funded through Section 8 new construction[5], Section 8 substantial rehabilitation,[6] and

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[1] 12 U.S.C.A. §1715*l* (d) (3), (5) (West 2014).

[2] *Id.* at § 1715z-1 (West 2014).

[3] *Id.* at § 1701q (West 2014 & Supp. 2015).

[4] 42 U.S.C.A. §1437f (West 2012 & Supp. 2015).

[5] 24 C.F.R. Part 880 (2015).

[6] *Id.* Part 881.

Section 8 through state housing agencies properties.[7] The primary differences are noted in Section III of this article.

A. Grounds for Eviction.

Congress has mandated that subsidized owners with project-based Section 8 contracts use leases that provide for termination of tenancy for any criminal activity that threatens health, safety, or right to peaceful enjoyment of the premises by other tenants; any criminal activity that threatens the health, safety, or right to peaceful enjoyment of their residences by persons residing in the immediate vicinity of the premises; or any drug-related criminal activity **on or near** such premises, engaged in by the tenant, any member of the tenant's household, or any guest or other person under the tenant's control.[8] The statutory mandate is implemented in governing regulations for the preceding programs set forth primarily at 24 C.F.R. Part 247 (2013) and 24 C.F.R. § 5.850 - § 5.861 (2015). The United States Department of Housing and Urban Development ("HUD") has also published *HUD Handbook 4350.3* that fleshes out somewhat the regulations and is an important source of additional tenant rights.[9]

A subsidized housing landlord may not terminate any tenancy except for (1) material

[7] *Id.* Part 883.

[8] 42 U.S.C. A. § 1437f(d) (West 2012 & Supp. 2015); (emphasis added); 42 U.S.C.A. § 13662 (West 2013) (statutory termination of tenancy provisions for illegal drug use and alcohol abuse).

[9] United States Department of Housing and Urban Development, *Handbook 4350.3 REV-1, Occupancy Requirements of Subsidized Multifamily Housing Programs*, chp.8, *Termination* (May 2003, as revised with Change-2 effective June 29, 2007, Change-3 issued June 23, 2009, and Change 4 issued August 7, 2013) (hereafter referred to as *Handbook 4350.3*). This is the handbook that governs evictions from the apartments identified in the preceding paragraph. For a very concise discussion of the weight a court is to give to Handbook 4350.3, see National Housing Law Project, *Questions Corner,* 43 Housing Law Bulletin 118 (June 2013).

noncompliance with the rental agreement; (2) material failure to carry out obligations under any state landlord and tenant act; (3) criminal activity by the tenant, a household member, guest, or other person under the tenant's control that threatens the health, safety, or right to peaceful enjoyment of the premises by other residents, including property management staff residing on the premises; (4) criminal activity by the tenant, a household member, guest, or other person under the tenant's control that threatens the health, safety, or right to peaceful enjoyment of their residences by persons residing in the immediate vicinity of the premises; (5) drug-related criminal activity engaged in on or near the premises by any tenant, household member, or guest, and any such activity engaged in on the premises by any other person under the tenant's control; (6) illegal use of a drug by a household member or a pattern of illegal drug use that interferes with the health, safety, or right to peaceful enjoyment of the premises by other residents; (7) alcohol abuse by the tenant or a household member; (8) violation by the tenant of a condition of probation or parole imposed under federal or state law; (9) fleeing by the tenant to avoid prosecution or confinement after conviction of a felony; and (10) other good cause.[10] To the extent a lease provides for termination of the tenancy without cause, the lease provision is invalid.[11] Thus, even at the end of the lease term, the subsidized housing landlord may terminate the tenancy only for cause.[12]

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[10] 24 C.F.R. § 247.3(a) (2015); 24 C.F.R. § 5.858 - § 5.861 (2015) (The regulations at Part 5 were first promulgated in 2001 and address evictions for criminal activity, illegal drug-related activity, alcohol abuse, violation of terms of probation or parole, and fleeing to avoid prosecution or confinement after conviction for a felony.); *Handbook 4350.3*, chp. 8, § 3, ¶¶ 8-11 - 8-16.

[11] 24 C.F.R. § 247.3(a).

[12] *Id.*; *Handbook 4350.3,* chp. 8, § 3, ¶ 8-12-C*; Grady Management, Inc. v. Epps*, 98 A.3d 457, 463-72 (Md. Ct. Spec. App. 2014); *Horizon Homes of Davenport v. Nunn,* 684 N.W.2d 221 (Iowa 2004); *Kennedy v. Andover Place Apartments*, 203 S.W.3d 495, 497 (Tex. App. – Houston [14 th Dist.] 2006, no pet.); *911 Glen Oaks Apartments v. Wallace*, 88 S.W.3d 281, 285 (Tex. App. – Corpus Christi 2002, no pet.); *Newhouse v. Settegast Heights Village Apartments*, 717 S.W.2d 131

1. Material Noncompliance.

The regulations define the phrase *material noncompliance* as including one or more substantial violations of the rental agreement; repeated minor lease violations that disrupt the livability of the apartment complex, adversely affect the health or safety of any person or the right of any tenant to the quiet enjoyment of the leased premises and related facilities, interfere with the management of the apartments, or have an adverse financial effect on the apartments; nonpayment of rent or other financial obligations under the lease; failure to timely supply information necessary for annual and interim recertification reviews of the family's income and family composition; knowingly providing incomplete or inaccurate information required by the landlord to verify tenant income and family composition.[13] The late payment of rent after the due date but within the grace period constitutes a minor violation of the lease.[14] Material noncompliance requires a pattern of repeated minor violations, not isolated incidents.[15]

(Tex. App. – Houston [14th Dist.] 1986, no writ).

[13] 24 C.F.R. § 247.3 (c) (2015).

[14] *Id*. at § 247.3 (c) (4); *see also American National Bank & Trust Co. v. Dominick*, 507 N.E.2d 512, 515 (Ill. Ct. App. 1987) (holding that tenant's repeated late payment of rent did not constitute material noncompliance where tenant on public assistance routinely received her assistance check between the 9th and 11th of the month and paid rent, plus the late charge, immediately upon receipt of the check); *Mins Court Housing Co., Inc. v. Wright*, 984 N.Y.S.2d 633 (N.Y. Civ. Ct. Jan. 10, 2014) (table) (refusing to evict long-time tenant for repeated late payments on basis that landlord failed to prove sufficient number of late payments so as to constitute a substantial violation of the lease.).

[15] *Waimanalo Village Residents' Corp. v. Young*, 956 P.2d 1285, 1300 (Haw. Ct. App. 1998); *Mid-Northern Management, Inc. v. Heinzeroth*, 599 N.E.2d 568, 574 (Ill. App. Ct. 1992); *Millennium Hills Housing Development Fund Corp. v. Patterson*, No. HULT 165-09, 2009 N.Y. Misc. LEXIS 2822, at *7-9 (N.Y. Dist. Ct. Oct. 16, 2009) (refusing to evict for housekeeping which was cured, minor damage to outside of building, and termination of electrical service for a few days).

With respect to minor violations, the subsidized landlord must not only show the violation is repeated but also that it disrupts the livability of the apartments, or adversely affects the health or safety of any person or the right of any tenant to the quiet enjoyment of the leased premises and related facilities, or interferes with the management of the apartments, or has an adverse financial effect on the apartment complex.[16] HUD gives the following non-comprehensive list of examples of minor lease violations: unauthorized occupants; failing to pay the utilities; damaging or destroying the unit or property; behaving in a manner that continuously disrupts the right of other residents to enjoy the property; and failing to pay the cost of all repairs caused by neglect or carelessness of the tenant.[17]

2. Other Good Cause

The phrase *other good cause* is not defined under regulations. When a tenant violates a community rule or engages in conduct not specifically prohibited by the terms of the lease, such conduct is not material noncompliance under the lease and would generally fall under the definition

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[16] *See* 24 C.F.R. § 247.3(c)(2) (2015); *Oak Glen of Edina v. Brewington*, 642 N.W.2d 481 (Minn. Ct. App. 2002) (in eviction for repeated late payments or any repeated minor violation of the lease, the landlord must also satisfy one of the preconditions of § 247.3(c)(2)); *see also Nealy v. Southlawn Palms Apartments*, 196 S.W.3d 386, 395 (Tex. App. – Houston [1st. Dist.], 2006, no pet.) (refusing to evict tenant when only proof was claim by owner that it had received two reports that tenant had exposed her buttocks on two occasions; noting that "reports are nothing more than allegations which this Court will not term as "good cause" for evicting a tenant in federally subsidized housing."); 911 *Glen Oak Apartments v. Wallace*, 88 S.W.3d 281 (Tex. App. – Corpus Christi 2002, no pet.) (upholding trial court finding that landlord failed to prove that tenant had violated the lease by numerous loud disturbances that threatened the health and safety of other tenants); *compare Chancellor Manor v. Gales*, 649 N.W.2d 892 (Minn. Ct. App. 2002) (holding that filing more than seventy late rent notices and evictions constituted an adverse financial effect on the subsidized owner).

[17] *See Handbook 4350.3*, chp. 8, § 3, at ¶ 8-13-A-4, *Example – Minor Violation* ; *see also Wilhite v. Scott County Housing and Redevelopment Authority*, 759 N.W.2d 252, 256 (Minn. Ct. App. 2008) (citing as examples of minor lease violations -- late payment of rent, improperly boarding a pet, ignoring homeowner association rules).

of *other good cause.* But, the conduct of a tenant cannot be deemed *other good cause* for the eviction unless the landlord has given the tenant prior notice that such conduct constitutes a basis for termination of the tenancy.[18] Since subsidized owners use form leases and do not bargain over the terms of the lease, any ambiguity on whether an act constitutes good cause or material noncompliance should be resolved in the tenant's favor.[19] Thus, if the landlord has not given the tenant prior written notice that the conduct on which the eviction is premised constitutes a basis for eviction and the ground for eviction does not clearly fit within the definition of material noncompliance, alcohol abuse, criminal activity, or illegal drug activity, the tenant should argue that the eviction is for *other good cause*. In such case, since the tenant has not been given prior written notice that the conduct could result in eviction, the landlord cannot evict the tenant for the conduct.[20]

In addition, when the eviction is based on *other good cause*, the termination date must be effective at the end of the lease term and not during the lease term.[21] Thus, for example, if the tenant is six months into a one year lease, the landlord may not evict on grounds that fall under the definition of *other good cause* until the lease term has expired. On the other hand, if the tenant's lease term has expired or the lease is on a month-to-month basis, the landlord may evict for *other good cause* after giving the proper thirty-day notice of proposed termination. Of course, the owner

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[18] 24 C.F.R. § 247.3 (b) (2015). Such notice must be in writing and served on the tenant by first class mail and hand delivery.

[19] *See e.g.*, *Sirtex Oil Industry v. Erigan*, 403 S.W.2d 784, 788 (Tex. 1966) (lease will be most strongly construed against the lessor).

[20] *See Millennium Hills Housing Development Fund Corp. v. Patterson*, No. HULT 165-09, 2009 N.Y. Misc. LEXIS 2822, at *8 (N.Y. Dist. Ct. Oct. 16, 2009)

[21] 24 C.F.R. § 247.4(c) (2015).

must prove good cause in court and cannot simply show that the lease has expired and that he has given proper notice of termination.

3. Evictions for Criminal Activity, Including Drug-Related Criminal Activity.

See discussion in this outline at Section XIII.

B. Notice of Lease Termination.

1. Contents of the Notice.

The notice of termination must comply with certain requirements. It must state the date the tenancy is terminated; state the reasons for the eviction with sufficient specificity to enable the tenant to prepare a defense; advise the tenant that if he or she remains in the apartment on the date specified for termination, the landlord may seek to enforce the termination only by bringing a judicial action, at which time the tenant may present a defense;[22] advise the tenant that he has ten days in which to discuss the proposed termination of tenancy with the landlord; [23] and advise that persons with disabilities have the right to request reasonable accommodations to participate in the hearing process.[24] In addition, the landlord must also comply with all requirements of state law.[25]

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[22] 24 C.F.R. § 247.4(a) (2015).

[23] *Handbook 4350.3.* at chp. 8, § 3, ¶ 8-13-B-2(c)(4) . The requirement that the tenant be notified of an opportunity to discuss the proposed eviction is imposed by *Handbook 4350.3*; it is not included in 24 C.F.R Part 247. The regulations for the Section 8 new construction program, however, do include a requirement that the owner advise the tenant of the tenant's right to respond to the owner. *See* 24 C.F.R. § 880.607 (c)(1) (2015). The right to respond established by the Section 8 new construction regulations is also applicable to the Section 8 substantial rehabilitation program and the Section 8 through state housing agencies program. *See* 24 C.F.R. § 881.601 (2015) (substantial rehabilitation); § 883.701 (2015) (Section 8 for state housing agencies).

[24] *Handbook 4350.3.* at chp. 8, § 3, ¶ 8-13-B-2(c)(5). HUD imposed this requirement with its CHG-2 revisions to the Handbook effective June 29, 2007; see *Dobbs Crossing Associates, LP v. Hicks,* TTDCV124018172, 2013 Conn. Super. LEXIS 1501 (Conn. Super. Ct. July 5, 2013) (concluding that the tenant had raised a "colorable defense" sufficient to set aside a default judgment on basis that the termination notice had failed to inform the tenant of right to request a

No termination is valid unless the landlord has complied with the federal notice requirements.[26]

Subsidized landlords frequently fail to give adequate notice of termination. As noted, it is a defense to eviction when the landlord fails to give proper notice of lease termination.[27] Although the notice may appear at first blush to comply with the regulations, it should be closely scrutinized. One frequent mistake is failure of the notice to state the reasons for the eviction with sufficient

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reasonable accommodation to participate in the hearing process.).

[25] See *24* C.F.R. § 247.6(c) ("A tenant may rely on State or local law governing eviction procedures where such law provides the tenant procedural rights which are in addition to those provided by this subpart, except where such State or local law has been preempted. ..."); *Rowe v. Pierce*, 622 F. Supp. 1030 (D.D.C. 1985); *Laurel Hill Apartments v. Hall,* 723 S.E.2d 173 (N.C. Ct. App. 2012); *Kennedy v. Andover Place Apartments*, 203 S.W.3d 495, 498 (Tex. App. – Houston [14th Dist.] 2006, no pet.).

[26] 24 C.F.R. § 247.3(a) (2015); *Leake v. Ellicott Redevelopment Phase II*, 470 F. Supp. 600, 602 (W.D. N.Y. 1979); *Timber Ridge v. Caldwell*, 672 S.E.2d 735 (N.C. Ct. App. 2009).

[27] *See, e.g., Leake v. Ellicott Redevelopment Phase II*, *supra* note 26, 470 F. Supp. at 602 (finding termination notice failed to comply with the requirements of 24 C.F.R. Part 450, the predecessor to Part 247); *Stewart v. Tacoma Rescue Mission*, 228 P.3d 1289 (Wash. Ct. App. 2010 (reversing judgment of eviction because the termination notice did not adequately identify "threatening and intimidating behavior); *Riverview Towers Associates v. Jones*, 817 A.2d 324 (N.J. Super. Ct. App. Div. 2003) (landlord must comply with HUD lease termination notice requirements); *Lincoln Terrace Associates, Ltd., v. Kelly*, 635 S.E.2d 434, 438 (N.C. Ct. App. 2006) (subsidized landlord failed to prove that notice of termination complied with lease requirements); *Hedco v. Blanchette*, 763 A.2d 639 (R.I. 2000) (notice of proposed termination that failed to specify the termination date of the lease but that merely stated "unless you make payment of all rent in arrears within ten (10) days of the date that this Notice was mailed to you, your tenancy will be terminated and an eviction notice may be initiated in court against you on or after June 29, 1998," does not comply with the requirement of 24 C.F.R. § 247.4(a)(1), which requires a specific termination date for a federally subsidized tenancy); *Moon v. Spring Creek Apartments*, 11 S.W.3d 427 (Tex. App. – Texarkana 2000, no pet.) (termination notice failed to meet the specificity requirement mandated by the federal regulations and constitutional due process and, therefore, tenant's lease was not lawfully terminated); *Lakeside Gardens v. Lashay*, No. 2007AP1246, 2008 Wisc. App. LEXIS 43, at *3-8 (Wis. Ct. App. Jan. 16, 2008) (subsidized owner must comply with federal rules relating to notice of lease termination even if the terms are not included in the lease)*; see also Swords to Plowshares v. Smith,* 294 F. Supp. 2d 1067, 1070-72 (N.D. Cal. 2002) (recognizing that landlord must comply with applicable federal regulations when serving lease termination notice).

specificity. Conclusory allegations such as an allegation that the tenant is being evicted for "violation of paragraph six of the lease," "material noncompliance with the lease," or for "conduct that disturbs the quiet enjoyment of the premises neighbors" are all insufficient.[28] Another common mistake is the failure to state the date of the termination of the tenancy; a statement that the lease will be terminated a certain number of days after delivery of the notice is insufficient.[29] In nonpayment of rent cases the notice must state both the dollar amount of the balance due on the rent account and the date of the computation.[30] The notice must accurately state the amount the tenant owes.[31] Because federally subsidized landlords may not evict for unpaid late fees,[32] the inclusion of late fees on the notice of lease termination violates the law.[33]

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[28] *See e.g.*, *Fairview Co. v. Idowu*, 559 N.Y.S.2d 925, 928-30 (N.Y. Civil Ct. 1990) (termination notice not sufficiently specific); *Associated Estates Corp. v. Bartell*, 492 N.E.2d 841, 846 (Ohio Ct. App. 1985) (notice that claimed "serious, repeated damage to unit. Repeated disturbance" was inadequate because it did not refer to specific instances of conduct; *Moon v. Spring Creek Apartments*, *supra* note 27 (termination notice failed to meet the specificity requirement mandated by the federal regulations and constitutional due process and, therefore, tenant's lease was not lawfully terminated); *Gold Key Realty/Senior Village Apts. V. Phillips*, No. 26450, 2015 WL 3932449, at *6 (Ohio Ct. App. June 26, 2015) (unpublished) (explaining that failure to state in the termination notice that one of the grounds for eviction was a series of incidents occurring over a period of time precluded landlord from evicting tenant on those grounds); *see also Escalera v. New York City Housing Authority*, 425 F.2d 853, 862 (2d Cir.), *cert denied*, 400 U.S. 853 (1970) (public housing – termination notices must adequately inform tenant of nature of evidence against him).

[29] *See* 24 C.F.R. § 247.4(a) (2015); *Hedco v. Blanchette*, *supra* note 27.

[30] 24 C.F.R. at § 247.4(e); *Fairview Co. v. Idowu*, *supra* note 28, 559 N.Y.S.2d at 929; see *Leake v. Ellicott Redevelopment Phase II*, *supra* note 26, 470 F. Supp. at 602.

[31] *Presidential Village, LLC v. Perkins*, No. NHSP118752, 2015 WL 6499333, at *5-6 (Conn. Super Ct. Sept. 28, 2015).

[32] Handbook 4350.3, at chp. 6, § 3, ¶ 6-23E.

[33] *Seldin Co. v. Calabro,* 702 N.W.2d 504 (Iowa Ct. App. 2005); *Presidential Village, LLC v. Perkins*, No. NHSP118752, 2015 WL 6499333, at *6 (Conn. Super Ct. Sept. 28, 2015).

2. Service of the Notice of Termination.

The notice of termination must be served on the tenant by mailing it to the tenant by first-class mail and by serving a copy on any adult person [34] answering the door at the apartment, or, if no adult responds, by placing the notice under or through the door or by attaching it to the door.[35] Service is not effective until both notices have been served.[36] The notice is deemed received on the date on which it is mailed or the date on which the notice is delivered to the apartment, whichever is later.[37]

3. Thirty Day Notice Required for Good Cause.

A thirty-day notice of termination is required for termination based on good cause.[38] In evictions for criminal activity, alcohol abuse, material noncompliance, or material failure to carry out obligations under a state landlord and tenant act, the notice period is determined by the lease agreement and state law.[39] The landlord may not rely on any grounds in court which are different from the reasons set forth in the termination notice, except those grounds of which the landlord had

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[34] In *Cromwell Towers Redevelopment Co, L.P. v. Blackwell*, 966 N.Y.S.2d (N.Y. App. Term 2012), the court held that service of notice of termination on the tenant's sixteen-year old son did not comply with the requirement that the notice be served on an adult and thus was defective.

[35] 24 C.F.R. § 247.4(b) (2015).

[36] *Id.*; *Draper and Kramer, Inc. v. King*, 24 N.E.3d 851, 866 (Ill. Ct. App. Jan. 28, 2015); *Leake v. Ellicott Redevelopment Phase II*, *supra* note 26, 470 F. Supp. at 602.

[37] 24 C.F.R. § 247.4(b) (2015).

[38] *Id*. at § 247.4(c).

[39] *Id.*; *see also Long Beach Brethren Manor, Inc. v. Leverett*, 191 Cal.Rptr.3d 837 (Cal. App. Dep't Super. Ct. 2015) (§ 202 PRAC lease; court holds that thirty days' notice of lease termination required under this lease when reason for termination is material noncompliance.)

no knowledge at the time the termination notice was sent.[40] Although the regulation does not preclude a landlord from relying on a ground of which the landlord had no knowledge when the termination notice was sent, the HUD model lease trumps that provision.[41] It specifically states "[i]f an eviction is initiated, the Landlord agrees to rely only upon those grounds cited in the termination notice required by paragraph e."[42] Thus, when the owner pleads additional grounds not cited in the termination notice, the tenant should argue that the lease contract governs and precludes the landlord from pleading additional grounds not cited in the termination notice. The landlord must send another termination notice, including any additional grounds not originally set forth in the notice.

C. Right to Meet to Discuss Proposed Eviction.

As noted, the notice of termination must state that the tenant has ten days in which to discuss the proposed eviction with the landlord.[43] Although this does not entitle the tenant to a formal grievance hearing as is available in public housing evictions based on non-criminal conduct, it does at least ensure that the tenant has an opportunity to talk with management. The tenant should always utilize this meeting as both an opportunity to resolve the eviction and as an informal discovery opportunity.

The meeting requirement may lead to several possible defenses. For example, if

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[40] *Id*. at § 247.6(b). But section 8 new construction landlords may not rely on any grounds that are different from the grounds set forth in the termination notice. S*ee* 24 C.F.R. § 880.607(c)(3) (2015); *Ross v. Broadway Towers, Inc.*, 228 S.W.3d 113, 120-21 (Tenn. Ct. App. 2006), *cert denied*, 552 U.S. 1019 (2007).

[41] *See* Model Lease for Subsidized Programs (Form HUD-90105-A), at ¶ 23f.

[42] *Id.*

[43] *Handbook 4350.3.* at chp. 8, § 3, ¶ 8-13-B-2(c) (4).

management refuses to meaningfully discuss the proposed termination but merely insists that the tenant must move, the tenant should argue that the landlord has failed to comply with the meeting requirement of the lease and *Handbook 4350.3,* because *Handbook 4350.3* and the lease require a discussion.[44] The lease is a contract. Just as the landlord has a right to enforce the contract, the tenant has a contract right to enforce the discussion provision. Judges who may not regularly see federally subsidized eviction cases and who may be unfamiliar with the importance of the tenant rights can certainly understand an argument based on the lease contract.

In addition, the tenant should use the ten-day meeting requirement as an opportunity to cure any breach of the lease (for instance, by tendering any rent owed or by ceasing any conduct of which management has complained). If the landlord proceeds with the eviction, the tenant should argue that the ten-day period should be construed as a cure period.[45] In one case, the court held that the purpose of the ten-day right to meet is to provide the tenant with an opportunity to cure the default and avoid eviction.[46]

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[44] *See id.*; *Gorsuch Homes, Inc. v. Wooten*, 597 N.E.2d 554, 560 (Ohio Ct. App. 1992) (The purpose of the meeting "is to attempt to resolve the controversy in a mutually satisfactory matter, that will, if possible, avoid the tenant's loss of subsidized housing while protecting the rights of the landlord."); *Crossroads Somerset Ltd. v. Newland*, 531 N.E.2d 327, 331-32 (Ohio Ct. App. 1987) (same).

[45] *Cf. Housing Authority of the City of Everett v. Terry*, 114 Wash. 2d 558, 78 P.2d 745 (Wash. 1990) (en banc) (holding that state law cure provision not preempted by federal public housing eviction and grievance regulations). With respect to evictions premised upon criminal activity, at least two courts have held that a state law opportunity to cure does not apply to federally subsidized housing evictions premised upon criminal activity. *See Scarborough v. Winn Residential L.L.P.*, 890 A.2d 249, 258 (D.C. 2006); *Hous. Auth. Of City of Norwalk v. Brown*, 19 A.3d 252 (Conn. App. Ct. 2011); *but see Housing Authority of Covington v. Turner*, 295 S.W.3d 123 (Ky. Ct. App. 2009) (applying state law right to cure to PHA action to evict tenant for drug activity of nephew and refusing to evict).

[46] *Presidential Village, LLC v. Perkins*, No. NHSP118752, 2015 WL 6499333, at *8 (Conn. Super Ct. Sept. 28, 2015).

D. Right to Review File.

Advocates should also use the meeting requirement as an opportunity for informal discovery about the landlord's case. This can be accomplished by asking questions of the landlord about the underlying facts for the eviction and by reviewing the tenant's file. Often, however, landlords or their attorneys refuse to allow review of the tenant's file. Unlike HUD, such owners are not covered by the Freedom of Information Act.[47] But, with the revisions to HUD Handbook 4350.3 effective June 29, 2007, HUD mandated that owners permit tenants and their authorized representatives to review the tenant's file.[48] Sometime an owner can be convinced to allow review of the file with the argument that settlement is more likely when both parties fully understand the strength of each other's position. When landlords simply shut the door, however, the tenant should aggressively use the discovery process in the eviction proceeding to obtain the tenant's file.

Competent advocacy requires review of the landlord's tenant file, because it can lead to many possible defenses. For example, the landlord may claim nonpayment of rent, but may have failed to properly calculate the tenant's rent. That can be determined only by reviewing the HUD Form 50059 completed by the landlord on the tenant. Or, the file may reveal that the landlord retaliated against the tenant by sending a notice of lease termination after the tenant complained about failure to repair or management practices.

