Residential Eviction Defense in Minnesota

Twelfth Edition
February 2011

By

Lawrence R. McDonough
Attorney at Law

Lawrence R. McDonough
Visiting Professor of Law
Hamline University School of Law
1536 Hewitt Avenue, Room 213W
St. Paul, MN 55104
651-523-2472
Fax 651-523-2400
http://hamlinetpc.homestead.com/
http://landlordtenantlaw.homestead.com
lmcdonough02@hamlineuniversity.edu

ACKNOWLEDGMENTS

Tenth Edition, March 2008

Thanks again to the attorneys, law students, advocates, legislators, judges, and referees who continue to assert and expand the law for the benefit of tenants. I especially wish to thank Drew Schaffer, whose analysis is reflected in much of the next text; John Freeman, for his technical support at www.projusticemn.org; and Alice Engstrom and Christa Lord, for word processing support.

Ninth Edition, March 2004

Thanks to the attorneys, law students, advocates, legislators, judges, and referees who continue to expand the law for the benefit of tenants. I especially wish to thank Paul Birnberg, whose analysis once again is reflected in many sections of this manual, and Sharon Elmore and Jaya Shoffner of the Minnesota Legal Services Coalition, who managed the placement of this manual, forms, and cases on www.projusticemn.org.

Eighth Edition, July 2000

I am grateful to Lila Talvitie-Zamora, who helped process the updates for this edition, and the attorneys and advocates who continue to expand the law for the benefit of tenants. I especially wish to thank Paul Birnberg, whose analysis is reflected in many sections of this manual, and Bricker Lavik and Candee Goodman, who first developed the idea of an annual housing law institute, for which I first prepared this manual. Finally, thanks to the Minnesota State Bar Association and Nancy Kleeman, Dorsey and Whitney, and Probono.net, for providing the encouragement and technical support to make this manual and the many unpublished decisions discussed in it available on the internet.

Seventh Edition, November 1996

I would like to thank Chris Nelson, who helped process this edition, and the attorneys and advocates who developed many creative arguments that resulted in the decisions reported here. As I put these materials together I can see the wonderful work all of you are doing to make life a little more just for tenants.

Sixth Edition, November 1995

I wish to thank and acknowledge the work of Peggy Armour, who spent many hours processing this edition; and the attorneys and advocates from legal services, volunteer attorney programs and other agencies, which provided important court decisions for these materials. I especially want to thank Paul Birnberg, Robin Williams, Charlene D'Cruz, and Doug Clark, who helped me develop some of the arguments and forms in these materials. Finally, I wish to dedicate this edition to Dawn Carlson, a legal services attorney in Moorhead, Minnesota, who recently passed away. While she was with Legal Services only for a few short years, her dedicated work benefitted her clients, the law, and those of us who knew her.

Fifth Edition, November 1994

The author again wishes to thank Kaylen Randle, who spent many hours processing this edition; and the attorneys and advocates from legal services, volunteer attorney programs and other agencies dedicated to

the protection of tenants.

Fourth Edition, November 1993

The author wishes to thank Kaylen Randle, who had the thankless task of processing this edition from the previous edition, two supplements and additional material.

Third Edition, April 1991

This article is dedicated to all of the Legal Services and volunteer attorneys whose advocacy continues to expand legal protection for tenants. Many of the statutes and court decisions discussed in this article are a result of their work. The author also wishes to thank Mescal Urich, who again devoted countless hours to processing this continuously expanding article.

Second Edition, October 1989

The author wishes to thank Peter Brown, Richard Fuller, Bricker Lavik, Candace Rasmussen, Galen Robinson, Randall Smith, Timothy L. Thompson, Thomas Vasaly, and John Whitelaw, Esquires, whose written materials and/or comments formed the basis for portions of this article; and Mescal Urich, who devoted many hours to formatting and processing numerous drafts of this article.

Lawrence R. McDonough

TABLE OF CONTENTS

CHAPTER I:
INTRODUCTION TO UNLAWFUL DETAINER (EVICTION) ACTIONS AND LANDLORD-TENANT RELATIONSHIPS

A. STATUTES AND CASES

1. Recodification of Landlord-Tenant Laws

The 1998 legislature passed a recodification of the existing landlord-tenant statutes in Chapters 504 and 566 into a new chapter 504A. The legislature delayed the effective date of Chapter 504A and the repeal date of Chapters 504 and 566 one year to allow for study and comment of the recodification. The purpose of Chapter 504A was to make landlord-tenant laws more accessible to the public by placing them in one chapter, and rewriting them in a more understandable form. A committee of landlord and tenant attorneys reviewed Chapter 504A, and proposed in its place Chapter 504B, which was an attempt to reach the goals of Chapter 504A while better ensuring that the recodification does not change state law.

In 1999 the legislature passed 504B. It replaces both 504A, which never went into effect, and 504 and 566, which it consolidated. Tenants should cite to both 504B (the current statutes) and either 504 or 566 (the old statutes), since case law up to 1999 cited the old statutes. This manual contains cites to both the new statute and it old counterpart. Tenants can review and download a copy of 504B, 504, and 566 from the Minnesota Legislature at http://www.leg.state.mn.us/leg/statutes.htm. Tenants also should review the Statute Cross Reference Charts (Form 1).

As part of the recodification creating Chapter 504B, the term unlawful detainer was replaced with eviction. Minn. Stat. § 504B.001. This manual will use both terms, often with a cross reference to the other term, since all cases before 1999 used the term unlawful detainer.

2. Cases

Many cases interpreting landlord-tenant law are unreported, either at the state district court or Court of Appeals levels. Unreported district court decisions are in an appendix to this manual. Given the rise of tenant screening agencies reporting information on eviction cases, recent decisions discussed in this manual do not contain the tenant's name in the citation.

This manual also refers to some unpublished district court decisions contained in MINNESOTA RESIDENTIAL TENANT REMEDIES and its appendix (TR), which covers actions brought by tenants to enforce tenant rights. Unreported Court of Appeals decisions can be reviewed and downloaded from the Minnesota State Courts, as well as online legal research services.

3. Effect of Unpublished Court of Appeals Decisions

Since creation of the Minnesota Court of Appeals, most appellate decisions discussing residential landlord-tenant law have been unpublished decisions of the Court of Appeals, rather than published decisions of the Court of Appeals or Minnesota Supreme Court. Unpublished decisions of the Court of Appeals may be of persuasive value, but are not precedential. *Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796 (Minn. Ct. App. 1993); MINN. STAT. § 480A.08, subd. 3 (Unpublished opinions of the Court of Appeals are not precedential. Unpublished opinions must not be cited unless the party citing the unpublished opinion provides a full and correct copy to all other counsel at least 48 hours before its use

in any pretrial conference, hearing, or trial. If cited in a brief or memorandum of law, a copy of the unpublished opinion must be provided to all other counsel at the time the brief or memorandum is served, and other counsel may respond). The *Dynamic Air* Court noted that the trial court "committed error by relying upon an unpublished [Court of Appeals] opinion ...." The Court added that "a party may cite to an unpublished opinion affirming a trial court's exercise of discretion to persuade a trial court to exercise discretion in the same manner. It is, however, improper to rely on unpublished opinions as binding precedent." *Id.* at 800. However, counsel may have an ethical obligation to cite unpublished opinions adverse to counsel's client if that authority is the only opinion on point in the jurisdiction. M. Johnson, *Advisory Opinion Service Update*, BENCH & BAR OF MINN. at 13 (Oct. 1993). *See generally* 3 E. MAGNUSON, D. HERR & R. HAYDOCK, MINN. PRAC. § 117.3 at 95 (Supp. 1994).

4. Preemption of Ordinances by State Statutes

Many cities have ordinances regulating landlord and tenant relationships. Rarely a state statute will specifically preempt application of a contrary ordinance. *See* Minn. Stat. § 504B.205 and Eviction for Emergency Police Calls, discussion, *infra*, at VI.G.31.

In *City of Morris v. Sax Investments, Inc.*, 730 N.W.2d 531 (Minn. Ct. App. 2007), the Court of Appeals considered a challenge to a local habitability ordinance on the grounds that it was preempted by the state building code. The Court concluded that the state building code did not preempt local regulation of habitability. On appeal, the Minnesota Supreme Court held that the authority of municipalities to enact and enforce habitability standards for rental housing is constrained by the prohibition on municipal regulation of building code provisions in Minn. Stat. § 16B.62, subd. 1. *City of Morris v. Sax Investments, Inc.*, 749 N.W.2d 1, 3 (Minn. 2008).

B. SUMMARY OF UNLAWFUL DETAINER (EVICTION) ACTIONS AND COURT PROCEDURE

The unlawful detainer action is now called an eviction action under Minn. Stat. § 504B.001, Subd. 4. It is a summary proceeding, created by statute, to allow the landlord or owner of rental property to evict the tenant or possessor of the property. The landlord prepares a complaint, often using a form. *See* Housing Court forms. http://www.courts.state.mn.us/default.aspx?page=513&category=58. The plaintiff files the case with the court administrator, who prepares a summons. The defendant must be served at least seven days before the initial hearing, either by personal or substitute service.

The filing fee for court actions, including eviction actions, is $322. The fee applies to both plaintiff and defendants, and landlords and tenants, for the first document filed each party in a case. If a tenant does not file anything and orally presents an answer or response to the landlord's complaint, the court does not assess a fee to the tenant. Low income persons can request a fee waiver by filing an *in forma pauperis* application. *See* http://www.mncourts.gov/default.aspx?page=513&category=56.

In most courts, the initial hearing serves as an arraignment. If the defendant does not appear, the court will find for the plaintiff and issue a Writ of Restitution. If the defendant appears to contest the action, the court generally will schedule a trial for another day. While a written answer is not required, the courts require a $322 fee if the defendant files an answer, unless the defendant obtains *in forma pauperis* status. If the defendant appears and does not contest the action, the court will find for the plaintiff, but might stay issuance of the Writ of Restitution for seven days.

In the Fourth the Second Judicial Districts for Hennepin and Ramsey Counties, referee presides over the arraignment, which could include as many as 50 cases scheduled on the calendar. The

Hennepin County cases are heard in Minneapolis at 8:45 and 10:30 am. Monday and Wednesday through Friday, at the Hennepin County Government Center, C-300, 300 South 6th Street, Minneapolis, http://www.mncourts.gov/district/4/?page=128. The Ramsey County cases are heard in St. Paul at 8:45 am, Monday through Friday, at the Ramsey County Courthouse, Room 170, 15 West Kellogg Boulevard, Saint Paul, http://www.mncourts.gov/district/2/?page=53.

The clerk does a roll call before the arraignment begins. The order of cases in Hennepin County is judge requests, defaults, settled cases, disputed cases with counsel, and disputed cases without counsel. *See* Memorandum to Housing Court Staff from Sue Daigle (Oct. 3, 1996) (Appendix 173). If a trial is necessary, the referee generally will schedule it for another day. However, now and then judges may substitute for the referee at arraignment, and may be more inclined to schedule trials for that day. Tenants should call the Housing Court Administration Office to find out in advance who is hearing arraignments. The court also may schedule an evidentiary hearing if needed to resolve pre-trial motions, such as motions for dismissal for improper service.

A party may opt out of a Housing Court referee hearing by filing a written request the day before the first hearing, and the case will be referred to a judge. A party also may remove a specific referee from a case, as can be done with judges assigned to cases, upon a written notice of removal. The court then would assign the case to either another referee or a judge.

Hennepin County Housing Court administrative services are divided into two offices, with one office on the skyway public service level handling eviction (formerly unlawful detainer) action case filings and public service information, and the Third Floor Housing Court (formerly on the Seventeenth Floor), which houses courtrooms and clerks office handling other services. *See* Hennepin County District Court, *Access, Filing & Information Are Moving* (Appendix 174). The Housing Court issued a May 15, 1996, Order approving acceptance of uncertified checks from Legal Aid and other law firms. The Housing Court retains discretion to decide whether to accept uncertified checks from social service agencies. It takes quite a bit longer for the Court to process and disperse uncertified funds, so if quick dispersal of funds is important to the tenant, the tenant or tenant's attorney should submit funds by certified check. (Appendix 174A).

At trial, the plaintiff has the burden of proof by preponderance of the evidence, and the defendant may raise numerous statutory and common law defenses. If the tenant prevails, the landlord may not evict the tenant at this time. If the landlord prevails, the court may immediately issue a Writ of Restitution, or stay issuance of the Writ for up to seven days. The landlord then must arrange for the sheriff or police to deliver the Writ, which is a 24-hour eviction notice. If the tenant does not move, the landlord must schedule an eviction of the tenant with the sheriff or police. The landlord must store the tenant's property, either on site for 28 days (formerly 60 days), or with a storage company for 60 days.

Either party may appeal from entry of judgment, within 10 days of entry of judgment. If the case was heard by a referee in the Second or Fourth Judicial Districts (Ramsey and Hennepin counties), a party may request district court judge review of the decision, but should request stay or vacation of entry of judgment pending review to preserve the right to appeal.

C. Creation of a Landlord-Tenant Relationship.

A landlord-tenant relationship arises when one person occupies the premises owned by another with or without consent, in subordination to the other person's title. *Gates v. Herberger*, 202 Minn. 610, 612, 279 N.W. 711, 712 (1938). The relationship is created by a conveyance of property for a period less

than the conveying party has in the premises, in consideration of rent, leaving the landlord a reversionary interest. *State v. Bowman*, 202 Minn. 44, 46, 279 N.W. 214, 215 (1938). *See* 10B DUNNELL MINN. DIGEST 2D *Landlord and Tenant* § 1.00.

The term "lease" generally is used to refer to the physical document creating the tenancy, although it is common to refer to a tenancy created by an oral agreement as an "oral lease". The lease is both a conveyance of the right to possession of real property and a contract creating the terms for the landlord-tenant relationships. *Local Oil Company, Inc. v. City of Anoka*, 303 Minn. 537, 539, 225 N.W. 2d. 849, 851 (1975). Often the term "lease" and "tenancy" are used interchangeably to describe the relationship between the landlord and tenant. The tenant's interest in the property is a leasehold interest. *Sanford v. Johnson*, 24 Minn. 172, 173 (1877). While a tenancy may be created by an oral or written lease, it also may be created by operation of law.

D. TYPES OF PRIVATE TENANCIES

1. Fixed term

A tenancy for a fixed term also is called a tenancy for years, and can be for any duration. Generally, during the term of the lease, the terms of the agreement cannot be changed without the consent of the parties. The landlord cannot evict the tenant unless the tenant has breached (violated) the lease. The tenant cannot terminate the lease before the end of the term without the landlord's consent, unless a constructive eviction occurs or the tenant enters the miliary service and gives written notice to the landlord.

Some term leases allow the landlord and tenant to terminate the lease before the end of the term with notice. However, in some cases, the notice period may be unconscionable. *See Pickerign v. Pascal Marketing, Inc.*, 303 Minn. 442, 446, 228, N.W. 2d 562, 565 (1975) (lease providing for 30-day notice to service station operator may be unconscionable). If a term lease becomes void under the statute of frauds, the law will imply the creation of a tenancy at will. *Fisher v. Heller*, 174 Minn. 233, 236, 219 N.W. 79, 80 (1928).

When a landlord has proposed a written term lease, but the tenants took occupancy without signing it and the landlord did not provide a copy to the tenants, the written lease is not applicable to the tenancy, leaving the landlord and tenant in a month-to-month oral tenancy. *Ochoa v. Kenneth*, UD-1950919505 (Minn. Dist. Ct. 4th Dist. Oct. 20, 1995) (Appendix 79). *But see Line v. Reynolds*, Number UD-1960612512 (Minn. Dist. Ct. 4th Dist Aug 12, 1996) (Appendix 175) (Consolidated unlawful detainer (now called eviction) and rent escrow actions; landlord could require tenant to sign a term lease rather than continue as a month to month tenant).

A term tenancy should not terminate upon sale of property by the owner, *Fisher v. Heller*, 174 Minn. 233, 236, 219 N.W. 79, 80 (1928) (tenancy at will).

2. Month-to-month and other periodic tenancies

A periodic tenancy is a tenancy made up of an indefinite series of rental periods, which either party may terminate by giving written notice before the last rental period. A periodic tenancy also is created where a tenant of urban real estate holds over after expiration of a lease, with a period of the tenancy being the period between payments. Minn. Stat. §§ 504B.135 (formerly 504.06), 504.141 (formerly § 504.07). Upon expiration of an initial term lease, without any action by the parties to renew

the lease, the parties' continuation of the landlord-tenant relationship becomes a month-to-month tenancy and cannot be based on the original written lease. *Urban Investments, Inc. v. Thompson*, No. UD-1950626525 (Minn. Dist. Ct. 4th Dist. Aug. 10, 1995) (Appendix 80). When a landlord has proposed a written term lease, but the tenants took occupancy without signing it and the landlord did not provide a copy to the tenants, the written lease is not applicable to the tenancy, leaving the landlord and tenant in a month-to-month oral tenancy. *Ochoa v. Kenneth*, UD-1950919505 (Minn. Dist. Ct. 4th Dist. Oct. 20, 1995) (Appendix 79).

In the most common form, the month-to-tenancy, written notice must be given before the last month of the tenancy. Minn. Stat. § 504B.135 (formerly 504.06); *Johnson v. Ceil Hamm Brewing Company*, 213 Minn.12, 16, 4 N.W.2d 778, 781 (1942); *Oesterreicher v. Robertson*, 187 Minn. 497, 501, 245 N.W. 825, 826 (1932). *See Mako v. Naditch & Sons*, 303 Minn. 6, 7, 226 N.W.2d 289, 290 (1975) (strict compliance required); *Eastman v. Vetter*, 57 Minn. 164, 166, 58 N.W. 989, 989-90 (1894) (defective notice void and not effective at end of next month). A periodic tenancy does not terminate upon the death by either party. *State Bank of Loretto v. Dixon*, 214 Minn. 39, 43, 7 N.W.2d 351, 353 (1943).

It is unclear whether the landlord has the right to unilaterally modify the terms of a periodic tenancy by giving the same kind of notice as is required to terminate the tenancy. Landlords argue that it is a common practice for landlords to give notice of changes in the rent or building rules, and for these changes to be accepted as part of the lease without the need for specifically terminating the existing tenancy or informing the tenant that the tenant must move if the tenant does not accept the new terms. Alternatively, landlords argue that such a notice is actually a notice to terminate the old periodic tenancy combined with an offer to re-rent the premises on new terms.

Tenants argue that if the tenant objects to the rent increase, the tenant cannot be bound to a new lease by implication. *See Urban Investments, Inc. v. Thompson,* UD-1950626525 (Minn. Dist. Ct. 4th Dist. Aug. 10, 1995) (Appendix 80) (additional provisions that were not part of the original lease do not create additional obligations on the part of the tenant, without an agreement to make the additional provisions part of a new lease); FUNDAMENTALS OF LANDLORD/TENANT LAW AND PRACTICE, *supra*, § 4.1-02(3) at 3-4 (MCLE 1988). However, a notice that explicitly terminates an existing tenancy, offers to renew the lease at an increased rent, and specifies that the offer may be accepted by remaining in possession past the expiration of the original term should be effective.

3. Tenancy at will

Historically there was some disagreement over whether a periodic tenancy was a tenancy at will. *See State Bank of Loretto v. Dixon*, 214 Minn. 39, 43 n.1, 7 N.W.2d 351, 353 n.1 (1943). *Compare* 10B DUNNELL MINN. DIGEST 2D *Landlord and Tenant* § 1.02 *and* FUNDAMENTALS OF LANDLORD/TENANT LAW AND PRACTICE, § 4.1-02(4) at 4. In any event, a tenancy at will generally has the same legal effect as a periodic tenancy.

A tenancy at will has an uncertain term, and is created where the parties agree to a tenancy without a fixed term, *Weidemann v. Brown*, 190 Minn. 33, 40-41, 250 N.W. 724, 727 (1933); where the lease is void, *Hagen v. Bowers*, 182 Minn. 136, 137-38, 233 N.W. 822, 823 (1931); or where a tenant remains on the property after expiration or termination of the lease (holdover tenant) and continues to pay rent, *Paget v. Electrical Engineering*, 82 Minn. 244, 246, 84 N.W. 800, 801 (1901). Where the parties relationship was a personal and domestic partnership, rather than a relationship of landlord-tenant, vendor-vendee, or arms-length contracting parties, the relationship may be a tenancy-at-will.

Charboneau v. Johnson, UD-1950817510 (Minn. Dist. Ct. 4th Dist. Aug. 30, 1995) (Appendix 81). Where there is a landlord-tenant relationship, but the term is indefinite and the rent is unclear, the relationship may be a tenancy-at-will. *Hansen v. Trom,* UD-1950926503 (Minn. Dist. Ct. 4th Dist. Nov. 6, 1995) (Appendix 82).

Permission is all that is needed from an owner to create a tenancy-at-will, and rent or other obligations are not needed. *Thompson v. Baxter,* 107 Minn. 122, 119 N.W. 797 (1909); *Lee . Regents of the University of Minnesota*, 672 N.W.2d 366 (Minn. Ct. App. 2003) (followed *Thompson*).

Either party may terminate a tenancy at will in the same manner as a periodic tenancy. Minn. Stat. § 504B.135 (formerly 504.06). A tenancy at will does not terminate upon sale of property by the owner, *Fisher v. Heller*, 174 Minn. 233, 236, 219 N.W. 79, 80 (1928) or upon death of either party. *See* R. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT, § 10.3 (Bancroft-Whitney 1980 and Supp. 2008).

4. Tenancy at sufferance

A tenancy at sufferance describes the legal limbo which exists when a tenant holds over after expiration or termination of the lease and the landlord does not accept rent. *Weidemann v. Brown*, 190 Minn. 33, 40-41, 250 N.W. 724, 727 (1933). It is not a true tenancy because there is no landlord/tenant relationship between the parties, but the landlord must bring an eviction (formerly unlawful detainer) action to evict the tenant. Minn. Stat. § 504B.285 (formerly § 566.03), 504B.301 (formerly § 566.02).

5. Subtenants

A subtenancy is created when a tenant transfers the tenant's possessory interest under the lease to another for less than the whole term of the lease. *Warnert v. MGM Properties*, 362 N.W.2d 364, 367 (Minn. Ct. App. 1985). A subtenancy creates a landlord tenant relationship between the tenant-sublessor and subtenant. Privity of estate exists between the landlord and the tenant, and the sublessor and the subtenant, but not between the landlord and the subtenant. *See* R. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT, §§ 8.11-8.12 (Bancroft-Whitney 1980 and Supp. 2008). Generally, termination of the prime lease terminates the subtenant's possessory rights under the sublease, but surrender of the prime lease does not terminate the sublease. It simply causes the lessor to "step down" to the position of the sublessor on the sublease. *Warnert*, 362 N.W.2d at 367-69. A tenant may not create a sublease for a time period identical to the tenants lease with the landlord, and co-tenants of a landlord may not create a sublease between themselves. *Hansen v. Trom*, UD-1950926503 (Minn. Dist. Ct. 4th Dist. Nov. 7, 1995) (Appendix 82).

The writ cannot be enforced against a subtenant who was not a party to the eviction (unlawful detainer) action nor named in the writ of restitution. *See Kowalenko v. Haines*, No. C6-85-1365 (Minn. Ct. App., July 24, 1985) (attached as Appendix 4). In *Kowalenko*, the petitioner had subleased the apartment from the former tenants. The writ was enforced against the petitioner, pursuant to an unlawful detainer action against former tenants, but not the petitioner. The petitioner was not named in the writ. The court ordered the landlord to return possession of the apartment and petitioners personal property to her, pursuant to Minn. Stat. § 504B.375 (formerly § 566.175).

An assignment is created when a tenant transfers the tenant's possessory interest under the lease for the full remaining term of the lease. *Kostakes v. Daly*, 246 Minn. 312, 315-16, 75 N.W.2d 191, 193-94 (1956). Where a third person is in possession of the premises under a lease, the law presumes that the

lease has been assigned by the lessee to such person, but the presumption is rebuttal. *O'Neal v. A.F. Oys & Sons*, 216 Minn. 391, 394, 13 N.W.2d 8, ___ (1944). However, the reservation of the right to collect rents, reenter in case of default, and enter to make repairs creates a sublease, rather than an assignment. *Judd v. Landin*, 211 Minn. 465, 472, 1 N.W.2d 861, 865 (1942).

An assignment leaves privity of estate only between the landlord and the assignee, and privity of contract between the tenant-assignor and the assignee. *Kostakes*, 246 Minn. at 316, 75 N.W.2d at 194. However, in some cases the assignee may be an equitable assignee, subject to the covenants and obligations of the agreement between the landlord and tenant-assignor. *Baehr v. Penn-O-Tex Oil Corp.*, 258 Minn. 533, 536, 104 N.W.2d 661, ____ (1960). The assignee is liable for rent only during the time the assignment. *O'Neil v. A.F. Oys & Sons*, 216 Minn. 394-95, 13 N.W.2d at ___. However, the landlord and the assignee could agree that the assignee would pay prior rent. Additionally, if the assignee vacated before the end of the assignment period, the assignee could be liable for rent for the balance of the assignment period.

A landlord may prohibit assignment and subletting by the terms of the lease, or limit assignment and sublet to the landlord's sole consent. A landlord has no duty to agree to an assignment or sublease where the tenant desires an early termination of the lease and proposes an assignment or sublease to mitigate damages. *Gruman v. Investors Diversified Services, Inc.*, 247 Minn. 502, 505-08, 78 N.W.2d 377, ___ (1956). A landlord may condition consent to assignment on specific terms or restrictions. *Leonard, Street & Deinard v. Marquette Assocs.*, 353 N.W.2d 198, 200-01 (Minn. Ct. App. 1984). However, acceptance by the landlord of rent from the assignee with knowledge of the assignment waives a provision requiring consent of the landlord to any assignment. *O'Neal v. A.F. Oys & Sons*, 216 Minn. at 394, 13 N.W.2d at ____.

See generally 10B DUNNELL MINN. DIGEST 2D *Landlord and Tenant*, §§ 2.01-2.02, 7.04; R. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT, |Ch. 8 (Bancroft-Whitney 1980 and Supp. 2008).

6. Domestic partners

Domestic partners may or may not be in a landlord-tenant relationship, and if not, an eviction (formerly unlawful detainer) action not be an appropriate forum to determine their possessory interests in the property. In *Shustarich v. Fowler*, UD 1960604520 (Minn. Dist. Ct. 4th Dist. July 5, 1996) (Appendix 176), Plaintiff and defendant first lived in defendant's home. Then plaintiff and defendant moved from her home to a second property, and the parties then living at the second property moved to defendant's old home. Plaintiff took title to the new property, and defendant contributed several thousand dollars from the sale of her home to a new roof and appliances. The parties kept separate expenses. After defendant obtained an order for protection, plaintiff gave notice and filed an unlawful detainer action. The court concluded that plaintiff failed to establish a landlord-tenant relationship, defendant was entitled to assert an interest in the premises, and an unlawful detainer action was a summary remedy inappropriate to try issues of title or to substitute for an action in ejectment, and denied restitution of the premises. *See In re Estate of Ericksen,* 337 N.W.2d 671 (Minn. 1983). *But see Stock v. Beaulieu* (Minn. Dist. Ct. 9th Dist. Mar. 9, 1995) (Appendix 140) (domestic partners were in landlord-tenant relationship; plaintiff retaliated against defendant for reporting a crime of domestic abuse committed by the plaintiff in which the defendant was the victim).

7. Implied tenancy and terms

When the parties have neither a written nor oral agreement of undisputed terms but act as if there is a rental agreement by continuing all the indicia of a landlord/tenant relationship, the court must determine the applicable terms by their actions and the surrounding circumstances. The landlord's regular acceptance of a specific sum from the tenant based on the tenant's written offer to pay that sum, and the landlord's acceptance of it for the following eight months without any written or oral objections to it, establishes the parties' agreement to rent at that sum. *Orchestra Hall Associates v. Crawford*, No. UD-1960119508 (Minn. Dist. Ct. 4th Dist. Feb. 13, 1996) (Appendix 177).

8. Covenant running with the land

In general, basic covenants that touch the land run with the land, including covenants to pay rent and maintain the property. R. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT Ch. 8 (Bancroft-Whitney 1980 and Supp. 2008). A new landlord takes the land with the rights and liabilities which existed between the old landlord and the tenant. *Glidden v. Second Avenue Investment Co.*, 125 Minn. 471, 473-74, 147 N.W. 658, 659 (1914); *Farmers Insurance Exchange v. Ouellette*, No. C8-97-1504 (Minn. Ct. App. Feb. 24, 1998) (Appendix 330) (Unpublished: new landlord assumed terms of modified lease under the terms of the lease, and Minnesota case law). The old landlord's rights and obligations transfer over to the new landlord, if the tenant had notice of the change. *See Pillsbury Investment Co. v. Otto*, 242 Minn. 432, 437, 65 N.W.2d 913, ___ (1954). *See also Borer v. Carlson*, 450 N.W.2d 592, 594 (Minn. Ct. App. 1990); *Snortland v. Olsonawski*, ___ Minn. ___, ___ 238 N.W.2d 215, 217-18 (1976).

9. Covenants implied by statute

All oral and written leases include implied statutory covenants on habitability and illegal activity. Minn. Stat. §§ 504B.161 (formerly § 504.18), 504B.171 (formerly § 504.181). *See* discussion at VI.E.1. (habitability), VI.G.16. (unlawful activities).

10. Lease renewal or extension

If a term for the duration of the lease's extension is indefinite, any extension due to holdover and payment is limited to the duration of the original lease. *Hildebrandt v. Newell*, 199 Minn. 319, 272 N .W. 257 (1937); *Hallin v. Hallin*, No. C3-02-910, 2002 WL 31893031 (Minn. Ct. App. Dec. 31, 2002) (unpublished). Acceptance of rent following expiration of lease creates a month to month lease, but not a lease renewal where negotiations still were underway. *Stoneburner v. Dubow*, No. CX-01-2160, 2002 WL 1051700 (Minn. Ct. App. May 28, 2002) (unpublished).

Minn. Stat. § 504B.145 (formerly § 504.21) restricts automatic renewals of leases.

> Notwithstanding the provisions of any residential lease, in order to enforce any automatic renewal clause of a lease of an original term of two months or more which states, in effect, that the term shall be deemed renewed for a specified additional period of time of two months or more unless the tenant gives notice to the landlord of an intention to quit the premises at the expiration of the term due to expire, the landlord must give notice to the tenant as provided in this section. The notice must be in writing and direct the tenant's attention to the automatic renewal provision of the lease. The notice must be served personally or mailed by certified mail at least 15 days, but not more than 30 days prior to the time that the tenant is required to furnish notice of an intention to quit.

There is little case law interpreting it. In *Mid Continent Management Corp. v. Donnelly*, 372 N.W.2d 814 (Minn. Ct. App. 1985), the Court held that tenants may not enforce an automatic renewal clause if the landlord has not given the statutory notice.

Fixed term leases often include a provision that following expiration of the original lease term, the tenancy will continue on a month-to-month basis. Such provisions do not trigger the notice requirement of the automatic renewal statute, Minn. Stat. § 504B.145 (formerly § 504.21), since it only applies to leases of an original term of at least two months and a renewal period of at least two months.

However, it is unclear how § 504B.145 (formerly § 504.21) applies a periodic tenancy where the parties have agreed to a two month or 60 day notice period. On one hand, the parties have mutually agreed to the longer notice period in order to give both parties more time to respond to a notice to quit, and the parties should be bound to the agreement. *See Control Data Corp., v. Metro Office Parks, Co.*, 208 N.W.2d 738, 740 (Minn. 1973) (after commercial tenant exercised option to extend lease, tenant was bound by 12 month notice requirement of the lease). On the other hand, § 504B.145 (formerly § 504.21) requires that in leases with an original term of at least two months, and then an automatic renewal period of at least two months if the tenant does not give a notice to quit, the landlord must give a reminder notice to the tenant at least 15 days before the tenant is required to give the notice to quit. In theory, this would require the landlord to give such a reminder notice every two months. This interpretation would appear to conflict with Minn. Stat. § 504B.135 (formerly 504.06), which provides that a periodic tenancy with a rental period of three months or more may be terminated by three months notice, thus a revolving three month periodic tenancy. Perhaps the applicability of § 504B.145 (formerly § 504.21) to a two month periodic tenancy rests on how one analyzes operation of the tenancy. On one hand it is a tenancy that continues on a one month-to-one month basis, but a two month termination notice is required. On the other hand, it is a two month-to-two month tenancy, since at any point in time a two month termination notice is required to terminate it.

11. Relatives and Guests

Adult members of the same family in the same dwelling might or might not be in a landlord and tenant relationship. If one member owns the property and the other does not pay rent or provide services in lieu of rent under Minn. Stat. § 504B.001 discussed next, the owner still could file an eviction action to evict the other person as one unlawful detaining the property under Minn. Stat. § 504B.301 (formerly § 566.02). *See DePetro v. DePetro*, No. A03-727, 2004 WL 885552 (Minn. Ct. App. April 27, 2004) (unpublished) (affirmed eviction by owner of her adult daughter who was not a rent-paying tenant). *See* Subject Matter Jurisdiction, *infra*, at III.

E. Statutory Definitions

The definitions of tenants and buildings that now are in Minn. Stat. § 504B.001 were formerly in Minn. Stat. § 566.18 of the Tenants' Remedies Act, and had been incorporated in the Rent Escrow Act, § 566.34, and applied by § 504.27 to the following statutes: §§ 504B.271 (formerly § 504.24) (property abandonment), 504B.204 (formerly § 504.245) (action for rental of condemned residential premises), 504B.225 (formerly § 504.25) (criminal unlawful eviction or termination of utilities), 504B.231 (formerly § 504.255) (unlawful eviction), 504B.221 (formerly § 504.26) (unlawful termination of utilities), and 504B.315 (formerly § 504.265) (restrictions on eviction due to familial status).

> "Residential tenant" means any person who is occupying a dwelling in a building. . . under any agreement, lease, or contract, whether oral or written, and for whatever period of time, which

requires the payment of money or exchange of services as rent for the use of the dwelling unit, and all other regular occupants of that dwelling unit, or any resident of a manufactured home park.

"Residential building" means any building used in whole or in part as a dwelling, including single family homes, multiple family units such as apartments, and structures containing both dwelling units and units used for non-dwelling purposes, and also includes a manufactured home park.

"Landlord" means the owner or owners of the free hold of the premises or lesser estate therein, contract vendee, receiver, executor, trustee, lessee, agent, or any other person, firm or corporation directly or indirectly in control of a building.

F. MANUFACTURED (MOBILE) HOME PARK LOT TENANCIES

Minn. Stat. Ch. 327C governs rental of lots in manufactured or mobile home parks. A manufactured home park is land on which two or more occupied manufactured homes are located and where facilities are open for more than three seasons. §§ 327C.01, subd. 5, 327.14. The rental agreement must be in writing and include elements required by statute. § 327C.02, subd. 1. 60 days notice is required to change any park rules. However, a rule adopted or amended after a resident initially enters into a rental agreement can be enforced against that resident only if the new or amended rule is reasonable and is not a substantial modification of the original agreement. § 327C.02, subd. 2. A park owner may terminate the tenancy only for cause. § 327C.09.

G. PUBLIC AND GOVERNMENT SUBSIDIZED HOUSING TENANCIES

Tenancies in public and government subsidized housing are a hybrid of traditional periodic and fixed term tenancies. On one hand, the tenancy has an indefinite term without an expiration date. On the other hand, the landlord cannot terminate the tenancy simply by giving notice; the landlord must have good cause to terminate the tenancy. *See generally* HUD HOUSING PROGRAMS: TENANTS' RIGHTS (National Housing Law Project, 2d ed. 1994 and Supplements); F. FUCHS, INTRODUCTION TO HUD - PUBLIC AND SUBSIDIZED HOUSING PROGRAMS (March 5, 1993).

There are four categories of public and government subsidized housing. In each of these housing programs, the tenant's rent usually is based on a percentage of the tenant's adjustable income. First, public housing is owned and operated by local housing authorities with assistance from the federal government. The housing authority may terminate the tenancy for serious violations of a material lease term or other good cause.

Second, a number of programs provide federal funds directly to landlords in connection with the building, renovation or operation of subsidized housing units. The landlord may terminate the tenancy for material noncompliance with the lease, material failure to meet obligations under state, landlord/tenant law or other good cause. These programs include Section 8 New Construction Substantial Rehabilitation, and Set-Aside; Section 8 administered by state housing finance agencies or owned and operated by the United States Department of Housing and Urban Development (HUD); and Section 236, 221 and 202 programs. Some of these programs, including the Section 8 Moderate Rehabilitation and Project Based Certificate programs, also provide for local housing authority inspection for compliance with its housing code, and allow the housing authority to terminate the tenancy if the unit is not in compliance.

Third, and similar to the second set of programs discussed above, the Federal Low Income Housing Tax Credit program provides assistance to landlords in connection with the building, renovation or operation of subsidized housing units. Most tenants may not know that they are in a low income housing tax credit project, because their rent may not be based on their income. The Minnesota Housing Finance Agency (MHFA), as well as redevelopment agencies in Minneapolis and St. Paul, have listings of low income housing tax credit projects. Recently, in *Bowling Green Manor L.P. v. Kirk*, the Ohio Court of Appeals held that the landlord could terminate the tenancy only for good cause, following a 30-day written notice of termination setting forth specific good cause for eviction. No. WD 94-125, 1995 WL 386,476, 1995 Ohio App. LEXIS 2707 (June 30, 1995) (Appendix 83).

Fourth, some programs provide the tenant with a housing certificate or voucher, which allows the tenant to find a landlord willing to participate in the program. These programs include the Section 8 Existing Housing Certificate and Section 8 Voucher Programs. The housing authority sends a monthly rent subsidy to the landlord and the tenant pays the remaining share of the rent. The landlord may terminate the tenancy for serious or repeated violations of the lease, violation of federal, state, or local law which imposes an obligation on the tenant in connection with occupancy of the unit, or other good cause. Also, the housing authority can terminate the tenancy if the unit is not in compliance with its housing code.

The Minnesota Housing Finance Agency (MHFA) administers the Rental Assistance for Family Stabilization (RAFS) Program in partnership with local housing organizations in Minnesota counties with high average housing costs as determined by the United States Department of Housing and Urban Development (HUD). In Minneapolis, the program is operated by the Section 8 Office of the Minneapolis Public Housing Authority (MPHA). The program is similar to the Section 8 Existing Housing Certificate and Voucher Programs, in that it provides subsidies to tenants who then use the subsidy in the private rental market. While the state subsidy in the RAFS Program are smaller than the federal Section 8 subsidies, the program follows many of the requirements of the Section 8 programs, including federal Housing Quality Standards (HQS) for apartment conditions, and the requirement that the landlord notify the Section 8 Office of termination of tenancy and eviction actions. *See* RAFS Owners Handbook (Minneapolis Public Housing Authority May 1, 1999) (Appendix 414).

H. NON LEASEHOLD RELATIONSHIPS

1. Tenant versus hotel guest

A hotel is a building which is kept, used and advertised, or held out to the public as a place for sleeping or housekeeping accommodations or supplied for pay to guests for transient occupancy. Transient occupancy means occupancy when it is the intention of the parties that the occupancy will be temporary. There is a rebuttable presumption that, if the unit occupied is the sole residence of the guest, the occupancy is not transient. There also is a rebuttable presumption that, if the unit occupied is not the sole residence of the guest, the occupancy is transient. Minn. Stat. § 327.70, subds. 3, 5.

In *Luten v. Salvation Army*, No. UD-1860324520 (Minn. Dist. Ct. 4th Dist. March 24, 1986) (Appendix 603) even though the respondent considered itself a hotel and not a landlord, the court noted that the nature of the tenancy is created by the conduct of the parties, as well as the written documents, and concluded that the petitioner was a tenant where he paid monthly rent for two years and reasonably understood that he was a tenant. *See Residential Tenants' Remedies*, Appendix 18. *See Gutierrez v. Eckert Farm Supply, Inc.*, No. C5-02-1900, 2003 WL 21500161 (Minn. Ct. App. July 1, 2003) (unpublished) (affirmed conclusion that hotel resident was a tenant and not a hotel guest).

2. Licenses

A license is an authority to do an act or series of acts upon the land of the person granting the license, without conferring on the licensee any estate in the land. *Minnesota Valley Gun Club v. North Line Corp.*, 207 Minn. 126, 128, 290 N.W. 222, 224 (1940). *See* 11A DUNNELL MINN. DIGEST *Licenses in Real Property* (3rd ed. 1978 and Supp. 1989). However, some landlord tenant statutes specifically include licenses. *See e.g.* Minn. Stat. §§ 504B.161 (formerly § 504.18) (covenants of habitability), 504B.171 (formerly § 504.181) (covenant not to manufacture or traffic drugs).

3. Caretakers: tenants versus employees

Caretakers traditionally were reviewed as occupying the premises incidentally to the caretaker's employment, and once the landlord terminated the employment, the employee who did not vacate immediately became a trespasser who could be evicted without court process. *See Lighbody v. Truelsen*, 39 Minn. 310, 40 N.W. 67 (1888); *Trustees v. Froislie*, 37 Minn. 447, 35 N.W. 216 (1887). However, Section 504B.001 (formerly § 566.18) now includes caretakers in the definition of tenant. *State Auto Insurance Company v. Knuttila*, 645 N.W.2d 475 (Minn. Ct. App. 2002) (caretaker was a tenant under Minn. Stat. § 504B.001 (formerly § 566.18)). *See Mountainview Place Apartments v. Ford*, No. 94CV1492 (Colo. Cty. Ct. Mar. 24, 1994) (Appendix 179) (Section 8 project tenancy was unaffected by employment agreement; termination of employment was not good cause for eviction).

4. Constructive trust

In *Deems v. Gustafson*, No. C1-96-827 (Minn. Dist Ct. 9th Dist. Nov. 26, 1997) (Appendix 324) (Rasmussen, J.), the plaintiff's mother, who also was the defendant's late wife, initially owned the property. Through several transactions, plaintiff acquired title to the property, but reserving a life estate for her mother, who later made a handwritten note stating that defendant could live on the property past her death. Following her mother's death without a will, plaintiff gave a one month notice to defendant and filed an unlawful detainer (now called eviction) action. The court amended the action to be an action for a ejectment. The court found that it would be a hardship for the defendant to move from his home of 22 years, where he had no substantial savings or resources and was close to his relatives, while on the other hand, plaintiff would be unjustly enriched by dispossessing the defendant where she had contributed little to the property. The court concluded that the property would be subject to constructive trust by the defendant for the remainder of his life or as long as he occupied the property on the condition that he maintain the property in good condition, be responsible for utilities and routine maintenance, and pay plaintiff $100 per month for taxes and insurance.

5. Post Dissolution

An eviction (formerly unlawful detainer) action is available to enforce a change in occupancy mandated by a dissolution decree. In *Swanson v. Wenzel*, Nos. C1-97-2185 and C5-97-1881 (Minn. Ct. App. May 26, 1998) (Appendix 369) (Unpublished), the decree provided that the parties would own the homestead as joint tenants but would sell it by July 6, the appellant was entitled to exclusive occupancy, but if the property was not sold by July 6, the respondent would be entitled to exclusive occupancy and would have the obligation to resell it. After the parties did not sell the property and the appellant refused to move, respondent brought an unlawful detainer (now called eviction) action and was awarded a judgment of restitution. The court affirmed the decision, concluding that strict construction of the sale provision in the decree was proper.

I. TAX FORFEITED PROPERTY

See O'Connor v. Miller, UD-1940211505 (Minn. Dist. Ct. 4th Dist. Mar. 24, 1994) (Appendix 178) (tax forfeiture extinguishes prior leases; rent collection attempts created new leases).

J. FORMS

During 1996 and 1997 the Pro Se Housing Court Subcommittee of the Conference of Chief Judges Pro Se Committee developed for various types of summary housing actions, including unlawful detainer (eviction), lock out, rent escrow, tenant remedies, and emergency tenant remedies actions. The Subcommittee also developed instructions for the forms. All of the forms and instructions were mailed to all of the district court administrators around the state. Included in the Forms Appendix is a copy of the forms which apply to the actions discussed in this article. Also included are forms drafted by the author which include many optional claims to allow for inclusion of claims under various housing statutes.

CHAPTER II:
SUMMARY PROCEEDING

A. SUMMARY PROCEEDING TO REPLACE SELF-HELP EVICTION

Self-help evictions are prohibited. *Berg v. Wiley*, 264 N.W.2d 145, 149-51 (Minn. 1978) (*Berg II*). *See also* Minn. Stat. §§ 504B.101 (formerly § 504.01), 504B.225 (formerly § 504.25), 504B.231 (formerly § 504.255), 504B.281 (formerly § 566.01), 504B.301 (formerly § 566.02), 504B.375 (formerly § 566.175).

The unlawful detainer (eviction) action is a summary proceeding, created by statute, which provides an alternative to the common law ejectment action. Minn. Stat. §§ 504B.301 (formerly § 566.02) *et. seq. Warnert v. MGM Properties*, 362 N.W.2d 364, 366-67 n.1 (Minn. Ct. App. 1985) ("The unlawful detainer is not designed for extensive litigation, and the proceeding should not be used as a substitute for the common-law remedy of ejectment. The issues of abandonment and surrender raised in this case are clearly not amenable or appropriate to a summary detainer proceeding. The postural difficulties presented in this case demonstrate the wisdom of this rule. Plaintiff's proper remedy was an ejectment action, where necessary legal procedures and equitable remedies were available and the right to possession and damages could be resolved in one action."). The action is for possession of the premises, and not for damages. Minn. Stat. §§ 504B.301 (formerly § 566.02), 504B.285 (formerly § 566.03).

B. ACTION NOT APPROPRIATE FOR CERTAIN TYPES OF LITIGATION

1. Parallel or complex litigation

In *Rice Park Properties v. Robins, Kaplan, Miller & Ciresi*, 532 N.W.2d 556 (Minn. 1995), the Minnesota Supreme Court decision reversed the Court of Appeals and affirmed the district court decision to stay an unlawful detainer (now called eviction) action pending final disposition of a related and earlier filed declaratory judgment action commenced by the tenant. In *Stein v. J.D. White, Inc.*, No. CO-91-2164 (Minn. Ct. App. Apr. 21, 1992), FINANCE & COMMERCE at B24 (April 24, 1992) (App. 0.F) (unpublished), the commercial tenant brought a declaratory judgment, breach of contract and misrepresentation action against the landlord to determine responsibility for payment of utilities under the lease. The landlord then filed an unlawful detainer action against the tenant alleging breach of the lease by failure to pay a share of the utility bill. The court affirmed dismissal of the action, noting that when a pending parallel action will properly resolve the dispute which has been incorrectly brought as an unlawful detainer action, trial courts may grant procedural dismissals without ruling on the merits. The court noted that in "[i]nterpretations of complex lease provisions, particularly when collateral to the basic rent obligation, are not a amenable or appropriate to the type of summary disposition envisioned by the unlawful detainer act." *Id.* (citing *Berg v. Wiley*, 303 Minn. 247, 250, 226 N.W.2d 904, 906-07 (1975)). The court added that decisions on the merits merely determine the right to present possession of the property and do not determine the ultimate rights of the parties. *Id.* (citing *William Weisman Holding Co. v. Miller*, 152 Minn. 330, 188 N.W. 732 (1922)). *See Bjur v. Burgmeier*, No. C2-92-409 (Minn. Ct. App. Aug. 18, 1992), FINANCE & COMMERCE at B45 (Aug. 21, 1992) (unpublished: because plaintiff, as the mortgagee's assignee, has presumptively good title and because defendants cannot litigate title in an unlawful detainer action, defendants are foreclosed from challenging plaintiff's title by reference to their collateral litigation) (Appendix 0.H).

In *Amresco Residential Mortgage Corp. v. Stange*, 631 N.W.2d 444 (Minn. Ct. App. 2001), the trial

court ruled that it could not consider mortgage defects in the eviction action. On appeal, the court held that rather than order the trial court to hear the issues or convert the action to an ejectment action, the appellants could seek to enjoin prosecution of the eviction action in the separate proceeding in which they sought to set aside respondent's foreclosure which they commenced after dismissal of their counterclaims in the eviction action. While the court affirmed dismissal of the counterclaims, it ordered that the court's stay of the writ of restitution during the appeal be continued for a reasonable period of time in which appellants can assert, and the district court can determine in their pending proceeding, whether their right of possession should be protected by enjoining the writ until the court rules on their title claims.

In *Fraser v. Fraser*, 642 N.W.2d 34 (Minn. Ct. App., 2002), the husband's father, who sold house to husband and wife under contract for deed, gave notice of cancellation of contract after husband brought dissolution action. The wife sought to enjoin cancellation as part of dissolution proceedings, which was granted and later vacated. The father then brought an eviction action against wife, and the district court ruled in father's favor. The wife appealed in both cases and they were consolidated. The court held that there was no jurisdiction in the dissolution action jurisdiction to enjoin cancellation of contract for deed. In the eviction action, the court held that the trial court was not bound by findings on the contract for deed service from the dissolution action, given the lack of jurisdiction in the latter. As to whether the wife could litigate equitable real estate issues in the eviction case, relying on *Amresco Residential Mortgage Corp. v. Stange*, 631 N.W.2d 444 (Minn. Ct. App. 2001), the court held that if she has the ability to litigate her equitable mortgage and other claims and defenses in alternate civil proceedings where she could enjoin the eviction action, it would be inappropriate for her to seek to do so in the eviction action. However, since the court could not determine whether the eviction action was wife's only opportunity to address her claims and defenses, it remanded the case for the district court to address wife's service claims, address the propriety of entertaining wife's equitable defenses in the eviction action or in an alternate proceeding; and, if appropriate, decide the equitable defenses.

2. Domestic partners

Domestic partners may or may not be in a landlord-tenant relationship, and if not, an unlawful detainer (eviction) action not be an appropriate forum to determine their possessory interests in the property. In *Shustarich v. Fowler*, U.D. 1960604520 (Minn. Dist. Ct. 4th Dist. July 5, 1996) (App. 176), Plaintiff and defendant first lived in defendant's home. Then plaintiff and defendant moved from her home to a second property, and the parties then living at the second property moved to defendant's old home. Plaintiff took title to the new property, and defendant contributed several thousand dollars from the sale of her home to a new roof and appliances. The parties kept separate expenses. After defendant obtained an order for protection, plaintiff gave notice and filed an unlawful detainer action. The court concluded that plaintiff failed to establish a landlord-tenant relationship, defendant was entitled to assert an interest in the premises, and an unlawful detainer action was a summary remedy inappropriate to try issues of title or to substitute for an action in ejectment, and denied restitution of the premises. *See In re Estate of Ericksen,* 337 N.W.2d 671 (Minn. 1983). *But see Stock v. Beaulieu* (Minn. Dist. Ct. 9th Dist. Mar. 9, 1995) (Appendix 140) (domestic partners were in landlord-tenant relationship; plaintiff retaliated against defendant for reporting a crime of domestic abuse committed by the plaintiff in which the defendant was the victim).

CHAPTER III:
SUBJECT MATTER JURISDICTION

MINN. STAT. § 504B.285 (formerly § 566.03), Subd. 1 provides the most common basis for subject matter jurisdiction:

1. Holding over after sale on an execution or judgment, expiration of the redemption period following mortgage foreclosure, or termination of a contract for deed.

2. Holding over after expiration of the term of the lease.

3. Breach of lease.

4. Nonpayment of rent.

5. Holding over after termination of the tenancy by notice to quit.

The landlord may combine actions for nonpayment of rent and material lease violations under § 504B.285 (formerly § 566.03), subd. 5. These claims shall be heard as alternative grounds. The hearing is bifurcated to first cover material violation of the lease, and then nonpayment of rent if the landlord does not prevail on the material lease violation claim. The tenant is not required to pay into court outstanding rent, interest or costs to defend against the material lease violation claim. If the court reaches the nonpayment of rent claim, the tenant shall be permitted to present defenses. The tenant shall be given up to seven days to pay any rent and costs determined by the court to be due, either into court or to the landlord.

Minn. Stat. § 504B.301 (formerly § 566.02) provides jurisdiction for unlawfully detaining the premises after having entered unlawfully, forcibly, or peaceably. Unlawful detention includes a seizure on residential rental property of contraband or a controlled substance manufactured, distributed or acquired in violation of Chapter 152 (Prohibited Drugs) and with a retail value of $100.00 or more, if the tenant does not have a defense under § 609.5317. *See* discussion, *infra*, at VI.G.16. While Minn. Stat. § 504B.285 (formerly § 566.03), subd. 1 applies to tenants, this section would cover occupants who are not tenants in addition to tenants. *See DePetro v. DePetro*, No. A03-727, 2004 WL 885552 (Minn. Ct. App. April 27, 2004) (unpublished) (affirmed eviction by owner of her adult daughter who was not a rent-paying tenant).

A tenant cannot bring an unlawful detainer (eviction) action against the landlord who has wrongfully reentered the premises. The tenant's remedy is provided by the lockout statute, Minn. Stat. § 504B.375 (formerly § 566.175). *Berg v. Wiley*, 303 Minn. 247, 250-51, 226 N.W.2d 904, 906-07 (1975). (*Berg I*).

A state court does not have jurisdiction over an unlawful detainer (eviction) action involving the right of an enrolled member of an Indian tribe to possession of property held in trust for Indians by the United States. *White Earth Housing & Redevelopment Authority v. J.F.*, No. C8-91-224 (Minn. Dist. Ct. 9th Dist. Feb. 5, 1992) (Appendix 24); *All Mission Indian Housing Authority v. Silvas*, 680 F. Supp. 330 (C.D. Cal. 1987); 28 U.S.C. § 1360(b).

In *Eagan East Ltd. Partnership v. Powers Investigations, Inc.*, 554 N.W. 2d 621 (Minn. Ct. App. 1996) the commercial landlord demanded from the commercial tenant a prospective and retroactive rent

increase after the square footage used by the tenant was remeasured. When the tenant failed to pay the additional rent, the landlord filed an eviction (formerly unlawful detainer) action. The trial court held that the rent increase clauses in the lease were ambiguous and could not be applied retroactively from the new square footage measurement, but could be applied prospectively. The landlord then announced a new prospective rent increase, and in a subsequent order of the trial court, the court ruled that the landlord was entitled to the rent increase and the tenant was not entitled to attorney's fees under the lease. On appeal, the Court of Appeals held that the trial court's jurisdiction was limited to determining present possessory rights of the parties, and that the trial court exceeded its jurisdiction by ruling on the prospective rent increase and attorney's fee issues. *But see Duling Optical Corp. v. First Union Management, Inc.,* No. C5-95-2718 (Minn. Ct. App. Aug. 13, 1996), FINANCE & COMMERCE at 66 (Aug. 16, 1996) (Appendix 181) (unpublished decision: affirmed the district court's conclusion in a separate damages action that it lacked jurisdiction to award attorney's fees for separate eviction (formerly unlawful detainer) actions, since the issue of attorney's fees should have been decided in the unlawful detainer actions).

CHAPTER IV:
PERSONAL JURISDICTION

See discussion, infra, at VI.C.

CHAPTER V:
PROCEDURE

A. INITIAL HEARING

The hearing must be held within seven (7) to fourteen (14) days after issuance of the summons. Minn. Stat. § 504B.321 (formerly § 566.05).

B. ANSWER

The tenant may answer the complaint at the initial hearing. Minn. Stat. § 504B.335 (formerly § 566.07). The new Housing Court Rules do not require a written answer. MINN. GEN. R. PRAC. 601-12. (Appendix 0.B). However, a written answer is useful to present to the court affirmative defenses and grounds for dismissal or summary judgment. The Forms Appendix includes form answers and motions for dismissal or summary judgment. These forms have been prepared as a counterpart to complaint forms available to landlords, also contained in the Forms Appendix. The tenant or tenant's attorney can check-off the defenses or grounds for dismissal or summary judgment which are applicable. A verified answer and motion for dismissal or summary judgment can serve as an answer, motion, and supporting memorandum and affidavit. Additionally, counsel should consider submitting proposed orders on issues of dismissal or summary judgment. Many of the orders in the Appendix were proposed orders submitted by the tenant's counsel.

A written answer may be needed to preserve the record for appeal. *See Andrzijek v. Hall,* No. C5-88-2134 (Minn. Ct. App. April 18, 1988) (unpublished decision: issue of trial court's refusal to allow defendant to present evidence of cause of disrepair and rent abatement not preserved for appeal where defendant did not file an answer, object, or request leave to file answer to conform to evidence). *But see Christy v. Berends,* No. A07-1451, 2008 WL 2796663 *2 (Minn.Ct. App. July 22, 2008) (unpublished) (failure to plead waiver of breach defense did not waive defense).

C. THIRD PARTY PRACTICE AND JOINDER

In some cases, the alleged breach of the lease on the part of the tenant may have been caused by a third party. For instance, tenants with Section 8 Existing Housing Certificates or Vouchers pay part of the rent themselves, but the remaining rent is paid by a public housing authority. If the public housing authority withholds its subsidy or incorrectly calculates the subsidy, the landlord might file an unlawful detainer (eviction) action for nonpayment of rent against the tenant. The tenant may wish to bring a third party complaint in conjunction with the tenant's answer. However, since the time periods provided in MINN R. CIV. P. 14 are inconsistent with the summary nature of the unlawful detainer (eviction) action, the tenant should request that the court continue the action to allow the tenant to serve a third party complaint, and order an expedited period, such as seven (7) days, for the third party defendant to appear and respond. Additionally, dismissal may be appropriate for failing to include an indispensable party. *See Wynmore Apartments v. Stellick*, No. UD-1920513525 (Minn. Dist. Ct. 4th Dist. June 23, 1992) (Appendix 182) (tenant alleged failure to join HRA as indispensable party and alternative claim for a continuance to join HRA as a third party defendant where HRA miscalculated tenant's income and rent;

action settled); *Lilyerd v. Carlson*, 499 N.W.2d 803, 807 (Minn. Ct. App. 1993) (defendant raised third party claim but did not notify or serve third party and apparently did nut pursue claim). *See also* Indispensable Parties, *infra*, at VI.D.14.

In *Barry v. Lane*, Nos. UD-1980629502 and UD-1980603900 (Minn. Dist. Ct. Sep. 15, 1998) (Appendix 310B), the total rent was $760, with the tenant's share of the rent being $257 and the Section 8 housing subsidy being $503. The court previously ordered a rent abatement of $500 per month, or 66% of the total rent and 195% of the tenant's share of the rent. The public housing authority apparently asserted that it was entitled to rent abatement beyond the tenant's share of the rent, but since it did not move to intervene, the court disbursed funds in escrow to the tenant. In *CAMM Properties, Inc. v. Peacock*, No. C6-97-1128, C7-97-1168, C9-97-1365, C2-97-1420 (Minn. Ct. App. May 18, 1998) (Appendix 316) (Unpublished), the defendant in an unlawful detainer action following default on a contract for deed moved to join an assignee of the mortgage as an involuntary party plaintiff to the action. The district court granted the motion, and later found that cancellation of the contract for deed was effective.

In some cases, affording complete relief to the tenant may require joining and indispensable party under Minn. R. Civ. P. 19. This may be more common in motions regarding disposition of property, where someone other than the plaintiff is retaining the property. *See Lang v. Terpstra*, No. UD-1940207512 at 2 (Minn. Dist. Ct. 4th Dist. June 12, 1994) (appendix 70) (storage company joined as necessary party on motion regarding property disposition).

D. Temporary Restraining Orders

1. Against tenant within eviction action

The court has the power to issue temporary restraining orders in unlawful detainer (eviction) actions. *Berg v. Wiley*, 264 N.W.2d 145, 151 (Minn. 1978); *Yager v. Thompson*, 352 N.W.2d 71, 74 (Minn. Ct. App. 1974). *See generally* Minn. R. Civ. P. 65. In *Sentinel Management Co. v. Kraft*, No. UD-1920806546 (Minn. Dist. Ct. 4th Dist. Aug. 12, 1992) (Appendix 11.I.3), the government subsidized housing project landlord served the tenant with the summons and complaint and motion for a temporary restraining order, which the landlord obtained the same day as service. The temporary restraining order evicted the tenant pending the hearing in the unlawful detainer action. The tenant moved for reconsideration of the temporary restraining order and for dismissal or summary judgment on the grounds that the landlord had failed to give the federally required eviction notice before commencing the action. The court vacated the temporary restraining order and dismissed the action. Minn. Stat. § 504B.325 (formerly § 566.051) also authorizes temporary relief by filing a harassment action under Section 609.748, or by filing a petition for a temporary restraining order in conjunction with an unlawful detainer (eviction) action.

2. Against landlord to prevent filing of eviction action

Tenants have had some recent success restraining landlords from filing unlawful detainer (eviction) actions. *See McNair v. Doub*, No. 1960708524 (Minn. Dist. Ct. 4th Dist. July 10, 1996) (Appendix 183) (temporary retraining order in rent escrow action against landlord filing separate unlawful detainer action and allowing landlord to raise any unlawful detainer issue in a counterclaim, to protect the tenant from a tenant screening listing of an unlawful detainer action); *Lumpkin v. Lewis*, No. 96-10295 (Minn. Dist. Ct. 4th Dist. July 12, 1996) (Appendix 184) (temporary restraining order in consumer fraud action restraining landlord from filing a second unlawful detainer action, where landlord

in a separate unlawful detainer action was denied rent due to housing conditions, and landlord said that he would file a new action for the same rent and try to bypass the judge from the first case; motion was supported by an affidavit from Sharlyn LaPlace of Person to Person on the effect of unlawful detainer actions on a tenant's record).

E. CONTINUANCE

The court may continue the trial for up to six (6) days without consent of the parties; or, in certain circumstances, up to three (3) months for a material witness if a bond is paid. Minn. Stat. § 504B.341 (formerly § 566.08). While some courts regularly hold the trial at the initial appearance, others regularly will treat the initial hearing as an arraignment and schedule the trial at a later time or date. *But see Minneapolis Public Housing Authority v. Demmings*, No. C5-94-2045 (Minn. Ct. App. May 9, 1995), FINANCE & COMMERCE at 20 (May 12, 1995) (Appendix 159) (denial of continuance to obtain counsel upheld where result of trial would not have been different).

The court has discretion to continue the trial longer in the interests of judicial administration and economy. *Rice Park Properties v. Robins, Kaplan, Miller and Cieresi*, 532 N.W.2d 556 (1995); *Thompson v. Stevens*, No. C6-96-650 (Minn. Ct. App. Dec. 10, 1996), FINANCE AND COMMERCE at 76 (Dec. 13, 1996) (Appendix 299) (Unpublished: followed *Rice Park Properties*).

A district court abuses its discretion by denying a motion to stay an eviction action when (1) an existing, separate district court action would be dispositive of the issues of possession and title to commercial real property involved in the eviction action and (2) the district court in the eviction action has concluded that some of the claims asserted in the first-filed action are essential to the defense of the eviction action. *Bjorklund v. Bjorklund Trucking, Inc.,* 753 N.W.2d 312, 317-20 (Minn. Ct. App. 2008).

In *Minneapolis Public Housing Authority v. _____,* No. HC 1020213525 (Minn. Dist Ct. 4th Dist. Mar. 21, 2002) (Appendix 544), the parties agreed to a continuance of 19 days for trial. The landlord then sought another continuance beyond the date of a criminal trial concerning the tenant's son, and when it could not locate a witness. When the court would not grant another continuance, the landlord moved to dismiss without prejudice. The court dismissed the action with prejudice, holding that a dismissal without prejudice would circumvent the statutory limitation on continuances to 6 days.

Minnesota Statutes § 325N.18 also requires the court to issue an automatic stay without imposition of a bond if a defendant makes a prima facie showing that the defendant has commenced an illegal foreclosure reconveyance action.

F. DISCOVERY

The Housing Court Rules provide for discovery. MINN. GEN. R. PRAC. 612 (Appendix 0.B). *Swanson v. Ivie*, No. UD-1950411541 (Minn. Dist. Ct. 4th Dist. Apr. 21, 1995) (Appendix 171); *Sage Mgmt. Co. v. Hughes*, No. UD-1930129502 (Minn. Dist. Ct. 4th Dist. Feb. 23, 1993) (Appendix 0.E.1). The court also can sanction a party for not complying with a discovery order. *Lynch v. Hart*, No. UD-1960610529 (Minn. Dist. Ct. 4th Dist. Jun. 27, 1996) (Appendix 185) (tenants could not introduce evidence not in compliance with the discovery order). Before the Rules became effective, in *Seward Handicap Housing Associates v. Wells*, No. UD-1911002516 (Minn. Dist. Ct. 4th Dist. Oct. 16, 1991) (Appendix O.E), the court granted defendant's motion for expedited discovery, including the landlord's file on the tenant and a list of the landlord's witnesses and the facts on which they would testify. (Appendix 0.F). Counsel can argue that even outside of the Second and Fourth Judicial Districts,

defendants are entitled to such basic information in order to prepare a minimal defense in the summary proceeding.

Given the expedited nature of discovery in an unlawful detainer action, if the landlord fails to comply with the discovery order, the tenant should argue that documents or testimony introduced at trial in violation of the discovery order should be excluded. Under Minn. R. Civ. P. 37.02(b), the court may refuse to allow the party who violated the discovery order to support or oppose certain claims or defenses, or prohibit that party from introducing designated matters into evidence. *See Minneapolis Public Housing Authority v. Eberhardt*, No. UD-1970204642 (Minn. Dist. Ct. 4th Dist. Mar. 17, 1997) (Appendix 275) (After admitting city chemist drug report conditionally during trial, court later excluded the report based on the landlord's violation of discovery order, delay in submission for testing, the small weight of the substance, and lack of testimony from the chemist); *Larson v. Anderson*, No. C9-96-416 (Minn. Dist. Ct. 9th Dist. Nov. 8, 1996) (Appendix 264) (attorney fees denied on motion to compel discovery).

In *Stewart v. Anderson*, No. A06-1878, 2007 WL 2366528 (Minn. Ct. App. Aug. 21, 2007) (unpublished), the housing court referee refused to accept the tenant's documentary evidence while accepting the landlord's documentary evidence, even though both parties failed to comply with the discovery order in a timely fashion. On appeal to the district court judge, the court reversed the housing court referee, finding that the referee erred by receiving the landlord's late exhibits but refusing to receive the tenant's late exhibits. On appeal to the Minnesota Court of Appeals, the Court affirmed the district court's reversal of the housing court referee.

G. HOUSING COURT: RAMSEY AND HENNEPIN COUNTIES

1. Housing Court Rules

In 1989 the Legislature provided for creations of housing courts in the Second sand Fourth Judicial Districts (Ramsey and Hennepin Counties). Minn. Stat. § 484.103. The Housing Court Rules went into effect on January 1, 1992. MINN. GEN. R. PRAC. 600-12. (Appendix 0.B). The major changes from old FOURTH JUD. DIST. SPEC. R. PRAC. 13 and 17 are that:

a. In holding over cases, the landlord must include the termination notice with the complaint or provide it to the tenant at the initial appearance, unless the landlord does not possess a copy of the notice or at the hearing the tenant acknowledges receipt of the notice, Minn. Gen. R. Prac. 604(c);

b. In breach of lease cases, the landlord must include with the complaint a copy of the lease or provide it to the tenant at the initial appearance, unless the landlord does not possess a copy of it, Rule 604(d);

c. The affidavit of service must contain the printed or typed name of the person who served the summons, Rule 605;

d. If the landlord does not file the affidavit of service by 3:00 p.m. three business days before the hearing, the court may, rather than must, strike the action, *id.*;

e. No written answer is required;

f. The court has more discretion in determining whether the tenant must pay into court withheld rent, and the amount that must be paid, Rule 608;

g. motions may be made orally or in writing, with the requirements of service of notice of motions and time periods in the Minnesota Rules of Civil Procedure not applying, Rule 610; and

h. that the parties shall cooperate with reasonable and formal discovery requests, and that upon the request of any party to a matter scheduled for trial, the court may issue an order for an expedited discovery scheduled, Rule 612.