E. Nonpayment of Rent Evictions.

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[47] *See* 24 C.F.R. Part 15 (2015) (public access to HUD records).

[48] *Handbook 4350.3*, chp. 4, § 3, at ¶ 4-22-E; chp. 5, § 3 at ¶ 5-23-C (effective June 29, 2007). HUD uses the phrase "should be available for review" in both of the cited sections in Handbook 4350.3. Recalcitrant owners or their attorneys sometimes refuse to allow review of the file, choosing to interpret the language as non-mandatory. Given the language, however, a tenant should seek discovery when the owner refuses to allow review of the file in an eviction lawsuit.

1. Tenant Right to Rent Decrease when Income Decreases.

Evictions for alleged nonpayment of rent must always be scrutinized especially carefully, because many possible defenses are available. If the facts show that the eviction is truly for nonpayment of rent (as distinguished from nonpayment of other charges), the reason for the default should be examined. If, for example, the tenant did not pay because of a decrease in income, the tenant family is entitled to have its rent reduced.[49] Only two exceptions to this rule exist.[50] First, an owner may refuse to process an interim adjustment when the tenant reports a decrease in income if the decrease was caused by a deliberate action of the tenant to avoid paying rent.[51] This will almost never be the reason a tenant suffers a decrease in income. Second, the owner may refuse to decrease the tenant's rent if the owner has confirmation that the decrease will last less than one month.[52] HUD gives the owner the right, however, to process an interim recertification if it chooses but cautions that an owner must implement this policy consistently for all tenants.[53]

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[49] *See* 24 C.F.R. § 5.657 (c) (2015) ("A family may request an interim reexamination of family income because of any changes since the last examination. The owner must make the interim reexamination within a reasonable time after the family request."); *Handbook 4350.3*, at chp. 7, § 2, ¶ 7-13, "Effective Date of Interim Recertifications;" *see City of Albuquerque v. Brooks,* 844 P.2d 822, 824 (N.M. 1992) (it is an equitable defense in public housing eviction for failure to pay back rent that tenant is indigent and unable to pay); *Housing Authority of St. Louis County v. Boone*, 747 S.W.2d 311 (Mo. App. 1988) (public housing – holding that after the separation of husband and wife , the remaining spouse is liable only for adjusted rent based upon the household's new income level); *Maxton Housing Authority v. McLean*, 313 N.C. 277, 328 S.E. 2d 290(N.C. 1985) (public housing – holding that after separation, remaining spouse's public housing rent should be based on new income).

[50] *Handbook 4350.3*, chp. 7, § 2, at ¶ 7-11-D.

[51] *Id.*

[52] *Id.*

[53] *Id.*

Therefore, in a case when the owner is resisting processing an interim adjustment, the tenant should remind the owner that the owner clearly has the right to process an interim adjustment and that failure to do so may not be done in a discriminatory manner. In such a case, it may be necessary in the eviction to obtain discovery of the owner's records relating to requests by other tenants of interim adjustments. If the tenant can show inconsistent or discriminatory treatment, the tenant will have a defense to the eviction.[54]

2. Effective date of Rent Decrease.

Issues often arise over the effective date of the rent decrease. Owners frequently attempt to make the rent decrease effective the month following the owner's action in completing the interim recertification after the tenant reports the loss of income. *Handbook 4350.3*, however, is quite clear that if the tenant complies with interim reporting requirements, rent decreases must be effective on the "first day of the month after the date of action that caused the interim recertification, e.g., first of the month after the date of loss of employment."[55] The action causing the interim certification is the loss of income (for example, a loss of a job or reduction in child support), and not the recertification action by the owner.

In addition, owners often do not properly retroactively reduce a tenant's rent when the tenant delays in reporting a loss of income. Take the following example: Ms. Jones loses her job in early January. She first reports the loss of income in March. The landlord reduces Ms. Jones's rent

[54] *See id.*

[55] *Id.* at chp. 7, § 2, ¶ 7-13-C-2, "Effective Date of Interim Recertifications." HUD added the phrase "e.g., first of the month after the date of loss of employment" with its Change 4 revisions issued on August 7, 2013. The example clarifies that when the tenant complies with the reporting requirement, the effective date of the decrease is the month following the loss of income and not the month following the completion of the interim recertification by the owner.

effective April 1 and files an eviction lawsuit for the unpaid rent for February and March. The lease imposes no time requirement on reporting decreases in income, but paragraph 16 requires that income increases be reported immediately. Here, the owner should reduce Ms. Jones's rent retroactive to February 1. Ms. Jones complied with her interim reporting requirement, because the lease does not mandate that she report the income loss within a certain reporting period. Thus, under *Handbook 4350.3*, she is entitled to have the rent decreased effective February 1.[56]

(In these cases in which the defense depends on the provisions in *Handbook 4350.3*, the advocate must make sure that the applicable sections of *Handbook 4350.3* are entered into evidence. Unlike statutes and regulations, the court will not take judicial notice of handbooks. The handbook can be proved up through the manager's testimony. My experience is that managers pride themselves on familiarity with the handbook even if they misinterpret it, and they will authenticate it for you.)

3. Reasonable Accommodation on Rent Payment Due Date.

If the tenant is a person with disabilities who receives Social Security Disability payments after the rent due date in the lease, the tenant may request as a reasonable accommodation that the owner modify the rent due date. A tenant affirmatively sued in one case and subsequently settled with the owner agreeing to take a partial payment for one month, thus allowing the tenant to use his full disability check for the present month to pay in advance in the future.[57]

F. Minimum Rent Tenants and Eviction for Nonpayment.

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[56] *See id.*

[57] For a discussion of the case, see National Housing Law Project, *Management Company Agrees to Change Rent Due Date for Disabled Resident*, 37 Housing Law Bulletin 137 (August 2007); *see generally* the discussion in this article at section II-J on reasonable accommodations.

1. Hardship Exemption From Payment.

Evictions of minimum rent tenants raise unique issues. Although Congress mandated minimum rents with the passage of the Quality Housing and Work Responsibility Act of 1998[58], it recognized that situations would arise in which a family would be unable to pay the minimum rent. Thus, Congress created an exception for hardship circumstances.[59] Congress required that a hardship exemption be granted to families unable to pay the minimum rent because of financial hardship in the following circumstances: (1) the family has lost eligibility for or is waiting on an eligibility determination for a federal, state or local assistance program; (2) the family would be evicted as a result of the minimum rent requirement; (3) the income of the family has decreased because of changed circumstances, including loss of employment; (4) a death in the family has occurred; and (5) such other circumstances determined by HUD.[60] When HUD published implementing regulations, it did not expand the list of circumstances but tracked the hardship circumstances established by Congress.[61] Public housing authorities ("PHAs") and project-based Section 8 landlords are free, however, to establish other circumstances in their local policies.[62]

In the first reported decision by a federal court on the hardship exemption, the court in *Chastain v. Northwest Georgia Housing Authority,*[63] held that the hardship exemption from the

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[58] Pub. L. No. 105-276, 112 Stat. 2461, 2518 (October 21, 1998) (codified in scattered sections of Title 42 of the United States Code).

[59] *See* 42 U.S.C.A. § 1437a(a)(3)(B) (West 2012).

[60] *Id.*

[61] *See* 24 C.F.R. § 5.630(b) (2015); *HUD Handbook 4350*, at chp. 5, § 3, ¶ 5-26-D.

[62] 24 C.F.R. at § 5.630(b)(1)(v) (2015).

[63] *See Chastain v. Northwest Georgia Housing Authority*, No. 4:11-CV-0088-HLM, 2011

minimum rent may be enforced by tenants in an action under 42 U.S.C. § 1983.[64] The plaintiff filed suit after a PHA grievance panel upheld the denial of a hardship exemption even though the plaintiff was unable to work, survived on $200 per month in food stamps, and had a pending application for SSDI benefits.[65] The court granted a preliminary injunction ordering the PHA to grant the plaintiff a hardship exemption retroactive to the month the plaintiff first submitted a written request for a hardship exemption.[66]

2. Hardship Exemption and Interplay with Utility Allowance.

If the tenant is being evicted for nonpayment of the $25 minimum rent, the tenant may have a hardship exemption defense to the eviction.[67] This includes cases in which a minimum rent tenant receives a utility reimbursement check to pay for utilities and the eviction is based not on nonpayment of the $25 but on the tenant's failure to maintain utility service.[68] The tenant's failure to maintain utility service, however, may be attributable to a qualifying hardship. For example, if a tenant is on the minimum rent of $25 and entitled to a utility allowance of $45, that

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U.S. Dist. LEXIS 135712 (N.D. Ga. April 28, 2011) (holding that tenant may bring § 1983 action to enforce hardship exemption from minimum rent and granting preliminary injunction ordering PHA to give plaintiff hardship exemption).

[64] *Id.* at *26

[65] *See id.* at *11-13.

[66] *See id.* at *38.

[67] *See* 42 U.S.C.A. § 1437a(a)(3) (West 2012); 24 C.F.R. § 5.630 (2015).

[68] Minimum rent tenants who pay their own utilities are entitled to a utility allowance and utility reimbursements when the allowance exceeds the total tenant payment. *See generally* 24 C.F.R. § 5.628 (total tenant payment), § 5.632 (utility reimbursements), and 5.634 (tenant rent). The $25 minimum rent must be adjusted by any utility allowance for which the family is eligible. *See* 24 C.F.R. § 5.632, § 5.634 (2015).

tenant will receive a monthly utility reimbursement check of $20.

But, if the tenant is granted a hardship exemption from payment of the minimum rent, the tenant will receive a utility reimbursement check of $45. If the tenant's utility bill is averaging $40 each month, the exemption from the minimum rent will give the tenant $45 to apply to the utility bill rather than $20.[69] That extra $25 may mean the difference between homelessness and shelter. In sum, although the eviction on its face may seem to be a straightforward failure to maintain utility service, it should be closely examined to determine whether a hardship exemption from the minimum rent might prevent the eviction.

3. Effective Date of Hardship Exemption and Temporary and Long-Term Exemptions.

In any nonpayment of the minimum rent case, the advocate should immediately request that the landlord grant the tenant a hardship exemption from the minimum rent.[70] That will start the clock running on the effective date for implementation of the hardship exemption and can help set up a defense to the unpaid rent due before the request. If a family requests a financial hardship

[69] *See e.g., Chastain v. Northwest Georgia Housing Authority*, No. 4:11-CV-0088-HLM, 2011 U.S. Dist. LEXIS 135712 (N.D. Ga. April 28, 2011) (challenge to PHA's denial of hardship exemption; minimum rent of $50 and utility allowance of $82.00; granting the hardship exemption from minimum rent of $50 resulted in monthly utility reimbursement of $82 for tenant rather than $32).

[70] The regulations and *Handbook 4350.3* do not include a requirement that subsidized owners notify minimum rent tenants of the right to request a hardship exemption. But, when a subsidized owner fails to do so and a resulting nonpayment of rent eviction could have been avoided, the tenant should craft an argument under state law theories of equity, estoppel, and due process that the landlord may not evict. *Cf. Bella Vista Apartments v. Herzner*, 796 N.E.2d 593 (Ohio Ct. Common Pleas 2003) (applying equity and refusing to evict tenant who moved in his wife and three children without getting approval from the subsidized landlord). Public housing authorities, on the other hand, must "advise any family who pays the minimum rent of the right to request the exemption. United States Department of Housing and Urban Development, *Public Housing Occupancy Guidebook,* chp. 13, at § 13.1 (June 2003).

exemption, the project-based Section 8 landlord must suspend the minimum rent beginning the month following the family's request.[71] The suspension continues until the landlord determines whether a hardship exists and whether it is temporary or long term.[72]

In addition, PHAs are prohibited from evicting the family for nonpayment of the minimum rent during the ninety days following the family's request for a hardship exemption even if the PHA determines that the family does not qualify for a financial hardship exemption.[73] Unfortunately, this same ninety day protection does not apply to project-based Section 8 landlords who determine that the family does not qualify for an exemption.[74]

It is not perfectly clear under the regulations whether a family is protected from eviction for any unpaid minimum rent that came due before the family requested an exemption. It can be argued that the family is protected for the ninety day period. The family cannot avail itself of the hardship exemption until the month following the request, but one can argue that the eviction protection prohibits eviction for the ninety day period – even for unpaid minimum rent due prior to the request for a hardship exemption. This makes sense because most families will first request a hardship exemption only after they have defaulted on paying the minimum rent. The family can then use the ninety day period to pay any minimum rent that came due before the request for the hardship exemption.

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[71] 24 C.F.R. § 5.630(b)(2)(ii) (2015).

[72] *Id.*

[73] *See id.* at § 5.630(b)(2)(i)(c).

[74] *See id.*; § 5.630(b)(2)(ii) (directing that project-based Section 8 landlords suspend the minimum rent until they determine whether a qualifying hardship exists and whether it is temporary or long term but imposing no mandatory ninety day suspension period.)

4. Process when Tenant Does not Qualify, When Hardship is Temporary, and When Hardship is Long-Term.

When the tenant requests a hardship exemption, three different results are possible. First, if the owner determines there is no qualifying hardship, the owner must immediately reinstate the minimum rent, and the tenant is responsible for paying any minimum rent that was not paid from the date the rent was suspended.[75] The owner is required to enter into a reasonable repayment agreement.[76] Second, if the owner determines the hardship is temporary, the owner may not impose the minimum rent requirement until ninety days after the suspension.[77] At the end of the ninety days, however, the tenant is responsible for paying the minimum rent retroactive to the date of the suspension.[78] Here again, the owner must permit the tenant to pay under the terms of a reasonable repayment agreement.[79] Third, if the owner determines the hardship is long term, the owner must exempt the tenant from the minimum rent until such time the hardship no longer exists.[80] But, the owner must recertify the tenant every ninety days.[81]

G. Evictions for Nonpayment of Other Charges – Possible Defenses, Including Bankruptcy.

Evictions for alleged nonpayment of rent must also be reviewed to determine whether the

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[75] *Id.* § 5.630(b)(2)(iii)(A).

[76] *Handbook 4350.3*, chp. 5, § 4, at ¶ 5-26-D-3-b(2).

[77] 24 C.F.R. § 5.630(b)(2)(ii) (c) (2015).

[78] *Id.*

[79] *Id.*

[80] *Id.* at § 5.630(b)(2)(iii)(B).

[81] *Handbook 4350.3*, chp. 5, § 4, at ¶ 5-26-D-3-b(4).

alleged nonpayment of rent is really nonpayment of charges other than rent. For example, the eviction for nonpayment of rent may have resulted from the subsidized owner applying rent payments by the tenant to late charges, repair charges, or other amounts owed by tenant. Unless the lease or state law specifically allows the owner to determine how payments are to be applied, the owner's unilateral action in supplying rent payments to other charges may be illegal.[82] The tenant in such a case may have notice defenses or defenses to the validity of the particular charges assessed by the landlord. For instance, subsidized owners are prohibited from evicting for failure to pay late charges [83] and must pay the cost of repairs resulting from normal wear and tear.[84] Finally, when all else fails, Chapter 13 bankruptcy may be appropriate as a legal measure to prevent the tenant's eviction for nonpayment of rent. [85] Some courts have held that a public housing tenant who files a

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[82] At least one HUD regional office has taken the position that an owner's policy of applying rent payments to accrued late charges is illegal. See letter from Lionel Jenkins, Director, Housing Management, Providence Rhode Island Regional Office, to Muriel Varieur of PROMAC, Inc. (July 29, 1991) (on file with the National Housing Law Project).

[83] *Handbook 4350.3* at chp. 6, § 3, ¶ 6-23-F; *Community Realty Management Inc. v. Harris*, 714 A.2d 282, 292-93 (N.J. 1998); *Seldin Co. v. Calabro*, 702 N.W.2d 504 (Iowa Ct. App. 2005).

[84] *See Handbook 4350.3*, at chp. 6, § 3, ¶ 6-25-C (permitting owner to charge for damages cause by carelessness, misuse, or neglect by tenant, household members or visitors). The lease will also impose a repair obligation upon the subsidized owner; *see also Gorsuch Homes, Inc. v. Wooten*, 597 N.E.2d 554 (Ohio Ct. App. 1992) (holding that failure of a subsidized housing tenant to pay disputed damages cannot be deemed to be a material breach of the lease.).

[85] *See e.g., Stoltz v. Brattleboro Housing Authority (In re Stoltz)*, 315 F.3d 80 (2d Cir. 2002); *Brattleboro Housing Authority v. Stoltz (In re Stoltz)*, 197 F.3d 625 (2d. Cir. 1999); *Biggs v. Hous. Auth. of City of Pittsburgh*, No. 07cv0007, 2007 U.S. Dist. LEXIS 14232 (W.D. Pa. Feb. 28, 2007, *appeal dism'd sub nom*. *In re Biggs*, 271 Fed. Appx. 286 (3d Cir. 2008). Use of Chapter 13 bankruptcy as a tool to defend evictions is a topic onto itself and beyond the scope of this article. In *In re: Dunbar*, 474 B.R. 14 (Bankr. D. Mass. 2012), a former public housing tenant sought to discharge a debt to the PHA resulting from her failure to accurately disclose her income. (She vacated the apartment after the PHA filed an eviction suit.) *Id.* at *19, n. 9. The PHA filed a complaint asserting the debt was nondischargeable. The court held that a trial would be necessary

Chapter 7 bankruptcy after the PHA obtained a judgment of eviction does not have to cure the pre-petition arrearage within thirty days of filing bankruptcy, because the antidiscrimination provision of the Bankruptcy Code prohibits a government entity from conditioning continued occupancy on the payment of pre-petition rent.[86]

H. Evictions Following Subsidy Terminations by Owner.

Some nonpayment of rent evictions result when the owner claims the tenant failed to comply with the annual recertification requirement, and the owner raises the rent to the fair market rent. HUD requires the owners to follow specific notice procedures.[87] Notices should be carefully scrutinized for compliance with all HUD requirements. The owner is not entitled to evict the tenant when the owner does not scrupulously follow those procedures.[88]

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to determine whether the former tenant intended to deceive the PHA by her materially false financial statement. Id. at *23.

[86] *See In re: Aikens*, 503 B.R. 603 (Bankr. S.D. N.Y. 2014); *In re: Carpenter*, No. 15-10046, 2015 WL 1956272 (Bankr. D. Vt. April 29, 2015).

[87] *Handbook 4350.3*, at chp. 7.

[88] *See, e. g., Beekman MHA HDFC v.* Owens, 920 N.Y.S.2d 240, at *3-4 (N.Y. Civ. Ct. 2010); *Clinton Towers Housing Co., Inc. v. Ryan*, 907 N.Y.S.2d 436 (N.Y. Civ. Ct. March 1, 2010) (table) (unpublished); *Good Neighbor Apt Associates v. Rosario*, No. 073743/07, 2008 N.Y. Misc. LEXIS 4584 (N.Y. Civ. Ct. June 20, 2008); *Lower East Side I Associates LLC v. Estevez*, 787 N.Y.S.2d 636 (N.Y. Civ. Ct. 2004); *East Harlem Pilot Block Building 1 HFDC v. Cordero*, 763 N.Y.S.2d 203 (N.Y. Civ. Ct. 2003); *Lambert Houses Redevelopment Co. v. Huff*, 951 N.Y.S.2d 86, *9-14 (N.Y. Civ. Ct. 2012) (table) (unpublished) (finding that owner could not increase rent to fair market rent because the first reminder notice mailed one day late and the third reminder notice was mailed five days past deadline); *Terrace 100, L.P. v. Holly*, No. SP0774/10, 2010 N.Y. Misc. LEXIS 3188 (N.Y. Dist. Ct. July 14, 2010) (dismissing eviction for failure to pay fair market rent because the third reminder notice to recertify failed to inform the tenant of the increased amount in rent upon failure to recertify as required by Handbook 4350.3); *Hidden Meadows Townhomes v. Ross*, No. C-120045, 2012 Ohio App. LEXIS 5226, at *15 (Ohio. Ct. App. Dec. 21, 2012) (holding that because the landlord did not properly inform the tenant of her obligation to sign the HUD Form 50059, it could not increase her rent to the fair market rent for failure to do so).

If the tenant fails to timely comply with the annual recertification obligation, the owner must inquire whether any extenuating circumstances precluded the tenant from recertifying.[89] (NHLP addressed the "extenuating circumstances" issue in a Housing Law Bulletin article.[90]) In one case, an appellate court reversed a trial court judgment of eviction because the landlord had not shown that it complied with the HUD Handbook requirement mandating that an owner inquire whether extenuating circumstances had prevented the tenant from timely responding to the request for recertification.[91] The court also properly rejected the landlord's argument that this was merely a nonpayment to pay rent case, explaining "[d] efendant's entire monthly rent obligation was met by her federal subsidy. Without that subsidy, she had no ability to pay the rent. Thus, the issue of defendant's recertification for rental assistance was clearly subsumed within plaintiff's complaint for non-payment of the rent it claims was due."[92]

Subsidized owners may also terminate the tenant's rental subsidy in certain other limited circumstances, but those circumstances are very limited,[93] and an owner may do so only in strict

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[89] *Handbook 4350.3*, chp. 7, at ¶ 7-8-D-4 (on p. 7-20).

[90] National Housing Law Project, 45 Housing Law Bulletin 31, *Recertification: Navigating the "Extenuating Circumstances" and "Totality of the Circumstances" Standards"* (February 2015).

[91] *See Somerset Homes v. Woodard*, No. LT-021118-13, 2014 WL 2574037, at *5 (N.J. Super. Ct. App. Div. June 10, 2014) (unpublished).

[92] Id. at *6.

[93] The owner may terminate the tenant's rental subsidy if (1) the tenant fails to provide required information at the time of the annual recertification; (2) the tenants fails to sign required consent and verifications forms; (3) the tenant's income has increased such that it is sufficient to pay the full contract rent; (4) the tenant fails to move to a different-sized unit within thirty days after notification from the owner that the unit of the required size is available; (5) a tenant is receiving housing subsidy assistance but the owner is unable to establish citizenship or eligible immigration status for any family members; or (6) a student enrolled at an institution of higher education does not meet the eligibility requirements for Section 8 assistance. *Handbook 4350.3*, chp. 8, § 1, at ¶

compliance with the notice procedures set forth in the lease and *Handbook 4350.3*.[94] An owner may not terminate assistance because of alleged lease violations and then seek to evict the tenant on the basis of nonpayment of the fair market rent.[95] HUD's form family model lease for subsidized program requires that the landlord give the tenant notice and an opportunity to meet with the owner to discuss the proposed termination of assistance in two circumstances: (1) when the tenant does not provide requested recertification information within ten days after receipt of the landlord's notice of intent to terminate assistance and (2) the tenant's income has increased such that the tenant is required to pay the full fair market rent.[96]

8-5; *see Bay Towers Co. v. Hankinson*, No. 62159/07, 2008 N.Y. Misc. LEXIS 7269 (N.Y. Civ. Ct. Dec. 15, 2008) (holding tenant's rent subsidy terminated illegally because landlord failed to give her minimum of thirty days to transfer to smaller apartment and landlord failed to respond to her reasonable accommodation request to provide her with moving assistance because of her health); *Seward Towers Corp. v. Ogbe*, A13-0312, 2013 Minn. App. Unpub. LEXIS 957 (Minn. Ct. App. Oct. 21, 2013) (unpublished) (granting eviction for refusal of tenant to transfer from two-bedroom apartment to one-bedroom apartment when tenant did not claim a disability and a necessity for a two-bedroom unit as a reasonable accommodation); *see also Homesavers Council of Greenfield Gardens, Inc. v. Sanchez*, 874 N.E.2d 497 (Mass. App. Ct. 2007). In *Homesavers*, a Section 236 landlord terminated the tenant's section 8 subsidy, without notice to the tenant, because the value of the subsidy at the time was minimal because of the tenant's income and transferred it to another apartment. The landlord subsequently filed an eviction when the tenant lost her job and was unable to pay the section 236 rent. The parties settled the eviction with the landlord agreeing to reinstate the tenant's section 8 subsidy. The court upholds emotional distress damages of $5,000 and attorney's fees award).

[94] *See Handbook 4350.3,* chp. 8, § 1, at ¶ 8-1-A.

[95] *See Jessie v. Jerusalem Apartments*, No. 12-06-00113-CV, 2006 Tex. App. LEXIS 9142 (Tex. App. – Tyler Oct. 25, 2006, no pet.); *Palisades Manor Estates v. Chapman*, No. LT-13-000225, 2013 WL 10301136 (Pa. Ct. Common Pleas June 4, 2013); *cf. DiVetro v. Housing Authority of Myrtle Beach*, No. 4:13-cv-01878- RBH, 2014 WL 3385163 (D. S.C. July 10, 2014) (finding due process violation when Housing Authority terminated tenant's rental assistance for alleged lease violations and evicted tenant for failing to pay full market rent without giving her hearing on underlying lease violations).

[96] HUD Family Model Lease for Subsidized Programs (Form HUD-90105-A), at ¶ 17. The form lease is set forth in Appendix 4-A of *Handbook 4350.3*.

When the termination of assistance is based on the family's failure to establish citizenship or eligible immigration status, the owner must also notify the tenant and give the tenant an opportunity for a hearing.[97] Interestingly, the opportunity for a hearing requirement is not required by the lease or *Handbook 4350.3* when the subsidy termination results because of the tenant's failure to move to a different-sized unit.[98] But, in any case in which the owner has terminated the tenant's assistance, the tenant should maintain that the tenant has a property right in the subsidy, and due process requires notice and an opportunity for a hearing prior to the termination of the subsidy. [99]

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[97] See 24 C.F.R. §5.514 (2015); *Handbook 4350.3*, chp. 8, § 1, at ¶ 8-7-C.