A housing court referee shall preside over all hearings and trials concerning matters scheduled on the unlawful detainer (eviction) calendar. A party may remove the referee and request that a judge hear a case by filing a written request with the court administrator at least one day prior to the scheduled hearing date. Rule 602. It appears that the request must be filed one day before the initial hearing, rather than before a subsequent hearing. *Amsler v. Harris*, and *Harris v. Amsler*, Nos. UD-1990826901 and UD-1990902500 (Minn. Dist. Ct. 4th Dist. Sep. 24, 1999) (Appendix 376) (Notice of removal of judicial officer untimely.; *Amsler v. Wright*, No. UD-1960502510 (Minn. Dist. Ct. 4th Dist. May 30, 1996) (Appendix 186) (Court denied landlord's untimely request to remove referee). A party also may remove a specific referee from a case, as can be done with judges assigned to cases, upon a written notice of removal. Minn. R. Civ. P. 63.03. The court then would assign the case to either another referee or a judge.

Orders and findings recommended by a referee become effective only when countersigned or confirmed by district court judge. A judgment based entirely on a referee's orders that have not been countersigned, reviewed or confirmed by a district court judge is unauthorized. *Griffis v. Luban*, 601 N.W.2d 712 (Minn. Ct. App. 1999).

In the Fourth District Court, First Division (Minneapolis), a hearing officer had presided over the initial appearance, and referred contested cases to the referee. Starting in the Fall of 1996, the Housing Court eliminated the hearing officer position and had the Housing Court Referee consolidate the arraignment and hearing calendars. Counsel should check in with the court clerk before the arraignment begins, since the order of cases is judge requests, defaults, settled cases, disputed cases with counsel, and disputed cases without counsel. *See* Memorandum to Housing Court Staff from Sue Daigle (Oct. 3, 1996) (Appendix 173). Beginning around December 16, 1996, housing court administrative services were divided into two offices, with one office on the skyway public service level handling unlawful detainer (eviction) case filings and public service information, and the eighth floor (and now the 17th floor) office handling other services. *See* Hennepin County District Court, *Access, Filing & Information Are Moving* (Appendix 174).

The initial appearance is at the "calendar call." When a case is called, the defendant will be asked whether the defendant admits or denies the charges in the complaint. A request for trial by jury must be made at that time, and the jury fee must be paid before the jury is impaneled. Contested cases shall be set for trial the same day as the initial hearing, if possible, or set on the first available calendar date. Rule 607. In the Fourth District Court, First Division, (Minneapolis), the unlawful detainer (eviction) calendar is scheduled for Tuesday through Friday mornings. If a trial cannot be heard at that time, the referee normally schedules the trial for Tuesday, Wednesday or Friday afternoons, or Monday morning or afternoon.

Rule 610 allows motions to be made orally or in writing at any time including the day of trial. Whenever possible, oral or written notice of any dispositive motions must be provided to all the parties prior to the hearing. All motions would be heard by the court as soon as possible. The court may grant a request for time to prepare a response to any motion for good cause or by agreement of the parties. The requirements of service of notice of motions and time periods in the Minnesota Rules of Civil Procedure do not apply.

Rule 612 provides that the parties shall cooperate with a reasonable and formal discovery request by another party. Upon the request of any party to a matter scheduled for trial, the presiding referee or judge shall issue an order for an expedite discovery schedule. *Id*.

2. Judge Review

See discussion, *infra*, Chapter IX.

3. Free photocopies

Given the limited amount of time to prepare a defense, sometimes the tenant's attorney or advocate can prepare quicker by reviewing the court file before meeting with the tenant. The Fourth Judicial District Court (Hennepin County) issued a standing order waiving housing court photocopying charges to legal services attorneys and voluntary attorneys through the Legal Advice Clinic (now called Volunteer Lawyers Network (VLN)). Order Waiving Housing Court Photocopying Charges to Legal Services and Legal Advice Clinic Attorneys (Minn. Dist. Ct. 4th Dist. June 8, 1992) (Appendix 0.G).

4. Consolidation of actions

Minn. Stat. § 484.013 provides for consolidation of actions:

> Subd. 2. Jurisdiction. The housing calendar program may consolidate the hearing and determination of all proceedings under chapter 504B; criminal and civil proceedings related to violations of any state, county or city health, safety, housing, building, fire prevention or housing maintenance code; escrow of rent proceedings; and actions for rent abatement. A proceeding under sections 504B.281 to 504B.371 may not be delayed because of the consolidation of matters under the housing calendar program.
>
> The program must provide for the consolidation of landlord-tenant damage actions and actions for rent at the request of either party. A court may not consolidate claims unless the plaintiff has met the applicable jurisdictional and procedural requirements for each cause of action. A request for consolidation of claims by the plaintiff does not require mandatory joinder of defendant's claims, and a defendant is not barred from raising those claims at another time or forum.

Rules for Conciliation Court are in Minn. R. Gen. Prac. 501 *et. seq.*

H. TRIAL AND EVIDENCE

The parties are entitled to a full trial, and may demand a trial by jury. Minn. Stat. § 504B.335 (formerly § 566.07). *See Gutsch v. Hyatt Legal Services*, 403 N.W.2d 314, 315-16 (Minn. Ct. App. 1987) (damages action removed from conciliation court to district court: right to trial includes right to

be heard, to produce witnesses and documents, to examine and cross-examine witnesses, to present arguments, and to have case decided on the merits). Given the large volume of cases in some courts, it is common for the courts to conduct the trial as a summary hearing at the bench, especially where both parties are unrepresented by counsel. Counsel should be careful to give notice to the court and the opposing party at the beginning of any summary discussion of the case that the right to a full trial is not being waived by such a discussion.

In *Soukup v. Molitor*, 409 N.W.2d 253, 254-55 (Minn. Ct. App. 1987), plaintiff and defendant settled an eviction (formerly unlawful detainer) action by agreeing to dismiss the action, and that if defendant defaulted on future rental payments, plaintiff could apply for a writ of restitution without further court action. Plaintiff later filed another unlawful detainer action alleging nonpayment of rent, holding over after notice, and breach of the lease. The trial court entered judgment for plaintiff without a trial. The Court of Appeals held that while the agreement may have waived defendant's right to a jury trial on the issue of nonpayment of rent, but it did not waive his right to a jury trial on all issues.

Landlords and tenants often submit public documents to support their cases, such as landlords submitting police reports in breach cases, and tenants submitting inspection reports in habitability cases. While both documents probably comply with the public records exception to the hearsay rule in Minn. R. Evid. 803(8), they still must be authenticated or be self-authenticating under Rules 901 and 902. *State v. Northway*, 588 N.W.2d 180 (Minn. Ct. App. 1999) (affirmed trial court exclusion of federal report which was not authenticated).

Hearsay statements within the report should be excluded unless they meet an exception to the hearsay rule. *Countryview Mobile Home Park v. Oliveras*, No. A04-160, 2004 WL 20049986 (Minn. Ct. App. Sept. 14, 2004) (unpublished) (affirmed from district court ruling sustaining objection to police report containing observations of officers who were not present in court); *Minneapolis Public Housing Authority v.* _____, No. HC 10306313566 (Minn. Dist Ct. 4th Dist. July 31, 2003) (Appendix 539) (Judge Doty) (landlord's knowledge of alleged altercation was from a police report whose authors did not testify, and did not connect tenant to the incident).

Tenants and other lay witnesses have the right to testify about their observations of habitability problems. In *Stewart v. Anderson*, No. A06-1878, 2007 WL 2366528 (Minn. Ct. App. Aug. 21, 2007) (unpublished), the landlord filed a combination eviction action and conciliation court action in housing court, and the tenant answered alleging habitability. At trial, the tenant attempted to testify about her observations about how her dryer worked, and rodent infestation. The housing court referee did not accept her testimony, since she was not an expert in dryer repair or pest control. After the referee ruled for the landlord, the tenant sought review by a district court judge. The district court reversed the referee, finding that the referee erred by requiring expert testimony for lay testimony. On appeal, the Court of Appeals held that the district court correctly found that the referee had erred.

I. POSTING RENT OR SECURITY

In limited circumstances, the court may require the defendant to post rent or other security as a precondition to a trial or to raising a defense.

1. Continuance beyond six (6) days for lack of a material witness: bond to cover rent which may accrue while the action is pending. Minn. Stat. § 504B.341 (formerly § 566.08). The court may require the rent to be paid into court as it becomes due. *See* discussion, *supra*, at V.E.

2. Retaliatory rent increase defense: payment to the court or the plaintiff of the pre-increase rent. Minn. Stat. § 504B.285 (formerly § 566.03), Subd. 3. *See* discussion, *infra*, at VI.E.9.

3. Breach of the covenants of habitability defense: payment of withheld rent into court or in escrow, or adequate security which is more suitable. *Fritz v. Warthen*, 298 Minn. 54, 61-62, 213 N.W.2d 339, 343 (1973). *See* discussion, *infra*, at VI.E.1.c.

4. Rule 608 provides that in any unlawful detainer (eviction) action where a tenant withholds rent and relies on a defense, "the defendant shall deposit forthwith an amount . . . . equal to the rent due as the same accrues or other such amount as determined by the court to be appropriate as security for the plaintiff, given the circumstances of the case." Rule 608 appears to require payment of rent as it "accrues", rather than the rent withheld prior to commencement of the action. While some courts require payment of past due rent as a condition to litigating a defense, this practice is of questionable validity, as well as bad public policy. *See* discussion, *infra*, at VI.E.1.C. In *Ted Glassrud Assoc. v. Balsimo*, No. C6-85-1821 (Minn. Ct. App. Oct. 1, 1985), the trial court required the defendant to post the full amount of past due rent alleged by the plaintiff, even though the defendant disputed the arrearage. The Court of Appeals granted a writ of prohibition, and remanded the case to the trial court for consideration of Minn. Stat. § 566.08 (now § 504B.341) (bond for continuances beyond six (6) days).

5. Combined actions for nonpayment of rent and breach of the lease: no payment unless the Court finds that the tenant owes rent. *See* discussion, *supra* and *infra*, at III., VI.E.20.c, VI.G.21.

The Fourth District (Hennepin County) Housing Court issued a May 15, 1996, Order approving acceptance of uncertified checks from Legal Aid and other law firms. The Housing Court retains discretion to decide whether to accept uncertified checks from social service agencies. It takes quite a bit longer for the Court to process and disperse uncertified funds, so if quick dispersal of funds is important to the tenant, the tenant or tenant's attorney should submit funds by certified check. (Appendix 174(A).

J. EXCEPTIONS TO THE UNAUTHORIZED PRACTICE OF LAW (EXCEPT FOR JURY TRIALS AND APPEALS)

An authorized management company or agent may commence and conduct the action in its own name or on behalf of the owner of the property. Minn. Stat. § 481.02, subd. 3(12). The tenant or landlord may be represented by a person who is not a licensed attorney. Minn. Stat. § 481.02, subd. 3(13). *See* Letter from Honorable Thomas F. Haeg, 4th District Housing Court Referee, to Sherry Coates (July 13, 1994) (Appendix 25).

However, except for a nonprofit corporation, a person who is not a licensed attorney-at-law shall not charge or collect a separate fee for services in representing a party. *Id.* Some for profit businesses represent plaintiffs in actions and charge a separate fee for such representation. Defendant should move to dismiss the action. *See* Standing Order Regarding Court Appearances by Non-attorney Non-managing Agents, C4-90-11340 (Minn. Dist. Ct. 2nd Dist. June 9, 1995) (Appendix 84) (person and company which admitted that a non-attorney, non-managing agent collected fees for filing and maintaining unlawful detainer (now called eviction) actions were prohibited from filing and maintaining such actions).

Corporations, limited partnerships, and limited liability companies must be represented by an attorney. *Nicollet Restoration, Inc. v. Turnham,* 486 N.W.2d 753 (Minn. 1992) (Corporation); *Westfalls Housing Ltd. Partnership v. Scheer*, No. C8-93-227 (Minn. Dist. Ct. 5th Dist. Nov. 30, 1993) (limited partnership) (Appendix 26); *Remas Properties, LLC v. Student*, No. UD-1940705517 (Minn. Dist. Ct. 4th Dist. July 19, 1994)(limited liability co.) (Appendix 27). *See* discussion, *infra*, VI.D.7 (unauthorized practice of law defense).

K. AMENDING THE COMPLAINT

It is not uncommon for the plaintiff to raise additional issues not pleaded in the complaint at the initial hearing or trial. The court should not hear such additional issues, since:

1. The summary nature of the action and Minn. Stat. § 504B.285 (formerly § 566.03), subd. 1 require specificity in pleading, *see* discussion, *infra*, at VI.D.6, and

2. The plaintiff may be entitled to restitution based only upon the unlawful possession alleged in the complaint. *See Mac-Du Properties v. LaBresh*, 392 N.W.2d 315, 318 (Minn. Ct. App. 1986).

In *Langenberger v. Moss*, Partial Transcript, UD-1950912529 (Minn. Dist. Ct. 4th Dist. Sept. 28, 1995) (Appendix 85), the Court denied the landlord's motion to amend the complaint to add an additional issue. The Court noted that while an unlawful detainer (eviction) action is a summary proceeding where parties often appear without counsel, the parties are expected to be prepared for trial and obtain counsel ahead of time if necessary. In *Northern Management, Inc. v. Bade*, C9-94-3915 (Minn. Dist. Ct. 7th Dist. Nov. 25, 1994) (Appendix 86), the Court denied the landlord's motion to amend the complaint of breach of lease to include alleged lease violations occurring after the landlord filed the action. The Court held that only matters detailed in the complaint may be considered in the action. *See Valley Investment & Management, Inc. v. _____,* No. HC 000927525 (Minn. Dist Ct. 4th Dist. Nov. 1, 2000) (Appendix 589a) (14 day notice requirement for termination of month to month tenancy for nonpayment of rent in Minn. Stat. § 504B.135 (formerly § 504.06) is not required for a nonpayment of rent eviction action; landlord's acceptance of part payment without a written agreement to retain an eviction claim for the balance waives the eviction claim; plaintiff cannot amend complaint once defendant has served an answer); *Brooklyn Park Housing Associates I, LLP v. _____*, No. HC 1010124505 (Minn. Dist Ct. 4th Dist. Feb. 7, 2001) (Appendix 482) (landlord may pursue claim for part payment of rent only if there is a written document reserving that right; landlord may amend complaint to claim current rent claim not waived by part payment, with tenant retaining right to redeem); *Hurt v. Johnston*, No. HC-000103513 (Minn. Dist. Ct. 4th Dist. Jan. 14, 2000) (Appendix 398) (Landlord's motion to amend complaint denied and action dismissed where landlord failed to attach the lease to the complaint to support a claim of breach of lease, and the landlord's claims of breach by unsanitary conditions in that tenant knew information about the landlord required by statute to be disclosed to the tenant were not pled with sufficient specificity).

The defendant in an unlawful detainer (eviction) action is given very little time to prepare a response and it is essential that they are given both sufficient notice of the allegations and adequate time to prepare a defense. Allowing matters arising after the date of filing of the complaint would severely prejudice a tenants ability to prepare an adequate defense. On the other hand, very little prejudice results to a plaintiff, as the plaintiff is free to file a new action in unlawful detainer (now called eviction) based on any violations which may occur after the filing of an unlawful detainer action. *Id.* at 6. *See Lynch v. Hart*, No. UD-1960610529 (Minn. Dist. Ct. 4th Dist. Jun. 27, 1996) (Appendix 185) (landlord could not

introduce evidence about lease violations not included in the complaint of non-payment of rent).

In *Public Housing Agency of City of St. Paul v. Simpkins*, No. C7-97-2137 (Minn. Dist. Ct. 2d Dist. Jan. 30, 1998) (Appendix 359) (Faricy, J.), the public housing authority gave the tenant a 14 day non-payment of rent notice for $25.00. The tenant then paid the rent and a late fee. However, the PHA applied the payments to an alleged arrearage for previous months, and filed an unlawful detainer action claiming non-payment of the February rent. The referee allowed the PHA to orally amend its claim, and ordered the tenant to pay $209 and court costs within seven days or move. The tenant moved and later obtained bank verification of deposit of the tenant's payment. The tenant moved to vacate the judgment, which was first denied by another referee, and then granted on judge review. The court concluded the first referee erred by going beyond the pleadings and ordering the tenant to pay more than had been pled, and the second referee erred in denying the motion to vacate. The court noted that it would be unjust to evict another tenant who moved into the unit vacated by the tenant, so the court ordered the PHA to place the tenant's name immediately at the top of the waiting list for the next available vacancy without requiring her to address claims for past due rents.

On the other hand, the courts in some cases have allowed the landlord to amend the complaint where the amendment allegedly does not prejudice the tenant. This occurs most often where the landlord has claim nonpayment of rent and the case extends into the next month. *See Lowe v. Cotton*, No. UD-01990224515 (Minn. Dist. Ct. 4th Dist. Oct. 7, 1999 (Appendix 404) (Breach of lease claim dismissed where there was no written lease, parties recently entered into a written agreement that defendant would not have a pet but the memo did not include a right of reentry; plaintiff granted leave to amend complaint for nonpayment of rent as defendant admitted the claim; landlord agreed to give tenant eight days to redeem.; *Phoenix Group, Inc. v. Phonseya*, UD-1951004-508 (Minn. Dist. Ct. 4th Dist. Nov. 1, 1995) (Appendix 87) (court considered November rent in case filed in October, where decision was issued in November); *BRI Associates v. Gangl*, C4-95-845 (Minn. Dist. Ct. 10th Dist. Apr. 24, 1995) (Appendix 88) (landlord allowed to amend case caption to avoid trade name registration penalty). *But see Ridgewood Arches v. Williams*, No. UD-1950201501 (Minn. Dist. Ct. 4th Dist. Feb. 22, 1995) (Appendix 165) (complaint alleged only breach of lease, landlord testified about rent due; court found against landlord on breach claim and noted that the parties could resolve the rent issue independent of the court).

While the summary nature of the action argues against allowing the plaintiff to amend the complaint, should the court allow amendment, it should require the same period of notice to the defendant, as if the plaintiff had commenced another action.

L. SUMMARY JUDGMENT AND DISMISSAL

Counsel for defendants often seek summary judgment and dismissal of the action before trial. Some counsel for plaintiffs also move for summary judgment. *Federal Land Bank of St. Paul v. Obermoller*, 429 N.W.2d 251 (Minn. Ct. App. 1988). Even if state or local district court rules place time requirements on such motions that are inconsistent with the unlawful detainer (now called eviction) statute, counsel should pursue and the court should entertain summary judgment and dismissal where (1) there are no genuine issues as to any material fact, (2) judgment must be ordered for one party as a matter of law, (3) the opposing party is not prejudiced from lack of notice or other procedural irregularities, and (4) the opposing party had a meaningful opportunity to respond to the motion. *Id.* at 254-55. *See DePetro v. DePetro*, No. A03-727, 2004 WL 885552 (Minn. Ct. App. April 27, 2004) (unpublished) (affirmed eviction summary judgment for plaintiff under doctrine of collateral estoppel, where plaintiff was unable to execute writ of recovery in first eviction action and commenced second

eviction action on the same grounds and defendant did not raise any new claims or defenses); *Bjur v. Burgmeier,* No. C2-92-409 (Minn. Ct. App. Aug. 21, 1992) (unpublished: summary judgment for plaintiff) (Appendix O.H.. In Housing Courts in Hennepin and Ramsey Counties, Rule 610 deletes the time requirements for a motion practice in other rules.

In *CAMM Properties, Inc. v. Peacock*, No. C6-97-1128, C7-97-1168, C9-97-1365, C2-97-1420 (Minn. Ct. App. May 18, 1998) (Appendix 316) (Unpublished), the defendant in a contract for deed unlawful detainer action raised the issue of which of several parties had the vendor's interest in the property. The trial court granted summary judgment for the plaintiffs, concluding that collateral estoppel and res judicata barred her from arguing issues which she raised in an earlier action against plaintiffs. The court affirmed the decision, concluding that the district court did not err in granting summary judgment.

M. FINDINGS AND CONCLUSIONS

The summary nature of the action does not relieve the court of the obligation to find facts specially and state separately its conclusions of law. *MCDA v. Mark Lee Productions, Inc.* 411 N.W.2d 599, 601 (Minn. Ct. App. 1987) (citing Minn. R. Civ P. 52.01). Failure to include findings usually requires reversal, unless the decision necessarily decides all disputed facts, or the undecided issues are immaterial. *Id.* See *Gear Properties v. Jacobs*, No. C1-97-2266, 1998 WL 550762 (Minn. Ct. App. Sep. 1, 1998) (unpublished) (Appendix 322) (in nonpayment of rent case, no further findings were required beyond that complaint was true); *Northstar Estates Manufactured Home Community v. Thompson*, No. C3-98-2005 (Minn. Ct. App. April 22, 1999) (unpublished opinion which shall not be cited as precedent)(District Court, which was not alerted to application of § 327C.02, erred in its determination of material breach because of rule violations where the court made no findings as to the reasonableness of rules or whether the rules substantially modified a prior agreement, and the residents were not given ten days to comply with the rule by the court; district court reversed..

The Court of Appeals also may remand the action to the trial court for further findings. *Nicollet Towers, Inc. v. Georgiff*, C5-94-1364 (Minn. Ct. App. Feb. 7, 1995), FINANCE AND COMMERCE 53 (Feb. 10, 1995) (Appendix 89); *Minneapolis Public Housing Authority v. Holloway*, C0-94-736 (Minn. Ct. App. Nov. 15, 1994), FINANCE AND COMMERCE 36 (Nov. 18, 1994) (Appendix 90) FINANCE AND COMMERCE 36 (Nov. 18, 1994) (Appendix 90); *Housing and Redevelopment Authority of Winona v. Fedorko*, C4-94-884 (Minn. Ct. App. Nov. 22, 1994), FINANCE AND COMMERCE 43 (Nov. 25, 1994) (Appendix 91). Counsel should consider preparing proposed orders to accompany motions for dismissal or summary judgment (Appendix 5.H), or after trial.

N. COLLATERAL ESTOPPEL AND RES JUDICATA

An unlawful detainer (now called eviction) judgment does not prevent the tenant from raising in another action:

1. An issue which could have been raised in the unlawful detainer (now called eviction) action, but was not raised, or was raised but later withdrawn, *Steinberg v. Silverman*, 186 Minn. 640, 642, 244, N.W. 105, 105-106 (1932).

2. An issue raised in the eviction (unlawful detainer) action which the court declined to rule on. *See Seifred v. Zabel*, 369 N.W.2d 571, 574 (Minn. Ct. App. 1985).

3. Issues of title. *Pushor v. Dale*, 242 Minn. 564, 568-69, 66 N.W.2d 11, 14 (1954); *Hargreaves v. FDIC*, No. C9-89-1966 (Minn. Ct. App. June 15, 1990) FINANCE & COMMERCE at B12 (July 15, 1990) (unpublished).

While the summary nature of the eviction (unlawful detainer) action limits its collateral estoppel effect, *Cole v. Paulson*, 380 N.W.2d 215, 218 (Minn. Ct. App. 1986), the judgment is conclusive of the facts upon which the right of possession rested. *Id.* at 218-19 (tenant barred from re-litigating adequacy of notice). *See Gollner v. Cram*, 258 Minn. 8, 10-13, 102 N.W.2d 811, 820 (1960), *cert. denied*, 364 U.S. 894 (tenant barred from re-litigating breach and waiver of breach); *Wurdemann v. Hjelm*, 257 Minn. 450, 464, 102 N.W.2d 811, 820 (1960), *cert. denied*, 364 U.S. 894 (tenant barred from re-litigating breach and waiver of breach); *Ferch v. Hiller*, 210 Minn. 3, 7-8, 297 N.W. 102, 104 (1941) (defendant barred from re-litigating cancellation of a contract for deed); _____ *v. Tran*, No. AC-03-13965 (Minn. Dist Ct. 4th Dist. Nov. 19, 2003) (Appendix 456) (repairs litigated in previous emergency relief action cannot be relitigated in subsequent action for property damage; landlord claiming tenant damage must prove the condition of the property when the tenant moved to the property, and a connection between repairs and tenant damage; landlord failed to comply with security deposit statute).

The Court in the eviction (unlawful detainer) action also can specifically state which issues were litigated, and direct the parties to not attempt to re-litigate the issues in another form. *Ochoa v. Kenneth*, UD-1950919505 (Minn. Dist. Ct. 4th Dist. Oct. 20, 1995) (Appendix 79) (landlord may not pursue litigated rent claim in conciliation court or by security deposit setoff); *Lewis Properties v. Pruitt*, UD-1950315516 (Minn. Dist. Ct. 4th Dist. Sept. 22, 1995) (Appendix 92) (landlord may not claim litigated rent against tenants' security deposit); *The Hornig Company v. Mmubango*, UD-1950213513 (Minn. Dist. Ct. 4th Dist. Mar. 6, 1995) (Appendix 93)(landlord may not raise litigated rent claim in conciliation court, but damage claim was not determined).

"If, however `the judgment might have been based upon one or more of several grounds, but does not expressly rely upon any one of them, then none of them is conclusively established under the doctrine of collateral estoppel, since it is impossible for another court to tell which issue or issues were adjudged by the rendering court.'" *Hauser v. Mealey*, 263 N.W.2d 803, 808 (Minn. 1978), quoting 1 B. MOORE'S FEDERAL PRACTICE at 3915 (2d ed. 1948).

In an eviction (unlawful detainer) action based upon nonpayment of rent, a judgment for the plaintiff on default or where the defendant did not raise breach of the covenants of habitability, does not bar a subsequent action for breach of the covenants. *Mayse v. Nordlie*, No. 84-13390 (Minn. Dist. Ct., 4th Dist., 1985) (Appendix 1).

In *Ellis v. Minneapolis Commission on Civil Rights*, 319 N.W.2d 702, 704 (Minn. 1982), the Court held that the issue of illegal discrimination, which was litigated in an eviction (unlawful detainer) action, could not be litigated in a subsequent discrimination action. The Court noted that in the unlawful detainer action, the proceeding was not summary in nature, where the tenant had significantly more time to prepare than in the typical case, the tenant introduced extensive evidence, and the jury trial lasted for four days. The court concluded that "[i]n this unique fact situation, [the tenant] had a full and fair opportunity to litigate [the issue]." *See Jacobs v. Gear Properties*, No. 00-1257MN, 2001 WL 87440 (8th Cir. Feb. 2001) (unpublished) (affirmed dismissal of federal court action claiming discriminatory eviction following loss in state court eviction action where tenant did not raise discrimination, on the grounds that discrimination could have been raised in the eviction).

In *Russell v. Popper*, 914 F.2d 1494 (6th Cir. 1990), the Sixth Circuit Court of Appeals affirmed

dismissal of a housing discrimination suit filed by a tenant who unsuccessfully raised identical allegations in a state court eviction proceeding. The Court of Appeals concluded that the tenant had a full and fair opportunity to litigate her discrimination claim. *But see Seifred,* 369 N.W.2d at 574 (discrimination raised but not ruled upon does not bar subsequent discrimination action). For a general discussion of whether litigation of discrimination in eviction actions bars later litigation by a government agency, *see* Memorandum of Harry L. Carey, (Appendix 407).

In *Huffman v. Ellis*, No. UD-1991119518 (Minn. Dist. Ct. 4th Dist. Feb. 2, 2000) (Appendix 397), the parties settled an unlawful detainer action for nonpayment of rent with habitability defenses for rent abatement and a deadline to complete repairs. When the landlord did not complete repairs by the deadline, the tenant moved for relief based on breach of the settlement agreement. The court found the breach of the agreement, diminished use of enjoyment of the premises, and awarded rent abatement. After taking testimony on damage to the tenant's car allegedly caused by repair problems not contemplated in the settlement agreement, the court concluded that the damages were excluded from rent abatement and would not be considered *res judicata* as to future claims.

However, there may be some issues which should have been litigated in the eviction (unlawful detainer) action which cannot be litigated later in a separate damages action. In *Duling Optical Corp. v. First Union Management, Inc.,* No. C5-95-2718 (Minn. Ct. App. Aug. 13, 1996), FINANCE & COMMERCE at 66 (Aug. 16, 1996) (Appendix 181) (unpublished decision), the Court of Appeals affirmed the District Court's conclusion in a separate damages action that it lacked jurisdiction to award attorney's fees for separate unlawful detainer actions, since the issue of attorney's fees should have been decided in the unlawful detainer actions. *But see* In *Eagan East Ltd. Partnership v. Powers Investigations, Inc.*, 554 N.W. 2d 621 (Minn. Ct. App. 1996) (trial court's jurisdiction was limited to determining present possessory rights of the parties, and that the trial court exceeded its jurisdiction by ruling on a prospective rent increase and attorney's fee issues).

A landlord who brought second unlawful detainer action to correct errors made in first unlawful detainer action over the same subject matter was not barred by lack of jurisdiction while the first case was appealed, or collateral estoppel since unlawful detainer actions have limited collateral effect. *Jordan v. Peterson*, No. C7-96-1757 (Minn. Ct. App. Mar. 18, 1997, FINANCE AND COMMERCE at 49 (Mar. 21, 1997) (Appendix 263) (Unpublished). In *CAMM Properties, Inc. v. Peacock*, No. C6-97-1128, C7-97-1168, C9-97-1365, C2-97-1420 (Minn. Ct. App. May 18, 1998) (Appendix 316) (Unpublished), the defendant in a contract for deed unlawful detainer action raised the issue of which of several parties had the vendor's interest in the property. The trial court granted summary judgment for the plaintiffs, concluding that collateral estoppel and res judicata barred her from arguing issues which she raised in an earlier action against plaintiffs. The court affirmed the decision, concluding that the district court did not err in granting summary judgment. *See Franklin v. Rae*, No. HC-000121503 (Minn. Dist. Ct. 4th Dist. Feb. 4, 2000) (Appendix 392) (Judge Albrecht: dismissal based on *res judicata*) (Memorandum by Paul Birnberg attached arguing that dismissal was on the merits under MINN. R. CIV. P. 41.02).

A second eviction action brought on grounds different from the first is not barred. *Anoka County Community Action Program v. Solmonson*, No. A05-1251, 2006 WL 1320332 (Minn. Ct. App. May 16, 2006) (unpublished) (*res judicata* did not apply to second eviction case where first case involved different grounds, and was dismissed by plaintiff voluntarily). On the other hand, a second action brought on the same grounds as the first where the landlord could not enforce the writ of recovery in a timely manner is not barred, and summary judgment for the landlord may be appropriate where the tenant has no new defenses to raise in the second action. *See DePetro v. DePetro*, No. A03-727, 2004

WL 885552 (Minn. Ct. App. April 27, 2004) (unpublished)(affirmed eviction summary judgment for plaintiff under doctrine of collateral estoppel, where plaintiff was unable to execute writ of recovery in first eviction action and commenced second eviction action on the same grounds and defendant did not raise any new claims or defenses).

Minnesota law encourages a settlement of disputes and generally presumes the validity of releases of claims. Since a release is a contract, interpretation of the release is a question of law, governed by principles of contract construction. *The Regents of the University of Minnesota v. Scheurer*, No. C2-99-1065 (Minn. Ct. App. Dec. 28, 1999) (unpublished) (The general release in the parties' unlawful detainer settlement agreement discharged all claims and liabilities, not just housing related claims..

O. REMOVAL OF ACTION TO FEDERAL COURT

When the claims of the plaintiff or defendant involve federal law, the defendant may be able to remove the case to federal court. For example, the Civil Rights Removal Statute, 28 U.S.C. § 1443(1) allows removal of the action to federal court where the defendant asserts that the action was motivated by a discriminatory purpose or in retaliation for the exercise of the defendant's rights to challenge discrimination. *See* Defendant's Memorandum In Opposition to Plaintiff's Motion to Remand, *Bossen Terrace v. Ewing*, No. 4-91-Civ. 824 (D. Minn. Nov. 6, 1991) (discussion of cases; action settled in federal court) (Appendix 28).

P. RELEASE FROM PRISON FOR HEARING

The Court may order the release of an institutionalized person to appear at an eviction (unlawful detainer) action, under Minn. Stat. § 589.35. *Minneapolis Public Housing Authority v. Harding*, No. UD-1941011532 (Minn. Dist. Ct. 4th Dist. Oct. 26, 1994) (Appendix 29).

Q. EXPEDITED CASES

In 1994, the Legislature created a priority in scheduling for cases including claims of illegal drugs under Section 504.181 (now § 504B.171), or on the basis that the tenant is causing a nuisance or seriously endangering the safety of other residents, their property, or their landlord's property. The priority includes scheduling appearances at the arraignment, scheduling trials, and issuing and executing Writs of Restitution. The court also may not stay issuance of the Writ of Restitution in such cases. Minn. Stat. § 504B.321 (formerly § 566.05), 504B.335 (formerly § 566.07), 504B.345 (formerly § 566.09), 504B.361 (formerly § 566.16), 504B.365 (formerly § 566.17), *amended by* 1994 Minn. Laws. Ch. 502, §§ 4-9.

In 1997 the Legislature replaced the priority for scheduling cases involving claims of illegal drugs with a process for bringing expedited actions involving illegal drugs, prostitution related activities, certain firearm possession offenses, or nuisance or other illegal behavior that seriously endangers the safety of other residents, their property, or the landlord's property. MINN. STAT. § 504B.321 (formerly § 566.05), *amended by* 1997 Minn. Laws Ch. 239, Art. 12, section 5 (Appendix 242). The person filing the complaint must file an affidavit stating specific facts and instances to support it, and explain why an expedited hearing is required. A referee or judge must review the complaint and affidavit to determine whether an expedited hearing is justified. The court must schedule a hearing in not less than five days or more than seven days from the date the summons is issued. A summons must be served within 24 hours of issuance unless the court orders otherwise for good cause. If the court determines that the person

seeking an expedited hearing did so without sufficient basis, the court must impose a civil penalty of up to $500 for abuse of the process.

It is unclear what the court will do if at the expedited hearing the landlord cannot prove the basis for the expedited hearing, but can prove a lease violation. The tenant should argue for assessment of the $500 penalty, but also ask that the case be dismissed for not meeting the jurisdictional requirement for an expedited hearing. Without such relief, there would be little disincentive for landlords to characterize breach of lease cases as expedited hearing cases.

R. SETTLEMENT

Most unlawful detainer actions which are contested initially later result in settlement. Settlements can include many issues, including those which could not be resolved if the case were contested. Counsel should include deadlines for action to be taken by the landlord. For instance, if there is agreement on a reference letter, counsel should accept a deadline for drafting the letter, and include a deadline for the landlord to sign and return it. *Shatek v. Kneeland*, No. UD-1970306507 (Minn. Dist. Ct. 4th Dist. Mar. 26, 1997) (Appendix 292) (Settlement for payment of rent, security deposit refund without deductions, reference, schedule for completing the reference letter, writ of restitution if tenant violates agreement, trial if landlord violates agreement). *See Grimmer v. Svoboda*, No. UD-1960923520 (Minn. Dist. Ct. 4th Dist. Jan. 6, Jan. 15, and Mar. 14, 1997) (Appendix 257) (Writ stayed where landlord failed to execute stipulated reference, told tenants they could stay longer, and accepted rent beyond the move out date; landlord ordered to execute reference letter and tenant given extra month to move; damages and move out date settled).

Landlords occasionally include in settlement agreements provisions on future payments of rent. While the landlord may obtain a writ and evict the tenant for failing to make installment payments on back rent, the landlord must file a new action if future rents are not paid. *See* discussion, *infra*, at VIII.B.2.

The court retains the right to approve or not approve a settlement, and in some cases may not approve provisions unfavorable to a tenant that the tenant had agreed to follow. *Minneapolis Public Housing Authority v. Taylor*, No. UD-1961211526 (Minn. Dist. Ct. 4th Dist. Mar. 20, 1997) (Appendix 281) (Settlement for two and one half months to move, 10-day notice of exact date to move, neutral reference, dismissal, and cancellation of agreement; court struck provision requiring tenant to exclude her minor daughter from the property).

Counsel should consider contempt as a method for enforcing settlement agreements. *See* discussion, *infra,* at VII.C.

Minnesota law encourages a settlement of disputes and generally presumes the validity of releases of claims. Since a release is a contract, interpretation of the release is a question of law, governed by principles of contract construction. *The Regents of the University of Minnesota v. Scheurer*, No. C2-99-1065 (Minn. Ct. App. Dec. 28, 1999) (unpublished) (The general release in the parties' unlawful detainer settlement agreement discharged all claims and liabilities, not just housing related claims).

The maintains jurisdiction over the case to enforce the settlement. In *Huffman v. Ellis*, No. UD-1991119518 (Minn. Dist. Ct. 4th Dist. Feb. 2, 2000) (Appendix 397), the parties settled an unlawful detainer action for nonpayment of rent with habitability defenses for rent abatement and a deadline to

complete repairs. When the landlord did not complete repairs by the deadline, the tenant moved for relief based on breach of the settlement agreement. The court found the breach of the agreement, diminished use of enjoyment of the premises, and awarded rent abatement. After taking testimony on damage to the tenant's car allegedly caused by repair problems not contemplated in the settlement agreement, the court concluded that the damages were excluded from rent abatement and would not be considered *res judicata* as to future claims. *Patterson v. Heinecke*, No. C3-00-600301 (Minn. Dist. Ct. 6th Dist. Mar. 24, 2000) (Judge Oswald) (Appendix 412) (Writ vacated where the parties settled for payment of back rent but plaintiff refused to cooperate; plaintiff ordered to immediately cooperate with defendant to provide forms necessary to obtain rental assistance from the Salvation Army. "This Court is not going to act as Plaintiff's rent collection agency nor is it going to allow Plaintiff's own refusal to cooperate to frustrate the prior settlement of the parties).

Occasionally court personnel may be reluctant to expunge a court file where there is a settlement agreement setting out actions or events that will occur in the future. The tenant should ask the court to order that expungement occur immediately. This is especially important during a period in which the tenant is seeking new housing. *Viking Properties of MN LLC v. Wesley*, Nos. UD-1990714563 and UD-1990709901 (Minn. Dist. Ct. 4th Dist. Aug. 11, 1999) (Judge Rosenbaum) (Appendix 421) (Action to be expunged immediately upon filing of order where unlawful detainer action was erroneously filed due to mistake or confusion; settlement providing that tenant would move in one and one-half months, tenant would not pay rent for two months and landlord would retain deposit plus interest, landlord would provide neutral reference, landlord would make repairs as ordered by the housing inspector, landlord would give 24 hours written notice of intention to make repairs, tenant would accommodate repair persons, landlord could contact tenant's community liaison except all repair notices would be between the parties, the agreement did not waive other rights related to nuisance, illegal or criminal conduct, privacy, or discrimination, tenant would not pursue claims for rent abatement, landlord would not pursue claims for past rent, deposit, late fees, court costs, or court fees, the parties did not admit liability).

Counsel should consider the following issues for settlement:

1. Rent and fees: rent abatement for disrepair; scheduling rent abatement in installments to conform to government benefit program income or asset requirements; landlord rent abatement payment by lump sum or installment payments with interest; waiver or limitation of back or future rent or utility charges; waiver of late, service and filing fees; extension and/or payment plan to pay rent or other fees; rent abatement to enforce a lockout penalty; suspension of government subsidy to landlord pending repairs; recalculation of subsidized housing income, rent and government subsidy; waiver of side payments (charges or fees not authorized by subsidized housing programs); assessment of $250 in costs for failing to register trade name with Secretary of State; damages; tenant retains potential tort claim;

2. Repairs: schedule for repairs; landlord will comply with inspection orders; apartment reinspection; landlord enjoined from filing any unlawful detainer actions for nonpayment of rent until after repairs have been made;

3. Housing: relocation and relocation benefits during apartment remodeling; landlord will put tenant in suitable replacement housing and provide money for food until hearing; landlord will provide habitable replacement housing with kitchen facilities; landlord's relocation of tenant to another property which would pass Section 8 inspection, and landlord and tenant will sign Section 8 lease at new apartment;

4. Tenant and landlord conduct: reasonable accommodation of the tenant's disability; mediation between the landlord, landlord staff, tenant and/or neighbors; changes in how a landlord, landlord staff, tenant and/or neighbors deal with each other; probation period for the tenant; extended period for tenant to comply with the lease or government codes; exclusion of certain guests; mutual non-harassment order; notice of landlord visits; pets; tenant will not be noisy and landlord will take action against other noisy tenants; tenant agrees not to damage property; limitation on residents but not guests;

5. Future agreements: executing a contract for deed or other contract; executing a lease; executing subsidized housing contracts;

6. Moving: lease termination notice; landlords allows tenant to terminate lease; tenant can move out with one month's notice; extended period to move and/or extended stay of issuance of the Writ of Restitution; scripted favorable or non-negative reference to prospective landlords and to tenant screening agencies and process for preparing and circulating reference; tenant will clean old apartment; disposition of security deposit and interest; landlord will return security deposit or provide itemized list of damages in ten days with an evidentiary hearing if tenant disputes landlord's determination;

7. Other: explanation of the dispute between the parties; apologies by the parties; extension of the period in which a notice quit by the landlord would be presumed to be retaliatory; retraction of eviction notices;

8. Enforcement: notice to the tenant and tenant's advocate of landlord's allegation that tenant has violated the settlement agreement and landlord's seeks the writ of restitution, with opportunity for the tenant to request a hearing to challenge the allegation; agreement admissibility in other actions; agreement enforcement; confession of judgment; waiver of other claims if parties comply with agreement, and re-opening of action if parties violate agreement; continuing jurisdiction;

9. Case disposition: dismissal of the unlawful detainer action; judgment; sealing or expunging court records.

The following settlement agreements address many of these issues:

1. Amended Settlement & Release, *Smith v. Meyer*, No. UD-1940804538 (Minn. Dist. Ct. 4th Dist. Oct. 3, 1994) (rent escrow action settlement; rent abatement in installments to conform to government benefits program, favorable reference, rent-free occupancy, extended vacate date, liability releases, and continuing jurisdiction) (Appendix 30).

2. *Clark v. Johnson*, No. UD-1940720506 (Minn. Dist. Ct. 4th Dist. Aug. 5, 1994) (rent paid into court released to plaintiff, extended vacate date, waiver of additional rent, limitation of utility bill liability, and favorable reference) (Appendix 31).

3. Settlement & Agreement *Lisk v. McGee*, No. 1940811500 (Minn. Dist. Ct. 4th Dist. Aug. 18, 1994) (rent payment, waiver of filing fee, vacate date, *pro rata* rent for last month, return of security deposit, favorable reference, and dismissal) (Appendix 32).

4. *Bratton v. Dockery*, No. UD-1940912513 (Minn. Dist. Ct. 4th Dist. Sep. 30, 1994)

(payment plan for rent and filing fee) (Appendix 33).

5. Settlement Agreement between Bethune Associates, Parkview Apartments, and Derrell Woodard (Oct. 20, 1994) (schedule for rent payment, parties' cooperation in excluding a non-resident, retraction of eviction notices, admissibility of settlement agreement, and enforcement) (Appendix 34).

6. Settlement Agreement, *Minneapolis Public Housing Authority v. Patterson*, No. UD-1940511538 (Minn. Dist. Ct. 4th Dist. May 31, 1994) (probation) (Appendix 35).

7. *Ehlart v. Billat*, No. 24-C794-956 (Minn. Dist. Ct. 3rd Dist. Sep. 30, 1994) (extension to pay rent, taxes and insurance, entry into contract for deed, and dismissal) (Appendix 36).

8. *Public Housing Authority v. Vang*, UD-1951003612 (Minn. Dist. Ct. 4th Dist. Oct. 17, 1995) (Appendix 94) (tenant already paid all of the rent, landlord's records were inaccurate, and landlord apologizes to tenant).

9. _____ *v.* _____, C3-94-211 (Minn. Dist. Ct. 5th Dist. Dec. 21, 1994) (Appendix 95) ($500 in lockout damages prospectively applied to rent, schedule for repairs, and confession of judgment, tenant cooperation with landlord for completing repairs, extension of 90 day retaliatory eviction presumption under Minn. Stat. § 566.28 (now § 504B.441)).

10. *Wynmore Apartments v. Stellick*, No. UD-1920513525 (Minn. Dist. Ct. 4th Dist. June 23, 1992) (Appendix 182) (housing authority shall pay increased subsidy after miscalculating tenant's income and rent; $250 penalty for failing to register trade name; waiver of late fees; waiver of side payments or fee charged in excess of amounts stated in lease; waiver of ½ of the filing fee; payment plan for back rent).

11. *Grimmer v. Svoboda*, No. UD-1960923520 (Minn. Dist. Ct. 4th Dist. Oct. 29, 1996) (Appendix 188) (extended time to move; $250 penalty for failing to register trade name of the plaintiff's management company to be paid from rent paid into court; mutual non-harassment order; 48 hours written notice for landlord visits, containing date, time and duration for visit; non-interference with tenant's access to garage; neutral reference letter with specific statements and limitations; process for resolution of disputed claims to personal property in garage); *Grimmer v. Svoboda*, No. UD-1960923520 (Minn. Dist. Ct. 4th Dist. Jan. 6, Jan. 15, and Mar. 14, 1997) (Appendix 257) (Writ stayed where landlord failed to execute stipulated reference, told tenants they could stay longer, and accepted rent beyond the move out date; landlord ordered to execute reference letter and tenant given extra month to move; damages and move out date settled).

12. *Kedrowski v. Doe*, No.-UD 1950801514 (Minn. Dist. Ct. 4th Dist. Nov. 17, 1995) (Appendix 189) (non-negative reference, lease termination, and rent abatement).

13. *Chromy v. Wastweet*, No. CX-96-1328 (Minn. Dist. Ct. 7th Dist. Aug. 12, 1996) (Appendix 190) (Tenant’s remedies action settlement: $4,800 rent abatement, collected by prospective rent credit, lump sum or installment payments with interest; relocation of tenant during apartment remodeling and rehabilitation; relocation and moving benefits, suspension of rent subsidy to landlord until tenant returns to the remodeled; execution of

lease and reinstatement of rent subsidy following remodeling; lease termination notice security deposit; any attempt to evict tenant during duration of agreement presumed retaliatory; court jurisdiction retained).

14. *Pirkola v. Bastie,* No. C1-95-602242 (Minn. Dist. Ct. 6th Dist. Feb. 20, 1996) (Appendix 196) (settlement for one month period for tenant to comply with local fire code).

15. Jenkins, Harvey, and Van Patten Settlement Agreement (Jan. 20, 1995) (Appendix 190(A)) (Section 8 voucher: schedule for landlord repairs, execution of new Section 8 lease, landlord participation in Section 8 program, rent abatement, lease termination with sixty days notice upon agreement to sell the house, favorable reference).

16. *Guevara v. Catchings*, No. UD-01970117520 (Minn. Dist. Ct. 4th Dist. Jan. 30, 1997) (Appendix TR 147b) (Settlement for dismissal of unlawful detainer action with prejudice, landlord enjoined from filing any unlawful detainer actions for nonpayment of rent until after repairs have been made, retaliation protection period of 90 days will not begin until all repairs have been made and rent abatement collected, unlawful detainer files will be expunged).

17. *LaSalle Group, Ltd. v.* _____, No. UD-1970326507 (Minn. Dist. Ct. 4th Dist. Sep. 30, 1997) (Appendix 267) (Joint request for expungement).

18. *Heintzman v. Steinman*, No. C7-99-1772 (Minn. Dist. Ct. 10th Dist. Dec. 29, 1999) (Appendix 394) (Based upon stipulation for dismissal, dismissal of action with prejudice and expungement).

19. *2407 Partners v. Kirk*, No. HC-1990409512 (Minn. Dist. Ct. 4th Dist. Sep. 30, Dec. 8, 1999) (Appendix 402) (Settlement for rent abatement, landlord payment of $500 in costs for failure to register two business names with the Secretary of State, favorable reference, dismissal, and expungement; file expunged).

20. *Bratton v. Cobb*, No. 8C-000222514 (Minn. Dist. Ct. 4th Dist. Apr. 12, 2000) (Appendix 380) (parties agreed there was short service but executed move out agreement; case expunged due to short service).

21. _____ *v. Tran*, No. AC-03-13965 (Minn. Dist Ct. 4th Dist. Nov. 19, 2003) (Appendix 456) (repairs litigated in previous emergency relief action cannot be relitigated in subsequent action for property damage; landlord claiming tenant damage must prove the condition of the property when the tenant moved to the property, and a connection between repairs and tenant damage; landlord failed to comply with security deposit statute).

S. CONSOLIDATING THE EVICTION ACTION WITH OTHER ACTIONS

While some courts take an expansive view of the relief that can be afforded the tenant, others view the court's jurisdiction to be very narrow. *See* Breach of Covenants of Habitability Relief, *infra* at VI.E.1.i; Remedies and Requests for Relief, *infra* at VII. Tenants' advocates should considering commencing a separate action and moving for consolidation. In *Ridgemont Apartments v. Englund*, No. C3-96-68 (Minn. Dist. Ct. 10th Dist. Apr. 1, 1996) (Appendix 191), the landlord of a RHCDS Sect. 515

subsidized housing project sought to terminate the tenant's subsidy and increase the tenant's share of the rent to the market rent for failing to recertify on time. The landlord brought an eviction (unlawful detainer) action, and the tenant defended the action while bringing an affirmative action as well. The court held that while the landlord gave the tenant several notices, the notice which contained the required information that failure to recertify would result in termination of the subsidy was not given thirty days before the due date, as required by the program handbook. Since the two actions were consolidated, in addition to dismissing the unlawful detainer action for non-payment of the market rent, the court granted additional affirmative relief, including ordering the landlord to recalculate the tenant's share of the rent, immediately reinstate the subsidy if a subsidy slot was available, credit defendant's rent for an amount equal to the subsidy even if a subsidy slot is not available, and notify the tenant of the amount of past rent due, and ordered the tenant to pay that amount within 10 days after notice from the landlord.

See generally Action Not Appropriate for Certain Types of Litigation, *supra* at II.B; Temporary Restraining Orders, *supra* at V.D.; Companion Actions, *infra* at VI.E.1.j, Housing Court Consolidation of Claims, *supra* at V.G.4; Appeal Period, *infra* at X.A.

T. Sealing or Expunging Court Records

In some circumstances, the court may considering sealing or expunging the eviction (unlawful detainer) court records. *See* discussion, *infra*, VIII.E.5.

U. Disbursement of Funds Paid Into Court

A party's payment of the funds into court does not operate as a relinquishment of the party's interest in the money. The parties are entitled to notice and an opportunity for hearing before the disposition of funds on deposit. *Knutson v. Seeba*, No. C7-98-1665 (Minn. Ct. App. Mar. 30, 1999) (Appendix 341) (Unpublished).

V. Witness Fees

Subpoenaed witnesses who do not receive a witness fee along with the subpoena are not obligated to attend the trial. Parties are not entitled to county payment of witness fees. *Bossen Terrace v. Price*, No. C5-98-434 and C1-98-480 (Minn. Ct. App. Oct. 6, 1998) (Appendix 312) (Unpublished: Trial court did not err in quashing subpoenas where the witness fee was not paid, or requiring a preliminary showing of merit before providing witness fees).

W. Attorney Testimony

Where the tenant's attorney takes action on behalf of the tenant, such as calling or sending a letter to the landlord, there is a question as to whether the attorney can provide testimony on the subject. *See Gale v. Winge*, No. C7-98-2279 (Minn. Ct. App. July 6, 1999) (unpublished) (affirmed determination as not clearly erroneous that husband continued to use property as his place of abode and substitute service on wife was proper; minor inaccuracies in contract-for-deed legal description do not render the cancellation notice ineffective; trial court did not abuse its discretion in denying motion to vacate default judgment where tenant did not present a defense on the merits nor a reasonable excuse for failure to act; attorney's testimony at trial regarding payment of money was not on a contested issue, and did not require disqualification; equitable rights were not at issue, but equities were not in the defendants' favor).

CHAPTER VI:
DEFENSES

A. FORM ANSWERS AND MOTIONS

Included in the Forms Appendix are form answers and motions for dismissal or summary judgment for private and subsidized tenancies.

B. LIMITATIONS ON QUESTIONS OF TITLE OR EQUITABLE DEFENSES

1. In Municipal or County Court

The court did not have jurisdiction to hear questions of title or equitable defenses. *Dahlberg v. Young*, 231 Minn. 60, 67-68, 42 N.W.2d 570, 576 (1950). However, the defendant could commence a separate action in district court and seek to enjoin prosecution of the eviction (unlawful detainer) action, *William Weisman Holding Co. v. Miller*, 152 Minn. 330, 332, 188 N.W. 732, 733 (1922), or remove the action to District Court. *Albright v. Henry*, 285 Minn. 452, 460, 174 N.W. 2d 106, 110 (1970). *See Brundidge v. Bleckinger*, No. UD-1850916524 (Henn. Cty. Mun. Ct., Oct. 28, 1985) (Appendix 2).

2. In District Court

Unification of trial courts in the district court should have altered the above limitation. *See Sternaman v. Hall*, 411 N.W.2d 18, 19 n.1 (Minn. Ct. App. 1987). But subsequent decisions have affirmed the rule, even though the rule probably was based on the jurisdictional limits of municipal and county courts, rather than an inherent jurisdictional limitation for eviction (unlawful detainer) actions. *Federal Land Bank v. Obermoller* 429 N.W.2d 251, 257 (Minn. Ct. App. 1988), *pet. for rev. denied* (Minn. Oct. 26, 1988); *Park Drive Partnership v. Granse* No. C7-96-401 (Minn. Ct. App. Sep. 24, 1996), FINANCE & COMMERCE at 38 (Sep. 27, 1996) (Appendix 193) (unpublished decision: pending separate quiet title action did not preclude unlawful detainer action, which determines who has the superior right of possession, but does not determine title; the defendant cannot assert title, equitable rights or counterclaims; the defendant did not present any evidence demonstrating a greater right of possession than the plaintiff); *Bjur v. Burgmeier*, No. C2-92-409 (Minn. Ct. App. Aug. 18, 1992), FINANCE & COMMERCE at B45 (Aug. 21, 1992) (unpublished: because plaintiff as the mortgagees assignee, has presumptively good title and because defendants cannot litigate title in an eviction (unlawful detainer) action, defendants are foreclosed from challenging plaintiffs title by reference to their collateral litigation) (Appendix 0.H); *Stein v. J.D. White, Inc.,* No. C0-91-2164 (Minn. Ct. App. Apr. 21, 1992), FINANCE & COMMERCE at B24 (April 24, 1992) (unpublished: rule that unlawful detainer action merely determines right to present possession of property and does not determine ultimate rights of the parties is based in part on an obsolete division of equity jurisdiction between municipal and district courts, but the rule retains legal force because the unlawful detainer action is a suspension of ordinary procedures in order to achieve a summary disposition of the right to present possession) (Appendix 0.F); *Hargreaves v. FDIC*, No. C9-89-1966) (Minn. Ct. App. June 12, 1990), FINANCE & COMMERCE at B12 (June 15, 1990) (unpublished) (unlawful detainer action does not adjudicate legal or equitable ownership interests).

However, in *Lilyerd v. Carlson*, 499 N.W.2d 803, 807, 812 (Minn. Ct. App. 1993), the court noted that while an eviction (unlawful detainer) action is generally summary in nature, determines only present possessory rights, and usually does not bar subsequent actions involving title or equitable rights of the parties, counterclaim for first right of refusal to purchase could have been tried to the unlawful

detainer action jury.

In *Real Estate Equity Strategies, LLC v. Jones*, 720 N.W.2d 352 (Minn. Ct. App. 2006), the Court reviewed the history of litigation of title issues in eviction actions, dating back to the time when evictions were heard in county and municipality courts of limited jurisdiction. The Court concluded that unification of the trial courts removed any limitations based on the nature of the court, leaving only limitations based on the summary nature of the eviction action, which does not preclude litigation of title.

3. Mortgage Foreclosure and Contract for Deed Cancellation

a. *Before 2006*

There was some confusion over whether the defendant can litigate the plaintiff's compliance with procedural requirements of mortgage foreclosure and contract for deed cancellation statutes. The defendant clearly may raise non-compliance with statutory notice and service requirements for contract for deed cancellation. *Enga v. Felland,* 264 Minn. 67, 70-71, 117 N.W.2d 787, 789-90 (1962) (eviction reserved for improper contact for deed cancellation). *See Revels v. O'Neal*, No. UD-1960723503 (Minn. Dist. Ct. 4th Dist. Sep. 11, 1996) (Appendix 194) (contract for deed cancellation notice properly served; vendor's mortgagee is not a party which must be served; defenses of unjust enrichment, void and unenforceable contract for deed and fraudulent inducement could not be raised in the eviction (unlawful detainer) action where vendee brought no action within the statutory sixty day period following notice of cancellation); *Swartwood v. Clark,* No. UD-1920928505 (Minn. Dist. Ct. 4th Dist. Oct. 15, 1992) (Appendix 16.C) (vendor failed to meet burden of proof regarding alleged service of cancellation notice); *Edwards v. Sagataw,* No. 31-C2-92-512 (Minn. Dist. Ct. Itasca Cty. Apr. 30, 1992) (Appendix 16.D) (quit claim deed obtained by vendor from vendee while vendee was not in default lacked consideration; allegations of default in payment of taxes by vendee implied continuing application of contract for deed; vendor, cannot evict vendees without foreclosing the contract). *See also* discussion, *supra* at V.N. (collateral estoppel).

However, raising mortgage foreclosure defects was another story. In *Amresco Residential Mortgage Corp. v. Stange*, 631 N.W.2d 444 (Minn. Ct. App. 2001), the trial court ruled that it could not consider mortgage defects in the eviction action. On appeal, the court held that rather than order the trial court to hear the issues or convert the action to an ejectment action, the appellants could seek to enjoin prosecution of the eviction action in the separate proceeding in which they sought to set aside respondent's foreclosure which they commenced after dismissal of their counterclaims in the eviction action. While the court affirmed dismissal of the counterclaims, it ordered that the court's stay of the writ of restitution during the appeal be continued for a reasonable period of time in which appellants can assert, and the district court can determine in their pending proceeding, whether their right of possession should be protected by enjoining the writ until the court rules on their title claims. *See AHR Construction, Inc. v. Dixon*, Nos. A06-1554, A06-0248, 2007 WL 2417083 (Minn. Ct. App. Aug. 28, 2007), *review denied* (Minn. Nov. 21, 2007) (unpublished) (challenges to foreclosure cannot be raised in an unlawful detainer action and must be asserted in a separate proceeding, citing *AMERSCO*). *But see Comerica Mortgage Corp. v. Gaddy*, No. UD-1950223514 (Minn. Dist. Ct. 4th Dist. Mar. 24, 1995) (Appendix 195) (Mortgager did not prove that service of the notice of foreclosure sale was insufficient).

In *Fraser v. Fraser*, 642 N.W.2d 34 (Minn. Ct. App., 2002), the husband's father, who sold house to husband and wife under contract for deed, gave notice of cancellation of contract after husband brought dissolution action. The wife sought to enjoin cancellation as part of dissolution proceedings,

which was granted and later vacated. The father then brought an eviction action against wife, and the district court ruled in father's favor. The wife appealed in both cases and they were consolidated. The court held that there was no jurisdiction in the dissolution action jurisdiction to enjoin cancellation of contract for deed. In the eviction action, the court held that the trial court was not bound by findings on the contract for deed service from the dissolution action, given the lack of jurisdiction in the latter. As to whether the wife could litigate equitable real estate issues in the eviction case, relying on *Amresco Residential Mortgage Corp. v. Stange*, 631 N.W.2d 444 (Minn. Ct. App. 2001), the court held that if she has the ability to litigate her equitable mortgage and other claims and defenses in alternate civil proceedings where she could enjoin the eviction action, it would be inappropriate for her to seek to do so in the eviction action. However, since the court could not determine whether the eviction action was wife's only opportunity to address her claims and defenses, it remanded the case for the district court to address wife's service claims, address the propriety of entertaining wife's equitable defenses in the eviction action or in an alternate proceeding; and, if appropriate, decide the equitable defenses.

In most eviction (unlawful detainer) actions based on contract for deed cancellation or mortgage foreclosure the plaintiff will assert compliance with statutory procedures in the complaint. The defendant's denial of these claims is not an equitable defense, but rather a denial that plaintiff has satisfied the procedural preconditions for commencing the action.

The defendant was precluded from raising *ultimate legal or equitable defenses* in an eviction (unlawful detainer) action. *See Dahlberg*; *William Weisman Holding Co. But see Lilyerd.* In *Dahlberg*, the Court made the distinction between the claim that an instrument is voidable is an equitable issue, while the claim that an instrument is void is not an equitable issue, concluding that the claim of fraud involved whether the instrument was voidable, thus an equitable issue that could not be raised in an unlawful detainer action. The defendant could assert that challenging compliance with procedural requirements is not an equitable issue, since it involves a determination of whether the contract for deed cancellation or mortgage foreclosure was void, rather than voidable.

b. *2006: Real Estate Equity Strategies, LLC v. Jones*

The issue of litigation of mortgage foreclosure issues in eviction cases took another turn in *Real Estate Equity Strategies, LLC v. Jones*, 720 N.W.2d 352 (Minn. Ct. App. 2006). When the defendants' home went into foreclosure, they entered in an agreement with the plaintiff under which the defendants sold their home to one of plaintiff's entities, which leased it back to the defendants with an option for purchase. When the defendants defaulted on the lease, the plaintiff filed an eviction action against them. The defendants filed a separate equity stripping action against the plaintiff and its entities under Minn. Stat. §§ 325N.01-08, and filed an answer in the eviction case asking for dismissal or a stay pending resolution of the equity stripping action. The trial denied the motion and entered judgment for the plaintiff.

The Court of Appeals affirmed the decision, first concluding that a defendant's assertion of claim of title under Minn. Stat. § 504B.121 does not deprive subject matter jurisdiction to the eviction court. *Id.* The Court concluded that the trial court has discretion to decide whether to stay the eviction pending resolution of the equity stripping action, and does not abuse its discretion by declining to stay the eviction. *Id.*

The Court reviewed the history of litigation of title issues in eviction actions, dating back to the time when evictions were heard in county and municipality courts of limited jurisdiction. The Court concluded that unification of the trial courts removed any limitations based on the nature of the court,

leaving only limitations based on the summary nature of the eviction action, which does not preclude litigation of title. *Id.*

Since this decision, the Legislature amended Minn. Stat. § 325N.18 to include a new subdivision 6, which requires the court to issue an automatic stay without imposition of a bond if a defendant makes a prima facie showing that the defendant has commenced an illegal foreclosure reconveyance action, raises the defense under Minn. Stat. § 504B.121 of an illegal foreclosure reconveyance, or asserts a claim of fraud, false pretense, false promise, misrepresentation, misleading statement, or deceptive practice in conveyance with a foreclosure reconveyance. The defendant also must show that the defendant owned foreclosed residence, the foreclosure reconveyance, and continued occupancy of the property. The automatic stay expires if the foreclosed homeowner fails to commence a foreclosure reconveyance action within 90 days of issuance of the stay.

Just months before the *Real Estate Equities Strategies* decision and afterwards, the Court of Appeals has following the earlier line of cases, holding that the eviction court could not adjudicate legal and equitable rights of ownership. *RedStar Capital, LLC v. Rex,* No. A07-1873, 2008 WL 5136002 (Minn. Ct. App. Dec. 9, 2008) (unpublished); *Ketterling v. Hamilton*, Nos. A05-1872, A05-2119, 2006 WL 2258053 (Minn. Ct. App. Aug. 8, 2006) (unpublished); *Sundberg v. Sundberg*, No. A05-1845, 2006 WL 1806394 (Minn. Ct. App. July 3, 2006) (unpublished) (eviction defendant could not litigate the legal cancellation of contract for deed).

4. Counterclaims

Counterclaims or set offs are not allowed if the basis of the counterclaim or setoff is *independent* of the tenant's obligation to pay rent. *Keller v. Henvit*, 219 Minn. 580, 585, 18 N.W.2d 544, ___(1945); *William Weisman Holding Co. v. Miller*, 152 Minn. 330, 332, 188 N.W. 732, ___ (1922); *Warren v. Hodges*, 137 Minn. 389, 390, 163 N.W. 739, ___ (1917) (in nonpayment of rent case, no defense for landlord's violation of repair covenant); *Peterson v. Kreuger*, 67 Minn. 449, 450, 70 N.W. 567, (1897). *Warren* was reversed in *Fritz v. Warthen*, 298 Minn. 48, 54, 213 N.W.2d 339, 341-42 (1973), where the court held that § 504.18 (now § 504B.161) created an exception to the rule, holding that the covenants of habitability and the covenant to pay rent are mutual and dependant, and all or part of the rent is not due when the landlord has breached the covenants.

C. IMPROPER SERVICE

1. Requirements for personal jurisdiction

"The summons shall be served . . . in the manner provided for service of a summons in a civil action in the district court." Minn. Stat. § 504B.331 (formerly § 566.06). *See* Minn. R. Civ. P. 4. The summons and complaint shall be served not less than seven (7) nor more than fourteen (14) days before the initial court appearance. Minn. Stat. §§ 504B.321 (formerly § 566.05), 504B.331 (formerly § 566.06). The time period excludes the date of service but includes the date of the initial hearing. Minn. Stat. § 645.15. *See Township Bd. v. Lewis*, 305 Minn. 488, 490-92, 234 N.W.2d 815, 817-18 (1975).

Minn. Stat. § 504B.331 (formerly § 566.06) provides for the methods of service:

a. By delivery to the defendants.

b. If the defendants cannot be found in the county, substituted service.

(1) By delivery at the defendant's residence, to a family member or other person of suitable age and discretion residing at the defendant's residence, or

(2) By mail and posting, if

(A) service has been attempted at least twice on different days, with at least one of the attempts between 6:00 p.m. and 10:00 p.m., and

(B) The plaintiff or counsel files an affidavit (1) stating that the defendant cannot be found, or the affiant believes that the defendant is not in the state, and (2) that a copy of the summons has been mailed to the defendant at the defendant's last address known to the plaintiff.

The summons may be served by any person not named a party to the action. See also Minn. R. Civ. P. 4.02. If the defendant is confined to a state institution, by serving also the chief executive officer at the institution. Minn. R. Civ. P. 4.03(a).

Strict compliance with service requirements is a precondition to personal jurisdiction. See Bloom v. American Express Co., 222 Minn. 249, 253, 23 N.W.2d 570, ___ (1946). *B&J Property Management v. Gates*, No. UD-01970602519 (Minn. Dist. Ct. 4th Dist. June 12, 1997) (Appendix 247) (Dismissal for improper service, failure to register trade name, and failure to attach notice to quit and lease to complaint).

2. Specific defenses

a. No service

Minn. Stat. § 504B.331 (formerly § 566.06); *Karnis v. Rayford*, No. UD-1940714513 (Minn. Dist. Ct. 4th Dist. Aug. 15, 1994) (personal service proven by a preponderance of the evidence) (Appendix 37); *Koop v.* _____, No. 27-CV-HC-09-1163 (Minn. Dist. Ct. 4th Dist. Feb. 17, 2009) (Appendix 606) (eviction dismissed for improper service, where action listed four named defendants and affidavit of service claimed service on "John Doe"). If the process server and the defendant are within speaking distance of each other and the process server takes such action as to convince a reasonable person that personal service is being attempted, the defendant cannot avoid service simply by refusing to accept the summons. *Nielsen v. Braland*, 264 Minn. 481,484, 119 N.W.2d 737, 739 (1963).

b. Service less than seven (7) days before the initial hearing

The summons must be served seven days before the hearing, but not to the exact hour. *Central Internal Medicine Assoc. P.A. v. Chilgren*, No. C2-00-36, 2000 WL 987858 (Minn. Ct. App. July 18, 2000) (unpublished). Minn. Stat. § 504B.331 (formerly § 566.06).

In *Peart v. Peloquin,* No. C3-90-430 (Minn. Dist. Ct. 8th Dist. May 25, 1990), the court dismissed the action when the tenant received the summons and complaint only five days before the hearing. (Appendix 2.A). *See Judge v. Rio Hot Properties, Inc.,* No. UD-1981202903 (Minn. Dist. Ct. 4th Dist. July 7, 1999) (Appendix 401) (unlawful detainer action dismissed for service less than seven days before the hearing); *Bratton v. Cobb*, No. 8C-000222514 (Minn. Dist. Ct. 4th Dist. Apr. 12, 2000)

(Appendix 380) (parties agreed there was short service but executed move out agreement; case expunged due to short service).

c. Service on legal holidays.

Minn. Stat. §645.44, subd. 5 prohibits services on legal holidays. Service on Sunday had been prohibited by § 624.04, but it was repealed in 2005.

d. Service by a named plaintiff or agents

Service by the plaintiff is improper. Minn. R. Civ. P. 4.02. *Williams v. McCrimmon*, No. UD-1991207535 (Minn. Dist. Ct. 4th Dist. Dec. 17, 1999) (Appendix 428) (Improper service by delivery to a person of suitable age and discretion, who lives in Iowa and was only a temporary guest of the tenant; service on the tenant was made by the plaintiff; action dismissed). *See Landgren v. Pipestone County Board of Commissioners*, 633 N.W.2d 875 (Minn. Ct. App. 2001) (sheriff may not serve his own action).

In *Lewis v. Contracting Northwest, Inc.*, 413 N.W.2d 154 (Minn. Ct. App. 1987), the court explained the reason for precluding parties from serving process:

> The law has wisely entrusted the decision of disputes between citizens *to persons wholly disinterested and free from bias and the acrimony of feeling so frequently, if not uniformly, engendered by litigation*; and the same is equally true of *the persons selected to execute the process necessary to the adjustment of such disputes*.

Id. at 155 (emphasis added). A court should carefully scrutinize service by persons related to or employed by the plaintiff who are not "wholly disinterested and free from bias" related to the action.

A number of courts have held that partners, managers, caretakers, and other employees of the plaintiff are not authorized to serve defendants because they are not wholly disinterested in the case. In *Hedlund v. Potter*, No. C3-91-1542 (Minn. Dist. Ct. 10th Dist. Dec. 31, 1991), the caretaker for the landlord served the tenant with the summons and complaint. The caretaker had signed the lease, and was authorized to sign leases, collect rent, maintain the premises, and receive service of process on behalf of the landlord under Minn. R. Civ. P. 4.03. *Id.* at 2. The court held that service was improper under Minn. Stat. § 566.06 (now § 504B.331) and Minn. R. Civ. P. 4.02, which states that the summons must be served by any person not named a party in the action. *Id.* at 4. (Appendix 4.C.2). *See Meldahl and SJM Prop. v.* _____, No. 1050923509, Order on Referee Review at 12-14 (Minn. Dist. Ct. 4th Dist. Feb. 23, 2006) (Appendix 609) (judge reversed referee and ordered dismissal for improper service by maintenance person who was agent for landlord); *MJD Enterprises, Inc. v.* _____, No. HC-1040406523 (Minn. Dist. Ct. 4th Dist. May 18, 2004) (Appendix 612) (eviction dismissed and expunged and costs awarded where property manager served defendant and filed false affidavit stating that another person served defendant; it was irrelevant that manager called herself an "independent contractor" when she handled all matters related to rental); *Alex Properties v.* _____, No. HC 031105500 (Minn. Dist Ct. 4th Dist. Nov. 13, 2003) (Appendix 462) (dismissal for service by plaintiff's managing partner); *Sidal Realty Company, LLP v.* _____, No. HC 030114401 (Minn. Dist Ct. 4th Dist. Jan. 28, 2003) (Appendix 569) (dismissal for service by employee of plaintiff); *Riebe v. Graves*, No. UD-1940321515 (Minn. Dist. Ct. 4th Dist. Apr. 11, 1994) (improper service by person whose duties, responsibilities, rights and powers were identical to named plaintiff) (Appendix 38).

e. Substituted service on non-defendant defenses

(1) Defendant could be found in the county

Berrybill v. Healey, 89 Minn. 444, 446, 95 N.W. 314, (1903). *See Durigan v. Smith*, No. UD-80515 (Henn. Cty. Mun. Ct., July 25, 1977) (Appendix 3) (service improper).

(2) Service on a person who does not reside with the defendant

Murray v. Murray, 159 Minn. 111, 113-14, 198 N.W. 307, 308 (1924); 1 D. MCFARLAND & W. KEPPEL, MINNESOTA CIVIL PRACTICE, § 935 at 464 (1979) (hereinafter "D. MCFARLAND & W. KEPPEL"). When the issue of nonresidence has been raised but not proven by the defendant, the courts have considered when the defendant actually received the summons. *See Murray*, 159 Minn. at 114, 198 N.W. at 308; *Juhl v. Rose*, 366 N.W. 2d 706, 707 (Minn. Ct. App. 1985); *Metropolitan Bank v. Panis*, No. CX-89-681 (Minn. Ct. App. Aug. 22, 1989) (unpublished). The defendant should present convincing evidence of nonresidence, such as testimony or an affidavit of the person's landlord and proof of rent payment. *See Norby v. _____*, No. _____ (Minn. Dist Ct. 4th Dist. May 24, 2001) (Appendix 549) (improper substitute service on non-resident house guest); *Stevens Avenue Limited Partnership v. Hayes*, No. UD-1930203533 (Minn. Dist. Ct. 4th Dist. Feb. 11, 1993) (Appendix 3.A) (dismissal where service was on nonresident); *Sloneker v. Taylor*, No. UD-1940810530 (Minn. Dist. Ct. 4th Dist. Sep. 16, 1994) (dismissal where service was a non-resident) (Appendix 39); *Minneapolis Public Housing Authority v. Kline*, No. UD-1930712506 (Minn. Dist. Ct. 4th Dist. Aug. 5, 1993) (Appendix 3.B) (motion to quash writ granted where service was on child who did not reside on the premises).

In *Capper v. Kragt*, No. C6-98-698 (Minn. Ct. App. Aug. 25, 1998) (Appendix 317) (The Court reversed a trial court denial of the defendant's motion to dismiss for insufficient service, where the summons and complaint were served on a neighbor and relative of the defendant, who agreed to give the papers to the defendant. The Court noted that because the process server failed to substantially comply with the requirements of Minn. R. Civ. P., the fact that the defendant later received the summons and complaint did not render service proper.

The status of a person being a resident is somewhere between something more permanent as in domicile, and something less permanent as in a visitor. *O'Sell v. Peterson*, 595 N.W.2d 870 (Minn. Ct. App. 1999) (service on defendant's 14-year-old stepson who stayed with defendant during regular and planned noncustodial visitation was a resident; discussion of cases in Minnesota and other states). *But see Williams v. McCrimmon*, No. UD-1991207535 (Minn. Dist. Ct. 4th Dist. Dec. 17, 1999) (Appendix 428) (Improper service by delivery to a person of suitable age and discretion, who lives in Iowa and was only a temporary guest of the tenant; service on the tenant was made by the plaintiff; action dismissed).

(3) Service on a person who is not of suitable age and discretion

There is no minimum age for a person receiving service. The person need not understand the legal importance of the papers. *Holmen v. Miller*, 296 Minn. 99, ___, 206 N.W.2d 916, 919 (1973). While there are no reported cases interpreting this part of Minn. Stat. § 504B.331 (formerly § 566.06), courts have upheld service on children in two cases involving a rule and statute with the same language. In *Holmen v. Miller*, 296 Minn. 99, 103-05, 206 N.W.2d 916. 919-20 (1973), the court held that the sheriff's certificate, which stated that the 13 year old who received service of a civil summons was of suitable age and discretion, was *prima facie* evidence of proper service, and defendant did not rebut the presumption where defendant cited no evidence other than the child's age. In *Temple v. Norris*, 53 Minn.

286, 289, 55 N.W. 133, 134 (1893), the court presumed that a 14-year old was of suitable age and discretion to be served with a civil complaint by the sheriff, where it was not shown that she was not ordinarily intelligent nor in full possession of her facilities. *See* D. MCFARLAND & W. KEPPEL, *supra*, § 935.

Both cases involve service by the sheriff, whose certificate is *prima facie* evidence. However, an affidavit of service from someone other than the sheriff is not *prima facie* evidence, and is entitled to no greater weight that the defendant's affidavit. *See Seivert v. O'Brien*, 202 Minn. 314, 316, 278 N.W. 162, _ _ (1938).

The defendant should present convincing evidence of the child's age and discretion, such as the child's general behavior, educational level and performance, ability to follow instruction and to deliver letters and notices (i.e., notes from teachers), and when defendant actually received the papers, if at all. *See Minneapolis Public Housing Authority v. Kline*, No. UD-1930712506 (Minn. Dist. Ct. 4th Dist. Aug. 5, 1993) (Appendix 3.B) (motion to quash writ granted where service was on child who did not reside on the premises); *Joiner v. Harris*, No. UD-1930712506 (Minn. Dist. Ct. 4th Dist. July 23, 1993) (Appendix 3.C) (dismissal for service on 13 year old child who suffered from attention deficit disorder; affidavit of service did not identify the person receiving service).

(4) Service not at the defendant's residence

See Holtberg v. Bommersbach, 236 Minn. 335, 337-38, 52 N.W.2d 766, 768-69 (1952); *Crofton v.* _____, No. HC 030702519 (Minn. Dist Ct. 4th Dist. July 10, 2003) (Appendix 489) (improper service by leaving summons and complaint at tenant's workplace).

f. Improper substitute service by mail and posting

(1) The defendant could be found in the county.

Berryhill v. Healey, 89 Minn. at 446, 95 N.W. at 315.

(2) Personal service was not attempted twice on different days, with at least one attempt between 6:00 p.m. and 10:00 p.m.

Project for Pride in Living, Inc. v. _____, No. HC 010815515 (Minn. Dist Ct. 4th Dist. Aug. 29, 2001) (Appendix 563) (mailing and posting service improper where there was no attempt at personal service between 6:00 and 10:00 p.m.).

(3) The summons was mailed but not posted, or posted but not mailed.

Harris v. _____, No. HC 031006514 (Minn. Dist Ct. 4th Dist. Oct. 14, 2003) (Appendix 512) (dismissal for failure to mail summons); *Hartog v. Ketchum*, No. C4-94-796 (Minn. Dist. Ct. 3rd Dist. July 25, 1994) (dismissal where summons was posted but not mailed) (Appendix 40).

(4) No affidavit filed.

While the affidavit has specific requirements, the court tends to look at actual service rather than the contents of the affidavit. *Juhl v. Rose*, 366 N.W.2d at 707 (service on person residing with defendant). *But see Igherighe v.* _____, No. HC 020208501 (Minn. Dist Ct. 4th Dist. Feb. 20, 2002)

(Appendix 521) (improper mailing and posting service where plaintiff filed no affidavit of posting, and affidavit of not finding defendant was ambiguous of whether service was attempted in the evening; dismissed and expunged).

(5) The plaintiff posted the summons *before* mailing the summons and filing the affidavit of mailing, rather than mailing the summons, filing the affidavit, and then posting the summons.

Ali v. _____, No. HC 040213545 (Minn. Dist Ct. 4th Dist. Feb. 27, 2004) (Appendix 463) (dismissal for posting before filing affidavits); *Plymouth Avenue Townhomes and Apartments v. Hollie*, No. UD-1950912555 (Minn. Dist. Ct. 4th Dist. Sept. 26, 1995) (Appendix 96); *Blackmon v. Johnson*, No. UD-1950516515 (Minn. Dist. Ct. 4th Dist. June 2, 1995) (Appendix 97); *Gasparre v. Acres*, No. UD-2940715809 (Minn. Dist. Ct. 4th Dist. July 28, 1994) (dismissal) (Appendix 41); *Minneapolis Public Housing Authority v. McKinley*, No. UD-98-0305507 (Minn. Dist. Ct. 4th Dist. Mar. 27, 1998) (Appendix 348A) (Posting of summons before mailing of summons did not comply with statute and rule, requiring dismissal).

(6) Time for posting

The summons must be posted for seven days, but not to the exact hour. *Central Internal Medicine Assoc. P.A. v. Chilgren*, No. C2-00-36, 2000 WL 987858 (Minn. Ct. App. July 18, 2000) (unpublished).

g. If the defendant is confined to a state institution, failure to serve the institution's chief executive officer. Minn. R. Civ. P. 4.03(a).

h. Improper affidavit of service

See Joiner v. Harris, No. UD-1930712506 (Minn. Dist. Ct. 4th Dist. July 23, 1993) (Appendix 3.C) (dismissal for service on 13 year old child who suffered from attention deficit disorder; affidavit of service did not identify the person receiving service).

i. Waiver of defense

Often tenants have other defenses in addition to the defense of improper service. If a defendant does not move the District Court for dismissal based on lack of personal jurisdiction before or contemporaneously with a motion for dismissal on other grounds or partial summary judgment, the defendant invokes the jurisdiction of the District Court and waives by implication, the defense of lack of personal jurisdiction. *Patterson v. Wu Family Corporation*, 608 N.W.2d 863 (Minn. 2000).

j. Service before filing action

Service may not occur before filing the action. *Stevens Community Assoc. v.* _____, No. HC 010003507 (Minn. Dist Ct. 4th Dist. Oct. 12, and Dec. 13, 2000) (Appendix 579) (dismissal where affidavit of service claimed service before action was filed; expungement granted later).

k. Service on business

Service on a business must be on a person authorized to accept service. *Tri Star Developers, LLC v. _____*, No. HC 010109514 (Minn. Dist Ct. 4th Dist. Oct. 17, 2001) (Appendix 584) (improper service on employee of business who was not an officer and not authorized to accept service; defendant business was incorrectly named; default judgment vacated and action dismissed and expunged).

3. It is unclear whether defendants can be designated as "John" or "Jane Doe"

The summons must be directed to "stating the full name and date of birth of the person against whom the complaint is made, unless it is not known . . ." Minn. Stat. § 504B.321 (formerly § 566.05). The eviction (unlawful detainer) statutes do not contain authority for commencement of an action against an unknown defendant by use of a fictitious name. *Compare with* Minn. Stat. §§ 558.02 (partition of real estate), 559.02 (adverse claims to real estate).

While Minn. R. Civ. P. 9.08 provides for designating the unknown name of an opposing party with any name, it also contemplates amendment of the pleadings with the true name of the party. *See Peterson v. Sorlien*, 299 N.W.2d 123, 132 (Minn. 1980); *Leaon v. Washington County*, 397 N.W.2d 867, 871-72 (Minn. Ct. App. 1986). Since the eviction (unlawful detainer) action is a summary proceeding, some of the Minnesota Rules of Civil Procedure may not apply. It appears that Rule 9.08 contemplates an action of longer duration, which would allow for identification of the true names of the defendants.

The writ of restitution should not be enforced against unnamed occupants. The writ of restitution is to be executed against the defendant if he or she can be found in the county, or any adult member of the defendant's family, or other person in charge of the premises. The writ directs the defendant to remove himself or herself, the defendant's family, and all of their personal property from the premises. Minn. Stat. § 504B.365 (formerly § 566.17).

The writ cannot be enforced against a person who was not a party to the eviction (unlawful detainer) action nor named in the writ of restitution. *See Kowalenko v. Haines*, No. C6-85-1365 (Minn. Ct. App., July 24, 1985) (attached as Appendix 4). In *Kowalenko*, the petitioner had subleased the apartment from the former tenants. The writ was enforced against the petitioner, pursuant to an unlawful detainer action against former tenants, but not the petitioner. The petitioner was not named in the writ. The court ordered the landlord to return possession of the apartment and petitioners personal property to her, pursuant to Minn. Stat. § 504B.375 (formerly § 566.175).

If the sheriff cannot determine whether the designation of "John" or "Jane Doe" includes the person in the premises, the sheriff should not enforce the writ. *See Casper v. Klippen*, 61 Minn. 353, 356, 63 N.W. 737, 739 (1895). Given the uncertainty of application of Rule 9.08 and the problems in enforcing a "John" or "Jane Doe" writ, the prudent landlord should avoid such designation and discover the names of tenants prior to commencing an eviction (unlawful detainer) action.

The tenant who has not been specifically named in an eviction (unlawful detainer) action faces a dilemma about challenging how the case has been pled. While the tenant may have grounds for re-opening the action and vacating the judgment based on a lack of personal jurisdiction, the landlord may simply refile another action pleading the name of the tenant. If a tenant does not have any other defenses to the action, the tenant simply will have bought more time to move by forcing the landlord to file an eviction (unlawful detainer) action which will become part of the tenant's record with the tenant screening company, making it more difficult to move. In addition, if the case name remains John or Jane Doe, then tenant screening agencies may not be able to connect the case to the tenant. Depending on other defenses available to the tenant, the tenant may be better served by raising the issue with the

landlord and negotiating for more time to move and a positive or neutral tenant reference, thus avoiding a court file which creates an unfavorable tenant screening report.

In *Koop v. _____*, No. 27-CV-HC-09-1163 (Minn. Dist. Ct. 4th Dist. Feb. 17, 2009) (Appendix 606), the eviction was dismissed for improper service, where action listed four named defendants and affidavit of service claimed service on "John Doe."

4. Subtenants

The landlord may bring the action against the tenant and subtenant, jointly. *Judd v. Arnold*, 31 Minn. 430, 433, 18 N.W. 151, 152 (1884). However, if the subtenant is not named as a party in an action against the tenant, the writ cannot be enforced against the subtenant. *Bagley v. Steinberg*, 34 Minn. 470, 471, 26 N.W. 602, ___ (1886); *Kowalenko v. Haines*, No. C6-85-1365 (Minn. Ct. App. July 24, 1985) (Appendix 4).

D. FAILURE TO SATISFY PRECONDITIONS TO RECOVERY OF THE PREMISES

1. The plaintiff is not entitled to possession

The action may be commenced only by the person entitled to the premises, Minn. Stat. § 504B.285 (formerly § 566.03), subd. 1, or the authorized management company or agent for the owner of the premises. Minn. Stat. § 481.02, subd. 3(13). *See Johnson v. Robertson*, No. UD-193072254 (Minn. Dist. Ct. 4th Dist. Aug. 4, 1993) (Appendix 4.B.1) (dismissal where plaintiff's agent appeared without written authorization); *Remas Properties, LLC v. Student*, No. UD-1940705517 (Minn. Dist. Ct. 4th Dist. July 19, 1994) (Appendix 27); *Lewis Properties v Pruitt*, No. UD-1950315516, Decision Order at 2 (Minn. Dist. Ct. 4th Dist. Sept. 22, 1995) (92).

One joint tenant can evict a lessee from co- owned property without the other joint tenant's consent. *Abraham V. Bellefy*, No. A03-585, 2004 WL 193127 (Minn. Ct. App. Feb. 3, 2004) (unpublished).

In *Hedlund v. Potter*, No. C3-91-1542 (Minn. Dist. Ct. 10th Dist.), the action was commenced by an individual. The court found that the individual plaintiff was not a proper party, since he simply was a trustee for an entity that he had formed, and that he provided no evidence stating his relationship to the entity. Order (Nov. 26, 1991) (Appendix 4.C.1). *See FTK Properties, Inc. v. US Benefit Association, LLC*, No. HC 010518508 (Minn. Dist Ct. 4th Dist. June 1, 2001) (Appendix 503) (action dismissed without prejudice where three shareholder corporation landlord of commercial property was represented by a person who was not an attorney and did not have a power of attorney.

The power of authority must be properly executed. *DeCourey v. Peterson*, No. UD-1940614513 (Minn. Dist. Ct. 4th Dist. July 1, 1994) (Appendix 42). A power of authority signed by a person other than the principle must be notarized. *Minneapolis Public Housing Authority v. Redding*, No. UD-1930222507 (Minn. Dist. Ct. 4th Dist. Mar. 5, 1993) (Appendix 4.B.2); Minn. Stat. § 523.01; *Remas Properties, LLC v. Student*, No. UD-1940705517 (Minn. Dist. Ct. 4th Dist. July 19, 1994) (Appendix 27).

A landlord who files bankruptcy listing the premises as part of the bankruptcy estate relinquishes control of the premises to the bankruptcy court, and does not have the right to file an eviction (unlawful detainer) action until the bankruptcy court abandons the property. *See Grandco Management v.*

Wielding, No. UD-1921202525 (Minn. Dist. Ct. 4th Dist. Dec. 16, 1993) (Appendix 4.B.3). If the plaintiff is a corporation, the attorney or advocate for the tenant should determine whether the corporation is in good standing by contacting the Secretary of State at 296-2803. If the corporation is not in good standing, the court should dismiss the action because a corporation not in good standing would not be entitled to possession as a proper party.

Similarly, the owner may not be a proper plaintiff when the property is under the control of a court appointed administrator in a tenant remedies action. *See Sun Trust Mortgage Inc. V.* _____, No. 27-CV-HC-08-5044, Order (Minn. Dist. Ct. 4th Dist. June 25, 2008) (Appendix 622) (eviction filed by owner dismissed and expunged where property was under control of administrator in another action); Minn. Stat. §§ 504B.385, 504B.425, 504B.435, 504B.445, 504B.451, 504B.455, 504B.461.

It seems increasingly common for landlords to defend a retaliation claim by asserting that they have sold or are going to sell the property. In *Mattice v. Judge*, No. UD-1990504519 (Minn. Dist. Ct. 4th Dist. May 19, 1999) (Appendix 399), the plaintiff was a purchaser on a purchase agreement for the property, but there had been no closing on the purchase agreement, the seller had not yet conveyed a deed to the plaintiff, and the purchase agreement did not otherwise entitle the plaintiff to possession of the property prior to closing on the purchase agreement. The court concluded that the plaintiff was not entitled to current possession of the property. *See Filas v.* _____, No. HC 040115532 (Minn. Dist Ct. 4th Dist. Feb. 18, and Mar. 10, 2004) (Appendix 497) (motion to quash writ granted and eviction dismissed where "Plaintiffs were not the real parties in interest when the complaint was filed because they had executed a contract for deed, now cancelled, with another vendee", later expunged).

2. Landlord address disclosure

The landlord cannot maintain an eviction (unlawful detainer) action if the names and addresses of the authorized manager of the premises and the owner or agent authorized to accept service, are not disclosed as required by the statute, and such information is not known by the tenant at least 30 days before the issuance of the summons. Minn. Stat. § 504B.181 (formerly § 504.22); *Sakala v.* _____, No. 27-CV-HC-08-6156 (Minn. Dist. Ct. 4th Dist. Sep. 9, 2008) (Appendix 619) (order reversing referee order for eviction, and dismissing eviction action for landlord's failure to post address until two weeks after filing eviction action); *Haage v. Strong*, No. UD-1911206527 (Minn. Dist. Ct. 4th Dist. Dec. 20, 1991) (Appendix 4.A) (dismissal for landlord's failure to give oral or written notice of his address); *Dube v. Dahill*, Partial Transcript, No. 2941107802 at 6 (Minn. Dist. Ct. 4th Dist. Nov. 17, 1994) (Appendix 137); *Edwards v. Bledsoe*, No. UD-1940712561 (Minn. Dist. Ct. 4th Dist. Aug. 16, 1994) (Appendix 43) (plaintiff failed to prove compliance by preponderance of evidence).

A post office box does not comply with the statute, since it is not an address and not a place where the plaintiff can be personally served. In *Brown v. Austin*, No. UD-1000203527 (Minn. Dist. Ct. 4th Dist. Feb. 16, 2000) (App. 382), the court first ruled that a post office box number is not a sufficient disclosure under § 504B.181. Since there was a dispute in fact over whether an actual street address had been provided, the case was scheduled for trial with disclosure being the first issue to be raised. Tr. at 3. The court then ruled that since the tenant's habitability defense was based on a notice of intent to condemn the property, the court would not require the tenant's to deposit any rent into court. *Id.* 5-8. *See Igherighe v.* _____, No. HC-1011001519 (Minn. Dist Ct. 4th Dist. Oct. 10, 2001 and Feb. 19, 2002) (Appendix 519) (costs awarded and file expunged where action was dismissed where plaintiff landlord of Section 8 Voucher tenant failed to served Section 8 office, plaintiff disclosed only a post office box and not a street address to tenant, plaintiff pled rent due from Section 8 and not the tenant, and plaintiff named a non-tenant as a defendant); *Franklin v. Bryd*, No. HC-000103511 (Minn. Dist. Ct. 4th Dist. Jan.

14, 2000) (Appendix 390) (Dismissal where lease provided only a post office box address for the landlord, in violation of § 504B.181); *Swartwood v. Dampier*, No. UD-1950803520 (Minn. Dist. Ct. 4th Dist. Aug. 23, 1995) (Appendix 172); *Pocklington v. Brown*, No. UD-1950113512 (Minn. Dist. Ct. 4th Dist. Jan. 26, 1995) (Appendix 98); *Mathers v. Davis*, No. UD-1911002512 (Minn. Dist. Ct. 4th Dist. Oct. 11, 1991) (Appendix 4.B); *Anderson v. Whitney*, No. 510527, Transcript at 5-8 (Minn. Dist. Ct. 4th Dist. May 23, 1989) (Appendix 5).

The statute extends to and is enforceable against any successor, owner, caretaker, manager, or individual to whom rental payments for the premises are made. § 504B.181 (formerly § 504.22). *But see O'Connor v. Miller*, UD-194-0211505 (Minn. Dist. Ct. 4th Dist. Mar. 24, 1994) (Appendix 178) (new landlord complied with disclosure statute, even though he filed case 10 days after receiving title through tax forfeiture).

The landlord also must plead compliance with the statute. *See Stein v. _____,* No. HC 000804513 (Minn. Dist Ct. 4th Dist. Aug. 18, 2000) (Appendix 577) (dismissal where landlord failed to plead compliance with address disclosure statute, Minn. Stat. § 504B.181 (formerly § 504.22)); *Henz v. Bronzin*, No. _____ (Minn. Dist. Ct. 6th Dist. June 4, 1991) (Appendix 4.C) (dismissal for plaintiff's failure to plead compliance with Minn. Stat. § 504.22 (now § 504B.181)). The landlord's failure to post a rental license under local ordinance may be additional proof that the landlord has not complied with the disclosure statute as well.

The landlord's use of a commercial mailbox service, while appearing to be a street address, is not a proper address under MINN. STAT. § 504B.181 (formerly § 504.22) because the landlord could not be personally served there. *Towns v. Dailey*, No. UD-01970912521 (Minn. Dist. Ct. 4th Dist. Oct. 13, 1997) (Appendix 300); *Smith v. Reese*, No. UD-1961203542 (Minn. Dist. Ct. 4th Dist. Jan. 3, 1997) (Appendix 293) (Box at private commercial mail collection/distribution center is not an address where plaintiffs could be personally served, in violation of § 504.22 (now § 504B.181)).

Changes in the landlord's name less than 30 days before filing might violate the statute. *Compare Sterling Properties, L.L.C. v. Skjefte*, No. UD-1961113528 (Minn. Dist. Ct. 4th Dist. Nov. 22, 1996) (Appendix 295a) (Dismissal for failure to disclose name 30 days before filing action, where Sterling Properties, Inc. conveyed property to Sterling Properties, L.L.C., and the latter filed the action that same day), *with Carriagehouse Apartments v. Stewart*, No. UD-1970107501 (May 13, 1997) (Appendix 249) (Landlord complied with § 504.22 (now § 504B.181) where rental documents referred to "Gene Glick Management Corp." and a local address, signs at the address contained variations on that name, and the tenant knew the location of the building).

Some local ordinances require a landlord who does not live in the local area to maintain a contact person who resides in the area. Minneapolis Code of Ord. § 244.1840 (within 16-county metropolitan area); (Appendix 11.A); Brooklyn Center Ordinance § 12-904 (within metropolitan counties). (Appendix 244a) Failure to comply with such ordinances may be a violation of § 504B.181 (formerly § 504.22). *Anda Construction v. Peoples*, No. UD-01970321516 (Minn. Dist. Ct. 4th Dist. Apr. 2, 1997) (Appendix 244) (Violation of local contact ordinance violates § 504.22 (now § 504B.181)). *See City of Minneapolis v. Swanson*, No. C5-97-312, 1997 WL 471182 (Minn. Ct. App. Aug. 19, 1997) (Appendix 251) (Unpublished: Ordinance requiring landlord to list residential address rather than post office box on rental license is constitutional).

3. Trade name registration

Persons conducting a business under an assumed trade name must register the name with and disclose the name of the principles to the Secretary of State. An assumed name is a name which does not set forth the true name of every person interested in the business. Minn. Stat. § 333.01. The terms "person" and "true name" are defined broadly. § 333.001, subds. 2, 3.

The required certificate to be filed must state the name of the business, the business address, and the true name of each person conducting or transacting the business, and the addresses of such persons. § 333.01. If any event occurs which makes any statement in the certificate incorrect, the business must file an amended certificate within sixty (60) days. § 333.035.

A person conducting a business violation of §§ 333.001 to 333.06 may not commence or defend against a civil action based upon contracts or transactions of the business before a certificate has been filed. § 333.06. If such an action is filed before the certificate has been filed with the Secretary of State, the opposing party may raise the failure to file the certificate as a defense. All proceedings must be stayed until the certificate is filed. If the opposing party prevails in the action, the opposing party also shall be entitled to tax $250.00 in costs, in addition to other statutory costs. If the opposing party does not prevail in the action, the opposing party shall be entitled to deduct $250.00 from the judgment otherwise recoverable. *Id.*

Tenants' advocates should not ignore the issue just because the name of the plaintiff is a personal name rather than a trade name, since the statute focuses on whether the person acts through an unregistered entity. In *Timberland Partners III. LLP the Henning,* No. UD-2960711201 (Minn. Dist. Ct. 4th. Dist. July 22, 1996) (Appendix 197), the court correctly focused on the entity doing business as opposed to the entity listed in the case caption. The court found that the plaintiff's use of a business name not listed on the complaint and not registered with the Secretary of State violated the statute. The court ordered the case to go ahead only after plaintiff demonstrated compliance with the statute by properly registering the trade name. *See also Grimmer v. Svoboda*, No. UD-1960923520 (Minn. Dist. Ct. 4th Dist. Oct. 29, 1996) (Appendix 188) (settlement: $250 penalty for failing to register trade name of the plaintiff's management company to be paid from rent paid into court).

In *Hedlund v. Potter*, No. C3-91-1542 (Minn. Dist. Ct. 10th Dist.), the action was commenced by an individual. The court initially found that the individual plaintiff was not a proper party, since he simply was a trustee for an entity that he had formed, and that he provided no evidence stating his relationship to the entity. The court then found that the entity was doing business under a third name, that of a mobile home park, but had failed to register this name with the Secretary of State. The court ordered the action stayed until plaintiff complied with the statute, and ordered that defendants were entitled to a setoff in the amount of $250.00 under Minn. Stat. § 333.06. Order (Nov. 26, 1991) (Appendix 4.C.1). After plaintiff registered with the Secretary of State, the court dismissed the action for improper service of the summons and complaint by the landlord's caretaker. Order (Dec. 31, 1991) (Appendix 4.C.2). Defendants then moved for taxation of $250.00 in costs for each Defendant under Minn. Stat. § 333.06. Plaintiff argued that the court could not award costs since § 333.06 requires commencement of a civil action, and since the action really had not been commenced because it was dismissed for improper service. The court rejected plaintiff's argument, finding that the action was not void at its commencement but merely was voidable upon proper motion. The court ordered taxation of

costs of $250.00, but treated the Defendants as one party and did not order multiple awards of costs. Order for Judgment (Feb. 8, 1992) and Judgment (Mar. 3, 1992) (Appendix 4.C.3).[1]

Relief is available even where the plaintiff ultimately prevails. *Rush Riverview Apartments v. _____,* No. C3-01-0996 (Minn. Dist. Ct. 10th Dist. Aug. 7, 2001) (Appendix 567) (Judge Clifford) (violent conduct and noise constituted material non-compliance in HUD subsidized project; writ stayed for 7 days and until plaintiff complies with the trade name registration statute and pays defendant $250 in costs).

4. Foreign corporation

A foreign corporation which transacts business in Minnesota must hold a certificate of authority from the Secretary of State. Minn. Stat. § 303.03. A foreign corporation may not sue in Minnesota courts without obtaining the certificate. Minn. Stat. § 303.20. *See Uptown Classic Properties JV1, LLC v. _____*, No. HC 1030123529 (Minn. Dist Ct. 4th Dist. Apr. 9, 2003) (Appendix 588) (dismissal and expungement where foreign limited liability company had no state certificate of authority under Minn.

---

[1]*See 2407 Partners v. Kirk*, No. HC-1990409512 (Minn. Dist. Ct. 4th Dist. Sep. 30, Dec. 8, 1999) (Appendix 402) (Settlement for rent abatement, landlord payment of $500 in costs for failure to register two business names with the Secretary of State, favorable reference, dismissal, and expungement; file expunged); *Barnes Properties v. Sims*, No. 8C-01991105512 (Minn. Dist. Ct. 4th Dist. Nov. 16, 1999) (Appendix 377). Plaintiff moved for dismissal; defendant credited $250 off rent); *Solar IV Partnership v. Sederstrom*, No. UD-1980812534 (Minn. Dist. Ct. 4th Dist. Sep. 3, 1998) (Appendix 364) ($250.00 in costs awarded where plaintiff registered its trade name, but operated under another trade name which was not registered); *Central Manor Apartments v. Beckman*, Nos. UD-1980609509, UD-1980513525 (Minn. Dist. Ct. 4th Dist. Aug. 6, 1998) (Appendix 319C) (Tenant awarded a setoff of $500 where landlord commenced two successive unlawful detainer actions without registering its trade name); *Central Manor Apartments v. Beckman*, Nos. UD-1980609509, UD-1980513525 (Minn. Dist. Ct. 4th Dist. July 29, 1998) (Appendix 319B); *Sterling Properties v. Skjefte*, No. UD-2961015201 (Minn. Dist. Ct. 4th Dist. Oct. 28, 1996) (Appendix 295) (Landlord failed to register trade names: hearing stayed until landlord registers assumed names, $250 in costs taxed against plaintiff); *Timberland Partners III, L.L.P. v. Henning*, No. UD-2960711201 (Minn. Dist. Ct. 4th Dist. July 22, 1996) (Appendix 197) (Landlord failed to register trade names: hearing stayed until landlord registers assumed names, $250 in costs taxed against plaintiff); *B&J Property Management v. Gates*, No. UD-01970602519 (Minn. Dist. Ct. 4th Dist. June 12, 1997) (Appendix 247) (Dismissal for improper service, failure to register trade name, and failure to attach notice to quit and lease to complaint).

Earlier decisions include *Lewis Properties v. Pruitt,* No. UD-1950315516 (Minn. Dist. Ct. 4th Dist. Sept. 22, 1995) (Appendix 92); *Lewis Properties v. Pruitt*, No. UD-1950315516 (Minn. Dist. Ct. 4th Dist. May 11, 1995) (Appendix 99); *Gramith V. Thibodeau*, No. UD-1941223506 (Minn. Dist. Ct. 4th Dist. Jan. 13, 1995). *See Elliot Court v. Robinson*, No. UD-1930514543 (Minn. Dist. Ct. 4th Dist. June 18, 1993) (Appendix 4.C.5); *DVN Properties v. Gammage*, No. UD-1930525546 (Minn. Dist. Ct. 4th Dist. June 23, 1993) (Appendix 4.C.6); *Nouvelle Apartments v. Moore*, No. UD-1930302522 (Minn. Dist. Ct. 4th Dist. Mar. 26, 1993) (Appendix 4.C.7) (writ granted where notice signed by both parties was valid notice to quit on which plaintiff relied and refused to rescind; plaintiff ordered to pay defendant $250.00 for failing to register trade name with Secretary of State). *See also Northbrook Terrace v. Timmons*, No. UD-920917517 (Minn. Dist. Ct. 4th Dist. Sep. 30, 1992) (hearing continued for plaintiff to file trade name registration with the Secretary of State) (Appendix 4.C.4). *But see BRI Associates v. Gangle,* No. C4-95-845 (Minn. Dist. Ct. 10th Dist. Apr. 24, 1995) (Appendix 88) (plaintiff allowed to amend case caption to defeat trade name registration claim).

Stat. § 322B.94); *Uptown Classic Properties JV1, LLC v. _____*, No. HC 1030123527 (Minn. Dist Ct. 4th Dist. Apr. 9, 2003) (Appendix 587); *Cohn-Hall-Marx Co. v. Feinberg*, 214 Minn. 584, 588, 8 N.W.2d 825, 826-27 (1943); *E.C. Bogt, Inc. v. Ganley Bros. Co.*, 185 Minn. 442, 443-44, 242 N.W. 338, 338-39, (1932).

5. Tenant in possession for at least three years

An eviction (unlawful detainer) action is unavailable where the tenant has "been in quiet possession [of the premises] for three years next before the filing of the complaint, after determination of the leasehold estate . . ." Minn. Stat. § 504B.311 (formerly § 566.04).

The meaning of the statute is unclear. In *Berg v. Wiley*, the Minnesota Supreme Court noted in *dictum* that the statute reflects the policy choice of the legislature that tenants in possession for at least three years can be evicted only in an ejectment action. 264 N.W.2d 145, 151 n.8 (Minn. 1978) (*Berg II*). In *Priordale Mall Investors v. Farrington*, 390 N.W.2d 412 (Minn. Ct. App. 1986) (*Priordale Mall*), the Court of Appeals held that the *Berg II* Court did not intend to change its earlier holding that the statute only prohibited eviction (unlawful detainer) actions commenced more than three years after expiration of the lease. *Id.* at 414, citing *Alworth v. Gordon*, 81 Minn. 445, 453, 84 N.W. 454, 457 (1900), *Suchaneck v. Smith*, 45 Minn. 26, 27, 47 N.W. 397, 397 (1890). Chief Judge Popovich dissented in *Priordale Mall I*, arguing that *Berg II*, as the latest pronouncement of the Supreme Court on the issue, must be followed. 390 N.W.2d at 415.

6. Failure to state the facts that authorize recovery of the premises

In an eviction (unlawful detainer) action, the plaintiff must plead in the complaint "the facts which authorize the recovery of possession." Minn. Stat. § 504B.321 (formerly § 566.05) (emphasis added). *See Mac-Du Properties v. LaBresh*, 392 N.W.2d 315, 317, 318 (Minn. Ct. App. 1986). *See also* Minn. R. Gen. P. 604. The complaint must set forth a legally sufficient claim for relief. *Mankato & Blue Earth County Housing & Redevelopment Authority v. Critzer*, No. C2-92-1712, 1995 WL 130608 (Minn. Ct. App. Mar. 28, 1995), FINANCE AND COMMERCE 48 (Mar. 31, 1995) (Appendix 101).

The statute appears to require more than mere notice pleading used in other civil actions. *See* Minn. R. Civ. P. 8.01. This is consistent with the summary nature of eviction (unlawful detainer) actions, where the defendant has little time to prepare a defense and possibly no opportunity for discovery. Pleading "the facts which authorize recovery" of the premises should require more than mere conclusory statements. For example, rather than state that the tenant breached the lease, the complaint should specifically allege the facts which lead to the conclusion of breach of the lease. *Mollins v. Persaud*, No. UD-1940712552 (Minn. Dist. Ct. 4th Dist. July 22, 1994) (Appendix 73) (complaint must include lease and be more specific as to grounds for eviction, where defendant claimed the complaint failed to state dates and times of alleged violations, specific lease provisions violated, names of persons allegedly living on the property, names of neighbors stating complaints, and the precise nature of those complaints).

The court may strike or dismiss the inadequately pled claims, and allow adequately pled claims to proceed. *Mei Jen Chen v. _____*, No. HC 040106505 (Minn. Dist Ct. 4th Dist. Jan. 13, 2004) (Appendix 538A) (rent claim stricken as vague, notice claim and retaliation defense scheduled for trial).

a. Pleading compliance with statutory preconditions for the action

Where a statute or regulation sets out preconditions for commencement of an action, facts establishing compliance must be pleaded. *Biron v. Board of Water Commissioners*, 41 Minn. 319, 320 43 N.W. 482, 482 (1889). Such statutes include the following subjects:

(1) Who may commence the action.

Minn. Stat. §§ 481.02, subd. 3(13), 504B.285 (formerly § 566.03); Minn. R. Gen. P. 604. *See* discussion, *supra*, at VI.D.1.

(2) Description of the premises.

MINN. STAT. § 504B.321 (formerly § 566.05); Minn. R. Gen. P. 604.

(3) Compliance with the disclosure statute.

MINN. STAT. § 504.22 (now § 504B.181). *See* discussion, *supra* at VI.D.2. Rule 604 requires that the complaint contain "a statement of how plaintiff has complied with Minnesota Statues 504.22 (now § 504B.181) by written notice to the defendant, by posting or by actual knowledge of the defendant." A simple statement that the landlord complied with § 504B.181 (formerly § 504.22) may not comply with Rule 704, since it requires a statement of *how* the landlord has complied with § 504B.181 (formerly § 504.22). *See Stein v. _____,* No. HC 000804513 (Minn. Dist Ct. 4th Dist. Aug. 18, 2000) (Appendix 577) (dismissal where landlord failed to plead compliance with address disclosure statute, Minn. Stat. § 504B.181 (formerly § 504.22)); *Henze v. Bronzin*, No. __ (Minn. Dist. Ct. 6th Dist. June 4, 1991) (Appendix 4.C) (dismissal for failure to plead compliance with § 504.22 (now § 504B.181)); *Charboneau v. Johnson,*, No. UD-1950817510 (Minn. Dist. Ct. 4th Dist. Aug. 30, 1995) (Appendix 81).

(4) Compliance with the trade name statute.

MINN. STAT. §§ 333.01-333.06. *See* discussion, *supra* at VI.D.3.

(5) Compliance with the foreign corporations registration statutes.

MINN. STAT. §§ 303.03-303.20. *See* discussion, *supra* at VI.D.4.

(6) Compliance with the statutory and regulatory requirements of the public and government subsidized housing programs.

See discussion, *infra* at VI.E.12, VI.F.10., VI.G.10; *Okotete v. Courtney* UD-1931222507 (Minn. Dist. Ct. 4th Dist. Jan. 7, 1994) (Appendix 103) (failure to plead subsidized tenancy, subsidized eviction requirements and whether plaintiff complied with them, and only generic allegations of breach without any details, names or dates); *Parkview Assoc. v. Woodard*, No. UD-1940912558 (Minn. Dist. Ct. 4th Dist. Sep. 23, 1994) (Appendix 44) (dismissal of complaint that failed to state premises were federally subsidized housing, federal eviction requirements, and whether plaintiff complied with requirements); *Reitman v. Smith*, No. UD-1940720534 (Minn. Dist. Ct. 4th Dist. Aug. 2, 1994) (Appendix 45) (dismissal of complaint that failed to state applicability of Section 8 federal laws and rules, and did not include the Section 8 lease); *Fragale v. Sims*, No. UD-1930802515 (Minn. Dist. Ct. 4th Dist. Aug. 11, 1993) (Appendix 4.D.1) (dismissal for failure to give notice and failure to plead §8 tenancy, eviction requirements and whether plaintiff complied with requirements); *Loring Towers Apartments Limited*

Partnership v. Redcloud, No. UD-1921210529 (Minn. Dist. Ct. 4th Dist. Jan 20, 1993) (Appendix 11.I.5) (complaint failed to state notice requirement, that notice was given, and that defendant was allowed informal conference); *Krieg v. Clark*, No. UD-4920204900 (Minn. Dist. Ct. 4th Dist. Mar. 4, 1992) (Appendix 4.D); *Riverside Plaza Limited Partnership v. Lee*, No. UD-1901009585 (Minn. Dist. Ct. 4th Dist. Oct. 18, 1990) (Appendix 5.A). *See generally RFT & Assocs. v. Smith*, 419 N.W.2d 109, 111 (Minn. Ct. App. 1988); *Housing and Redev. Auth. of Waconia v. Chandler*, 403 N.W.2d 708, 711 (Minn. Ct. App. 1987); *Hoglund-Hall v. Kleinschmidt*, 381 N.W.2d 889, 895 (Minn. Ct. App. 1986).

(7) Compliance with the manufactured (mobile) home park lot rental statutes.

MINN. STAT. Ch. 327C. *See* discussion, *infra* at VI.E.11, VI.F.7, VI.G.11.

(8) Compliance with the statutory requirement that a tenant holding over after sale of the property, foreclosure of a mortgage in expiration of the time for redemption, or termination of a contract to convey the property, has received at least one month's written notice of the termination of tenancy as a result of the sale, foreclosure, or termination.

MINN. STAT. § 504B.285 (formerly § 566.03), subd. 1. *See* discussion, *infra* at VI.F.11-12.

(9) Allegations of unlawful activity.

MINN. STAT. § 504B.171 (formerly § 504.181). *Brogdon Properies, LLC v. _____,* No. 1030826501 (Minn. Dist. Ct. 4th Dist. Sep. 4, 2003) (Appendix 479) (dismissed for lack of specific allegations of illegal activity); *Ford v. _____,* No. HC-1020325505 (Minn. Dist. Ct. 4th Dist. Apr. 26, 2002) (Appendix 500) (Section 8 voucher, plaintiff failed to allege drug use with any particularity; action dismissed and defendant awarded costs and disbursements); *Johnson v. _____*, No. HC 1001005514 (Minn. Dist Ct. 4th Dist. Oct. 18, 2000) (Appendix 526) (directed verdict entered on drug claim where witness testified no drugs were found in raid, and testimony on earlier controlled purchase of drugs was not pled; nonpayment of rent was by Section 8 and not tenant, so tenant not required to pay filing fee to redeem); *MPHA v. _____*, No. UD-1970123530 (Minn. Dist. Ct. 4th Dist. Feb. 19, 1997) (Appendix 273) (Dismissal where complaint failed to state with sufficient specificity facts supporting drug paraphernalia claim).

b. Rent claims

Barzallo v. _____, No. 27-CV-HC-08-4535 (Minn. Dist. Ct. 4th Dist. June 23, 2008) (Appendix 598) (eviction dismissed where landlord pled nonpayment of rent without stating an amount due, and the tenant bringing people to the property); *Mei Jen Chen v. _____*, No. HC 040106505 (Minn. Dist Ct. 4th Dist. Jan. 13, 2004) (Appendix 538A) (rent claim stricken as vague, notice claim and retaliation defense scheduled for trial); *Igherighe v. _____,* No. HC-1011001519 (Minn. Dist Ct. 4th Dist. Oct. 10, 2001 and Feb. 19, 2002) (Appendix 519) (plaintiff pled rent due from Section 8 and not the tenant, and plaintiff named a non-tenant as a defendant).

c. Breach claims

Berg v. _____, No. 27-CV-HC-08-3505 (Minn. Dist. Ct. 4th Dist. May 19, 2008) (Appendix 599) (eviction dismissed where landlord failed to comply with order to provide tenant with detailed factual basis for eviction action); *Hurt v. Johnston*, No. HC-000103513 (Minn. Dist. Ct. 4th Dist. Jan. 14, 2000)

(Appendix 398) (Landlord's motion to amend complaint denied and action dismissed where landlord failed to attach the lease to the complaint to support a claim of breach of lease, and the landlord's claims of breach by unsanitary conditions in that tenant knew information about the landlord required by statute to be disclosed to the tenant were not pled with sufficient specificity); *Walters v.* _____, No. HC 010706519 (Minn. Dist Ct. 4th Dist. July 25, 2001) (Appendix 592) (dismissal of breach claim for lack of specificity); *Westfalls Housing Ltd. Partnership v. Scheer*, No. C8-93-227 (Minn. Dist. Ct. 5th Dist. Nov. 30, 1993) (Appendix 26) (dismissal for alleging only that defendant had broken terms of lease, and termination of lease due to infraction notices).[2]

c. Litigating claims not raised in the complaint

The plaintiff may not litigate claims and facts not raised in the complaint. *Mac-Du Properties v. LaBresh*, 392 N.W.2d 315, 318 (Minn. Ct. App. 1986) (plaintiff only could be entitled to restitution of the property based on claims in the complaint, and not other grounds: the trial court "lacked jurisdiction to order restitution for reasons which had nothing to do with respondents' unlawful detainer complaint").

---

[2]Other decisions include *Jafer Enterprises, Inc. v. Peters*, No. UD-1920701512 (Minn. Dist. Ct. 4th Dist. July 2, 1992) (where complaint alleged written lease but did not have right of reentry clause and plaintiff later alleged an oral lease which reserved a right of reentry, the complaint fails to state the facts authorizing recovery of the premises) (Appendix 4.F); *Krieg v. Clark*, No. UD-4920204900 (Minn. Dist. Ct. 4th Dist. Mar. 4, 1992) (Appendix 4.D) (dismissal for alleging only disturbances and participation in use of illegal drugs in subsidized housing, noting that "the pleading requirement is particular important in public housing, subsidized housing, and other cases based on breach of lease,) citing RESIDENTIAL UNLAWFUL DETAINER SEMINAR FOR JUDGES OF THE FOURTH JUDICIAL DISTRICT at 12 (Jan. 1988); *Henze v. Bronzin*, No. _____ (Minn. Dist. Ct. 6th Dist. June 4, 1991) (Appendix 4.C) (dismissal for failure to plead compliance with MINN. STAT. § 504.22 (now § 504B.181)); *VIP Properties v. Turner*, No. UD-1910318501 (Minn. Dist. Ct. 4th Dist. Mar. 28, 1991) (Appendix 4.E) (dismissal for alleging only disturbances and violations of rules); *Nationwide Mgmt. Whispering Pines Apartments v. Vittorio*, No. C3-95-832 (Minn. Dist. Ct. 6th Dist. Oct. 30, 1995) (Appendix 102) (complaint alleged only violation of the lease); *Okotete v. Courtney*, No. UD-1931224507 (Minn. Dist. Ct. 4th Dist. Jan. 7, 1994) (Appendix 103) (failure to plead subsidized tenancy, subsidized eviction requirements and whether plaintiff complied with requirements, and pled only generic allegations of breach without details, names or dates); *Dubina v. Olson*, No. C5-95-600980 (Minn. Dist. Ct. 6th Dist. June 20, 1995) (Appendix 104) (defective complaint).

In *Riverside Plaza Limited Partnership v. Lee*, No. UD-1901009585 (Minn. Dist. Ct. 4th Dist. Oct. 18, 1990) (Appendix 5.A), the landlord and tenant participated in the Section 8 Housing Assistance Program for the Disposition of HUD-Owned Projects. The federal regulations, program handbook, and the lease all provided that the tenancy continued indefinitely until the landlord properly terminated the lease for material noncompliance with the lease, material failure to carry out obligations under any state landlord and tenant law, or other good cause. The complaint only alleged that the tenant had failed to move after notice, and that the tenant had broken the terms of the rental agreement with the landlord by "material noncompliance." The landlord did not attach the notice to the complaint, incorporate the notice in the complaint by reference, state in the complaint the allegations stated in the notice, or allege in the complaint what conduct by the tenant constituted material noncompliance. *Id*. at 1-2. The court concluded that plaintiff had not plead any facts which authorized discovery, and dismissed the action. *See also Whittier Cooperative Inc. v. Rosewag*, No. UD-1910306501 (Minn. Dist. Ct. 4th Dist. Mar. 19, 1991) (Appendix 5.B); *Franklin v. McDonald*, No. UD-1900312613 (Minn. Dist. Ct. 4th Dist. Mar. 22, 1990) (Appendix 5.C). *Contra Flikeid v. Darrough*, No. UD-1940328501 (Minn. Dist. Ct. 4th Dist. May 3, 1994) (Appendix 59).

7. Unauthorized practice of law

See discussion, *supra* at V.J.

a. Management agents for plaintiff

In *Hedlund v. Potter*, No. C3-91-1542 (Minn. Dist. Ct. 10th Dist.), the action was commenced by an individual. The court found that the individual plaintiff was not a proper party, since he simply was a trustee for an entity that he had formed, and that he provided no evidence stating his relationship to the entity. Order (Nov. 26, 1991) (Appendix 4.C.1). *See Meldahl and SJM Prop. v.* _____, No. 1050923509, Order on Referee Review at 18-19 (Minn. Dist. Ct. 4th Dist. Feb. 23, 2006) (Appendix 609) (judge reversed referee and ordered dismissal where agent was not authorized by principal); *Erickson v. Kane*, C4-92-600535 (Minn. Dist. Ct. 6th Dist. Apr. 7, 1992) (person who appeared with plaintiff who was not an authorized management agent of the owner of rental property was prohibited from commencing, maintaining, conducting or defending on behalf of plaintiffs an unlawful detainer action under Minn. Stat. § 481.02) (Appendix 4.H). *See* Standing Order Regarding Court Appearances by Non-Attorney, Non-Managing Agents (Minn. Dist. Ct. 2nd Dist. June 9, 1995) (Appendix 84).

b. Corporations

In *Nicollet Restoration, Inc. v. Turnham*, 486 N.W.2d 753 (Minn. 1992), the Court held that a corporation must be represented by a licensed attorney when appearing in district court. It is important to closely review this decision, because the Court went into great detail discussing the history of the rule, its policy basis, and whether the Legislature had limited the effect of the rule.

This was not a new issue for the Court. The Court reviewed the history of the principle, both in Minnesota around the country, requiring that a corporation must be represented by a licensed attorney when appearing in court, regardless of whether the person seeking to represent the corporation is a director, officer or shareholder.

> Minnesota follows the common law rule that a corporation may appear only by attorney. We first touched upon this rule in *Banks v. Pennsylvania Ry. Co.*, 111 Minn. 48, 126 N.W. 410 (1910). In finding jurisdiction over a foreign corporation which appeared generally and entered an answer on the merits, we stated:
>
> > It may be conceded, as claimed, that the courts of this state have no jurisdiction over a foreign corporation, except as it is brought within the purview of our statutes; but it is equally true that such a corporation may voluntarily appear *by attorney* and submit its person to the jurisdiction of the courts of the state, precisely as it may *by attorney* come into such courts for the purpose of enforcing its claims.
>
> *Banks,* 111 Minn. at 54, 126 N.W. at 411 (emphasis supplied). Sixteen years later, we directly addressed the common law rule in *Cary & Co. v. F.E. Satterlee & Co.,* 166 Minn. 507, 208 N.W. 408 (1926). We held:
>
> > The ruling refusing to permit Mr. Francis C. Cary to appear as attorney for plaintiff was correct. Mr. Cary is no longer an attorney at law, and the right of a party to a suit in court to appear in person therein does not entitle him to appear for a corporation, even if he owns all its capital stock for the corporation is a distinct legal entity.

Cary, 166 Minn. at 509, 208 N.W. at 409.

Nicollet Restoration, Inc., 486 N.W.2d at 754. The Court went into detail discussing the policy considerations for the rule.

> In order to understand the importance of this prohibition, it is necessary to examine its underlying rationale. A non-attorney agent of a corporation is not subject to the ethical standards of the bar and is not subject to court supervision or discipline. The agent knows but one master, the corporation, and owes no duty to the courts. In addition, a corporation is an artificial entity which can only act through agents. To permit a lay individual to appear on behalf of a corporation would be to permit that individual to practice law without a license. The purpose behind attorney licensing requirements is the protection of the public and the courts from the consequences of ignorance or venality. *Strong Delivery Ministry,* 543 F.2d at 33 (citation omitted). The Seventh Circuit Court of Appeals explained:
>
> > The rule in these respects is neither arbitrary nor unreasonable. It arises out of the necessity, in the proper administration of justice, of having legal proceedings carried on according to the rules of law and the practice of courts and by those charged with the responsibility of legal knowledge and professional duty.
> >
> > ....
> >
> > Were it possible for corporations to prosecute or defend actions in person, through their own officers, men unfit by character and training, men, whose credo is that the end justifies the means, disbarred lawyers or lawyers of other jurisdictions would soon create opportunities for themselves as officers of certain classes of corporations and then freely appear in our courts as a matter of pure business not subject to the ethics of our profession or the supervision of our bar associations and the discipline of our courts.
>
> *Id.* at 33-34 (citations omitted). Thus, there are strong public policy considerations on which the prohibition is based. [Any] departure [from the general policy that corporate representation must be by lawyers] should always be cautiously controlled to avoid the dangers inherent in representation by those without legal training or professional discipline and standards. *Employers Control Serv. Corp. v. Workers Compensation Bd.,* 35 N.Y.2d 492, 364 N.Y.S.2d 149, 323 N.E.2d 689, 692 (1974).

Nicollet Restoration, Inc., 486 N.W.2d at 754-75.

The Court then addressed the argument that Minn. Stat. § 481.02, subd. 2 (1990) authorizes a corporation to appear by or through a non-attorney agent.

> Minn. Stat. § 481.02, subd. 2 provides, in pertinent part, that: "No corporation, organized for pecuniary profit, except an attorney's professional corporation ... by or through its officers or employees or any one else, shall maintain, conduct, or defend, except in its own behalf when a party litigant, any action or proceeding in any court in this state ...."
>
> We reject this argument for two reasons. First, a careful reading of Minn. Stat. § 481.02, subd. 2, indicates that the legislature intended to grant the power to corporations to appear in court by or

through its officers, employees or other agents when they are a party litigant to an action. Contrary to petitioner's interpretation, this does not mean that the officer, employee or agent appearing on behalf of a corporation may be a non-attorney. Under the common law, a corporation still must be represented by a licensed attorney when appearing in district court whether or not the attorney is an officer, employee or other agent. If district courts are to handle their increasingly crowded and complex dockets efficiently and justly, it is important that clients' causes be presented by persons trained and licensed to do so.

Even assuming that Minn. Stat. § 481.02, subd. 2, could be construed to permit a corporation to appear by or through a non-attorney agent, such a construction would raise serious constitutional problems. Since corporations are distinct legal entities, any individual attempting to appear on behalf of the corporation would, in effect, be practicing law. Based on the legislature's power to enact criminal statutes, it is clear that the legislature has the authority to determine who may or may not be prosecuted for the unauthorized practice of law. This, however, does not mean that the legislature may decide who may properly practice law before the courts of this state. Under Article 3, Section 1 of the Minnesota Constitution, this power is vested solely in the judiciary. *Minneapolis Star & Tribune Co. v. Housing & Redevelopment Auth.,* 310 Minn. 313, 318, 251 N.W.2d 620, 623 (1976). Art. 3, § 1 provides:

> Division of Powers. The powers of government shall be divided into three distinct departments: legislative, executive and judicial. No person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others except in the instances expressly provided in this constitution.

In *Sharood v. Hatfield,* 296 Minn. 416, 425, 210 N.W.2d 275, 280 (1973), we held that, [T]he power to make the necessary rules and regulations governing the bar was intended to be vested exclusively in the supreme court, free from the dangers of encroachment either by the legislative or executive branches. *Id.* at 425, 210 N.W.2d at 280 (citation omitted). We explained:

> Under our form of government, where the judicial constitutes an independent branch, the character of those who stand in this relation to the court should be of the court's choosing and under the supervision of the court, and other branches of the government should not be permitted to embarrass or frustrate judicial functions by the intrusion of incompetent or improper officers upon the courts. *Courts will defer to reasonable legislative regulation, but this deference is one of comity or courtesy rather than an acknowledgement of power.* This view is without doubt supported by the great weight of authority.

Sharood, 296 Minn. at 426, 210 N.W.2d at 281 (citation omitted) (emphasis supplied). Therefore, legislative enactments which purport to authorize certain classes to practice law in the courts of this state are not controlling upon the judiciary. As such, we reaffirm our conviction that a corporation must be represented by a licensed attorney when appearing in district court.

Nicollet Restoration, Inc., 486 N.W.2d at 755-76.

The only issue which was new to the Court in *Nicollet Restoration, Inc.* was that the action as issue first originated in conciliation court. The Court held that where the action originated was irrelevant. *Id.* In doing so, the Court affirmed both the decision of the trial court judge and the Court of Appeals. 486 N.W.2d at 753, *affirming* 475 N.W.2d 508 (Minn. Ct. App. 1991).

In *World Championship Fighting v. Janos*, 609 N.W.2d. 263 (Minn. Ct. App. 2000), the Court of Appeals affirmed a district court dismissal of removal to district court from conciliation court by a corporation not represented by counsel. Citing *Nicollet Restoration Inc.*, the Court stated that "we perceive no reason why a corporation unrepresented by counsel should be able to commence a district court action by removing a case from conciliation court when it is not allowed to do so by filing a complaint." 609 N.W.2d. at 265. In response to the claim that state statute provided otherwise, the Court quoted *Nicollet*: "[L]egislative enactments which purport to authorize certain classes to practice law in the courts of this state are not controlling upon the judiciary. As such, we reaffirm our conviction that a corporation must be represented by a licensed attorney when appearing in district court." *Id.*, citing 486 N.W.2d at 756. The Court concluded that the filing of the notice of removal was an appearance under Minn. R. Civ. P. 5.01, and could not be done without counsel. *Id.* at 265.

In *Towers v. Schwan*, No. A07-1311, 2008 WL 4224462 (Minn. Ct. App. Sept. 16, 2008) (unpublished), the Court of Appeals held that the district court erred in allowing a corporation to proceed in an eviction action without the representation of legal counsel, quoting extensively from both *Nicollet Restoration, Inc.* and *World Championship Fighting. Id.* at *2. The Court noted that while the litigants did not brief the impact of Minn. Stat. § 481.02, subd. 3(12) (2006), which provides that any authorized management agent of an owner of rental property used for residential purposes, whether the management agent is a natural person, corporation, partnership, limited partnership, or any other business entity, is not authorized to appear before a district court or the court of appeals or supreme court pursuant to an appeal if the agent it not a licensed attorney. Still, the Court stated that "the language of this statute comports with *Nicollet Restoration,* but we recognize that there could be alternative readings of this statute." *Id.* The Court also noted that it expressed "no opinion at this time as to whether Minn. R. Gen. Pract. 603 is inconsistent with Minn. Stat. § 481.02, subd. 3. *See* Minn. R. Gen. Pract. 601 (stating that the rules pertaining to housing court shall apply to housing court practice except where they are in conflict with applicable statutes). *Id.*

The *Towers* decision appears to be the impetus for the request of the Minnesota Multi-Housing Association that the Supreme Court Advisory Committee on the Rules of General Practice adopt a rule allowing corporations to appear in district court eviction actions without representation by a licensed attorney. On April 23, 2009, the Committee considered a proposal and decided to take no action on the proposal. Several members commented that it was not the role of the Committee to propose a rule different than the rulings of the appellate courts. The Commitee concluded

> It was noted that the committee has taken up the issue of corporate representation in district court before, and it keeps popping up, but the Minnesota Supreme Court has decided it as a matter of law as discussed in *Nicollet Restoration, Inc. v. Turnham*, 475 N.W.2d 508 (Minn. Ct. App. 1991), *aff'd* 486 N.W.2d 753 (Minn. 1992). The proposal in essence asks the committee to overrule caselaw, and it is generally not the role of the committee to attempt to overrule caselaw. An appeal would be an appropriate means to raise this issue, *e.g.* , as an amicus.

Supreme Court Advisory Committee on the Rules of General Practice, Meeting Summary, at 9-10 (Apr. 23, 2009).

The lower courts have not consistently applied *Nicollet Restoration, Inc.* In *Meldahl and SJM Prop. v.* _____, No. 1050923509, Order on Referee Review at 15-18 (Minn. Dist. Ct. 4th Dist. Feb. 23, 2006) (Appendix 609), the judge reversed referee and ordered dismissal where corporation represented by president. *See FTK Properties, Inc. v. US Benefit Association, LLC*, No. HC 010518508 (Minn. Dist Ct. 4th Dist. June 1, 2001) (Appendix 503), the court dismissed the eviction without prejudice where three

shareholder corporation landlord of commercial property was represented by a person who was not an attorney and did not have a power of attorney). *See Hedlund v. Otten*, No. CX-93-08 (Minn. Dist. Ct. 10th Dist. Mar. 2, 1993) (Appendix 4.F.1) (dismissed where trust was similar to corporation); *Welsh v. Clark*, No. UD-1921120502 (Minn. Dist. Ct. 4th Dist. Dec. 3, 1993) (Appendix 4.F.2) (dismissed). *See Jafer Enterprises, Inc. v. Peters*, No. UD-1920701512 (Minn. Dist. Ct. 4th Dist. July 21, 1992) (action continued) (Appendix 4.F); *Cities Management, Inc. v. Thompson*, No. UD-1920720517 (Minn. Dist. Ct. 4th Dist. Aug. 4, 1992) (action continued) (Appendix 4.G). Corporations which are not in good standing may be susceptible to challenge as a proper party. *See* discussion, *supra* at VI.D.3.

On the other hand, a referee did not apply the decision in *Nicollet Restoration, Inc.* to landlord corporations in *Rio Hot Properties, Inc. v. Judge*, No. UD-1981005518 (Minn. Dist. Ct. 4th Dist. Oct. 19, 1998) (Appendix 362A) (Denial of tenant's motion to dismiss, on the grounds that plaintiff was a sole shareholder corporation, *Nicollet* did not deal with residential property, *Nicollet* involved an appeal from conciliation court and was not an unlawful detainer action, and Minn. Stat. §481.02 allows non-attorneys to maintain unlawful detainer actions). Counsel should argue that none of these factors counteract the strong language in *Nicollet* which prohibit non-attorney representation of corporations.

Some courts have issued standing orders on corporations acting without attorneys. Memorandum of Chief Judge Lawrence Cohen (Minn. Dist Ct. 2nd Dist. Mar. 30, 2001) (Appendix 538) (citing *Nicollet Restoration, Inc. v. Turnham,* 486 N.W.2d 753 (Minn. 1992), "a licenced attorney must represent any corporation appearing in the Housing Court of the Second Judicial District"); *In re Morning Sun Investments, Inc.*, Standing Order (Minn. Dist Ct. 4th Dist. Mar. 21, 2001) (Appendix 523) (corporation "must be represented by a licensed attorney when appearing in District Court," citing *Nicollet Restoration, Inc.*).

c. Limited Partnerships and Limited Liability Companies

Citing *Nicollet Restoration*, courts have held that limited partnerships and limited liability companies must be represented by an attorney. *Westfalls Housing Ltd. Partnership v. Scheer*, No. C8-93-227 (Minn. Dist. Ct. 5th Dist. Nov. 30, 1993) (Appendix 26) (limited partnership); *Remas Properties, LLC v. Student*, No. UD-1940705517 (Minn. Dist. Ct. 4th Dist. July 19, 1994) (Appendix 27) (limited liability company).

8. Failure to attach to the complaint or provide at the initial hearing a copy of the termination notice or lease (Hennepin and Ramsey County Housing Court)

Minn. R. Gen. Prac. Rule 604 provides that in an action for holding over after termination of the lease, plaintiff must attach a copy of the termination notice, if any, to the complaint or provide it to defendant or defendant's counsel at the initial appearance, unless the plaintiff does not possess a copy of the notice, or if the defendant acknowledges receipt of the notice at the hearing. Similarly, if the action is for breach of the lease, plaintiff must attach a copy of the lease, if any, to the complaint or provide it to defendant or defendant's counsel at the initial appearance unless the plaintiff does not possess a copy of it.