[98] *See Handbook 4350.3*, chp. 8, § 1, at ¶ 8-5; HUD Family Model Lease for Subsidized Programs, at ¶ 17

[99] *See Holbrook v. Pitt,* 643 F.2d 1261, 1277-78 (7th Cir. 1981) (finding government action and property right in project-based Section 8s subsidy); *Anast v. Commonwealth Apartments*, 956 F. Supp. 792, 797-99 (N.D. Ill. 1994) (finding government action on part of Section 8 Substantial Rehabilitation landlord in evicting tenant); *American Property Management Co. V. Green-Talaefard*, 552 N.E.2d 14 (III. Ct. App. 1990) (court holds that tenant's rental subsidy may not be terminated without notice and an opportunity for hearing). The presence of a property right for an existing tenant in the subsidy is clear. *See id.* The more difficult issue is establishing the presence of sufficient governmental action to implicate the fourteenth amendment. *Compare Miller v. Hartwood Apartments, Ltd.*, 689 F.2d 1239, 1242-44 (5th Cir. 1982) (finding no government action in eviction action by owner of section 8 new construction apartment complex), and *Hodges v. Metts*, 676 F.2d 1133, 1135-38 (6th Cir. 1982) (finding no government action in eviction action by owner of § 221(d)(4) apartment complex), *with Anchor Pacifica Management Co.,* 205 Cal. App. 4th 232, 242-45 (Cal. Ct. App. 2012) (concluding that the low-income housing program at the apartment complex sufficiently infused with city action so as to constitute state action requiring good cause for termination of tenancy). Although the doctrine of state action has dramatically evolved since the late 1970's and depends on the extent of the participation of the government in the particular challenged action, *compare Brentwood Academy v. Tennessee Secondary School Athletic Assn.*, 531 U.S. 288 (2001) (finding state action sufficient to implicate fourteenth amendment) *with American Mfrs. Mutual Ins. Co. v. Sullivan*, 526 U.S. 40 (1999) (finding insufficient state action to implicate fourteenth amendment), the requisite governmental action implicating due process will be present if HUD directs the termination of the subsidy; *see also, Watson v. U. S. Dept. of Housing and Urban Development,* 645 F. Supp. 345 (S. D. Ohio 1986) (assuming state action without discussion and focusing on existence of property right);

If the owner terminates the subsidy on an impermissible ground or fails to comply with the proper procedures in terminating the tenant's subsidy and increasing the tenant's rent, the underlying termination of the tenant's rental subsidy is invalid and the owner should not prevail in an eviction based on nonpayment of the full fair market rent.[100]

I. Evictions for Fraud or Failure to Report Income Changes.

1. Distinguishing between Fraud and Negligent or Accidental Non-Reporting.

Evictions for alleged fraud by the tenant present special issues. A common error is to label a tenant's action fraud when the action or failure to act is either negligent or unintentional. Fraud is an intentional deception resulting in payment of Section 8 funds in violation of program rules.[101] Tenant errors resulting because tenants misunderstand or forget the rules do not constitute fraud.[102]

When the owner discovers that the tenant has failed to report a change in income[103] or inaccurately reported information, the owner is required to notify the tenant in writing and give the

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Peery v. Chicago Housing Authority, 791 F.3d 788 (7th Cir. 2015) (holding that because the government had not compelled mandatory drug testing by private landlords, the Fourth Amendment's prohibition against unreasonable searches and seizures not implicated).

[100] *See Handbook 4350.3,* chp. 8, at ¶ 8-1-A ("Owners are authorized to terminate assistance only in limited circumstances and after following required procedures to ensure that tenants have received proper notice and an opportunity to respond.") *Lower East Side I Associates LLC v. Estevez*, *supra* note 88, 787 N.Y.S.2d 636 (refusing to evict tenant for untimely annual recertification when owner failed to send notices required by *Handbook 4350.3*).

[101] 24 C.F.R. Part 792 (2015); *Handbook 4350.3*, chp. 8, § 4, at ¶ 8-17 (procedures for addressing discrepancies and errors); ¶ 8-18 (procedures for addressing fraud).

[102] *See Handbook 4350.3*, chp. 8, § 4, at ¶ 8-18-B.

[103] The HUD Model Family Lease for Subsidized Owners requires tenants to immediately report that a household member has moved out, an adult family member who was reported as unemployed on the most recent certification obtains employment, or the household's income cumulatively increases by $200 or more a month. *Id.* at ¶ 16a (2).

tenant ten days to meet with the owner to discuss the allegations.[104] If the owner fails to follow the procedure set forth in *Handbook 4350.3*, the owner may not prevail in an eviction suit against the tenant.[105] If the tenant acted unintentionally or acted based upon a misunderstanding, the owner has no basis to evict if the tenant agrees to enter into a repayment agreement.[106] Moreover, although an unemployed tenant may have an obligation to report income from an occasional one-day job, such income should not affect the tenant's rent because it is temporary, nonrecurring, and sporadic.[107] When this is the case, the tenant's failure to report does not constitute fraud, because the income, if reported, should not be counted in calculating the tenant's rent. Thus, no Section 8 subsidy would be improperly paid as a result of the failure to report the sporadic income.[108]

HUD gives the following as an example of an unintentional program violation: The tenant reports his full time job but does not report a part-time job of another family member where the work is on an as-needed basis, with the income uncertain, small in amount, and infrequent.[109] In this instance, the tenant should be allowed to sign a repayment agreement and not be evicted.[110] Tenant error also occurs when the tenant obtains employment and does not promptly report it but

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[104] *Handbook 4350.3*, chp. 8, § 4, at ¶ 8-17-C, D.

[105] *See Southeast Grand Street Guild HDFC, Inc. v. Holland*, 897 N.Y.S.2d 869 (N.Y. Civ. Ct. 2010); *Kingsbridge Court Associates v. Hamlette*, 906 N.Y.S.2d 773 (N.Y. Civ. Ct. 2009).

[106] *Handbook 4350.3*, chp. 8, § 4, at ¶ 8-17-E.

[107] 24 C.F.R. § 5.609 (c) (2015).

[108] *Id.* at § 792.103.

[109] *Handbook 4350.3*, chp. 8, § 4, at ¶ 8-17-E.

[110] *Id.*

reports it at the next annual recertification or after receiving a letter from management that it has received a report that the tenant has gone to work.

Owners too often conclude this is fraud and attempt eviction on that basis. The tenant's defense here is that the action was not fraud; therefore, the landlord may only require repayment for the time period the tenant delayed in reporting the change but may not evict the tenant.[111] On the other hand, fraud is more likely if the act was done repeatedly, the tenant falsified or altered documents, or the tenant signed recertification paperwork under penalty of perjury listing some income but excluding other income.[112] Fraud requires that the tenant have received some increased subsidy.[113]

2. Enterprise Income Verification (EIV) System.

Effective January 31, 2010, HUD began requiring subsidized owners to use its EIV System.[114] This is the program under which HUD reports to subsidized owners all income from all sources reported on all members of a subsidized household.[115] HUD has operated the system under a series of notices. It issued the most recent notice for HUD multifamily programs on March

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[111] *See id.*

[112] *Id.* at ¶ 8-17-F.

[113] 24 C.F.R. § 792.103 (2015); *Greene Avenue Associates, v. Cardwell,* 743 N.Y.S.2d 842 (N.Y. Civ. Ct. 2002) (refusing to evict tenant for fraud in not reporting presence of granddaughter because tenant received no personal gain in the form of an increased subsidy); *cf. Inkster Housing Commission v. Allen*, No. 317507, 2015 WL 248668, at *3 (Mich. Ct. App. Jan. 20, 2015) (unpublished) (subsidized tenant did not violate her lease by not notifying landlord that her daughter was also receiving a housing subsidy for two grandchildren over whom tenant had legal custody).

[114] *See* 24 C.F.R. § 5.233 (2015).

[115] *See id.* at § 5.234.

8, 2013,[116] and it has a separate chapter in Handbook 4350.3 devoted to the EIV System.[117] HUD has included procedural safeguards in the EIV System prohibiting owners from terminating assistance or taking any adverse action against an individual based solely on the data in the EIV system.[118] The owner must notify the tenant of the results of any third party verification and ask the tenant to come to the office to discuss the results.[119] If the owner determines that the tenant knowingly provided incomplete or inaccurate information, the Notice does not mandate eviction but states that the owner "must follow the guidance in Chapter 8, Section 3 of Handbook 4350.3 REV-1 for terminating the tenant's tenancy."[120] If an owner files an eviction lawsuit without complying with the procedural requirements of Notice H 2013-06, tenants should seek dismissal using the same arguments used in those cases where owners increase a tenant's rent to the fair market rent without following the procedural requirements.[121]

Notice H 2013-06 requires that tenants reimburse owners when they were charged less rent than required under HUD's regulations because they failed to correctly report income.[122] The Notice provides that a tenant may repay by entering into a repayment agreement.[123] It also provides

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[116] HUD Notice H 2013-06, *Enterprise Income Verification (EIV) System* (March 8, 2013) (effective until amended, revoked, or superseded).

[117] Handbook 4350.3, at chp. 9.

[118] *See* 24 C.F.R. § 5.236(b) (2015).

[119] *Id.* § 5.236(c).

[120] Notice H 2013-06, at IX-A (on p. 39).

[121] *See* cases cited *supra* note 88.

[122] Notice H 2013-06, at IX-C (on pp. 41-43).

[123] *Id.* at C-2 (on pp. 41-42).

that both the owner and the tenant must agree on the terms of the repayment agreement.[124] Finally, it provides that the monthly payment plus the amount of the tenant's total tenant payment "should not exceed 40 percent of the family's monthly adjusted income"[125] When an owner establishes a repayment agreement in violation of the requirements of Notice H 2011-21 and files an eviction suit for default, the tenant should assert the owner's noncompliance with the Notice as a defense to the eviction suit.

J. Evictions for Non-Rent Lease Violations and Fair Housing Act Reasonable Accommodation Defense.

Finally, especially with respect to evictions premised on misconduct, including criminal activity, tenants may have defenses under the Fair Housing Act. Such claims may be raised as affirmative defense to the eviction.[126] In addition, if the tenant is a person with a mental or physical disability, the tenant may have a defense under the Fair Housing Act and Rehabilitation Act of 1973, which require that federally subsidized owners provide some accommodation for an otherwise qualified tenant's disability.[127] For example, in *Sinisgallo v. Town of Islip Housing*

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[124] *Id.* at C-3 (on p. 42).

[125] *Id.*

[126] *See Newell v. Rolling Hills Apartments*, 134 F. Supp. 2d 1026, 1036-39 (N.D. Iowa 2001). The Supremacy Clause of the United States Constitution requires that state courts consider federal claims or defenses. *See Flynn v. 3900 Watson Place, Inc.*, 63 F. Supp.2d 18, 23 (D.D.C. 1999); *Fayyumi v. City of Hickory Hills*, 18 F. Supp.2d 909, 912 (N.D. Ill. 1998); *Rodriguez v. Westhab*, 833 F. Supp. 425 (S.D. N.Y. 1993) (state eviction court must consider tenant's defense to eviction under Fair Housing Act).

[127] A landlord must make reasonable accommodations in rules, policies, practices and services to accommodate tenants with disabilities. *See* 42 U.S.C.A. §3604(f)(3)(B) (West 2012); 29 U.S.C.A. § 794(a) (West 2008 & Supp. 2015); 24 C.F.R. § 100.204, § 8.33 (2015); *Majors v. DeKalb Housing Authority of DeKalb, Ga*., 652 F. 2d 454 (5th Cir. 1981) (tenant with mental disability could not be evicted for violation of no pet rule if housing authority can readily accommodate the tenant); *Sinisgallo v. Town of Islip Housing Authority,* 865 F. Supp.2d 307,

341-43 (E.D. N.Y. 2012) (plaintiff accused of physically assaulting neighbor; holding that plaintiffs' requested accommodation of probationary period to show that adjustments in medication would prevent him from constituting a direct threat was reasonable); *Roe v. Housing Authority of the City of Boulder*, 909 F. Supp. 814 (D. Colo. 1995)(eviction and reasonable accommodation); *Roe v. Sugar River Mills Associates*, 820 F. Supp. 636 (D. N.H. 1993) (eviction and reasonable accommodation); *Boston Housing Authority v. Bridgewaters*, 898 N.E.2d 848, 852-61 (Mass. 2009) (reversing eviction for assault; holding that PHA must make an individualized assessment based on current medical knowledge to ascertain the risk of future injury and whether reasonable modification of policies will mitigate the risk); *Lebanon County Housing Authority v. Landeck*, 967 A.2d 1009 (Pa. Super. Ct. 2009) (remanding case to permit tenant to present evidence that she was unable to maintain housekeeping standards because of her depression); (*Douglas v. Kriegsfeld Corp*., 884 A.2d 1109 (D.C. 2005) (en banc) (tenant entitled to assert failure to grant reasonable accommodation as a defense in eviction for unsanitary housekeeping); *City Wide Associates v. Penfield, Mass*., 564 N.E.2d 1003 (Mass. 1991) (eviction of tenant with mental disability manifested by auditory hallucinations would violate Rehabilitation Act of 1973); *Whittier Terrace Ass'n. v. Hampshire*, 26 Mass. App. Ct. 1020, 532 N.E.2d 712 (1989) (subsidized landlord required by Rehabilitation Act of 1973 to accommodate disabled tenant's need for pet cat); *see also*, Jennifer L. Dolak, *The FHAA's Reasonable Accommodation & Direct Threat Provisions as Applied to Disabled Individuals Who Become Disruptive, Abusive, or Destructive in Their Housing Environment,* 36 IND. L. REV. 759 (2003).

If the landlord rejects a request for an accommodation and refuses to engage in an interactive back-and-forth exchange for an accommodation that would avoid an eviction, tenants should raise as a defense to the eviction, the landlord's refusal to engage in an interactive process. Although the Fair Housing Act does not include specific language imposing an obligation on landlords to engage in an interactive process for reaching appropriate reasonable accommodations, such a process does allow both parties to explore the availability and feasibility of various accommodations. *See Jankowski Lee & Associates v. Cisneros*, 91 F.3d 891, 895 (7th Cir. 1996) (suggesting landlord has duty under Fair Housing Act to engage in the interactive process); *Douglas v. Kriegsfeld Corp*., 884 A.2d 1109, n.22 (D.C. 2005) (en banc) (citing case law on duty to engage in interactive process).

If the requested accommodation would create an undue financial or administrative burden or fundamentally alter the nature of the program, it is not reasonable and the landlord may deny the requested accommodation. *See, e.g.*, *Geter v. Horning Brothers Management*, 537 F. Supp. 2d 206 (D.D.C. 2008) (granting judgment on the pleadings for landlord in pro se tenant's lawsuit seeking as a reasonable accommodation a change in the due date of his monthly rent payments from the first to the fifteenth and a reduction in his monthly rent from $1,325 to $890; explaining that plaintiff did not establish a causal link between his disability an inability to pay the rent required by the lease and could have opted to pay his rent upon his receipt of the disability payment so it was timely received by the first of the month or saved the money until payment due); *Huberty v. Washington County Housing & Redevelopment Authority*, 374 F. Supp. 2d 768, 773-775 (D. Minn. 2005) (request to permit Section 8 voucher participant an indefinite extension of time to comply with recertification requirements was unreasonable because it would require the PHA to pay participant's rent, regardless of financial need); *Solberg v. Majerle Management*, 879 A.2d

Authority, 865 F. Supp. 2d 307 (E.D. N.Y. 2012), the court in an extended discussion of the reasonable accommodation provision enjoined the PHA from proceeding with an eviction of a public housing tenant accused of an assault, ruling that the PHA had failed to show that the plaintiffs' requested accommodation of a probationary period with a change in medication was unreasonable.[128] In another case, the court refused to evict a tenant with mental disabilities after a dispute over extermination for a bed bug infestation.[129] The tenant argued that he was entitled to an accommodation under the Fair Housing Act and both the trial court and appellate court agreed.[130] In appropriate cases, a tenant may request an accommodation in the form of a probationary period of continued residency.[131] (Defending such evictions is discussed in some detail in an article in the

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1015, 1022-24 (Md. 2005) (tenant's imposition of conditions under which landlord could enter apartment to inspect that effectively precluded any inspection of the home for four years was unreasonable, and landlord was entitled to evict for breach of lease); *Andover Housing Authority v. Shkolnik*, 820 N.E.2d 815 (Mass. 2005) (request to delay eviction as accommodation for tenant's disability was not reasonable because tenant had shown no ability during pendency of the eviction to eliminate excessive noise that disturbed neighbors); *Assenberg v. Anacortes Housing Authority*, No. C05-1836RSL, 2006 U.S. Dist. LEXIS 34002 (W.D. Wash. May 25, 2006) (requests that a tenant be allowed to carry snakes throughout the premises without limitation and that he be allowed to use marijuana for medicinal purposes on the premises are not reasonable and thus may be rejected by the landlord).

[128] *Sinisgallo,* 865 F. Supp.2d at 336-44.

[129] *See Rutland Court Owners, Inc. v. Taylor*, 997 A.2d 706 (D.C. 2010); *see generally* National Housing Law Project, *Questions Corner,* 44 Housing Law Bulletin 71 (March 2014) (discussing issues related to responsibility for payment for extermination for bed bugs).

[130] *Id.*

[131] *See Sinisgallo v. Town of Islip Housing Authority*, 865 F. Supp.2d 307, 341-43 (E.D. N.Y. 2012) (holding that plaintiffs' requested accommodation of probationary period to show that adjustments in medication would prevent him from constituting a direct threat was reasonable); *Brooker v. Altoona Housing Authority*, No. 3:11-CV-95, 2013 WL 2896814, at *15-17 (W.D. Pa. June 12, 2013) (noting that a probationary period of continued residency was "potentially warranted under the circumstances of this case.")

September-October 2007 Clearinghouse Review.[132]) Hoarding cases can be especially difficult when the landlord has given the tenant one or more opportunities to clean up the unit, but the landlord may be required to give the tenant an additional chance to correct the behavior in response to a reasonable accommodation request. The National Housing Law Project has an excellent discussion on using the reasonable accommodation provision in handling hoarding cases in the November-December 2013 Housing Law Bulletin.[133] Finally, if a PHA unduly delays in granting an accommodation, the delay is tantamount to a constructive denial of the request.[134]

K. Evictions Premised on Criminal Activity or Drug-Related Criminal Activity.

See discussion in this outline at Section XII. In addition, defending such evictions is discussed in detail in an article in the May-June 2007 Clearinghouse Review titled *Wait A Minute: Slowing Down Criminal-Activity Eviction Cases to Find the Truth.*[135]

L. Eviction Defense When PHA or Owner Failed to Communicate with Designated Contact Person.

With the issuance of HUD Notice H-2009-13 and PIH-2009-36(HA)[136] on September 15,

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[132] Fred Fuchs, *Using the Reasonable Accommodation Provision of the Fair Housing Act to Prevent the Eviction of a Tenant with Disabilities*, 40 CLEARINGHOUSE REVIEW JOURNAL OF POVERTY LAW AND POLICY 272 (Sept.-Oct. 2007).

[133] National Housing Law Project, *Questions Corner,* 43 Housing Law Bulletin 236 (Nov-Dec. 2013).

[134] *See Brooks v. Seattle Housing Authority*, No. C12-0878-JCC, 2015 WL 3407415, at *6 (W.D. Wash. May 26, 2015) (citing cases on constructive denials).

[135] Lawrence R. McDonough & Mac McCreight, *Wait a Minute: Slowing Down Criminal-Activity Eviction Cases to Find the Truth*, 41 CLEARINGHOUSE REVIEW JOURNAL OF POVERTY LAW AND POLICY 55 (May-June 2007).

[136] The notice is titled *Supplemental Information to Application for Assistance Regarding*

2009, HUD implemented 42 U.S.C. § 13604 and directed PHAs to give applicants the opportunity to designate an individual or organization to facilitate contact and to assist in resolving issues arising during the tenancy.[137] HUD issued another notice on May 9, 2012, reinstating and extending the 2009 joint notice.[138] And, with Change-4 to HUD Handbook 4350.3, issued August 7, 2013, HUD added a section to the Handbook requiring subsidized owners to whom the Handbook applies to provide all applicants the opportunity to designate a contact person.[139] With respect to existing tenants, HUD said PHAs "should provide" them the opportunity to provide contact information at the time of their next annual recertification.[140] HUD transmitted with the Notice Form HUD-92006 titled *Supplement to Application for Federally Assisted Housing* and mandated its use by PHAs and subsidized owners. Advocates should review the landlord's file to see whether the tenant was offered the opportunity to sign the form.

If a tenant has designated a contact person or organization and the PHA or subsidized owner fails to contact that person when a problem arises, the tenant should contend that the failure to comply estops the PHA or owner from evicting the tenant. Also, if the PHA or owner failed to offer the tenant an opportunity to designate a contact person, the tenant should assert that as a

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Identification of Family Member, Friend or Other Person or Organization Supportive of a Tenant for Occupancy in HUD Assisted Housing.

[137] *See generally*, National Housing Law Project, *New HUD Form May Improve Communication Between Tenants and Housing*, 40 Housing Law Bulletin 19 (January 2010).

[138] See Notice H 2012-9; PIH 2012-22(HA) (effective until superseded by successor notice or regulation).

[139] Handbook 4350.3, at chp. 4, § 3, ¶ 4-14-D, *Supplement to Application for Federally Assisted Housing* (on pages 4-36 & 4-37).

[140] Notice H 2012-9; PIH 2012-22(HA) (effective until superseded by successor notice or regulation), p. 4, at IV-D-3.

defense. Admittedly, this is plowing on new ground. Although failure to comply may not be a legal defense to eviction, the court may accept it as an equitable defense precluding the landlord from obtaining possession.

III. Evictions from Apartments with Rental Subsidy under Section 8 New Construction, Section 8 Substantial Rehabilitation, or Section 8 through State Housing Agencies.

The eviction requirements differ ever so slightly for several of the federally subsidized housing programs.[141] These programs are Section 8 new construction[142], Section 8 substantial rehabilitation, [143] Section 8 moderate rehabilitation, [144] Section 8 through state housing agencies,[145]and Section 8 new construction set aside for section 515 rural rental housing.[146] The previous discussion applies to evictions from apartments receiving rental subsidies under these programs, but this section of the article will identify the ever-so-slight differences in the eviction procedures from the rental programs discussed in Part B.

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[141] The regulations at 24 C.F.R. Part 247 do not apply to Section 8 project based assistance under the Section 8 new construction, Section 8 substantial rehabilitation, Section 8 through state housing agencies, and Section 8 moderate rehabilitation programs. *See* 24 C.F.R. § 247.2 (2015) (definition of *subsidized project* specifically excluding such apartment complexes from coverage under the regulations); *Handbook 4350.3* applies, except to the Section 8 moderate rehabilitation program. *Handbook 4350.3,* chp.1, at ¶1-2-B, Figure 1-1; at ¶ 1-2-D.

[142] 24 C.F.R. Part 880 (2015) (program regulations).

[143] *Id*. at Part 881 (program regulations).

[144] *Id*. at § 882.401 - § 882.518 (program regulations); see also § 882.801 - § 882.810 (regulations for Section 8 moderate rehabilitation single room occupancy program for homeless individuals).

[145] *Id*. at Part 883 (program regulations).

[146] *Id*. at Part 884 (program regulations).

A. Manner of Service of Notice of Lease Termination.

The eviction requirements for the Section 8 new construction program, Section 8 substantial rehabilitation program, and the Section 8 program through state housing agencies are identical.[147] Under these programs, the subsidized landlord is not required to serve the notice of proposed lease termination by both first class mail and delivery to the apartment.[148] The regulations require only that the owner give the family a written notice of proposed termination.[149] The manner of service is not specified. But, if the lease specifies the manner of service, then the subsidized owner must comply with the terms of the lease.

B. Contents of the Notice.

The notice requirements as set forth in the regulations are slightly different from the notice requirements for evictions from the federally subsidized apartments discussed in Part B of this article.[150] The regulations for these three programs require only that the notice of proposed termination state the grounds, state the tenancy is terminated on a specified date, and advise the family that it has an opportunity to respond to the owner.[151] But, because HUD has made applicable to these programs the requirements of the notice set forth in Handbook 4350.3, the

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[147] *Compare* 24 C.F.R. § 880.607 (2015) (Section 8 new construction eviction regulations) *with* 24 C.F.R. § 881.601 (2015) (Section 8 substantial rehabilitation; applying § 880.607 by cross reference) *and* 24 C.F.R. § 883.701 (2015) (Section 8 through state housing agencies eviction; applying § 880.607 by cross reference). The eviction regulations for criminal activity, alcohol abuse, and drug-related criminal activity at 24 C.F.R. § 5.850 - 5.905 (2015) apply here also.

[148] *See* 24 C.F.R. § 880.607 (c) (2015); Handbook 4350.3, chp. 8, § 3, at ¶ 8-13-B-3, 4.

[149] *See* 24 C.F.R. § 880.607 (c) (2015).

[150] *Compare* 24 C.F.R. Part 247 (2015) *with* 24 C.F.R. § 880.607 (2015).

[151] *Id.* at § 880.607 (2015).

owner must also advise the tenant of the right to defend the eviction in court **and** give the tenant ten days to discuss the termination with the owner.[152] The regulations for these subsidized complexes do not address the requirement of specificity in nonpayment of rent cases.[153] The termination notice must state the grounds, but there is no requirement that the notice state the dollar amount and the date of the computation.[154] Thus, the lease and state law will control on the specificity question for nonpayment cases.

C. Landlord May not Rely on Any Grounds not Stated in Notice.

One final significant difference is that Section 8 new construction, substantial rehabilitation, and state agency properties may rely only on the grounds cited in the termination notice, and, unlike other subsidized owners, may not rely on grounds about which the owner had no knowledge at the time the owner sent the termination notice to the tenant.[155] This is a critical distinction in that such owners cannot add new grounds in the judicial proceeding without first serving the tenant with a new notice of lease termination for the new ground.

IV. Evictions from Apartments with Rental Subsidy under Section 8 Moderate Rehabilitation Program.

A. Grounds for Eviction.

Evictions from Section 8 moderate rehabilitation subsidized apartments are governed by

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[152] *See Handbook 4350.3*, at chp.1, ¶ 1-2, Figure 1-1 (identifying programs subject to *Handbook*); at chp. 8, § 3, ¶ 8-13-B-2 (listing requirements of termination notice).

[153] *See* 24 C.F.R. § 880.607 (2015).

[154] *See id.*

[155] *Id.* at § 880.607 (c) (3); Handbook 4350.3, chp. 8, § 3, at ¶ 8-13-B-5-b; *Ross v. Broadway Towers, Inc.*, 228 S.W.3d 113, 120-21 (Tenn. Ct. App. 2006), *cert denied*, 552 U.S. 1019 (2007).

procedures slightly different from the other programs described in the preceding parts if this article.[156]

First, the grounds on which the owner may terminate are different. The Section 8 moderate rehabilitation program owner may terminate for criminal activity, illegal drug activity, alcohol abuse, violation by the tenant of a condition of probation or parole imposed under federal or state law, fleeing by the tenant to avoid prosecution or confinement after conviction of a felony, violation of applicable federal, state, or local law, serious or repeated violations of the terms and conditions of the lease, or other good cause.[157]

The owner cannot evict for *material noncompliance*; rather, the owner must establish a violation based on one of the grounds described above.[158] Similarly, the owner may evict for violation of federal, state, or local law but not for material failure to carry out obligations under any state landlord and tenant act.[159]

B. Time Period for Notice of Termination.

Second, the time period for the notice of termination is different. When the eviction is based on nonpayment of rent, the owner must give the tenant at least five working days' notice of

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[156] *Compare* 24 C.F.R. § 882.511 (2015) (Section 8 moderate rehabilitation eviction regulations) *with* 24 C.F.R. Part 247 and 24 C.F.R. § 880.607. The regulations at 24 C.F.R. Part 247 and the handbook provisions in *Handbook 4350.3* do not apply to the Section 8 moderate rehabilitation program. *See* 24 C.F.R. § 247.2 (excluding from applicability Section 8 moderate rehabilitation apartments); *Handbook 4350.3*, chp.1, at ¶ 1-2-D (noting that Handbook does not apply to Section 8 moderate rehabilitation program). But the regulations on eviction for criminal conduct, drug-related criminal activity, and alcohol abuse do apply. *See* 24 C.F.R. § 5.850 (2015).

[157] 24 C.F.R. § 882.511 (a), (b) (2015); 24 C.F.R. § 5.858 - § 5.861 (2015).

[158] *See id.*

[159] *See* 24 C.F.R. § 882.511(c) (2015).

lease termination dating from date of the tenant's receipt of the notice.[160] When the eviction is based on an allegation of criminal activity, drug-related criminal activity, alcohol abuse, violation by the tenant of a condition of probation or parole imposed under federal or state law or fleeing to avoid prosecution or custody after conviction for a felony, a serious or repeated violation of the terms of the lease or violation of applicable federal, state, or local law, the date of termination must be in accordance with state and local law.[161] When the eviction is for other good cause, at least thirty days' notice of termination is required.[162]

C. Contents of Notice of Termination.

Third, the notice requirements are different. The notice of termination must (1) state the reasons for the termination with the sufficient specificity to enable the family to prepare a defense, and (2) advise the family that if a judicial proceeding for eviction is instituted, the tenant may present a defense.[163] The tenant is not entitled to meet to discuss the eviction.[164] Of course, if the lease gives the tenant a right to meet, then the landlord must comply with the lease. If the eviction is premised on nonpayment of rent, the termination notice must comply with the foregoing requirements; however, in nonpayment cases any state required notices may run concurrently with

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[160] *Id.* at § 882.511(d)(1)(i).

[161] *Id.* at § 882.511(d)(1)(ii); § 5.851(b).

[162] *Id.* at § 882.511(d)(1)(iii).

[163] *Id.* at § 882.511(d)(2)(i), (ii).

[164] *See id.* at § 882.511; Handbook 4350.3 at chp.1, ¶ 1-2 (Handbook does not apply to moderate rehabilitation program); *see generally Perry v. Royal Arms Apartments*, 729 F.2d 1081 (6th Cir. 1984) (per curiam) (due process does not require an administrative hearing prior to eviction for tenants of Section 8 new construction when state law provides an adequate hearing).

the notice required by the regulations.[165]

D. Manner of Service of Notice of Termination.

Fourth, service requirements for the notice of termination differ from those for other subsidized housing. The notice of termination must be served either by mailing it to the tenant by first-class mail (return receipt requested) or by delivering a copy to the apartment.[166] The owner need not serve the notice by both first class-mail and by hand delivery.[167] Of course, again, if the lease requires service in other ways, the owner must also comply with the lease contract.

[165] 24 C.F.R. § 882.511(d) (3) (2015).

[166] *Id.* at § 882.511(d) (2) (iii).

[167] *See id.*

V. Evictions from Apartments Financed under Section 515 Rural Rental Housing Program and with Rental Subsidy under Section 8 New Construction for Section 515 Rural Rental Housing Program.[168]

A. Grounds for Eviction.

The HUD regulations for owners of section 515 rural rental housing receiving a Section 8 subsidy state that the owner is responsible for evictions and that the owner may evict for the family's failure to sign consent forms for obtaining wage and claim information; for the family's failure to establish citizenship or eligible immigration status; and on the grounds set forth in 24 C.F.R. § 5.858, §5.859 and § 5.860.[169]

The Rural Housing Service has its own regulations on evictions.[170] In addition to the grounds identified in the preceding paragraph, the Rural Housing Service regulations permit owners to terminate the lease for criminal activity, alcohol abuse, material noncompliance with the lease or occupancy rules, and other good cause.[171]

Material noncompliance is defined as including substantial or repeated violations of lease provisions or occupancy rules; nonpayment or repeated late payment of rent or other financial obligations due under the lease or occupancy rules; or admission by the tenant or conviction for use,

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[168] *See* National Housing Law Project, 44 Housing Law Bulletin 173, *Defending Rural Housing Service Evictions* (Sept. 2014).

[169] *Id.* at § 884.216.

[170] *See* 7 C.F.R. § 3560.159 (2015) (interim final rule published at 69 Fed. Reg. 69032 (Nov. 26, 2004)). This rule on evictions replaces the previous long-standing Rural Housing Service regulation on lease termination and evictions set forth at 7 C.F.R. Part 1930, Subpart C, Exhibit B, at ¶ XIV (2004). *See* National Housing Law Project, 35 Housing Law Bulletin 89, *New RHS Multi-Family Housing Regulations and Handbooks* (March 2005) (criticizing regulations and comparing the new regulations to previous regulations).

[171] 7 C.F.R. §3560.159(a), (d) (2015).

attempted use, possession, manufacture, selling, or distribution of an illegal drug when such activity occurs on the apartment complex premises by the tenant, household member, the tenant's guest, or any other person under the tenant's control at the time of the activity.[172]

Good cause is defined as including actions prohibited by state and local laws; actions by the tenant or household member resulting in substantial physical damage causing an adverse financial effect on the housing or the property of other persons; or actions by the tenant or household member which disrupt the livability of the housing by threatening the health and safety of other persons or the right of other persons to enjoyment of the premises and related facilities.[173] Expiration of the lease term is not sufficient ground for lease termination and eviction.[174]

B. Opportunity to Cure Required Prior to Termination of Lease.

Section 515 owners may terminate the lease only if the owner has given the tenant written notice of the violation giving the tenant an opportunity to correct the violation.[175] The owner may terminate the lease for subsequent violations only when the "incidences related to the termination are documented and there is documentation that the tenant was given notice prior to the initiation of the termination action that their activities would result in occupancy termination."[176] The regulations do not limit the right to cure to rent breaches. Thus, the right to cure applies to any lease violation.

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[172] *Id.*at § 3560.159(a)(1).

[173] *Id.* at § 3560.159(a)(2).

[174] *Id.* at § 3560.159(b).

[175] *See* 7 C.F.R. § 3560.159(a).

[176] *Id.*

C. Contents of Notice of Termination.

When terminating the tenant's occupancy in a § 515 complex, the owner must give the tenant a termination notice that includes the following information: (1) a specific date the lease will terminate; (2) a statement of the basis for the termination with specific reference to the provisions of the lease or occupancy rules that the owner alleges the tenant has violated; and (3) a statement explaining the conditions under which the owner may initiate judicial action to enforce the lease termination notice.[177]

In addition, if the § 515 complex has a project-based section 8 contract, as many do, the owner must comply with the notice requirements of HUD Handbook 4350.3.[178] Thus, the notice must also inform the tenant that the tenant has ten days within which to discuss the termination of tenancy with the owner; that the owner may enforce the termination in court, at which time the tenant may present a defense; and that persons with disabilities have the right to request reasonable accommodations to participate in the hearing process.[179]

The regulations include a special provision that if the occupancy is terminated because of conditions beyond the control of the tenant, such as required repairs, rehabilitation, or a natural disaster, the tenant is entitled to benefits under the Uniform Relocation Act and may request a letter of priority entitlement from the Rural Housing Service.[180]

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[177] *Id.*

[178] *See Handbook 4350.3*, at chp. 1, § 1-2, Figure 1-1, *Programs Subject to this Handbook*; at chp. 8, § 3, ¶ 8-13-B-2 (listing notice requirements).

[179] *Id.* at chp. 8, § 3, ¶ 8-13-B-2.

[180] 7 C.F.R. at § 3560.159(c) (2015).

D. Manner of Delivery of Notice of Lease Termination.

The regulations do not specify any requirements relating to the manner of the delivery of the notice of termination.[181] Thus, the lease and state law will determine the manner of delivery.[182] In addition, although the regulations do not give tenants a specific right to examine relevant documents, including the tenant's file, tenants should always request the file and cite to the tenant's right to review the file when the grievance procedure is applicable.[183] When the § 515 apartment complex has a § 8 contract in place, then the owner must permit tenants and their representatives to review the tenant's file.[184]

E. Termination of Rental Assistance & Interaction with Eviction.

In *DiVetro v. Housing Authority of Myrtle Beach*[185], the tenant lived in Rural Rental Housing owned by the Housing Authority.[186] The tenant received rental assistance, and following the second annual recertification, the Housing Authority set her tenant rent at $0 per month with a $13 utility allowance.[187] Following several alleged lease violations during the next year, the Housing Authority informed her that her lease would not be renewed when it expired at the end of

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[181] *See id.* at § 3560.159.

[182] *See Handbook 4350.3*, at chp. 8, § 3, ¶ 8-13-B-4.

[183] 7 C.F.R. at § 3560.160(g)(4) (2015).

[184] *See Handbook 4350.3*, chp. 4, § 3, at ¶ 4-22-E; chp. 5, § 3 at ¶ 5-23-C (effective June 29, 2007).

[185] No. 4:13-cv-01878- RBH, 2014 WL 3385163 (D. S.C. July 10, 2014).

[186] *Id.* at *1.

[187] *Id.*

January 2013.[188] The Housing Authority subsequently filed an eviction suit claiming the tenant should be evicted for holding over after non-renewal of her lease and for failure to pay the market rent of $658 per month for three months at issue.[189] The trial court rejected the tenant's argument that her rent was $0, found that she owed the full market rent of $658 for three months, and evicted her.[190] She filed suit under 42 U.S.C. § 1983 asserting that the Housing Authority had violated her due process rights by never providing her with an opportunity to contest the violations resulting in the non-renewal of her lease, because it had filed suit on the ground that she had failed to pay the market rent.[191] The court agreed that this raised a due process issue and refused to dismiss the case.[192] The court correctly decided that the tenant had been denied due process since the state court never considered the underlying merits of the PHA's action in terminating the tenant's rental assistance and increasing her rent to the fair market rent.

F. Rural Housing Service Grievance Procedure Does Not Apply to Evictions.

Although tenants in section 515 rural rental housing have access to a tenant grievance procedure,[193] the grievance procedure does not apply to "[l]ease violations by the tenant that would result in the termination of tenancy and eviction."[194] But, if the § 515 owner has a § 8 contract in

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[188] *Id.*

[189] *Id.* at *2.

[190] *Id.*

[191] *Id.* at *7-8.

[192] *Id.* at *8.

[193] 7 C.F.R. at § 3560.160 (2015).

[194] *Id.* at § 3560.160(b)(2)(v).

place, then, as previously noted, the tenant has the right to meet with the owner to discuss the proposed termination.[195]

When the eviction results in part because of action or inaction on the part of the owner, the tenant should request a grievance hearing and contend that the owner's actions are subject to the grievance procedure.[196] For example, if the owner attempts to evict for non-payment of rent in a case in which the owner refuses to reduce the tenant's rent after the tenant suffers an income loss, the tenant should contend that the owner's refusal to reduce the rent is subject to the grievance procedure.[197] Or, if the owner initiates an eviction motivated in part by illegal retaliation or discrimination for the tenant's exercise of rights, the tenant should invoke the grievance procedure.

VI. Evictions from Properties Funded through the HOME Investment Partnerships Program.[198]

Tenants living in housing assisted with HOME funds have two special statutory protections.[199] First, owners may not terminate the tenancy except for serious or repeated violation of the terms and conditions of the lease; for violation of applicable federal, state, or local law; or for other good cause.[200] (HUD has added as an additional ground for termination the completion of the tenancy

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[195] *Handbook 4350.3,* chp. 8, § 3, ¶ 8-13-B-2.

[196] *See* 7 C.F.R. § 3560.160(b) (2015) (grievance and appeal procedure applies to an owner's action or failure to act that adversely affects the tenant).

[197] *See id.* at § 3560.160(d) (acceptable reasons for filing a grievance may include the owner's violation of the lease or occupancy rules).

[198] 42 U.S.C.A. § 12741 - § 12756 (West 2013).

[199] *See* 42 U.S.C.A. § 12755(b) (West 2013); 24 C.F.R. § 92.253(c) (2015).

[200] 42 U.S.C.A. § 12755(b) (West 2013).

period for transitional housing.[201]) Second, the owner must serve the tenant with at least thirty days written notice of tenancy termination, specifying the grounds for the termination.[202] The notice requirement does not differ for nonpayment of rent evictions and evictions premised on other grounds; at least thirty days' notice is required.[203]

VII. Evictions from Shelter Plus Care Housing[204] and Supportive Housing Program for the Elderly and Persons with Disabilities.[205]

The eviction requirements for Shelter Plus Care participants and Supportive Housing

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[201] 24 C.F.R. § 92.253(c) (2015).

[202] 42 U.S.C. § 12755(b) (West 2013); 24 C.F.R. § 92.253(c) (2015).

[203] *See id.*

[204] 42 U.S. C.A. § 11403 - § 11407b (West 2013), repealed by Pub. L. 111-22, Div. B, § § 1001-1505 (May 20, 2009); 24 C.F.R. Part 582 (2015). **Important Note:** See discussion in this outline at section VIII on Continuum of Care Funded Housing. Congress repealed the Shelter Plus Care Housing Program statute on May 20, 2009. *See* Pub. L. 111-22, Div. B, § § 1001-1505 (May 20, 2009), with the amendments effective the earlier of eighteen months after May 20, 2009, or the expiration of the three-month period beginning upon publication by HUD of final regulations for the statutory revisions. *See* 42 U.S.C.A. §11391 - 11407b (West 2013) (notation stating sections repealed). The regulations on program terminations have not yet been revised, so they would still govern program terminations.

[205] The Supportive Housing Program was authorized by title IV of the Stewart B. McKinney Homeless Assistance Act, 42 U.S.C.A. § 11381 - § 11389 (West 2005 & Supp. 2011). **Important Note:** Congress substantially rewrote the statute in May 2009, including changing the heading of Part C from "Supportive Housing Program" to "Continuum of Care Program," with the amendments to take effect the earlier of eighteen months after May 20, 2009, or the expiration of the three-month period beginning upon publication by HUD of final regulations for the statutory revisions. *See* 42 U.S.C.A. § 11381 (West 2013) (historical and statutory notes). The regulations on program terminations set forth in 24 C.F.R. § 583.300(i) (2015), have not yet been revised, so they would still govern program terminations. As a further historical note, HUD published proposed rules in the Federal Register on July 20, 2004, that would have modified the regulations for the Supportive Housing Program. *See* 69 Fed. Reg. 43,488 (July 20, 2004) (to be codified in 24 C.F.R. Part 583). But, it never finalized those rules.

Program participants are very similar.[206] Shelter Plus Care participants enter into an occupancy agreement for a term of at least one month.[207] The occupancy agreement must be automatically renewable unless terminated upon prior notice by either party.[208] Shelter Plus Care recipients may terminate assistance to participants who violate program requirements or conditions of occupancy.[209] But, the landlord must "exercise judgment and examine all extenuating circumstances" to ensure that assistance is terminated only in the most severe cases.[210]

In a 2009 case from Illinois[211], a tenant who was being evicted from housing receiving HOPWA funding for possession of illegal drugs in his apartment argued that the phrase "most severe case" precluded eviction because the quantity of marijuana found in his apartment was minimal.[212] The court rejected that argument, ruling that illegal drug activity would constitute a "most severe case."[213]

In terminating assistance to a participant, the entity providing the housing and care must give the participant (1) written notice of the reasons for the termination, (2) an opportunity for the participant to appeal the decision to a person other than the person or a subordinate of the person

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[206] *Compare* 24 C.F.R. § 582.320 (2015) (Shelter Plus Care) *with* 24 C.F.R. § 583.300(i) (2015) (Section 811 Supportive Housing for Persons with Disabilities).

[207] 24 C.F.R. § 582.315(a) (2015).

[208] *Id.*

[209] *Id.* at § 582.320(a).

[210] *Id.*

[211] *Garden View v. Fletcher*, 916 N.E.2d 554 (Ill. App. 2009).

[212] *Id.* at 562-63.

[213] *Id.*

who made or approved the termination, and (3) prompt written notice of the final decision.[214]

Supportive Housing recipients may terminate assistance to participants who violate program requirements.[215] But, they are required to terminate assistance "only in the most severe cases."[216] Supportive Housing recipients, like Shelter Plus Care recipients, may terminate assistance only if they provide participants written notice, an opportunity for review by an impartial decision-maker, and prompt written notice of the final decision.[217]

The regulations for the Shelter Plus Care Program do not require that the entity providing the shelter and care establish a tenancy. Rather, they refer to an occupancy agreement.[218] Similarly, the Supportive Housing regulations reference termination of housing assistance rather termination of tenancy.[219] This has created some uncertainty whether a housing provider under these programs must utilize the state landlord-tenant eviction process to evict the participant.[220]

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[214] 24 C.F.R. § 582.320(b) (2015).

[215] *Id.* at § 583.300(i).

[216] *Id.*

[217] *Id.*; *Vance v. Housing Opportunities Comm'n*., 332 F. Supp.2d 832 (D. Md. 2004).

[218] *See* 24 C.F.R. at § 582.315 (2015); *see generally, Burke v. Oxford House of Oregon Chapter V*, 137 P.3d 1278 (Ore. 2006) (holding that residents of halfway house were subject to state landlord-tenant act protections on evictions because the landlord had structured the lease arrangement to avoid application of landlord-tenant laws and under Oregon law had thus subjected itself to the laws).

[219] 24 C.F.R. § 583.300(i) (2015); *see* 69 Fed. Reg. 43,488 (July 20, 2004) (proposed rules). The proposed rules specifically stated that housing providers are not required to create a landlord-tenant relationship with participants of that supportive housing, but participants would be entitled to notice of termination and an opportunity for review of the termination decision. Proposed § 583.325.

[220] *See Cotton v. Alexian Brothers Bonaventure House*, Nos. 02-C-7969 & 02-C-8437, 2003 U.S. Dist. LEXIS 16023 (N.D. Ill. Sept. 11, 2003). In *Cotton*, the housing grantee/landlord

Another issue is whether participants may lose their housing for failing to participate in required services.[221] If a participant fails to participate in required services, the provider may end the tenancy. But, such participants should surely have the protections of the judicial eviction process.

VIII. Evictions from Housing Funded Under Continuum of Care Program.[222]

In 2009 Congress enacted the Homeless Emergency Assistance and Rapid Transition to Housing (HEARTH) Act.[223] As HUD explains in its comments to the interim regulations: "The HEARTH Act not only codified in law the planning system known as Continuum of Care, but consolidated the three existing competitive homeless assistance grant programs (Supportive Housing, Shelter Plus Care, and Single Room Occupancy into the single grant program known as the Continuum of Care program."[224] HUD further noted that "Because grants are still being administered under the Shelter Plus Care program and the Supportive Housing program, the regulations for these programs in 24 CFR parts 582, and 583, respectively, will remain in the Code

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providing housing under the Housing Opportunities for People with AIDS Act, 42 U.S.C. § 12901 *et. seq*., claimed that the state forcible detainer act did not apply to an eviction of a participant because it did not have a landlord-tenant agreement with the participant. The district court ruled that it was unclear whether the forcible detainer statute applied and reconsidered and vacated an earlier opinion. *See id.* at *7. *See also Serreze v. YWCA of Western Massachusetts*, Inc., 572 N.E.2d 581 (Mass. App. Ct. 1991) (holding that battered women living in transitional housing were protected under state landlord-tenant law from self-help eviction).

[221] *See Angelo J. Melillo Center for Mental Health v. Denise B.,* 777 N.Y.S.2d 830 (N.Y. Dist. Ct. March 1, 2004) (holding that a Shelter Plus Care Program provider may evict participants for failure to participate in treatment programs).

[222] 42 U.S.C.A. § 11381 - § 11388 (West 2013); 77 Fed. Reg. 45422 (July 31, 2012) (interim rule) (codified at 24 C.F.R. Part 578 (2015)); *see generally* National Housing Law Project, *New HUD Rules Will Impact Implementation of Homelessness Programs*, 42 Housing Law Bulletin 159 (August 2012).

[223] Pub. L. No. 111-22, §§1001-1501, 123 Stat. 1632, 1663-1703 (2009).

[224] 77 Fed. Reg. 45422, 45424 (July 31, 2012).

of Federal Regulations for the time being. When no more, or very few, grants remain under these programs, HUD will remove the regulations in these parts by a separate rule (if no grants exist) or will replace them with a savings clause, which will continue to govern grant agreements executed prior to the effective date of the HEARTH Act regulations."[225]

Congress required that if a provider of assistance terminates Continuum of Care assistance to an individual or family, it may do so only "in accordance with a formal process established by the recipient that recognizes the rights of individuals receiving such assistance to due process of law, which may include a hearing."[226] HUD has provided due process protections on the termination of assistance in the interim regulations.[227] The program participant is entitled to written notice of the reasons for any termination, a review of the decision in which the participant may present written or oral objections to someone other than the person (or a subordinate of that person) who made or approved the termination decision, and prompt written notice of the final decision.[228] In addition, the regulations require the provider to "exercise judgment and examine all extenuating circumstances in determining when violations are serious enough to warrant termination so that a program participant's assistance is terminated only in the most severe cases."[229] Because the regulations speak in terms of termination of assistance rather than in terms of termination of tenancy, advocates must argue in evictions that the court has the ultimate determination whether the

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[225] *Id.* at p. 45439.

[226] 42 U.S.C.A. § 11386(g) (West 2013).

[227] 24 C.F.R. § 578.91 (2015).

[228] *Id.* § 578.91(b).

[229] *Id.* § 578.91(c).

termination of assistance meets the strict standard set forth in the regulations.

IX. Evictions from Housing Funded through Housing Opportunities for Persons with AIDS ("HOPWA").[230]

The regulations for HOPWA refer to termination of assistance rather than termination of tenancy.[231] This has created some uncertainty about whether the landlord must prove its case through the eviction process.[232] HOPWA recipients may terminate assistance to participants who violate program requirements or conditions of occupancy.[233] But, the grantee "must ensure that supportive services are provided, so that a participant's assistance is terminated only in the most severe cases."[234]

In a 2009 case from Illinois, a tenant who was being evicted from housing receiving HOPWA funding for possession of illegal drugs in his apartment argued that the court had to apply a higher standard than the terms of the lease to evict and that the landlord also had to show it provided supportive services to the tenant before terminating his tenancy.[235] The court rejected both of those arguments.[236] The tenant also contended that the phrase "most severe case" precluded eviction because the quantity of found in his apartment was minimal.[237] The court also

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[230] 42 U.S.C.A. § 12901 - § 12912 (West 2013); 24 C.F.R. Part 574 (2015).

[231] *See* 24 C.F.R. §574.310(e)(2) (2015).

[232] *See supra* note 220.

[233] 24 C.F.R. § §574.310(e)(2)(i) (2015).

[234] *Id.*

[235] *See Garden View v. Fletcher*, 916 N.E.2d 554, 559-62 (Ill. App. 2009).

[236] *See id.*

[237] *Id.* at 562-63.

rejected that argument, ruling that illegal drug activity would constitute a "most severe case."[238]

In terminating assistance to a participant, the entity "must provide a formal process that recognizes the rights of individuals receiving assistance to due process of law."[239] The grantee must give the participant (1) written notice containing a clear statement of the reasons for the termination, (2) an opportunity to a "review" of the decision in which the participant is given the opportunity to confront opposing witnesses, present written objections, and be represented by counsel before a person other than the persons or a subordinate of the person who made or approved the termination decision, and (3) prompt written notice of the final decision.[240]

If a participant is evicted, he or she may seek to find housing assistance at another facility receiving HOPWA funding. In the decision from Illinois described above, the appellate court noted that the legislative history suggests that local programs make attempts to bring the person back into the program when termination occurs.[241]

X. Evictions from Tax Credit Apartments.

Tax credit landlords may evict tenants and refuse to renew the lease at the end of the lease term only for good cause. [242] IRS, the federal enforcement agency for the tax credit program, first issued a revenue ruling in July 2004, notifying state tax credit agencies that tax credit landlords may

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[238] *Id.*

[239] 24 C.F.R. § 574.310(e)(2)(ii) (2015).

[240] *Id.*

[241] *Garden View v. Fletcher*, 916 N.E.2d at 562.