Since plaintiff has the option of either attaching the termination notice or lease to the complaint or providing it at the initial appearance, the defendant should not move to dismiss the action before the first hearing if these documents are not attached to the complaint. However, if plaintiff does not provide these documents at the initial appearance, defendant should immediately move to dismiss the action for failing to comply with Rule 704. Even if plaintiff supplies these documents at the initial hearing, counsel should consider moving for a continuance if counsel has not seen these documents before.

a. Breach claims

Meldahl and SJM Prop. v. _____, No. 1050923509, Order on Referee Review at 19-20 (Minn. Dist. Ct. 4th Dist. Feb. 23, 2006) (Appendix 609) (judge reversed referee and ordered dismissal of breach of lease claim in eviction case claiming breach of lease and nonpayment of rent for failing to give tenant copy of lease); *Pham v.* _____, No. HC 030131517 (Minn. Dist Ct. 4th Dist. Feb. 13, 2003) (Appendix 560) (dismissal for failure to present lease for breach claim and notice for holdover claim, and for waiver of notice by acceptance of rent); *Hurt v. Johnston*, No. HC-000103513 (Minn. Dist. Ct. 4th Dist. Jan. 14, 2000) (Appendix 398) (Landlord's motion to amend complaint denied and action dismissed where landlord failed to attach the lease to the complaint to support a claim of breach of lease, and the landlord's claims of breach by unsanitary conditions in that tenant knew information about the landlord required by statute to be disclosed to the tenant were not pled with sufficient specificity.; *Reitman v. Smith*, No. UD-1940720534 (Minn. Dist. Ct. 4th Dist. Aug. 3, 1994) (Appendix 45) (subsidized housing lease not attached to complaint); *Mollins v. Persaud*, No. UD-1940712552 (Minn. Dist. Ct. 4th Dist. July 22, 1994) (Appendix 73).

b. Notice claims

Floy v. _____, No. HC-010821507 (Minn. Dist Ct. 4th Dist. Sep. 13, 2001) (Appendix 499) (combined eviction and emergency relief action: dismissal of eviction breach claim since tenant actions did not violate the lease; dismissal of notice claim since notice was not attached to complaint and there was no evidence of when notice was given; tenant raising condemnation as a habitability defense did have to pay rent into court; landlord who rented out condemned property was liable for $1900 in rent and deposit paid plus $5700 additional treble damages, plus $500 in moving expenses, for $8100; deadlines for payment; expungement of eviction case); *O'Brian v.* _____, No. HC 1010402506 (Minn. Dist Ct. 4th Dist. Apr. 18, 2001) (Appendix 552) (breach claims dismissed where oral lease contained no right of re-entry clause; notice claim dismissed where landlord failed to attached notice to complaint, and failed to prove notice was given; expungement granted); *B&J Property Management v. Gates*, No. UD-01970602519 (Minn. Dist. Ct. 4th Dist. June 12, 1997) (Appendix 247) (Dismissal for improper service, failure to register trade name, and failure to attach notice to quit and lease to complaint).

9. Failure to provide defendant with a copy of the lease before commencement of the action

Minn. Stat. § 504B.115 (formerly § 504.015) requires the landlord to provide a copy of the lease to the tenant. In actions to enforce a written lease, except for nonpayment of rent, disturbing the peace, malicious destruction of property, or violation of the drug covenant in § 504B.171 (formerly § 504.181), failure to provide a copy of the lease is a defense. A signed acknowledgment by the tenant of receipt is *prima facie* evidence of receipt. The landlord may overcome the defense by establishing that the tenant had actual knowledge of the provision. In *Meldahl and SJM Prop. v.* _____, No. 1050923509, Order on Referee Review at 19-20 (Minn. Dist. Ct. 4th Dist. Feb. 23, 2006) (Appendix 609), the judge reversed the referee and ordered dismissal of breach of lease claim in eviction case claiming breach of lease and nonpayment of rent for failing to give tenant copy of lease.

Some local ordinances require the landlord to give the tenant a copy of the lease. Minneapolis Code of Ordinances § 244.280 (Appendix 138) requires the landlord to give the tenant a copy of the lease within five days after it is signed by both parties. The tenant also may be entitled to rent abatement for the landlord's violation of this section. *See* discussion, *infra*, at VI.E.1.d.(3) (Violation of covenants of habitability).

10. Failure to timely file the affidavit of service (Fourth District; Hennepin and Ramsey County Housing Courts)

Minn. R. Gen. P. 605 requires the plaintiff to file the affidavit of service by 3:00 p.m. three business days before the hearing, and gives the court the discretion to strike the action. *See Okoiye v. Washington*, No. UD-1990708534 (Minn. Ct. Dist. July 22, 1999) (Appendix 425) (dismissal for failure to file affidavit of service; expungement motion granted; tenant awarded costs); *Pillsbury Partnership v. Loomer*, No. UD-1941121505 (Minn. Dist. Ct. 4th Dist. Dec. 2, 1994) (Appendix 105) (dismissal for failure to file affidavit of service).

11. Section 8 Existing Housing Certificate and Voucher Programs: Failure to give notice to the public housing authority

Requirements for eviction and defenses to evictions in public and government subsidized housing are discussed under the headings of nonpayment of rent, holding over and breach of lease cases.

The Section 8 Existing Housing Certificate and Voucher Programs provide the tenant with a housing certificate or voucher, which allows the tenant to find a landlord willing to participate in the program. The housing authority sends a monthly rent subsidy, called a Housing Assistance Payment (HAP), to the landlord and the tenant pays the remaining share of the rent. The landlord may terminate the tenancy only for serious or repeated violations of the lease, violation of federal, state, or local law which imposes an obligation on the tenant in connection with occupancy of the unit, or other good cause, except at the end of the term. The provisions of the HAP contract between the landlord and the housing authority, and the lease between the landlord and the tenant mirror the requirements of the regulations.

a. Under old regulations

Under the old regulations, the landlord had to notify the housing authority when it commenced an eviction (unlawful detainer) action. 24 C.F.R. §§ 882.215(c)(1) and 887.213(c) provided that the owner must notify the housing authority in writing of the commencement of procedures for termination of the tenancy, at the same time that the owner gives notice to the tenant under state or local law. The notice to the housing authority could be given by furnishing to the housing authority a copy of the notice to the tenant. If the owner failed to give such notice to the housing authority, the action had to be dismissed. *Carlson v. Lavine*, No. UD-1930104506 (Minn. Dist. Ct. 4th Dist. Jan. 22, 1993) (Appendix 5.J.3) (dismissed where service of HRA occurred 7 days after service on defendant and only three days before hearing; service was not "at same time" as service on defendant); *Shun v. Jasper*, No. UD-1920605513 (Minn. Dist. Ct. 4th Dist. July 7, 1992) (dismissal where Plaintiff failed to serve public housing authority with copy of lease termination letter and summons and complaint until after Defendant raised the issue in court as a violation of 24 C.F.R. § 882.215(c)(4) (1992)) (Appendix 5.J.1).[3]

---

[3] *See Pearson v. Cook*, No. UD-1950825523 (Minn. Dist. Ct. 4th Dist. Sept. 13, 1995) (Appendix 106); *Semple Enterprises v. Smith,* No. UD-1944104509 (Minn. Dist. Ct. 4th Dist. Nov. 23, 1994) (Appendix 107); *Kedrowski v. Marbury*, No. UD-194110547 (Minn. Dist. Ct. 4th Dist., Nov. 22, 1994) (Appendix 108); *Bedeau v. Bryant*, No. UD-1930401504 (Minn. Dist. Ct. 4th Dist. April 13, 1993) (Appendix 5.J.4); *McMullen v. Cole*, No. UD-2921105800 (Minn. Dist. Ct. 4th Dist. Nov. 16, 1992) (Appendix 5.J.5); *Golf View Properties v. Brown*, No. UD-4921005900 (Minn. Dist. Ct. 4th Dist. Oct. 19, 1992) (Appendix 5.J.2) (voucher); *Z & S Management Company v. Jankowicz*, No. UD-1920131503 (Minn. Dist. Ct. 4th Dist. Feb. 14, 1992) (Appendix 5.H); *Maciej v. Christian*, No. UD-1910905516 (Minn. Dist. Ct. 4th Dist. Sept. 17, 1991) (Appendix 5.I); *Hechter v. Wilson*, No.

b. New regulation

The United States Department of Housing and Urban Development (HUD) published an extensive revision of the Section 8 Certificate and Voucher regulation. 60 Fed. Reg. 34,660 (July 3, 1995). The regulations became effective October 2, 1995. The regulations retain the requirement that the landlord notify the housing authority, but the regulations changed the language to state: "The owner must give the HA [housing authority] a copy of any owner eviction notice to the tenant." 24 C.F.R. § 982.310(e)(2)(ii), 60 Fed. Reg. at 34,705. "Owner eviction notice means notice to vacate, or a complaint or other initial pleading used under State or local law to commence an eviction action." § 982.310(e)(2)(ii), 60 Fed. Reg. at 34,705 (Appendix 109). Cases decided under the old regulations remain good law under the new regulations, except that the new regulations do not state when the landlord must notify the public housing authority. *Wright v. _____*, No. 27-CV-HC-08-4603 (Minn. Dist. Ct. 4th Dist. Sep. 24, 2008) (Appendix 626) (expungement granted where landlord did not notify Section 8 Office was eviction action); *Meldahl and SJM Prop. v. _____*, No. 1050923509, Order on Referee Review at 14-15 (Minn. Dist. Ct. 4th Dist. Feb. 23, 2006) (Appendix 609) (judge reversed referee and ordered dismissal of eviction in part for plaintiff's failure to give notice to public housing authority); *Nelson v. _____*, No. HC 031007508 (Minn. Dist Ct. 4th Dist. Oct. 16, 2003) (Appendix 548) (dismissal where Section 8 landlord did not notify housing authority); *Rio Hot Properties, Inc. v. ____*, No. HC 021024517 (Minn. Dist Ct. 4th Dist. Nov. 7, 2002) (Appendix 566) (dismissal where Section 8 landlord did not notify housing authority of eviction action at the same time it notified tenant, although landlord notified housing authority afterwards); *Igherighe v. _____,* No. HC-1011001519 (Minn. Dist Ct. 4th Dist. Oct. 10, 2001 and Feb. 19, 2002) (Appendix 519) (costs awarded and file expunged where action was dismissed where plaintiff landlord of Section 8 Voucher tenant failed to served Section 8 office, plaintiff disclosed only a post office box and not a street address to tenant, plaintiff pled rent due from Section 8 and not the tenant, and plaintiff named a non-tenant as a defendant); *SJM Properties, Inc. v. _____,* No. HC 020402501 (Minn. Dist Ct. 4th Dist. Apr.. 11, 2002, Feb. 12, 2003) (Appendix 570) (dismissal where Rental Assistance for Family Stabilization (RAFS) Program landlord failed to serve the Section 8 office; different notice periods for landlord and tenant might be proper; costs and disbursements awarded, which may be credited against rent; expungement granted later).[4]

UD-4910802900 (Minn. Dist. Ct. 4th Dist. Aug. 12, 1991) (Appendix 5.J); *Wayzata Woods Apartments v. Gager*, No. UD-1900917544 (Minn. Dist. Ct. 4th Dist. Sept. 27, 1990) (Appendix 5.D); *Filister v. Nord*, No. C9-87-8066 (Minn. Dist. Ct. 10th Dist. Aug. 25, 1987) (Appendix 5.E); *Lamlon Development Corp. v. Owens*, ___ Misc.2d ___, 533 N.Y.S.2d 186 (Dist. Ct. 1988) (Appendix 5.F); *Defloria v. Crooks*, No. SPN 088-03-07038 (Conn. Super. Ct. May 20, 1988) (Appendix 5.G).

[4]In *Stillday v. Kittleson*, No. UD-01980421523 and 1980430900 (Minn. Dist. Ct. 4th Dist. Jul. 21, 1998) (Appendix 368), the court consolidated unlawful detainer and rent escrow actions, dismissed the unlawful detainer action for failing to serve a copy of the summons and complaint on the Minneapolis Public Housing Authority, and concluded that the landlord violated the tenant's privacy, and awarded $100 to the tenant. *See Williams v. McCrimon*, No. HC-1991117529 (Minn. Dist. Ct. 4th Dist. Dec. 7, 1999) (Appendix 428) (Dismissal for failure to give notice to public housing authority under 24 C.F.R. § 982.310 (e)(2)(ii); defendants' names expunged); *Nelson v. Kragness*, No. HC-1991103507 (Minn. Dist. Ct. 4th Dist. Nov. 17, 1999) (Appendix 409) (Action dismissed where plaintiff failed to give housing authority copies of eviction notices as required by the lease addendum.; *Morris v. Jordan*, No. UD-1980406518 (Minn. Dist. Ct. 4th Dist. Jun. 18, 1998) (Appendix 352B) (dismissed Section 8 certificate unlawful detainer action for failing to serve a copy of the summons and complaint on the public housing authority, expunged name of minor as there was no reason to name him as a defendant); *Morris v. Jordan*, No. UD-1980504511 (Minn. Dist. Ct. 4th Dist. May 13, 1998) (Appendix 352A) (dismissed Section 8 certificate unlawful detainer action for failing to serve a copy of the summons and complaint on the public housing

12. Bankruptcy

A landlord may not use an eviction (unlawful detainer) action to terminate the interest in lease to property of a tenant who has filed a bankruptcy action, without first obtaining relief from the automatic stay. *Otten v. Washington*, No. UD-1910617506 (Minn. Dist. Ct. 4th Dist. July 3, 1991) (Appendix 5.K) (dismissal of complaint alleging nonpayment of rent for period following bankruptcy filing); 11 U.S.C. §§ 362, 541. *See Minneapolis Public Housing Authority v. Sterling*, No. UD-1980604506 (Minn. Dist. Ct. 4th Dist. Jul. 6, 1998) (Appendix 350) (writ quashed by stipulation where writ issued after filing of bankruptcy); *In re Sudler*, 71 B.R. 780 (Bankr. E.D.Pa. 1987) (tenancy rights not terminated prior to bankruptcy filing where tenant had not been put out of property as of time of filing).

The landlord also may not proceed against a co-tenant of the bankruptcy debtor where such a proceeding would affect the property of the bankruptcy estate and adversely affect the interest of the bankruptcy debtor. *Otten*, citing *In re Otero Mills, Inc.*, 25 B.R. 1018, 1021 (Bankr. D.N.M. 1982). A landlord who files bankruptcy listing the premises as part of the bankruptcy estate relinquishes control of the premises to the bankruptcy court, and does not have the right to file an unlawful detainer action until the bankruptcy court abandons the property. *See Grandco Management v. Wielding*, No. UD-1921202525 (Minn. Dist. Ct. 4th Dist. Dec. 16, 1993) (Appendix 4.B.3).

13. Pending parallel litigation

In some cases a landlord may file an eviction (unlawful detainer) action as a way to get around defending an action already brought by the tenant. The court may dismiss or stay the action as being incorrectly commenced when the pending parallel action would properly resolve the dispute. *Rice Park Properties v. Robins, Kaplan, Miller & Ciresi*, 532 N.W.2d 556 (Minn. 1995) (Minnesota Supreme Court decision reversing the Court of Appeals and affirming the district court decision to stay an unlawful detainer action pending final disposition of a related and earlier filed declaratory judgment action commenced by the tenant); *Stein v. J.D. White, Inc.*, No. CO-91-2164 (Minn. Ct. App. Apr. 21, 1992), FINANCE & COMMERCE B24 (April 24, 1992) (Appendix 0.F) (affirmed dismissal). *But see Park Drive Partnership v. Granse* No. C7-96-401 (Minn. Ct. App. Sep. 24, 1996), FINANCE & COMMERCE at 38 (Sep. 27, 1996) (Appendix 193) (unpublished decision: pending separate quiet title action did not preclude unlawful detainer action, which determines who has the superior right of possession, but does not determine title; the defendant cannot assert title, equitable rights or counterclaims; the defendant did not present any evidence demonstrating a greater right of possession than the plaintiff).

Tenants' advocates also should consider a motion in the pending action to restrain the landlord from filing the eviction (unlawful detainer) action. *See* Temporary Retraining Orders, *supra* at V.D.

14. Failure to join an indispensable party

---

authority); *Anderson v. Burton*, No. UD-2971024200 (Minn. Dist. Ct. 4th Dist. Nov. 6, 1997) (Appendix 246) (Lease followed old regulations and required service on housing authority at the same time as on the tenant; service on housing authority eight days after service on tenant was improper); *Papenheim v. Smith*, UD-1960415534 (Minn. Dist. Ct. 4th Dist. Apr. 26, 1996) (Appendix 198) (§8 certificate unlawful detainer dismissal for failure to notify §8 office under new regulations). *See also Santouse v. Scott*, 2006 WL 1600385 (Conn. Super. Ct. 2006) (eviction dismissed where landlord failed to prove compliance); *Homestead Equities, Inc. v. Washington*, 176 Misc.2d 459, 672 N.Y.S.2d 980 (N.Y. City Civ. Ct. 1998) (eviction dismissed for failure to plead §8 status or tenancy and failure to comply with regulation).

In some cases, the alleged breach of the lease on the part of the tenant may have been caused by a third party. For instance, if a public housing authority providing a rent subsidy for the tenant to the landlord withholds the subsidy or incorrectly calculates the subsidy, the landlord might file an eviction (unlawful detainer) action for nonpayment of rent against the tenant. The tenant may argue that the action should be dismissed for failure to join an indispensable party, or that the party should be joined under Minn. R. Civ. P. 19. *See Lang v. Terpstra*, No. UD-1940207512 (Minn. Dist. Ct. 4th Dist. June 12, 1994) (Appendix 70) (storage company added as necessary party on defendant's motion regarding property disposition). The landlord might respond that the action is a summary proceeding in which parties who do not have a possessory interest in the premises could not be joined. The tenant could respond by asserting that the plaintiff would have an adequate remedy in an ejectment action.

In *Hanson v. Trom*, No. UD-1950926503 (Minn. Dist. Ct. 4th Dist. Nov. 3, 1995) (Appendix 82), the landlord alleged non-payment of rent against one co-tenant, without naming the other co-tenant. The court held that the landlord failed to name an indispensable party, since the court could not enter final judgment without affecting the interests of the co-tenant. *See Tri Star Developers, LLC v.* _____, No. HC 010109514 (Minn. Dist Ct. 4th Dist. Oct. 17, 2001) (Appendix 584) (improper service on employee of business who was not an officer and not authorized to accept service; defendant business was incorrectly named; default judgment vacated and action dismissed and expunged).

The writ cannot be enforced against a subtenant who was not a party to the eviction (unlawful detainer) action nor named in the writ of restitution. *See Kowalenko v. Haines*, No. C6-85-1365 (Minn. Ct. App., July 24, 1985) (attached as Appendix 4). In *Kowalenko*, the petitioner had subleased the apartment from the former tenants. The writ was enforced against the petitioner, pursuant to an unlawful detainer action against former tenants, but not the petitioner. The petitioner was not named in the writ. The court ordered the landlord to return possession of the apartment and petitioners personal property to her, pursuant to Minn. Stat. § 504B.375 (formerly § 566.175).

If the tenant commences an action including all of the parties before the landlord commences the eviction (unlawful detainer) action, the tenant could argue for dismissal based on the existence of the pending parallel action. *See Stein v. J.D. White, Inc.*, No. C0-91-2164 (Minn. Ct. App. Apr. 21, 1992), FINANCE & COMMERCE B24 (April 24, 1992) (Appendix O.F).

The tenant also could request that the court continue the action to allow the tenant to serve a third party complaint on the indispensable party, and order an expedited period such as seven days for the third party Defendant to appear and respond.

15. Lack of jurisdiction over Indian trust property

The state courts do not have jurisdiction over claims involving the right of an enrolled member of an Indian tribe to possession of property held in trust for Indians by the United States. *White Earth Housing & Redevelopment Authority v. J.F.*, No. C8-91-224 (Minn. Dist. Ct. 9th Dist. Feb. 5, 1992) (Appendix 24); *All Mission Indian Housing Authority v. Silvas*, 680 F. Supp. 330 (C.D. Cal. 1987); 28 U.S.C. § 1360(b).

16. Action is inappropriate method to resolve complex claims

a. Manufactured (mobile) home park lot home repossession

In *Nygren v. Nix*, No. C1-96-42 (Minn. Dist. Ct. 9th Dist. Jan. 25, 1996) (Appeal 199), the defendant agreed to purchase a manufactured (mobile) home park lot home from the plaintiff by a promissory note

which stated monthly payments, and rented the land below it by a lease which did not state rent payments. The plaintiff brought an action for non-payment of rent and late fees, and the defendant answered that the action should be dismissed because the action was not an appropriate forum since the dispute was more properly governed by the Manufactured Home Repossession Security Act (MHRSA), Minn. Stat. § 327.62 *et seq.* The court dismissed the action for preparing and issuing a summons which should have been prepared and issued by the court, and for not signing the complaint.

b. Domestic partners.

Domestic partners may or may not be in a landlord-tenant relationship, and if not, an eviction (unlawful detainer) action not be an appropriate forum to determine their possessory interests in the property. In *Shustarich v. Fowler*, UD 1960604520 (Minn. Dist. Ct. 4th Dist. July 5, 1996) (Appendix 176), Plaintiff and defendant first lived in defendant's home. Then plaintiff and defendant moved from her home to a second property, and the parties then living at the second property moved to defendant's old home. Plaintiff took title to the new property, and defendant contributed several thousand dollars from the sale of her home to a new roof and appliances. The parties kept separate expenses. After defendant obtained an order for protection, plaintiff gave notice and filed an unlawful detainer action. The court concluded that plaintiff failed to establish a landlord-tenant relationship, defendant was entitled to assert an interest in the premises, and an unlawful detainer action was a summary remedy inappropriate to try issues of title or to substitute for an action in ejectment, and denied restitution of the premises. *See In re Estate of Ericksen,* 337 N.W.2d 671 (Minn. 1983). *But see Stock v. Beaulieu* (Minn. Dist. Ct. 9th Dist. Mar. 9, 1995) (Appendix 140) (domestic partners were in landlord-tenant relationship; plaintiff retaliated against defendant for reporting a crime of domestic abuse committed by the plaintiff in which the defendant was the victim).

17. Failure to sign complaint

In *Nygren v. Nix*, No. C1-96-42 (Minn. Dist. Ct. 9th Dist. Jan. 25, 1996) (Appendix 199), the court dismissed the action for preparing and issuing a summons which should have been prepared and issued by the court, and for not signing the complaint.

18. Landlord's preparation of summons

In *Nygren v. Nix*, No. C1-96-42 (Minn. Dist. Ct. 9th Dist. Jan. 25, 1996) (Appendix 199), the court dismissed the action for preparing and issuing a summons which should have been prepared and issued by the court, and for not signing the complaint.

19. Action or claim is premature

When the complaint alleges an act that has not yet occurred, such as nonpayment of future rent or fees or failing to move at expiration of a notice period that has not yet expired, the action or claim should be dismissed as being premature or not ripe. The court should consider only *present* possessory interests of the parties.

In *Eagan East Ltd. Partnership v. Powers Investigations, Inc.*, 554 N.W. 2d 621 (Minn. Ct. App. 1996), the commercial landlord demanded from the commercial tenant a prospective and retroactive rent increase after the square footage used by the tenant was remeasured. When the tenant failed to pay the additional rent, the landlord filed an eviction (unlawful detainer) action. The trial court held that the rent increase clauses in the lease were ambiguous and could not be applied retroactively from the new square footage measurement, but could be applied prospectively. The landlord then announced a new prospective

rent increase, and in a subsequent order of the trial court, the court ruled that the landlord was entitled to the rent increase and the tenant was not entitled to attorney's fees under the lease. On appeal, the Court of Appeals held that the trial court's jurisdiction was limited to determining present possessory rights of the parties, and that the trial court exceeded its jurisdiction by ruling on the prospective rent increase and attorney's fee issues.

The most common premature cases are notice cases filed before the effective date of the notice. In *Walters v. Demmings*, No. UD-1990916517 (Minn. Dist. Ct. 4th Dist. Nov. 15, 1999) (Appendix 422), the court dismissed the landlord's notice to quit claim as premature, as the action was filed before the effective date of the notice. *See Clobes v. _____,* No. HC 010301510 (Minn. Dist Ct. 4th Dist. Mar. 15, 2001) (Appendix 487) (action dismissed as premature where notice set vacate date as March 3 and landlord filed action March 1; costs and disbursements awarded); *Ewing Square Associates v. Koerner*, No. UD-2910104802 at 2-6 (Minn. Dist. Ct. 4th Dist. Feb. 4, 1991) (Appendix 15.B) (unlawful detainer action dismissed where it was commenced contemporaneously with issuance of the ten day notice of termination); *Loring Towers Apartments Limited Partnership v. Redcloud*, No. UD-1921210529 (Minn. Dist. Ct. 4th Dist. Jan 20, 1993) (Appendix 11.I.5).

Rent claims also can be premature. *BIRDMA, LLC v. _____*, No. HC 1011102511 (Minn. Dist Ct. 4th Dist. Dec. 7, 2001) (Appendix 476) (action filed on the 2nd was premature to claim service fee due on the 5th; tenant tendered but landlord refused rent; landlord failed to prove amount of utility bills; lease did not comply with shared meter statute conditions). *See* discussion, *infra*, at VI.E.15.2.

20. Plaintiff's voluntary dismissal

Plaintiff may dismiss the action without order of the court *only* before the tenant serves the answer. Minn. R. Civ. P. 41.01(a). If the answer contains a counterclaim, the court cannot dismiss the action unless the court retains jurisdiction to hear the counterclaim. Rule 41.01(b). While counterclaims generally are not available in eviction (unlawful detainer) actions. If a rent abatement claim is viewed as a counterclaim as opposed to a set off, the court would have to adjudicate the claim even if the eviction claim were dismissed. *See* Breach of Covenants of Habitability, *infra* at VI.E.1.a.

If the plaintiff dismisses an action and then refiles, the court may assess costs against the plaintiff from the first action and stay the second action until the plaintiff has complied with the order. Rule 41.04. If the plaintiff dismisses the second action, the dismissal is an adjudication on the merits. Rule 41.01(a).

21. Lease Signed under Duress

The landlord should not be able to enforce provisions of a written lease signed under duress. Duress is a defense to a contract "when there is coercion by means of physical force or unlawful threat, which destroys one's free will and compels compliance with the demands of the party exerting the coercion." Minnesota courts have not recognized the defense of economic duress. *St. Louis Park Investment Co. v. R.L. Johnson Investment Co.*, 411 N.W.2d 288, 291 (Minn. Dist. Ct. at 1987) (No duress where contract for deed vendee willingly executed deed after consulting with attorney and was not subjected to physical force or unlawful threats, even though forced to move from a previous location by time constraints); *Cedar Associates LLP v. Curtis*, No. UD-1970108508 (Minn. Dist. Ct. 4th Dist. May 20, 1997) (Appendix 250) (Tenant did not prove duress where tenant alleged landlord required her to sign lease under threat of immediate eviction).

22. Filing case in violation of consumer fraud order

On occasion courts have found landlords fraudulently filing and prosecuting unlawful detainer and other actions in violation of state consumer protection laws, and have ordered the landlords to obtain judge approval before filing new actions. In *In re Application of Okoiye* (Jan. 7, 1998) (Appendix 354E), the landlord sought *in forma pauperis* status to file another unlawful detainer action. The court reminded the landlord of the requirement for court approval for filing, and concluded that the landlord had given improper notice and had not submitted substantive proof supporting claims which he had litigated before. *See Le v.* _____, No. HC 02-7952 (Minn. Dist Ct. 4th Dist. May 14, 2002) (Appendix 530) (ordered landlord who filed several actions again defendant and other tenants in violation of federal subsidized housing termination regulations to secure approval of Chief Judge prior to filing any eviction actions); *Okoiye v. Washington*, No. UD-1981029901 (Minn. Ct. Dist. June 29, 1999) (Appendix 424) (landlord not allowed to file unlawful detainer action where claims were controlled by previous court orders). Landlords may try to avoid the effect of such orders by having cases brought in the name of a spouse or other person. *Amsler v. Touliot*, No. UD-1970908519 (Minn. Dist. Ct. 4th Dist. Sep. 24, 1997) (Appendix 245) (landlord ordered to obtain judge approval when his wife files cases on properties in which he maintains an interest).

23. Domestic abuse

a. *Eviction Defense*

Issues of domestic abuse can come up in a number of ways in unlawful detainer actions. Some cases involve the abuser trying to evict the cohabiting victim after the victim obtains a restraining order. The victim may be able to get the case dismissed on the grounds of no landlord-tenant relationship, or retaliation. *Shustarich v. Fowler*, No. UD-1960604520 (Minn. Dist. Ct. 4th Dist. July 5, 1996) (Appendix 176) (No landlord-tenant relationship); *Stock v. Beaulieu*, Minn. Dist. Ct. 9th Dist. Mar. 9, 1995) (Appendix 140) (Retaliation).

Other cases involve the landlord trying to evict the victim based on the actions of the abuser or the actions of the victim in dealing with the abuse. The landlord might file an unlawful detainer action for nonpayment of rent after the victim excludes the abuser from the household and the abuser no longer contributes toward rent. The victim could argue that eviction is not appropriate where the victim is not responsible for the nonpayment of rent, and only needs additional time to obtain assistance with the rent. *Maxtin Housing Authority v. McLean*, 328 S.E.2d 290 (N.C. 1985) (Public housing: default on payment of rent rested with abuser and not the remaining victim); *614 CO. v. D. H. Overmayer*, 297 Minn. 395, 396, 211 N.W.2d 891, 893 (1973), *affirming* First and Second Interlocutory orders, No. 204678 (Minn. Dist. Ct. 2nd Dist. Apr. 22 and July 9, 1972) (Appendix 54) (Affirmed trial court orders allowing commercial tenant one month to pay amount in default).

The landlord might give a victim a notice to quit in a month-to-month tenancy after the victim defends against the abuser, or excludes the abuser from the property. The victim could raise a retaliation defense against the landlord, since tenants are protected against retaliation for actions they take to enforce their rights under any laws, not just housing law. MINN. STAT. § 504B.285 (formerly § 566.03). *See* discussion, *infra*, VI.F.3.

The landlord might file an action for breach of lease where the conduct of the abuser offends other tenants, neighbors or the landlord's staff. The victim could argue that the court should evict the abuser if a household member and allow the victim to remain, or allow the victim to remain if the victim has excluded the abuser from the property on the grounds that forfeiture of the tenancy is not appropriate.

In *Steven Scott Management, Inc. v. Scott*, No. CA-98-09527 (Minn. Dist. Ct. 2d Dist. Oct. 28, 1998) (Appendix 367), after one tenant violently assaulted his domestic partner, he pled guilty to a felony, and was sentenced to workhouse incarceration, chemical dependency treatment and anger management counseling. The assailant complied with his sentence and committed no other assaults. The landlord found out about the incident six months later, gave notice for substantial annoyance and endangerment, and commenced an unlawful detainer action to evict both tenants. The court held that the claim against the victim was in response to her call to the police and prohibited by Minn. Stat. § 504.215 (now § 504B.205), the victim did not endanger others by allowing the assailant to remain in the household, it would be unconscionable to evict the assailant where he was sincere in his rehabilitative efforts and had complied with his sentence and had not endangered others in the manufactured (mobile) home park lot and the tenants had cured any violation which had occurred. On appeal, in *Steven Scott Management, Inc. v. Scott*, No. C7-98-2024 (Minn. Ct. App. June 8, 1999) (unpublished), the Court of Appeals affirmed the finding that the victim had not violated Minn. stat. 327C.09 or committed a material violation of the lease, as there was no evidence of any annoyance or danger to other residents. However, the Court reversed the trial court as to the assailant, concluding that a finding that he violated the lease and the statute was sufficient to compel issuance of an order against him. *See Akron Metropolitan Housing Authority v. Rice*, No. 88-CV-04013 (Ohio Mun. Ct., Akron, June 22, 1988), 23 CLEARINGHOUSE REV. 322 (1989) (Appendix 309) (Court could enter judgment in eviction against one household member but not the rest of the family, which was innocent). *See* discussion, *infra*, VI.G.28. (forfeiture). *But see Phillips Neighborhood Housing Trust v. Brown*, 564 N.W.2d 573 (Minn. Ct. App. 1997) (Affirmed eviction of entire household when one co-tenant violated the lease by engaging in illegal drug activity). *See generally* E. Lauer, *Housing and Domestic Abuse Victims: Three Proposals for Reform in Minnesota*, 15 LAW AND INEQUALITY 471 (Spring 1997).

b. *Tenant Remedies*

Tenants facing domestic abuse have remedies other than eviction defense. Tenants have used rent escrow and tenant remedies actions, claiming that the landlord was obligated under the lease, a covenant of quiet enjoyment, or the covenant of habitability to maintain the property fit for the use intended by the parties to take action against an abuser, or that the circumstances amounted to constructive eviction. In _____ *v. Country Village Apartments*, C8-02-14178 (Minn. Dist. Ct. 1st Dist. July 8, 2002) (Appendix 436), the tenant obtained a restraining order against the father of her child. She called the police for subsequent incidents of threats and property damage, but did not feel safe. She gave notice to the landlord that she would vacate, claiming that the property was not fit for her use under Minn. Stat. § 504B.161 (formerly § 504.18). When the landlord did not agree to end the tenancy, she filed an rent escrow action under Minn. Stat. § 504B.385 (formerly § 566.34). The court found that she had been constructively evicted, and ordered her released from the lease, ending her rent liability, and that the landlord return her deposit minus the cost of damage beyond ordinary wear and tear. *See Person v. Torchwood Management*, No. UD-1920604543 (Minn. Dist. Ct. 4th Dist. July 6, 1992) (Appendix 205) (rent escrow action: landlord's failure to effectively abate loud and abusive language by neighboring tenants, noisy parties, and unjustified harassment by other tenants violated § 504.18 (now § 504B.161)); *Colonial Court Apartments, Inc. v. Kern*, 292 Minn. 533, 163 N.W.2d. 770 (1968) (damages action: affirmed trial court finding of constructive eviction for landlord's failure to respond to tenant's complaints about neighboring tenants).

24. Summons content

In *Times Square Shopping Center, L.L.P., v. The Tobacco City, Inc.*, 585 N.W. 2d 791 (1998), the tenant challenged the summons as not stating that an original complaint had been filed with the District Court, as required by Minn. Stat. § 504B.321 (formerly § 566.05). The Court concluded that the function of the eviction summons was not negated by the minor technical error in the standard form.

25. Failure to use written lease

Minn. Stat. § 504B.111 (formerly § 504.012) provides that a "landlord of a residential building with 12 or more residential units must have a written lease for each unit rented to a residential tenant.... A landlord who fails to provide a lease, as required under this section, is guilty of a petty misdemeanor." Generally a contract entered into in violation of a statute or ordinance which imposes a prohibition and a penalty for an action is void and unenforceable. However, the court first must consider the nature and circumstances of the contract in light of the statute or ordinance. The court will not infer that the legislative body intended the contract to be void unless such is necessary to accomplish its purpose. The courts have voided contracts where the violations offended important public policies with respect to health and safety of the public, and have upheld contracts where the legislative intent did not indicate that its sanction should apply where the violation is slight, not seriously injurious to the public order, and where no wrong has resulted from want of compliance. *New Bonn Company v. Herman*, 271 Minn. 105, 135 N.W.2d 222 (1965).

26. Mootness

Since the eviction action is for allegedly unlawful detention or possession of the property, the case is moot if the tenant has vacated the property prior to the court hearing. Mootness is the doctrine of standing set in a time frame: "the personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Nathan v. Town Centre Self Storage, LLC*, No. A06-461, 2007 WL 446831 (Minn. Ct. App. Feb. 13, 2007) (unpublished) (quoting *Kahn v. Griffin,* 701 N.W.2d 815, 821 (Minn. 2005). Mootness occurs "if an event occurs that resolves the issue or renders it impossible to grant effective relief." *Id.* (quoting *Isaacs v. Am. Iron and Steel Co.*, 690 N.W.2d 373, 376 (Minn. Ct. App. 2004), *review denied* (Minn. Apr. 4, 2005). *See Olson v.* _____, No. HC 031008504 (Minn. Dist Ct. 4th Dist. Oct. 21, 2003) (Appendix 556) (dismissed where tenant vacated before hearing but after action commenced); *Ukatu v.* _____, No. HC 0307614501 (Minn. Dist Ct. 4th Dist. July 30, 2003) (Appendix 586) (dismissal for no license at time of filing, even though landlord later obtained license; eviction case is moot when tenants have vacated; expungement granted).

27. Plaintiff's default

It is common for the court to strike a case when the plaintiff does not appear to proceed with it. Tenants still should appear and ask that the case be dismissed. *Filas v.* _____, No. HC 040218516 (Minn. Dist Ct. 4th Dist. Mar. 2, 2004) (Appendix 498) (dismissal with prejudice where tenant appeared but plaintiff did not).

28. Statute of frauds

The tenant cannot use statute of frauds to avoid a contract that she approved and signed. *MM Home Builders, Inc. v. Williams*, No. C3-02-521, 2002 WL 31247999 (Minn. Ct. App. Oct. 8, 2002) (unpublished).

29. Tenant waiver of claims

The tenant may waive claims related to financial obligations to the landlord by paying amounts later to be challenged. *White v. Ford*, No. C2-02-2048, 2003 WL 21694419 (Minn. Ct. App. July 22, 2003) (unpublished) (tenant waived claim that landlord improperly modified lease to require tenant payment of utilities by paying for utilities for 9 months after notice).

Many statutory protections cannot be waived. *See* discussion, *infra*, at VI.G.12.

30. Statute of limitations

Some claims may be barred by a statute of limitations. *Boston Housing Authority v. Tyler*, N0. 00-01016 (Mass. Dist. Ct., Boston Housing Ct. Jan. 21, 2004) (Appendix 478) (dismissal of eviction action not brought within two year statute of limitations for forfeiture; 6 year statute of limitations for contract actions did not apply to evictions).

The Minnesota statute of limitations period is six years for claims under a contract or statute, or concerning personal property, fraud, and other listed claims, Minn. Stat. § 541.05, and two years for penalties created by statute. Minn. Stat. § 541.07.

31. Servicemembers Civil Relief Act

On December 19, 2003, the new Servicemembers Civil Relief Act replaced the Soldiers' and Sailors' Civil Relief Act. Pub. L. No. 108-189 (2003), 117 Stat 2835, 50 App. U.S.C.A §§ 501-594. It extends coverage to members of the National Guard serving "more than 30 consecutive days of active duty. The court may grant a stay of proceedings in a number of circumstances, should grant a stay in some, and must grant a stay in others.

Absent a court order, a landlord may not evict a servicemember or the dependents of a servicemember from a residential lease when the monthly rent is at or below $2400 per month for the year of 2003, and $2465 in 2004, with a formula to calculate the rent ceiling for subsequent years. Pub. L. No. 108-189 §301, 50 App. U.S.C.A. § 531.

In any eviction case, if a servicemember whose ability to pay the rent is materially affected by military service, the court shall grant a request for (1) a stay of the action for 90 days, unless equity requires a shorter or longer stay, or (2) adust the obligation under the lease to preserve the interests of all parties. The court also may grant the relief on its own motion, and may grant landlord as equity may require. It is a misdemeanor for a person to knowingly take part or attempt to take part in an eviction.

E. NONPAYMENT OF RENT DEFENSES.

1. Breach of the covenants of habitability

a. The covenants

Implied in every oral and written residential lease are three covenants or obligations of the landlord. Minn. Stat. § 504B.161 (formerly § 504.18), subd. 1 (emphasis added).

1. That the premises and all common areas are fit for the use intended by the parties.

2. To keep the premises in reasonable repair, except where the disrepair was caused by the willful, malicious or irresponsible conduct of the tenant or tenant's agent.

3. Maintain the premises in compliance with applicable state and local housing maintenance, health, and safety laws, except where the violation was caused by the willful, malicious, or irresponsible conduct of the tenant or tenant's

> agent. Included in "health and safety laws" are: (a) The weatherstripping, caulking, storm window, and storm door energy efficiency standards for rental property contained in Minn. Stat. § 216C.27, subd. 1, 3. *See* Minn. Stat. § 216C.30, subd. 5, Minn. R. § 7655.0400; and (b) Fire extinguisher and smoke detector installation requirements. Minn. Stat. §§ 299F.361, 299F.362.

The "fit for intended use covenant" includes the landlord's statutory obligations to be the bill payer and customer of record for utility services supplied to a building through one meter where the service covers more than one unit or the common areas. Minn. Stat. § 504B.215 (formerly § 504.185). *See* Utilities, *infra*, at VI.E.4.

The statute is to be liberally construed. *Id.* The covenants of habitability and the covenant to pay rent are mutual and dependant, and all or part of the rent is not due when the landlord has breached the covenants. *Fritz v. Warthen*, 298 Minn. 48, 54, 213 N.W.2d 339, 341-42 (1973). The defendant may raise breach of the covenants as a defense to an action for nonpayment of rent. *Id.* at 59, 213 N.W.2d at 342.

The fact that a residential tenant operates a business out of the home does not negate operation of the statutory covenants. *Swartwood v. Gardner*, No. UD-1950929506 (Minn. Dist. Ct. 4th Dist. Oct. 20, 1995) (Appendix 113) (tenants operation of a family day care center at residential rental premises does not relieve landlord of obligations under covenants of habitability).

The parties may not waive or modify the covenants. Minn. Stat. § 504B.161 (formerly § 504.18), subd. 1. *Greevers v. Greevers*, No. UD-1950628506 (Minn. Dist. Ct. 4th Dist. July 24, 1995) (Appendix 110) (no existence of agreement by tenant reside in condemnable or uninhabitable premises, and such an agreement would be contrary to public policy and in violation of State law).

While the tenant may agree in writing to perform special repairs or maintenance if the agreement is supported by adequate consideration, the agreement does not waive the covenants. § 504B.161 (formerly § 504.18), subd. 2. The tenant's pre-rental inspection of the premises does not defeat the covenants. § 504B.161 (formerly § 504.18) , subd. 3. A lease term stating that the tenant accepts the premises as being in excellent condition is void and contrary to public policy, where the condition of the premises violates the covenants. In *Wardin v. Maski*, No. C4-97-2245, 1998 WL 481917, at *3 (Minn. Ct. App. Aug. 18, 1998) (unpublished), the Court affirmed the trial court's application of the statute to a lease requiring the tenant to make repairs.

> The lease provided that the respondents would maintain mechanical systems, but the district court found that the lease did not contain a "conspicuous indication * * * to support [Wardin's] contention that [respondents] were obligated to perform specific repairs or maintenance." We agree that the maintenance provision was not specific and was not set forth in a conspicuous writing. The maintenance provision appears on page three of a six-page form lease and is written in the same typeface as the rest of the lease. Also, the maintenance agreement was not supported by any consideration. The district court properly found that respondents were not responsible for maintaining the heating system and water pipes and did not abuse its discretion in abating rent for insufficient utilities.

Id. See State v. Ellis, 441 N.W.2d 134, 137-38 (Minn. App. Ct. 1989) (ultimate responsibility for compliance with the covenants remains with the landlord; landlord's attempt to transfer responsibility to tenant is prohibited).

In *Jafer Enterprises, Inc. v. Peters,* No. UD-1920701512 (Minn. Dist. Ct. 4th Dist. Aug. 10, 1992) (Appendix 5.P), the landlord and tenant agreed that the rent would be reduced by $50.00 because the tenant agreed to paint the house, install carpet, and do other needed repairs at her cost. The court found that given the condition of the premises and the rent reduction already negotiated between the parties, the tenant still was entitled to a $300.00 per month rent abatement for three months. *Id.* at 3. *See Coleman v. Kopet*, No. UD-1000211534 (Minn. Dist. Ct. 4th Dist. Mar. 8, 2000) (Appendix 385) (Adequate consideration to shift the obligation for repairs from the landlord to the tenant must be fair and reasonable under the circumstances; the landlord failed to prove adequate consideration, so the landlord was responsible for making all repairs; rent abatement of $2,925 over ten months (32%) covered by rent paid into court and credits against future rent); *Larson v. Cooper*, No. UD-1880209557, Order at 6 (Minn. Dist. Ct. 4th Dist. Mar. 21, 1988) (Appendix 6); *Greevers v. Greevers*, No. UD-1950628506 (Minn. Dist. Ct. 4th Dist. July 24, 1995) (Appendix 110) (no existence of agreement by tenant reside in condemnable or uninhabitable premises, and such an agreement would be contrary to public policy and in violation of State law); *U and W, Inc. v. Grove*, No. UD-1950403505 (Minn. Dist. Ct. 4th Dist. Apr. 25, 1995) (Appendix 111) (provision stating tenant would provide all maintenance not enforced); *Phoenix Group, Inc. v. Phonseya*, No. UD-1951004508 (Minn. Dist. Ct. 4th Dist. Nov. 1, 1995) (Appendix 87) (illiterate and vulnerable adult who began paying full rent after stipulated rent abatement did not prove that repairs were completed); *Olson v. Brooks*, No. UD-1950209512 (Minn. Dist. Ct. 4th Dist. Mar. 7, 1995) (Appendix 112) (landlord failed to prove oral agreement for tenants to make repairs related to items listed by the housing inspector).

The landlord may not charge the tenant for service calls to maintain the property. *Meldahl and SJM Prop. v. _____*, No. 1050923509, Order on Referee Review at 21-22 (Minn. Dist. Ct. 4th Dist. Feb. 23, 2006) (Appendix 609) (judge reversed referee and ordered lease term requiring payment of $50 service call fee was illegal and unenforceable).

b. The plaintiff must prove that rent was not paid

Often the amount of rent withheld is not in dispute. If it is in dispute, the court should allow litigation of that issue before it determines whether withheld rent should be paid into court. However, as noted below, the court should only consider whether rent should be paid into court as it accrues, rather than back rent withheld. *See Kahn v. Greene*, No. UD-1940330506 (Minn. Dist. Ct. 4th Dist. May 25, 1994) (Appendix 46) (plaintiff alleged but did not prove part of plaintiff's nonpayment of rent claim); *See Z & S Management Company v. Jankowicz*, No. UD-1920219515 (Minn. Dist. Ct. 4th Dist. Mar. 24, 1992) (9.B) (plaintiff's alleged but did not prove nonpayment of January and February rent where plaintiff's complex manager had been warned about not promptly submitting rent payments to plaintiff after receiving them from tenants, and plaintiff later fired the manager).

c. The defendant must tender the rent to be withheld or provide adequate security

(1) *Fritz* factors

In *Fritz*, 298 Minn. at 61-62, 213 N.W.2d at 343, the court stated that the trial court shall order the defendant to provide security in one of three ways: (1) Pay into court "rent to be withheld" and "any future rent withheld," (2) Deposit such rents in escrow subject to appropriate terms and conditions, or (3) Provide adequate security if such is more suitable under the circumstances. The *Fritz* Court based the need for payment of rent or security on its concern that the plaintiff may need the rent to pay for expenses of the premises during the unlawful detainer action, and if the plaintiff prevails, the plaintiff would be harmed if the rent could not be collected and the action delayed eviction of the defendant. *Id.*

(2) The court should not require full payment of back rent into court

Most courts regularly require the defendants to pay into court back and future withheld rent, without consideration of the factors discussed in *Fritz* and the other methods of providing security outlined in *Fritz*.

On the other hand, some courts have not required defendants to pay back or future rent into court, without explanation. *See Kahn v. Foote*, No. UD-194041455503 (Minn. Dist. Ct. 4th Dist. May 6, 1994) (Appendix 47); *Erickson v. Foster*, No. UD-1871007506 (Minn. Dist. Ct. 4th Dist. Oct. 28, 1987) (Appendix 5.N).

The court should not require prepayment of back rent where the defendant withheld the rent but no longer has all of the money, the defendant has a claim that the covenants have been breached, and there will be little or no delay in proceeding to trial. In such cases, prepayment of back rent should not be required for five reasons.

(a) *Fritz does not explicitly require the defendant to post alleged back rent owed as a precondition to litigating the defense*

The court's discussion of the need to protect the plaintiff while the action is pending, and the use of the terms "rent to be withheld" and "any future rent" suggest that the court did not envision the posting of back rent. *See id.* Courts in other jurisdictions have concluded that requiring posting of back rent is inappropriate, since payment of future rent as it becomes due adequately protects the plaintiff while the action is pending. *Bell v. Tsintolas Realty Co.,* 430 F.2d 474, 483 (D.C. Cir. 1970). *See Cooks v. Fowler*, 459 F.2d 1269, 1274 (D.C. Cir. 1974); *Teller v. McCoy*, 162 W. Va. 367, ___, 253 S.E.2d 114, 129-30 (1978) (citing *Fritz* and other cases); *Medford v. Superior Court*, 140 Cal. Ct. App. 3d 236, 239-42, 189 Cal. Rptr. 227, 229-30 (1983). *See also Carlson v. Mixwell*, 412 N.W.2d 771, 772-73 (Minn. Ct. App. 1987) (contract for deed cancellation injunction bond).

(b) *Local rules similarly do not explicitly require the defendant to post alleged back rent owed as a precondition to litigating the defense*

Rule 608 provides that when a tenant withholds rent and relies on a defense, the defendant shall pay into court an amount "equal the rent due as the same *accrues* or such *other amount* as determined by the court to be *appropriate* as security for the plaintiff, given the circumstances of the case." (emphasis added). Again, the rule does not require payment of the back rent withheld. Indeed, Rule 608 is more flexible than in FOURTH JUD. DIST. SPEC. R. PRAC. 13.09, since it recognizes the court's discretion in determining what would be appropriate security for the plaintiff.

(c) *Requiring the posting of back rent may violate due process, since the opportunity to be heard includes the right to answer and defend*

Hovey v. Elliott, 167 U.S. 409, 415-17 (1897). *See Boddie v. Connecticut,* 401 U.S. 371, 377-83 (1971); *Griffin v. Illinois*, 351 U.S. 12, 17-18 (1956). Such a requirement also may violate equal protection. *Lindsey v. Normet,* 405 U.S. 56, 74-79 (1972).

(d) *Fritz allows for payment of adequate security where it is more suitable under the circumstances*

Such security could include where there is no delay, no payment, since there is no harm to the plaintiff, or where there may be some delay, partial payment (where the defendant has a strong claim of breach of the covenants) or documented eligibility for Emergency Assistance from the county or a private social service agency to pay any arrearage remaining after trial on breach of the covenants. Additionally, Rule 608 gives the court the discretion to consider these factors.

In *Granco Management v. Moore,* No. UD-1920727536 (Minn. Dist. Ct. 4th Dist. Aug. 15, 1992) (Appendix 5.Q), the referee ordered the tenant to deposit withheld rent into court, and allowing a writ of restitution to issue by default if she did not. The tenant requested judge review of the order. The court concluded that the tenant's affidavit and exhibits demonstrated the substantial likelihood of success on the merits of her defense under the covenants of habitability, the tenant was without funds and unable to make the payment ordered by the referee, and the tenant's lack of funds was in part a direct result of the floor of other circumstances which gave rise to her defense. The court concluded that no deposit was appropriate as security for the landlord, and ordered that the referee's order be vacated regarding the deposit with the court.

(e) *Requiring prepayment of back rent not only prejudices the defendant with a valid claim, but allows the landlord to evade forced compliance with the covenants*

The *Fritz* Court recognized the importance of facilitating enforcement of the covenants. *Id.* at 59-60, 213 N.W.2d at 342. The statute is to be liberally construed. Minn. Stat. § 504B.161 (formerly § 504.18), subd. 3. *See Bell*, 430 F.2d at 483.

(3) Decisions requiring less than full payment into court of back rent.

There have been many cases in which the courts have ordered a tenant to pay into court less than all of the rent withheld, and in some cases, no rent at all. In *Larson v. Cooper*, No. UD-1880209557 (Minn. Dist. Ct. Mar. 21, 1988) (Appendix 6), the plaintiff claimed $1,805.16 due, and the court allowed the defendant to assert the defense after depositing $1,405.16. Order at 6. In *Schwanke v. Magnuson*, No. CO-90-0640 (Minn. Dist. Ct. 8th Dist. Jan. 9, 1991) (Appendix 5.L), plaintiff alleged nonpayment of rent of $250.00 in monthly rent for December and January for a total of $500.00. The court allowed defendant to assert the habitability defense after paying $250.00 into court. After trial, the court concluded that plaintiff was entitled to $300.00 in rent, released the $250.00 to the plaintiff and ordered to pay the remaining $50.00.

Recent decisions include *Hanson v. Widmark,* No. UD-1960625508 (Minn. Dist. Ct. 4th Dist. Aug. 2, 1996) (Appendix 200) (complaint alleged May and June rent of $837.00; court allowed landlord to include claim from July rent, but ordered tenant to pay into court only $1000.00 of $1,570.00 due based upon tenant's showing that condition of the premises was more than likely a basis for rent abatement); *Donovic v. Dodson*, No. C2-96-600607 (Minn. Dist. Ct. 6th Dist. Apr. 29, 1996) (Appendix 201) (no rent paid into court); *Judnick v. Boje*, No. C7-96-600537 (Minn. Dist. Ct. 6th Dist. Apr. 19, 1996) (Appendix 202) (no rent paid into court); *Ellis v. McDaniel*, No. UD-1960318520 (Minn. Dist. Ct. 4th Dist. Apr. 4, 1996) (Appendix 203) (landlord alleged $735.00 rent due through March; tenants paid into court $840.00 for March and April rent, leaving $315.00 not paid into court).

Earlier decisions include *Jensen v. Scott*, No. UD-1950203531 (Minn. Dist. Ct. 4th Dist. Feb. 28, 1995) (Appendix 114) (50% of withheld rent paid in to court); *Schaapveld v. Crump*, No. UD-1951011528 (Minn. Dist. Ct. 4th Dist. Nov. __, 1995) (Appendix 115) (no rent paid into court, based on guarantees from agencies to pay into court $1,100.00 against $1,650.00 allegedly due); *Phoenix Group, Inc. v. Phonseya*, No. UD-1951004508 (Minn. Dist. Ct. 4th Dist. Nov. 1, 1995) (Appendix 87) ($162.50 (50%) of $325.00

withheld paid into court); *Klyberg v. Elkboy*, No. UD-1910617511 (Minn. Dist. Ct. 4th Dist. July 3, 1991) (Appendix 5.M) (defendant ordered to pay into court $300.00 of $350.00 withheld in June, and $450.00 for July).

(4) Condemned or condemnable housing

Where the premises have been condemned or are in condemnable condition, the defendant should be allowed to move for summary judgment without prepayment of back rent, since the value of the premises is $0.00. In *Brown v. Austin*, No. UD-1000203527 (Minn. Dist. Ct. 4th Dist. Feb. 16, 2000) (App. 382), the court first ruled that a post office box number is not a sufficient disclosure under § 504B.181. Since there was a dispute in fact over whether an actual street address had been provided, the case was scheduled for trial with disclosure being the first issue to be raised. Tr. at 3. The court then ruled that since the tenant's habitability defense was based on a notice of intent to condemn the property, the court would not require the tenant's to deposit any rent into court. *Id.* 5-8. In *Erickson v. Foster*, No. UD-1871007506 (Minn. Dist. Ct. 4th Dist. Oct. 28, 1987) (Appendix 5.N), the court did not require the defendant to pay withheld rent into court. The court found the apartment to be extensively dilapidated, noting that the housing inspector testified that he posted a notice on the premises that the apartment was subject to condemnation if it was not repaired immediately. The court ordered an entire abatement of past rent due, and ordered future abatement until plaintiff complied with the housing code and Minn. Stat. § 504.18 (now § 504B.161). *See Floy v. _____*, No. HC-010821507 (Minn. Dist Ct. 4th Dist. Sep. 13, 2001) (Appendix 499) (combined eviction and emergency relief action: dismissal of eviction breach claim since tenant actions did not violate the lease; dismissal of notice claim since notice was not attached to complaint and there was no evidence of when notice was given; tenant raising condemnation as a habitability defense did have to pay rent into court; landlord who rented out condemned property was liable for $1900 in rent and deposit paid plus $5700 additional treble damages, plus $500 in moving expenses, for $8100; deadlines for payment; expungement of eviction case); *Walters v. Demmings*, No. UD-1990916517 (Minn. Dist. Ct. 4th Dist. Oct. 21, 1999) (Appendix 422) (tenant in consolidated unlawful detainer and emergency relief actions not required to pay withheld rent into court where tenant alleged payment on utility bills for an illegal shared meter); *Swanson v. Ivie*, No. UD-1950411541 (Minn. Dist. Ct. 4th Dist. May 8, 1995) (Appendix 116) ($250.00 (25%) of $1,000.00 withheld paid into court where notice of condemnation issued).

(5) Disputed rent

Where the plaintiff and defendant disagree on how much rent was withheld, the court should not order the defendant to pay into court more than the tenant claims has been withheld. In *Z & S Management Company v. Jankowicz*, No. UD-1920219515 (Minn. Dist. Ct. 4th Dist. Mar. 24, 1992) (Appendix 9.B), plaintiff alleged nonpayment of $402.00 for December through February rent. Defendant argued that she owed only $137.00 through March. The court ordered defendant to pay into court $137.00. *See Kahn v. Greene*, No. UD-1940330506 (Minn. Dist. Ct. 4th Dist. May 25, 1994) (Appendix 46) (defendant not required to pay into court disputed rent claim from before March).

(6) Law firm and agency checks

The Fourth District (Hennepin County) Housing Court issued a May 15, 1996, Order approving acceptance of uncertified checks from Legal Aid and other law firms. The Housing Court retains discretion to decide whether to accept uncertified checks from social service agencies. It takes quite a bit longer for the Court to process and disperse uncertified funds, so if quick dispersal of funds is important to the tenant, the tenant or tenant's attorney should submit funds by certified check. (Appendix 174(A).

(7) Tenant's failure to comply with court's order to pay rent into court.

Generally, if the court orders the tenant to pay rent into court and the tenant does not, the court will allow the landlord to order a writ of restitution. *Swartwood v. Rouleau*, No. C8-98-1691 (Minn. Ct. App. May 11, 1998) (unpublished) (affirmed order for eviction for nonpayment of rent where tenants claimed habitability violations but did not pay rent into court).

However, in *Hanson v. Widmark,* No. UD-1960625508 (Minn. Dist. Ct. 4th Dist. Aug. 2, 1996) (Appendix 200), the complaint alleged May and June rent of $837.00. The court allowed landlord to include claim from July rent, but ordered tenant to pay into court only $1000.00 of $1,570.00 due based upon tenant's showing that condition of the premises was more than likely a basis for rent abatement. While the tenant did not deposit the money in the court authorized eviction, the court decided to determine rent abatement to avoid unnecessary duplication of litigation. In *Amsler v. Wright*, No. UD-1960502510 (Minn. Dist. Ct. 4th Dist. May 30, 1996) (Appendix 186), the court denied the landlord's objection to court receipt of tenant's rent three minutes late, and objection to the source of funds paid into court. *See Amsler v.* _____, No. 27-CV-HC-09-37 (Minn. Dist. Ct. 4th Dist. Jan 16, 2009) (Appendix 597) (reversing referee order for eviction) (tenant showed good cause for paying rent into court late, where tenant was unable to convert money orders into cash before the court's deadline).

(8) Appeal of decision ordering tenant to pay rent into court

If the tenant believes that the amount ordered is too high, the tenant could consider appealing to the Court of Appeals for a writ of prohibition, or if the decision was made by a housing court referee, requesting judge review of the decision. *See Granco Management v. Moore,* No. UD-1920727536 (Minn. Dist. Ct. 4th Dist. Aug. 15, 1992) (Appendix 5.Q) (judge review: court concluded that no deposit was appropriate as security for the landlord, and ordered that the referee's order be vacated regarding the deposit with the court); Writ of Prohibition, *infra* at XI.

(9) Guarantee of Payment

In some cases the court will accept a guarantee of payment of rent by an agency in lieu of payment of rent into court. *Larson v. Bonacci*, No. UD-970506542 (Minn. Dist. Ct. 4th Dist. Jun. 18, 1997) (Appendix 265) (Guarantee of payment from Economic Assistance Department); *Hemraj v. Hicks*, No. UD-1970306508 (Minn. Dist. Ct. 4th Dist. Apr. 8, 1997) (Appendix 259) (Trial scheduled for March 28, tenant paid half of rent into court and court accepted agency guarantee of payment of the remainder by April 10).

d. Evidence of violations

(1) Reasonable repair and code compliance covenants

Useful evidence includes reports and/or testimony of housing, health, fire, and energy inspectors, pictures, items from the premises, utilities and other bills, and lay witnesses.

Most large cities have housing maintenance and health codes. In such cities, tenants often will assert the covenants of habitability defense based on a breach of the codes. It is equally important to present evidence of the violations of the codes *and* the affect of those violations on the tenant. For instance, in two separate cases involving the same landlord and building but different tenants and apartments, the inspections reports listed the same violations of the code. However, apparently due to differences in the extent of the

code violations and the affect of the violations on the tenants use and enjoyment of the property, the rent abatements were different. *See Zeman v. Arnold*, No. UD-1900911501 (Minn. Dist. Ct. 4th Dist. Oct. 11, 1990) (Appendix 6.A); *Currington v. Zeman*, Nos. UD-1900910517 and UD-1900911502 (Minn. Dist. Ct. 4th Dist. Oct. 11, 1990) (Appendix 6.B).

In *City of Morris v. Sax Investments, Inc.*, 730 N.W.2d 531 (Minn. Ct. App. 2007), the Court of Appeals considered a challenge to a local habitability ordinance on the grounds that it was preempted by the state building code. The Court concluded that the state building code did not preempt local regulation of habitability. On appeal, the Minnesota Supreme Court held that the authority of municipalities to enact and enforce habitability standards for rental housing is constrained by the prohibition on municipal regulation of building code provisions in Minn. Stat. § 16B.62, subd. 1. *City of Morris v. Sax Investments, Inc.*, 749 N.W.2d 1, 3 (Minn. 2008).

A number of Minnesota trial courts have confronted the issue of what condition constitutes violations of the covenants *See Jafer Enterprises, Inc. v. Peters,* No. UD-1920701512 (Minn. Dist. Ct. 4th Dist. Aug. 10, 1992) (Appendix 5.P) (a defective stove for one month, roach and mice infestation, broken porch door lock, missing porch door screen, broken cold water faucet, trash in the basement, and missing storms and screens); *Z & S Management Company v. Jankowicz*, No. UD-1920219515 (Minn. Dist. Ct. 4th Dist. Mar. 24, 1992) (Appendix 9.B) (peeling lead paint); *Klyberg v. Elkboy*, No. UD-1910617511 (Minn. Dist. Ct. 4th Dist. July 3, 1991) (Appendix 5.M) (debris and junk, decayed cellar hatch, buckled floor, inoperable smoke detector, defective light switch, leaking faucets, inadequate toilet installation, roach infestation, water damage, unsecured counter top, floor holes, defective plaster, and lack of storms); *Schwanke v. Magnuson,* No. C0-90-0640 (Minn. Dist. Ct. 8th Dist. Jan. 9, 1991) (Appendix 5.L) (heater improperly vented, electrified refrigerator, unsafe electrical outlets, and unsafe bathroom floor); *Erickson v. Foster*, No. UD-1871007506 (Minn. Dist. Ct. 4th Dist. Oct. 28, 1987) (Appendix 5.N) (extensive dilapidation, holes and cracks in walls and ceilings, exposed pluming, defective light fixture, and cracked toilet seat).

In *Bebault v. Danko*, No. 742053 (Minn. Dist. Ct. 4th Dist. 1978) (Appendix 7) the court found that the tenant did not have an adequate supply of water in her apartment at any time during her tenancy. The court concluded that the landlord had violated the covenant to keep the premises in reasonable repair, in addition to violating the housing code. *Id.* at 6-8. In contrast, the court found that a deadbolt lock is an amenity rather than a factor affecting habitability, and that the lack of the deadbolt lock did not cause inconvenience or harm to the tenant. *Id*. at 7. However, deadbolt locks are required by codes in Minneapolis and other municipalities.

In *Krong v. Armogost*, No. 80-C-3958 (Minn. Dist. Ct. 3rd Dist. Aug. 14, 1986) (Appendix 7.A), tenants commenced a Tenants' Remedies Action claiming violations of the covenants. The court found that numerous violations of the housing code also constituted violations of the covenants to maintain the premises in reasonable repair and fit for the use intended by the parties. The violations included, among other violations, disrepair of ceilings, walls, windows, faucets, and appliances, and mildew on the walls. *Id*. at 2-3. In another Tenants' Remedies Action, the Dodge County Court found in *Hawkins v. McNeillus* numerous violations of the covenants to maintain the premises in reasonable repair and fit for the use intended by the parties, including water damage on ceiling, walls, and outlets; mold and mildew in sleeping areas; the lack of operable fire extinguishers and vent fans; and storage of flammable liquids. Nos. 2063, 2131 at 3-7 (May 3, 1984) (Appendix 7.B).

In *Gramith v. Thibodeau*, No. UD-1941223506 (Minn. Dist. Ct. 4th Dist. Jan. 13, 1995) (Appendix 100), the tenants failed to prove violation of the covenants of habitability and diminished use and enjoyment of the premises, where the items of disrepair were allegedly minor and the landlord corrected the problems.

See Wheeler v. _____, No. HC 030905517 (Minn. Dist Ct. 4th Dist. Oct. 3, 2003) (Appendix 594) ($1005 in late fees were excessive, tenant did not prove habitability violations, tenant may redeem).

Recent decisions include *Donovic v. Dodson*, No. C2-96-600607 (Minn. Dist. Ct. 6th Dist. Apr. 29, 1996) (Appendix 201) (landlord breached covenants of habitability by failing to ensure the unit had hot and cold water at all times, failing to install a deadbolt lock, failing to have an adequate heating system for all rooms of the house, and other code violations); *Judnick v. Boje*, No. C7-96-600537 (Minn. Dist. Ct. 6th Dist. Apr. 19, 1996) (Appendix 202) (two months where housing conditions were poor, the tenants replaced the stove, furnace (with a grant) and planned to replace the hot water heater).

In *Richter v. Czock*, No. C7-01-1340, 2002 WL 338181 (Minn. Ct. App. 2002) (unpublished), the court consolidated an eviction action based on holding over after notice with a rent escrow action. The court affirmed trial court rulings that the lease required a 45 day notice, that $100 per month rent abatement would cover only the period in which the landlord knew of the habitability issues, and that the landlord did not violate the privacy statute where the tenants were present when the landlord came, and the landlord claimed an emergency. The court also held that the trial court did not err in not admitted evidence when the *pro se* tenants did request admission. The court noted that since the tenant appealed from the rent escrow action judgment but not the separate eviction action judgment, it would not consider whether the notice was retaliatory.