[242] 26 U.S.C. A. § 42 (h)(6)(E)(ii)(I) (West Supp. 2015); Rev. Rul. 2004-82, at A-5, 2004-35 I.R.B.350; Rev. Procedure 2005-37 (June 21, 2005); *see generally* Marc Jolin, *Good Cause Eviction and the Low-Income Housing Tax Credit*, 67 U. CHI. L. REV. 521 (2000) .

evict tenants only for good cause, both during the lease term and at the end of the lease term.[243] Prior to this ruling by the IRS, several state appellate courts had held that tax credit landlords must have good cause to terminate the tenancy of a tenant in a tax credit unit.[244] In its most recent guide for state agencies monitoring tax credits complexes for compliance, IRS gave the following guidance:

> A lease to rent low-income housing is a contract. A lease contract expires at the end of the time period specified in the lease. At that time, the tenant surrenders the low-income housing unit to the owner and the owner accepts it back. The owner and tenant may renew the contract (or enter into a new contract), thereby allowing the tenant to continue occupying the low-income unit, but the owner is not obligated to renew a lease or enter into a new one, and failure to do so does not, per se, constitute an eviction without good cause. **However, the owner must be prepared to demonstrate if challenged in state court that the nonrenewal of a lease is not a "termination of tenancy" for other than good cause under IRC § 42.**
>
> The owner must provide the tenant with timely notice that the lease will not be renewed as required under state law.[245]

Notwithstanding the less than perfectly clear language of the paragraph, the critical sentence

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[243] Rev. Rul. 2004-82, at A-5, 2004-35 I.R.B. 350; Rev. Procedure 2005-37 (June 21, 2005); *see generally* National Housing Law Project, *IRS Finally Clarifies Good Cause Eviction Protection for Tax Credit Tenants*, 34 Housing Law Bulletin 208 (Oct. 2004); *Update on Good Cause Eviction Protections for Tax Credit Tenants*, 35 HOUS. L. BULL. 117 (April 2005).

[244] *See Carter v. Maryland Management Co.*, 835 A.2d 158 (Md. Ct. App. 2003); *Cimarron Village v. Washington*, 659 N.W.2d 811 (Minn. Ct. App. 2003); *Land Lease Apartment Management, LLC v. Stribling*, No. HWA30495, 2004 Conn. Super. LEXIS 2988 (Conn. Super. Ct. Sept. 8, 2004); *Bowling Green Manor Limited Partnership v. Kirk*, No. WD-94-125, 1995 Ohio App. LEXIS, at *6-14 (Ohio Ct. App. June 30, 1995) (finding tenant had property interest in her tax credit apartment and owner's actions constituted government action); *Bowling Green Manor Limited Partnership v. LaChance*, No. WD-94-117, 1995 Ohio App. LEXIS 2767, at *9-15 (Ohio Ct. App. June 30, 1995) (finding tenant had property interest in her tax credit apartment and owner's actions constituted government action).

[245] Internal Revenue Service, *Guide for Completing Form 8823, Low-Income Housing Credit Agencies Report of Noncompliance or Building Disposition*, at chp. 26, "Tenant Good Cause Eviction and Rent Increase Protection" (updated March 22, 2011).

emphasized above does clearly state that an owner must prove good cause "if challenged in state court."

The IRS has not required, however, that tax credit landlord include good cause language in their lease agreements with tenants;[246] as a result, most tax credit tenants have no idea that their landlord can refuse to renew the lease only for good cause. Thus, advocates must be especially vigilant to identify tenants facing non-renewal evictions from tax credit complexes to ensure that their tenancy is terminated only for good cause.[247] Since good cause is required, it is implicit that the notice of lease termination state specific grounds for the termination or lease non-renewal.[248] The lease and state law will determine the required notice period, because neither the tax credit statute nor IRS regulations address this issue. Depending on the state law pleading requirements, it may be necessary to plead as an affirmative defense that good cause is required.

XI. Evictions of Section 8 Housing Choice Voucher Program Tenants.[249]

A. Grounds for Eviction.

Evictions of Section 8 housing choice voucher tenants are the responsibility of the owner

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[246] *See* Rev. Procedure 2005-37 (June 21, 2005).

[247] *See Virgin Islands Community Housing Limited Partnership v. Rivera,* No. ST-07-CV-655, 2008 V.I. LEXIS 16, at *12-13 (Super. Ct. Dec. 24, 2008) (noting that the tenant had presented a "colorable claim that under the LIHTC regulations, she ... should not be evicted at the expiration of her lease, absent good cause")

[248] *See* cases cited *supra* note 244 (citing cases discussing good cause requirement for eviction from Low Income Housing Tax Credit housing).

[249] *See* 42 U.S.C.A. § 1437f(o)(7) (West 2012 & Supp. 2015); 24 C.F.R. § 982.310 (2015); United States Department of Housing and Urban Development, *Housing Choice Voucher Program Guidebook 7420.10G,* at chp.15, §15.2 (April 2001).

and not the public housing authority ("PHA") administering the program.[250] A landlord may evict during the initial lease term and any extension only on the following grounds: (1) serious or repeated violation of the terms and conditions of the lease; (2) violation of federal, state, or local which imposes obligations on the tenant in connection with the occupancy of the unit; (3) criminal activity by the tenant, household member, guest, or other person under the tenant's control that threatens the health, safety, or peaceful enjoyment of the premises by other residents or persons residing in the immediate vicinity; (4) violent criminal activity on or near the premises by a tenant, household member, or guest, or any such activity on the premises by any other person under the tenant's control; (5) drug-related criminal activity engaged in on or near the premises by any tenant, household member or guest, or such activity engaged in on the premises by any other person under the tenant's control; (6) when the owner determines that a household member is illegally using a drug or when the owner determines that a pattern of illegal use of a drug interferes with the health, safety, or right to peaceful enjoyment of the premises by other residents; (7) alcohol abuse by the tenant or a household member that threatens the health, safety, or right to peaceful enjoyment of the premises by residents; (8) violation by the tenant or a household member of a condition of probation or parole imposed under federal or state law; (9) fleeing by the tenant to avoid prosecution or confinement after conviction of a felony; and (10) other good cause.[251] The landlord is not required to evict when the tenant has violated the lease; the regulations give the landlord the right to consider

[250] 24 C.F.R. § 982.310 (2015).

[251] *See* 42 U.S.C.A. § 1437f(o)(7) (West 2012 & Supp. 2015); 24 C.F.R. § 982.310 (2015); U.S. Dept. of Housing and Urban Development, *Housing Choice Voucher Program Guidebook 7420.10G,* at chp.15, §15.2 (April 2001); *see also Indigo Real Estate Services, Inc.,*280 P.3d 506, 507 (Wash. Ct. App. 2012) ("section 8 tenant may not be found to have unlawfully detained the premises absent a determination that the tenant's conduct resulted in good cause to terminate the tenancy.")

all the circumstances.[252]

During the first year of the lease term, the owner may not terminate the tenancy for *other good cause* unless the termination is based on something the family did or failed to do.[253] Thus, during the first year of the lease term, an owner may not terminate the tenancy on the grounds that the owner desires to use the unit for personal or family use, for a purpose other than as residential rental unit, or for a business or economic reason such as a sale of the property, renovation of the unit, or a desire to rent the unit at a higher rental.[254] At the end of the initial lease term, however, an owner may terminate the tenancy or non-renew the lease without cause.[255] But an owner of a multifamily apartment complex who has prepaid the mortgage or opted out of a project-based Section 8 contract may not terminate the tenancy or non-renew the lease without cause of tenants living at the complex with enhanced vouchers.[256] Also, if a local rent stabilization ordinance precludes eviction except on certain enumerated grounds, the voucher regulations allowing

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[252] 24 C.F.R. § 982.310(h) (2015).

[253] *Id*. at § 982.310(d)(2).

[254] *Id.*

[255] *See* 42 U.S.C.A. § 1437f(o)(7) (West 2012 & Supp. 2015); 24 C.F.R. § 982.310 (2015); *Sauer v. Johnson*, 106 So.3d 724, at *11-15 (La. Ct. App. 2012) (rejecting argument that month-to-month continuation of lease after the initial term constituted an extension of the lease requiring good cause for termination); *In re Burch*, 401 B.R. 153, 158-160 (Bankr. E.D. Pa. 2008); *Pelham v. Formisano*, 782 N.Y.S.2d 898 (N.Y. S. Ct. 2004); *Carol Ricket & Associates v. Law*, 54 P.3d 91 (N.M. Ct. App. 2002; *Kane Realty, LLC v. Goss*, No. BRSP055613, 2004 Conn. Super. LEXIS 3860 (Conn. Super. Ct. Dec. 20, 2004). If the lease requires good cause to terminate at the end of the lease term, the landlord must show good cause. And, low income housing tax credit owners must have good cause to terminate the tenancy of a voucher holder. *See* discussion at § X of this outline.

[256] *See* 42 U.S.C.A. § 1437f(t)(1)(B) (West 2012); *Jeanty v. Shore Terrace Realty Ass'n.*, No. 03 Civ 8669 (BSJ), 2004 U.S. Dist. LEXIS 15773 (S.D. N.Y. Aug. 9, 2004) (holding that landlord who opted out of project-based Section 8 contract must accept enhanced voucher)

termination without cause at the end of the initial lease term are trumped by the local ordinance offering additional tenant protections.[257]

If the parties wish to continue the tenancy, it is not necessary that the landlord and the PHA sign a new housing assistance payments contract unless the landlord is changing lease terms governing payment for utilities or appliances or changing the lease provisions governing the term of the lease, or the family is moving to a new unit.[258] The owner must notify the PHA of any changes in the amount of the rent at least sixty days before any such changes go into effect.[259]

B. Notice of Lease Termination and Right to Continued Participation in Section 8 Housing Voucher Program.

The owner must give the tenant written notice specifying the grounds for eviction.[260] The tenancy does not terminate before the owner gives the notice, and the notice must be given at or before commencement of the eviction in court.[261] The notice giving the grounds for the eviction may be included in or combined with the notice to vacate or the court pleading filed to commence the eviction lawsuit.[262] The requisite notice period is determined by the lease and state law, because the regulations do not address the issue.[263] The PHA plays no role in the eviction process,

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[257] *See Barrientos v. 1801-1825 Morton LLC,* 583 F.3d 1197, 1210-13 (9th Cir. 2009); *Crisales v. Estrada,* 139 Cal. Rptr. 3d 780 (Cal. App. Dep't Super. Ct. 2012).

[258] *See* Tenancy Addendum Section 8 Tenant-Based Assistance Housing Choice Voucher Program, Form HUD-52641-A (8/2009), at ¶ 15.b.

[259] *Id.* at ¶ 15.d.

[260] *See* 42 U.S.C.A. § 1437f(o)(7)(E) (West 2012); 24 C.F.R. § 982.310(e) (2015).

[261] 24 C.F.R. § 982.310(e)(1)(i) (2015).

[262] *Id.* at § 982.310(e)(1), (2).

[263] *See id.* at § 982.310*; Wasatch Property Mgmt. v. Degrate*, 112 P.3d 647, 649-50 Cal/

although the owner must give the PHA a copy of the notice to vacate or court complaint.[264] Failure of the landlord to provide a copy of the notice to the PHA is grounds for dismissal of the eviction suit.[265] Moreover, the Section 8 Tenancy Addendum requires the landlord give notice to the PHA "at the same time the owner notifies the tenant." [266] Failure to do so is also grounds for dismissal.[267] Because the PHA is not involved in the eviction procedure, no state or government action is present.[268] The owner may only evict the tenant through the judicial process.[269]

All too frequently landlords will attempt to evict tenants because the PHA has not paid the housing assistance payment. The regulations are clear that nonpayment by the PHA is not grounds for termination of the tenancy by the landlord, and the owner may not terminate the tenancy during the term of the lease for nonpayment by the PHA.[270] Landlords may also refuse to make repairs,

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2005) (Section 8 landlord must comply with state notice requirements); *Gallman v. Pierce*, 639 F. Supp. 472, 476-78 (N.D. Cal. 1986).

[264] 24 C.F.R. at § 982.310(e)(2)(ii) (2015).

[265] *See Lamlon Develop. Corp. v. Owens*, 533 N.Y.S.2d 186, 189-191 (N.Y. Dist. Ct. 1988); *Santouse v. Scott*, HDSP137470, 2006 Conn. Super. LEXIS 1660 (Conn. Super. Ct. June 2, 2006).

[266] Tenancy Addendum Section 8 Tenant-Based Assistance Housing Choice Voucher Program, Form HUD-52641-A (8/2009), at ¶ 8.g(2).

[267] *See Winns v. Rosado*, 111A.3d 155, 159-60 (N.J. Super. Ct. Law Div. 2014) (court lacked jurisdiction because landlord failed to notify PHA at same time it notified tenant).

[268] *Cf. Miller v. Hartwood Apartments, Ltd.*, 689 F.2d 1239 (5th Cir.1982) (holding that the actions of a Section 8 New Construction apartment owner in evicting a tenant do not constitute either state or federal governmental action); *contra Anast v. Commonwealth Apartments*, 956 F. Supp. 797-99 (N.D. Ill. 1994) (finding government action on part of Section 8 Substantial Rehabilitation landlord in evicting tenant).

[269] 24 C.F.R. § 982.310(f) (2015).

[270] *Id.* at § 982.310(b); *Soliman v. Cepeda*, 634 A.2d 1057 (N.J. Super. Ct. Law Div.

resulting in termination of the housing assistance contract by the PHA. When that happens, a landlord may seek to evict. In a 2010 case from New York, the court held that so long as the tenants paid their share of the rent, the landlord could not evict absent good cause.[271]

Section 8 participants have a property right in continued participation in the Section 8 Voucher Program.[272] When the tenant is evicted for a serious violation of the lease, however, the PHA must propose termination of the family's participation in the Section 8 voucher program.[273] Although the regulations require termination when the tenant is evicted for a serious lease violation, they also permit the PHA to consider all the circumstances in deciding whether to terminate the family's assistance.[274] Thus, the PHA is obligated to propose termination of assistance, but it may decide, in considering the circumstances, not to terminate the assistance of a family that has been

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1993); *see Thirty LLC v. Omaha Housing Authority*, 771 N.W.2d 165 (Neb. Ct. App. 2009) (PHA entitled to recoup housing assistance payments from landlord who charged tenant a monthly side payment of $103 in violation of the housing assistance payments contract); *Sunflower Park Apartments v. Johnson*, 937 P.2d 21 (Kan. Ct. App. 1997) (landlord not entitled to recover rent judgment against tenant for PHA's unpaid housing assistance payments); *Marant Apartments, LLC v. Baez*, 779 N.W.2d 725 (Wis. Ct. App. 2009) (unpublished) (ruling that tenant was not liable for PHA's rent share for months during which the unit failed housing quality standards).

[271] *See 1212 Grand Concourse LLC* v. Ynguil, 894 N.Y.S.2d 713 (N.Y. Civ. Ct. 2010). The court in this case is also influenced by a consent decree that limited the landlord's right to terminate the lease, so the opinion must be read carefully for its application in other jurisdictions.

[272] *See e.g.*, *Stevenson v. Willis*, 579 F. Supp. 2d 913, at *11-12 (N.D. Ohio 2008) ("Plaintiff's participation in the § 8 Housing Choice Voucher Program, administered by LMHA, is a property interest protected by the requirement of procedural due process.")*; see also Baldwin v. Housing Authority of Camden*, 278 F. Supp.2d 365, 377-80 (D. N.J. 2003) (finding that *applicants* for voucher program have property interest).

[273] 24 C.F.R. § 982.552(b)(2) (2015).

[274] *Id.* at § 982.552 (c) (2).

evicted for a serious lease violation.[275]

An evicted family whose voucher assistance is not terminated is entitled to receive a voucher to locate another dwelling unit.[276] As previously noted, although a tenant may have been evicted, the PHA need not always terminate assistance.[277] In some case, the PHA may decide to continue assistance conditioned on the removal from the household of the household member responsible for the activity leading to the eviction.[278] Or, the PHA may condition continued assistance on completion of a supervised drug or alcohol rehabilitation program or other evidence of rehabilitation.[279] If the family includes a person with disabilities, the PHA decision is subject to consideration of a reasonable accommodation request.[280] Finally, the PHA's decision must be consistent with fair housing provisions of the law.[281]

In addition, in any number of circumstances, although the tenant may have been evicted, no basis may exist to terminate the voucher assistance.[282] For example, when the tenant has been evicted for holding over at the end of the lease term, such conduct should not be considered a

[275] The PHA must give the family notice and an opportunity for an administrative hearing; it may not simply terminate the tenant's participation following the eviction suit. *See* 24 C.F.R. § 982.555(a)(1)(v)(2015); *Colvin v. Housing Authority of City of Sarasota*, 71 F.3d 864 (11th Cir. 1996).

[276] 24 C.F.R. § 982.314(b)(2) (2015).

[277] *Id.* at § 982.552(c)(2).

[278] *Id.* at § 982.552(c)(2)(ii).

[279] *Id.* at § 982.552(c)(2)(iii).

[280] *Id.* at § 982.552(c)(2)(iv).

[281] *Id.* at § 982.552(c)(2)(v).

[282] *See id.* at § 982.551, § 982.552, § 982.553 (identifying permissible grounds for termination of Section 8 voucher assistance).

serious lease violation for which a PHA may terminate assistance.[283] Or, the landlord may have evicted for some other non-serious lease violation. Or, the family may have failed to answer an eviction lawsuit and the owner obtained a default judgment of eviction. In this case, the PHA should not be able to terminate assistance without proof at the termination hearing of the grounds supporting the eviction.[284] The eviction may have been without merit or the tenant may have had compelling defenses.[285] Because of the possible ramifications of an eviction on the tenant's voucher subsidy, the advocate must diligently discuss strategy choices with the tenant.

XII. Public Housing Evictions.

The actions of a PHA constitute government action within the meaning of the fourteenth amendment,[286] and the due process and equal protection clauses of the fourteenth amendment

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[283] *See id.* at § 982.551(e) ("The family may not commit any serious or repeated violation of the lease."); *Gray v. Allegheny County Hous. Auth.*, 8 A.3d 925 (Pa. Commw. Ct. 2010) (eviction may not constitute serious lease violation where landlord may have been partially responsible; remanding for further factual development of record); *see Eslin v. Housing Authority of the Town of Mansfield*, No. 3:11-cv-134, 2013 U.S. Dist. LEXIS 90108, at *19-23 (D. Conn. June 27, 2013). In this case, the court refuses to hold that as a matter of law the failure to vacate following termination of the lease is not a serious lease violation. The court concludes that "a genuine issue of material facts exists as to whether Eslin's failure to vacate constituted a 'serious violation' of her lease," thus precluding summary judgment for plaintiff. *Id.* at *22.

In *Wilhite v. Scott County Housing and Redevelopment Authority*, 759 N.W.2d 252, 255-57 (Minn. Ct. App. 2008), the court held that the plaintiff's failure to vacate the premises at the end of her lease term constituted a serious lease violation. The lease included a phrase requiring that the tenant "give immediate possession" to the landlord upon termination. Id. at 256.

[284] *Cf. Housing Authority of Grant County v. Newbigging, 19 P.3d 1081 (Wash. Ct. App. 2001)* (setting aside default judgment in public housing eviction, finding that tenant had compelling defense to eviction).

[285] *See id.*

[286] *See e.g.*, *Caulder v. Durham Housing Authority*, 433 F.2d 998, 1002 (4th Cir. 1970), *cert. denied*, 401 U.S. 1003 (1971); *Holmes v. New York City Housing Authority*, 398 F.2d 262, 264-65 (2d Cir. 1968).

apply to the action of the PHA.[287] Therefore, when a PHA acts arbitrarily, discriminates in its treatment of applicants or tenants, or deprives an applicant or tenant of a property right without notice or an opportunity for a hearing, potential due process and equal protections claims arise.[288]

A. Property Interest in Public Housing Apartment.

A tenant has a property interest in a public housing unit[289] and may not be evicted except for serious or repeated violations of material terms of the lease or for other good cause.[290] Congress has codified the good cause protection by legislation that provides that PHAs may evict only for (1) serious or repeated violation of the terms or conditions of the lease; (2) other good cause; (3) criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants; (4) drug-related criminal activity on or off the premises on the part of the tenant, any member of the tenant's household, or a guest, and any such activity engaged in on the premises by any other person under the tenant's control; (5) violation by the tenant of a condition of probation or

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[287] *See Caulder*, *supra* note 286, 433 F.2d at 1002; *Holmes*, *supra* note 286, 398 F.2d at 264-65.

[288] *See e.g., Bray v. McKeesport Housing Authority*, 114 A.3d 442, 455 (Pa. Commw. Ct. 2015) ("[a]pplicants for public housing have a legitimate expectation that their application will be fully considered and not unfairly denied" and, as such, "have a [cognizable] 'property interest,'" … in having their "application [is considered] in accordance with the guideline" in the Housing Act and regulations."); *Blatch v. Hernandez,* 360 F. Supp. 2d 595, 621-27 (S.D. N.Y. 2005) (finding due process violations in PHA's eviction procedures as applied to persons with mental disabilities);

[289] *Department of Housing and Urban Development v. Rucker*, 535 U.S. 125, 135 (2002) ("The Court of Appeals sought to bolster its discussion of constitutional doubt by pointing to the fact that respondents have a property interest in their leasehold interest, citing *Greene v. Lindsey*, 456 U.S. 444 (1982). This is undoubtedly true, and *Greene* held that an effort to deprive a tenant of such a right without proper notice violated the Due Process Clause of the Fourteenth Amendment.").

[290] *Caulder*, note 286, 433 F.2d at 1003-04; *Escalera v. New York City Housing Authority*, 425 F.2d 853, 861-64 (2d Cir.), *cert. denied*, 400 U.S. 853 (1970).

parole; (6) the tenant's action in fleeing to avoid prosecution or confinement after conviction for a felony;[291] or (7) alcohol abuse use that interferes with the health, safety, or the right to peaceful enjoyment of the premises by other tenants or illegal drug use.[292]

B. Notice of Lease Termination.

In order to evict, a PHA must first serve the tenant with a notice of lease termination.[293] A notice to vacate required by state or local law may be combined with or run concurrently with a notice of lease termination.[294] The notice of lease termination must (1) state the specific grounds for termination; (2) inform the tenant of her right to make such reply as she may wish; (3) inform the tenant of her right to examine PHA documents relevant to the eviction; and (4) inform the tenant of the tenant's right to request a hearing in accordance with the PHA's grievance procedure when the PHA is required to afford the tenant an opportunity for a grievance hearing.[295]

When the PHA is not required to give the tenant an opportunity for a grievance hearing on the eviction, the notice of lease termination must additionally (1) state that the tenant is not entitled to a grievance hearing; (2) specify the judicial eviction procedure the PHA will use for eviction; (3) state that HUD has determined that the eviction procedure provides the opportunity for a hearing in court that contains the basic elements of due process as defined in HUD regulations;

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[291] 42 U.S.C.A. § 1437d(l)(5), (6), (7), (9) (West 2012 & Supp. 2015).

[292] *Id.* at § 13662 (West 2013) (termination for alcohol abuse and illegal drug use).

[293] 42 U.S.C.A. § 1437d(l)(4) (West 2012) ; 24 C.F.R. § 966.4(l)(3) (2015); *New York City Housing Authority v. Harvell*, 731 N.Y.S.2d 919 (N.Y. App. Term. 2001).

[294] 24 C.F.R. § 966.4(l)(3)(iii) (2015).

[295] *Id.* at § 966.4(l)(3)(ii).

and (4) state whether the eviction is for criminal activity or drug-related criminal activity.[296]

The notice term depends upon the grounds for the eviction. In nonpayment of rent cases, the PHA must give fourteen days' notice of lease termination.[297] The PHA must give "a reasonable period of time considering the seriousness of the situation (but not to exceed 30 days)" (1) when the health or safety of other tenants, PHA employees, or persons residing in the immediate vicinity of the premises is threatened; (2) if any member of the household has engaged in any drug-related criminal activity or violent criminal activity; or (3) if any member of the household has been convicted of a felony.[298] In all other cases the PHA must give thirty days' notice of lease termination, except that if state or local law allows a shorter notice period, that period applies.[299]

If a PHA attempts to evict for nonpayment of utility charges or repair charges, thirty days' notice rather than fourteen days' notice would be required, since the basis for the eviction is not nonpayment of "rent" but nonpayment of other charges. In addition, the PHA must also comply with any notice periods set forth in the lease.

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[296] *Id.* at § 966.4(l)(3)(v).

[297] *Id.* at § 966.4(l)(3)(i)(A); *see also Community Development Authority of Madison v. Yoakum*, 481 N.W.2d 707 (Wis. Ct. App. 1992) (unpublished limited precedent op.) (PHA could not evict for late payment of rent based on fourteen day notice of termination claiming nonpayment of rent. Failure to pay rent and failure to pay rent on time are different things. Thirty days' notice of termination would have been required for late payment of rent.).

[298] 24 C.F.R. § 966.4(l)(3)(i)(B) (2015); *see Sumet I Associates, LP v. Irizarry,* 959 N.Y.S.2d 254 (N.Y. App. Div. 2013) (ruling that subsidized owner failed to show that graffiti markings had threatened the health, safety, or peaceful enjoyment of the premises by other residentsf); *Housing Authority of Jersey City v. Myers,* 685 A.2d 532 (N.J. Super. Ct. Law Div. 1996) (holding that 30-day notice of lease termination required when basis of eviction was arrest for possession of drug paraphernalia because PHA had not shown that the conduct constituted threat to health and safety of other tenants);

[299] 24 C.F.R. § 966.4(l)(3)(i)(c) (2015).

The PHA must strictly comply with the notice requirements. PHAs frequently fail to detail the specific factual grounds for termination but simply state conclusory grounds such as "disturbance of neighbors" or "creation or maintenance of threat to health or safety of other tenants or PHA employees." Such notices are insufficient, because they are conclusory.[300] Similarly, notices that do not comply with the other requirements of the regulations are defective, and the PHA may not prevail in the eviction.[301]

C. State Law Opportunity to Cure.

If state law provides an opportunity to cure a lease violation prior to eviction, the PHA must give the tenant such an opportunity to prior to filing an eviction suit.[302] PHAs will argue that a state law right to cure may not apply to evictions for drug related and violent criminal activity, since Congress has preempted such laws with the enactment of the statutes imposing strict liability on tenants for such conduct.[303] But, an appellate court in Kentucky held that a state law right to remedy a breach for alleged drug activity is not preempted by federal law when the lease

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[300] *Escalera v. New York City Housing Authority*, *supra* note 290, 425 F.2d at 862.

[301] *See, e.g., Housing Authority of Newark v. Raindrop*, 670 A.2d 1087 (N.J. Super. Ct. App. Div. 1996); *see also Corpus Christi Hous. Auth. v. Lara,* No. 13-07-00277-CV, 2008 Tex. App. LEXIS 5290, at *9-13 (Tex. App. – Corpus Christi July 17, 2008, no pet.).

[302] *See Housing Authority of City of Everett v. Terry*, 789 P.2d 745 (Wash. 1990) (en banc) (holding that public housing eviction and grievance regulations do not preempt state law cure provisions).

[303] *See*, *e.g.*, *Scarborough v. Winn Residential L.L.P./Atlantic Terrace Apartments*, 890 A.2d 249 (D.C. 2006); *Hous. Auth. Of City of Norwalk v. Brown*, 19 A.3d 252 (Conn. App. Ct. 2011)*; but see Pratt v. District of Columbia Hous. Auth.*, 942 A.2d 656 (D.C. 2008) (holding that where eviction is sought based only on a lease provision that does not incorporate the statutory prohibition against criminal activity, the District of Columbia statute allowing tenants an opportunity to cure a lease violation is not preempted).

incorporated the statute.[304] In that case, the PHA filed an eviction suit after it found crack cocaine in a room in the tenant's apartment where her nephew, who visited every other weekend, kept his belongings.[305] The court concluded that state law provided the right to cure such a breach, and the tenant had remedied the breach by prohibiting her nephew from returning to her apartment.[306]

If state law does not provide an opportunity to cure, the tenant should treat the period given in the notice of lease termination as a cure period and cure the lease violation.[307] Tenant omissions are capable of being cured – for example, the tenant pays the rent or the tenant signs the recertification paperwork. If state law also allows for cure of non-rent violations or is ambiguous, the tenant should attempt to cure those violations by taking whatever steps can be taken to remedy the violation. That will set up the tenant's cure defense in court.

D. Right to Administrative Grievance Hearing.

Tenants threatened with eviction have a right to avail themselves of the PHA grievance procedure, except in certain circumstances.[308] The grievance procedure regulations create a right

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[304] *See Housing Authority of Covington v. Turner*, 295 S.W.3d 123 (Ky. Ct. App. 2009).

[305] *Id.* at 124.

[306] *Id.* at 128.

[307] *See Caro v. Housing Authority of the City of Austin*, 794 S.W.2d 901, 905-06 (Tex. App. – Austin 1990, writ denied) (indicating that the fourteen day notice of lease termination period may be a cure period but finding that federal law preempted any cure opportunity).

[308] 42 U.S.C.A. § 1437d(k) (West 2012); 24 C.F.R. § 966.51 (2015). Tenants will sometime settle a pending eviction with an agreement that the tenant will waive the right to a grievance hearing in the future on an eviction arising out of similar facts. Such agreements should be entered into with caution, because the courts are likely to enforce them when the tenant was represented by counsel. *See Whitfield v. Public Housing Agency of St. Paul*, No. 03-6096, 2004 U.S. Dist. LEXIS 24714 (D. Minn. Dec. 7, 2004).

that may be enforced under 42 U.S.C. § 1983.[309] If a PHA refuses to grant the tenant a hearing on a proposed eviction subject to the grievance procedure, the tenant may either seek dismissal of the eviction[310] or sue affirmatively to enforce the right to a grievance hearing.[311]

PHAs generally specify in their termination notices that the tenant must request the grievance hearing within a specified time period or the tenant loses the right to the hearing. Tenants may have defenses to the eviction when the PHA refuses to grant a hearing on the ground the request was untimely.[312]

1. Exclusions From Grievance Procedure.

A PHA may exclude from the grievance procedure any grievance on an eviction based upon any criminal activity that threatens the health, safety or right to peaceful enjoyment of the premises of other tenants or employees of the PHA; any violent or drug-related criminal activity on or off the PHA premises; or any criminal activity that resulted in felony conviction of a household member.[313] Thus, an eviction premised on nonpayment of rent or other charges, tenant

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[309] *Samuels v. District of Columbia*, 770 F.2d 184 (D.C. Cir. 1985).

[310] *See Housing Authority of Salt Lake v. Snyder*, 44 P.3d 724 (Utah 2002).

[311] *See Conway v. Housing Authority of City of Asheville*, 239 F. Supp. 2d 593, 597-99 (W.D. N. C. 2002).

[312] *See, e.g.*, *Housing Authority of Danville v. Love*, 874 N.E.2d 893 (Ill. App. Ct. 2007). Here the PHA served the tenant with a thirty day notice of termination for failing to keep the apartment clean and free of trash. The termination notice gave the tenant ten working days to request a grievance hearing. The tenant requested a grievance hearing after the ten day period had expired but within the thirty day termination period. The court reviewed 42 U.S.C. § 1437d (k)(2) and (*l*)(4) and read those provisions as entitling the tenant to a hearing if the tenant requests the hearing within the thirty day period. This case can be used in any eviction in which the tenant is served with a thirty day notice of termination, requests a grievance hearing after the deadline given in the notice but within the thirty day period, and the PHA denies the request as untimely.

[313] 24 C.F.R. § 966.51 (a)(2)(i) (2015); *see Housing Authority of City of New Haven v.*

misconduct that is not criminal or drug-related, or tenant omissions is subject to the grievance procedure.[314] Moreover, if the PHA has not incorporated by reference in the tenant's lease the information about the grievance procedure and exemptions, the PHA must then give the tenant an opportunity for a grievance hearing in all cases.[315] In addition, if the lease gives the tenant a right to a grievance hearing in more circumstances than required under the regulations, the tenant may enforce that contractual right to a grievance hearing.[316]

2. Grievances and Nonpayment of Rent Evictions.

In any grievance over the amount of rent which the PHA claims is due, the tenant must pay to the PHA the amount of rent the PHA states is due and payable as of the first of the month preceding the month in which the family's act or failure to act took place.[317] Thereafter, so long as the grievance is pending, the tenant is required to deposit the same amount of monthly rent in escrow.[318]

A tenant who complains of a rent redetermination must deposit the amount in dispute in escrow in order to be entitled to a grievance hearing.[319] The escrow deposit is not required,

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Deroche, 962 A.2d 910-11 (Conn. App. Ct. 2009) (holding that tenant who was intoxicated and started a fire was not entitled to grievance hearing, because such conduct constituted criminal activity).

[314] *See, e.g., Conway supra* note 311, 239 F. Supp. 2d 593 (W.D. N. C. 2002).

[315] 24 C.F.R. § 966.52(b) (2015); *Housing Authority of Salt Lake supra* note 310, 44 P.3d 724 (Utah 2002).

[316] *Housing Authority of Jersey City v. Jackson*, 749 F. Supp. 622, 634 (D. N.J. 1990).

[317] 24 C.F.R. § 966.55(e) (2015).

[318] *Id.* at. § 966.55(e)(1).

[319] *See Head v. Jellico Housing Authority*, 870 F.2d 1117, 1122-23 (6th Cir. 1989) (holding

however, before the informal meeting required under the grievance procedure regulations; it is due prior to the formal hearing.[320] Moreover, a PHA must waive the escrow requirement where required by the hardship exemption from the minimum rent requirement or the regulations on the effect of welfare reduction in calculation of family income.[321] The escrow requirement poses a problem for the tenant in those cases on nonpayment of rent after a decrease in income. In such a case, a tenant who has failed to pay the rent because of a decrease in income obviously will not be able to pay into escrow the amount the PHA claims is due. The best procedure in such a case is to pay the monthly rent the tenant claims is correct into escrow and argue with the PHA that to require more would violate due process and the intent of the regulations.

3. Grievance Hearing Procedural Rights.

The tenant has a right to copy all relevant PHA documents before the formal grievance hearing.[322] The tenant also has a right to representation by an advocate and has a right to a private hearing, unless a public hearing is requested.[323] The private hearing right can be extremely important in small communities where PHA Board members might be interested in attending the hearing as a way of influencing the hearing official. The tenant has the right to confront and cross examine adverse witnesses, but, interestingly, the PHA does not have the same right under the

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that a tenant who complains of a rent redetermination must make an escrow deposit to receive a grievance hearing).

[320] *Conway*, *supra* note 311, 239 F. Supp.2d 593, 599-600 (W.D. N.C. 2002).

[321] 24 C.F.R. § 966.55(e)(2) (2015).

[322] 42 U.S.C.A. § 1437d (k) (3); § 1437d (l)(7) (West 2012 & Supp. 2015); 24 C.F.R. § 966.4(m), § 966.56(b) (2015).

[323] 24 C.F.R. § 966.56(b)(2), (3) (2015).

regulations.[324] Thus, a tenant may rely on written statements, but a PHA may not. The tenant has the burden of first showing an entitlement to the relief sought; the PHA must then sustain the burden of justifying the PHA action.[325] The tenant may at his expense arrange for a hearing transcript.[326] The PHA must provide reasonable accommodations for person with disabilities to participate in the hearing.[327]

The panel or hearing officer must prepare a written decision and give the tenant a copy.[328] The panel or hearing officer may order all necessary remedies, including equitable relief and money damages.[329] The decision is binding on the PHA, unless the PHA Board determines that (1) the grievance does not concern PHA action or failure to act in accordance with the tenant's lease and PHA regulations which adversely affect the tenant's rights, or (2) the decision of the hearing officer or panel is contrary to applicable law or regulations.[330] A PHA may not, however, nullify a hearing officer's decision simply because the PHA determines that it is not practicable or

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[324] *Id.* at § 966.56(b)(4).

[325] *Id.* at § 966.56(e).

[326] *Id.* at § 966.56(g).

[327] *Id.* at § 966.56(h); *Blatch v. Hernandez*, 360 F. Supp. 2d 595, 621-27 (S.D. N.Y. 2005) (finding due process violations in PHA's eviction procedures as applied to persons with mental disabilities); *see also Padilla v. Martinez*, 752 N.Y.S.2d 28 (N.Y. App. Div. 2002) (when it is clear tenant has a mental disability that renders her incapable of representing herself adequately at grievance hearing, the hearing violates due process).

[328] 24 C.F.R. § 966.57 (2015).

[329] *Samuels v. District of Columbia,* 650 S. Supp. 482 (D.D.C. 1986).

[330] 24 C.F.R. § 966.57(b) (2015).

economical to implement.[331] A tenant who is unsuccessful in the grievance process is entitled to a de novo hearing in state court.[332]

E. Evictions for Serious Lease Violations or Other Good Cause.

HUD has implemented the statutory grounds given by Congress as grounds for eviction.[333] HUD gives as examples of serious or repeated violations of material terms of the lease (1) failure to make payments due under the lease and (2) failure of the tenant to fulfill household obligations described at 24 C.F.R. 966.5(f).[334] HUD has also added as an additional ground for lease termination having income in excess of the income limit for public housing.[335] HUD has defined *other good cause* as including (1) criminal activity or alcohol abuse, (2) discovery after admission of facts that made the tenant ineligible; (3) discovery of material false statements or fraud by the tenant in connection with an application or reexamination of income; (4) failure of a family member to comply with the community service requirements of 24 C.F.R. 960.600 - 960.609, but only as grounds for non-renewal at the end of a one year lease term; and (5) failure of the tenant to accept a revision to the lease duly adopted by the PHA.[336]

When tenants accidentally damage the premises, PHAs often file an eviction claiming the

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[331] *Samuels v. District of Columbia*, 669 F. Supp. 1133, 1143-44 (D.D.C. 1987).

[332] 24 C.F.R. §966.57(c) (2015).

[333] *See* 24 C.F.R. § 966.4(f)(12); (l), (2), (5) (2015).

[334] *Id.* at § 966.4(l)(2)(i) .

[335] *See* 69 Fed. Reg. 68791 (Nov. 26, 2004) (codified in the 2015 C.F.R. at 24 C.F.R. § 966.4(l)(2)(ii)). But a PHA may not evict a family for being over the income limit if the family currently receives the earned income disregard. 24 C.F.R. § 960.261(b) (2015).

[336] 24 C.F.R. § 966.4(l)(2)(iii) (2015).

tenant committed a serious lease violation. One possible argument is that the damages were the result of an accident and not tenant negligence or intentional behavior.[337] In the *House* case the trial court refused to evict the tenant for a fire in her apartment, finding it was the result of an accident rather than negligence on the part of the tenant. The appellate court upheld the judgment for the tenant, holding that the evidence supported the trial court's conclusion that the tenant had not negligently caused the fire and thus had not committed a serious lease violation.[338]

In some cases, a tenant may face eviction for threatening behavior toward PHA staff. In the *Rock v. Rhea*[339] case, the New York City Housing Authority filed an eviction lawsuit against a tenant who yelled and cursed at a NYCHA employee when the employee told her that the documentation she provided in support of a reduction in her income was insufficient.[340] The employee attempted to dial 911 but the tenant grabbed the telephone and threw it towards her.[341] Several PHA employees then removed the tenant from the premises, but she made a threatening remark as she left.[342] The appellate court concluded that the eviction shocked the conscience because the behavior was isolated and specifically related to stressful circumstances for the tenant who had lost part of her income and was having difficulty in receiving assurances that her rent

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[337] *See Houston Hous. Auth. v. House*, No. 14-10-00574-CV, 2011 Tex. App. LEXIS 6569 (Tex. App. – Houston [14th. Dist.] Aug. 18, 2011, no pet. h.) (mem. op.).

[338] *Id.* at *14.

[339] 114 A.D.3d 578 (N.Y. App. Div. 2014).

[340] *Id.* at 54-55.

[341] *Id.* at 55.

[342] *Id.*

would be adjusted.[343] The court also noted that the tenant was a single mother of two young children, one of whom had a developmental disability and had needed medical attention since her birth and that the tenant had been a victim of domestic violent.[344] The court remanded the case for imposition of a lesser penalty.[345]

F. Eviction for Discovery of Facts After Admission.

The right to evict a family for discovery of facts after admission that made the tenant ineligible is troubling. If the family provides truthful information during the application process, the PHA should not be able to evict the family if it later discovers information that makes the family ineligible.[346] Courts are likely to be sympathetic to equitable arguments in evictions based on information that the tenant truthfully provided during the application process.[347] But, if an applicant misrepresents his criminal history upon application, courts may are likely to uphold a subsequent eviction based on the criminal history that occurred prior to admission.[348]

G. Eviction of Sex Offenders with Lifetime Registration Requirement.

Convicted sex offender cases are in a category of their own and can be distinguished from

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[343] *Id.* at 57.

[344] *Id*. at 58.

[345] *Id.*

[346] *See Bennington Housing Authority v. Bush*, 933 A.2d 207 (Vt. 2007) (holding that PHA had failed to prove that tenant had knowingly failed to reveal during the application process prior convictions for burglary and sale of controlled substance; reversing trial court judgment of eviction).

[347] *See id.*

[348] *See, e.g. Ross v. Broadway Towers, Inc.*, 228 S.W.3d 113, 121 (Tenn. Ct. App. 2006), *cert denied*, 128 S. Ct. 543 (2007).

other cases in which information is discovered, because Congress has specifically prohibited sex offenders with a lifetime registration requirement from receiving federal housing assistance.[349] The ban applies only to sex offenders with lifetime registration requirements.[350] With respect to existing tenants, HUD has encouraged owners and PHAs to institute eviction proceedings if they discover for any admission after June 25, 2001 (the effective date of the regulations on screening for criminal activity) at the annual recertification that a tenant or household member has failed to disclose their sex offender registration status.[351] At least one court has held that a PHA may not evict a public housing tenant solely because of status as a lifetime registered sex offender.[352] At least one court has upheld the eviction of a convicted sex offender who was convicted before moving into public housing.[353] In a more recent case, the Ninth Circuit affirmed a district court ruling denying a preliminary injunction to a convicted sex offender who had sought to enjoin the

[349] 42 U.S.C. A. § 13663 (West 2013).

[350] *See id.*

[351] *See* HUD Notices PIH 2012-28, H 2012-11 (June 11, 2012); HUD Notice H-2009-11, PIH-2009-35(HA), *State Lifetime Sex Offender Registration* (issued Sept. 9, 2009) (encouraging subsidized landlords and PHAs to screen for and evict registered sex offenders who were admitted after June 25, 2001); *see also*, HUD Notice H-2002-22, *Screening and Eviction for Drug Abuse and Other Criminal Activity – Final Rule* (October 29, 2002) ("Households already living in Federally-assisted housing units are not subject to the provisions in the regulations at 24 C.F.R. 5.856.") (notice applies only to project-based section 8); National Housing Law Project, *HUD Shifts Approach to Lifetime Registered Sex Offenders*, 39 Housing Law Bulletin 257 (Oct. 2009); National Housing Law Project, *HUD Heightens Efforts to Restrict Sex Offenders' Access to Subsidized Housing*, 42 Housing Law Bulletin 191 (Sept. 2012).

[352] *See Housing Authority of the City of Hartford v. Kenyatta*, No. HDSP-165671, 2013 WL 3766903 (Conn. Super. Ct. June 21, 2013) (citing voucher termination cases in support of its conclusion that an existing public housing tenant may not be evicted).

[353] *See Archdiocesan Housing Authority v. Demmings*, No. 46157-5-I, 2001 Wash. App. LEXIS 2276 (Wash. Ct. App. Oct. 15, 2001) (upholding eviction of convicted sex offender who had been convicted before moving into public housing unit.).

PHA from evicting him.[354] The court held that, given federal law, the tenant was unlikely to succeed on the merits of his case.[355] In the subsequent opinion on summary judgment the district court ruled in favor of the PHA, holding that it had a legitimate basis to terminate the tenant's lease based on his sex offender registrant status.[356]

If the person is not subject to a lifetime registration requirement, the ban does not apply. And, if the tenant was admitted prior to June 25, 2001, the person should not be subject to eviction on the basis of a lifetime registration requirement imposed prior to June 25, 2001.

H. Nonpayment Evictions.

1. Substantive Defenses.

A public housing tenant may have many defenses in a nonpayment of rent case that a tenant living in privately owned housing does not have, because tenants have a legitimate claim that their rent not exceed the amount established by Congress.[357]

One, the PHA may have incorrectly calculated the tenant's rent and may be overcharging the tenant. For example, the PHA may have overestimated anticipated income; failed to give the tenant all deductions to which the tenant is entitled under the law; or based the calculation on

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[354] *See Zimbelman v. Southern Nevada Regional Housing Authority*, 583 Fed. Appx. 704 (9th Cir. 2014).

[355] *Id.*

[356] *Zimbelman v. Southern Nevada Regional Housing Authority,* No. 2:13-cv-02143-APG-VCF, 2015 WL 3484750 (D. Nev. June 20, 2015).

[357] *See McGee v. Housing Authority of the City of Lanett*, 543 F. Supp. 607, 608 (M.D. Ala. 1982) (public housing tenants have a legitimate claim that they should receive the benefits of low-cost housing at the rental rate prescribed by Congress.)

erroneous information from the tenant's employer.[358]

Two, the PHA may have included income not actually received by the family.[359] For example, frequently PHAs include child support the family is not actually receiving. If the tenant is being overcharged, the tenant has a defense.

Three, the tenant may have suffered a loss of earned income, disability benefits, child support, or other income and be entitled to a rent reduction. PHAs are required to reduce a family's rent when the family suffers an income loss.[360]

Four, the PHA may have failed to reduce the tenant's rent following a reduction in the tenant's welfare grant.[361] The rent reduction should be retroactive to the month following the loss of income.[362]

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[358] *See 42* U.S.C.A. § 1437a(b)(5) (West 2012) ("adjusted income"); *24* C.F.R. § 5.609 (2015) (defining annual income); § 5.611 (defining deductions to annual income).

[359] *See* 42 U.S.C.A. § 1437a(b)(4) (West 2012) ("any amounts not actually received by the family ... may not be considered as income. .."). One court has held that when child support payments are automatically deducted from social security benefits, the PHA must use the gross amount of the social security payment prior to the deduction in calculating rent, because the term "received" includes constructive receipt of benefits. *See Cincinnati Metropolitan Housing Authority v. Edwards,* 881 N.E.2d 325 (Ohio Ct. App. 2007).

[360] 24 C.F.R. § 960.257(b) (2015); *see Maxton Housing Authority v. McLean*, 328 S.E.2d 290 (N.C. 1985); *Housing Authority of St. Louis County v. Boone*, 747 S.W.2d 311, 314-16 (Mo. Ct. App. 1988) (holding that a remaining spouse is liable for future rent calculated upon the household's new income level).

[361] 24 C.F.R. § 5.615 (2015). The PHA is required to reduce the tenant's rent because of a reduction in the welfare grant unless the welfare grant has been reduced because of welfare fraud or because of noncompliance with economic self-sufficiency requirements. *Id.*

[362] United States Department of Housing and Urban Development, *Public Housing Occupancy Guidebook*, chp. 13, at ¶ 13.3 (June 2003) ("Rent decreases usually go into effect the first of the month following the reported change.").

Five, the PHA may have illegally assessed the tenant for repair charges[363] that the PHA should pay or may have failed to provide an adequate utility allowance.[364]

Six, the PHA may have included maintenance charges as part of the rent payment, demanded payment of all or none, and then sued claiming nonpayment of rent.[365]

Seven, the PHA may be charging a late fee in excess of any maximum established by state law. For example in *Housing and Redevelopment Authority of Duluth, v. Lee,*[366] state law limited late fees to eight percent of the overdue rent. The tenant's tenant rent was $50, and the lease provided for a late fee of $25 per month. The tenant challenged the eviction on the ground that the

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[363] The PHA is required to pay for all repairs resulting from normal wear and use. 24 C.F.R. § 966.4(e)(3), (f)(10) (2015). A PHA may not assess a tenant for damages to the apartment unit without first finding fault on the part of the tenant, providing notice of the grounds for assessment, and notice of an opportunity to challenge the assessments. *Id.* at § 966.4(b)(4); *Chavez v. Santa Fe Housing Authority*, 606 F.2d 282 (10th Cir. 1979); *see also See Houston Hous. Auth. v. House*, No. 14-10-00574-CV, 2011 Tex. App. LEXIS 6569 (Tex. App. – Houston [14th. Dist.] Aug. 18, 2011, no pet. h.) (mem. op.) (refusing to evict tenant for accidental fire).

[364] The PHA must provide a utility allowance sufficient to approximate a reasonable consumption of utilities by an energy-conservative household of modest circumstances consistent with the requirements of a safe, sanitary, and healthful living environment. *Id.* at § 965.505(a). A tenant may also have a claim against a PHA under the lease for utility overcharges. *Nelson v. Greater Gadsden Housing Authority*, 802 F.2d 405, 408-09 (11th Cir. 1986). *See also Amone v. Aeiro*, 226 F.R.D. 677 (D. Hawaii 2005) (certifying class of disabled public housing tenants whose special needs require excess consumption of utilities in lawsuit challenging PHA's refusal to increase the allowance as a reasonable accommodation under Section 504).

[365] *See Lorain Metropolitan Housing Authority v. Noel*, No. 06CA009006, 2007 Ohio App. LEXIS 2640 (Ohio Ct. App. 2007) (finding PHA could not evict for nonpayment of rent when PHA had demanded full payment of rent and maintenance charges). If the PHA seeks to evict for late payment, it should give thirty days' notice of lease termination, not fourteen days. *See Community Development Authority of Madison v. Yoakum*, 481 N.W.2d 707 (Wis. Ct. App. 1992) (unpublished limited precedent op.) (PHA could not evict for late payment of rent based on fourteen day notice of termination claiming nonpayment of rent. Failure to pay rent and failure to pay rent on time are different things. Thirty days' notice of termination would have been required for late payment of rent.).

[366] 852 N.W.2d 683 (Minn. 2014).

late fee exceeded the maximum allowed under state law. The PHA argued that federal law allowing PHAs to impose late fees as long as they are not unreasonable preempted the eight percent limitation. The Minnesota Supreme Court disagreed, holding that the eight percent limitation was not preempted by federal law.

In a 2013 case, the plaintiff challenged a PHA lease provision that provided that any payment by the tenant not specifically designated as a payment for rent may be applied by the PHA first to outstanding maintenance charge, late fee, or legal fees.[367] The court held, first, that the lease provision was unlawful in violation of the Brooke Amendment, because it effectively expanded the definition of rent.[368] It also held that it was an unreasonable lease provision that violated 42 U.S. C. § 1437(d)(l)(2).[369]

Tenants may also have defenses to nonpayment based on (1) the PHA's failure to give the tenant the earned income disregard;[370] (2) the PHA's failure to offer the tenant the choice between the flat rent and an income-based rent, resulting in the payment by the tenant of higher rent than the tenant would have paid with a flat rent;[371] (3) the PHA's failure to offer the family the opportunity

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[367] *See Sager v. Housing Commission of Anne Arundel County,* 957 F.Supp.2d 627 (D. Md. 2013); *see also Sager v. Housing Commission of Anne Arundel County,* 855 F. Supp.2d 524 (D. Md. 2012) (earlier ruling by the court on PHA's motion to dismiss).

[368] *Sager v. Housing Commission of Anne Arundel County*, 957 F. Supp. 2d at 637-38.

[369] *Id.* at 638-40.

[370] 42 U.S.C.A. § 1437a(d) (West 2012); 24 C.F.R. § 960.255 (2015). The earned income disregard is also applicable to families with a member who is a person with disabilities in the Housing Choice Voucher Program, HOME Investment Partnerships Program, Housing Opportunities for Persons with AIDS, and Supportive Housing Program. *See* 24 C.F.R. § 5.617 (2015).

[371] 42 U.S.C.A. § 1437a (a)(2) (West 2012 & Supp. 2015); 24 C.F.R. § 960.253 (2015).

to switch from a flat rent to an income-based rent because of a financial hardship;[372] and (4) the PHA's failure to give a minimum rent tenant a hardship exemption from payment of the minimum rent.[373] Because the flat rent, earned income disregard, and hardship exemption from the minimum rent, and hardship exemption from the flat rent are all relatively new statutory protections enacted as part of the Housing Quality and Work Responsibility Act of 1998,[374] reported case law appears to be non-existent.