(2) Fit for use intended covenant: other conditions and conduct problems

While most cases involve violations of the reasonable repair and code compliance covenants, it is possible to have a violation of only the "fit for intended use" covenant. For instance, if the parties agreed that the landlord would supply a room air conditioner for the apartment but then did not supply it, the lack of the air conditioner may violate the "fit for intended use" covenant without constituting disrepair or a code violation. In *Swartwood v. Gardner*, No. UD-1950929506 (Minn. Dist. Ct. 4th Dist. Oct. 20, 1995) (Appendix 113), the tenant did not prove that the landlord promised to provide her a stove and refrigerator. Other violations could include conduct issues, such as harassment or unannounced visits by the landlord, or failure of the landlord to control the conduct of other tenants. *See Person v. Torchwood Management*, No. UD-1920604543 (Minn. Dist. Ct. 4th Dist. July 6, 1992) (Appendix 205) (rent escrow action: landlord's failure to effectively abate loud and abusive language by neighboring tenants, noisy parties, and unjustified harassment by other tenants violated § 504.18 (now § 504B.161)); *Colonial Court Apartments, Inc. v. Kern*, 292 Minn. 533, 163 N.W.2d. 770 (1968) (damages action: affirmed trial court finding of constructive eviction for landlord's failure to respond to tenant's complaints about neighboring tenants); *Gittleman v. Klinkner*, No. UD-1970805900 (Minn. Dist. Ct. 4th Dist. Aug. 29, 1997) (TR Appendix 151) (Rent abatement of $300 (18%) for problems with the size of the air conditioner, plumbing, and other repairs where landlord promptly responded to some repair needs but slowly to others; landlord ordered to provide properly-sized air conditioner). *But see O'Connor v. Miller*, UD-194-0211505 (Minn. Dist. Ct. 4th Dist. Mar. 24, 1994) (Appendix 178) (improper citizen arrest did not support rent abatement).

(3) Housing code violations not concerning housing condition

While most housing code cases deal with the physical condition of housing, the housing code covenant is not limited to repair cases. Issues of the landlord-tenant relationship governed by local housing maintenance, health, and safety laws also should be open for litigation, if the landlord does not maintain the premises in compliance with them. For instance, the Minneapolis Code of Ordinances Housing Maintenance Code (Appendix 138)

(a) requires the landlord to give the tenant a copy of the lease within five days after it is signed by both parties, § 244.280,

(b) requires the landlord to make good faith and reasonable effort to notify the tenant before entering the unit, § 244.285,

(c) prohibits termination of the tenancy because of housing repair litigation by the tenant or City or tenant complaint about housing conditions, § 244.80, and

(d) requires the landlord to take appropriate action to deal with disorderly activity by tenants and/or guests on the premises. § 244.2020 (Appendix 128).

Counsel should seek rent abatement when the landlord does not maintain the premises in compliance with such code requirements.

(4) Disrepair caused by acts of nature or third parties

Section 504B.131 (formerly § 504.05) provides that where the property is "destroyed or is so injured by the elements or any other cause as to be untenantable or unfit for occupancy, [the tenant] is not liable thereafter to pay rent ...." The statute generally served as the basis for constructive eviction. In *Ellis v. McDaniel*, No. UD-1960318520 (Minn. Dist. Ct. 4th Dist. Apr. 4, 1996) (Appendix 203), the court held that the tenant was not liable for rent where apartment is made uninhabitable due to actions of a third party and through no fault or negligence of the landlord or tenant, under Sections 504.05 (now § 504B.131) and 504.18 (now § 504B.161).

(5) Court inspection of the property

It is not uncommon for courts to take a first hand view of the property. In *Scroggins v. Solchaga,* 552 N.W.2d 248, 252 (Minn. Ct. App. 1996), the court noted that the district court may inspect the property, as long as it does not gather its own evidence.

(6) Trial court discretion

In *Wardin v. Maski*, No. C4-97-2245 (Minn. Ct. App. Aug. 18, 1998) (Appendix 371) (Unpublished), the court noted that on appeal trial court findings on habitability will be upheld unless clearly erroneous. The court affirmed trial court findings of the uninhabitability of a basement bedroom and the number of habitable units as not being clearly erroneous. The trial court also has considerable discretion in evidentiary rulings relating to habitability. In *Wardin*, the Court affirmed trial court evidentiary rulings as not constituting an abuse of discretion, where the trial court admitted photographs of conditions taken by a prior tenant but supported by the current tenant's testimony that the photographs accurately depicted the condition when the tenant moved into the property.

(7) Use of inspection reports

Landlords and tenants often submit public documents to support their cases, such as landlords submitting police reports in breach cases, and tenants submitting inspection reports in habitability cases. While both documents probably comply with the public records exception to the hearsay rule in Minn. R.

Evid. 803(8), they still must be authenticated or be self-authenticating under Rules 901 and 902. *State v. Northway*, 588 N.W.2d 180 (Minn. Ct. App. 1999) (affirmed trial court exclusion of federal report which was not authenticated).

Hearsay statements within the report should be excluded unless they meet an exception to the hearsay rule. *Countryview Mobile Home Park v. Oliveras*, No. A04-160, 2004 WL 20049986 (Minn. Ct. App. Sept. 14, 2004) (unpublished) (affirmed from district court ruling sustaining objection to police report containing observations of officers who were not present in court); *Minneapolis Public Housing Authority v. _____*, No. HC 10306313566 (Minn. Dist Ct. 4th Dist. July 31, 2003) (Appendix 539) (Judge Doty) (landlord's knowledge of alleged altercation was from a police report whose authors did not testify, and did not connect tenant to the incident).

A housing inspection under city ordinance without tenant consent conducted pursuant to a valid administrative search warrant was not unconstitutional. *Cardinal Estates, Inc. v. the City of Morris*, No. CX-02-1505, 2003 WL 1875487 (Minn. Ct. App. April 15, 2003) (unpublished).

(8) Lead paint

Federal law requires owners of most pre-1978 rental property to disclose known information about lead based paint and hazzards, with penalties of up to $11,000 per violation and treble damages for willful violations. 24 C.F.R. Part 35, § 30.65; 40 C.F.R. Part 745. *See* D. Ryan and R. Scott, *New environmental Sampling and Right-to Know Strategies for Housing and Tenants' Rights Advocates*, CLEARINGHOUSE REVIEW at 447 (Nov.-Dec. 2001).

(9) Lay testimony

Tenants and other lay witnesses have the right to testify about their observations of habitability problems. In *Stewart v. Anderson*, No. A06-1878, 2007 WL 2366528 (Minn. Ct. App. Aug. 21, 2007) (unpublished), the landlord filed a combination eviction action and conciliation court action in housing court, and the tenant answered alleging habitability. At trial, the tenant attempted to testify about her observations about how her dryer worked, and rodent infestation. The housing court referee did not accept her testimony, since she was not an expert in dryer repair or pest control. After the referee ruled for the landlord, the tenant sought review by a district court judge. The district court reversed the referee and awarded rent abatement, finding that the referee erred by requiring expert testimony for lay testimony. On appeal, the Court of Appeals held that the district court correctly found that the referee had erred.

e. Is notice of violations required?

The tenant need *not* prove notice of violations of the covenants that existed at the *beginning* of the tenancy. *See Bebault v. Danko*, No. 742053 at 8 (Minn. Dist. Ct. 4th Dist. 1978) (three judge appellate panel) (landlord "must be held to know the conditions of the premises [the landlord] offers for rent") (Appendix 7). *See also* R. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT, § 3:24 at 141 n.20 (Bancroft-Whitney 1980 and Supp. 2008); 51C C.J.S., *Landlord and Tenant*, § 371 (1968), cited in *Bebault* at 8.

There is disagreement over whether the landlord must receive notice of violations of the covenants which arise after commencement of the tenancy. Section 504B.161 (formerly § 504.18) does not discuss notice, and there are no Minnesota Appellate cases on point.

Landlords may argue that the lack of notice would be a bar to recovery where the defective condition arose during the tenancy or where the parties' lease contained a term requiring the tenant to give the landlord notice of repair problems. In *Mease v. Fox*, the Iowa Supreme Court reasoned that "since the basic contract remedies are available to tenant, the basic contract duties are imposed upon them. The tenant is under an obligation to give landlord notice of a deficiency or defect not known to the latter." 200 N.W.2d 791, 797 (1972).

Tenants should argue that the tenant is not required to notify the landlord of defective conditions. The statute contains no notice requirement. In *Bebault*, the court noted that "[a]rguably, requiring that notice of a breach of warranty be given to the landlord runs contrary to the clearly articulated legislatively purpose to thwart some measure of protection to tenants." No. 742053 at 7. *See Meldahl and SJM Prop. v. _____*, No. 1050923509, Order on Referee Review at 21-22 (Minn. Dist. Ct. 4th Dist. Feb. 23, 2006) (Appendix 609) (judge reversed referee and ordered that tenant need not give written notice to the landlord of violations of covenants of habitability, regardless of provisions in the written lease); *Gerald Snyder Rental Associates v. Bello*, No. UD-1950117553 (Minn. Dist. Ct. 4th Dist. Mar. 15, 1995) (Appendix 118) (on Judge review of referee's decision, tenant need not give written notice to the landlord of violations of covenants of habitability, regardless of provisions in the written lease); *McNair v. Doub*, No. UD-1960708524 (Minn. Dist. Ct. 4th Dist. Aug.12, 1996) (Appendix 205) (lease did not require tenant who gave oral notice of disrepair to give written notice).

In *George Washington University v. Weintraub*, the District Columbia Court of Appeals held that actual notice need not be given if the landlord, in exercise of reasonable care, would have become aware of the defective condition. 458 A.2d 43, 48-49 (1983). (Appendix 7.C) Until recently, in tort cases based upon a violation of the covenants of habitability, the courts considered whether the landlord knew or should have known of the danger on the property. A landlord who violated the covenants had a duty to warn the tenant of the defective condition of the property if the landlord knew or should have known of the danger, and if the tenant would not discover it by exercising due care. *See Oakland v. Stunlund*, 420 N.W.2d 248, 252 (Minn. Ct. App. 1988); *Broughton v. Maes*, 378 N.W.2d 134, 135-37 (Minn. Ct. App. 1985); *Hanson v. Rowe*, 373 N.W.2d 366, 370 (Minn. Ct. App. 1985); *Meyer v. Parkin*, 350 N.W.2d 435, 437-39 (Minn. Ct. App. 1984). However, *Bills v. Willow Run I Apartments*, 534 N.W.2d 286 (Minn. Ct. App. 1995), the court held that a violation of the Uniform Building Code in leased premises is negligence *per se* when the violation harms tenants and that harm is the type which the building code was intended to prevent.

The requirement for tenant remedies and rent escrow actions that the landlord receives notice of repair problems either from a tenant or a housing inspector do not apply to unlawful detainer actions. *Larson v. Bonacci*, No. UD-970506542 (Minn. Dist. Ct. 4th Dist. Jun. 18, 1997) (Appendix 265).

f. Landlord defenses

The landlord may defend against the alleged violation of the covenants by proving that the housing was fit for the use intended, in reasonable repair, and in compliance with the code, or by showing that any disrepair or code violation was caused by the willful, malicious, or irresponsible conduct of the tenant or tenant's agent. Minn. Stat. § 504B.161 (formerly § 504.18), subd. 1. However, the landlord would be responsible for violations of the covenants that result from acts of nature or third parties who are not guests, agents or family members of the tenant. While a lease provision stating that the landlord is not liable for damage caused to the tenant's property, may be enforceable, such a provision does not limit the landlord's liability under § 504B.161 (formerly § 504.18).

The landlord also may argue that the tenant agreed in writing to perform specified repairs or maintenance, if the agreement is supported by adequate consideration and set forth in a conspicuous writing. However, such an agreement may not waive the covenants or relieve the landlord of the duty to maintain common areas of the premises. § 504B.161 (formerly § 504.18), subdivision 2. *See Jafer Enterprises, Inc. v. Peters,* No. UD-1920701512 (Minn. Dist. Ct. 4th Dist. Aug. 11, 1992) (Appendix 5.P) (rejection of defense that negotiated rent reduction precluded further rent abatement). In *Wardin v. Maski*, No. C4-97-2245 (Minn. Ct. App. Aug. 18, 1998) (Appendix 371) (Unpublished), the Court affirmed the trial court's finding that a lease provision requiring the tenants to maintain mechanical systems violated Minn. Stat. § 504.18 (now § 504B.161), where the provision was not specific, was not set forth in a conspicuous writing, and was not supported by consideration. *See* discussion, *supra*, VI.E.1.a.

A landlord may argue that the landlord took reasonable steps to deal with the repair problems. While the landlord's reasonable efforts to deal with repair problems would be commendable, they do not change the fact that the repair problems existed in the first place, and that the tenant had to live with them. The landlord's efforts may somewhat mitigate rent abatement, but should not eliminate it. *See Uni-B-Partnership v. Mahto*, No. UD-1970515516 (Minn. Dist. Ct. 4th Dist. Jul. 1, 1997) (Appendix 301) (Landlord took reasonable steps to eliminate infestation problems: rent abatement of $250 (11%) over three months); *Ramdin v. Ali*, Nos. UD-1981001900 (Minn. Dist. Ct. 4th Dist. Oct. 27, 1998) (Appendix 360).

While landlords often allege that the tenant caused the disrepair, few decisions have found that the disrepair was caused by willful, malicious or irresponsible conduct of the tenant or tenant's agent. *Rogers v. Stewart*, No. UD-1961029511 (Minn. Dist. Ct. 4th Dist. Jan. 6, 1997) (Appendix 290) (Tenant, family and guests intentionally or negligently caused damage beyond normal wear and tear of a large family).

To the contrary, courts often find that the tenant's conduct to fall below this high standard. In *Genie Management Co. v. Wilson*, No. UD-1980707541 (Minn. Dist. Ct. 4th Dist. Jul. 29, 1998) (Appendix 334), the court found that the tenant and her guest inhibited but did not prevent the landlord from making repairs, noting that the tenant requested that the landlord work on the property only when she was present, and that her friend created a hostile environment for the landlord when he made repairs. The court still awarded rent abatement, but ordered that the tenant fully cooperate with the landlord in making repairs, including controlling the behavior of her guest, noting that failure to do so could result in a reduction of rent abatement in future months.

Recent decisions include *Judge v. Rio Hot Properties, Inc.*, No. UD-1981202903 (Minn. Dist. Ct. 4th Dist. July 7, 1999) (Appendix 401) (tenants proved landlord breach of covenants of habitability, while landlord failed to prove tenant negligence or commission in damage, or that tenants unreasonably denied access to the landlord); *Lynch v. Hart*, No. UD-1960610529 (Minn. Dist. Ct. 4th Dist. Jun. 27, 1996) (Appendix 185);*Overstreet v. Jackson*, No. UD-1960520509 (Minn. Dist. Ct. 4th Dist. Jun. 17, 1996) (Appendix 206); *Ellis v. McDaniel*, No. UD-1960318520 (Minn. Dist. Ct. 4th Dist. Apr. 4, 1996) (Appendix 203); *Brook v. Boyd*, No. C8-96-47 (Minn. Dist. Ct. 9th Dist. Feb. 13, 1996) (Appendix 207). *See Hirani v. Neu*, No. UD-1960522506 (Minn. Dist. Ct. 4th Dist. Jun. 17, 1996) (Appendix 208) (rent abatement awarded even though tenant contributed to, but did not cause some repair needs). *But see Scroggins v. Solchaga,* 552 N.W.2d 248, 252 (Minn. Ct. App. 1996) (Court of Appeals held that § 566.25 (now § 504B.425) (the tenant remedies relief section) gave the district court discretion to not award rent abatement, noting that the tenant may have caused some of the properties' problems).

Earlier decisions include *Richard v. Mix*, No. UD-1950424510 (Minn. Dist. Ct. 4th Dist. May 3, 1995) (Appendix 118) (landlord failed to prove that hazardous plumbing and lack of maintenance were caused by alleged lack of cooperation or negligent or intentional acts by the tenant); *Kahn v. Greene*, No.

UD-1940330506 at 5 (Minn. Dist. Ct. 4th Dist. May 25, 1994) (Appendix 46) (no convincing evidence that violations or damage were result of defendants' conduct or behavior); *Buckeye Realty Co. v. Elias*, No. CX-91-0697 at 4-5, 9 (Minn. Dist. Ct. 10th Dist. Aug. 6, 1991) (Appendix 15.E) (plaintiff made no showing that damage caused by grease fire in defendant's town home was due to willful, malicious, or irresponsible conduct of defendants); *Bebault v. Danko*, No. 742053 at 6-7 (Minn. Dist. Ct. 4th Dist. 1978) (Appendix 7); *Zeman v. Arnold*, No. UD-1900911501 at 2, (Minn. Dist. Ct. 4th Dist. Oct. 11, 1990) (Appendix 6.A); *Tyus v. Minneapolis Public Housing Authority*, No. UD-1900502523 at 4 (Minn. Dist. Ct. 4th Dist. July 11, 1990) (Appendix 9.A). *U and W, Inc. v. Grow*, No. UD-19504103505 (Minn. Dist. Ct. 4th Dist. Apr. 25, 1995) (Appendix 111); *Hendersen v. Schaapveld*, No. UD-1950127501 (Minn. Dist. Ct. 4th Dist. Mar. 10, 1995) (Appendix 119); *Apple Square, Inc. v. Muldrow*, No. UD-1950213547 (Minn. Dist. Ct. 4th Dist. Mar. 2, 1995) (Appendix 120); *Jensen v. Scott*, No. UD-1950203531 (Minn. Dist. Ct. 4th Dist. Feb. 28, 1995) (Appendix 114).

g. Measure of damages

(1) Pre-Covenants of Habitability and *Fritz*

Before enactment of the covenants of habitability and the *Fritz* Court's interpretation of the covenants, the courts applied a "rental value" approach to measuring damages resulting from violations of express covenants to repair in leases. The measure of damages was the difference between the rental value of the premises in their present condition and their value in the condition required by the covenants. *See Geo. Benz & Sons v. Massie*, 208 Minn. 118, 126, 293 N.W. 133, 137 (1940); *Theopold v. Curtsinger*, 170 Minn. 105, 109, 212 N.W. 18, 20 (1927); *Warren v. Hodges*, 137 Minn. 389, 390, 163 N.W. 739 (1917). There is disagreement over what constitutes market value. Landlords may argue that market value may be the rent agreed upon by the parties. However, this may not be appropriate in cases where the rent charged is, due to the condition of the building, below the market value of comparably sized units in the same community that are in compliance with the covenants. Tenants should argue that the rent agreed to by the parties was the market value of the premises in compliance with the covenants, under ordinary circumstances. See Theopold, 170 Minn. at 109, 212 N.W. at 20. Tenants also argue that the landlord's argument goes against the prohibition on waiver of the covenants and the provision that the covenants be liberally construed. § 504B.161 (formerly § 504.18), subds. 1, 2, 3.

(2) Post-Covenants of Habitability and *Fritz*

Neither § 504B.161 (formerly § 504.18) nor the Minnesota Appellate Courts have clearly stated what standard should be used to measure damages for violation of the covenants of habitability. Tenants should argue that the "percentage reduction in the use and enjoyment" formula is most appropriate. Under this formula, the rent is abated by a percentage amount equal to the percentage reduction in the use and enjoyment which the trier of fact determines to have been caused by the defects. Because of the cost and impracticability of using expert testimony to establish rental value in a habitability case, this measure appears to be the one most commonly adopted in cases which have actually set damages. R. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT, § 3:25 at 143 (1980), at 73 (Supp. 1990).

This standard also is consistent with the covenants of habitability. "The parties to a lease or license of residential premises may not waive or modify the covenants. . ." § 504B.161 (formerly § 504.18), subd. 1. In *Fritz*, the Minnesota Supreme Court stated that "the rent or at least part of it, is not due under the terms of the lease when the landlord has breached the statutory covenants." 298 Minn. at __, 213 N.W.2d at 342. The Tenants' Remedies Act incorporates this standard by authorizing the court to "find the extent to which

any uncorrected violations *impair the tenant's use and enjoyment of the premises contracted for* and order the rent abated accordingly." Minn. Stat. § 504B.425 (formerly § 566.25) (emphasis added).

To the contrary, applying the pre-Section 504B.161 (formerly § 504.18) and *Fritz* standard of measuring damages based on the difference between the rental value of the premises in their present condition and the rental value of the premises in the condition required by the covenants, could lead to a minimal rent abatement or no abatement at all in substandard property rented at a low rent. *See* R. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT, § 3:25 (Bancroft-Whitney 1980 and Supp. 2008); *Cezares v. Ortiz*, 109 Cal. Appendix 3rd Supp. 23, _168 Cal. Rptr. 108, 110-13 (1980); *McKenna v. Begin*, 362 N.E.2d 548, 552-53 (Mass. Ct. App. 1977).

Minnesota trial courts also have applied the reduced use and enjoyment standard in summary proceedings such as eviction (unlawful detainer) and tenants' remedies actions. In *Zeman v. Arnold*, No. UD-1900911501 (Minn. Dist. Ct. 4th Dist. Oct. 11, 1990) (Appendix 6.A), the court expressly applied the standard, finding that "[t]he condition of the premises has reduced the tenants use and enjoyment of the property." *Id*. at 2. In *Z & S Management Company v. Jankowicz,* No. UD-1920219515 at 9-10 (Minn. Dist. Ct. 4th Dist. Mar. 24, 1992) (Appendix 9.B), the court again expressly applied the "tenants use and enjoyment of the property" standard. *See Kahn v. Greene*, No. UD-1940330506 at 5 (Minn. Dist. Ct. 4th Dist. May 25, 1994) (Appendix 46); *Kahn v. Foote*, No. UD-1940414503 at 4 (Minn. Dist. Ct. 4th Dist. May 6, 1994) (Appendix 47). *See generally* Appendices 110-120.

In *Larson v. Cooper*, the 4th District Court found that the basement rooms in a house were not habitable. The rooms constituted one-half of the total floor space of the rental unit, and one-fourth of the total rooms. The court ordered an abatement of $175 per month from a total rent of $675 per month, or a 26% abatement. No. UD-1880209557 (March 21, 1988) (Appendix 6). In *Hawkins v. McNeillus*, the Dodge County Court found violations of the covenants including water damage on ceilings, walls, and outlets; mold and mildew in sleeping areas, lack of operable fire extinguishers and vent fans; and storage of flammable liquids. The court ordered an abatement from 25 to 50% of the net rent received. Nos. 2063 and 2131 at 8-9 (Appendix 7.B).

In _____ *v. Gustafson*, No. 030220564 (Minn. Dist Ct. 4th Dist. Apr. 14, 2003) (Appendix 440), in a rent escrow action, the court ordered complete rent abatement for numerous housing code violations, partial rent abatement following substantial but not complete compliance by landlord.

It is not uncommon to have rent abatements in the range of 25 to 50 percent. Recent rent abatement decisions, in declining order of percentage rent abatement, include *Zeman v.* _____, No. HC 031002500 (Minn. Dist Ct. 4th Dist. Nov. 3, 2003) (Appendix 595) (50% rent abatement, retaliation defenses to not apply in nonpayment of rent case); *Washington v. Okoiye* and *Okoiye v. Washington*, No. UD-1981029901 (Minn. Ct. Dist. June 15, 1999) (Appendix 423) (rent abatement increase to $300 from $650 (46 %)); Washington Rent Abatement Table (Appendix 427); *Walters v. Demmings*, No. UD-1990916517 (Minn. Dist. Ct. 4th Dist. Nov. 15, 1999) (Appendix 422) (rent abatement at $200 a month from $480 per month rent (42%)); *Smith v. Brinkman* and *Brinkman v. Smith*, Nos. HC-1000124900 and HC-1000202517 (Minn. Dist. Ct. 4th Dist. Mar. 9, 2000) (Appendix 418) (rent abatement of $800 over four months (38%)); *Wilson v. Lowe*, No. UD-1991123901 (Minn. Dist. Ct. 4th Dist. Jan. 14, 2000) (Appendix 429) (Rent escrow action: tenant awarded treble what she paid on shared electrical meter covering basement and common areas in addition to her unit, and rent abatement of $2,600 over eight months (37%)); *Leshoure v. O'Brian*, No. UD-01000303900 (Minn. Dist. Ct. 4th Dist. May 17, 2000)(Appendix 403) (rent escrow action: monthly rent abatement of $300 out of $850 (35%) for $3,600 over one year); *Coleman v. Kopet*, No. UD-1000211534

(Minn. Dist. Ct. 4th Dist. Mar. 8, 2000) (Appendix 385) (rent abatement of $2,925 over ten months (32%) covered by rent paid into court and credits against future rent).[5]

---

[5]Earlier decisions include *Rio Hot Properties, Inc. v. Judge*, No. UD-1981005518 (Minn. Dist. Ct. 4th Dist. Oct. 29, 1998) (Appendix 362B) (50% rent abatement); *Sternfels & Co., Inc. v. Thomas*, No. C8-97-2376 (Minn. Ct. App. Nov. 10, 1998) (Appendix 366) (Unpublished: the trial awarded rent abatement of $400.00 against three months' rent of $1,050.00 (38%); Court of Appeals concluded that there was sufficient evidence to support the finding of a partial rent abatement, where the tenant was not forced to move, and where the tenant did not cooperate with the landlord in its efforts to address the problems); *Dunger v. Markowitz*, No: UD-1971224504 (Minn. Dist. Ct. 4th Dist. Jan. 23, 1998) (Appendix 326A) (Monthly rent abatement of $60 out of $217, or 28%); *Moore v. Shelly*, No. UD-1980619500 (Minn. Dist. Ct. 4th Dist. Jul. 8, 1998) (Appendix 351) (Monthly rent abatement of $100 out of $550, or 18%); *Okoye v. Washington*, No. UD-1980909564 (Minn. Dist. Ct. 4th Dist. Oct. 2, 1998) (Appendix 354A) (Rent abatement of $100 out of $650 rent, or 15%); *Wardin v. Maski*, No. C4-97-2245 (Minn. Ct. App. Aug. 18, 1998) (Appendix 371) (Unpublished: affirmed the trial court's award of a 1/7 or 14% rent abatement where the property contained six rather than seven habitable bedrooms, noting that courts have broad discretion in fashioning remedies); *Grider v. Hardin*, No. UD-1980501520 (Minn. Dist. Ct. 4th Dist. May 19, 1998) (Appendix 335) (Monthly rent abatement of $50 out of $500, or 10%).

Larson v. Anderson, No. C9-96-416 (Minn. Dist. Ct. 9th Dist. Oct. 11 and Nov. 8, 1996) (Appendix 264) (Rent abatement of $6,910 *(100%)* over five years failing to repair discharge of raw sewage on the premises; landlord's notice to quit was in retaliation for tenant's complaint to health department); *Cedar Associates LLP v. Curtis*, No. UD-1970108508 (Minn. Dist. Ct. 4th Dist. May 20, 1997) (Appendix 250) (Rent abatement of $2,350 *(75%)* over seven months for problems with heat, insulation, plumbing, security, appliances, smoke detector, infestation, floors, and electrical, where the landlord kept poor records and failed to begin repairs promptly); *Barger v. Behler*, No. UD-1970116527 (Minn. Dist. Ct. 4th Dist. Jan. 30, 1997) (Appendix 248) (Rent abatement of $600 *(50%)* over two months for extensive soot from fireplace malfunction); *Hemraj v. Hicks*, No. UD-1970306508 (Minn. Dist. Ct. 4th Dist. Apr. 8, 1997) (Appendix 259) (No rent abatement for snow shoveling; monthly rent abatement of $133 *(30%)* for lack of a functioning refrigerator and plumbing defects); *Larson v. Bonacci*, No. UD-970506542 (Minn. Dist. Ct. 4th Dist. Jun. 18, 1997) (Appendix 265) (Rent abatement of $600 *(18%)* over six months for weatherization and electrical problems); *Uni-B-Partnership v. Mahto*, No. UD-1970515516 (Minn. Dist. Ct. 4th Dist. Jul. 1, 1997) (Appendix 301) (Landlord took reasonable steps to eliminate infestation problems: rent abatement of $250 *(11%)* over three months); *Rogers v. Stewart*, No. UD-1961029511 (Minn. Dist. Ct. 4th Dist. Jan. 6, 1997) (Appendix 290) (*No* rent abatement where tenant, family or guests intentionally or negligently damaged their apartment); *McNair v. Doub*, No. UD-1960708524 (Minn. Dist. Ct. 4th Dist. Aug.12, 1996) (Appendix 205) (monthly rent abatement of $150.00 out of $900.00 rent; no present rent abatement because repairs completed); *Donovic v. Dodson*, No. C2-96-600607 (Minn. Dist. Ct. 6th Dist. Apr. 29, 1996) (Appendix 201) (landlord breached covenants of habitability by failing to ensure the unit had hot and cold water at all times, failing to install a deadbolt lock, failing to have an adequate heating system for all rooms of the house, and other code violations; rent abatement of $120.00 out of rent of $380.00 per month for four months); *Judnick v. Boje*, No. C7-96-600537 (Minn. Dist. Ct. 6th Dist. Apr. 19, 1996) (Appendix 202) ($560.00 rent abatement over two months where housing conditions were poor, the tenants replaced the stove, furnace (with a grant) and planned to replace the hot water heater); *Brook v. Boyd*, No. C8-96-47 (Minn. Dist. Ct. 9th Dist. Feb. 13, 1996) (Appendix 207) (consolidated unlawful detainer and rent escrow actions; monthly rent abatement of $100.00 out of $320.00 rent).

Kahn v. Greene, No. UD-1940330506 (Minn. Dist. Ct. 4th Dist. May 25, 1994) (Appendix 46) (retroactive monthly rent abatement of $300 (43%) and prospective monthly rent abatement of $150 (21%)); *Kahn v. Foote*, No. UD-1940414503 (Minn. Dist. Ct. 4th Dist. May 6, 1994) (Appendix 47) (monthly rent abatement of $200

Even a lower percentage rent abatement can add up over a number of months. _____ *v. Brogdon Properties, Inc.*, No. HC 030904900 (Minn. Dist Ct. 4th Dist. Sep. 17, 2003) (Appendix 435) (rent escrow action: complete rent abatement for lack of licensing, judgment of $2500); *Walters v.* _____, No. HC 10101004526 (Minn. Dist Ct. 4th Dist. Oct. 26, 2001) (Appendix 593) (landlord responsible for shared meter bills, and liable for treble damages or $500 to be credited against rent; tenant payment on bill deemed payment of rent; tenant entitled to costs and disbursements from successful Court of Appeal case; habitability rent abatement of $150-175 per month; leave to file motion for attorney's fees; $3818 disbursed from court to tenant); *Wood v. O'Brien*, No. UD-1970203900 (Minn. Dist. Ct. 4th Dist. Apr. 29, 1997) (Appendix TR 165) (Rent escrow action: $1,250 (25%) rent abatement over nine months for foundation, electrical, plumbing, heating, and basement drainage problems).

The only decisions apparently adopting a market value analyses were decisions in which the trial court concluded that condemned properties had no market value and therefore no rent was due. *See Hamre v. Wu*, No. 797483 at 7 (Minn. Dist. Ct. 4th Dist. Jan. 26, 1983) (Appendix 8); *Zeman v. Smith*, Nos. UD-1840605512 and UD-1840605520 at 9 (Henn. Cty. Mun. Ct. July 11, 1984) (Appendix 9). Indeed, in cases where the property has been condemned, the tenant may prefer to assert a market value analysis, since it leads to a result where the property has no market value and therefore no rent is due. An analysis under the percentage reduction in use and enjoyment standard could lead to the result where the condemned property had some use, and therefore some rent was due.

(3) Condemned or condemnable housing

Where the premises have been condemned as uninhabitable or are condemnable, the present value is $0.00 and no rent is due to the landlord. *See Hamre v. Wu*, No. 797483 at 7 (Minn. Dist. Ct. 4th Dist. Jan.

(38%)); *Brown v. Owens*, No. UD-1940726506 (Minn. Dist. Ct. 4th Dist. Aug. 18, 1994) (Appendix 48) (monthly rent abatement of $100 (20%)); *Jensen v. Bosto*, No. UD-1931203513 (Minn. Dist. Ct. 4th Dist. Dec. 17, 1993) (Appendix 74) (monthly rent abatement ranging from $200 to $350 (33-58%); *Almen v. Meadors*, No. UD-1921118525 (Minn. Dist. Ct. 4th Dist. Dec. __, 1992) (Appendix 75) (monthly rent abatement of $635 (100%); *Jafer Enterprises, Inc. v. Peters,* No. UD-1920701512 (Minn. Dist. Ct. 4th Dist. Aug. 10, 1992) (Appendix 5.P) (after negotiated rent reduction from $450.00 to $400.00 with tenant agreeing to make repairs, further abatement of $100.00 per month); *Klyberg v. Elkboy,* No. UD-1910617511 (Minn. Dist. Ct. 4th Dist. July 3, 1991) (Appendix 5.M) (rent abated 50% per month from $450.00 to $225.00); *Schwanke v. Magnuson*, No. C0-90-0640 (Minn. Dist. Ct. 8th Dist. Jan. 9, 1991) (Appendix 5.L) (Abatement of $100.00 from $250.00 to $150.00); *Century Apartments, Inc. v. Yalkowsky,* 106 Misc.2d 762, ___, 435 N.Y.S.2d 627, 629-30 (New York City Civ. Ct. 1980) (Appendix 7.A) (review of numerous percentage rent abatement awards); *Veres v. Warren*, No. UD-81253, (Henn. Cty. Mun. Ct. June 24, 1977) (Appendix 11).

None of these decisions discuss market value. In 1995, there were many decision awarding a wide range of rent abatement. *See generally* Appendices ___. Substantial rent abatements were awarded in *Lewis Properties v. Pruitt*, No. UD-1950315516 (Minn. Dist. Ct. 4th Dist. Sept. 22, 1995) (Appendix 92) (rent abatement of $1,338.00 (49%) of $2,738.00 rent); *Greevers v. Greevers*, No. UD-1950628506 (Minn. Dist. Ct. 4th Dist. July 24, 1995) (Appendix 110) (rent abatement of $1,000.00 (71%) of $1,400.00 rent); *Gerald V. Snyder Rental Associates v. Bello*, No. UD-1950117553 (Minn. Dist. Ct. 4th Dist. Feb. 6, 1995) (Appendix 121), *affirmed on Judge review*. (Mar. 15, 1995) (Appendix 117) (rent abatement of $750.00 (43%) of $1,750.00 rent); *Lehikoinen v. Salinas*, No. C3-95-60158 (Minn. Dist. Ct. 6th Dist. July 11, 1995) (Appendix 122) (itemized rent abatement of $495.00 (58%) of $850.00 rent); *LeDoux v. Zanosko*, No. CX-95-1001 (Minn. Dist. Ct. 9th Dist. Oct. 16, 1995) (Appendix 124) (monthly rent abatement of $395.00 (100%) where landlord refused to restore tenants propane supply for heat).

26, 1983) (three judge appellate panel) (Appendix 8). *See also Zeman v. Smith*, Nos. UD-1840504512, UD-1840605520 at 5-6 (Henn. Cty. Mun. Ct., July 11, 1984) (Appendix 9) (tenant also owes no rent for period prior to condemnation where premises were in condemnable condition; inspection occurred after rent was due, and inspection orders warning of condemnation were placed on the property during the time period and were not obeyed, leading to condemnation). The tenant is entitled to a 100% abatement of rent paid. *Love v. Amsler,* No. 87-14719 (Minn. Dist. Ct. 4th Dist. July 14, 1988), *aff'd* 441 N.W.2d 555 (Minn. Ct. App. 1989) (complete rent abatement for unhabitable apartment); _____ *v. Gibson*, and _____ *v. Gibson*, Nos. 1000301900 and 1000301901 (Minn. Dist. Ct. 4th Dist. Mar. 27, June 30, 2000) (Appendix 439) (emergency relief action, 100% rent abatement for condemnation, and additional treble damages, tenant may repair and deduct costs from rent, replacement housing, fines; subsequent order that new owner bound by predecessor landlord's obligations, $1800 in attorney fees, injunction against retaliation). *See* Orders (Minn. Dist. Ct. 4th Dist. Mar. 9 and 13, 2000) (Appendix 383); *Cloutier v. Gibson*, and *Jackson v. Gibson*, Nos. 1000301900 and 1000301901 (Minn. Dist. Ct. 4th Dist. Mar. 9 and 13, 2000) (Appendix 383) (Emergency relief action: tenant's awarded complete rent abatement plus treble the rent abatement and relocation expenses).

See also Ellis v. McDaniel, No. UD-1960318520 (Minn. Dist. Ct. 4th Dist. Apr. 4, 1996) (Appendix 203) (tenant is not liable for rent where apartment is made uninhabitable due to actions of a third party and through no fault or negligence of the landlord or tenant, under Sections 504.05 (now § 504B.131) and 504.18 (now § 504B.161); complete rent abatement prorated for a period in which tenants could not inhabit the apartment); *Erickson v. Foster,* No. UD-1871007506 (Minn. Dist. Ct. 4th Dist. Oct. 28, 1987) (Appendix 5.N) (complete rent abatement for dwelling inappropriate for human occupancy); *Henderson v. Schaapveld*, No. UD-1950127501 (Minn. Dist. Ct. Apr. 10, 1995) (Appendix 119); *Richard v. Mix*, No. UD-1950424510 (Minn. Dist. Ct. 4th Dist. May 3, 1995) (Appendix 118) (condemned or condemnable); *Lewis Properties v. Pruitt,* No. UD-1950315516 (Minn. Dist. Ct. 4th Dist. Sept. 22, 1995) (Appendix 92); *Swanson v. Ivie*, No. UD-1950411541 (Minn. Dist. Ct. 4th Dist. May 8, 1995) (Appendix 116). *But see Kahn v. Morrow*, No. UD-1940504534 (Minn. Dist. Ct. 4th Dist. May 25, 1994) (Appendix 123) (notice of intent to condemn; monthly rent abatement of $400.00 (76%) of $525.00 rent).

If a landlord, agent, or person acting under the landlord's direction or control rents out residential housing after the premises were condemned or declared unfit for human habitation, the landlord is liable to the tenant for actual damages and an amount equal to three times the amount of all money collected from the tenant, including rent and security deposits, after the date of condemnation or declaration, plus costs and attorney's fees. Minn. Stat. § 504B.204 (formerly § 504.245). The provisions of § 504B.204 (formerly § 504.245) may not be waived.

The prospect of condemnation presents a double-edged sword to the tenant. On one hand, condemnation presents the tenant with evidence that no rent should be due. On the other hand, condemnation also sets a date on which the tenant should vacate the property. If the housing inspector has issued a notice of intent to condemn, the tenant may be able to convince the inspector to not go ahead with actual condemnation until the eviction (unlawful detainer) or rent escrow action is heard, to give the court an opportunity to deal with the situation. If the housing inspector already has condemned the property, the inspector may not have the authority to extend the vacate date. The tenant has two options to seek an extension in this case. First, the tenant could try to go up the chain of command within the inspections department, beginning with the inspector's supervisor and going to the head of the department, or a city council member or the mayor. Second, in some cities, the tenant, like the landlord, may appeal the decision of the inspection's department to a board of appeal. *See* Minneapolis Code of Ordinances Ch. 242 (Appendix 76).

(4) Trial court discretion to determine rent abatement

The trial court appears to have a great deal of discretion in determining what rent abatement is appropriate under the circumstances. In *Scroggins v. Solchaga,* 552 N.W.2d 248 (Minn. Ct. App. 1996), the tenant won a jury verdict in an unlawful detainer action finding violation of the covenants of habitability and retaliation. After the landlord gave another notice to quit several months later, the tenant filed a tenants remedies action, in which the court found habitability violations based on the jury verdicts, but denied claims for rent abatement and attorneys fees and released rent paid into court to the landlord. The landlord then filed another unlawful detainer action, in which the tenant defaulted. The Court of Appeals held that § 566.25 (now § 504B.425) (the tenant remedies relief section) gave the district court discretion to not award rent abatement, noting that the tenant may have caused some of the properties' problems. *See Love v. Amsler,* No. 87-14719 (Minn. Dist. Ct. 4th Dist. July 14, 1988), *aff'd* 441 N.W.2d 555 (Minn. Ct. App. 1989) (damages action: affirmed complete rent abatement for unhabitable apartment).

In *Richter v. Czock*, No. C7-01-1340, 2002 WL 338181 (Minn. Ct. App. 2002) (unpublished), the court consolidated an eviction action based on holding over after notice with a rent escrow action. The court affirmed trial court rulings that the lease required a 45 day notice, that $100 per month rent abatement would cover only the period in which the landlord knew of the habitability issues, and that the landlord did not violate the privacy statute where the tenants were present when the landlord came, and the landlord claimed an emergency. The court also held that the trial court did not err in not admitted evidence when the *pro se* tenants did request admission. The court noted that since the tenant appealed from the rent escrow action judgment but not the separate eviction action judgment, it would not consider whether the notice was retaliatory.

(5) Limitation on retroactivity (back) rent abatement

Unfortunately, it is not uncommon for the court to place an arbitrary limit on how far back in time the tenant can seek rent abatement. *Smith v. _____,* No. HC 1010417559 (Minn. Dist Ct. 4th Dist. May 21, 2001) (Appendix 571) (failure to renew license with accurate address information suspended right to collect rent; tenant could not recoup rent paid during period before the period of the landlord's rent claim in which there was no license; landlord liable for statutory penalties for interrupting water service; habitability rent abatement of $100 per month); *Larson v. Bonacci*, No. UD-970506542 (Minn. Dist. Ct. 4th Dist. Jun. 18, 1997) (Appendix 265) (Rent abatement claim limited to current lease, going back five months); *Beliveau v. Olson,* No. UD-1970403902 (Minn. Dist. Ct. 4th Dist. Jun. 4, 1997) (Appendix TR 144) (Monthly rent abatement of only $60.00 out of $395 rent for four months on claim of problems over two and one half years).

Some courts have chosen not to limit retroactive rent abatement. _____ *v. Brogdon Properties, Inc.*, No. HC 030904900 (Minn. Dist Ct. 4th Dist. Sep. 17, 2003) (Appendix 435) (rent escrow action: complete rent abatement for lack of licensing, judgment of $2500); *Walters v. _____*, No. HC 10101004526 (Minn. Dist Ct. 4th Dist. Oct. 26, 2001) (Appendix 593) (landlord responsible for shared meter bills, and liable for treble damages or $500 to be credited against rent; tenant payment on bill deemed payment of rent; tenant entitled to costs and disbursements from successful Court of Appeal case; habitability rent abatement of $150-175 per month; leave to file motion for attorney's fees; $3818 disbursed from court to tenant); *Wilson v. Lowe*, No. UD-1991123901 (Minn. Dist. Ct. 4th Dist. Jan. 14, 2000) (Appendix 429) (Rent escrow action: tenant awarded treble what she paid on shared electrical meter covering basement and common areas in addition to her unit, and rent abatement of $2,600 over eight months (37%)); *Leshoure v. O'Brian*, No. UD-01000303900 (Minn. Dist. Ct. 4th Dist. May 17, 2000)(Appendix 403) (rent escrow action: monthly rent abatement of $300 out of $850 (35%) for $3,600 over one year); *Coleman v. Kopet*, No. UD-1000211534 (Minn. Dist. Ct. 4th Dist. Mar. 8, 2000) (Appendix 385) (rent abatement of $2,925 over ten months (32%) covered by rent paid into court and credits against future rent.; *Clark v. Urban Investments*, No. UD-

1970821901 (Minn. Dist. Ct. 4th Dist. Sep. 10, 1997) (Appendix 629) (Rent abatement from 1993 through 1997); *Larson v. Anderson*, No. C9-96-416 (Minn. Dist. Ct. 9th Dist. Oct. 11 and Nov. 8, 1996) (Appendix 264) (Rent abatement of $6,910 over five years failing to repair discharge of raw sewage on the premises; landlord's notice to quit was in retaliation for tenant's complaint to health department). The tenant should argue that the only limitation on the rent abatement claim is the six-year statute of limitations for claims under a contract or statute. Minn. Stat. § 541.05. Any shorter limitation on the claim requires the tenant to litigate similar issues in two separate cases.

(6) Increase rent abatement for noncompliance

Some court have increased rent abatement over time when the landlord fails to comply with court orders. *Judge v. Rio Hot Properties, Inc.*, No. UD-1981202903 (Minn. Dist. Ct. 4th Dist. July 7, 1999) (Appendix 401) (rent abatement to increase if repairs are not completed); *Washington v. Okoiye* and *Okoiye v. Washington*, No. UD-1981029901 (Minn. Ct. Dist. June 15, 1999) (Appendix 423) (compliance order in consolidated unlawful detainer and emergency relief actions: rent abatement increase to $300 from $650 (46%) after 1 ½ years of failure to complete repairs; fine of $750 payable to county; $1000 statutory damages and $200 rent abatement for two interruptions of utilities; $1000 for ten privacy violations; landlord ordered to stop privacy violations). *See* Washington Rent Abatement Table (Appendix 427).

h. Public and Government Subsidized Housing

(1) Federal requirements

In addition to the covenants implied by Minn. Stat. § 504B.161 (formerly § 504.18), public and government subsidized housing programs require landlords to maintain and repair the premises. 24 C.F.R. §§ 966.4 (public housing); 236.1 and 221.530(b) (Section 236 housing); 221.530(b) (Section 221 housing); 880.601(b) (Section 8 new construction); 881.601(b) (Section 8 substantial rehabilitation); 886.119(a)(2) and 866.123 (Section 8 set aside program); 883.702(b) (Section 8 housing through state housing agencies); 886.323 (HUD-owned Section 8 housing); 882.516 (Section 8 moderate rehabilitation program); 882.747 and 882.516(a)-(d) (Section 8 project based certificate program).

Some subsidized housing programs include a federal housing code, called Housing Assistance Standards. A landlord is required to comply with the standards, and the housing authority inspects the housing for compliance with the standards. If the landlord fails to comply with the standards, the housing authority may suspend payment of its subsidy to the landlord. The tenant is not required to reimburse the landlord for the lost subsidy. *See* 24 C.F.R. Part 982 (Section 8 Existing Housing Certificate and Voucher Program); 882.404 and 882.516 (Section 8 Moderate Rehabilitation Program); and Part 983 (Section 8 Project-Based Certificate Program).

(2) Rent abatement

A tenant in public or government subsidized housing may raise a claim for rent abatement based on violation of the program maintenance requirements or the covenants of habitability. *See Meldahl and SJM Prop. v. _____*, No. 1050923509, Order on Referee Review at 28 (Minn. Dist. Ct. 4th Dist. Feb. 23, 2006) (Appendix 609) (judge reversed referee and ordered retroactive and prospective rent abatement beyond amounts abated by Section 8 voucher office, to continue until Section 8 voucher office concludes repairs have been completed)*; Z & S Management Company v. Jankowicz,* No. UD-1920219515 (Minn. Dist. Ct. 4th Dist. Mar. 24, 1992) (Appendix 9.B) (rent abatement defense in Section 8 Existing Housing Certificate unlawful detainer action); *Tyus v. Minneapolis Public Housing Authority*, No. UD-1900502523 (Minn. Dist.

Ct. 4th Dist. July 11, 1990) (rent abatement claim in public housing rent escrow action) (Appendix 9.A). *See also Housing Authority of East St. Louis v. Melvin*, 154 Ill. Appendix 3rd 999, ___, 507 N.E.2d 1289, 1290-91, 1293-95 (1987) (public housing rent abatement claim in unlawful detainer action); *Housing Authority of Newark v. Scott*, 137 N.J. Super. 110, ___, 348 A.2d 195, 197-99 (1975) (public housing); *Simon v. Solemon*, 385 Mass. 91, __, 431 N.E.2d 556, 561-62, 569 n.13 (1982) (rent abatement claim in subsidized housing eviction proceeding).

(3) Measure of damages

In subsidized housing, tenants should argue that the measure of damages also should be calculated by the percentage reduction in use standard. *See Housing Authority of East St. Louis v. Melvin*, 154 Ill. Appendix 3rd at ____, 507 N.E.2d at 1293-95; *Housing Authority of Newark v. Scott*, 137 N.J. Super. at __, 348 A.2d at 197-99. *See also* discussion, *supra,* VI.E.1.g. In subsidized housing, the rent abatement should be calculated based on the contract rent (tenant's rent plus government subsidy), rather than just the tenant's share of the rent. *Simon v. Solemn*, 385 Mass. at __, 431 N.E.2d at 569 n.13. Tenants should argue that the rent abatement first should go to the tenant, rather than the government, since it is the tenant's use and enjoyment of the premises that has been effected. For instance, if the contract rent was $550.00, with the tenant paying $150.00 and the housing authority paying $400.00, and the court finds that the rent should be reduced by $100.00 for the month of September, the tenant should receive the $100.00 rent abatement, rather than the government.

The tenant may be entitled rent abatement not only for the tenant's share of the rent, but also the subsidy if the housing authority or HUD does not seek it. *Anderson v. Abidoye*, 824 A.2d 42 (D.C. App. 2003) (unpublished) (trial court limited rent abatement to tenant's share of the rent; court of appeals reversed, holding tenant entitled for full rent subject to claims of the subsidy provider).

In *Z & S Management Company v. Jankowicz*, No. UD-1920219515, (Minn. Dist. Ct. 4th Dist. Mar. 24, 1992) (Appendix 9.B), the plaintiff and defendant participated in the Section 8 Existing Housing Certificate Program. The housing inspector found significant peeling of lead paint on all portions of the exterior of the three floor building, in violation of the federal Housing Quality Standards. After several additional inspections and warnings to the plaintiff, the housing authority withheld the government subsidy for December and January, until the plaintiff corrected the problem at the end of January. *Id.* at 5-8. The plaintiff then filed an unlawful detainer action, not for the government subsidy withheld by the housing authority, but for the rent withheld by the defendant.

The court found that "peeling lead paint is of special concern when children under the age of 7 reside in the building because young children can eat lead paint chips, resulting in serious illness and even in death." *Id.* at 9. Noting that the defendant was six months pregnant and had a four year old child, the court found that because of the existence of lead paint in and on the building for five months and plaintiff's failure to remove it promptly, the defendant had suffered loss of use and enjoyment of the premises. *Id.*

The court awarded a rent abatement of $150.00, but it was not clear if this rent abatement covered the five month period, or a shorter period. *Id.* at 9-10. It is possible that the rent abatement would have been larger had the peeling lead paint been more accessible to the child, either on the interior walls or on the lower exterior walls during the summer months. The rent abatement award was in addition to, and not set off by the withheld government subsidies.

In public housing, some would argue that the rent abatement should be calculated based on the tenant's rent, since there is no "contract rent" or direct subsidy attributable to individual tenants. Tenants

should argue that while rent agreed to by the parties reflects the market value of the premises in compliance with the covenants under ordinary circumstances, *see Theopold v. Curtsinger*, 170 Minn. 105, 109, 212 N.W. 18, 20 (1927), the public housing tenant's rent does not reflect market value since it is based on a percentage of the tenant's adjusted income, and rent abatements based upon the tenant's subsidized rent would lead to public housing tenants, with the lowest incomes and the lowest rents, obtaining the smallest abatements for disrepair in public housing. Rent abatement instead should be based upon HUD Fair Market Rent (FMR), which prescribes market rents for apartments rented under the Section 8 government subsidized housing programs. HUD generally issues new FMR's each year at the end of September.

Decisions in recent subsidized housing cases include *Curtis v. Surrette*, 726 N.E.2d 967 (Mass. App. Ct. 2000) (Section 8 landlord was not entitled to recover entire contract rent from tenants after housing authority terminated housing subsidy payments, only the tenant's share of the rent; landlord's breach of covenant of quiet enjoyment in connection with its efforts to delead tenants' apartment supported award of three month's rent as damages); *Overstreet v. Jackson*, No. UD-1960520509 (Minn. Dist. Ct. 4th Dist. Jun. 17, 1996) (Appendix 206) (Section 8 certificate; monthly rent abatement of $100.00 out of $150.00 tenant rent); *Robinson v. Schaapveld*, No. UD-1951006523 (Minn. Dist. Ct. 4th Dist. Dec 15, 1995) (Appendix 209) (retroactive rent abatement of $30.00 out of $43.00 rent in Section 8 housing).

(4) Multiple inspection agencies

Tenants participating in the Section 8 certificate and voucher program often have access to two different inspectors, one through the Section 8 program, and another with the city inspections department. It is not uncommon for one inspector to fail a unit, and another inspector to pass it, since the inspectors from Section 8 and city inspection offices use different criteria. *See Genie Management Co. v. Wilson*, No. UD-1980707541 (Minn. Dist. Ct. 4th Dist. Jul. 29, 1998) (Appendix 334) (Unit failed Section 8 inspection in May, passed Section 8 inspection following repairs, and failed city inspection in June; monthly rent abatement of $200.00, or 26% of the total rent of $775.00 and 51% of the tenant's share of the rent of $391.00).

(5) Public housing authority claims for rent abatement

The tenant may be entitled rent abatement not only for the tenant's share of the rent, but also the subsidy if the housing authority or HUD does not seek it. *Anderson v. Abidoye*, 824 A.2d 42 (D.C. App. 2003) (unpublished) (trial court limited rent abatement to tenant's share of the rent; court of appeals reversed, holding tenant entitled for full rent subject to claims of the subsidy provider).

In *Barry v. Lane*, Nos. UD-1980629502 and UD-1980603900 (Minn. Dist. Ct. Sep. 15, 1998) (Appendix 310B), the total rent was $760, with the tenant's share of the rent being $257 and the Section 8 housing subsidy being $503. The court previously ordered a rent abatement of $500 per month, or 66% of the total rent and 195% of the tenant's share of the rent. The public housing authority apparently asserted that it was entitled to rent abatement beyond the tenant's share of the rent, but since it did not move to intervene, the court disbursed funds in escrow to the tenant.

i. Relief

If the defendant proves breach of the covenants, the court should reduce the rent owed by the measure of damages. Some courts have allowed the rent reduction to include a measure of damages over a number of months of noncompliance with the covenants, while others have reduced future rent until compliance is achieved.

A recent appellate decision might at first glance suggest that the courts should not rule on future rent abatement, but it does not discuss rent abatement and is distinguishable on other grounds. In *Eagan East Ltd. Partnership v. Powers Investigations, Inc.*, 554 N.W. 2d 621 (Minn. Ct. App. 1996), the commercial landlord demanded from the commercial tenant a prospective and retroactive rent increase after the square footage used by the tenant was remeasured. When the tenant failed to pay the additional rent, the landlord filed an eviction (unlawful detainer) action. The trial court held that the rent increase clauses in the lease were ambiguous and could not be applied retroactively from the new square footage measurement, but could be applied prospectively. The landlord then announced a new prospective rent increase, and in a subsequent order of the trial court, the court ruled that the landlord was entitled to the rent increase and the tenant was not entitled to attorney's fees under the lease. On appeal, the Court of Appeals held that the trial court's jurisdiction was limited to determining present possessory rights of the parties, and that the trial court exceeded its jurisdiction by ruling on the prospective rent increase and attorney's fee issues.

The decision was appropriate on the issue of the prospective rent increase, because that issue was not ripe when the landlord commenced the action. Tenant advocates should argue that this decision does not affect rent abatement cases because the rent abatement determination determines present possessory rights, and the doctrines of *res judicata* and collateral estoppel prevent the landlord from claiming increased rent until the repairs are completed.

Recent decisions continue the long trend of awarding retroactive and prospective rent abatement, sometimes with a compliance hearing scheduled, and with other relief where appropriate. *See Larson v. Anderson*, No. C9-96-416 (Minn. Dist. Ct. 9th Dist. Oct. 11 and Nov. 8, 1996) (Appendix 264) (Rent abatement judgment of $6,910 over five years failing to repair discharge of raw sewage on the premises; landlord's notice to quit was in retaliation for tenant's complaint to health department); *Barger v. Behler*, No. UD-1970116527 (Minn. Dist. Ct. 4th Dist. Jan. 30, 1997) (Appendix 248) (Current and prospective rent abatement; landlord ordered to fully clean tenant's apartment; court to release rent to landlord only after verification of cleaning); *Cedar Associates LLP v. Curtis*, No. UD-1970108508 (Minn. Dist. Ct. 4th Dist. May 20, 1997) (Appendix 250) (Retroactive and prospective rent abatement, tenant to continue paying abated rent into court, court will release money to landlord only after verification of completion of repairs).[6]

---

[6]Earlier decisions include *Hanson v. Widmark,* No. UD-1960625508 (Minn. Dist. Ct. 4th Dist. Aug. 2, 1996) (Appendix 200) (since tenant did not deposit the money in the court authorized eviction, court would determine rent abatement to avoid unnecessary duplication of litigation; landlord did not prove tenant's negligence or intentional act's caused repair needs; landlord shall give tenant a rent credit in any claim landlord may make against tenant related to this tenancy to account for court ordered rent abatement; landlord may not seek from tenant costs claimed in this); *Lynch v. Hart*, No. UD-1960610529 (Minn. Dist. Ct. 4th Dist. Jun. 27, 1996) (Appendix 185) (tenants not assessed costs because they proved covenant of habitability violations present and prospective rent abatement with future rent credit to recover present rent abatement); *Lundstrom v. Colglazier*, No. UD-1960524502 (Minn. Dist. Ct. 4th Dist. Jun. 17, 1996) (Appendix 210) (retroactive rent abatement even though repairs had been completed); *Overstreet v. Jackson*, No. UD-1960520509 (Minn. Dist. Ct. 4th Dist. Jun. 17, 1996) (Appendix 206) (Section 8 certificate; retroactive and prospective monthly rent abatement; jurisdiction retained); *Amsler v. Wright*, No. UD-1960502510 (Minn. Dist. Ct. 4th Dist. May 30, 1996) (Appendix 186) (landlord responsible for all utilities services which do not separately and accurately measure the tenant's sole use of utilities; landlord required to pay water bills where specific lease provisions state such, and general lease term permitting landlord to assess water bills from tenants is invalid; landlord ordered not to claim from tenant the costs of this case or rents abated as additional rent or a security deposit deduction; landlord ordered not to require public assistance vendoring; landlord ordered not to collect water bill payments from tenants; prospective and retroactive rent abatement); *Donovic v. Dodson*, No. C2-96-600607 (Minn. Dist. Ct. 6th Dist. Apr. 29, 1996) (Appendix 201)

If the defendant does not prove breach, the defendant still may redeem by paying the rent owed. *See* discussion, *infra* at VI.E.20.

j. Companion tenant's remedies and rent escrow actions

Rent escrow actions and eviction (unlawful detainer) actions which involve the same parties must be consolidated and heard on the dates scheduled for the eviction (unlawful detainer) action. Minn. Stat. § 504B.385 (formerly § 566.34). However, if the tenant commences a tenants' remedies or rent escrow action and pays the withheld rent into court *before* the landlord *files* an eviction (unlawful detainer) action, the court should dismiss the eviction (unlawful detainer) action because the tenant no longer is withholding the rent. *Zeman v. Currington*, Nos. UD-1900910517 and UD-1900911502 at 3 (Minn. Dist. Ct. 4th Dist. Oct. 11, 1990) (Appendix 6.B); *Gallion v. Brighton II Ltd. Partnership*, No. UD-1931109510 (Minn. Dist.

(rent abatement credit against future rent; tenant given thirty days to pay share of unpaid utilities, but not required to pay a share of future utility bills because the agreement was based on temporary increased usage); *Ellis v. McDaniel*, No. UD-1960318520 (Minn. Dist. Ct. 4th Dist. Apr. 4, 1996) (Appendix 203) (complete rent abatement prorated for a period in which tenants could not inhabit the apartment; tenants given ten days to pay rent due; landlord ordered not to claim additional rent or deduction from deposit for costs in this case or rents abated by this order).

See Appendices 110-26. In *Drews v. Ennis*, No. UD-1950512523 (Minn. Dist. Ct. 4th Dist. June 5, 1995) (Appendix 125) (the court ordered the landlord to pay rent abatement in excess of the amount the tenant paid into court within 14 days or a money judgment would be entered for the tenant); *Brown v. Owens,* No. UD-1940726506 (Minn. Dist. Ct. 4th Dist. Aug. 18, 1994) (retroactive and prospective rent abatement); *Kahn v. Greene*, No. UD-1940330506 (Minn. Dist. Ct. 4th Dist. May 25, 1994) (Appendix 46) (retroactive and prospective rent abatement); *Kahn v. Foote*, No. UD-1940414503 (Minn. Dist. Ct. 4th Dist. May 6, 1994) (Appendix 47) (current and prospective rent abatement); *Jensen v. Bosto*, No. UD-1931203515 (Minn. Dist. Ct. 4th Dist. Dec. 17, 1993) (Appendix 74) (retroactive rent abatement going back six months, and prospective rent abatement); *Buckeye Realty Co. v. Elias,* No. CX-91-0697 at 5, 9 (Minn. Dist. Ct. 10th Dist. Aug. 6, 1991) (Appendix 15.E) (plaintiff ordered to make requested repairs, and defendants may continue to deposit the rent increase with the court administrator until repairs are completed or until further order of the court); *Z & S Management Company v. Jankowicz*, No. UD-1920219515 (Minn. Dist. Ct. 4th Dist. Mar. 24, 1992) (Appendix 9.B) (retroactive rent abatement); *Klyberg v. Elkboy*, No. UD-1910617511 (Minn. Dist. Ct. 4th Dist. July 3, 1991) (Appendix 5.M) (retroactive and future rent abatement until compliance with housing code).

See also Schwanke v. Magnuson, No. C0-90-0640 (Minn. Dist. Ct. 8th Dist. Jan. 8, 1991) (Appendix 5.L) (retroactive and future rent abatement until repairs are completed); *Erickson v. Foster*, No. UD-1871007506 (Minn. Dist. Ct. 4th Dist. Oct. 28, 1987) (Appendix 5.N) (complete retroactive and future rent abatement until compliance with housing code and MINN. STAT. § 504.18 (now § 504B.161)); *Zeman v. Arnold*, No. UD-1900911501 at 3 (Minn. Dist. Ct. 4th Dist. Oct. 11, 1990) (Appendix 6.A) (partial rent abatement with remaining rent paid into court held until filing of statement by defendant or city inspector that corrections have been made); *Larson v. Cooper*, No. UD-1880209557 at 5-7 (Minn. Dist. Ct. Mar. 21, 1988) (Appendix 6) (retroactive abatement and future abatement until compliance with housing code; *Willet v. Streit*, No. 238043 (Ram. Cty. Mun. Ct., May 31, 1978) (Appendix 10) (no rent due until compliance with housing code); *Veres v. Warren*, No. UD-81253 (Henn. Cty. Mun. Ct., June 24, 1977) (Appendix 11) (June rent reduced by diminished value in May and June; future rents paid into court and reduced until compliance).

Ct. 4th Dist. Dec. 7, 1993) (Appendix 49). *See Floyd v. Myers*, Nos. UD-1930601511 and UD-1930602512 (Minn. Dist. Ct. 4th Dist. June 28, 1993) (Appendix 6.C) (rent abatement of $285.00 from $425.00; subsequent eviction notice retaliatory and technical lease violation not material). Other options to consider including seeking a temporary restraining order against filing the eviction (unlawful detainer) action, or sealing the eviction (unlawful detainer) records. *See* Action Not Appropriate for Certain Types of Litigation, *supra* at II.B; Temporary Restraining Orders, *supra* at V.D., Consolidating Actions, *supra* at V.S., Sealing Court Records, *supra* at V.T.

In *Richter v.. Czock*, No. C7-01-1340, 2002 WL 338181 (Minn. Ct. App. 2002) (unpublished), the court consolidated an eviction action based on holding over after notice with a rent escrow action. The court affirmed trial court rulings that the lease required a 45 day notice, that $100 per month rent abatement would cover only the period in which the landlord knew of the habitability issues, and that the landlord did not violate the privacy statute where the tenants were present when the landlord came, and the landlord claimed an emergency. The court also held that the trial court did not err in not admitted evidence when the *pro se* tenants did request admission. The court noted that since the tenant appealed from the rent escrow action judgment but not the separate eviction action judgment, it would not consider whether the notice was retaliatory.

Consolidating actions also may allow the court to grant relief beyond what it would do in the eviction action. In *Washington v. Okoiye*, Nos. UD-1981029901 and UD-19809090564 (Minn. Dist. Ct. 4th Dist. Nov. 20, 1998) (Appendix 354C), the court consolidated unlawful detainer and emergency tenant remedies actions, and awarded $100 in monthly rent abatement, $100 for rent abatement for water shutoff, $250 as a stayed fine for violating a repair order, $500 in utility termination damages, $353 as a credit for tenant payments on the landlord's water bill, $500 in privacy violations, all of which could be credited against rent, and $500 in attorney's fees, with a later hearing scheduled to review landlord compliance and additional attorney's fees. The court later ordered that the tenant could remedy violations and deduct the cost from rent, rent abatement would increase from $100 to $200 out of monthly rent of $650, or from 15% to 31% if the landlord did not complete repairs, the tenant could credit payments on the landlord's water bill against rent, the landlord must obtain a rental license, the landlord's right to collect rent was suspended until he obtained the license, and prior orders relating to court approval of future filings remained in effect. (Feb. 4, 1999) (Appendix 354G). *See Washington v. Okoiye* and *Okoiye v. Washington*, No. UD-1981029901 (Minn. Ct. Dist. Oct. 8, 1999) (Appendix 426) (compliance order in consolidated unlawful detainer and emergency relief actions: landlord violated unlawful exclusion statute by excluding tenant from the basement; landlord violated shared meter statute where tenant's meter covered her first floor apartment and the common basement which the landlord used for an office and for personal use; landlord violated tenant privacy for coming on the property to do repairs without notice, and by interrogating guests of the tenant; tenant proved that landlord did not provide a certificate of rent paid; landlord failed to prove that tenant failed to pay rent in a timely manner; tenant awarded monthly rent abatement of $300 from $650 (46%) ongoing, $500 for exclusion from the basement, $500 for privacy violations, $500 for violation of the shared meter statute, all of which could be credited against rent; landlord ordered to cease violations of tenant's privacy, and immediately provide tenant with a certificate of rent paid.; *Washington v. Okoiye* and *Okoiye v. Washington*, No. UD-1981029901 (Minn. Ct. Dist. June 15, 1999) (Appendix 423) (compliance order in consolidated unlawful detainer and emergency relief actions: rent abatement increase to $300 from $650 (46%) after 1 ½ years of failure to complete repairs; fine of $750 payable to county; $1000 statutory damages and $200 rent abatement for two interruptions of utilities; $1000 for ten privacy violations; landlord ordered to stop privacy violations). *See* Washington Rent Abatement Table (Appendix 427).

In *Walters v. Demmings*, No. UD-1990916517 (Minn. Dist. Ct. 4th Dist. Nov. 15, 1999) (Appendix 422), the duplex had separate electrical and gas meters for each unit. The electrical meter for the downstairs

tenant also covered the basement and hallways, with the court concluding that it was a shared meter. After the furnace became inoperable and the landlord failed to supply adequate temporary heat and the tenant withheld rent, the landlord and tenant filed unlawful detainer and emergency relief actions, which the court consolidated. The court dismissed the landlord's notice to quit claim as premature, as the action was filed before the effective date of the notice. The court awarded rent abatement at $200 a month from $480 per month rent (42%), $500 in shared meter statutory damages, $500 for utility service interruption damages, all of which could be credited against future rent. The tenant moved for reconsideration of the shared meter damages, arguing that her damages exceeded the $500 statutory minimum. The court rejected the argument, concluding that the tenant must prove how much usage occurred outside of her unit. *Demmings v. Walters*, No. UD-1991006902 (Minn. Dist. Ct. 4th Dist. Mar. 22, 2000) (Appendix 422).

In *Judge v. Rio Hot Properties, Inc.*, Nos. UD-1981202903, UD-1981005518, and UD-1981104522 (Minn. Dist. Ct. 4th Dist. Dec. 18, 1998) (Appendix 362D), in consolidated unlawful detainer and emergency tenant remedies actions, the court concluded that a notice to quit which was not effective but the parties agreed to litigate was retaliatory where the landlord only wished to rent to other tenants, the landlords waived a no pet provision and could not rely on it to show a non-retaliatory purpose, the tenants were entitled to additional rent abatement beyond an ongoing rent abatement for loss of utilities, and the tenants were entitled to $500 in statutory damages for termination of utility services which they could credit against future rent.