2. Hardship Exemption from Minimum Rent.[375]

The PHA must affirmatively notify a family of the hardship exemption from the minimum rent requirement.[376] Its failure to do so should be an affirmative defense to an eviction for nonpayment of the minimum rent. This is a fertile area for imaginative and assertive advocacy to ensure PHA compliance with federal law.

In the first reported decision by a federal court on the hardship exemption, the court in *Chastain v. Northwest Georgia Housing Authority,*[377] held that the hardship exemption from the

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[372] 42 U.S.C.A. § 1437a(a)(2)(C) (West 2012); 24 C.F.R. § 960.253(f) (2015). See discussion on the minimum rent and hardship exemptions at section II-F of this outline. Unlike subsidized owners who must set the minimum rent at $25, PHAs may set the minimum rent at any amount between $0 and $50. *See* 24 C.F.R. § 5.630(a)(2) (2015).

[373] 42 U.S.C.A. § 1437a(a)(3)(B) (West 2012); 24 C.F.R. § 5.630(b) (2015). *See* discussion on hardship exemption from minimum rent in section II-F of this outline.

[374] Pub. L. No. 105-276, 112 Stat. 2461 (October 21, 1998) (flat rent, earned income disregard, and hardship exemption provisions codified in 42 U.S.C. § 1437a)

[375] See discussion at section II-F in this article.

[376] United States Department of Housing and Urban Development, *Public Housing Occupancy Guidebook,* chp. 13, at ¶ 13.1 (June 2003).

[377] *See Chastain v. Northwest Georgia Housing Authority*, No. 4:11-CV-0088-HLM, 2011 U.S. Dist. LEXIS 135712 (N.D. Ga. April 28, 2011) (holding that tenant may bring § 1983 action

minimum rent may be enforced by tenants in an action under 42 U.S.C. § 1983.[378] The plaintiff filed suit after a PHA grievance panel upheld the denial of a hardship exemption even though the plaintiff was unable to work, survived on $200 per month in food stamps, and had a pending application for SSDI benefits.[379] The court granted a preliminary injunction ordering the PHA to grant the plaintiff a hardship exemption retroactive to the month the plaintiff first submitted a written request for a hardship exemption.[380]

3. Evictions for Repeated Late Payments.

Some PHAs provide in their leases that the tenant may be evicted if the tenant pays rent late three or more times during a twelve-month period. At least one court upheld such a provision, ruling that three late payments during a twelve-month period can constitute a serious or repeated violation of material terms of the lease.[381] In such a case, advocates should have the tenant testify on the reasons for the late payment. Even when the tenant's rent has been correctly calculated, family emergencies or other unexpected high expenses may have contributed to the late payment, and the court can apply equity to avoid the forfeiture. [382]

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to enforce hardship exemption from minimum rent and granting preliminary injunction ordering PHA to give plaintiff hardship exemption).

[378] *Id.* at *26

[379] *See id.* at *11-13.

[380] *See id.* at *38.

[381] *See Delaware State Hous. Auth./Clark's Corner v. Justice of the Peace Court 16,* No. 07A-11-004-WLW, 2008 Del. Super. LEXIS 300, at *17-18 (Del. Super. Ct. August 8, 2008).

[382] *Cf. Bella Vista Apartments v. Herzner*, 796 N.E.2d 593 (Ohio Ct. Common Pleas 2003) (applying equity and refusing to evict tenant who moved in his wife and three children without getting approval from the subsidized landlord).

4. Enterprise Income Verification (EIV) System.

Effective January 31, 2010, HUD began requiring PHAs to use its EIV System.[383] This is the program under which HUD reports to PHAs all income from all sources reported on all members of a subsidized household.[384] HUD has published a separate notice for the public housing program – Notice PIH 2010-19 (HA).[385] HUD extended Notice PIH-2010-19 on June 1, 2013, until August 31, 2013,[386] and it issued another extension notice on August 30, 2013, further extending Notice PIH-2010-19 until September 1, 2014.[387] It issued another extension on January 9, 2015, that is effective until amended, superseded, or rescinded.[388] PHAs must promptly notify tenants of any adverse findings made on the basis of information they obtain through the EIV system and independently verify.[389] The tenant has the right to contest the findings and use the PHA grievance procedure to contest the findings.[390]

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[383] *See* 24 C.F.R. § 5.233 (2015).

[384] *See id.* at § 5.234.

[385] *See* United States Department of Housing and Urban Development, *Administrative Guidance for Effective and Mandated Use of the Enterprise Income Verification (EIV) System*, Notice PIH 2010 - 19 (HA), issued May 17, 2010, extended by Notice PIH 2011-25 (HA) (expires on May 31, 2012).

[386] *See* Notice PIH 2013-13 (HA) (June 1, 2013) (providing for a three month extension of Notice PIH-2010-19(HA) and stating that "further streamlined guidance will be forthcoming in the near future.").

[387] *See* Notice PIH 2013-23 (HA) (August 30, 2013).

[388] *See* Notice PIH 2015-02 (HA) (Jan. 9, 2015) ("This notice remains in effect until amended, superseded, or rescinded.")

[389] 24 C.F.R. § 5.236(c) (2015).

[390] *See id.*

Notice PIH 2010-19(HA) provides that tenants must reimburse PHAs when charged less rent than required by HUD's rent formula because of tenant failure to report income.[391] It further provides that if the tenant refuses to enter into a repayment agreement or fails to make payments, the PHA must terminate the tenancy.[392] But it does not mandate eviction when the tenant knowingly failed to report income.[393] With respect to repayment agreements, it provides that the monthly retroactive payment plus the amount of rent the tenant pays "should be affordable and not exceed 40 percent of the family's monthly adjusted income."[394] When a PHA establishes a repayment agreement in violation of the requirements of Notice H 2011-21 and files an eviction suit for default, the tenant should assert the PHA's noncompliance with the Notice as a defense to the eviction suit.

5. Chapter 13 Bankruptcy.

Finally, filing Chapter 13 bankruptcy may be proper to stop an eviction.[395] See discussion

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[391] Notice PIH 2010-19 (HA), at ¶ 16 (on p. 14).

[392] *Id.*

[393] *See id.*

[394] *Id.* (on p. 15).

[395] *See e.g., Stoltz v. Brattleboro Housing Authority (In re Stoltz)*, 315 F.3d 80 (2d Cir. 2002); *Brattleboro Housing Authority v. Stoltz (In re Stoltz)*, 197 F.3d 625 (2d. Cir. 1999; *Biggs v. Hous. Auth. of City of Pittsburgh*, *supra* note 85; *In re: Kelly*, 356 B.R. 899 (Bankr. S.D. Fla. 2006) (holding that a public housing tenant is entitled to remain in her apartment under § 525(a) even if she discharges, rather than cures, her prepetition rent default); *but see Housing Authority of New Orleans v. Eason*, 12 So.3d 970 (La. 2009) (holding that 11 U.S.C. §525(a) does not preclude eviction of tenant for breach of lease when tenant discharges pre-petition rent under Chapter 7 of the Bankruptcy Code). Use of Chapter 13 bankruptcy as a tool to defend evictions is a topic onto itself and beyond the scope of this article. The bankruptcy act effective October 17, 2005, provides that an eviction against a debtor involving residential property is not stayed if the landlord has obtained a final judgment for possession prior to the filing of the bankruptcy petition. See 11 U.S.C.A. § 362(b)(22) (West Supp. 2015). But, the stay should apply if the judgment is on

in this article at section II-G.

I. Evictions Premised on Criminal Activity or Drug-Related Criminal Activity.

See discussion *infra* at section XIII in this article. In addition, defending such evictions is discussed in detail in an article in the May-June 2007 Clearinghouse Review titled *Wait A Minute: Slowing Down Criminal-Activity Eviction Cases to Find the Truth.*[396]

XIII. Evictions Premised on Criminal Activity or Drug Related Criminal Activity of Household Members, Guests, or Other Persons Under Tenant's Control – Federally Subsidized Housing, Section 8 Housing Choice Voucher Program, and Public Housing.

A. Introduction.

This section of the article applies to evictions from federally subsidized housing, public housing, and the Section 8 Housing Choice Voucher Program. There is much to discuss, but this is only a very brief overview. In addition to a detailed discussion on defending such evictions in the National Housing Law Project Greenbook referenced at the very beginning of this article, an article in the May-June 2007 Clearinghouse Review titled *Wait A Minute: Slowing Down Criminal-Activity Eviction Cases to Find the Truth*[397] discusses the defense of such evictions in detail.

B. Public Housing.

Congress has mandated that PHAs use leases that provide for termination of tenancy for

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appeal. *See id.* The eviction judgment may also be stayed in certain limited circumstances set forth in the statute. *Id.* at § 362(*l*)(2).

[396] Lawrence R. McDonough & Mac McCreight, *Wait a Minute: Slowing Down Criminal-Activity Eviction Cases to Find the Truth*, 41 CLEARINGHOUSE REVIEW JOURNAL OF POVERTY LAW AND POLICY 55 (May-June 2007).

[397] *Id.*

criminal activity that threatens health, safety or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity [398] **on or off** such premises, engaged in by the tenant, any member of the tenant's household, or any guest or other person under the tenant's control.[399] HUD has interpreted the statute to require that PHAs use lease provisions that assure (1) that no tenant, member of the tenant's household, or guest engages in any criminal activity that threatens the health, safety or right to peaceful enjoyment of the premises by other residents; (2) that no tenant, member of the tenant's household, or guest engages in any drug-related criminal activity on or off the premises; (3) that no other person under the tenant's control engages in any criminal activity that threatens the health, safety or right to peaceful enjoyment of the premises by other residents; and (4) that no other person under the tenant's control engages in any drug-related

[398] Under the Fair Housing Act drug addiction is a disability. *See* 24 C.F.R. § 100.201 (2015) (definition of *physical or mental impairment includes* "drug addiction (other than addiction caused by current, illegal use of a controlled substance)"). If the tenant can establish that the tenant is not a current user, then the landlord must grant a reasonable accommodation if necessary to prevent eviction. In *A.B. v. Housing Authority of South Bend, Indiana,* 498 Fed. Appx. 620 (7th Cir. 2012), the PHA served the tenant with a notice of lease termination after she was arrested for possession of cocaine. She entered into a substance abuse program, but the PHA filed an eviction lawsuit. The tenant's minor son filed suit claiming his mother had an addiction and qualified as a person with disabilities and thus the PHA was required to grant her a reasonable accommodation and not proceed with eviction. The court rejected the argument on the ground that the tenant was not disabled at the time the PHA gave her the termination notice but was a current user of illegal drugs and not entitled to any accommodation. In reaching this determination, the court wrote that "[a]n individual is a current drug user if her 'drug use was sufficiently recent to justify [a] reasonable belief that the drug abuse remained an ongoing problem.'" *Id*., (*quoting Mauerhan v. Wagner Corp.*, 649 F.3d 1180, 1187 (10th Cir. 2011)).

[399] 42 U.S.C.A. § 1437d (*l*)(6) (West 2012 & Supp. 2015) (emphasis added); 24 C.F.R. § 966.4(f)(11), (12), § 966.4 (*l*) (5) (2015). PHAs and owners must of course prove that the tenant or household member or guest engaged in drug related activity. In the context of the Sixth Amendment's confrontation clause, the United States Supreme Court held in 2009 that forensic analysts conducting tests must testify in court about their test results; lab sheets that identify a substance as a narcotic are not sufficient evidence. *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009). This case may be of some use in defending eviction lawsuits premised on alleged illegal drug activity.

criminal activity on the premises.[400]

1. Delinquent Acts by Juveniles.

Courts have held that actions of a minor that are defined as delinquent under state law can constitute criminal activity under the lease.[401]

2. Criminal Conduct Basis for Eviction only if it Threatens Health, Safety, or Peaceful Enjoyment of the Premises by Other Residents or Management.

The criminal conduct may serve as a basis for eviction only if it threatens the health, safety, or right to peaceful enjoyment. [402] In *Boston Housing Authority v. Bryant* [403], the appellate court reversed a trial court judgment of eviction of a public housing tenant on the ground the criminal conduct did not meet that standard. The tenant had run up credit card charges at two retail stores in the name of an employee of the Housing Authority. While acknowledging that such conduct is "profoundly disturbing," the court held it did not implicate a threat to health and safety "in the sense commonly understood." [404] Similarly, in *Kolio v. Hawaii Public Housing Authority*[405], the Hawaii Supreme Court reversed the eviction of a tenant who, while serving as president of the tenant

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[400] *See* 24 C.F.R. § 966.4(f) (12) (2015), § 966.4(*l*)(5)(i), (ii) (2015).

[401] *See Housing Authority for Prince George's County v. Williams*, 784 A.2d 621, 625-26 (Md. Ct. App. 2001); *Stout v. Kokomo Manor Apartments, 677 N.E.2d 1060, 1064-65 (Ind. Ct. App. 1997); Cincinnati Metropolitan Housing Authority v. Browning*, No. C-010055, 2002 Ohio App. LEXIS 155 (Ohio Ct. App. Jan. 18, 2002).

[402] *See* 42 U.S.C.A. § 1437d (*l*)(6) (West 2012 & Supp. 2015) (emphasis added); 24 C.F.R. § 966.4(f)(11), (12), § 966.4 (*l*) (5) (2015).

[403] 693 N.E.2d 1060 (Mass. App. Ct. 1998).

[404] *Id.* at 1062.

[405] 349 P.3d 374 (Haw. 2015).

association, pilfered $1,400 from the tenant association funds and pled guilty to second degree theft. The court held that the mere showing of some criminal activity was not enough to show a lease violation, but that "there must be evidence supporting a finding of actual threat to the health, safety, or peaceful enjoyment of the premises by other residents or management."[406] These cases illustrate that an initial inquiry in any eviction premised upon alleged criminal conduct is whether the conduct threatened health and safety or peaceful enjoyment of the premises by other residents or management. In addition, a tenant who merely engages in self-defense when attacked has a defense to an eviction for allegedly engaging in violent criminal activity.[407]

C. Multifamily Subsidized Apartments.

Congress has mandated that owners with project-based Section 8 contracts use leases that provide for termination of tenancy for any criminal activity by the tenant, household member, or other person under the tenant's control that threatens health, safety, or right to peaceful enjoyment of the premises by other tenants; any criminal activity by the tenant, household member, or other person under the tenant's control that threatens the health, safety, or right to peaceful enjoyment of their residences by persons residing in the immediate vicinity of the premises; or any drug-related criminal activity **on or near** such premises, engaged in by the tenant, any member of the tenant's household, or any guest or other person under the tenant's control.[408] With respect to drug-related criminal activity by other persons under the tenant's control, HUD requires that the activity occur

[406] *Id.* at 381.

[407] *See Estates New Orleans v. McCoy,* 162 So.3d 1179 (La. Ct. App. 2015) (reversing trial court judgment for eviction when evidence showed tenant only defended herself and was never the aggressor.)

[408] 42 U.S.C.A. § 1437f (d)(1)(B)(iii) (West 2012) (emphasis added); 24 C.F.R. § 5.850 - § 5.861 (2015).

on the premises.[409] HUD has incorporated its interpretation into its model lease agreement. [410]

D. Section 8 Housing Choice Voucher Program.

Congress has mandated that PHAs require that Section 8 voucher owners use leases that provide for termination of tenancy for any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants; any criminal activity that threatens the health, safety, or right to peaceful enjoyment of their residences by persons residing in the immediate vicinity of the premises; or any violent or drug-related criminal activity **on or near** the premises, engaged in by the tenant, any member of the tenant's household, or any guest or other person under the tenant's control.[411] With respect to drug-related criminal activity by other persons under the tenant's control, HUD regulations requires that the lease provide for eviction for such activity occurring on the premises.[412] But in its tenancy addendum that must be incorporated into every lease, HUD provides for termination of the tenancy for drug-related criminal activity on or near the premises, engaged in not only by the tenant, any member of the tenant's household, or any guest, but also by any other person under the tenant's control.[413]

E. Proof of Criminal Activity or Drug-Related Criminal Activity.

1. Standard Under the Regulations.

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[409] *See* 24 C.F.R. § 5.858 (2015).

[410] *See* United States Department of Housing and Urban Development, *Model Lease for Subsidized Programs,* Form HUD-90105-a, at ¶ 23c (December 2007).

[411] 42 U.S.C.A. § 1437f (o)(7) (West 2012 & Supp. 2015) (emphasis added); 24 C.F.R. § 982.310 (2015).

[412] *Id.* § 982.310(c)(1) (2015).

[413] *See* Tenancy Addendum Section 8 Tenant-Based Assistance Housing Choice Voucher Program, Form HUD-52641-A (8/2009), at ¶ 8.c (1)(d).

The PHA and subsidized owner may evict the tenant regardless of whether the person accused of the illegal activity has been arrested or convicted; proof in the eviction case is based on a preponderance of the evidence standard and not the more exacting "beyond a reasonable doubt" standard required in a criminal case.[414] If a PHA intends to evict based on criminal activity as shown by a criminal record, it must provide the tenant and the subject of the record with a copy of the record before trial of the eviction.[415] Although conviction records may be used in eviction cases, HUD has issued guidance (Notice H 2015-10) to PHAs and federally subsidized owners clarifying that a PHA or owner may not base an eviction on a record of arrest.[416] Moreover, with the issuance of Notice H 2015-10 on November 2, 2015, HUD listed as an example of best practices the policies of some PHAs that list the circumstances that will be considered in determining whether to terminate a tenant's lease on the basis of criminal activity.[417] In advocating with PHAs and owners not to file an eviction in the first instance, advocates should cite to those factors identified by HUD for consideration by the PHA or owner in deciding whether to proceed.

The HUD regulations create a potential problem on the proof required for a subsidized landlord (as distinguished from PHAs) to evict for illegal drug activity and criminal activity, because they direct that the landlord may evict "when you determine" and "if you determine" that

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[414] *Id.*, § 966.4(l)(5)(iii) (2015).

[415] *Id.* at § 966.4(l)(5)(iv).

[416] U.S. Department of Housing and Urban Development, Notice H 2015-10, *Guidance for Public Housing Agencies (PHAs) and Owners of Federally-Assisted Housing on Excluding the Use of Arrest Records in Housing Decisions* (Nov. 2, 2015) (remains in effect until amended, superseded, or rescinded).

[417] *Id.* at ¶ 7.

such conduct is occurring.[418] In a 2009 case, the Colorado Supreme Court addressed the proof standard and held that subsidized owners must prove by a preponderance of the evidence that a provision in the lease "was actually violated – not merely that the owner had reasonable grounds to believe it was violated."[419] In the Colorado case, the Section 8 voucher landlord argued that she had a right to terminate the lease if she merely showed that she had "reasonable grounds to believe that criminal activity was being conducted on the premises."[420] The Colorado Supreme Court correctly rejected this argument.

In another case from New Hampshire, the court held that the PHA did not prove by a preponderance of the evidence that the tenant had engaged in drug-related criminal activity.[421] The PHA introduced into evidence three criminal drug complaints filed against the tenant.[422] The complaints stated that on three occasions the tenant had unlawfully sold morphine.[423] The court held that "complaints only require a showing of probable cause. ... [C]omplaints, like indictments,

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[418] *See* 24 C.F.R. § 5.858 (2015) ("What authority do I have to evict drug criminals?"); 24 C.F.R. § 5.861 (2015) ("What evidence of criminal activity must I have to evict?").

[419] *Miles v. Fleming*, 214 P.3d 1054, 1058 (Colo 2009); *see also Nealy v. Southlawn Palms Apartments*, 196 S.W.3d 386, 395 (Tex. App. – Houston [1st. Dist.], 2006, no pet.) (refusing to evict tenant when only proof was claim by owner that it had received two reports that tenant had exposed her buttocks on two occasions; noting that "reports are nothing more than allegations which this Court will not term as "good cause" for evicting a tenant in federally subsidized housing.");

[420] *Miles v. Fleming*, 214 P.3d at 1058.

[421] *See Nashua Housing Authority v. Wilson*, 162 N.H. 358 (N.H. 2011).

[422] *Id.* at 359.

[423] *Id.*

do not satisfy the preponderance of the evidence burden of proof."[424] Another court held that the evidence consisting of (1) a copy of the tenant's guilty plea to one count of unlawful possession of marijuana and (2) the tenant's testimony that he was stopped as he exited the building and searched by a police officer who found one bag of marijuana was insufficient to show he had the "intent to manufacture, sell, distribute or use the drug" as required by 24 C.F.R. § 5.100 (2015).[425]

Some landlords may implement mandatory drug testing programs. In *Peery v. Chicago Housing Authority*, 791 F.3d 788 (7th Cir. 2015), five voucher residents living in privately owned buildings sued the Chicago Housing Authority and their landlord challenging an annual mandatory drug test. The Seventh Circuit held that because the Chicago Housing Authority had not mandated the drug testing but only strongly encouraged it, the requisite government action was missing and thus the Fourth Amendment's prohibition against unreasonable searches and seizures was not implicated.

2. Application of the Exclusionary Rule in Eviction Proceedings.

Tenants have argued in some cases that evidence of illegal drugs should be excluded in the eviction proceeding if seized in violation of the fourth amendment's prohibition against unreasonable searches and seizures.[426] The Illinois appellate court held in the *Head* case that the exclusionary rule should not be extended to eviction lawsuits.[427] This appears to be the most recent

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[424] *Id.* at 361.

[425] *See Los Tres Unidos Associates, LP v. Mercado*, 988 N.Y.S.2d 404, 405 (N.Y. App. Div. 2014) (per curiam).

[426] *See, e.g.*, *U.S. Residential Management and Development, LLC v. Head*, 922 N.E.2d 1 (Ill. App. Ct. 2009), *appeal denied without opinion*, 932 N.E.2d 1037 (2010).

[427] *Id.*

appellate opinion discussing application of the exclusionary rule in eviction proceedings. This may be an appropriate defense with the right facts in different states. For example, in an unreported case from Georgia, the magistrate court applied the exclusionary rule, and held that evidence found in violation of the tenant's Fourth Amendment rights would be suppressed in the eviction case.[428]

F. Evictions For Felonies and Criminal Activity Occurring Prior to Admission.

Although Congress mandated that PHAs and subsidized owners use lease provisions allowing for eviction for criminal activity that threatens health, safety, or peaceful enjoyment of the premises by other tenants and drug-related activity, this does not permit a PHA or subsidized owner to include language in the lease allowing for eviction if any family member is convicted of a felony.[429]

Subsidized landlords and PHAs sometimes try to evict the tenant for criminal activity that occurred prior to admission to the apartment complex. But, as set forth above, the criminal activity must threaten the health, safety, or right to peaceful enjoyment of the premises by other residents.[430] One court concluded that an eviction by a subsidized landlord based on a felony forgery conviction occurring less than one- and one-half years before the PHA gave the tenant notice of termination

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[428] *Forest Cove Apartments, LLC v. Taylor*, No. 12ED003259 (Ga. Magistrate Ct. Fulton County) (May 7, 2013). (Lindsey Siegel, at attorney with Atlanta Volunteer Lawyers Foundation represented the tenant.)

[429] *See* 42 U.S.C.A. § 1437d (*l*)(2) (West 2012 & Supp. 2015) ("Each public housing agency shall utilize leases which – ...(2) do not contain unreasonable terms and conditions..."); *Cabrini-Green Local Advisory Council v. Chicago Housing Authority*, No. 96 C 6949, 2007 U.S. Dist. LEXIS 6520 (N.D. Ill. Jan. 29, 2007) (striking PHA lease provision that permitted eviction upon conviction of any family member for a felony).

[430] *See Wellston Housing Authority v. Murphy*, 131 S.W.3d 378 (Mo. Ct. App. 2004) (holding that tenant could not be evicted for guest's criminal activity that did not occur during term of tenant's lease).

adequately stated a claim for eviction for criminal activity.[431] Such reasoning is simply not persuasive. The court was likely influenced by the tenant's failure to reveal the conviction at the time of application. [432]

G. Eviction for Possession of Drug Paraphernalia.

Although drug-related criminal activity is grounds for eviction, possession of drug paraphernalia does not constitute "drug-related criminal activity" under the governing federal regulations.[433] HUD defines *drug* for purposes of *drug-related criminal activity* as "a controlled substance defined in section 102 of the Controlled Substances Act (21 (U.S.C. 802)."[434] Congress defined the term "controlled substance" as meaning "a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter."[435] The referenced schedules do not include drug paraphernalia in the definition. Thus, a tenant caught with drug paraphernalia may not be evicted for allegedly engaging in drug-related criminal activity.[436]

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[431] *Ross v. Broadway Towers, Inc.*, 228 S.W.3d 113, 120 (Tenn. Ct. App. 2006), *cert denied*, 128 S. Ct. 543 (2007).

[432] *See id.* at 121; *compare Bennington Housing Authority v. Bush*, 933 A.2d 207 (Vt. 2007) (holding that PHA had failed to prove that tenant had knowingly failed to reveal during the application process prior convictions for burglary and sale of controlled substance; reversing trial court judgment of eviction).

[433] *See* 24 C.F.R. § 5.100 (2015) (definitions of *drug* and *drug-related criminal activity*).

[434] *Id.*

[435] *See* 21 U.S.C.A. § 802 (West 2013 & Supp. 2015).

[436] *See Romagna v. Housing Authority of Indiana County,* 2012 WL 3026386, 47 A.3d 1824 (Pa. Commw. Ct. July 13, 2012) (table)(unpublished) (holding that drug-related criminal activity did not include possession of paraphernalia and thus the PHA could not deny admission to Section 8 housing voucher program on that basis).