In *Stillday v. Kittleson*, No. UD-01980421523 and 1980430900 (Minn. Dist. Ct. 4th Dist. Jul. 21, 1998) (Appendix 368), the court consolidated unlawful detainer and rent escrow actions, dismissed the unlawful detainer action for failing to serve a copy of the summons and complaint on the Minneapolis Public Housing Authority, and concluded that the landlord violated the tenant's privacy, and awarded $100 to the tenant. *See Thomas v. Dobyne*, No. U-1980616536 (Minn. Dist. Ct. 4th Dist. Aug. 4, 1998) (Appendix 370C) (Combined unlawful detainer and lock out actions: award of $500 in statutory damages and $3,635 in attorney's fees where landlord changed the locks while tenant was removing her property following service of a writ of restitution); *Guevara v. Catchings*, No. UD-01961210536 (Minn. Dist. Ct. 4th Dist. Dec. 23, 1996) (Appendix TR 147a) (Unlawful detainer action filed after rent escrow action dismissed with prejudice).

See Smith v. Brinkman and *Brinkman v. Smith*, Nos. HC-1000124900 and HC-1000202517 (Minn. Dist. Ct. 4th Dist. Mar. 9, 2000) (Appendix 418) (Consolidated eviction and rent escrow actions: landlord failed to prove statutory notice to quit, notice to increase rent given November 1 was not effective to increase rent December 1, presumption of retaliation applied to a rent increase notice with the landlord failing to prove a non-retaliatory purpose, habitability rent abatement of $800 over four months (38%) tenant awarded $300 in civil penalties for landlord visits without notice in which he was rude toward the tenant and her daughter, landlord ordered to make repairs with tenant's authorized to make repairs and submit bills for court approval, landlord restrained from harassing tenant and household members with landlord allowed to enter only to make repairs with written 24-hours notice, tenants awarded costs, disbursements and attorney's fees); *Green v. Formanek*, and *Formanek v. Green*, No. 1991001905 and 4991004400 (Minn. Dist. Ct. 4th Dist. Oct. 27, Nov. 8, 1999) (Judge Bruce Peterson) (Appendix 393) (Consolidated rent escrow and eviction actions: dismissal of eviction action where landlord's notice was not wholly without retaliatory motive; tenant awarded retroactive and prospective rent abatement, and costs and disbursements upon application and affidavit.. [7]

[7]Earlier cases include *Line v. Reynolds*, No. UD-1960612512 (Minn. Dist. Ct. 4th Dist Aug 12, 1996) (App. 175) (consolidated unlawful detainer and rent escrow actions); *Player v. King,* UD-1960306541 (Minn. Dist. Ct.

Consolation all expands the time for appeal. *See* discussion, *infra*, X.A.

k. Landlord's potential tort liability.

Landlord's may have tort liability related to housing repair problems, but the law of torts has not kept pace with modern developments in landlord and tenant law, leaving tenants relatively unprotected in tort for injuries resulting from apartment disrepair. See L. McDonough, *Still Crazy after All of These Years: Landlords and Tenants and the Law of Torts*, 33 WM. MITCHELL L. REV. 427 (2006). In *Bills v. Willow Run I Apartments*, 534 N.W.2d 286 (Minn. Ct. App. 1995), the Court of Appeals held that a violation of the Uniform Building Code in leased premises is negligence *per se* when the violation harms tenants and that harm is the type which the building code was intended to prevent). But in *Bills v. Willow Run I Apartments*, 547 N.W.2d 693 (Minn. 1996), the Minnesota Supreme Court, reversing the Court of Appeals, held that an owner is not negligent *per se* for a violation of the uniform building code, *unless* the owner knew or should have known of the violation, the owner failed to take reasonable steps to remedy the violation, the injury suffered was the kind the code was intended to prevent, and the violation was the proximate cause of the injury. *See Smith v. Hemphill*, No. 94-12234 (Minn. Dist. Ct. 4th Dist. Dec. 12, 1994) (Appendix 127) (negligence *per se* and strict liability applied to violation of ordinance enacted to protect children from harms associated with ingesting lead contaminated paint and soil); *Canada v. McCarthy*, 567 N.W.2d 496 (Minn. 1997) (When performing lead abatement work at tenant's property, landlord owes duty of care to tenant and guests; damages award affirmed); *Peterson-White v. Duluth Housing and Redevelopment Authority*, No. CX-96-1915, 1997 WL 88934 (Minn. Ct. App. Mar. 4, 1997) (Appendix 285) (Unpublished: Public housing authority not entitled to statutory or official immunity in tort action for lead poisoning).

In *Funchess v. Cecil Newman Corp*, 615 N.W.2d 397 (Minn. Ct. App. 2000), reversed 632 N.W.2d 666 (Minn. 2001), the Court of Appeals reversed summary judgment for the landlord in a tort case filed by the mother of a tenant killed by a person who allegedly entered the building through a defective security system, holding that the landlord has a special relationship and duty to maintain security, and assumed a duty to maintain its security system. The Minnesota Supreme Court reversed, holding that the plaintiff did not create a record of statutory liability for appeal, the landlord did not have a special relationship to the tenant, and that the plaintiff did not plead breach of contract as a claim.

In *Gradjelick v. Hance*, 627 N.W.2d 708 (Minn. Ct. App. 2001), reversed 646 N.W.2d 225 (Minn. 2002), the Minnesota Supreme Court reversed both the trial court and Court of Appeal rulings for the landlord on summary judgment, holding that analyses under negligence per se and ordinary common law negligence are both available in landlord liability cases when uniform building code violations are alleged, citing *Bills v. Willow Run I Apartments*, 547 N.W.2d 693 (Minn. 1996). *See Stauffenecker v. Salmela*, No. C4-02-1712, 2003 WL 1962160 (Minn. Ct. App. 2003) (unpublished) (affirmed summary judgment for landlord, holding that covenants of liability under Minn. Stat. § 504B.161 (formerly § 504.18) does not create liability, citing *Meyer v. Parkin*, 350 N.W.2d 435, 437-39 (Minn. Ct. App. 1984)).

4th Dist. Apr. 3 & May 2, 1996) (consolidated unlawful detainer and emergency tenant remedies actions); *Brook v. Boyd*, No. C8-96-47 (Minn. Dist. Ct. 9th Dist. Feb. 13, 1996) (Appendix 207) (consolidated unlawful detainer and rent escrow actions); *Ochoa v. Kenneth*, No. UD-1950919505 (Minn. Dist. Ct. 4th Dist. Oct. 20, 1995) (Appendix 79) (unlawful detainer consolidated with rent escrow action); *Henderson v. Schaapveld*, No. UD-1950127501 (Minn. Dist. Ct. 4th Dist. Apr. 10, 1995) (Appendix 119) (unlawful detainer consolidated with emergency tenants remedies action); *Blevins v. Zeman*, No. UD-1950605568 (Minn. Dist. Ct. 4th Dist. Nov. 8, 1995) (Appendix 126) (unlawful detainer consolidated with lockout action and consumer fraud claim).

In *Okani v. Loven*, No. A03-1545, 2004 WL 1049182 (Minn. Ct. App. May 11, 2004) (unpublished), the Court of Appeals reversed the trial court summary judgment for landlord where material facts existed over whether the landlord negligently repaired the property, and whether negligent repair was a superseding or intervening cause of injury, but affirmed the district court ruling that Minn. Stat. § 405B.161 did not create negligence *per se* liability, citing *Meyer v. Parkin*, 350 N.W.2d 435, 438 (Minn. Ct. App. 1984).

While the collateral estoppel affect of eviction (unlawful detainer) litigation is limited, tenant attorneys' and advocates should make a record in appropriate cases that the tenant is not litigating nor waiving a potential tort claim. In *Judge v. Rio Hot Properties, Inc.*, Nos. UD-1981202903, UD-1981005518, and UD-1981104522 (Minn. Dist. Ct. 4th Dist. Dec. 18, 1998), (Appendix 362D), the court made no findings or conclusions on tenant's potential tort claims as they did not litigate them in the summary proceeding. *See generally* discussion *supra*, at V.N.

l. Consequential damages

Since the covenants of habitability are implied into all oral and written leases, a violation of the covenants of habitability may give rise to consequential damages. The tenant may recover such consequential damages as, at the time of the making of the lease, the parties could reasonably have contemplated would result from a breach. *Poppen v. Wadleigh*, 235 Minn. 400, 405, 51 N.W.2d 75, 78 (1952) (commercial lease lost profits); *Force v. Gottwald*, 149 Minn. 268, 272-75, 183 N.W. 356 359 (1921) (lost profits); *Romer v. Topel*, 414 N.W.2d 787, 788 (Minn. Ct. App. 1987), *review denied* (transportation and stabling of horses at another location following collapse of a barn). *See generally* 5C DUNNELL MINN. DIGEST 2D *Damages* § 3.00(b).

In *Les Jones Roofing v. City of Minneapolis*, 373 N.W.2d 807 (Minn. Ct. App. 1985), the commercial tenant rented a building and erroneously assumed that the landlord owned adjacent property and that it would be available for him for parking and storage. The tenant later discovered that the city owned the adjacent property. The tenant rented the property from the city for use as a parking lot and for storage of materials. After the tenant had blacktopped the property and constructed a fence around it, the city ordered it to vacate the property. Because of its inability to use the property, the tenant relocated its business. *Id*. at 808-09. The trial court directed an award for the tenant for the cost of blacktop installed, as a reasonably foreseeable expenditure at the time the parties entered into the lease. The jury awarded the tenant damages for construction of the fence and relocation expenses, but the trial court granted judgment not withstanding the verdict and vacated the award of relocation expenses. On appeal, the court held that the trial court did not err in vacating the award of moving expenses. The court noted that the tenant had operated its business for several months before it rented the adjacent property from the city and did not state that it would move its business if it could not rent the adjacent property from the city. The court concluded that the evidence did not establish that a lease with the city included an understanding that a breach of the lease would lead to relocation. *Id*. at 809.

It should be noted that the tenant was seeking relocation expenses for its business, operated on property rented from another landlord rather than the city. Had the business been operated on property rented from the city and rented at the same time, there would have been a clearer case for consequential damages for relocation expenses.

A determination of whether to award consequential damages must be made on a case-by-case basis. When a landlord's breach of the lease excludes the tenant from the premises or forces the tenant to vacate the premises, consequential damages may include relocation expenses, temporary shelter expenses, and increased transportation expenses. *See O'Leary v.* _____, No. 2990913207 (Minn. Dist Ct. 4th Dist. Sep.

27, 1999) (Appendix 553) (offset of tenant payment for improper towing); *Leshoure v. O'Brian*, No. UD-01000303900 (Minn. Dist. Ct. 4th Dist. May 17, 2000) (Appendix 403) (rent escrow action: monthly rent abatement of $300 out of $850 (35%) for $3,600 over one year; $250 in consequential damages; landlord failed to overcome presumption of retaliatory notice with claims that the rent was late, since landlord accepted late rent in the past, or that Section 8 repair requirements were too expensive, since tenant had continuously asked for repairs); *Bordeaux v. Mathers*, UD-1950922925 (Minn. Dist. Ct. 4th Dist. Jan. 29, 1996) (TR Appendix 66) (emergency tenants' remedies and consumer fraud decision finding consequential damages for increased gas bill at old apartment and higher rent at new apartment); *Henderson v. Schaapveld*, Nos. UD-1950127501, UD-1950127502 at 10-15 (Minn. Dist. Ct. 4th Dist. Apr. 10, 1995) (TR Appendix 49); *Overstreet v. Jackson*, No. UD-1960520509 (Minn. Dist. Ct. 4th Dist. Jun. 17, 1996) (Appendix 206) (Section 8 certificate; tenant did not prove entitlement to compensation for loss of food due to refrigerator disrepair where tenant refused entry by the landlord to repair the refrigerator for lack of 24 hours notice).

m. No assessment of costs against tenant

Where the tenant litigates and prevails on the issue of habitability violations, the landlord should not be awarded costs. *See Lynch v. Hart*, No. UD-1960610529 (Minn. Dist. Ct. 4th Dist. Jun. 27, 1996) (Appendix 185) (tenants not assessed costs because they proved covenant of habitability violations).

n. Fines

In *Rio Hot Properties, Inc. v. Judge*, No. UD-1981102522 (Minn. Ct. Dist. 4th Dist. Nov. 19, 1998) (Appendix 362C), the landlord was fined $250 to be credited against rent, with the court ordering second fine of $500 but stayed to allow landlord time to complete repairs. However, the referee later concluded that the fines must be paid to the county, and may not be awarded to the tenant as a credit against rent. *Rio Hot Properties, Inc. v. Judge*, No. UD-1981102522 (Minn. Ct. Dist. 4th Dist. Mar. 29, 1999) (Appendix 362E) (citing Minn. Stat. §574.34). In *Rio Hot Properties, Inc. v. Judge*, No. UD-01981005518 (Minn. Dist. Ct. 4th Dist. May 21, 1999) (Judge L. Arthur) (Appendix 400), the judge affirmed the referee's conclusion, concluding that the fine statute did not create an exception to the general rule under Minn. Stat. § 574.34 that fines are punitive and payable to the state.[8]

---

[8]Earlier decisions had ordered that fines under MINN. STAT. § 504B.391 (formerly § 566.35) may be awarded to the tenant as a credit against rent. In *Washington v. Okoiye*, Nos. UD-1981029901 and UD-19809090564 (Minn. Dist. Ct. 4th Dist. Nov. 20, 1998) (Appendix 354C), the court consolidated unlawful detainer and emergency tenant remedies actions, and awarded $100 in monthly rent abatement, $100 for rent abatement for water shutoff, $250 as a stayed fine for violating a repair order, $500 in utility termination damages, $353 as a credit for tenant payments on the landlord's water bill, $500 in privacy violations, all of which could be credited against rent, and $500 in attorney's fees, with a later hearing scheduled to review landlord compliance and additional attorney's fees. The court later issued a stayed $500 fine, and ultimately lifted the stay and allowed the tenant to credit it against rent. (Dec. 9, 1998, Jan. 4, 1999). The court later authorized the tenant to pay another water bill and credit the payment against rent, and ordered a stayed fine of $750. (Mar. 10, 1999). *See Dunger v. Markowitz*, No: UD-1971224504 (Minn. Dist. Ct. 4th Dist. Jul. 27, 1998) (Appendix 326B) (first stayed fine of $250 assessed); *id* (Jan. 20, 1999) (Appendix 326C) (stayed second fine of $500 assessed, to be credited against rent if repairs not completed by deadline); *id*, (Mar. 15, 1999) (Appendix 326D) (Landlord's sale of ownership interest did not relieve landlord of obligation to complete repairs in order to avoid lifting of a stayed fine to enforce a repair order; stay lifted on second fine of $500 and awarded to tenant).

Even if fines are not awarded to the tenant, they may have some deterrent effect, as they can escalate in $250 increments. *Washington v. Okoiye* and *Okoiye v. Washington*, No. UD-1981029901 (Minn. Ct. Dist. June 15, 1999) (Appendix 423) (compliance order in consolidated unlawful detainer and emergency relief actions: rent abatement increase to $300 from $650 (46%) after 1 ½ years of failure to complete repairs; fine of $750 payable to county; $1000 statutory damages and $200 rent abatement for two interruptions of utilities; $1000 for ten privacy violations; landlord ordered to stop privacy violations). *See* Washington Rent Abatement Table (Appendix 427). *See also Chmielewski v. _____*, No. UD 1990324502 (Minn. Dist Ct. 4th Dist. Apr. 14, 1999) (Appendix 484) ($200 per month rent abatement; landlord order to complete repairs; fines if landlord fails to comply).

o. Contempt of court

As an alternative to fines under § 504B.391 (formerly § 566.35), the court the power to award the amounts as damages to tenant as credits against rent under its contempt power. The court may order a party guilty of contempt to pay damages, costs, expenses, and attorney fees to the other party. Minn. Stat. §588.11. Constructive contempt includes disobedience of any lawful judgment, order, or process of court. §588.01, Subd. 3(3). *Judge v. Rio Hot Properties, Inc.*, No. UD-1981202903 (Minn. Dist. Ct. 4th Dist. July 7, 1999) (Appendix 401) (tenants' motion in consolidated cases to add punitive damages denied where court found no independent tort, but tenant granted leave to proceed with claims for contempt where the landlord had failed to complete repairs for almost one year.

p. Punitive damages

As another alternative to fines under § 504B.391 (formerly § 566.35), the court may award punitive damages. Punitive damages are available in civil actions upon clear and convincing evidence that the acts of the party show deliberate disregard for the rights or safety of others. Minn. Stat. §549.20. A party may not seek punitive damages in an initial pleading, but may move to amend the pleading to claim punitive damages. Minn. Stat. §549.191. *Judge v. Rio Hot Properties, Inc.*, No. UD-1981202903 (Minn. Dist. Ct. 4th Dist. July 7, 1999) (Appendix 401) (tenants' motion in consolidated cases to add punitive damages denied where court found no independent tort, but tenant granted leave to proceed with claims for contempt where the landlord had failed to complete repairs for almost one year..

q. Compliance hearings

Once the tenant has proven a violation of a covenant of habitability, the court may retain jurisdiction and schedule a compliance hearing to determine whether the rent abatement should continue in future months. The landlord has the burden of proving completion of repairs in order to cancel the rent abatement. *Central Manor Apartments v. Beckman*, Nos. UD-1980609509, UD-1980513525 (Minn. Dist. Ct. 4th Dist. July 29, 1998) (Appendix 319B) (Landlord proved completion of repair order by a preponderance of the evidence).

Careful monitoring of landlord compliance with repair orders of the court along with the use of compliance hearings can lead to significant abatements over time where landlord's fail to comply with court orders. *Washington v. Okoiye* and *Okoiye v. Washington*, No. UD-1981029901 (Minn. Ct. Dist. June 15, 1999) (Appendix 423) (compliance order in consolidated unlawful detainer and emergency relief actions: rent abatement increase to $300 from $650 (46%) after 1 ½ years of failure to complete repairs; fine of $750 payable to county; $1000 statutory damages and $200 rent abatement for two interruptions of utilities; $1000 for ten privacy violations; landlord ordered to stop privacy violations). *See* Washington Rent Abatement Table (Appendix 427). In *Huffman v. Ellis*, No. UD-1991119518 (Minn. Dist. Ct. 4th Dist. Feb. 2, 2000)

(Appendix 397), the parties settled an unlawful detainer action for nonpayment of rent with habitability defenses for rent abatement and a deadline to complete repairs. When the landlord did not complete repairs by the deadline, the tenant moved for relief based on breach of the settlement agreement. The court found the breach of the agreement, diminished use of enjoyment of the premises, and awarded rent abatement. After taking testimony on damage to the tenant's car allegedly caused by repair problems not contemplated in the settlement agreement, the court concluded that the damages were excluded from rent abatement and would not be considered *res judicata* as to future claims.

r. Housing inspection agency records

Sometimes tenants have difficulty obtaining information on housing court violations from a Housing Inspections Department. Data on code violations is governed by several statutes. Under the Minnesota Government Data Practices Act, generally code violations data are public. Minn. Stat. § 13.442. The identities of individuals who register complaints are private. § 13.44. Data collected for pending civil legal actions are protected. § 13.39. Criminal investigative data is confidential. § 13. 82. Persons who request public government data shall be permitted to inspect and copy it at reasonable times and places. § 13.03.

Chapter 504B also regulates disclosure of inspection records. § 504B.195(formerly § 504.245) requires landlords to disclose certain outstanding inspection orders to tenants, applicants and purchasers. A landlord's violation of the disclosure statute entitles the tenant to remedies under the private Attorney General Enforcement Statute, § 8.31, Subd. 3a, and other equitable relief as determined by the Court. Such relief could include dismissal or rent abatement in an unlawful detainer action.

After a local authority had inspected a residential building, the inspector must give written notice of code violations to the landlord, the tenant, and any housing-related neighborhood organization which requested the inspection. § 504B.185 (formerly § 566.19). Old § 504.23 set out a process for obtaining code violation information from the inspection agency. Section 504.23 was to be replaced by § 504B.191, but the current published edition of Chapter 504B does not contain 504B.191.

While tenants often rely on inspection reports to raise habitability issues, the report may be subject to objection unless it is certified, or used in connection with the testimony of an inspector. *See State v. Northway*, 588 N.W.2d 180 (Minn. Ct. App. 1999) (copy of federal agency report not admissible without certification by an official custodian of the report that the copy is a correct copy of the agency report).

s. Studies of effects of inadequate housing conditions

Air quality conditions in housing which adversely affect tenant health should violate the covenants of habitability. *See* Denise Grady, *Perseverance is Key to a Good Life with Asthma*, N.Y. TIMES SCIENCE (Oct. 19, 1999); Sheryl Gay Stolberg, *Poor Fight Baffling Surge in Asthma*, N.Y. TIMES, NATIONAL (Oct. 18, 1999). Inadequate housing may have a significant impact on the children who live in it. In *There's No Place Like Home: How America's Housing Crisis Threatens Our Children*, (Boston Medical Center Housing America, www.irc.org/housingamerica), substandard housing is linked with increased asthma attacks, anemia, house fires, burns from exposed home radiators, and lost IQ points due to lead poisoning.

t. Subsequent owner liability

A new owner may be bound by predecessor landlord's obligations. _____ *v. Gibson*, and _____ *v. Gibson*, Nos. 1000301900 and 1000301901 (Minn. Dist. Ct. 4th Dist. Mar. 27, June 30, 2000) (Appendix 439) (emergency relief action, 100% rent abatement for condemnation, and additional treble damages, tenant

may repair and deduct costs from rent, replacement housing, fines; subsequent order that new owner bound by predecessor landlord's obligations, $1800 in attorney fees, injunction against retaliation). *See* Orders (Minn. Dist. Ct. 4th Dist. Mar. 9 and 13, 2000) (Appendix 383).

u. Manufactured (mobile) home park lot tenancies

The manufactured (mobile) home park lot statutes also contain covenants of habitability. Minn. Stat. § 327C.10, subd. 1. *See Larson v. _____*, No. HC 030324502 (Minn. Dist Ct. 4th Dist. Feb. 13, 2004) (Appendix 528) (referee will not reconsider judge's order on waiver; tenant meets definition of disabled; requiring mobility disabled tenant to park vehicle further away than other tenants is not a reasonable accommodation; while parking tenant's vehicle near the home violated an ordinance, most other tenants also violated the unenforced ordinance; tenant's ordinance violations were repeated but not serious; tenant may raise landlord's violation of the covenants of habitability as a cause of tenant violation of the lease, where park owner's park design violated a local ordinance and forces tenant to violate the same ordinance); *Potvin v. _____*, No. C2-03-1604 (Minn. Dist Ct. 9th Dist. Sep. 19, 2003) (Appendix 562) (tenant first rent manufactured home (not in a park) and land under it, then purchased home and rented land, and fell behind on rent but landlord did not deliver title to tenant; court stayed writ for one week after landlord delivers title to tenant); *Sargent v. Bethel Properties, Inc.*, 653 N.W.2d 800 (Minn. Ct. App. 2002) (addition of utility charges to an existing manufactured-home park rental agreement is a new rule that substantially modifies the agreement and renders the agreement unenforceable). *Larson v. Anderson*, No. C9-96-416 (Minn. Dist. Ct. 9th Dist. Oct. 11 and Nov. 8, 1996) (Appendix 264) (Rent abatement of $6,910 over five years failing to repair discharge of raw sewage on the premises; landlord's notice to quit was in retaliation for tenant's complaint to health department). *See also* discussion, *infra*, at VI.E.11.

2. Other housing condition defenses

a. Violation of housing code precluding action for rent

While the covenants of habitability include compliance with housing codes, *see* discussion, *supra* at VI.E.1., violation of the housing code may be a separate and additional defense.

Generally a contract entered into in violation of a statute or ordinance which imposes a prohibition and a penalty for an action is void and unenforceable. However, the court first must consider the nature and circumstances of the contract in light of the statute or ordinance. The court will not infer that the legislative body intended the contract to be void unless such is necessary to accomplish its purpose. The courts have voided contracts where the violations offended important public policies with respect to health and safety of the public, and have upheld contracts where the legislative intent did not indicate that its sanction should apply where the violation is slight, not seriously injurious to the public order, and where no wrong has resulted from want of compliance. *New Bonn Company v. Herman*, 271 Minn. 105, 135 N.W.2d 222 (1965).

Violation of ordinances, including housing codes, may be punishable as a misdemeanor. *See* Minneapolis Code of Ordinances, § 1.30. In *Leuthold v. Stickney*, 116 Minn. 299, 133 N.W. 856 (1911), the landlord brought an action for rent and the tenant defended by alleging that the landlord did not provide a fire escape before commencing the tenancy or at any time during the tenancy, in violation of a state statute and punishable as a misdemeanor. In affirming judgment for the tenant, the court held that the violation rendered the lease void and without consideration, precluding the landlord's action for rent. *Id*. at 302-03, 133 N.W. at ___. *Accord Millier v. Pouliot*, 199 Minn. 331, 333, 271 N.W. 818, ___, (1937) (violation of Minneapolis building code may be a defense to an action for rent).

In *Niskanen v. Fielder*, C9-96-600751 (Minn. Dist. Ct. 6th Dist. May 23, 1996) (Appendix 212), the court held that the landlord had entered into an illegal contract by renting unlicensed property in Duluth and could not profit from her wrongdoing.

b. Agency housing repair orders

Some cities have an administrative proceeding within the code enforcement agencies, in which a hearing officer or board may grant rent abatements or allow tenants to make repairs and deduct the expense from the rent. In Minneapolis, if the Health, Housing Inspections, or Fire Departments find an emergency to exist regarding enforcement of the housing maintenance code which requires immediate action to protect health, safety or welfare of the occupants, the Department may issue an emergency order. Minneapolis Code of Ordinances § 244.160. If the Department issues an emergency repair order, it also shall notify the Minneapolis Emergency Violations Hearing Board, which shall hold a hearing as soon as the deadline date for completing the repairs has passed. Among other remedies, the Board may allow the occupants to make the repairs and deduct the expense from the occupants rent. *Id.* § 244.180.

c. Rental dwelling licenses

(1) *Beaumia v. Eisenbraun*

Many cities in Minnesota have ordinances which require residential landlords to obtain a license before renting their properties. In *Beaumia v. Eisenbraun*, No. A06-1482, 2007 WL 2472298 (Minn. Ct. App. Sept. 4, 2007) (unpublished), the Court of Appeals held that failure to pay rent could not be a ground for eviction where the landlord failed to comply with a municipal requirement to license or register the rental unit. The Alexandria City Ordinance made it unlawful to lease any residential property unless it had been registered with the City as a rental unit, and a registration fee had been paid. *Id.,* citing Alexandria Code of Ord, Sect. 5.08, Subds. 3(1)5. A landlord filed an eviction action when the tenants told the landlord they did not have the money to pay rent. The District Court ruled for the landlord, concluding that failure to register the rental unit was irrelevant to whether the landlord had the right to recover possession of the property.

The Court of Appeals reversed, first noting that if a tenant's duty to pay rent is excused, the eviction action must fail. *Id.*, citing *MAC-DUE Properties v. LaBresh*, 392 N.W.2d, 315, 316-17 (Minn. Ct. App. 1986), *review denied* (Minn. Oct. 29, 1986), landlord's failure to acquire city-required certificate of occupancy eliminated tenant's duty to pay rent, rendering eviction improper. The Court held that the tenants had no rental obligation during the period in which the property was unregistered, and that the tenants could credit rent paid during this period against rent which was unpaid after the landlord registered the property. The Court concluded that because the credit for rent paid but not due was larger than the rent due for the period in which the landlord had registered the property, the District Court erred by evicting the tenants. *Id.*

Revocation of a rental dwelling license is proper, where the owner received sufficient notice and was given the opportunity to be heard, and the record demonstrates that revocation was based on the issues of which the owner had notice. *Zorbalas v. City of Minneapolis*, No. A05-2141, 2006 WI 3490455 (Minn. Ct. App. Dec. 5, 2006).

(2) Minneapolis

In 1990 the Minneapolis City Council passed a new set of ordinances regulating rental dwelling licenses. Minneapolis Code of Ordinances Art. XVI, §§ 244.1800-244.2010. The effective date of the ordinances was January 1, 1991. (Appendix 11.A).

Owners of rental dwellings and dwelling units, including rented single family dwellings and rented dwelling units in owner-occupied dwellings, must obtain a license or a provisional license to rent the property. Excluded from this requirement are licensed hotels, licensed lodging houses, convents, monasteries, licensed nursing homes, licensed board and care homes, parsonages, parish homes, manses and rectories, hospitals, and dwellings in cooperative or condominium buildings. §§ 244.1810, 244.1820. By April 1, 1991 (90 days after the effective date of the ordinance), owners of rental dwellings had to apply for a license. § 244.1840. Licenses must be renewed on an annual basis. § 244.1860. Licenses are not transferrable. § 244.1870.

A license may be denied, revoked, suspended, or not renewed for any of the following reasons: (a) nonpayment of the license fee, (b) dwelling units exceeding the maximum number of dwelling units permitted by the zoning code, (c) dwelling or rental dwelling units over occupied or illegally occupied in violation of the zoning code or housing maintenance code, (d) a rental dwelling used or converted to rooming units in violation of the zoning code, (e) a rental dwelling under condemnation as hazardous or unfit for human habitation under this code or state statute, (f) the owner has allowed weeds, vegetation, junk, debris, or rubbish to accumulate repeatedly on the exterior of the premises so as to create a nuisance condition under the code, or (g) the rental dwelling or any rental dwelling unit is in substandard condition. §§ 244.1900, 244.1920. The director of inspections shall mail a notice of noncompliance to the owner or owner's agent, and post a notice to the tenants in the building. The owner shall have from ten to 60 days to correct the defects, depending upon the nature of the defect. § 244.1930. The maximum period was reduced from 90 days to 60 days by ordinance, effective July 6, 1995. Minneapolis Ordinance 95-OR-097 (July 6, 1995) (Appendix 128).

After the period has expired, if the dwelling is still in noncompliance, the director shall mail the owner a notice of denial, non-renewal, revocation or suspension of the license or provisional license. The city council will affirm the director's recommendation unless the owner appeals to the Rental Dwelling License Board of Appeals. § 244.1940-244.1970. When an application is denied or a license or provisional license is revoked, suspended, or not renewed, the director shall order the dwelling or dwelling units vacated within a reasonable time. § 244.1970. A person who allows any dwelling unit to be occupied or rents a dwelling unit to another person without a license is guilty of a misdemeanor. § 244.1980.

The remedies in these ordinances are not exclusive, and are in addition to other remedies available to the city or tenants provided under state law or the code. § 244.1990. On July 6, 1995, the ordinance was amended to reduce the maximum compliance time from 90 to 60 days, allowing entry for rental licensing inspectors to review notices with tenants, and requiring landlords to work with the Community Services Bureau when the conduct of their tenants or guests is considered disorderly. Minneapolis Ordinance 95-OR-097 (July 6, 1995) (Appendix 128).

Licensing status of properties by address is available at
http://apps.ci.minneapolis.mn.us/AddressApp/SearchByAddress.aspx?AppID=PIApp.

Court have moved beyond suspending the landlord' right to collect rent, to dismissing the action. *Hamid v.* _____, 27-CV-HC-08-5349 (Minn. Dist. Ct. 4th Dist. July 8, 2008) (Appendix 604) (nonpayment of rent eviction action dismissed and expunged where landlord has no rental license); *Taylor v.* _____, No. HC 031202508 (Minn. Dist Ct. 4th Dist. Dec. 26, 2003) (Appendix 582a) (dismissal for lack of rental

license); *Ukatu v.* _____, No. HC 0307614501 (Minn. Dist Ct. 4th Dist. July 30, 2003) (Appendix 586) (dismissal for no license at time of filing, even though landlord later obtained license; eviction case is moot when tenants have vacated; expungement granted); *Parks v.* _____, No. HC 030409567 (Minn. Dist Ct. 4th Dist. Apr. 22, 2003) (Appendix 557) (dismissal for lack of rental license); *Albrecht v.* _____, No. HC 011129507 (Minn. Dist Ct. 4th Dist. Dec. 13, 2001) (Appendix 461) (dismissal of nonpayment of rent case; landlord without a license shall not rent the premises, and rent collection is suspended until compliance); *Tri Star Developers, LLC v.* _____, No. HC 1011002522 (Minn. Dist Ct. 4th Dist. Oct. 16, 2001) (Appendix 585) ("renting without a rental license requires dismissal;" securing license after filing the action does not purge the defect in filing without one; expungement granted); *Connelly v. Schiff*, No. HC-1000417515 (Minn. Dist. Ct. 4th Dist. May 23, 2000) (Appendix 386) (dismissal without prejudice where landlord failed to secure rental license; tenant awarded $200 costs under § 549.02 and $40 in disbursements under § 549.04 for witness fees; expungement granted; plaintiff's motion to vacate and reopen treated as untimely motion for judge review under Minn. R. Gen. Prac. 611 when filed 11 days after oral announcement of decision).

The landlord's failure to license the property supports a complete rent abatement. _____ *v. Brogdon Properties, Inc.*, No. HC 030904900 (Minn. Dist Ct. 4th Dist. Sep. 17, 2003) (Appendix 435) (rent escrow action: complete rent abatement for lack of licensing, judgment of $2500); *Matsumoto v.* _____, No. AC 02-2123 (Minn. Dist Ct. 4th Dist. Apr. 19, 2002) (Appendix 534) (Judge Alton) (after license was revoked, landlord's rental was unlawful and was not entitled to collect rent; rent abatement of $2695; landlord violated shared meter statute, tenant entitled to reimbursement for payments made; landlord not entitled to late fees when he did not have a rental license; landlord proved some cleaning expenses deducted from the security deposit, but not other damages and penalties; tenant entitled to deposit penalties where part of landlord's withholding was in bad faith); *Smith v.* _____, No. HC 1010417559 (Minn. Dist Ct. 4th Dist. May 21, 2001) (Appendix 571) (failure to renew license with accurate address information suspended right to collect rent; tenant could not recoup rent paid during period before the period of the landlord's rent claim in which there was no license; landlord liable for statutory penalties for interrupting water service; habitability rent abatement of $100 per month); *Cregg v.* _____, No. HC 1001006502 (Minn. Dist Ct. 4th Dist. Oct. 23, 2000) (Appendix 488) ("landlord is prohibited from collecting rent if license is not obtained, ... the rental value of the premises is zero unless a landlord first obtains a rental license;" action dismissed with prejudice; costs and disbursements awarded); *Haney v.* _____, No. HC 10001002527 (Minn. Dist Ct. 4th Dist. Oct. 17, 2000) (Appendix 510) (landlord had no right to collect rent without a license; tenant may recoup rent paid in June and July when there was no license against rent not paid in September and October when there was a license).[9]

---

[9]In *Brown v. Owens*, No. UD-1940726506 (Minn. Dist. Ct. 4th Dist. Aug. 18, 1994) (Appendix 48), the court concluded that the landlord's failure to obtain the rental license warranted a suspension for collection of rent until compliance. The court prohibited the landlord from demanding or collecting rent from the tenant until the landlord complied with the licensing requirements. *Id*. at 6-7. *See Pocklington v. Brown*, No. UD-1950113512 (Minn. Dist. Ct. 4th Dist. Jan. 26, 1995) (following *Brown v. Owens*) (Appendix 98); *Drews v. Ennis*, No. UD-1950512523 (Minn. Dist. Ct. 4th Dist. June 5, 1995) (Appendix 125).

In *Washington v. Okoye*, Nos. UD-1980909564 and UD-1981029901 (Minn. Dist. Ct. 4th Dist. Feb. 4, 1999) (Appendix 354G), the court ordered that the tenant could remedy violations and deduct the cost from rent, rent abatement would increase from $100 to $200 out of monthly rent of $650, or from 15% to 31% if the landlord did not complete repairs, the tenant could credit payments on the landlord's water bill against rent, the landlord must obtain a rental license, the landlord's right to collect rent was suspended until he obtained the license, and prior orders relating to court approval of future filings remained in effect.

The temporary taking or suspension of a rental license does not result in a taking of the owner's property, under the United States and Minnesota Constitutions, as the ordinance was properly designed as a means for, and likely to succeed in, preventing harm to the community. *Zeman v. City of Minneapolis*, 552 N.W. 2d 548 (Minn. 1996).

In 1997, Minneapolis amended its housing code to increase the amount of information that the landlord must supply to the inspections department, and created minimum inspection standards for different types of properties. Housing Maintenance Code Amendments (Appendix 243). *See City of Minneapolis v. Swanson*, No. C5-97-312, 1997 WL 471182 (Minn. Ct. App. Aug. 19, 1997) (Appendix 251) (Unpublished: Ordinance requiring landlord to list residential address rather than post office box on rental license is constitutional).

Revocation of a rental dwelling license is proper, where the owner received sufficient notice and was given the opportunity to be heard, and the record demonstrates that revocation was based on the issues of which the owner had notice. *Zorbalas v. City of Minneapolis*, No. A05-2141, 2006 WI 3490455 (Minn. Ct. App. Dec. 5, 2006).

(3) Other cities

(a) Brooklyn Park

Leasing property in Brooklyn Center without a rental license is a misdemeanor under Section 12-901 of the Brooklyn Center Code of Ordinances, in association with Section 12-1302. http://www.cityofbrooklyncenter.org/index.asp?Type=B_BASIC&SEC=%7B463B184D-73EB-4409-ABD8-039D060CA9F1%7D.

In *Peterson v. Pearson,* UD-2951204800 (Minn. Dist. Ct. 4th Dist. Feb. 12, 1996) (Appendix 211), the court ordered rent abatement until the landlord registered property under Brooklyn Park licensing ordinance. *See Wersal v. Guggisberg*, No. UD-2970513211 (Minn. Dist. Ct. 4th Dist. May 23, 1997), *withdrawn by stipulation* (May 29, 1997) (Appendix 303). (Action dismissed for failure to obtain a license under Brooklyn Park Ordinance § 455.10).

(b) Duluth

In *Niskanen v. Fielder*, C9-96-600751 (Minn. Dist. Ct. 6th Dist. May 23, 1996) (Appendix 212), the court held that the landlord had entered into an illegal contract by renting unlicenced property in Duluth and could not profit from her wrongdoing. In *City of Mankato v. Mahoney*, 542 N.W.2d 689 (Minn. Ct. App. 1996): the Court of Appeals reversed the city council's revocation of a landlord's rental license, holding that the revocation was arbitrary and capricious because evidence did not support a finding that three noise disturbances occurred during one year within the meaning of the city code.

(c) Alexandria

In *Beaumia v. Eisenbraun*, No. A06-1482, 2007 WL 2472298 (Minn. Ct. App. Sept. 4, 2007) (unpublished), the Court of Appeals held that failure to pay rent could not be a ground for eviction where the landlord failed to comply with a municipal requirement to license or register the rental unit. *See* discussion, *supra*, VI.E.2.c.(1).

(d) New Hope

In *McGarrity v.* _____, No. 27-CV-HC-08-5946 (Minn. Dist. Ct. 4th Dist. Aug. 5, 2008) (Appendix 608), the court ruled that the landlord who failed to obtain license from City of New Hope could not claim rent due, except for pro rated amount after landlord obtained license.

3. Breach of an express covenant which creates a condition precedent to payment of rent

In *Mac-Du Properties v. LaBresh*, 392 N.W.2d 315 (Minn. Ct. App. 1986), a commercial lease provided that rent shall begin thirty days after the city granted an occupancy permit to the tenant and the landlord completed improvements; and that the lease was written and accepted by the parties subject to the city approving the occupancy by the tenant. The landlord did not complete the improvements, the city did not issue the permit, the tenant did not pay the rent, and the landlord filed an unlawful detainer action for nonpayment of rent. *Id*. at 316-17. On appeal the court held that the lease created a condition precedent to the tenant's obligation to pay rent and that the tenant did not owe rent. *Id*. at 317-18.

4. Tenant payment of utility or essential services following landlord's nonpayment Moved to VI.E.18.d.

5. Previous lockout or wrongful exclusion or eviction

In a tenancy, it is the tenant who has been given possession which is exclusive even against the landlord, with the only exceptions being the landlord's right to enter the premises to demand rent or make repairs, or exceptions provided by the lease. *Seabloom v. Krier*, 219 Minn. 362, ____, 18 N.W. 2d 88, 91 (1945). Wrongful eviction is prohibited by common law and by statute. *Berg v. Wiley*, 264 N.W.2d 145, 149 (1978); Minn. Stat. § 506.01. A tenant who has been wrongfully evicted may petition to recover possession of the premises and sue for treble damages or $500.00 in statutory damages, and reasonable attorney's fees. Minn. Stat. §§ 504B.375 (formerly § 566.175), 504B.231 (formerly § 504.255), 557.08, 557.09; *Lindner v. Foy*, No. A04-2060, 2005 WL 1514461 (Minn. Ct. App. June 28, 2005) (unpublished) (affirmed ruling that landlord locked out tenant where tenant vacated property, paid rent for the month, but was denied access to retrieve property; landlord's appeal of rental payment award rejected where trial court declined to award moving costs, trouble damages and attorney's fees, and punitive damages). A tenant who regains possession of the premises following a wrongful eviction may seek a rent abatement in defense of an unlawful detainer action for nonpayment of rent. *Yauch v. Caine*, No. UD-1900403548 at 3 (Minn. Dist. Ct. 4th Dist. Apr. 20, 1990) (Appendix 11.D).

There is disagreement over the amount of rent already paid that the tenant can recover following unlawful eviction. The tenant's obligation to pay rent is dependent upon the landlord's delivery of possession to the tenant. *Fritz v. Warthen*, 298 Minn. 54, _____, 213 N.W.2d 339, 341 (1973); *Cohen v. Conrad*, 110 Minn. 207, ____, 124 N.W. 992, ____ (1910). Some argue that the tenant may recover rent paid to the landlord for the period in which the tenant was unlawfully evicted from the premises on a *pro rata* basis. *See Klyberg v. Elkboy,* No. UD-1910617511 (Minn. Dist. Ct. 4th Dist. July 3, 1991) (Appendix 5.M) (*pro rata* rent abatement for three days when defendants were denied use of the premises). Others argue that the tenant can recover the full amount of rent paid for the month in which the tenant was wrongfully evicted. *See Harwood v. Meloney*, 139 Minn. 212, 214, 166 N.W. 125, ___ (1918) (well-established rule that where landlord wrongfully evicts tenant, the whole rent is suspended until possession has been restored to the tenant); *Chapman v. Fabian*, 104 Minn. 176, 177, 116 N.W. 207, _____ (1908) (landlord cannot recover rent for month in which tenant was wrongfully evicted; no holding on whether tenant could recover rent if rent already had been paid).

In *Yauch*, the tenant had not paid March rent. On March 15, he was locked out of the apartment. The tenant petitioned for recovery of the premises, which the court ordered on March 16. The landlord later brought an unlawful detainer action for nonpayment of March and April rent in the amount of $406.00 ($203.00 per month). The court granted a rent abatement of $175.00 (86 percent of the March rent). The court noted that:

> Under the somewhat unique circumstances of this case, the Court is disinclined to abate rent in the amount of $500.00 as argued by the defendant particularly in light of Plaintiff's legitimate concerns for the well-being of other residents and the security of their property. It is further noted that this Court immediately issued an Order granting the defendant herein relief from the lockout upon his petition for same.

No. UD-1900403548 at 3 (Appendix 11.D). It may be that in other circumstances, the tenant may be able to obtain a rent abatement in the amount of $500.00 statutory damages. *See LeDoux v. Zanosko*, No. CX-95-1001 (Minn. Dist. Ct. 9th Dist. Oct. 16, 1995) (Appendix 124) (rent abatement, relocation damages, statutory damages, and attorney's fees following unlawful termination of utilities).

Counsel should attempt to resolve the issue of rent abatement at the hearing on the tenant's petition of restoration to the premises, under Minn. Stat. §§ 504B.375 (formerly § 566.175), 504B.381 (formerly § 566.205), 504B.225 (formerly § 504.25), and 504B.231 (formerly § 504.255). In *Brackins v. Simon*, No. UD-1940803531 (Minn. Dist. Ct. 4th Dist. Aug. 5, 1994) (Appendix 77), the tenant petitioned to be restored to the premises following the landlord's attempt to exclude her. The court ordered a $500 penalty and $50 in attorneys fees against the landlord under Section 504.255 (now § 504B.231), which would be paid by rent abatement for the month of August. *See Smith v.* _____, No. 27-CV-HC-06-921 (Minn. Dist. Ct. 4th Dist. July 18, 2006) (Appendix 620) (referee ordered landlord did not need a rental license and terminated lease; judge reversed, concluding landlord without license did not have standing to file eviction, landlord constructively evicted tenant by obtaining restraining order against tenant in bad faith entitling tenant to $500 in damages and $500 in attorney fees, and ordering expungement); ____ *v.* _____, No. C-3-94-211 (Minn. Dist. Ct. 5th Dist. Dec. 21, 1994) (Appendix 95) (stipulated application of $500.00 statutory penalty to prospective rent abatement, and extension of retaliation protection).

Exclusion of the tenant from part of the property may be unlawful. *Washington v. Okoiye* and *Okoiye v. Washington*, No. UD-1981029901 (Minn. Ct. Dist. Oct. 8, 1999) (Appendix 426) (compliance order in consolidated unlawful detainer and emergency relief actions: landlord violated unlawful exclusion statute by excluding tenant from the basement;$500 for exclusion from the basement).

A *commercial* lease may require a commercial tenant to waive damages for a lockout. *Duling Optical Corp. v. First Union Management, Inc.,* No. C5-95-2718 (Minn. Ct. App. Aug. 13, 1996), FINANCE & COMMERCE at 66 (Aug. 16, 1996) (Appendix 181) (unpublished decision). However, residential tenants are protected from waiver by statute. Minn. Stat. §§ 504B.225 (formerly § 504.25), 504B.231 (formerly § 504.255), 504B.001 (formerly § 566.18).

A lockouts also constitutes a misdemeanor under Minn. Stat. § 609.606.

See discussion, *infra*, VI.E.18 (utilities).

6. Taxes on the land paid by the tenant

Minn. Stat. § 272.45 provides in part as follows:

> When any tax on land is paid by or collected from any occupant or tenant, or any other person, which, by agreement or otherwise, ought to have been paid by the owner, lesser, or other party in interest, such occupant, tenant, or other person may recover by action the amount which such owner, lesser, or party in interest ought to have paid with interest thereon at the rate of 12 percent per annum, or may retain the same from any rent due or accruing from the person to such owner or lesser for land on which such tax is so paid.

In *Space Center, Inc. v. 451 Corp.*, 298 N.W.2d 443 (Minn. 1980), the lease provided that the tenant shall pay to the landlord as additional rent all taxes and assessments due and payable, that the landlord shall submit to the tenant statements for such taxes, and that the tenant shall pay the landlord said taxes at least ten days before the same became due. The court concluded that:

In a true landlord-tenant relationship the additional-rents clause might not constitute an agreement by the landlord to pay the taxes. However, under the facts of this case, where the parties were also in a long-term relationship as optionor-optionee followed by vendor-purchaser, and where defendants had agreed to convey marketable title, we hold that defendants were obligated to pay the real estate taxes; their failure to do so entitled plaintiff to pay them and withhold rents for that purpose. *Id.* at 452.

7. Improper notice to increase rent or fees

If the lease does not provide for increasing the rent, the landlord may not increase the rent until the lease expires, unless the tenant agrees to an increase. If the lease provides for increasing the rent with notice, the landlord must comply with the notice provision. Some provisions for rent increases may be unconscionable. *See* discussion, *infra* at VI.G.13-14.

In a month-to-month lease, the landlord should give notice of the rent increase at least one month before the rent increase, since rent often is the most significant element of the lease, increasing the rent is equivalent to terminating the present lease and entering into a new lease with a higher rent, and termination of a month-to-month lease requires written notice before the last month of the tenancy. *Grider v. Hardin*, No. UD-1980501520 (Minn. Dist. Ct. 4th Dist. May 19, 1998) (Appendix 335) (no change in rent or late fees where landlord failed to give written notice); *Minneapolis Public Housing Authority v. Papasodora*, No. UD-1960611515 (Minn. Dist. Ct. 4th Dist. Jul. 17, 1996) (Appendix 213) (public housing notice to increase rent is equivalent to notice to terminate month to month lease and initiate new lease with new rent under Minn. Stat. Section 504.06 (now § 504B.135); notice mailed February 29 could not be received in February and was untimely for an April 1 rent increase; void notice could not be a basis for a future rent increase); *Donovic v. Dodson*, No. C2-96-600607 (Minn. Dist. Ct. 6th Dist. Apr. 29, 1996) (Appendix 201) (month to month tenant entitled to one month grace period to accept or reject term to pay one half of utilities). *See* discussion, *infra* at VI.F.1.

It is unclear whether the landlord has the right to unilaterally modify the terms of a periodic tenancy by giving the same kind of notice as is required to terminate the tenancy. Landlords argue that it is a common practice for landlords to give notice of changes in the rent or building rules, and for these changes to be accepted as part of the lease without the need for specifically terminating the existing tenancy or informing the tenant that the tenant must move if the tenant does not accept the new terms. Alternatively, landlords argue that such a notice is actually a notice to terminate the old periodic tenancy combined with an offer to re-rent the premises on new terms.

Tenants should argue that if the tenant objects to the rent increase, the tenant cannot be bound to a new lease by implication. *See* FUNDAMENTALS OF LANDLORD/TENANT LAW AND PRACTICE, *supra*, § 4.1-

02(3) at 3-4. However, a notice that explicitly terminates an existing tenancy, offers to renew the lease at an increased rent, and specifies that the offer may be accepted by remaining in possession past the expiration of the original term should be effective.

In a manufactured (mobile) home park lot lease, the landlord must give sixty (60) days written notice of the rent increase, and may increase the rent only twice in any twelve (12) month period. Minn. Stat. § 327C.06. The rent also may not be increased to pay any court or government imposed civil or criminal penalty. Minn. Stat. § 327C.11. Only reasonable rent increases may be enforced against existing tenants. Minn. Stat. § 327C.02, subd. 2.

8. Waiver of notice to increase rent

In *First National Realty v. Gumm,* No. UD-1910508527 (Minn. Dist. Ct. 4th Dist. May 31, 1991) (Appendix 11.F), the landlord increased the rent effective November 1, but continued to accept rent at the old amount from November through April. The court concluded that the landlord waived the right to evict the tenant for failure to pay the difference between the old rent and the new rent by continuing to accept the old amount of rent without demanding the new amount.

9. Retaliatory rent increase or services decrease

Under Minn. Stat. § 504B.285 (formerly § 566.03), subd. 3, the defendant must tender to the court or the plaintiff the amount of rent due before the increase, and prove by a preponderance of the evidence that (1) the defendant, in good faith attempted to secure or enforce the defendant's rights under the lease or federal, state, or local laws, or reported the plaintiff's violation of any health, safety, housing, or building code or ordinance to a governmental authority, and (2) the plaintiff increased the rent or decreased service as a penalty in whole or in part for the defendant's protected activity.

Proving retaliation under § 504B.285 (formerly § 566.03), subd. 3 may be difficult in most cases. However, if the defendant is the only tenant who has made complaints and the only tenant whose rent was increased, a case could be made for retaliation.

Proving retaliation under Minn. Stat. § 504B.441 (formerly § 566.28) is considerably easier. While § 504B.285 (formerly § 566.03), subd 3 does not create a presumption of retaliation in certain cases, § 504B.441 (formerly § 566.28) does include a presumption of retaliation if the landlord tries to evict the tenant, increase the tenant's obligations or decrease services to the tenant within 90 days after the tenant files a complaint about a violation of a code, a violation of the covenants of habitability, or a violation of the lease. While it is conceivable that a tenant could raise a retaliation defense under § 504B.441 (formerly § 566.28) in a nonpayment of rent case that did not involve an increase in rent or decrease in services, it appears that the landlord would be able to overcome the presumption of retaliation by simply showing that rent is due. *See Lewis Properties v. Pruitt*, No. UD-19503151516 (Minn. Dist. Ct. 4th Dist. May 11, 1995) (Appendix 99) (landlord overcame presumption that rent increase was retaliatory).

In *Smith v. Brinkman* and *Brinkman v. Smith*, Nos. HC-1000124900 and HC-1000202517 (Minn. Dist. Ct. 4th Dist. Mar. 9, 2000) (Appendix 418), in consolidated eviction and rent escrow actions, the court held that landlord failed to prove statutory notice to quit, notice to increase rent given November 1 was not effective to increase rent December 1, and the presumption of retaliation applied to a rent increase notice with the landlord failing to prove a non-retaliatory purpose, citing Minn. Stat. § 504B.441 (formerly § 566.28).

Some local ordinances include protection against retaliation. Minneapolis Code of Ordinances § 244.80 (Appendix 138) provides a presumption of retaliation where the landlord attempts to terminate the tenancy after the tenant complains to the inspection agency, or the tenant of City sues the landlord over housing conditions. *The presumption has no time limit.* The tenant also may be entitled to rent abatement for retaliation. *See* discussion, *supra*, at VI.E.1.d.(3) (Violation of covenants of habitability).

If the defendant proves a retaliatory rent increase, the rent would remain at the pre-increase amount. *Line v. Reynolds*, No. UD-1960612512 (Minn. Dist. Ct. 4th Dist Aug 12, 1996) (App. 175) (consolidated unlawful detainer and rent escrow actions; tenant proved that proposed 21% rent increase was in retaliation for tenant's complaints of repair needs, and landlord did not prove that the rent increase was based on other factors); *Lundstrom v. Colglazier*, No. UD-1960524502 (Minn. Dist. Ct. 4th Dist. Jun. 17, 1996) (Appendix 210) (tenants proved that landlord's proposed rent increase was in retaliation for complaints about repairs). If the defendant proves a retaliatory decrease in services, it appears that the defendant would be entitled to a rent reduction or a resumption of the pre-decrease level of services. Without such relief, the defense would appear meaningless, since the plaintiff would receive the full rent while the defendant received decreased services. Where the rent is reduced, the appropriate measure of damages would be the same as in the breach of covenants cases. *See* discussion, *supra* at VI.E.1. If the defendant fails to prove retaliation, the defendant still would be able to redeem the tenancy by paying the increased rent plus costs. *See* discussion, *infra* at VI.E.20.

In manufactured (mobile) home park lot tenancies, under Minn. Stat. § 327C.12, the defendant's protected activity includes a good faith, a complaint to the park owner or a governmental agency or official, or an attempt to exercise rights or remedies pursuant to federal or state law. The 1995 Legislature clarified the application of the statute to a landlord's adverse action against the tenant following the tenant joining and participating in the activities of a resident association. Minn. Stat. § 327C.12, *amended by* 1995 Minn. Laws Ch. 13, Art. 1. If the plaintiff increases rent, decreases services, alters an existing lease, or seeks possession of the premises, or threatens such action, within ninety (90) days of the defendant's protected activity, the plaintiff has the burden of proving non-retaliation. *Id.* The retaliatory eviction statute, Minn. Stat. § 504B.285 (formerly § 566.03), subd. 2, which also includes the ninety (90) day test, requires the plaintiff to prove that the notice to quit was not served in whole or part for a retaliatory purpose. If the plaintiff takes any of the listed illegal actions more than ninety (90) days after defendant's protected activity, the defendant must make a *prima facie* case of retaliation, and then the plaintiff must prove otherwise. Minn. Stat. § 327C.12 (emphasis added).

In *Schaff v. Hometown America, LLC*, No. A04-1778, 2005 WL 1545525 (Minn. Ct. App. July 5, 2005) (unpublished), manufactured home park residents challenged a park rent increase as being retaliatory. The court of appeals affirmed the trial court ruling that the rent increase in combination with a utility billing decrease resulted in a marginal rent increase which was both reasonable and not retaliatory. *See Hellen v. Hometown America LLC*, No. A06-1545, 2007 WL 2472337 (Minn. Ct. App. Sept. 4, 2007) (unpublished) (affirmed district court decision that rent increase was not retaliatory).

See Retaliation, *infra* at VI.E.25, VI.F.3., VI.G.18.

10. Late fees and other fees

Rent is a sum stipulated for the use and enjoyment of the premises. *Ambrozich v. City of Eveleth*, 200 Minn. 473, 483, 274 N.W. 635, 640 (1937); BLACK'S LAW DICTIONARY 1166 (5th ed. 1979). Late fees, damage deposits and other fees are not rent, and should not be included as rent in a nonpayment of rent action. Nonpayment of proper late fees, deposits and other fees may constitute a breach of the lease.

Some courts have held that utilities and other charges may be considered rent, entitling defendant to redeem the premises by paying the amount due. These case could support a claim that late fees may be included in a claim for rent. *See Central Union Trust Co. v. Blank*, 168 Minn. 312, 316, 210 N.W. 34, __ (1926) (covenant to pay taxes is part of consideration for payment of lease); *American Land Real Estate Investment Corp. v. Pokorny*, No. C0-90-1649 (Minn. Ct. App. Dec. 18, 1990) (Appendix 53) (unpublished: obligation to buy insurance equivalent to paying rent); *Kahn v. Greene*, No. UD-1940330506 at 7 (Minn. Dist. Ct. 4th Dist. May 25, 1994) (Appendix 46) (water bill deemed as rent); *Schaapveld v. Crump*, No. UD-1951011528 (Minn. Dist. Ct. 4th Dist. Oct. 31, 1995) (Appendix 115) (the parties' prior conduct demonstrated that tenants agreed to pay gas utilities and landlord agreed to pay water, sewer and recycling costs).

The tenant must decide whether it is advantageous to litigate late fees in a nonpayment of rent case rather than a breach of the lease case. In a nonpayment of rent case, if the court determines that the late fees are proper and owing, the tenant has the right to redeem the tenancy by paying the unpaid amounts. *See* discussion, *infra* at VI.E.20. However, in a breach of lease case, if the court finds that the tenant has not paid proper late fees, the tenant may not have the right to cure the breach of the lease by paying the late fee. *See* discussion, *infra* at VI.G.20.

Some leases provide for an additional fee to be paid if the rent is not paid by a certain date. Some leases provide for a flat fee, while others provide for a daily fee. Late fees may be analyzed as liquidated damages or interest. *Begin v. Reissman*, 1995 WL 348043 (Conn. Super. May 17, 1995) (unpublished) ($5.00 per day late charge constantly accruing was unconscionable and a penalty; 5% of one month's rent or a $25.00 flat fee can be justified by the administrative costs necessary to monitor late payments).

a. Liquidated damages and penalties

In leases, fees based upon a breach of the lease must be in the form of liquidated damages, *see Local 34 State, County & Mun. Employees v. County of Hennepin*, 310 Minn. 283, 288, 246 N.W.2d 41, 44 (1976) (*dictum*); and not an unenforceable penalty. *See Palace Theatre, Inc. v. Northwest Theatres Circuit, Inc.*, 186 Minn. 548, 553, 243 N.W. 849, 851 (1932).

Generally, liquidated damages serve as a reasonable forecast of general damages resulting from a breach. *Zirinsky v. Sheehan*, 413 F.2d 481, 485 (8th Cir. 1969), *cert. denied*, 396 U.S. 1059 (1970). The controlling factor is whether the amount agreed upon is reasonable or unreasonable in light of the contract as a whole, the nature of the damages contemplated, and the surrounding circumstances, and not the intention of the parties nor their expression of intention. *Gorco Const. Co. v. Stein*, 256 Minn. 476, 481-82, 99 N.W.2d 69, 74 (1959) (emphasis added). *See Meuwissen v. H.E. Westerman Lumber*, 218 Minn. 477, 483, 16 N.W.2d 546, 549-50 (1944).

Where actual damages cannot be measured, liquidated damages not manifestly disproportionate to actual damages are enforceable. *Gorco*, 256 Minn. at 482, 99 N.W.2d at 75. Where actual damages are susceptible of definite measurement, an amount greatly disproportionate is an unenforceable penalty. *Id.*, at 483, 99 N.W.2d at 75.

Liquidated damages can not be recovered if they are not provided for in the lease. *Cook v. Finch*, 19 Minn. 407, ____, 19 Minn. (Gil.) 350, 358 (1873). *Brooklyn Center Leased Housing v. _____*, No. HC 030819518 (Minn. Dist Ct. 4th Dist. Sep. 16, 2003, and Mar. 10, 2004) (Appendix 480) (ambiguities in lease concerning the deposit, rent and pro-rated rent and lack of documentation construed against landlord, no late fees if not contained in lease, redemption; later expunged).

Failure to license the property may block the claim for late fees. *Matsumoto v. _____,* No. AC 02-2123 (Minn. Dist Ct. 4th Dist. Apr. 19, 2002) (Appendix 534) (Judge Alton) (after license was revoked, landlord's rental was unlawful and was not entitled to collect rent; rent abatement of $2695; landlord violated shared meter statute, tenant entitled to reimbursement for payments made; landlord not entitled to late fees when he did not have a rental license; landlord proved some cleaning expenses deducted from the security deposit, but not other damages and penalties; tenant entitled to deposit penalties where part of landlord's withholding was in bad faith).

The actual damages for late payment of rent may be measured without difficulty: the legal rate of interest plus the actual costs caused by the late payment. *United Shoe Machinery Co. v. Abbott*, 158 F. 762, 763 (8th Cir. 1908). *See Mandlin v. American Savings & Loan Ass'n.*, 63 Minn. 358, 367, 65 N.W. 645, 649 (1896) (actual damages of breach of term to pay money susceptible of definite measurement).

A daily late fee may be excessive. *Begin v. Reissman*, 1995 WL 348043 (Conn. Super. May 17, 1995) (unpublished) ($5.00 per day late charge constantly accruing was unconscionable and a penalty; 5% of one month's rent or a $25.00 flat fee can be justified by the administrative costs necessary to monitor late payments).

The courts have found certain late fee provisions to be unenforceable penalties. *Wheeler v. _____*, No. HC 030905517 (Minn. Dist Ct. 4th Dist. Oct. 3, 2003) (Appendix 594) ($1005 in late fees were excessive, tenant did not prove habitability violations, tenant may redeem); *Miller v. George*, No. UD-1941223501 (Minn. Dist. Ct. 4th Dist. Jan. 10, 1995) (Appendix 129) ($25.00 late fee for non-payment of $10.00 rent is unconscionable); *Cherrier v. Harper*, No. UD-1940113508 (Minn. Dist. Ct. 4th Dist. Feb. 4, 1994) (Appendix 50) (late charge of $15 if rent was more than one day late, and $20 after two days, was an unenforceable penalty); *Central Community Housing Trust v. Anderson*, No. UD-1900611534 at 3 (Minn. Dist. Ct. 4th Dist. July 6, 1990) (Appendix 18.B) (government subsidized housing: $20.00 late fee bore no relation to cost of landlord's preparation of form notice and slipping the notice under the tenant's door, triggering the tenant's prompt action in paying the rent); *Auchampach v. IGO Co.*, Nos. C7-90-10716, C6-90-10559, and S9-90-6084 at 6-7 (Minn. Dist. Ct. 2nd Dist. Dec. 5, 1990) (Appendix 18.C) (late charge of 4 percent of the amount of rent unpaid plus $2.00 per day is excessive and unenforceable, intended as a penalty for nonperformance of the tenant's obligation to pay rent in a timely manner); *Larson v. Cooper*, No. UD-1880209557 at 8 (Minn. Dist. Ct. 4th Dist. Mar. 21, 1988) (Appendix 6) ($10.00 per day late fee was an unenforceable penalty).[10]

---

[10]Courts in other jurisdictions have found certain late fees provisions to be unenforceable penalties. In *Hobson Grove Apartments v. Edmonds,* No. 92-C-00219 (Ky. Dist. Ct. Warren Cty. Apr. 6, 1992) (Appendix 18.F.1), the monthly rent was $94.00. The lease provided for a late fee of $5.00 on the sixth day of the month, and one dollar for each additional day. Plaintiff alleged nonpayment of $22.00 rent and $249.00 in late fees. The court found that the damages resulting from late payment of rent should have been easily ascertainable, since plaintiff's employee followed an established routine to process late rent charges that required a minimal amount of work. The court found that the liquidated damages set forth in the lease were disproportionate to the amount of damages actually suffered, and concluded that the clause was unenforceable. *See Highgate Associates, Ltd. v. Merryfield,* No. 79-4-88WnC (Vt. Dist. Ct. Wash. Cty. Dec. 22, 1989) (Appendix 18.E). *aff'd* 597 A.2d 1280 (Vt. 1991) (Appendix 18.F) (subsidized housing lease late fee of $5.00 on the sixth day of the month and $1.00 for each additional day was an unenforceable penalty because it was disproportionate to the landlord's actual loss, damages from late rent payment are not difficult to ascertain, and the clause was intended to penalize late payment rather than compensate the landlord; excellent example of facts needed to contest a late fee); *Fellows v. National Can Co.*, 257 F. 970, 972 (6th Cir. 1919) (10% penalty for ten day delinquency in payment of rent for lease of

A late was upheld in *606 Vandalia Partnership v. JLT Mobil Building Ltd. Partnership*, No. C3-99-1723 (Minn. Ct. App. Apr. 25, 2000) (unpublished) (affirmed District Court conclusions that commercial late fee was a proper liquidated damage and not an unenforceable penalty or unconscionable provision).

b. Usurious interest

Usury elements include: (a) a loan of money or forbearance of a debt, (b) an agreement between the parties that the principal shall be repayable absolutely, (c) the exaction of a greater amount of interest or profit than is allowed by law, and (d) the presence of an intention to evade the law at the inception of the transaction. *Rathbun v. W.T. Grant Co.*, 300 Minn. 223, 230, 219 N.W.2d 641, 646 (1974). Minn. Stat. § 334.01, subd. 1 sets general annual interest rates at 6 and 8 percent.

Usury ordinarily is a question of fact. *Kantack v. Kreuer*, 280 Minn. 232, 240, 158 N.W.2d 842, 848 (1968). Minn. Stat. § 334.03 provides that where usury is found to exist, the underlying debt is void. However, while courts have invalidated the interest, some courts have been reluctant to void the entire debt. *Katz & Lange, Ltd v. Beugen*, 356 N.W.2d 733, 735 (Minn. Ct. App. 1984) (12% interest on unpaid legal fees held usurious). In *Dairy Farm Leasing Co. v. Sticha*, C3-95-2698 (Minn. Ct. App. July 30, 1996), FINANCE AND COMMERCE at 40 (Aug. 2, 1996) (Appendix 214), the court held that a violation of usury laws does not require specific intent, as long as the party intended to collect the amount of money stated on the face of the contract, and that amount is usurious.

Courts in Minnesota and other jurisdictions have found certain late fees in leases to be usurious. *Cherrier v. Harper*, No. UD-1940113508 (Minn. Dist. Ct. 4th Dist. Feb. 4, 1994) (Appendix 50) (late charge of $15 if rent of $73 per week was more than one day late, and $20 after two days was usurious); *Auchampach v. IGO Co.*, Nos. C7-90-10716, C6-90-10559, and S9-90-6084 at 6-7 (Minn. Dist. Ct. 2nd Dist. Dec. 5, 1990) (Appendix 18.C) (late fees assessed at rate of 4 percent of the amount of unpaid rent plus $2.00 per day were usurious); *Gramith v. Thibodeau*, No. UD-1941223506 (Minn. Dist. Ct. 4th Dist. Jan. 13, 1995) (Appendix 100) (late fee limited to $20.00); *Fellows v. National Can Co.*, 257 F. 970 972 (6th Cir. 1919) (10% penalty for ten day delinquency in payment of rent for lease of equipment held usurious): *Bonfanti v. Davis*, 487 So. 2d 165, 168 (La. Ct. App. 1986) (18% interest charged on late rent held usurious). *But see Widmark v. Northrup King Co.*, 530 N.W. 2d 588 Minn. Ct. App. 1995) (late fee in contract for sale of agricultural seeds was not subject to usury laws).

For an example of calculating annual interest for late fees, see Appendix 51.

c. Waiver of late fees

Like other lease provisions, late fees can be waived. *See* discussion, *infra*, at VI.G.2. *See also Chaska Village Townhouses and Lifestyle, Inc. v. Edberg*, No. 91-27365 (Minn. Dist. Ct. 1st Dist. Apr. 1,

---

equipment held penalty, since it bore no relation to actual damages); *Spring Valley Gardens Associates v. Earle*, 112 Misc. 2d 786, 787-88, 447 N.Y.S.2d 629, 630-31 (Rockland Cty. Ct. 1982) ($50.00 late fee on $405.00 rent paid 11 days late held unconscionable and a penalty); *Hankin v. Armstrong*, 109 Misc. 2d 709, 713, 440 N.Y.S.2d 972, 975-76 (Rockland Cty. Ct.), *aff'd*, 113 Misc. 2d 24, 25, 451 N.Y.S.2d 334, 335 (Appendix Term. 1981) ($1.00 per day late fee held unreasonable and a penalty); *Burstein v. Liberty Bell Village*, 120 N.J. Super. 54, ___, 293 A.2d 238, 240 (1972) (late fee of $5.00 after the fifth day of month and $1.00 per day for each successive day was excessive and unenforceable). *See generally* 5A CORBIN ON CONTRACTS § 1065 (1964).

1991) (Appendix 11.L) (plaintiff induced defendant to believe that late rental payments would continue to be accepted without consequences).

d. Public and subsidized housing

In most government subsidized housing projects, the landlord may not evict the tenant for not paying late fees. HUD Handbook No. 4350.3, ¶ 4-14(d). This provision does not apply to Section 202 Elderly Handicap Housing Projects receiving Section 8 or Rent Supplement assistance. In the two subsidized housing project programs not covered by HUD Handbook No. 4350.3, the Section 8 Moderate Rehabilitation and Project-Based Certificate Assistance Program the regulations do not provide for late fees or other charges in addition to rent. 24 C.F.R. §§ 882.401 *et. seq.* 882.701 *et. seq.*

In the Section 8 Existing Housing Certificate program, the landlord may not attempt to evict the tenant for not making additional payments in addition to rent. This arguably includes late fees. HUD Handbook No. 7420.7, ¶ 4-17(c) (Appendix 11.I). Since there is no handbook for the Section 8 Existing Housing Voucher Program, and since the program is almost identical to the Certificate program, it appears that this provision would apply. The Handbook may be out of date, given new regulations, but the regulations only provide for late fees payable by the housing authority for late subsidy payments, and do not provide for tenant late fees. 24 C.F.R. § 982.451.

In public housing, the fees must be reasonable. 24 C.F.R. § 966.4(b)(3).

e. Manufactured (mobile) home park lot tenancies

In manufactured (mobile) home park lot tenancies, the arrearage may not include any fees other than those specified in Minn. Stat. § 327C.03 (certain fees for installation and removal of the home, late rent, pets, maintenance, and security deposits). Minn. Stat. § 327C.10, subd. 1. *See Hedlund v. Davis,* No. C1-91-1687 (Minn. Dist. Ct. 10th Dist. Dec. 31, 1991) (Appendix 15.F) (improper maintenance charges); *Allison v. Sherburne Country Mobile Home Park*, 475 N.W.2d 501 (Minn. Ct. App. 1991) (park owner may charge electricity service fee identical to fee residents would have to pay to public utility, even if the fee exceeds the cost to the park owner).

f. No late fee is due because the tenant properly withheld rent

Tenants are not liable for late fees where the tenant property withheld rent. *Central Manor Apartments v. Beckman*, No. UD-1980513525) (Minn. Dist. Ct. 4th Dist. May 27, 1998) (Appendix 319A) ("When a tenant withholds rent due to habitability issues which are then proven by the tenant, fees for late payment of rent are not due for the month a tenant withheld rent. Assessing a late fee would frustrate the tenant's right to withhold rent to remedy habitability problems, and is contrary to public policy."). *The Hornig Companies v. Mmubango*, No. UD-1950213513 (Minn. Dist. Ct. 4th Dist. Mar. 6, 1995) (Appendix 93); *U and W, Inc. v. Grove*, No. UD-1950403505 (Minn. Dist. Ct. 4th Dist. Apr. 25, 1995) (Appendix 111).

g. Plaintiff did not prove existence of late fees

In *Smithrud v. McDaniel*, No. UD-195050529 (Minn. Dist. Ct. 4th Dist. May 22, 1995) (Appendix 130), neither party testified regarding the landlord's late fee claim of $150.00. The court found that it was not clear what late fees they landlord asserted were due and for which months, concluding that the landlord had not proven that the tenants owed $150.00 for late fees. *See Clark v. Urban Investments*, No. UD-1970821901 (Minn. Dist. Ct. 4th Dist. Sep. 10, 1997) (Appendix TR 145) (Late fees were not based on lease

but on later notice to increase late fees; landlord did not prove it was entitled to unilaterally amend lease to increase late fees); *Cedar Associates LLP v. Curtis*, No. UD-1970108508 (Minn. Dist. Ct. 4th Dist. May 20, 1997) (Appendix 250) (No late fee in lease); *Little v. Katzovitz,* No. UD-1970902903 (Minn. Dist. Ct. 4th Dist. Sep. 30, 1997 (Appendix 268) (Landlord did not prove tenants owed prior rents or late fees).

11. Manufactured (mobile) home park lot tenancies

a. Breach of the covenants of habitability. Minn. Stat. § 327C.10, subd. 1. *See Larson v. Anderson*, No. C9-96-416 (Minn. Dist. Ct. 9th Dist. Oct. 11 and Nov. 8, 1996) (Appendix 264) (Rent abatement of $6,910 over five years failing to repair discharge of raw sewage on the premises; landlord's notice to quit was in retaliation for tenant's complaint to health department). *See generally* discussion, *supra*, at VI.E.1.u.

b. Improper notice to terminate the lease. The landlord must give ten (10) days written notice to the tenant and the secured party. Minn. Stat. § 327C.09, subd. 2. *See* discussion, *infra*, VI.F.7 (manufactured (mobile) home park lot defenses) and VI.G.11 (manufactured (mobile) home park lot breach defenses).

c. The arrearage includes improper fees. Minn. Stat. § 327C.03, 327C.10, subd. 7. *See* discussion, *supra*, at VI.E.10.e (manufactured (mobile) home park lot late fees).

d. Waiver of notice. *See Hedlund v. Davis,* No. C1-91-1687 (Minn. Dist. Ct. 10th Dist. Dec. 31, 1991) (Appendix 15.F) (waiver of notice alleging failure to pay maintenance charges where landlord accepted and retained rent check and brought it to the hearing). *See* discussion, *infra*, at VI.F.4 (waiver of notice).

e. Improper rent increases. *See* discussion, *supra* at VI.E.7; *Nichols v. Harmon,* No. MX-89-8879 (Minn. Dist. Ct. 4th Dist. Apr. 30, 1990) (Appendix 11.G) (rent increases must be reasonable); *Pilgrim v. Crescent Lake Mobile Colony*, 582 S.2d 649 (Fla. Ct. App. 1991) (Appendix 11.N) (rent increase 15 to 55% above fair market rent with deteriorated conditions was unconscionable).

f. Retaliatory rent increase or services decrease. *See* discussion, *supra* at VI.E.9.

h. Redemption. *See* discussion, *infra* at VI.E.20.

i. The secured party to the purchase of the manufactured (mobile) home may not bring an unlawful detainer action for nonpayment on the contract. *Hermantown Federal Credit Union v. Leddy*, No. CX-97-601417 (Minn. Dist. Ct. 6th Dist. Aug. 11, 1997) (Appendix 260) (Remedy is under MINN. STAT. § Ch. 327, not Ch. 566 (now Ch. 504B)).

12. Public and government subsidized housing

Notice requirements vary depending on the program. In government subsidized housing projects and public housing the landlord must give written notice before commencement of an eviction (unlawful detainer) action for nonpayment of rent. *See* discussion, *infra* at VI.F.10.

Even if the tenant did not pay the rent, the tenant may argue that nonpayment of rent is simply a *prima facie* cause for termination of the lease, and that the tenant may rebut the showing that nonpayment was occasioned by circumstances beyond the tenant's control, the tenant notified the landlord of this, and the tenant made a diligent effort to pay when the tenant was able. *Real Properties Services Management Services v. Harigle*, No. 3-96-21, 1997 WL 4307773, 1997 LEXIS 3486 (Ohio Ct. App. July 30, 1997), HDR CURRENT DEVELOPMENTS 250 (Aug. 25, 1997) (Appendix 288) (No good cause for eviction for nonpayment of rent where tenants paid rent late or into court); *Stark Metropolitan Housing Authority v. Ruffin*, No. CA-8751, 1992 Ohio Appendix LEXIS 3254 (Aug. 17, 1992) (Appendix 11.J.1); *Housing Authority of St. Louis County v. Boone*, 747 S.W.2d 311 (Mo. Ct. App. 1988) (public housing, tenant not at fault for nonpayment of rent); *Regency Park Apartments v. Gidcumb*, No. 86-X-003 (Kty. Cir. Ct. Warren Cty. Apr. 3, 1986), *affirming* No. 86-C-062 (Kty. Dist. Ct. Warren Cty. Feb. 6, 1986) (Appendix 153) (no material non-compliance with lease where tenant paid rent late but landlord accepted it; and tenant caused $114 in damage, could not pay it within 15 days after receiving bill while receiving low income on AFDC, tenant offered to pay $78 before filing and had all of the money before hearing); *Maxton Housing Authority v. McClean*, 313 N.C. 277, 328 S.E.2d 290 (1985) (public housing, tenant not at fault for nonpayment of rent).

In cases where the public housing authority has provided less than the proper housing assistance payment to the landlord, either by miscalculating the tenant's income and rent or by improperly terminating the subsidy, the tenant may wish to file a third party complaint against the public housing authority. *See* discussion, *supra* at V.C.

In *JHCJ Associates v. Bryant*, No. UD-1960606502 (Minn. Dist. Ct. 4th Dist. Jul. 31, 1996) (Appendix 217), the Section 8 certificate landlord did not waive the right to evict for back rent because landlord regularly and consistently notified tenant of landlord's continuing claim for rent, but the court hesitated to evict the Section 8 tenant who has made timely rent payments recently, and authorized prospective monthly payments on the back rent.

a. Section 8 existing housing certificate and voucher programs

Court have consistently held that the landlord may not require the tenant to pay additional fees or rents not approved by the housing authority. *Hwang v. Jones*, No. UD-1960319526 (Minn. Dist. Ct. 4th Dist. Apr. 4. 1996) (Appendix 215) (Section 8 certificate: landlord cannot charge any rent, extra deposit, extra fees or other extra costs not approved by the public housing authority); *Robinson v. Schaapveld*, No. UD-1951006523 (Minn. Dist. Ct. 4th Dist. Dec 15, 1995) (Appendix 209) (rent collected in excess of rent set in the Section 8 lease violates law and policy); *Swanson v. Wallner*, No. _____ (Minn. Dist. Ct. 4th Dist. Sept. 7, 1995) (Appendix 131) (subsequent lease for higher rent not agreed to in Section 8 agreement void as contrary to federal law); *Waterston v. Minneapolis Public Housing Authority*, No. AC-93-4511 (Minn. Dist. Ct. 4th Dist. July 26, 1993) (Appendix 78) (landlord violated contract with public housing authority by seeking additional $50 per month from tenant); *Cooper v. Chit*, No. AC-90-15146 (Minn. Dist. Ct. 4th Dist. Oct. 12, 1990) (Appendix 11.M) (landlord not entitled to side payments in addition to rent). *But see Z & S Management Company v. Jankowicz*, No. UD-1920219515 at 10 (Minn. Dist. Ct. 4th Dist. Mar. 24, 1992) (Appendix 9.B) (plaintiff may charge defendant for garage rent under the lease agreement).

Since the tenant is only responsible for the tenant's share of the rent, the landlord may not recover from the tenant government subsidies withheld by the housing authority for the landlord's failure to keep the apartment in reasonable repair. *Johnson v.* _____, No. HC 1001005514 (Minn. Dist Ct. 4th Dist. Oct. 18, 2000) (Appendix 526) (directed verdict entered on drug claim where witness testified no drugs were found in raid, and testimony on earlier controlled purchase of drugs was not pled; nonpayment of rent was by

Section 8 and not tenant, so tenant not required to pay filing fee to redeem); *Denning v. Swanstrom*, No. A-97-761, 1998 WL 867250 (Neb. Ct. App. Nov. 3, 1998) (Appendix 325) (Unpublished). *See Wiley v. Flax*, No. UD-1961107516 (Minn. Dist. Ct. 4th Dist. Nov. 25, 1996) (Appendix 304) (Landlord only could enforce Section 8 lease, and could not enforce contradictory private lease for a higher rent or a subsequent side agreement for still higher rent and change in responsibility for utilities); *Mattson v. Harmon*, No. UD-1961203552 (Minn. Dist. Ct. 4th Dist. Jan. 28, 1997) (Appendix 269) (Tenant not responsible for rent subsidy withheld by housing authority which is not due to tenant's conduct; landlord cannot require tenant to pay full rent or evict tenant for failing to pay full rent; landlord bound by housing authority's reinstatement of contract); *Z & S Management Company v. Jankowicz*, No. UD-1920219515 at 9-10 (Minn. Dist. Ct. 4th Dist. Mar. 24, 1992) (Appendix 9.D) (rent abatement in addition to, and not offset by withheld government subsidies); *Kray v. Humphrey*, No. UD-1950110500 (Minn. Dist. Ct. 4th Dist. Feb. 8, 1995) (Appendix 132) (rent withheld by the Public Housing Authority not subject to unlawful detainer action against tenant); 24 C.F.R. §§ 982.310(b), 982.451(b)(4) (Appendix 109). Additionally, the decision in *Westminster Corp. v. Anderson*, 536 N.W. 2d 340 (Minn. Ct. App. 1995) supports the position that the landlord may not claim from the tenant payments allegedly due to the landlord from the housing authority. In *Westminster Corp*., the court held that the government subsidy to the landlord was not rent, so the landlord's acceptance of the subsidy did not waive the tenant's alleged breach of lease, while acceptance of the tenant's rent would have constituted waiver. Since the subsidy is not rent, and is not payable by the tenant, the landlord may not claim it from the tenant.

State law may prohibit a landlord from refusing to participate in the Section 8 certificate or voucher program with an existing tenant. In *Franklin Tower One, L.L.C. v. N.N.*, No. A-159-97 (N.J. Mar. 23, 1999) (Appendix 331), a tenant who had rented from the landlord for five years became eligible for a Section 8 voucher, but the landlord refused to accept the voucher or participate in the program. In an eviction action for non-payment of rent, the trial court held the landlord was not required to accept the voucher. The New Jersey Appellate Decision reversed the decision of the trial court, holding that N.J.S.A. §2A:42-100 prohibited landlords from refusing to accept vouchers. The statute prohibits refusing "to rent or lease any house or apartment to another person because of the source of any lawful income received by the person or the source of any lawful rent payment to be paid for the house or apartment." The New Jersey Supreme Court affirmed the decision of the appellate decision, holding that the statute prohibited landlords from refusing to accept vouchers, and that the statute was not preempted by federal law. The Minnesota Human Rights Act (MHRA) prohibits discrimination based on status with regard to public assistance. Minn. Stat. §363.03. This provision may prohibit landlords from refusing to accept Section 8 certificates and vouchers. For more information, contact the Housing Discrimination Law Project at (612) 827-3774.

b. Subsidized housing projects

Most government subsidized housing projects are covered by HUD Handbook No. 4350.3. Projects not covered by the handbook include the Section 8 Moderate Rehabilitation and Project-Based Certificate Assistance Programs. The following defenses may be applicable:

(1) Plaintiff did not give the tenant ten days notice before filing the eviction (unlawful detainer) action

In *Buffalo Court Apartments v. Velde*, No. C6-98-1798 (Minn. Dist. Ct. 10th Dist. Sep. 14, 1998) (Meyer, J.) (Appendix 313), the subsidized housing project sent a letter to the tenant retroactively terminating the subsidy, claiming that another person was living with her in violation of the lease. The tenant claimed that the person was a guest and not a resident, and provided documentation. The landlord did not give the required ten day notice to remove the subsidy, or the 30 day notice to terminate the lease.

The court concluded that the landlord had not proven that the tenant violated the lease, the landlord failed to comply with regulations in increasing the tenant's rent, and failure to provide proper notice prevented the landlord from removing the tenant's rent subsidy. The court dismissed the action and ordered that the landlord immediately reinstate the tenant's rent subsidy, and that if the subsidy was not available, the landlord must credit the tenant's rent in the same amount.

In *Horning Properties v. Wang*, No. C3-98-1211 (Minn. Dist. Ct. 10th Dist. Jun. 23, 1998) (Appendix 337) (Meyer, J.), the landlord of a Rural Housing and Community Development Service Subsidized Housing Project filed an action for nonpayment of rent and breach of lease. The court concluded that there was no lease violation where the tenant tendered but the landlord refused April rent, so this event did not support the eviction notice. The court noted that the landlord did not give the required warning notice, and concluded that the termination notice was improper where given after commencement of the unlawful detainer action but before the hearing. The court found that the tenant legally resided on the property during her incarceration so as to not breach the lease. Finally, the court concluded that the landlord improperly removed her subsidy and increased her rent.

See HUD Handbook No. 4350.3, ¶ 4.20 (Appendix 143); *Mathews Park Cooperative Townhomes v. Sanders*, No. UD-1910719523, partial transcript (Minn. Dist. Ct. 4th Dist. Aug. 7, 1991) (Appendix 11.J); *See Loring Towers Limited Partnership v. Seamon*, No. UD-1920810515 (Minn. Dist. Ct. 4th Dist. Aug. 31, 1992) (dismissal for giving only four days notice) (Appendix 11.I.1); *Loring Towers Limited Partnership v. Sheehy*, No. UD-1920810513 (Minn. Dist. Ct. 4th Dist. Sept. 4, 1992) (dismissal for giving only four days notice) (Appendix 11.I.2); *Loring Towers Apartments Limited Partnership v. Redcloud*, No. UD-1921210529 (Minn. Dist. Ct. 4th Dist. Jan 20, 1993) (Appendix 11.I.5). There are no exceptions to the notice requirement. *Sentinel Management Co. v. Kraft,* No. UD-1920806546 at 3 (Minn. Dist. Ct. 4th Dist. Aug. 12, 1992) (Appendix 11.I.3).

(2) Plaintiff alleged in the complaint grounds for eviction not stated in the notice. *See* HUD Handbook 4350.3, ¶ 4.20 (Appendix 143).

(3) Waiver of notice. *See* discussion, *infra* at VI.F.4-6.

(4) Violation of the covenants of habitability. *See* discussion, *supra* at VI.E.1.

(5) Plaintiff did not properly calculate the tenant's rent

See HUD Handbook No. 4350.3, Chs. 3, 5; *Innsbruck Limited Partnership v. Askvig*, No. C-5-95-0604 (Minn. Dist. Ct. 3rd Dist. Apr. 19, 1995) (Appendix 133) (tenant did not under report income and paid too little rent, since tenant could pool income and expenses from both of her jobs);

(6) Plaintiff improperly terminated the government subsidy and raised the tenant's rent to market rent.

In *Buffalo Court Apartments v. Velde*, No. C6-98-1798 (Minn. Dist. Ct. 10th Dist. Sep. 14, 1998) (Meyer, J.) (Appendix 313), the subsidized housing project sent a letter to the tenant retroactively terminating the subsidy, claiming that another person was living with her in violation of the lease. The tenant claimed that the person was a guest and not a resident, and provided documentation. The landlord did not give the required ten day notice to remove the subsidy, or the 30 day notice to terminate the lease. The court concluded that the landlord had not proven that the tenant violated the lease, the landlord failed to comply with regulations in increasing the tenant's rent, and failure to provide proper notice prevented the

landlord from removing the tenant's rent subsidy. The court dismissed the action and ordered that the landlord immediately reinstate the tenant's rent subsidy, and that if the subsidy was not available, the landlord must credit the tenant's rent in the same amount.

In *Horning Properties v. Wang*, No. C3-98-1211 (Minn. Dist. Ct. 10th Dist. Jun. 23, 1998) (Appendix 337) (Meyer, J.), the landlord of a Rural Housing and Community Development Service Subsidized Housing Project filed an action for nonpayment of rent and breach of lease. The court concluded that there was no lease violation where the tenant tendered but the landlord refused April rent, so this event did not support the eviction notice. The court noted that the landlord did not give the required warning notice, and concluded that the termination notice was improper where given after commencement of the unlawful detainer action but before the hearing. The court found that the tenant legally resided on the property during her incarceration so as to not breach the lease. Finally, the court concluded that the landlord improperly removed her subsidy and increased her rent. *See* HUD Handbook No. 4350.3, ¶¶ 5.14 - 5.18.

(7) Plaintiff may not evict the tenant for not paying late fees

Except in Section 202 Elderly and Handicap Housing Projects receiving Section 8 or Rent Supplement Assistance. *See* HUD Handbook No. 4350.3, ¶ 4.14(d); *see generally* discussion, *supra* at VI.E.10.

(8) Plaintiff is charging illegal side payments in addition to rent

Except for Section 202 Elderly and Handicap Housing Projects receiving Section 8 or Rent Supplement Assistance. *See* HUD Handbook No. 4350.3, ¶¶ 4.111 - 4.15.

c. Public housing

A public housing authority now can set a minimum rent from $0 to $50, regardless of the tenant's income. Pub. L. No. 104-204, § 201(e), 110 Stat. 2893 (1996). In *Minneapolis Public Housing Authority v. Papasodora*, No. UD-1960611515 (Minn. Dist. Ct. 4th Dist. Jul. 17, 1996) (Appendix 213), the court held that a public housing notice to increase rent is equivalent to notice to terminate month to month lease and initiate new lease with new rent under Minn. Stat. Section 504.06 (now § 504B.135); and the notice mailed February 29 could not be received in February and was untimely for an April 1 rent increase. *See Minneapolis Public Housing Authority v. Papasodora*, No. UD-1960611515 (Minn. Dist. Ct. 4th Dist. Nov. 14, 1996) (Appendix 280) (Judge affirmed referee decision requiring public housing notice to increase rent to be a one month notice); *Public Housing Authority v. Swickard,* No. UD-1920812518 (Minn. Dist. Ct. 4th Dist. Sept. 1, 1992) (Appendix 15.G) (rent reminder notice failed to satisfy eviction notice requirement).

In *St. Cloud Housing and Redevelopment Authority v. Slayton*, No. C9-98-1671 (Minn. Dist. Ct. 10th Dist. Nov. 3, 1998) (Appendix 365) (Danforth, J.), the court concluded that the public housing authority accepted the tenant's late recertification and the repayment agreement between the parties over back rent did not provide for eviction as a consequence for non-payment or late payment. The Court gave the tenants seven days to pay the arrearage of $1,200 and fees. *See Community Development Authority of Madison v. Yoakum*, No. 91-0641-FT, 1992 WL 50167 (Wis. Ct. App. Jan. 16, 1992) (Appendix 321) (unpublished: public housing tenant was entitled to 30 day notice rather than 14 day notice where landlord alleged claims other than nonpayment of rent; notice also was improper in that it did not include notice to right to review documents; trial court erred in granting judgment on grounds not listed in the complaint).

In *Minneapolis Public Housing Authority v. McKinley*, Nos. UD-1980312507 (Minn. Dist. Ct. 4th Dist. Aug. 21, 1998) (Appendix 348B) (Oleisky, J.), the referee concluded that arrearages in a service charge repayment schedule were not rent under Minn. Stat. §504.02 (now § 504B.291), so the tenant did not have the right to redeem by payment of arrearage, and that the tenant violated other material terms of the lease, including failure to provide necessary information and failing to attend scheduled meetings. On judge review, the Court reversed the referee's ruling on service charges, concluding that the service charges were rent under §504.02. However, the Court affirmed the referee's conclusion on the other causes for eviction.

In *St. Cloud HRA v. Rothchild*, No. C7-99-4306 (Minn. Dist. Ct. 7th Dist. Dec. 21, 1999) (Appendix 419), the public housing authority filed eviction action based on nonpayment of rent and material lease violations by repeated late payment of rent. The court held that tenant's statutory right to redeem could not be defeated by a claim of material violation related to rent.

13. Waiver of rent due by accepting partial payment

Section 504B.291 (formerly 504.02) provides that parties in eviction (unlawful detainer) cases involving nonpayment of rent can agree *only in writing* that partial payment of rent, accepted by the landlord before issuance of the order for the writ of restitution, may be applied to the balance due and does not waive the landlord's action for possession based on nonpayment of rent. This change implies that acceptance of a partial payment of rent *without a written agreement* may waive the eviction (unlawful detainer) action based on the remaining rent due. *Rush v.* _____, No. 27-CV-HC-09-361 (Minn. Dist. Ct. 4th Dist. Jan. 26, 2009) (Appendix 618) (eviction dismissed where landlord accepted part payment of rent after filing action, and lease did not contain a non-waiver clause); *Exodus Community Development Co. v.* _____, No. HC 040109515 (Minn. Dist Ct. 4th Dist. Jan. 23, 2004) (Appendix 495) (dismissal where landlord accepted part payment of rent); *Svendsen v.* _____, No. HC 1031006510 (Minn. Dist Ct. 4th Dist. Oct. 15, 2003) (Appendix 582a) (dismissal where landlord accepted part payment of rent); *Brooklyn Park Housing Associates I, LLP v.* _____, No. HC 1010124505 (Minn. Dist Ct. 4th Dist. Feb. 7, 2001) (Appendix 482) (landlord may pursue claim for part payment of rent only if there is a written document reserving that right; landlord may amend complaint to claim current rent claim not waived by part payment, with tenant retaining right to redeem); *Valley Investment & Management, Inc. v.* _____, No. HC 000927525 (Minn. Dist Ct. 4th Dist. Nov. 1, 2000) (Appendix 589a) (14 day notice requirement for termination of month to month tenancy for nonpayment of rent in Minn. Stat. § 504B.135 (formerly 504.06) is not required for a nonpayment of rent eviction action; landlord's acceptance of part payment without a written agreement to retain an eviction claim for the balance waives the eviction claim; plaintiff cannot amend complaint once defendant has served an answer).[11]

[11] *O'Connor v. Miller*, UD-194-0211505 (Minn. Dist. Ct. 4th Dist. Mar. 24, 1994) (Appendix 178); *Jensen v. Bosto*, No. UD-1931203513 (Minn. Dist. Ct. 4th Dist. Dec. 17, 1993) (Appendix 74) (landlord may not evict tenant for nonpayment of rent if landlord accepted part payment of rent in absence of written agreement with tenant); *Jorgenson v. Bishop*, No. UD-1930913525 (Minn. Dist. Ct. 4th Dist. Sept. 24, 1993) (Appendix 12.A) (acceptance of part payment for September rent without written agreement preserving right to pursue writ for the balance required dismissal).

The issue was been confused by the decision in *Jackson v. Minor*, No. UD-1949119514 (Minn. Dist. Ct. 4th Dist. Apr. 11, 1994) (Appendix 52). In *Jackson*, the district court judge reversed the decision of the housing court referee, which was consistent with Section 504.02 (now § 504B.291), *Jensen*, and *Jorgenson*. The court concluded, against the language of the statute, that the statute required the tenant to obtain a written agreement

Before enactment of the part payment statute, case law supported the argument that accepting partial payments in real estate contracts waived the default and the right to rescind or declare a forfeiture on that ground. *Brack v. Brack*, 218 Minn. 503, 509-11, 16 N.W. 2d 557, 560-61 (1944) (action to foreclose real estate mortgage).

In *Filister v. Okabue*, No. C6-97-61 (Minn. Ct. App. July 1, 1997), FINANCE AND COMMERCE at 45 (July 3, 1997) (Appendix 254) (Unpublished(, the court of Appeals, without citing Minn. Stat. § 504.02 (now § 504B.291), affirmed decision for landlord where landlord made monthly written rent payment requests noting possibility of legal action, lease included lost rent and non-waiver clauses, and tenants' underpayment was too small to justify immediate legal action.

In *JHCJ Associates v. Bryant*, No. UD-1960606502 (Minn. Dist. Ct. 4th Dist. Jul. 31, 1996) (Appendix 217), the Section 8 certificate landlord did not waive the right to evict for back rent because landlord regularly and consistently notified tenant of landlord's continuing claim for rent, but the court hesitated to evict the Section 8 tenant who has made timely rent payments recently, and authorized prospective monthly payments on the back rent.

---

from the landlord if the partial payment was intended to satisfy the entire balance due. It appears that the court was concerned that strict application of the statute would prohibit the landlord from ever obtaining the remaining rent from the tenant. However, Section 504B.291 simply prohibits the landlord from *evicting* the tenant for the remaining rent if the landlord has not preserved the remedy in a written agreement. The statute does not prohibit the landlord from seeking the remaining rent by withholding the tenant's security deposit, or filing a rent claim in conciliation court. Since the *Jackson* decision, the housing court referee has been following *Jackson*. *See Kahn v. Greene*, No. UD-1940330506 (Minn. Dist. Ct. 4th Dist. May 25, 1994) (Appendix 46). Counsel should argue that *Jackson* simply misreads the statute, apparently based on the incorrect assumption that strict application of the statute would prohibit the landlord from ever receiving the entire rent due.

Beginning in 1995, the courts went back to the earlier and correct reading of the statute, and have not followed *Jackson*. *Regal Estates Mobile Home Park v. Braun*, No. C3-98-2003 (Minn. Dist. Ct. 7th Dist. Dec. 1, 1998) (Judge Kirk) (Appendix 416) (Landlord acceptance of part payment in September waived unlawful detainer action for prior rents, but would not affect landlord's action to recover prior rents in a contract damages action); *Marvin Gardens Limited Partnership v. Becker*, Transcript No. UD-2981207200 (Minn. Dist. Ct. 4th Dist. Dec. 17, 1998) (Appendix 344) (Connolly, J.: Dismissal where landlord held tenant's part payment of rent for two weeks, returning it just prior to hearing); *Pow-Bel, L.L.P. v. Schultz*, No. UD-2970122203 (Minn. Dist. Ct. 4th Dist. Feb. 3, 1997) (Appendix 287) (Dismissal for part payment); *Goldview Properties v. McFarland*, No. UD-4970718401 (Minn. Dist. Ct. 4th Dist. July 28, 1997) (Appendix 256); *Jackson*. *Bebault v. Cox,* No. UD-950718854 (Minn. Dist. Ct. 4th Dist. Aug. 3, 1995) (Appendix 134) (wavier by part payment of services as rent); *Highland Management Group, Inc. v. Swanger*, No. UD-495071205 (Minn. Dist. Ct. 4th Dist. July 24, 1995) (Appendix 135) (waiver by acceptance of part payment); *Eden Park Apartments v. Baxter*, Transcript, No. UD-2950612808 (Minn. Dist. Ct. 4th Dist. June 22, 1995) (Appendix 136) (waiver by acceptance of part payment not affected by receipt signed two days later); *Dube v. Dahill*, Partial Transcript, No. 2941107802 (Minn. Dist. Ct. 4th Dist. Nov. 17, 1994) (Appendix 137) (waiver by acceptance of part payment without a written agreement to the contrary). In *H & Val J. Rothschild, Inc. v. Sampson*, No. CX-95 396 (Minn. Ct. App. Oct. 24, 1995), FINANCE & COMMERCE at 28 (Oct. 27, 1995) (Appendix 157), the raised the issue of waiver by part payment of rent, but the landlord notified the tenant by letter of back rent due and proposed a payment plan. The trial court found that the tenant has not complied with the letter and held for the landlord, and the Court of Appeals affirmed. While the court appeared confused about application of the statute, the statute did not apply in this case. *See* SUMMARY RESIDENTIAL LANDLORD-TENANT ACTIONS IN HOUSING COURT: A BENCH BOOK FOR JUDGES, REFEREES AND MEDIATORS at 21 (Fourth Jud. Dist. Hous. Ct. Rev. Feb. 1996).

A provision in a lease purporting to be a non-waiver clause might not cover part payment of rent. *The Wirth Companies v. Victor*, No. UD-1931108551 (Minn. Dist. Ct. 4th Dist. Nov. 30, 1993) (Appendix 420), (a landlord may satisfy the requirement for a written agreement stating that part payment of rent does not waive eviction with a provision in the lease, but a non-waiver clause directed at non-financial breaches does not include part payment of rent).

14. Waiver of past rent due by accepting rent for later months

Section 504B.291 (formerly 504.02) provides that rental payments intended to redeem the tenancy must first be applied to rent claimed in the complaint for prior rental periods before being applied to the most recent period, *unless the court finds the claim for earlier rent has been waived. Id.* (emphasis added). This implies that the landlord can waive past rent claims, probably by acceptance of rent for later months.

15. When and how much rent is due

a. Amount of rent

The plaintiff must prove that rent is due by the preponderance of the evidence. *Brooklyn Center Leased Housing v. _____,* No. HC 030819518 (Minn. Dist Ct. 4th Dist. Sep. 16, 2003, and Mar. 10, 2004) (Appendix 480) (ambiguities in lease concerning the deposit, rent and pro-rated rent and lack of documentation construed against landlord, no late fees if not contained in lease, redemption; later expunged); *Brooklyn Center Leased Housing v. _____,* No. HC 031216540 (Minn. Dist Ct. 4th Dist. Mar. 10, 2004) (Appendix 481) (expungement granted where landlord's accounting records resulted in confusion of amount of rent due). *Kahn v. Greene*, No. UD-1940330506 at 5 (Minn. Dist. Ct. 4th Dist. May 25, 1994) (Appendix 46) (no credible evidence that defendants did not pay rent); *Hanson v. Trom*, No. UD-1950926503 (Minn. Dist. Ct. 4th Dist. Nov. 6, 1995) (Appendix 82); *Public Housing Authority v. Vang*, No. UD-1951003612 (Minn. Dist. Ct. 4th Dist. Oct. 17, 1995) (Appendix 94).

Where the landlord claims rent due, the tenant claims rent was paid, and the landlord has no business records to support the claim, the landlord may not have proven that the rent is due. In *Genie Management Co. v. Wilson*, No. UD-1980707541 (Minn. Dist. Ct. 4th Dist. Jul. 29, 1998) (Appendix 334), the tenant claimed payment in June of $240.00 by money order, with a money order receipt submitted as evidence. The landlord claimed that the payment did not appear in the company's ledger or bank accounts. The Court found that the payment was not received. *See Ricke v. Villebrun*, No. UD-1961112566 (Minn. Dist. Ct. 4th Dist. Dec. 5, 1996) (Appendix 289) (No business records; landlord did not prove rent was due). *Clark v. Urban Investments*, No. UD-1970821901 (Minn. Dist. Ct. 4th Dist. Sep. 10, 1997) (Appendix 145) (No testimony to specify or explain rent claim); *Espeland v. Fondren*, No. UD-1961112556 (Minn. Dist. Ct. 4th Dist. Dec. 26, 1996) (Appendix 252) (Landlord did not prove that rent on oral lease was $650 where tenant claimed rent was $600 and landlord accepted $600 rent without verbal or written objection); *Hemraj v. Hicks*, No. UD-1970306508 (Minn. Dist. Ct. 4th Dist. Apr. 8, 1997) (Appendix 259) (Landlord offered no records to support claim of January rent being due).

Where the parties have agreed to a rent credit, the court should enforce the credit. *See Scherrier v. Harper*, No. UD-1940113508 at 2 (Minn. Dist. Ct. 4th Dist. Feb. 4, 1994) (Appendix 50); *Brown v. Owens*, No. UD-1940726506 at 2-3, 5, 6 (Minn. Dist. Ct. 4th Dist. Aug. 18, 1994) (Appendix 48) (oral agreement for rent credit enforced).

The parties may agree to rent payments in installments. *Judnick v. Boje*, No. C7-96-600537 (Minn. Dist. Ct. 6th Dist. Apr. 19, 1996) (Appendix 202) (parties agreed to semi-monthly rent payments); *Brook*

v. Boyd, No. C8-96-47 (Minn. Dist. Ct. 9th Dist. Feb. 13, 1996) (Appendix 207) (rent payable semi-monthly).

Where the landlord's agent received the rent and appropriated it to the agent's own use, the tenant is not liable for the rent. *Gjersten Realty Co., v. Holland Investment Co.*, 148 Minn. 473, 474, 180 N.W. 774, 775 (1921). *See Z & S Management Co. v. Jankowicz,* No. UD-1920219515 (Minn. Dist. Ct. 4th Dist. Mar. 24, 1992) (in dispute over whether tenant paid rent, court found that tenant paid rent); *Hedlund v. Potter,* No. C3-91-1542 at 2-3 (Minn. Dist. Ct. 10th Dist. Dec. 31, 1991) (Appendix 4.C.2..

b. No agreement on when the rent is due

Where the lease and the custom of the parties do not indicate when the rent is due, the rent may not be due until the end of the term. *Johanson v. Hoff*, 63 Minn. 296, 297, 65 N.W. 464 (1895); *First Nat'l Bank of Omaha v. Omaha Nat'l Bank*, 191 Neb. 249, ___, 214 N.W.2d 483, 485 (1974); *Bashor v. Turpin*, 506 S.W.2d 412, 421 (Mo. 1974). R. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT, § 539 at 348-49 (1980) (list of cases). *See Cheney v. Attaway,* No. UD-1910717523 (Minn. Dist. Ct. 4th Dist. July 30, 1991) (Appendix 11.K) (dismissed complaint filed July 17, where parties agreed rent was due on or before July 30.

When the parties have neither a written nor oral agreement of undisputed terms but act as if there is a rental agreement by continuing all the indicia of a landlord/tenant relationship, the court must determine the applicable terms by their actions and the surrounding circumstances. The landlord's regular acceptance of a specific sum from the tenant based on the tenant's written offer to pay that sum, and the landlord's acceptance of it for the following eight months without any written or oral objections to it, establishes the parties' agreement to rent at that sum. *Orchestra Hall Associates v. Crawford*, No. UD-1960119508 (Minn. Dist. Ct. 4th Dist. Feb. 13, 1996) (Appendix 177).

c. Waiver of prompt payment of rent

The landlord may waive prompt payment of rent by accepting, without objection, late rental payments. *See Gardner Investments, Inc. v.* _____, No. HC 040102502 (Minn. Dist Ct. 4th Dist. Jan. 15, and Mar. 10, 2004) (Appendix 504) (dismissal where landlord waived prompt payment of rent; later expunged); *Jim Bern Co. v. LeRoy*, No. HC 011228400 (Minn. Dist Ct. 4th Dist. Jan. 10, 2002) (landlord accepted late payments of rent over 5 years); *Eldemire v. Shilts*, 442 So.2d 1351, 1352 (La. Ct. App. 3rd Cir. 1983), *cert. denied*, 445 So.2d 452 (La. 1984); *Butterfield v. Duquesne*, 66 Ariz. 29, ___, 182 P.2d 102, 103 (1947); R. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT, § 539 (Bancroft-Whitney 1980 and Supp. 2008); RESTATEMENT (SECOND) OF PROPERTY § 12.1 comment c (1977). *See also Cobb v. Midwest Recovery Bureau Co.* 295 N.W.2d 232, 237 (Minn. 1980) (secured party's repeated acceptance of late payments waives right of repossession until notice of requirement of strict compliance with contract is given); *Steichen v. First Bank Grand*, 372 N.W.2d 768, 771 (Minn. Ct. App. 185) (followed *Cobb*); In *Chaska Village Townhouses and Lifestyle, Inc. v. Edberg,* No. 91-27365 (Minn. Dist. Ct. 1st Dist. Apr. 1, 1991) (Appendix 11.L) the court held plaintiff induced defendant to believe that late rent payments would continue to be accepted, citing *Cobb and Steichen.* *See* discussion, *supra*, at VI.D.19.

No waiver occurs where the lease contains a non-waiver clause. *Taherzadeh v. Clements,* 781 F.2d 1093, 1098 (5th Cir. 1986); R. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT, § 539 (Bancroft-Whitney 1980 and Supp. 2008); RESTATEMENT (SECOND) OF PROPERTY § 12.1 comment c (1977). The landlord can reassert the right to prompt payments by giving sufficient notice to the tenant that strict compliance with the terms of the lease are required. *See LaSalle Nat'l Bank v. Helry Corp.*, 136 Ill. Ct. App.

3d 897, ___, 483 N.E.2d 958, 963 (1985); R. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT, § 539 (Bancroft-Whitney 1980 and Supp. 2008); RESTATEMENT (SECOND) OF PROPERTY § 12.1 comment c (1977). *See also Cobb* 295 N.W.2d at 237 (repossession); *Steichen*, 372 N.W.2d at 771 (repossession).

16. Discrimination *See* discussion, *infra* at VI.F.8, VI.G.8.

17. Reasonable accommodation of disabilities *See* discussion, *infra* at VI.G.9.

18. Utilities

a. Tenant or landlord liability under the lease

Utilities and other charges may be considered rent, entitling defendant to redeem the premises by paying the amount due. *Central Union Trust Co. v. Blank*, 168 Minn. 312, 316, 210 N.W. 34, ___ (1926) (covenant to pay taxes is part of consideration for payment of lease); *American Land Real Estate Investment Corp. v. Pokorny*, No. C0-90-1649 (Minn. Ct. App. Dec. 18, 1990) (Appendix 53) (unpublished: obligation to buy insurance equivalent to paying rent); *Kahn v. Greene*, No. UD-1940330506 at 7 (Minn. Dist. Ct. 4th Dist. May 25, 1994) (Appendix 46) (water bill deemed as rent); *Schaapveld v. Crump*, No. UD-1951011528 (Minn. Dist. Ct. 4th Dist. Oct. 31, 1995) (Appendix 115) (the parties' prior conduct demonstrated that tenants agreed to pay gas utilities and landlord agreed to pay water, sewer and recycling costs).

Where the landlord claims that the tenant owes money on utility bills, but the account was in the landlord's name and the landlord has not given the tenant copies of the bills, the court should order the landlord to give the tenant the bills, and give the tenant time to make arrangements to pay them. *Aker v. Kennedy*, No. UD-1950908541 (Minn. Dist. Ct. 4th Dist. Oct. 19, 1995) (Appendix 165) (landlord given deadline to provide bills to tenant, but tenant not given deadline to make arrangements to payment). *See Amsler v. Wright*, No. UD-1960502510 (Minn. Dist. Ct. 4th Dist. May 30, 1996) (Appendix 186) (landlord required to pay water bills where specific lease provisions state such, and general lease term permitting landlord to assess water bills from tenants is invalid; landlord ordered not to collect water bill payments from tenants).

b. Landlord liability with shared meters

In 1995 Section 504B.215 (formerly § 504.185) was amended to require landlords to be the customer of record and responsible bill payer for utility services provided to a residential building with a single meter providing service to an individual unit *and* all or parts of the common areas or other units. 1995 Minn. Laws Ch. 192. The landlord must advise the utility provider about the status of the building. The landlord's failure to comply with the statute is a violation of the covenant of habitability in Section 504B.161 (formerly § 504.18), subd. 1(a), and Section 504B.221 (formerly § 504.26). This requirement may not be waived by contract or other method. The statute does not require the landlord to contract and pay for utility service provided to each residential unit through separate meters which accurately measure the units use only.

Before the year 2000, a landlord using shared meters who wanted to shift the burden of paying for utilities to the tenant has two options: (1) calculate past usage and factor it into the rent, or (2) install separate and accurate meters. The landlord could not simply pay the utility bill and then rebill the tenant. *Carr v. Jerry Schlink, Associated Enterprises of Minneapolis*, No. UD-1980601900 (Minn. Dist. Ct. 4th Dist. Apr. 1, 1999) (Appendix 318) (Referee decision affirmed on judge review: clear language of Minn. Stat. § 504.185 (now § 504B.215), Subd. 1a, and legislative history prohibit landlord rebilling for utility

service on shared meters). *See Britton v. Foundtainplace Apartments and Equity Residential Properties Trust*, No. UD-1990810901 and Conc. Ct. 990810050 (Minn. Dist. Ct. 4th Dist. Oct. 18, 1999) (Appendix 381) (Landlord's use of mathematical formula for apportioning the bill of a shared meter to separate tenants violated the shared meter statute. Tenant awarded $250 in costs for landlord's failure to register trade name with the Secretary of State; costs may be set off against rent; a flat monthly fee for trash removal does not violate the shared meter statute., affirmed, *Britton v. Foundtainplace Apartment, Equity Residential Properties, and Melair Associates Limited Partnership*, No. 1990810901 (Minn. Dist. Ct. 4th Dist. Dec. 10, 1999) (Appendix 381) (Referee's decision affirmed, following *Car v. Schlink*..

In 2000 the Minnesota Legislature revised Minn. Stat. § 504B.215 (formerly § 504.185) to allow a landlord in narrowly prescribed circumstances to apportion a shared meter bill among residential tenants. Minn. Laws 2000, Chapter 268. The revision is effective August 1, 2000, but is retroactive to August 1, 1995, only for leases which already included a provision for apportioning shared meter utility charges where no judicial or administrative court had rendered a decision. The amended statute includes a new subdivision to small a, which provides the conditions under which a landlord of a singled metered residential building may apportion bills among tenants. The landlord must provide prospective tenants with notice of the total utility cost for the building for each month of the most recent calendar year. The landlord must state in writing an equitable method of apportionment and the frequency billing by the landlord. The lease must contain a provision that upon a tenant's request, the landlord must provide a copy of the actual utility bill for the building along with each apportioned utility bill. Upon a tenant's request, the landlord must also provide past copies of actual utility bills for any period of the tenancy for which the tenant received an apportioned utility bill for the proceeding two years or the period since the landlord acquired the building, whichever is less. The landlord and tenant may agree to use a lease term of one year or more with the option to pay bills under an annualized budget plan providing for level monthly payments based on a good faith estimate of the annual bill. By September 30 of each year, the landlord must inform tenants in writing of the possible availability of Energy Assistance, including the toll-free telephone number of the administering agency.

The reference to the covenants of habitability should make it clear that a tenant is entitled to rent abatement when the tenant is forced to pay for utility service through a single meter which does not reflect the use in the tenant's apartment. *Amsler v. Wright*, No. UD-1960502510 (Minn. Dist. Ct. 4th Dist. May 30, 1996) (Appendix 186) (landlord responsible for all utilities services which do not separately and accurately measure the tenant's sole use of utilities); *Robinson v. Schaapveld*, No. UD-1951006523 (Minn. Dist. Ct. 4th Dist. Dec 15, 1995) (Appendix 209) (utility meter which can operate as a separate meter or a shared meter cannot reliably and accurately measure usage, requiring the owner to contract with the utility for service; when one tenant pays gas service for another tenant of a separate unit, the owner is responsible for one half of the tenant's service costs); *Henderson v. Schaapveld*, No. UD-1950127501 (Minn. Dist. Ct. 4th Dist. Apr. 10, 1995) (Appendix 119), the court ordered the landlord to pay a reasonable portion of the utility bill where the tenant did not have a separate and accurate meter. Local ordinances may contain similar requirements to the new statute. *See* Minneapolis Code of Ordinances § 244.270 (Appendix 138); discussion, *supra*, at VI.E.1.d.(3).

Shared meters are common in duplex units. Even where there are meters for each unit, one meter may be covering the common areas. *Washington v. Okoiye* and *Okoiye v. Washington*, No. UD-1981029901 (Minn. Ct. Dist. Oct. 8, 1999) (Appendix 426) (compliance order in consolidated unlawful detainer and emergency relief actions: landlord violated shared meter statute where tenant's meter covered her first floor apartment and the common basement which the landlord used for an office and for personal use; $500 for violation of the shared meter statute, all of which could be credited against rent).

Recent decisions include *Matsumoto v. _____,* No. AC 02-2123 (Minn. Dist Ct. 4th Dist. Apr. 19, 2002) (Judge Alton) (after license was revoked, landlord's rental was unlawful and was not entitled to collect rent; rent abatement of $2695; landlord violated shared meter statute, tenant entitled to reimbursement for payments made; landlord not entitled to late fees when he did not have a rental license; landlord proved some cleaning expenses deducted from the security deposit, but not other damages and penalties; tenant entitled to deposit penalties where part of landlord's withholding was in bad faith); *BIRDMA, LLC v.* _____, No. HC 1011102511 (Minn. Dist Ct. 4th Dist. Dec. 7, 2001) (Appendix 476) (action filed on the 2nd was premature to claim service fee due on the 5th; tenant tendered but landlord refused rent; landlord failed to prove amount of utility bills; lease did not comply with shared meter statute conditions); _____ *v. Siganos*, No. HC 020201900 (Minn. Dist Ct. 4th Dist. Mar. 5, 2002) (Appendix 451) (rent escrow action; habitability rent abatement of $100 per month for $1700, which can be credit against future rent with notice; tenant's payments for repairs and on shared meter credited against rent; tenant authorized to repair); *Walters v.* _____, No. HC 10101004526 (Minn. Dist Ct. 4th Dist. Oct. 26, 2001) (Appendix 593) (landlord responsible for shared meter bills, and liable for treble damages or $500 to be credited against rent; tenant payment on bill deemed payment of rent; tenant entitled to costs and disbursements from successful Court of Appeal case; habitability rent abatement of $150-175 per month; leave to file motion for attorney's fees; $3818 disbursed from court to tenant).[12]

A violation of the shared meter statute, Minn. Stat. § 504B.215 (formerly § 504.185), may violate the Prevention of Consumer Fraud Act. *State v. Northtown Village Limited Partnership*, (Minn. Dist Ct. 10th Dist. July 21, 2003) (Appendix 576) (consent judgment: landlord enjoined from collecting administrative fees in connection with allocating shared meter bills, retaining interest on tenant payments made before utility bills are due, and allocating shared meter utility bills without the lease language required by Minn. Stat. § 504B.215 (formerly § 504.185); landlord required to write off tenant debts in connections with violation of the statute and enjoined from reporting such debts to others).

---

[12]In *Walters v. Demmings*, No. UD-1990916517 (Minn. Dist. Ct. 4th Dist. Nov. 15, 1999) (Appendix 422), the duplex had separate electrical and gas meters for each unit. The electrical meter for the downstairs tenant also covered the basement and hallways, with the court concluding that it was a shared meter. After the furnace became inoperable and the landlord failed to supply adequate temporary heat and the tenant withheld rent, the landlord and tenant filed unlawful detainer and emergency relief actions, which the court consolidated. The court dismissed the landlord's notice to quit claim as premature, as the action was filed before the effective date of the notice. The court awarded rent abatement at $200 a month from $480 per month rent (42%), $500 in shared meter statutory damages, $500 for utility service interruption damages, all of which could be credited against future rent. The tenant moved for reconsideration of the shared meter damages, arguing that her damages exceeded the $500 statutory minimum. The court rejected the argument, concluding that the tenant must prove how much usage occurred outside of her unit. *Demmings v. Walters*, No. UD-1991006902 (Minn. Dist. Ct. 4th Dist. Mar. 22, 2000) (Appendix 422).

Tenants should argue that the *Demmings* decision is incorrect. The decision is based on the conclusion that the tenant is responsible for electricity consumed in the tenant's unit. However, where the landlord employs an illegal shared meter, the statute requires the landlord to be the bill payer of record, in other words, it is the landlord who is responsible for electricity consumed in the tenant's unit. The tenant's damages should be the amount paid by the tenant on what should have been the landlord's account, with the amount trebled under the statute. *Wilson v. Lowe*, No. UD-1991123901 (Minn. Dist. Ct. 4th Dist. Jan. 14, 2000) (Appendix 429) (Rent escrow action: tenant awarded treble what she paid on shared electrical meter covering basement and common areas in addition to her unit, and rent abatement of $2,600 over eight months (37%)).

c. Landlord termination of utilities

A landlord may not unlawfully terminate or interrupt utility service to the tenant. Minn. Stat. § 504B.221 (formerly § 504.26). Remedies may include an order for restoration of service, rent abatement, statutory damages of the greater of treble actual damages or $500.00, and attorney fees.

In *Washington v. Okoiye*, Nos. UD-1981029901 and UD-19809090564 (Minn. Dist. Ct. 4th Dist. Nov. 20, 1998) (Appendix 354C), the court consolidated unlawful detainer and emergency tenant remedies actions, and awarded $100 in monthly rent abatement, $100 for rent abatement for water shutoff, $250 as a stayed fine for violating a repair order, $500 in utility termination damages, $353 as a credit for tenant payments on the landlord's water bill, $500 in privacy violations, all of which could be credited against rent, and $500 in attorney's fees, with a later hearing scheduled to review landlord compliance and additional attorney's fees. *See Washington v. Okoiye* and *Okoiye v. Washington*, No. UD-1981029901 (Minn. Ct. Dist. June 15, 1999) (Appendix 423) (compliance order in consolidated unlawful detainer and emergency relief actions:$200 rent abatement for two interruptions of utilities); Washington Rent Abatement Table (Appendix 427); *Smith v. _____,* No. HC 1010417559 (Minn. Dist Ct. 4th Dist. May 21, 2001) (failure to renew license with accurate address information suspended right to collect rent; tenant could not recoup rent paid during period before the period of the landlord's rent claim in which there was no license; landlord liable for statutory penalties for interrupting water service; habitability rent abatement of $100 per month).

In *Judge v. Rio Hot Properties, Inc.*, Nos. UD-1981202903, UD-1981005518, and UD-1981104522 (Minn. Dist. Ct. 4th Dist. Dec. 18, 1998), (Appendix 362D), in consolidated unlawful detainer and emergency tenant remedies action, the court concluded that the tenants were entitled to additional rent abatement beyond an ongoing rent abatement for loss of utilities, and the tenants were entitled to $500 in statutory damages for termination of utility services which they could credit against future rent.

In *LeDoux v. Zanosko*, No. CX-95-1001 (Minn. Dist. Ct. 9th Dist. Oct. 16, 1995) (Appendix 124), the plaintiff-landlord disconnected the defendant-tenants propane heat supply. The tenant filed an emergency tenants remedies action, the landlord refused to abide by the order, forcing the tenant to rent a motel room. The landlord then commenced an unlawful detainer action, alleging non-payment of rent and deposit, holding over after notice, in breach of the oral lease. The court concluded that the action was retaliatory, the notice to quit was improper, and the disconnection of propane was wrongful. The court ordered complete retroactive and prospective rent abatement until the landlord reconnected service, and awarded the tenant judgment for relocation damages, wrongful disconnection statutory damages of $500.00 under Minn. Stat. § 504.26 (now § 504B.221), and attorney's fees and costs of $500.00. *See Walters v. Demmings*, No. UD-1990916517 (Minn. Dist. Ct. 4th Dist. Nov. 15, 1999) (Appendix 422) (unlawful detainer and emergency relief actions,$500 for utility service interruption damages).

The landlord's termination of the tenant's utility service also constitutes a misdemeanor under Minn. Stat. § 609.606.

d. Tenant payment of utility or essential services following landlord's nonpayment

Minn. Stat. § 504B.215 (formerly § 504.185) provides that when a municipality or company supplying home heating oil, propane, natural gas, electricity or water to residential housing has disconnected service or has given notice to disconnect service because the landlord who has contracted for the service has failed to pay for it, the tenant may pay to have the service reconnected. Before paying for the service, the tenant must give the landlord or landlord's agent oral or written notice of the tenant's intent to pay the bill after 48 hours, or a shorter period if reasonable under the circumstances, if the owner does not pay for the

service. If the notice is oral, the tenant must mail or deliver written notice within 24 hours after giving the oral notice. If natural gas, electricity or water have been discontinued or if the landlord has not paid the bill after notice by the tenant, the tenant may pay the outstanding bill for the most recent billing period if the company or municipality will restore the service for at least one billing period. If home heating oil or propane has been discontinued or if the landlord has not paid the bill after the tenant's notice, the tenant may order and pay for one month's supply of a proper grade and quality of oil or propane.

The tenant's payment to the company or municipality is considered payment of rent to the landlord, and the tenant may deduct the payment to the company or municipality from the next rent payment to the landlord after submitting receipts for the payment to the landlord. § 504B.215 (formerly § 504.185) , subd. 3. The tenant's rights under the statute do not apply to conditions caused by the willful, malicious, or negligent conduct of the tenant or tenant's agent; may not be waived or modified; and are an addition to and do not limit other rights available to the tenant, including the right to damages. § 504B.215 (formerly § 504.185), subd. 4.

In 2008, the Legislature changed the statutes in several respects. First, it stated requirements for posting of the service disconnection notice. Second, it clarified that the tenant may continue service by paying only current and not past charges. Third, it allows tenants in buildings with less than 5 units to restore gas or electric service by becoming the prospective payer of record, with the utility treating the tenant like a new customer. Minn. Stat. § 504B.215, 2008 Minn. Laws Ch. 313.

In *Washington v. Okoiye*, Nos. UD-1981029901 and UD-19809090564 (Minn. Dist. Ct. 4th Dist. Nov. 20, 1998) (Appendix 354C), the court consolidated unlawful detainer and emergency tenant remedies actions, and awarded $100 in monthly rent abatement, $100 for rent abatement for water shutoff, $250 as a stayed fine for violating a repair order, $500 in utility termination damages, $353 as a credit for tenant payments on the landlord's water bill, $500 in privacy violations, all of which could be credited against rent, and $500 in attorney's fees, with a later hearing scheduled to review landlord compliance and additional attorney's fees.

The court later ordered that the tenant could remedy violations and deduct the cost from rent, rent abatement would increase from $100 to $200 out of monthly rent of $650, or from 15% to 31% if the landlord did not complete repairs, the tenant could credit payments on the landlord's water bill against rent, the landlord must obtain a rental license, the landlord's right to collect rent was suspended until he obtained the license, and prior orders relating to court approval of future filings remained in effect. (Minn. Dist. Ct. 4th Dist. Feb. 4, 1999) (Appendix 354G). *See Moore v. Shelly*, No. UD-1980619500 (Minn. Dist. Ct. 4th Dist. Jul. 8, 1998) (Appendix 351) (credit against rent for tenant payment after notice of $1,086 for water and gas services).

Alternatively, city ordinances may allow the tenant to pay and deduct. Minneapolis Code of Ordinances § 244.590 governs discontinuance of utility service from utility companies supplying service through a single meter to a multiple dwelling or duplex. The utility company must provide a notice of delinquency in payment of utility bills after utility bills are 60 days in arrears, or a notice of intent to discontinue such service for failure to pay utility bills not less than 31 days before the effective date of discontinuance. After the utility company has posted either notice at the building, the tenants in the building may pay any rents owing to the owner or operator of the building directly to the utility company. The utility company shall not discontinue service if it has received payments from the tenants sufficient to cover the current bill and either (1) 1/3 of the past due bill within 31 days after posting the original notice, (2) 2/3 of the past due bill within 62 days after posting the original notice, or (3) 100 percent of the past due bill within 92 days after posting the original notice. (Appendix 11.B). St. Paul Ordinance § 49.03 also allows the tenant

to make payments to the utility company and deduct the cost from the rent after giving notice to the landlord. The amount deducted from the rent may not exceed three months rent in any twelve month period. (Appendix 11.C).

19. Combined actions for nonpayment of rent and material lease violations

See discussion, *infra*, at VI.E.20.c (Redemption); VI.G.21 (Combined Actions); *Thomas v. Dobyne*, No. U-1980616536 (Minn. Dist. Ct. 4th Dist. Jul. 8, 1998) (Appendix 370B) (combined action for breach and rent; breach claims dismissed for lack of a right of re-entry clause, and where landlord failed to prove tenant conduct on the property which amounted to breach of lease; matter rescheduled for trial on rent issues).

20. Redemption

An eviction (unlawful detainer) action based upon nonpayment of rent "is equivalent to a demand for rent . . ." Minn. Stat. § 504B.291 (formerly 504.02). "[I]f, at any time before possession has been delivered to the plaintiff . . . ., the [tenant] pays to the plaintiff or brings into court in the amount of the rent then in arrears, with interest and the costs of the action, and an attorney's fee not exceeding $5.00 and performs other [tenant] covenants . . . , the [tenant] may be restored to the possession . . ." *Id.* The statute restricts the landlord's right to restitution of the premises. *614 Co. v. D. H. Overmayer*, 297 Minn. 395, 397, 211 N.W.2d 891, 893-94 (1973); *Hanson v. Byrne*, No. C3-87-1408 (Minn. Ct. App. Feb. 16, 1988) (unpublished); *Valley Investment & Management, Inc. v. _____,* No. HC 000927525 (Minn. Dist Ct. 4th Dist. Nov. 1, Dec. 19, 2000) (Appendix 590) (on motion to vacate judgment, tenant may redeem by paying rent, late fee, court filing fee, service fee, and $5 attorney fee, but not a conciliation court filing fee or statutory costs).

The right to redeem does not apply to an action for breach which does not include a claim for rent. *Castaways Marina, Inc. v. Dedrickson,* No. C1-02-1425, 2003 WL 1961861 (Minn. Ct. App. April 29, 2003) (unpublished)

The phrase "[a]t any time before possession has been delivered to the plaintiff" has been interpreted in two commercial cases. In *614 Co.*, 297 Minn. at 397, 211 N.W.2d at 894 (1973), the court noted in *dictum* that the right of redemption exists "until a court has issued an order dispossessing the tenant and permitting reentry by the landlord." In *Paul McCusker & Associates, Inc. v. Omodt*, 359 N.W.2d 747, 749 (Minn. Ct. App. 1985), *petition for cert. denied* (Minn. Mar. 29, 1985), the Court of Appeals held that the right of redemption exists until the court signs the order restoring the premises to the landlord. The Court rejected the argument that redemption is available until the sheriff executes the writ, since such a rule would be vague, encourage litigation, and expose the sheriff to potential liability. *Id.* at 748-49. *See Gear Properties v. Jacobs*, No. C1-97-2266 (Minn. Ct. App. Sep. 1, 1998) (Appendix 332) (unpublished: redemption must occur before possession has been delivered to the plaintiff).

A subtenant also may redeem. *See Warnet v. MGM Properties*, 362 N.W.2d 364, 368-69 (Minn. Ct. App. 1985).

1992 Minn. Laws Art. 1, § 2 amended the redemption statute, Minn. Stat. § 504.02 (now § 504B.291) in three respects. First, the court may permit a tenant who wants to redeem and has already paid or brought into court all of the rent in arrears, but is unable to pay the statutory interest, attorney's fee and cost, to pay these additional amounts in the period when the court otherwise stays issuance of the writ of restitution under § 504B.345 (formerly § 566.09). The change formalizes what is now common practice in some courts.

Second, the parties can agree *only in writing* that partial payment of rent, accepted by the landlord before issuance of the order for the writ of restitution, may be applied to the balance due and does not waive the landlord's action for possession based on nonpayment of rent. *See generally,* discussion, *supra* at VI.E.13-14. Third, rental payments intended to redeem the tenancy must first be applied to rent claimed in the complaint for prior rental periods before being applied to the most recent period, *unless the court finds the claim for earlier rent has been waived. See generally id.*

a. The court may deny restitution of the premises, conditioned on the defendant's payment of the arrearage within a specific time

In *614 Co.*, 297 Minn. at 396, 211 N.W.2d at 893, *affirming* the First and Secondary Interlocutory Orders, Number 204678, Appellant's Appendix at A.51-A.55, A.69-A.72 (Minn. Dist. Ct. 2d Dist. Apr. 22 and July 9, 1972) (Appendix 54), the Court affirmed trial court orders allowing commercial tenant one month to pay amounts in default.

In residential cases, the court should allow for redemption within a specific time period, *id.*, or during the stay of the writ of restitution, since: (1) the courts abhor forfeiture. *614 Co.*, 297 Minn. at 398, 211 N.W.2d at 894; (2) the tenants' harm from eviction from the tenants' home far outweighs the landlord's harm from delay in full compensation; (3) forfeiture of the premises is not favored if the party seeking forfeiture is adequately protected by means other than forfeiture, *614 Co.* at __, 211 N.W. 2d at 894; *Kostakes v. Daly*, 246 Minn. 312, 318, 75 N.W.2d 191, __ (1956); and (4) the *Omodt* Court's concerns are resolved, since a specific deadline is retained.

The courts often give the tenant a short period of time to pay rent due. While the period usually is limited to 7 days, the same period for which the court could stay issues of a writ of restitution under Section 504B.345 (formerly § 566.09), the courts occasionally grant a longer period of time. *JHCJ Associates v. Bryant*, No. UD-1960606502 (Minn. Dist. Ct. 4th Dist. Jul. 31, 1996) (Appendix 217) (court hesitates to evict Section 8 tenant who has made timely rent payments recently, and will authorize prospective monthly payments on the back rent); *Ellis v. McDaniel*, No. UD-1960318520 (Minn. Dist. Ct. 4th Dist. Apr. 4, 1996) (Appendix 203) (10 days); *Schaapveld v. Crump*, No. UD-1951011528 (Minn. Dist. Ct. 4th Dist. Oct. 31, 1995) (Appendix 115) (agency providing assurance of payment given one month to pay portion of rent due, and tenant given two weeks from date of hearing to pay balance); *Schwanke v. Magnuson,* No. C0-90-0640 (Minn. Dist. Ct. 8th Dist. Jan. 9, 1991) (Appendix 5.L) (following rent abatement trial, court determined defendant owed plaintiff $50.00 beyond money paid into court and allowed defendant to redeem); *Nguyen v. Veit,* No. UD 1910115616 (Minn. Dist. Ct. 4th Dist. Feb. 15, 1991) (Appendix 5.0) (following rent abatement trial, defendant allowed seven days to pay into court additional rent to which plaintiff was entitled); *Yauch v. Caine,* No. UD-1900403548 (Minn. Dist. Ct. 4th Dist. Apr. 20, 1990) (Appendix 11D). The parties also may agree to extend the time period for redemption. *Bratton v. Dockery*, No. UD-1940912513 (Minn. Dist. Ct. 4th Dist. Sept. 30, 1994) (Appendix 33) (18 days).

Where the landlord claims that the tenant owes money on utility bills, but the account was in the landlord's name and the landlord has not given the tenant copies of the bills, the court should order the landlord to give the tenant the bills, and give the tenant time to make arrangements to pay them. *Aker v. Kennedy*, No. UD-1950908541 (Minn. Dist. Ct. 4th Dist. Oct. 19, 1995) (Appendix 165) (landlord given deadline to provide bills to tenant, but tenant not given deadline to make arrangements to payment).

b. Redemption apparently applies to more than just traditional nonpayment of rent cases

In *American Land Real Estate Investment Corp. v. Pokorny*, No. C0-90-1649, (Minn. Ct. App. Dec. 18, 1990) (Appendix 53) (unpublished), the landlord alleged that the tenants violated a contract provision requiring them to provide insurance for the premises they occupied under an option agreement. The landlord terminated the lease by giving a ten day notice to cure the default as required by the lease. The landlord then commenced an unlawful detainer action. The trial court permitted the tenants to make a payment to the landlord to satisfy the contractual obligation. On appeal, the court noted that the tenants "defaulted on their obligation to buy insurance, an obligation *equivalent* to paying rent." *Id*. (emphasis added). The court added that the "[landlords] notice, aimed at terminating the lease, does not preclude redemption." *Id*., citing *614 Co.*, 297 Minn. at 397-98, 211 N.W.2d at 894. *See Central Union Trust Co. v. Blank*, 168 Minn. 312, 316, 210 N.W. 34, __ (1926) (covenant to pay taxes part of consideration for payment for lease); *Kahn v. Greene*, No. UD-1940330506 at 7 (Minn. Dist. Ct. 4th Dist. May 25, 1994) (Appendix 46) (water bill deemed as rent).