H. Medical Marijuana.

In *Forest City Residential Management, Inc. v. Beasley* [437] the court held that a tenant in federally subsidized housing is not entitled to use medical marijuana as a reasonable accommodation under the Fair Housing Act or Section 504 of the Rehabilitation Act of 1973. In that case, the owner of several federally subsidized housing complexes sued in federal court seeking a declaratory judgment that state law permitting use of medical marijuana did not prevent the owner from evicting tenants for drug-related criminal activity. The tenant named as the defendant had been diagnosed with multiple sclerosis, and her physician had prescribed medicinal marijuana to help with the symptoms.[438] The court held that because federal law did not allow for an exception for medicinal use of marijuana, federal law preempted state law.[439] The court also held that allowing use of medicinal marijuana as a reasonable accommodation would require a fundamental alteration of the nature of the mission to provide drug-free federally assisted housing, and thus, no reasonable accommodation was required.[440]

HUD issued a memo on December 29, 2014, directed to federally subsidized owners reminding them that despite increasing decriminalization of marijuana at the state level, the "manufacture, distribution, or possession of marijuana is a federal criminal offense."[441] The memo also states, however, that owners have discretion whether to evict tenants for illegal drug

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[437] 71 F.Supp.3d 715 (E.D. Mich. 2014).

[438] *Id.* at 720.

[439] *Id.* at 726-27.

[440] *Id.* at 727-31.

[441] *See* http://portal.hud.gov/hudportal/documents/huddoc?id=useofmarijinmfassistpropty.pdf.

use.[442] The memo also states that owners cannot enact lease terms that permit occupancy by any individual who uses marijuana.[443]

I. Guests and Other Persons Under Tenant's Control.

HUD has defined *guest* as meaning "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 consent on behalf of the tenant."[444] HUD distinguishes *other person under the tenant's control* as a person, although not staying as a guest in the unit, is, or was as the time of the activity in question, on the premises 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.[445]

1. Supreme Court Decision in Department of Housing and Urban Development v. Rucker.

Following the enactment by Congress of the requirement of lease provisions allowing eviction without fault by the tenant, the courts struggled with the concept of the eviction of innocent tenants for action of household members or guests.[446] The United States Supreme Court resolved the constitutionality of the no-fault lease provision in *Department of Housing and Urban*

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[442] *Id.*

[443] *Id.*

[444] 24 C.F.R. § 5.100 (2015) (definitions).

[445] *Id.*

[446] For a discussion of the various cases, see the following articles: Barclay Thomas Johnson, *The Severest Justice in not the Best Policy: The One-Strike Policy in Public Housing*, 10 JOURNAL OF AFFORDABLE HOUSING 234 (Spring 2001); Nelson H. Mock, *Punishing the Innocent: No-Fault Eviction of Public Housing Tenants for the Actions of Third Parties*, 76 TEX. L. REV. 1495 (May 1998).

Development v. Rucker,[447] holding that 42 U.S.C. §1437d(l)(6) "requires lease terms that give local public housing authorities the discretion to terminate the lease of a tenant when a member of the household or a guest engages in drug-related activity, regardless of whether the tenant knew, or should have known, of the drug-related activity."[448] In so holding, the court reversed the Ninth Circuit decision in *Rucker v. Davis,*[449] *Rucker* is both sweeping and narrow. It is narrow in that it merely affirms the authority of Congress to require that PHAs (and by implication, subsidized landlords) use lease terms giving the PHA discretion to evict a tenant when a member of the household or a guest engages in drug-related activity, regardless of whether the tenant knew, or should have known, of the drug-related activity. It is sweeping in that the unrestrained exercise of that discretion can have devastating consequences on otherwise innocent poor families.[450]

Given the unjust consequences that can flow from strict enforcement of such no-fault lease provisions, HUD fairly quickly sent out a letter to all PHAs after *Rucker* was decided, urging them to be "guided by compassion and common sense in responding to cases involving the use of illegal drugs;" and to "[c]onsider the seriousness of the offense and how it might impact other family members;" and exhorting that "[e]viction should be the last option explored, after all others have

[447] 535 U.S. 125 (2002).

[448] *Id.* at 136.

[449] 237 F.3d 1113 (9th Cir. 2001) (en banc).

[450] *See Boston Housing Authority v. Garcia*, 871 N.E.2d 1073, 1080 (Mass. 2007) (finding that *Rucker* eliminated innocent tenant defense under Massachusetts law, but writing that "a housing authority should consider the circumstances presented by a tenant, or otherwise known to the housing authority, including the extent of the tenant's knowledge, or lack thereof, of the illegal drug activity and the tenant's ability to control or prevent the activity.")

been exhausted."[451] More recently, HUD issued Notice H 2015-10 clearly stating that HUD does not require PHA and owners to adopt "one-strike" policies.[452] HUD also emphasized that PHAs and owners have discretion to decide whether to evict for criminal activity.[453] Notwithstanding the HUD Secretary's directive following the *Rucker*, many PHAs have pursues eviction regardless of the particular facts of the case and the resulting consequences for the family.[454]

2. PHAs and Owners Have Discretion not to Evict. Tenants may Assert Contract, State Law, and Common Law Defenses.

HUD regulations specifically give discretion to PHAs, project-based Section 8 landlords, and Section 8 Housing Choice Voucher landlords on whether to proceed with eviction for activity of household members or guests.[455] In addition, *Rucker* does not require the eviction courts to ignore legal or equitable defenses, such as waiver, illegal discrimination, failure to grant a reasonable accommodation under the Fair Housing Act, unclean hands, estoppel, and other

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[451] Letter from Mel Martinez, Secretary of the United States Department of Housing and Urban Development, dated April 16, 2002 (on file with the National Housing Law Project).

[452] U.S. Department of Housing and Urban Development, Notice H 2015-10, *Guidance for Public Housing Agencies (PHAs) and Owners of Federally-Assisted Housing on Excluding the Use of Arrest Records in Housing Decisions*, at ¶ 7 (Nov. 2, 2015) (remains in effect until amended, superseded, or rescinded).

[453] *Id.*

[454] *See generally* National Housing Law Project, *Post-Rucker Decisions: Three Years Later,* 35 Housing Law Bulletin 257 (November/December 2005).

[455] 24 C.F.R. § 966.4(l)(5)(vii) (2015) (public housing); § 982.310(h) (2015) (Section 8 Housing Choice Voucher Program); § 5.852 (2015) (project-based Section 8 landlords); HUD Notice H 2015-10, supra, note 452; *see Oakwood Plaza Apartments v. Smith*, 800 A. 2d 265, 267-71 (N.J. Super. Ct. App. Div. 2002) (recognizing that *Rucker* does not mandate eviction and remanding for Section 8 landlord to consider circumstances); *Housing Authority of the City of Passaic v. Jackson*, No. A-1843-09T3, 2011 N.J. Super. Unpub. LEXIS 2807, at *5-6 (N.J. Super. Ct. App. Div. Nov. 14, 2011) (affirming trial court judgment in favor of tenant because the PHA produced no evidence on whether it considered tenant's circumstances).

defenses under the lease, state law, or common law. [456] Several state courts have held that Congress has preempted state law right to cure provisions with respect to engaging in drug-related criminal activity.[457]

But an appellate court in Kentucky held that a state law right to remedy a breach for alleged drug activity is not preempted by federal law.[458] In that case, the PHA filed an eviction suit after it found crack cocaine in a room in the tenant's apartment where her nephew, who visited every other

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[456] *See* National Housing Law Project, *Sweetening the Pill of Rucker: Recent Decisions*, 49 Housing Law Bulletin (March 2011); s*ee e.g., Pratt v. District of Columbia Housing Authority*, 942 A.2d 656 (D.C. 2008) (holding that where eviction is sought based only on a lease provision that does not incorporate the statutory prohibition against criminal activity, the District of Columbia statute allowing tenants an opportunity to cure a lease violation is not preempted); *Cuyahoga Metropolitan Housing Authority v. Hairston*, 790 N.E.2d 828 (Ohio Cleveland Municipal Ct. 2003) (PHA waived right to evict tenant for possession of marijuana when it continued to accept tenant's rent for seven months after it became aware of the breach of lease); *Joseph v. Beaumont Housing Authority*, 99 S.W.3d 765 (Tex. App.-- Beaumont 2003, no pet.) (PHA could not evict for conduct occurring prior to signing of new lease; *Millennia Housing Management, Ltd. v. Williams*, No. 101627, 2015 WL 1276464 (Ohio Ct. App. March 19, 2015) (by signing new HUD subsidized model lease, landlord waived the right to evict tenant for prior alleged lease violations); *H.J.Russell & Co. v. Pearson,* No. 1-12-3775, 2014 IL App (1st) 123775-U (Ill. Ct. App. May 9, 2014) (unpublished) (holding that where the parties signed a new lease on another unit, a new tenancy had been established, and owner could not evict for unpaid rent under prior lease); *Gallatin Housing Authority v. Montesillo*, No. M2001-02260-COA-R3-CV, 2002 Tenn. App. LEXIS 574 (Tenn. Ct. App. August 7, 2002) (unpublished) (PHA waived right to evict by signing new lease)*; Superior Housing Authority v. Foote*, 455 N.W.2d 679 (Wis. Ct. App. 1990) (unpublished limited precedent opinion) (PHA waived right to evict by signing new lease).

[457] *See*, *e.g.*, Milwaukee City Housing Authority v. Cobb, 860 N.W.2d 267 (Wis. 2015); *Scarborough v. Winn Residential L.L.P./Atlantic Terrace Apartments*, 890 A.2d 249 (D.C. 2006); *Hous. Auth. Of City of Norwalk v. Brown*, 19 A.3d 252 (Conn. App. Ct. 2011); *but see Pratt v. District of Columbia Hous. Auth.*, 942 A.2d 656 (D.C. 2008) (holding that where eviction is sought based only on a lease provision that does not incorporate the statutory prohibition against criminal activity, the District of Columbia statute allowing tenants an opportunity to cure a lease violation is not preempted);

[458] *See Housing Authority of Covington v. Turner*, 295 S.W.3d 123 (Ky. Ct. App. 2009).

weekend, kept his belongings.[459] The court concluded that state law provided the right to cure such a breach, and the tenant had remedied the breach by prohibiting her nephew from returning to her apartment.[460] In another post-*Rucker* case, an Ohio court held that the trial court had equity authority to refuse to evict an innocent tenant for the drug activity of a guest.[461]

More recently, in a North Carolina case, the court of appeals held that state law requiring a landlord to prove that an eviction would be not be unconscionable was not preempted by 42 U.S.C. § 1437d(*l*)(6) .[462] In that case a friend of the tenant's was arrested at her public housing apartment for outstanding child support warrants. The police searched him and found marijuana. The tenant testified at the eviction trial that she had no knowledge that he had brought marijuana into her apartment. She argued that notwithstanding the language of the lease, North Carolina law required a showing that the proposed eviction would not be unconscionable. The court of appeals agreed, concluding that the unconscionability requirement was not preempted by federal law. But the North Carolina Supreme Court has since granted the Housing Authority's request for review.[463]

In a case premised on alleged criminal activity, some possible resolutions to explore, depending on the facts, include the following. A PHA may be willing to settle an eviction based on criminal or drug-related conduct by a guest or a household member short of evicting the entire

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[459] *Id.* at 124.

[460] *Id.* at 128.

[461] *See Cuyahoga Metropolitan Housing Authority v. Harris*, 861 N.E.2d 179 (Ohio Mun. Ct. 2006).

[462] *Lofton v. Eastern Carolina Regional Housing Authority*, 767 S.E.2d 63 (N.C. Ct. App. 2014), review granted, 772 S.E.2d 708 (June 10, 2015).

[463] *Eastern Carolina Regional Housing Authority v. Lofton*, 772 S.E.2d 708 (N.C. June 10, 2015).

family. For example, it might agree to allow the family to remain in exchange for an agreement to bar the offending guest from the premises or an agreement that the responsible household member will move.[464] In a drug-usage eviction, the PHA might agree to allow the tenant to remain in exchange for an agreement that the offending household member will enter a drug rehabilitation program.[465] A PHA might also agree not to proceed with eviction in exchange for a lease probation agreement.[466]

3. Determination Whether Person Accused of Illegal Activity is Guest or Other Person Under Tenant's Control.

In defending evictions based on conduct by alleged guests, it is necessary first to determine whether the person of whose actions the PHA or landlord complains falls within the definition of a *guest* or *other person under the tenant's control*. The tenant's liability is different under the regulations, depending on whether the person was a guest or merely someone under the tenant's control at the time of the incident. For example, a project-based Section 8 landlord may evict a tenant for any drug-related activity *on or near* the premises by a *guest*, but if the person is not a guest but *a person under the tenant's control*, then the activity must have occurred on the premises.[467]

Similarly, a PHA may evict a tenant for a *guest's* drug-related criminal activity on or off the premises but may evict a tenant for the drug-related criminal activity of *a person under the tenant's*

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[464] 24 C.F.R. § 966.4(l)(5)(vii)(C) (2015).

[465] *Id.* at § 966.4(l)(5)(vii)(D).

[466] *See id*. at § 966.4(l)(5)(vii)(B); *see also* discussion in this outline in section II-J on the reasonable accommodation provision of the Fair Housing Act and use of lease probation agreements.

[467] 24 C.F.R. § 5.858 (2015).

control only if the person engaged in the activity on the premises.[468] In addition, tenants may have defenses to an eviction on the basis that the offending conduct was not committed by a member of the tenant's household, guest or other person under the tenant's control.[469] Tenants may also not be evicted merely because a guest has a criminal record.[470] And, tenants with Section 8 vouchers or living in Project-based Section 8 may have defense based on the fact that the drug-activity did not occur near the premises.[471]

J. Evictions Based on Domestic Violence, Dating Violence, or Stalking.

Tenants who are victims of domestic violence are protected from *Rucker* no-fault evictions with the enactment of amendments to the Violence Against Women Act (VAWA) signed into law on January 5, 2006.[472] With the passage of that legislation, Congress prohibited public housing

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[468] *Id.* at § 966.4(l)(5)(i)(B).

[469] *See Boston Housing Authority v. Bruno*, 790 N.E.2d 1121 (Mass. App. Ct. 2003) (finding public housing authority not entitled to evict tenant for drug activity of son because son was not a member of the household at the time he engaged in the activity).

[470] *Wellston Housing Authority v. Murphy*, 131 S.W.3d 378 (Mo. Ct. App. 2004) (holding that tenant could not be evicted for guest's criminal activity that did not occur during term of tenant's lease); *see also, Housing Authority of New Orleans v Haynes*, 172 So.3d 91 (La. Ct. App. 2015) (reversing eviction of public housing tenant on the ground that she had harbored a previous resident evicted for a one-strike violation; rejecting trial court conclusion that because the guest was "wanted," she was a fugitive and her mere presence in her mother's apartment was sufficient basis to evict the tenant).

[471] HUD gave this interpretation of "on or near" when it published the implementing federal regulations: "In general, this standard would cover drug crime in a street or other right of way that adjoins the project or building where a Section 8 unit is located." 60 Fed. Reg. 34660, 34673 (July 3, 1995).

[472] *See* Pub. L. No. 109-162, §§ 606, 607, 119 Stat. 2960 (2006) (codified at 42 U.S.C.A. § 1437d(*l*)(5) (West Supp. 2015) (public housing); § 1437f(d)(1)(B)(ii), (iii) (West Supp. 2015) (project-based Section 8 landlords); § 1437f(o)(7)(C), (D) (West 2012 & Supp. 2015) (Section 8 Housing Choice Voucher Program); 24 C.F.R. §§ 5.2001 - 5.2009 (2015); *see generally* National Housing Law Project, *HUD Publishes Violence Against Women Act Interim Rule*, 39 Housing

authorities, federally subsidized landlords with project-based Section 8 contracts, and Section 8 housing voucher landlords from evicting tenants who are victims of criminal activity directly related to domestic violence, dating violence, or stalking.[473] In addition, Congress specifically authorized covered landlords to bifurcate a lease in order to permit the victim to remain and to evict the perpetrator of the violence.[474]

(Congress extended the VAWA protections when President Obama signed VAWA 2013 on March 7, 2013.[475] HUD has published notice providing an overview of the VAWA Reauthorization Act of 2013 and its applicability to HUD programs.[476] On April 1, 2015, HUD published proposed rules that would amend its regulations to fully implement the 2013 statutory changes.[477])

HUD enacted an interim rule on the VAWA protections on November 28, 2008,[478] and a

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Law Bulletin 7 (Jan. 2009).

[473] *Id.*

[474] *Id.*

[475] *See* Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (March 7, 2013); *see generally* National Housing Law Project, *"VAWA 2013 Continues Vital Housing Protections for Survivors and Provides New Safeguards,"* 43 Housing Law Bulletin 79 (April-May 2013) (highlighting key differences between prior statute and new statute). With Change-4 to Handbook 4350.3, addresses the VAWA protections for federally subsidized owners. *See id.* at chp. 4, § 1, ¶ 4-4-C-9 (on pages 4-8 – 4-9).

[476] 78 Fed. Reg. 47717 (Aug. 6, 2013).

[477] *See* 80 Fed. Reg. 17548-17584 (April 1, 2015).

[478] *See* 73 Fed. Reg. 72336 (Nov. 28, 2008) (interim rule effective December 29, 2008) (conforming HUD's regulations to the self-implementing statutory protections for victims of domestic violence) (codified generally at 24 C.F.R. § 5.2001 - § 5.2009 and in lease termination regulations for all section 8 programs).

final rule on October 27, 2010.[479] The regulations make it clear that an incident of actual or threatened domestic violence, dating violence, or stalking may not be construed as a serious or repeated lease violation by the victim for which the tenancy of the victim may be terminated.[480] The regulations also provide that criminal activity directly related to domestic violence, dating violence, or stalking, engaged in by a member of the tenant's household or any guest or other person under the tenant's control, shall not be cause for termination of the tenancy if the tenant or immediate family member is the victim.[481] PHAs and owners are given express authority to bifurcate a lease and evict the person causing the abuse. [482]

The regulations allow a PHA to request documentation of the abuse.[483] Because the regulations allow the PHA or subsidized owner to require submission of the documentation within fourteen business days of receipt of the request for the documentation,[484] care must be taken to submit the documentation within the fourteen-day window. If the tenant fails to submit the requested documentation, the VAWA regulations "do not limit the authority" of the PHA or

[479] *See* 75 Fed. Reg. 66246 (Oct. 27, 2010) (effective Nov. 26, 2010) (conforming HUD's regulations to the self-implementing statutory protections for victims of domestic violence) (codified generally at 24 C.F.R. § 5.2001 - § 5.2009 (2015). The final rule replaced an earlier interim rule. *See* 73 Fed. Reg. 72336 (Nov. 28, 2008) (interim rule effective December 29, 2008).

[480] *See* 24 C.F.R. § 5.2005(c) (2015)).

[481] *Id.* at § 5.2005(c)(2).

[482] *See id*. at § 5.2009(a).

[483] *Id*. at § 5.2007(a).

[484] *Id.*

subsidized owner to evict.[485] Under the statute and HUD's interpretation, victims of domestic violence may self-certify that they are victims and must then be afforded the VAWA statutory protections from eviction.[486] Form HUD-50066 for self-certification is currently available on HUD's website at: http://www.hud.gov/offices/adm/hudclips/forms/files/50066.doc

Self-certification is a powerful tool. Even if an individual is arrested and charged with domestic violence, if the person asserts victim status under the Act, the protections of the Act apply, unless, of course, the assertion is proven false.[487] In a 2008 case, the court refused to evict a tenant who alleged she had been the victim of domestic violence and not the aggressor as claimed by the landlord.[488] When the tenant has been a victim of domestic violence, this statutory protection should be pleaded as a defense to the eviction.

In some cases the PHA or subsidized owner may file an eviction based on damages that an abuser caused to the unit. Advocates have a number of arguments they can assert on behalf of the tenant in such cases, including an argument that because the damages resulted from the abuser's acts of violence, the survivor's tenancy cannot be terminated under VAWA.[489]

K. Defending Evictions with the Reasonable Accommodation Provision of the Fair Housing Act and Section 504 of the Rehabilitation Act of 1973.

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[485] *Id.* at § 5.2007(c).

[486] *Id.*

[487] *See id.*

[488] *See Metro North Owners, LLC v. Thorpe*, 870 N.Y.S.2d 768 (N.Y. Civ. Ct. 2008) (holding that section 8 voucher tenant was a victim of domestic violence and thus landlord could not terminate her tenancy for the incident of violence that had occurred).

[489] See National Housing Law Project, *Questions Corner: Can a domestic violence survivor be evicted or terminated from a federal housing subsidy program as a result of the damage that an abuser caused to her unit?,* 43 Housing Law Bulletin 168 (August 2013).

See discussion in section II-J of this article.

L. Defending Evictions When PHA Failed to Communicate with Designated Contact Person.

See discussion in section II-L of this article.

XIV. Evictions from Project-Based Voucher Program Housing.

Project-based voucher[490] tenants have slightly different protections from evictions.[491] The tenant-based housing voucher eviction regulations at 24 C.F.R. 982.310 generally apply with the exception of the provision allowing termination for a business or economic reason or desire to use the unit for an individual, family, or non-residential purpose.[492] The provisions at 24 C.F.R. § 5.858 - § 5.861 on eviction for drug and alcohol abuse also apply.[493] The lease may provide for automatic renewal for successive definite terms or for automatic indefinite extension of the lease term.[494] The term of the lease terminates if the owner terminates the lease for good cause.[495] This

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[490] *See* 42 U.S.C.A. § 1437f(o)(13) (West 2012); 24 C.F.R. Part 983 (2015) (program regulations). The regulation on evictions was amended in 2014. *See* 78 Fed. Reg. 36146-01, at § 983.257 (June 25, 2014). The current regulation is set forth at C.F.R. § 983.257 (2015).

[491] *See* 24 C.F.R. 983.257 (2015).

[492] *Id.* at § 983.257(a) (2015).

[493] *Id.*

[494] 24 C.F.R. § 983.256(f)(2) (2015).

[495] *Id.* at § 983.256(f)(3)(i). Prior to revision of the project-based § 8 regulations, effective July 25, 2014, they allowed the owner, upon expiration of the lease, to refuse to renew the lease for good cause or to refuse to renew the lease without good cause. *See* 24 C.F.R. § 983.257(b) (2014) (prior section). They further provided that if the owner refused to renew the lease without good cause, the PHA had to provide the family with a tenant-based voucher, and the unit would be removed from the housing assistance payments contract. *Id.* Subsection (b) was removed from the regulations when the regulations were revised in 2014. *See* 79 Fed. Reg. 36146-01, at § 983.257 (June 25, 2014) ("In § 983.257, paragraph (b) is removed. ..").

required lease language imposes a good cause requirement on the owner to terminate the tenancy.[496] The landlord must comply with the tenant-based housing voucher notice provisions in terminating a tenancy.[497]

XV. Eviction from Section 811 Project Rental Assistance Housing.

HUD issued program occupancy guidance for the Section 811 Project Rental Assistance Program on August 23, 2011.[498] Owners are required to follow all applicable requirements found in HUD Handbook 4350.3.[499] Owners must comply with the termination of tenancy requirements set forth in Handbook 4350.3.[500] The Notice provides that a tenant's refusal to participate in or accept services or a termination of service is not a basis for lease termination.[501]

XVI. Conclusion.

Tenants threatened with eviction who live in federally assisted or public housing or who rent with the assistance of a Section 8 voucher have much at stake.[502] Poor individuals and families

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[496] In the comments to the final regulations issued in 2014, HUD stated the following on the good cause requirement: "The PBV provision that allowed an owner to renew without good cause, former § 983.257(b)(3), has been removed. Nonetheless, to eliminate the possibility of confusion, the final rule revises § 983.256 to clearly state that an owner may only terminate a lease for good cause during the lease term." *See* 79 Fed. Reg. 36146-01, at 36162 (June 25, 2014).

[497] *See id.* at § 983.257(a).

[498] See Notice H 2013-24, *Section 811 Project Rental Assistance (PRA) Occupancy Interim Notice*, (issued August 23, 2013; remains in effect until amended, revoked, or superseded.)

[499] *Id.* at IV (on p. 4).

[500] *Id.* at IV-G (on pp. 11-12).

[501] *Id.* at IV-G (on p. 11).

[502] *See, e.g.*, *Na'im v. Sophie's Arms Fine Residences, LLC,* No. 3:13-CV-02515-JAH-BLM, 2013 WL 8609251, at *2 (S.D. Calif. Nov. 18, 2013) (granting

and persons with disabilities are very vulnerable: a family emergency, a medical illness, a lost job, a grandson gone awry. This can happen to anyone. Homelessness and the hardships that accompany it are the consequences for a family that loses its housing. Evictions must be hard-fought to ensure the protections granted by Congress and the Constitution. Rights that exist "on the books" are meaningless without vigilant enforcement of those rights.

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preliminary injunction enjoining landlord from attempting to evict tenant; showing of substantial likelihood that landlord has violated the Fair Housing Act is sufficient to create a presumption of irreparable harm); *Chastain v. Northwest Georgia Housing Authority*, No. 4:11-CV-0088-HLM, 2011 U.S. Dist. LEXIS 135712, at *33-34 (N.D. Ga. April 28, 2011) (holding that plaintiff would suffer irreparable harm and face likely eviction if the court did not grant preliminary injunction ordering PHA to grant her a hardship exemption from minimum rent); *Villas at Parkside Partners v. City of Farmers Branch,* No. 3:06-CV-2371-L, 2007 U.S. Dist. Lexis 36918, at *31–32 (N.D. Tex. May 21, 2007) (threat of eviction if anti-immigrant ordinance enforced constitutes irreparable harm); *Garrett v. City of Escondido*, 465 F. Supp. 2d 1043, 1052 (S.D. Cal. 2006) (same); *Mitchell v. U.S. Department. of Housing and Urban Development*, 569 F. Supp. 701, 704–5 (N.D. Cal. 1983) (Clearinghouse No. 35,106) (scarcity of public housing constitutes irreparable harm sufficient to preliminarily enjoin eviction); *Bloodworth v. Oxford Village Townhouses*, 377 F. Supp. 709, 719 (N.D. Ga. 1974) (effective increase of 50 percent in housing costs may be tantamount to eviction or may impose substantial financial hardships on family sufficient to constitute irreparable harm); *Gwin v. Pyros*, No. 09-527, 2009 U.S. Dist. LEXIS 38489, at *4 (W.D. Pa. May 6, 2009) (enjoining eviction of tenant with disabilities because eviction would result in irreparable harm).