Redemption did not apply to the sale of cooperative apartment association stock of a tenant in *Mehralian v. River Tower Home Owners Assoc., Inc.*, 464 N.W.2d 571 (Minn. Ct. App. 1990). In *Mehralian*, the Association replaced windows in the complex and assessed its members for their share of the cost as provided by the bylaws. When the tenant did not pay the assessment, the association foreclosed its lien against the tenant's stock in the association, and sold the stock to a new tenant. The new tenant commenced an unlawful detainer action against the old tenant, and the old tenant brought a separate action seeking to redeem his interest under § 504.02 (now § 504B.291). The court affirmed the trial court's decision that § 504.02 did not apply to the foreclosure of Cooperative Housing Stock.

c. Combined actions for nonpayment of rent and material lease violations

These claims shall be heard as alternative grounds. The hearing is bifurcated to first cover material violation of the lease, and then nonpayment of rent if the landlord does not prevail on the material lease violation claim. The tenant is not required to pay into court outstanding rent, interest or costs to defend against the material lease violation claim. If the court reaches the nonpayment of rent claim, the tenant shall be permitted to present defenses. The tenant shall be given up to seven days to pay any rent and costs determined by the court to be due, either into court or to the landlord. *Kahn v. Greene*, No. UD-1940330506 (Minn. Dist. Ct. 4th Dist. May 9, 1994) (Appendix 55). *See generally* discussion, *infra*, at VI.G.21.

d. Attorney's fees

Minn. Stat. § 504B.291 (formerly 504.02) provides for fees not exceeding $5.00. In a commercial case where the lease provided for attorney's fees in an action based upon breach of the lease, the trial court's denial of restitution conditioned upon payment of rent, interest and attorney's fees was upheld. *614 Co.*, 297 Minn. at 398-99, 211 N.W.2d at 894.

However, in *Cheyenne Land Co. v. Wilde*, 463 N.W.2d 539 (Minn. Ct. App. 1990), the court affirmed the trial court's decision that the statutory limitation of $5.00 in attorney's fees governs residential cases. The court noted that "*614 Co.* is not applicable to this case. The trial court did not find the defaults of [the tenant] resulted from calculated commercial conduct as in *614 Co.* This court is compelled to follow the limitation on attorney's fees of Section 504.02 in this case." *Id*. at 540. However, the court added that "[w]e recognized the potential for abuse of the statute by lessees who take advantage of the fee limit by repeatedly withholding rent. Fairness would be served by amending Section 504.02 to require the payment of the lessors reasonable attorney's fees in all redemption cases." *Id*. at 540-41. *See Cityview Cooperative v. Marshall*, No. C6-99-968, 2000 WL 16334 (Minn. Ct. App. Jan. 11, 2000) (unpublished) ($5 attorney's

fee limit applied to Cooperative which chose landlord-tenant law to govern the relationship and the unlawful detainer action as a remedy).

When costs are assessed, they normally include the landlord's filing fee of $130.00. Since the assessment of costs and attorney's fees can be a significant impediment to a tenant's ability to redeem the tenancy, costs and attorney's fees should not be assessed when the tenant has prevailed on a defense against a claim for nonpayment of rent. For instance, in nonpayment of rent cases where the tenant successfully asserts a rent abatement claim based on breach of the covenants of habitability, the courts do not require the tenant to pay costs and attorney's fees. *See* discussion, *supra*, VI.E.1.m.; (Appendices 6-11). *But see Yauch v. Caine*, No. UD-1900403548 at 3 (Minn. Dist. Ct. 4th Dist. Apr. 20, 1990) (Appendix 11.D) (successful tenant on rent abatement claim for wrongful eviction assessed costs and attorney's fees apparently based on unique circumstances).

e. Month-to-month tenancies

In *University Community Prop. v. New Riverside Café*, 268 N.W.2d 573 (Minn. 1978), the court held that the right of redemption was unavailable to periodic tenants, including month-to-month tenants. *Id.* at 575-76. *See Birk v. Lane*, 354 N.W.2d 594, 596-98 (Minn. Ct. App. 1984).

New Riverside Café should be read narrowly. The tenancy was a commercial tenancy. 268 N.W.2d at 574. The plaintiff served a fourteen (14) day notice under Minn. Stat. § 504B.135 (formerly 504.06); and thus the defendant could have paid the rent during this period. *See id.* at 574. Usually, the summons and complaint is the first notice that the defendant receives and it serves as a demand for rent. Minn. Stat. § 504B.291 (formerly 504.02). The defendants attempted redemption after the trial. 268 N.W.2d at 574. In *Stevens Court v. Steinberg*, Nos. UD-92932, UD-92480, UD-92483 (Henn. Cty. Mun. Ct., Aug. 30, 1978), the court distinguished *New Riverside Café* on the above grounds, noting that the Supreme Court did not intend to disenfranchise the majority of tenants in the state. *Id.* (Appendix 12).

In *Kjellbergs, Inc. v. Herrera*, No. CX-98-0363 (Minn. Dist. Ct. 10th Dist. Mar. 11, 1998) (Appendix 340) (Mossey, J.), the manufactured (mobile) home park lot owner brought an unlawful detainer action for non-payment of rent. The tenant, who did not speak English and was unfamiliar with the court system, waited in the hallway for his case to be called and defaulted. The tenant moved to vacate the default judgment. The landlord claimed that, as a month to month tenant, the tenant did not have the right to redeem, so the motion should be denied, citing *University Community Properties v. New Riverside Café*, 268 N.W. 2d 573 (Minn. 1978). The court concluded that the tenant defaulted due to excusable neglect, and that the tenant had the right to redeem the property. The court distinguished *New Riverside*, noting that the *New Riverside* Court concluded that redemption would be negligible in a month to month tenancy at will as the lease could be terminated on one month's notice, while in this case, the landlord could terminate the lease only for cause and with proper notice.

f. In manufactured (mobile) home park lot tenancies

The tenant may redeem only twice in any twelve (12) month period, unless the tenant pays the landlord's actual reasonable attorney's fees for each additional redemption. Minn. Stat. § 327C.11, subd. 1. In *Kjellbergs, Inc. v. Herrera*, No. CX-98-0363 (Minn. Dist. Ct. 10th Dist. Mar. 11, 1998) (Appendix 340) (Mossey, J.), the manufactured (mobile) home park lot owner brought an unlawful detainer action for non-payment of rent. The tenant, who did not speak English and was unfamiliar with the court system, waited in the hallway for his case to be called and defaulted. The tenant moved to vacate the default judgment. The landlord claimed that, as a month to month tenant, the tenant did not have the right to redeem, so the motion

should be denied, citing *University Community Properties v. New Riverside Café*, 268 N.W. 2d 573 (Minn. 1978). The court concluded that the tenant defaulted due to excusable neglect, and that the tenant had the right to redeem the property. The court distinguished *New Riverside*, noting that the *New Riverside* Court concluded that redemption would be negligible in a month to month tenancy at will as the lease could be terminated on one month's notice, while in this case, the landlord could terminate the lease only for cause and with proper notice.

g. No waiver of right to redeem

Waiver of the right of redemption requires clear and convincing evidence of such intent so as to override judicial abhorrence of forfeiture. *See 614 Co.*, 297 Minn. at 398, 211 N.W.2d at 894; *Soukup v. Molitor*, 409 N.W.2d 253, 256-57 (Minn. Ct. App. 1987). A lease requirement waiving the tenant's right to the eviction (unlawful detainer) process and the right to redeem the premises is void as a violation of public policy. *Duling Optical Corp. v. First Union Management, Inc.,* No. C5-95-2718 (Minn. Ct. App. Aug. 13, 1996), FINANCE & COMMERCE at 66 (Aug. 16, 1996) (Appendix 181) (unpublished decision).

h. Landlord extension of tenant's right to redeem

If the landlord accepts the rent and costs after "issuance of the order," the landlord may have waived the right to proceed with the eviction. *See* discussion, *infra* at VIII.D; *Lowe v. Cotton*, No. UD-01990224515 (Minn. Dist. Ct. 4th Dist. Oct. 7, 1999 (Appendix 404) (landlord agreed to give tenant eight days to redeem).

i. Waiver of costs and service fees

In *Crystal Towers Apts. v. Schuneman*, UD-1960104502 (Minn. Dist. Ct. 4th Dist. Jan 31, 1996) (Appendix 217), the court found that it would be a hardship to require the tenant to pay the filing and service fees (27% of unpaid rent) when the landlord filed the case one day before the late fee date. The court did not rule on the tenant's request that her *in forma pauperis* status cover the fees.

j. Good faith effort to redeem

In *Huntington Place v. Scott*, Partial Transcript, No. UD-1980409509 (Minn. Dist. Ct. 4th Dist. Apr. 30, 1998) (Appendix 338), the court ordered the tenant to pay rent that day. The tenant contacted county emergency assistance that day, which agreed to make payment but did not accomplish it that day. The court concluded that the tenant made a good faith effort to redeem, and in fact redeemed, and ordered the judgment and writ vacated. *See State v. Clobes*, No. C7-97-240 (Minn. Dist. Ct. 5th Dist. Feb. 27, 1997) (Appendix 294) (Previous order denying right of redemption to tenant set aside; tenant allowed to redeem). *But see Clark v. Smith*, No. A04-1850, 2005 WL 1669123 (Minn. Ct. App. July 19, 2005) (unpublished) (eviction affirmed where tenant had promised rent payment but had not made payment before the trial court's decision, noting that statutory right of redemption under Minn. Stat. § 504B.291, subd. 1(a) "before possession been delivered" might be inconsistent with case law holding redemption is available only until the court issues its order"); *Willow Point Partners, LLC v. Willows on the Water, LLC*, No. A03-225, 2003 WL 22998880 (Minn. Ct. App. Dec. 23, 2003) (unpublished) (tenant was in default under the lease and tenant was not entitled to notice and an opportunity to cure; tenant failed to satisfy the settlement agreement when it issued a check with insufficient funds; tenant was not required to pay the full amount due under the lease for future months to redeem the property); *Jasa v.. LaMac Cleaners, Inc.*, No. C4-02-1239, 2003 WL 174729 (Minn. Ct. App. Jan. 28, 2003) (unpublished) (affirmed referee determination that tenant did not redeem the rented premises in a timely manner, rejecting a substantial compliance argument).

21. Violation of tenant privacy and security

The 1995 Minnesota Legislature created § 504.183 (now § 504B.211), which provides that a landlord may enter the tenants premises only for a reasonable business purpose and after making a good faith effort to give the tenant reasonable notice under the circumstances. A tenant may not waive and the landlord may not require the tenant to waive the tenant's right to prior notice. Minn. Stat. § 504B.211 (formerly § 504.183), subd. 2, 1995 Minn. Laws Ch. 226, Art. 4 § 21. The statute sets out several reasonable business purposes for landlord entry, and several exceptions to the notice requirement. If the landlord substantially violates the statute, the tenant may use a tenants remedies action or emergency tenants remedies action to enforce the statute and ask for a rent reduction, full recission of the lease, recovery of any damage deposit less amounts retained under the damage deposit statute, and up to a $100.00 civil penalty. *The statute does not provide for enforcement through an eviction (unlawful detainer) action defense.*

However, some local ordinances contain similar protections. For instance, Minneapolis Code of Ordinances, § 244.285 (Appendix 138) provides that whenever a landlord or landlord's agent intends to enter the tenant's unit, the person entering the unit shall make a good faith and reasonable effort to notify the tenant beforehand. The ordinance also contains some exceptions, but is much less specific than the new statute. As a right protected by ordinance, a tenant could seek rent abatement for a landlord's violation of the ordinance, and in turn violation of the covenants of habitability in Minn. Stat. § 504B.161 (formerly § 504.18), the tenant could seek rent abatement. *See* discussion, *supra*, at VI.E.1.d.(3) (Covenants of habitability).

The failure of the landlord to adequately deal with the actions of other tenants may be a violation of another tenants' quiet enjoyment of the property. *See Ricke v. Villebrun*, No. UD-1961112566 (Minn. Dist. Ct. 4th Dist. Dec. 5, 1996) (Appendix 289) (Nonpayment of rent unlawful detainer action: every lease contains right of quiet enjoyment; landlord's failure to remove known risk created by illegal drug activity violated covenant of quiet enjoyment; landlord ordered to notify court of immediate and continuing steps to enforce right to quiet enjoyment and tenants may pay rent into court if landlord does not). In *Olson v. Brooks*, No. UD-1950209512 (Minn. Dist. Ct. 4th Dist. Mar. 7, 1995) (Appendix 112), the court interpreted a "quiet enjoyment" clause in the lease as promising that the tenant shall enjoy the possession and use of the premises in peace and without disturbance. The court concluded that the tenant had proven that the landlord violated both the covenants of habitability and of quiet enjoyment as to repairs needed in the apartment and the landlord's continued interruption of the tenant's right to enjoy the premises without disturbance caused by the landlord. The court ordered rent abatement and ordered the landlord to change his activities in order to protect the tenants' privacy. Local ordinances also may require the landlord to take action to control tenant and guest activity which affect other tenants' security. For example, the landlord licensing sections of the housing code of the Minneapolis Code of Ordinances requires the landlord to take appropriate action to deal with disorderly activity by tenants and/or guests on the premises. Section 244.2020 (Appendix 128). The landlord's violation of the ordinance would be a violation of the covenants of habitability in Minn. Stat. § 504B.161 (formerly § 504.18), supporting a claim for rent abatement. Violations of tenant privacy and problems with security also may violate the covenant of habitability dealing with fitness of the premises for the use intended by the parties. *See* discussion, *supra*, at VI.E.1.d.(3)

When the court consolidates an eviction action with a tenant initiated action, like a rent escrow, tenant remedies, or emergency relief action, the court may award relief under the privacy statute. In *Washington v. Okoiye*, Nos. UD-1981029901 and UD-19809090564 (Minn. Dist. Ct. 4th Dist. Nov. 20, 1998) (Appendix 354C), the court consolidated unlawful detainer and emergency tenant remedies actions, and awarded $100 in monthly rent abatement, $100 for rent abatement for water shutoff, $250 as a stayed fine for violating a repair order, $500 in utility termination damages, $353 as a credit for tenant payments

on the landlord's water bill, $500 in privacy violations, all of which could be credited against rent, and $500 in attorney's fees, with a later hearing scheduled to review landlord compliance and additional attorney's fees. *See Washington v. Okoiye* and *Okoiye v. Washington*, No. UD-1981029901 (Minn. Ct. Dist. Oct. 8, 1999) (Appendix 426) (compliance order in consolidated unlawful detainer and emergency relief actions: landlord violated unlawful exclusion statute by excluding tenant from the basement; landlord violated shared meter statute where tenant's meter covered her first floor apartment and the common basement which the landlord used for an office and for personal use; landlord violated tenant privacy for coming on the property to do repairs without notice, and by interrogating guests of the tenant; tenant proved that landlord did not provide a certificate of rent paid; landlord failed to prove that tenant failed to pay rent in a timely manner; tenant awarded monthly rent abatement of $300 from $650 (46%) ongoing, $500 for exclusion from the basement, $500 for privacy violations, $500 for violation of the shared meter statute, all of which could be credited against rent; landlord ordered to cease violations of tenant's privacy, and immediately provide tenant with a certificate of rent paid.[13]

In *Richter v. Czock*, No. C7-01-1340, 2002 WL 338181 (Minn. Ct. App. 2002) (unpublished), the court consolidated an eviction action based on holding over after notice with a rent escrow action. The court affirmed trial court rulings that the lease required a 45 day notice, that $100 per month rent abatement would cover only the period in which the landlord knew of the habitability issues, and that the landlord did not violate the privacy statute where the tenants were present when the landlord came, and the landlord claimed an emergency. The court also held that the trial court did not err in not admitted evidence when the *pro se* tenants did request admission. The court noted that since the tenant appealed from the rent escrow action judgment but not the separate eviction action judgment, it would not consider whether the notice was retaliatory.

As with cases of housing disrepair, there may be tort ramifications to tenant claims involving privacy and security. In *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231 (Minn. 1998), the Minnesota Supreme Court held that a right to privacy exists in the common law of Minnesota, including causes of action in tort for intrusion upon seclusion, appropriation, and publication of private facts. In is unclear how this common law tort claim will relate to statutory tenant privacy claims. Counsel should explicitly reserve potential tort issues from the eviction (unlawful detainer) action. *See Neudecker v..Boisclair Corporation*, 351 F.3d 361 (8th Cir. 2003) (reversed dismissal of tenant's action for harassment based on disability, and ordered that tenant should be allowed to recast a claim under the Privacy Act of 1974, 5 U.S.C. § 552a, as a common-law privacy claim under *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 236 (Minn.1998)). *See generally* discussion, *supra*, VI.E.1.k. (Covenants of habitability: landlord's potential tort liability).

22. Landlord refused to accept rent

---

[13] *See Smith v. Brinkman* and *Brinkman v. Smith*, Nos. HC-1000124900 and HC-1000202517 (Minn. Dist. Ct. 4th Dist. Mar. 9, 2000) (Appendix 418) (Consolidated eviction and rent escrow actions: awarded $300 in civil penalties for landlord visits without notice in which he was rude toward the tenant and her daughter, landlord restrained from harassing tenant and household members with landlord allowed to enter only to make repairs with written 24-hours notice, tenants awarded costs, disbursements and attorney's fees); *Kersten v. Ballard*, No. 96-18387 (Minn. Dist. Ct. 4th Dist. Sep. 2, 1998) (Appendix 339) (Gomez, J.: award of $1,237 in penalties for privacy violations); *Stillday v. Kittleson*, No. UD-01980421523 and 1980430900 (Minn. Dist. Ct. 4th Dist. Jul. 21, 1998) (Appendix 368) (the court consolidated unlawful detainer and rent escrow actions, dismissed the unlawful detainer action for failing to serve a copy of the summons and complaint on the Minneapolis Public Housing Authority, and concluded that the landlord violated the tenant's privacy, and awarded $100 to the tenant).

In *L. Earl Bakke, Inc. v. O'Donnell*, No. UD-1941201517 (Minn. Dist. Ct. 4th Dist. Feb. 9, 1995) (Appendix 139), the landlord filed an unlawful detainer action for non-payment of rent after refusing to accept rent. By the time the court issued its decision, the landlord had accepted and cashed the rent payment. The court still concluded that a defense to a claim of non-payment of rent is that the landlord refused to accept rent. *Id.* at 6. While the tenant was able to redeem the tenancy in this case, there may be cases where the landlord may refuse rent and induce the tenant to spend the rent money on other items, leaving the tenant vulnerable to an eviction (unlawful detainer) action for non-payment of rent. Counsel should argue that the landlord's actions in refusing the accept rent, especially when not relevant to the landlord's litigation position in a prospective eviction (unlawful detainer) action, may waive the landlords' ability to obtain restitution of the premises for non-payment of rent.

In *Horning Properties v. Wang*, No. C3-98-1211 (Minn. Dist. Ct. 10th Dist. Jun. 23, 1998) (Appendix 337) (Meyer, J.), the landlord of a Rural Housing and Community Development Service Subsidized Housing Project filed an action for nonpayment of rent and breach of lease. The court concluded that there was no lease violation where the tenant tendered but the landlord refused April rent, so this event did not support the eviction notice.

23. Rent credit for work done for the landlord by the tenant

Lehikoinen v. Salinas, No. C3-95-601058 (Minn. Dist. Ct. 6th Dist. July 11, 1995) (Appendix 122) (parties agreed that in exchange for tenant's work for landlord around the premises, tenant would receive rent credit and an hourly rate; work credit abated from rent).

24. Tenant financial obligations under a separate agreement with the landlord may not be rent

In *St. Cloud Housing and Redevelopment Authority v. Slayton*, No. C9-98-1671 (Minn. Dist. Ct. 10th Dist. Nov. 3, 1998) (Appendix 365) (Danforth, J.), the court concluded that the Public Housing Authority accepted the tenant's late recertification and the repayment agreement between the parties over back rent did not provide for eviction as a consequence for non-payment or late payment. The Court gave the tenants seven days to pay the arrearage of $1,200 and fees. *See Apple Square, Inc. v. Muldrow*, No. UD-1950213547 (Minn. Dist. Ct. 4th Dist. Mar. 2, 1995) (Appendix 120) (tenants agreement to reimburse landlord for cost of replaced refrigerator was not part of the lease and the promised payment was not rent; tenants debt on the agreement was not properly the subject of an unlawful detainer complaint).

25. Retaliation

Section 504B.285 (formerly § 566.03), Subd. 3. applies to commercial as well as residential landlord-tenant relationships. It does not apply in breach of lease cases, or where the rights asserted by the tenant were unrelated to the landlord-tenant relationship. *Cloverdale Foods of Minnesota, Inc.,* 580 N.W.2d 46 (Minn. Ct. App. 1998). *See* discussion, *supra*, at VI.E.9 (Retaliatory rent increase or service decrease), and *infra*, at VI.F.3 (Holding over: retaliation), VI.G.18 (Breach: retaliation).

Retaliation claims under § 504B.441 (formerly § 566.28) and some local housing codes are not limited to notice to quit or rent increase notice claims. The claim of retaliation in a non-payment of rent case also may be available under the covenants of habitability, Minn. Stat. § 504B.161 (formerly § 504.18). Since the covenants of habitability include violation of housing codes, a violation of a housing code provision on retaliation would be a violation of the covenant's habitability. Also, since the covenants may not be waived and must be liberally construed, a landlord's effort to defeat enforcement of the covenant by filing an unlawful detainer action for non-payment of rent may constitute retaliation. *See* Memorandum of

Paul Birnberg (Dec. 11, 1998) (Appendix 345). Some local ordinances include protection against retaliation. Minneapolis Code of Ordinances § 244.80 (Appendix 138) provides a presumption of retaliation where the landlord attempts to terminate the tenancy after the tenant complains to the inspection agency, or the tenant of City sues the landlord over housing conditions. *The presumption has no time limit.* The tenant also may be entitled to rent abatement for retaliation. *See* discussion, *supra*, at VI.E.1.d.(3) (Violation of covenants of habitability).

Tenants have had mixed results trying to prove retaliation in a nonpayment of rent case. In *Brook v. Boyd*, No. C8-96-47 (Minn. Dist. Ct. 9th Dist. Feb. 13, 1996) (Appendix 207), in consolidated unlawful detainer and rent escrow actions, the court found that the non-payment of rent unlawful detainer action was in retaliation for tenant's complaints to landlord and housing inspector. *See Judnick v. Boje*, No. C7-96-600537 (Minn. Dist. Ct. 6th Dist. Apr. 19, 1996) (Appendix 202) (action for non-payment of rent was retaliatory). *But see Zeman v.* _____, No. HC 031002500 (Minn. Dist Ct. 4th Dist. Nov. 3, 2003) (Appendix 595) (50% rent abatement, retaliation defenses to not apply in nonpayment of rent case); *Gear Properties v. Jacobs*, No. C1-97-2266 (Minn. Ct. App. Sep. 1, 1998) (Appendix 332) (unpublished: a failure to pay rent when due is a proper legal basis for an eviction in response to a retaliation claim); *D & D Real Estate Investment, L.L.P. v. Hughes*, Nos. UD-1990311505 (Minn. Dist. Ct. 4th Dist. Mar. 30, 1999) (Appendix 323A) (defense of retaliation is not available in non-payment of rent or breach of lease cases, citing Minn. Stat. § 566.03 (now § 504B.285), Subd. 2..

26. Notice for rent in month to month tenancies

In *Butler v. Cohns*, No. C2-96-6599 (Minn. Dist. Ct. 2d Dist. Oct. 22, 1996) (Appendix 218), the referee ruled for the landlord on the claim that the tenants were a threat to the landlord and the landlord's property. On a request for judge review, the court concluded that whether or not there is an implied covenant in oral leases against threatening behavior, any termination of an oral lease must comply with MINN. STAT. Sec. 504B.135 (formerly 504.06): a one month notice to quit for violations of an oral lease, and a fourteen day notice for failure to pay rent. *But see Valley Investment & Management, Inc. v.* _____, No. HC 000927525 (Minn. Dist Ct. 4th Dist. Nov. 1, 2000) (Appendix 589a) (14 day notice requirement for termination of month to month tenancy for nonpayment of rent in Minn. Stat. § 504B.135 (formerly § 504.06) is not required for a nonpayment of rent eviction action; landlord's acceptance of part payment without a written agreement to retain an eviction claim for the balance waives the eviction claim; plaintiff cannot amend complaint once defendant has served an answer).

Section 504B.135 (formerly 504.06) states that to terminate (§ 504.06 stated "determine") an estate at will in the case of nonpayment of rent, 14 days notice in writing is required. Tenants can argue that Section 504B.135 requires 14 days written notices in all nonpayment of rent cases for month to month tenants. The benefit of the requirement would be a built it grace period before the landlord could file the case, which might lead to less cases being filed and more out of court settlements not tracked by tenant screening agencies. The downside is that when the notice is given, there might not be a right to redeem. *University Community Prop. v. New Riverside Café*, 268 N.W.2d 573 (Minn. 1978). The question for tenant advocates to consider if where is the best place to have the grace period: (1) a shorter period before the case is filed without additional costs, or (2) a longer period through the date of hearing but including additional costs.

27. Illegal lease provisions. *See* Illegal lease provisions, *infra* at VI.G.12.

28. Manufactured (mobile) homes not in mobile home parks

In *Nygren v. Nix*, No. C1-96-42 (Minn. Dist. Ct. 9th Dist. Jan. 25, 1996) (Appendix 199), the defendant agreed to purchase a manufactured (mobile) home from the plaintiff by a promissory note which stated monthly payments, and rented the land below it by a lease which did not state rent payments. The plaintiff brought an action for non-payment of rent and late fees, and the defendant answered that the action should be dismissed because the plaintiff prepared and issued the summons in violation of Minn. Stat. § 504B.321 (formerly § 566.05), the action was not an appropriate forum since the dispute was more properly governed by the Manufactured Home Repossession Security Act (MHRSA, Minn. stat. Sec. 327.62 *et seq.*, rent was improperly calculated, and restitution would be unconscionable, and moved for dismissal and attorney's fees under Minn. R. CIV. P. 11 for failing to sign the complaint. The court dismissed the action for preparing and issuing a summons which should have been prepared and issued by the court, and for not signing the complaint. The court also ordered that if the plaintiffs refiled the action, they must pay defendant's counsel attorney's fees as a condition to refile the action.

29. Tenant or landlord in bankruptcy. *See* Bankruptcy, *supra* at VI.D.12.

30. Assessment of rent from guest

The landlord does not have the right to assess additional rent from a guest. *Cedar Associates LLP v. Curtis*, No. UD-1970108508 (Minn. Dist. Ct. 4th Dist. May 20, 1997) (Appendix 250) (Tenant could not be assessed rent for when she was a guest of another tenant who rented from the same landlord).

31. Landlords actual or acquiescence in unlawful activities

In 1997 the drug covenant was expanded to cover other types of unlawful activity, and to cover landlords as well as tenants. Minn. Stat. § 504.181 (now § 504B.171), *amended by* 1997 Minn. Laws Ch. 239, Art. 12, § 4 (Appendix 242). Now, both the tenant and the landlord, as well as the licensor and licensee, covenant that neither will (1) unlawfully allow illegal drugs on the premises, the common area or curtilage, (2) allow prostitution or prostitution related activity to occur in the premises, common area or curtilage, or (3) allow the unlawful use or possession of certain firearms in the premises, common area, or curtilage. The parties also covenant that the common area and curtilage will not be used by them or persons acting under their control to carry out activities in violation of illegal drug laws.

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

The tenant can enforce the covenant in a tenant remedies, rent escrow or emergency action. Minn. Stat. § 504B.001 (formerly § 566.18).

A landlord's violation of the covenant may give rise to defenses in nonpayment of rent cases. In a nonpayment of rent case, the tenant should have the remedy of rent abatement that is available for a landlord's violation of the only other implied lease covenants, the covenants of habitability under 504B.161 (formerly § 504.18). The covenants are similar in that they deal with basic issues of safety and security, the Legislature has created the same enforcement mechanisms for them in the tenant remedies statutes, which also are part of the unlawful detainer chapter. Even before full extension of the covenants to landlords, the tenant could claim that the landlord's failure to remove unlawful activities from the building violated the

tenant's right to quiet enjoyment. *See Ricke v. Villebrun*, No. UD-1961112566 (Minn. Dist. Ct. 4th Dist. Dec. 5, 1996) (Appendix 289) (Nonpayment of rent unlawful detainer action: every lease contains right of quiet enjoyment; landlord's failure to remove known risk created by illegal drug activity violated covenant of quiet enjoyment; landlord ordered to notify court of immediate and continuing steps to enforce right to quiet enjoyment and tenants may pay rent into court if landlord does not).

32. Rent claims under prior leases

It is unclear whether the landlord can claim nonpayment of rent under prior leases as a basis for eviction. *Filister v. Okabue*, No. C6-97-61 (Minn. Ct. App. July 1, 1997), FINANCE AND COMMERCE at 45 (July 3, 1997) (Appendix 254) (Unpublished: affirming judgment for landlord, noting no reason why landlord could not extend lease yet still be entitled to amounts owed for prior lease periods). *But see Arcade Investment Co. v. Gieriet*, 99 Minn. 277, 279, 109 N.W. 250, 252 (1906) (Subsequent lease waives prior notice to quit; *Rio Hot Properties, Inc. v. Judge*, No. UD-1981005518 (Minn. Dist. Ct. 4th Dist. Oct. 29, 1998) (Appendix 362B) (Amounts due from earlier lease between the parties for a different property could not be raised in the current action for rent under the current lease); *Common Bond Housing v. Beier*, No. UD-1951204625 (Minn. Dist. Ct. 4th Dist. Feb. 23, 1996) (Appendix 227) (Waiver of breach by renewing lease); *Espeland v. Fondren*, No. UD-1961112556 (Minn. Dist. Ct. 4th Dist. Dec. 26, 1996) (Appendix 252) (Landlord did not prove that past due amount from lease on former apartment with tenant was part of the parties' new oral rental agreement on the new apartment). The tenant should argue that while the landlord may be entitled to damages under the old lease, the landlord is not entitled to evict the tenant for rent due under the old lease if the tenant is complying with the current lease.

33. Garnishment of rent

Sometimes a judgment creditor of the landlord, such as a former tenant, may seek to garnish the rent from a current tenant to satisfy the former tenant's judgment against the landlord. If the creditor successfully garnishes the rent, the tenant does not owe rent to the landlord. What is a more difficult question is what the current tenant should do if the tenant receives the garnishment summons before the rent is due, since rent that is not due yet may not be subject to garnishment. If the tenant withholds the rent from the landlord due to a reasonable and good faith belief that the rents are covered by the garnishment summons, the tenant should not be evicted for nonpayment of rent. *Omar Investments, Inc. v. Taylor*, No. UD-1970908563 (Minn. Dist. Ct. 4th Dist. Sep. 30, 1997) (Appendix 284) (Tenant not evicted where tenant withheld part of August rent and September rent after receiving garnishment summons on August 30; rent paid into court to be held until decision from other court which issued the judgment for collection).

34. Fair Debt Collection Practices Act defenses

An unlawful detainer action "is equivalent to a demand for the rent and a reentry upon the property" and gives rise to the tenant's right to redeem the property. Minn. Stat. § 504B.291 (formerly 504.02). The Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692-1692o, applies to *some* unlawful detainer actions for nonpayment of rent. The Act applies to debt collectors, including attorneys who regularly engage in debt collection, collection agencies, creditors collecting for third parties, and creditors collecting under the name of another, *but do not include* an officer or employee of the creditor collecting in the name of the creditor. §1692a(6).

While the Act does not apply to landlords, their employees, or managing agents for landlords, it does apply to attorneys who regularly engage in debt collection, and landlord agents who do not manage the property and regularly collect debts or commence unlawful detainer actions for nonpayment of rent. *See*

Hodges v. Sasil Corp., 189 N.J. 210, 915 A.2d 1 (N.J. 2007) (law firm and attorneys that regularly filed summary dispossess actions for nonpayment of rent were considered debt collectors subject to the FDCPA).

The Act's application is triggered by a communication regarding the debt. While the eviction complaint is an exception which does not trigger the Act's protections, §1692g(d), there are other communications in an eviction which would. The term "communication" means the conveying of information regarding a debt directly or indirectly to any person through any medium. §1692a(2). If the debt collector's initial communication is a written notice for nonpayment of rent, as opposed to a pleading for nonpayment of rent, the notice must state what is often called the "mini-Miranda warning": "that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose." §1692e(11). Section 1692g(a) adds:

> Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing ....
>
> (3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector; [and]
>
> (4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector ....

If within thirty days of receiving the required notice, the consumer disputes the debt or requests verification of the debt or the name of the original creditor, the collector must stop collection activity until the information is provided in writing. §1692g(b). Violation of the Act can create liability for actual damages, additional damages up to $1,000, and costs and attorney fees. §1692k(a).

On the other hand, a pleading in a civil action is not the debt collector's initial communication, §1692g(d), and the "mini-Miranda warning" *does not apply*, §1692e(11). Before amendment of the statute, several courts had held that the pleading was an initial communication. *Goldman v. Cohen,* 445 F.3d 152 (2nd Cir. 2006); *Oppong v. First Union Mortg. Corp.,* 2008 WL 2853252, No. CIV. A. 02-2149 (E.D.Pa. Jul 24, 2008); *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich,* 502 F.Supp.2d 686, 691 (N.D.Ohio Jun 20, 2007); *Nichols v. Byrd,* 435 F.Supp.2d 1101, 1106 (D.Nev. Jun 13, 2006).

The Act has been applied to eviction cases. In *Romea*, the landlord's attorneys gave the state required nonpayment of rent notice and then commenced an unlawful detainer action. The tenant sued in federal court, challenging the notice under the Act. The attorneys moved to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. The district court denied the motion, holding that the FDCPA applied to the attorney's letter. *Romea v. Heiberger & Assocs.*, 988 F.Supp. 712 (S.D.N.Y. 1997). The court then certified the issue for an interlocutory appeal. *Romea v. Heiberger & Assocs.*, 988 F.Supp. 715, 716-17 (S.D.N.Y. 1998). The Second Circuit affirmed, holding that back rent was "debt" within meaning of FDCPA, the notice was a "communication" to collect a debt, within meaning of FDCPA, and the attorneys were acting as "debt collectors" for FDCPA purposes. *Romea v. Heiberger & Associates*, 163 F.3d 111 (2d Cir. 1998). *See Hodges v. Sasil Corp.*, 189 N.J. 210, 915 A.2d 1 (N.J. 2007) (law firm and attorneys that regularly filed summary dispossess actions for nonpayment of rent were considered debt collectors subject to the FDCPA).

Housing court decisions have dismissed eviction actions for violations of the Act. *Eina Realty v. Calixte*, 178 Misc.2d 80, 679 N.Y.S.2d 796 (Civ. Ct. 1998); *Dearie v. Hunter*, 177 Misc.2d 525, 676 N.Y.S.2d 896 (Civ. Ct. 1998); *Soho v. Mills*, N.Y.L.J. 28, col. 6 (Civ. Ct. May 13, 1998).

In Minnesota, most nonpayment of rent unlawful detainer actions do not require notice before commencing the action, and few landlords voluntarily give such notice. Written notice is required in most public and subsidized housing programs, and in manufactured (mobile) home park lot tenancies. However, notice given by the landlord would not trigger the statute, since the landlord is not a debt collector under the statute, but notice given by the landlord's attorney would be covered. Even though an eviction complaint filed by the landlord's attorney would not trigger the statute, any other communication would, including oral or written communications to the tenant before or after filing the action. Violations of the Act should result in dismissal. Damages, costs and attorney fees also may be available.

Where the notice complies with the Act, if the tenant disputes the debt or requests verification of the debt or the name of the original creditor, the court should continue the hearing until the information is provided in writing. In most cases, it should take the debt collector little time to supply the information.

35. Joint liability only if provided in lease

Many housing attorneys, including the author, have interpreted Minn. Stat. § 504B.125 (formerly § 504.04) to provide for joint liability among co-tenants. That may not be the case. Section 504B.125 provides:

> Every person in possession of land out of which any rent is due, whether it was originally demised in fee, or for any other estate of freehold or for any term of years, shall be liable for the amount or proportion of rent due from the land in possession, although it be only a part of the land originally demised. Such rent may be recovered in a civil action, and the deed, demise, or other instrument showing the provisions of the lease may be used in evidence by either party to prove the amount due from the defendant. Nothing herein contained shall deprive landlords of any other legal remedy for the recovery of rent, whether secured to them by their leases or provided by law.

The case law indicates that the statute, which was based on a Massachusetts statute, did not create new liability between tenants and landlord, but did protect the landlord from losing the right to collect rent where the tenant assigned her interest to two or more persons. *See Baehr v. Penn-O-Tex*, 258 Minn. 533, 104 N.W.2d 661 (1960); *McLaughlin v. Minnesota L & T*, 192 Minn. 203, 255 N.W. 839 (1934); *Minnesota Loan & Trust v. Medical Arts Building*, 192 Minn. 6, 255 N.W. 839 (1934); *Campbell v. Stetson*, 2 Metcalf (Mass) 504 (1839); 22 Pick (Mass.) 565 (1839). Under § 504B.311 (formerly § 566.04), (1) each tenant or assignee is liable only for the reasonable value of her physical share of the property, unless the lease creates joint liability, and (2) each tenant or assignee is liable only for the time he occupies the property, unless the lease creates liability past the date that occupancy ends. *See generally* Birnberg Letter (Jan. 15, 1998) (Appendix 311). Since the statute does not contain a non-waiver clause, the parties may be free to contact for joint liability.

36. Right to cure under the lease

Whether there is a right to cure separate from the right to redeem is governed by the lease. *Willow Point Partners, LLC v. Willows on the Water, LLC*, No. A03-225, 2003 WL 22998880 (Minn. Ct. App. Dec. 23, 2003) (unpublished) (tenant was in default under the lease and tenant was not entitled to notice and an opportunity to cure; tenant failed to satisfy the settlement agreement when it issued a check with insufficient

funds; tenant was not required to pay the full amount due under the lease for future months to redeem the property).

37. Foreclosure of residential rental property

The relationship between the landlord and tenant is not changed during the mortgage foreclosure process. The tenant remains liable for the rent and other obligations under the lease and landlord tenant laws, and the landlord remains obligated to maintain the property and comply with the lease and landlord tenant laws.

The landlord is required by statute to notify a prospective tenant in writing that the property is in foreclosure, and may not accept rent or a deposit before giving notice. If the landlord and tenant then enter into a lease, the lease is limited to the time in which the landlord continues to own the property. The statute does not apply if the foreclosing entity agrees to honor the lease after the landlord's ownership interest expires. Minn. Stat. § 504B.151, 2008 Minn. Laws Ch. 177, §1. While the statute does not contain a penalty for violations, tenants should argue that a violation of the disclosure requirement renders the lease illegal and void, entitling tenant to a full abatement of rents illegally obtained. *See* discussion, *supra*, at VI. E.2.a (Violation of Housing Code Precluding Action for Rent) and VI. E.2.c (Rental Dwelling Licenses).

A tenant in the last month of the foreclosure redemption period may withhold the rent and have the deposit cover it. Minn. Stat. § 504B.178, subd. 8, 2008 Minn. Laws Ch. 177, §2.

Following expiration of the redemption period, the foreclosing bank steps in the shoes of the landlord as the owner of the property, until the bank terminates the tenancy. *See* discussion, *supra*, at I.E (Statutory Definitions).

F. HOLDING OVER AFTER NOTICE TO QUIT DEFENSES

1. Improper notice to quit

a. Month-to-month tenancies

The tenancy can be terminated by giving written notice before the last month of the tenancy. Minn. Stat. § 504B.135 (formerly § 504.06); *Johnson v. Theo Hamm Brewing Co.*, 213 Minn. 12, 16, 4 N.W.2d 778, 781 (1942). Notice must be served (and received) before the first day of the month in which the tenancy is to terminate. *Oesterreicher v. Robertson*, 187 Minn. 497, 501, 245 N.W. 825, 825 (1932); *Coker v. Hulsey*, No. UD-1991101520 (Minn. Dist. Ct. 4th Dist. Nov. 12, 1999) (Appendix 384) (Notice must be actually received before October 1 to terminate lease at the end of October; notice to quit sent by registered mail on September 29 resulting in failed deliveries on October 1 and October 6 was untimely); *Minneapolis Public Housing Authority v. Papasodora*, No. UD-1960611515 (Minn. Dist. Ct. 4th Dist. Jul. 17, 1996) (Appendix 213) (notice mailed February 29 could not be received in February and was untimely for an April 1 rent increase); *Hegg v. Martinez*, UD-1951206549 (Minn. Dist. Ct. 4th Dist. Jan 19, 1996) (Appendix 219) notice claim dismissed due to lack of proper and timely service of notice); *Ochoa v. Kenneth*, UD-1950919505 (Minn. Dist. Ct. 4th Dist. Oct. 20, 1995) (notice dated 1st of month untimely); *Kahn v. Morrow*, No. UD-1940504534 (Minn. Dist. Ct. 4th Dist. May 25, 1994) (notice dated 1st of month untimely); *Lehikoinen v. Salinas*, No. C3-95-60158 (Minn. Dist. Ct. 6th Dist. July 11, 1995) (7 days notice untimely); *Valley Manor Apts. v. Gullickson*, No. CX-94-10 (Minn. Dist. Ct. 8th Dist. Feb. 3, 1994) (Appendix 56); *Karlson v. Ellis*, No. UD-1931102538 (Minn. Dist. Ct. 4th Dist. Nov. 26, 1993) (Appendix 61); *Phillips*

Neighborhood Housing Trust v. Chaboyea, No. UD-1890502548 (Minn. Dist. Ct. 4th Dist. May 12, 1989) (Appendix 13) (notice received on April 1st ineffective for April 30).

The notice must state a termination date before rent is due. If the notice states the date on which rent is due, then the tenancy would start another month, and would not be terminated. *See Oesterreicher v. Robertson*, 187 Minn. at 501, 245 N.W. at 825. Strict compliance is required. *Markoe v. Naiditch & Sons*, 303 Minn. 6, 7, 226 N.W.2d 289, 290 (1975). A defective notice is void, and does not become effective at the end of the next month. *See Eastman v. Vetter*, 57 Minn. 164, 166, 58 N.W. 989, 989-90 (1894); *Minneapolis Public Housing Authority v. Papasodora* (Appendix 213); *Philips Neighborhood Housing Trust* (Appendix 13)*; Valley Manor Apts.* (Appendix 56)*, supra*.

In *Butler v. Cohns*, No. C2-96-6599 (Minn. Dist. Ct. 2d Dist. Oct. 22, 1996) (Appendix 218), the referee ruled for the landlord on the claim that the tenants were a threat to the landlord and the landlord's property. On a request for judge review, the court concluded that whether or not there is an implied covenant in oral leases against threatening behavior, any termination of an oral lease must comply with MINN. STAT. Sec. 504B.135 (formerly 504.06).

In *Thomas v. Dobyne*, No. UD-1980513503 (Minn. Dist. Ct. 4th Dist. Jun. 3, 1998) (Appendix 370A), the landlord alleged an agreement with the tenant to vacate the property based on a telephone conversation with the tenant's attorney and a meeting, after which the parties intended to reduce the agreement to writing. The parties never executed a written agreement and the landlord did not give a written notice to quit. The court dismissed the action.

In *Rio Hot Properties, Inc. v. Judge*, No. UD-1981102522 (Minn. Ct. Dist. 4th Dist. Nov. 19, 1998) (Appendix 362C), the landlord claimed the notice to quit for October 31 was given to tenants on September 16, but the tenants testified that they did not receive it until October 16 at a court hearing in their previous unlawful detainer action. The court concluded that notice was not given until October 16, and earlier oral statements were ineffective to terminate the lease. *See Lawler v.* _____, No. HC 010817525 (Minn. Dist Ct. 4th Dist. Sep. 6, 2001) (Appendix 529) (notice to quit claim dismissed where landlord failed to prove he delivered notice; breach claim dismissed where landlord did not give three day notice with right to cure as required by lease; remaining claims settled); *O'Brian v.* _____, No. HC 1010402506 (Minn. Dist Ct. 4th Dist. Apr. 18, 2001) (Appendix 552) (breach claims dismissed where oral lease contained no right of re-entry clause; notice claim dismissed where landlord failed to attached notice to complaint, and failed to prove notice was given; expungement granted); *Smith v. Brinkman* and *Brinkman v. Smith*, Nos. HC-1000124900 and HC-1000202517 (Minn. Dist. Ct. 4th Dist. Mar. 9, 2000) (Appendix 418) (Consolidated eviction and rent escrow actions: landlord failed to prove statutory notice to quit).

b. Periodic tenancies with no rent term

Under Minn. Stat. § 504B.135(a) (formerly § 504.06), the "time of the notice must be at least as long as the interval between the time rent is due or three months, whichever is less." Where there is no rent term, the notice must be a three month notice. *Hagen v. Bowers*, 182 Minn. 136, 233 N.W. 822 (1931) (three month notice required where dairy farmer gave landlord 50% of harvest of cream in lieu of rent); *Marlett v.* _____, No. 27CVHC 09-66, Order (Minn. Dist. Ct. 4th Dist. Jan. 22, 2009) (Appendix 607) (plaintiff owned the property and cohabited with defendant, plaintiff vacated, defendant remained, and plaintiff filed eviction action; court concluded defendant was tenant at will without a rent obligation, requiring three month notice to terminate, but plaintiff could seek reasonable rent).

c. Term leases

Leases may provide for notice to terminate the lease before the end of the term. Failure to give the notice requires dismissal. *Osuji v. Coleman*, No. HC-01991118524 (Minn. Dist. Ct. 4th Dist. Nov. 30, 199) (Appendix 411) (Action dismissed where landlord failed to provide written notice as required by the lease, and failed to abide by the terms of the notice); *Okoye v. Washington*, No. UD-1980909564 (Minn. Dist. Ct. 4th Dist. Oct. 2, 1998) (Appendix 354A) (Lease required 30 day termination notice for breach of lease); *Commonwealth Terrace Cooperative, Inc. v. Jassim,* No. C6-90-8892, slip op, at 6 (Minn. Dist. Ct. 2nd Dist. Oct. 3, 1990) (Appendix 13.A) (restitution denied where plaintiff issued notice to quit that did not contain the language required by the lease; plaintiff could not retroactively modify the requirement). However, in some cases, the notice period may be unconscionable. *See Pickerign v. Pasco Marketing, Inc.*, 303 Minn. 442, 446, 228 N.W.2d 562, 565 (1975) (lease providing for 30-day notice to service station operator may be unconscionable). *See also* discussion, *infra* at VI.G.13-14.

Some leases do *not* grant the landlord the right to terminate the lease by notice without cause. *Valley Manor Apts. v. Gullickson*, No. CX-94-10 (Minn. Dist. Ct. 8th Dist. Feb. 3, 1994) (Appendix 56).

d. Following cancellation of a contract for deed or a mortgage foreclosure

i. State Law

The purchaser can not terminate a tenancy which preceded the mortgage. *See Claflin v. Commercial State Bank of Two Harbors,* 487 N.W.2d 242 (Minn. 1992) (actual and open possession of property was sufficient to put mortgage lender on inquiry notice of possible rights in property).

For tenancies which postdate the mortgage, prior to August 1, 2008, termination of the tenancy of a tenant renting from a owner following cancellation of a contract for deed or a mortgage foreclosure required one month written notice. Minn. Stat. § 504B.285 (formerly § 566.03), subd. 1. In 1992, the statute was amended to clarify when notice to vacate must be provided to a tenant whose tenancy is being terminated due to an contract for deed cancellation or mortgage foreclosure. The change specified that the tenant must be given one month's written notice (1) to vacate no sooner than one month after the date the redemption or termination period expires, or (2) to vacate no later than the date when the redemption or termination period expires. If the second option requiring the earlier vacate date is chosen, the notice must state that the sender of the notice will hold the tenant harmless if the tenant breaches the lease by vacating before the end of the redemption period and the mortgage is subsequently redeemed.

In *Broszko v. Principal Mutual Life Ins. Co.*, 533 N.W.2d 656 (Minn. Ct. App. 1995), the Court held that persons who began occupying foreclosed property beginning late in the redemption period were not tenants of the bank at the end of the redemption period. The Court stated that the mortgagor does not have the power to create a tenancy in the redemption period which extends beyond the redemption period, after which any tenant of the mortgagor becomes a trespasser. The Court noted that the person did not have a lease, did not pay rent for the last half year, knew foreclosure was taking place and they would have to move, knew the end of the redemption period, was served with process by substitute service, did not attend the hearing, then later contacted the bank's attorney to ask when she had to lease, giving the bank its first notice of her presence on the property, and did not attempt to reopen the unlawful detainer action, but rather sued after execution of the writ of restitution. The broad holding limits application of the statute to persons who began renting from the mortgagor before the foreclosure sale, giving no protection to the large number of persons who rent from mortgagors during the redemption period.

In 2008, the Legislature amended the statute to overrule *Broszko* and require a longer notice. The bank now must give a two month notice to tenants who reside in the property during the redemption period

and who entered into a lease after the mortgage foreclosure commencement notice. Minn. Stat. § 504B.285, subd. 1, 2008 Minn. Laws Ch. 177, §3. Banks argued that the notice was not required for leases which predated the foreclosure notice, but tenants argued that it applies to leases which are renewed or continued during the redemption period. The Legislature clarified the notice requirement in 2009. 2009 Minn. Laws Ch. 130, S.F.No. 1302.

In *Webster Bank v. Occhipinti*, No. CV-970059147S, 1998 WL 846105 (Conn. Sup. Ct. Nov. 20, 1998) (Appendix 372), the court held that federal Section 8 law preempted state mortgage foreclosure law, which provided that foreclosure terminated the interest of the tenant of the mortgagor. Thus, the foreclosing mortgagee or the purchaser at the foreclosure sale could terminate the Section 8 lease only in accordance with the Section 8 statutes and regulations.

ii. Federal Law

In 2009 Congress created new protections for tenants whose landlords are in foreclosure. Pub. L. No. 111-22, § 702-04 123 Stat 1632, 1660-62 (May 20, 2009). All qualified tenants (not a child, spouse, or parent of the mortgagor; arms-length transaction; rent that is not substantially less than fair market rent for the property) receive a 90 day notice from the successor in interest, normally the bank. The foreclosing bank is not a successor until the redemption period ends, so it is a 90 day notice on top of the redemption period. Tenants under state law who are not qualified under the federal law still are entitled to the state two month notice.

Tenants who start a term lease before the foreclosure notice get to keep the lease until it expires, unless the successor sells to a third party who would occupy the premises, and gives the 90 day notice. Since the successor could not sell until it owns at the end of the redemption period, the tenant would get a 90 day notice on top of the redemption period at a minimum, and longer if the lease is longer (i.e. two year lease) and there is no sale to a person who would occupy the premises. This does not apply to leases which begin after the foreclosure notice, but the above 90 day notice protection still would apply.

To the extent state law better protects the tenants, it would apply, but it appears that the federal law has more protections.

Foreclosure is not good cause for Section 8 voucher eviction, and does not end the Section lease and contract. The successor in interest picks up the Section 8 voucher contract rights and obligations. However, if a new owner will occupy the unit, the new owner can give the 90 day notice before becoming the owner, to be effective when becoming an owner. If the owner does not occupy the property, the owner cannot end the lease with a 90 day notice.

The new law was effective when signed on May 20, 2009, as to foreclosures after that date. Any foreclosure which had not been completed (end of the redemption period) by then would be covered. The section 8 provisions also apply to completed foreclosures. HUD, New England PIH Advisory Letter #09-02 (June 15, 2009). The law terminates December 31, 2012.

e. Different notice lengths for landlord and tenant

Court differ on whether the parties may be bound to different notice periods for terminating the lease. Courts have held that a month-to-month lease that requires a minimum occupancy greater than the term of the lease to obtain return of the deposit lacks mutuality, since the landlord could terminate the lease within the same period without penalty. _____ *v. Apartment Management Co., Inc.*, No. AC-87-6066 (Minn. Dist.

Ct. 4th Dist. July 29, 1987) (Appendix 434A); _____ *v. Steele*, No. AC-667 (Minn. Dist. Ct. 4th Dist. Nov. 28, 1986) (Appendix 452A). The Minnesota Attorney General has challenged a similar provision as violating the Prevention of Consumer Fraud and Uniform Deceptive Practices Acts. *In re Chinyere Ike Njake*, No. 453070 (Minn. Dist. Ct. 2d Dist. Aug. 25, 1981) (order and assurance of discontinuance of use of clause) (Appendix 522A). *But see SJM Properties, Inc. v. _____,* No. HC 020402501 (Minn. Dist Ct. 4th Dist. Apr.. 11, 2002, Feb. 12, 2003) (Appendix 570) (dismissal where Rental Assistance for Family Stabilization (RAFS) Program landlord failed to serve the Section 8 office; different notice periods for landlord and tenant might be proper; costs and disbursements awarded, which may be credited against rent; expungement granted later).

2. The lease does not provide for termination of the tenancy before expiration of the lease

3. Retaliatory eviction

Section 504B.285 (formerly § 566.03), Subd. 3. applies to commercial as well as residential landlord-tenant relationships. It does not apply in breach of lease cases, or where the rights asserted by the tenant were unrelated to the landlord-tenant relationship. *Cloverdale Foods of Minnesota, Inc.,* 580 N.W.2d 46 (Minn. Ct. App. 1998). *See* discussion, *supra* at VI.E.9 and *infra* at VI.G.18.

The retaliatory defense statute does not apply to a mortgagor holding over after foreclosure of the mortgage unless the mortgagor can show an established landlord-tenant relationship. *Federal Land Bank of St. Paul v. Obermoller*, 429 N.W.2d 251, 257-58 (Minn. Ct. App. 1988).

a. Protected tenant activity

Under Minn. Stat. § 504B.285 (formerly § 566.03), subd. 2, the defendant's protected activity includes the defendant's good faith attempt to secure or enforce the rights under the lease or federal, state, or local laws, or report of the plaintiff's violation of any health, safety, housing, or building code or ordinance to a governmental authority. It appears that these rights could be those of the tenant, or of others.

Examples of protected activity include:

(1) Requesting repairs from the landlord.

Parkin v. Fitzgerald, 307 Minn. 423, 427, 240 N.W.2d 828, 831 (1976); *Payne v. _____*, No. HC 1010801519 (Minn. Dist Ct. 4th Dist. Aug. 23, 2001) (Appendix 558) (presumption of retaliation applied even though tenant call for housing department inspection after notice was given, but had complained to landlord before notice was given; landlord failed to rebut presumption where rent payment history and clogged toilet problems paled in comparison to seriousness of habitability problems; expungement granted); *Line v. Reynolds*, No. UD-1960612512 (Minn. Dist. Ct. 4th Dist Aug 12, 1996) (App. 175); *Ochoa v. Kenneth*, UD-1950919505 (Minn. Dist. Ct. 4th Dist. Oct. 20, 1995) (Appendix 79); *Harris v. Carlson*, No. C8-92-10809 (Minn. Dist. Ct. 10th Dist. Nov. 16, 1992) (Appendix 57).

(2) Reporting housing code violations to the housing inspector.

Parkin v. Fitzgerald, 307 Minn. 423, 427, 240 N.W.2d 828, 831 (1976); *Payne v. _____*, No. HC 1010801519 (Minn. Dist Ct. 4th Dist. Aug. 23, 2001) (Appendix 558) (presumption of retaliation applied even though tenant call for housing department inspection after notice was given, but had complained to landlord before notice was given; landlord failed to rebut presumption where rent payment history and

clogged toilet problems paled in comparison to seriousness of habitability problems; expungement granted); *Line v. Reynolds*, No. UD-1960612512 (Minn. Dist. Ct. 4th Dist Aug 12, 1996) (App. 175); *Ochoa v. Kenneth*, UD-1950919505 (Minn. Dist. Ct. 4th Dist. Oct. 20, 1995) (Appendix 79); *Olowu v. Patterson*, No: UD-1950606520 (Minn. Dist. Ct. 4th Dist. July 3, 1995) (Appendix 142); *Harris v. Carlson*, No. C8-92-10809 (Minn. Dist. Ct. 10th Dist. Nov. 16, 1992) (Appendix 57). *But see Lehikoinen v. Salinas*, No. C3-95-60158 (Minn. Dist. Ct. 6th Dist. July 11, 1995) (Appendix 122) (no retaliation where landlord did not know of tenant's complaint).

(3) Insisting on the right to rent without illegal discrimination.

Barnes v. Weis Management Co., 347 N.W.2d 519, 521-22 (Minn. Ct. App. 1984). *See* discussion, *infra* at VI.F.8.

(4) Contacting the police.

Howard Lake Mobile Home Park v. _____, No. C1-01-2272 (Minn. Dist Ct. 10th Dist. Nov. 19, 2001) (Appendix 516) (waiver of notice to terminate manufactured home lot rental by receiving, retaining, and intending to negotiate rent check; plaintiff notice was in retaliation for defendant's complaints to police and resident association; plaintiff's claims did not meet the various statutory grounds for eviction; expungement not awarded as case was under Minn. Stat. Ch. 327C and not Ch. 504B); *Stock v. Beaulieu* (Minn. Dist. Ct. 9th Dist. Mar. 9, 1995) (Appendix 140) (reporting a crime of domestic abuse committed by the plaintiff in which the defendant was the victim); *Salvation Army v. Luten*, No. UD-1860523522 (Henn. Cty. Mun. Ct., June 12, 1986) (Appendix 14).

(5) Commencing an action to restore possession of the premises following a lockout.

Salvation Army v. Luten, No. UD-1860523522 (Henn. Cty. Mun. Ct., June 12, 1986) (Appendix 14).

(6) Withholding rent or defending a previous eviction (unlawful detainer) action on the grounds that the landlord violated the covenants of habitability.

Donovic v. Dodson, No. C2-96-600607 (Minn. Dist. Ct. 6th Dist. Apr. 29, 1996) (Appendix 201) (Notice to quit following tenant's withholding of rent was retaliatory); *Olowu v. Patterson*, No: UD-1950606520 (Minn. Dist. Ct. 4th Dist. July 3, 1995) (Appendix 142); *Floyd v. Myers*, Nos. UD-1930601511 and UD-1930602512 (Minn. Dist. Ct. 4th Dist. June 28, 1993) (Appendix 6.C) (rent abatement of $285.00 from $425.00; subsequent eviction notice retaliatory and technical lease violation not material); *Zeman v. Arnold*, No. UD-1910102533 at 2-3 (Minn. Dist. Ct. 4th Dist. Jan. 23, 1991) (Appendix 14.A); *Zeman v. Currington*, No. UD-1910102534 at 3 (Minn Dist. Ct. 4th Dist. Jan. 23, 1991) (Appendix 14.B).

(7) Commencing an action to restore utility service to the premises following the landlord's termination of utility service.

LeDoux v. Zanosko, No. CX-95-1001 (Minn. Dist. Ct. 9th Dist. Oct. 16, 1995) (Appendix 124) (disconnected propane heat supply).

(8) Complaining about landlord's entry onto the premises.

Grommes v. Williams, No. UD-1950901500 (Minn. Dist. Ct. 4th Dist. Nov. 8, 1995) (Appendix 141).

(9) Commencing a rent escrow action.

McNair v. Doub, No. UD-1960708524 (Minn. Dist. Ct. 4th Dist. Aug.12, 1996) (Appendix 205) (landlord's claim for eviction was in retaliation to tenant's initiation of rent escrow claim; proof of retaliation may void a landlord's non-waiver lease provision).

(10) Failure to cooperate with landlord's attempt to place water service in the tenant's name while payment remaining the landlord's responsibility.

Anya v. Rulford, UD-1960501506 (Minn. Dist. Ct. 4th Dist. May 24, 1996) (Appendix 220).

(11) Tenant inquiries about the landlord's insurance carrier.

Anya v. Rulford, UD-1960501506 (Minn. Dist. Ct. 4th Dist. May 24, 1996) (Appendix 220).

(12) Protected activity should include enforcement of the tenant's rights under statute.

MINN. STAT. § 504B.205 (formerly § 504.215), in which a landlord may not "(1) bar or limit a tenant's right to call for police or emergency assistance in response to domestic abuse or any other conduct; or (2) impose a penalty on a tenant for calling for police or emergency assistance in response to domestic abuse or any other conduct," and attempts to enforce the implied landlord covenants on illegal activities. Minn. Stat. § 504.181 (now § 504B.171). In *Real Estate Equities, Inc. v. Schmidt*, No. CX-00-297 (Minn. Dist. Ct. 10th Dist. Mar. 14, 2000) (Judge Mossey) (Appendix 415), the tenant was assaulted on the property both before and after she obtained a restraining order, leading her to call the police. The landlord sent a letter stating it would terminate the tenancy based on late payment of rent, damage to the property, and police calls to the unit. The parties then executed an agreement to vacate. The court concluded that the termination letter, and the resulting agreement, violated § 504B.205, rendering the agreement void as contrary to public policy.

(13) Successful eviction defense.

McCampbell v. _____, No. HC 031002506 (Minn. Dist Ct. 4th Dist. Nov. 5, 2003, Jan. 22, 2004) (Appendix 537) (successful eviction defense gave rise to presumption of retaliation for subsequent notice to vacate; landlord's evidence of prior tenant claims again the landlord did not prove claims were in bad faith; expungement granted later on judge review, reversing referee denial of expungement).

(14) Complaints to resident association.

Howard Lake Mobile Home Park v. _____, No. C1-01-2272 (Minn. Dist Ct. 10th Dist. Nov. 19, 2001) (Appendix 516) (waiver of notice to terminate manufactured home lot rental by receiving, retaining, and intending to negotiate rent check; plaintiff notice was in retaliation for defendant's complaints to police and resident association; plaintiff's claims did not meet the various statutory grounds for eviction; expungement not awarded as case was under Minn. Stat. Ch. 327C and not Ch. 504B).

(15) Making complaints for other tenants.

City View Apartments v. Sanchez, No. C2-00-313, 2000 WL 1064897 (Minn. Ct. App. Aug. 2000) (unpublished: combined eviction action and tenant remedies action; retaliation statute applies to efforts of

tenant to make repair complaints to other tenants; the trial court erred by finding the notice was proper without making findings on the factors in *Parkin v. Fitzgerald*, 307 Minn. 423, 240 N.W.2d 828 (1976); trial court erred in dismissing tenant remedies action based on inadequate findings on the notice in the eviction action).

b. Presumption of retaliation

If the plaintiff serves a notice to quit within ninety (90) days of the defendant's protected activity, the plaintiff must establish by a fair preponderance of the evidence, a substantial non-retaliatory purpose, arising at or within a short time before service of the notice to quit, wholly unrelated to and unmotivated by the defendant's protected activity. *Parkin*, 307 Minn. at 430, 240 N.W.2d at 832-33; Minn. Stat. § 504B.285 (formerly § 566.03), subd. 2. *See City View Apartments v. Sanchez*, No. C2-00-313, 2000 WL 1064897 (Minn. Ct. App. Aug. 2000) (unpublished: combined eviction action and tenant remedies action; retaliation statute applies to efforts of tenant to make repair complaints to other tenants; the trial court erred by finding the notice was proper without making findings on the factors in *Parkin v. Fitzgerald*, 307 Minn. 423, 240 N.W.2d 828 (1976); trial court erred in dismissing tenant remedies action based on inadequate findings on the notice in the eviction action); *Anya v. Rulford*, UD-1960501506 (Minn. Dist. Ct. 4th Dist. May 24, 1996) (Appendix 220) (landlord did not prove absence of retaliatory motive). A notice to not renew a lease also may be retaliatory. *Line v. Reynolds*, No. UD-1960612512 (Minn. Dist. Ct. 4th Dist Aug 12, 1996) (App. 175) (tenant proved that landlord's revocation of offer to continue renting to tenant and notice to vacate were in retaliation for tenant's complaints).

In *Walters v. Demmings*, No. C4-01-2, 2001 WL 641753 (Minn. Ct. App. 2001) (unpublished), the Court held that facts of non-retaliatory purpose cannot be raised for the first time in closing argument, the trial court erred in placing the burden of proof on the tenant when the tenant proved a termination notice within 90 days of her enforcement of her rights, since the burden shifted to the landlord to rebut the presumption of retaliation, and the trial court erred in not closely examining the landlord's purposed legitimate business purpose. *But see Tamarack Court, Inc. v. Milliman*, No. C2-02-1787, 2003 WL 21911150 (Minn. Ct. App. Aug. 12, 2003) (unpublished) (affirmed holding of no retaliation, where trial court concluded that tenant did not prove retaliation when the presumption of retaliation applied, but also concluded that manufactured home park had a legitimate economic reason for eviction).

In manufactured (mobile) home park lot rentals, the 1995 Legislature clarified the application of the 90 day presumption of retaliation to a landlord's adverse action against the tenant following the tenant joining and participating in the activities of a resident association. Minn. Stat. § 327C.12, *amended by* 1995 Minn. Laws Ch. 13, Art. 1. *Howard Lake Mobile Home Park v. _____,* No. C1-01-2272 (Minn. Dist Ct. 10th Dist. Nov. 19, 2001) (Appendix 516) (waiver of notice to terminate manufactured home lot rental by receiving, retaining, and intending to negotiate rent check; plaintiff notice was in retaliation for defendant's complaints to police and resident association; plaintiff's claims did not meet the various statutory grounds for eviction; expungement not awarded as case was under Minn. Stat. Ch. 327C and not Ch. 504B); *Larson v. Anderson*, No. C9-96-416 (Minn. Dist. Ct. 9th Dist. Oct. 11 and Nov. 8, 1996) (Appendix 264) (Rent abatement of $6,910 over five years failing to repair discharge of raw sewage on the premises in manufactured (mobile) home park; landlord's notice to quit was in retaliation for tenant's complaint to health department).

If the plaintiff alleges a non-retaliatory purpose, the defendant should have the opportunity to rebut the alleged purpose by showing that it was a pretext used to cover for the retaliation. *See Barnes*, 347 N.W.2d at 522. If the notice to quit is served more than ninety (90) days after the defendant's protected

activity, the defendant must establish retaliation by a fair preponderance of the evidence. *See* Minn. Stat. § 504B.285 (formerly § 566.03), subd. 2.

(1) Failed landlord justifications

Landlord justifications have been rejected many times. *Green v. Formanek*, and *Formanek v. Green*, No. 1991001905 and 4991004400 (Minn. Dist. Ct. 4th Dist. Oct. 27, Nov. 8, 1999) (Judge Bruce Peterson) (Appendix 393) (Consolidated rent escrow and eviction actions: dismissal of eviction action where landlord's notice was not wholly without retaliatory motive); *Amsler v. Harris*, and *Harris v. Amsler*, Nos. UD-1990826901 and UD-1990902500 (Minn. Dist. Ct. 4th Dist. Sep. 20, 1999) (Appendix 376) (landlord failed to prove a non-retaliatory purpose for an eviction complaint filed seven days after the tenant filed an emergency lockout petition); *Hughes v. Schudi*, Nos. 1990208901 and UD-1990205510 (Minn. Dist. Ct. 4th Dist. Feb. 25, 1999) (Appendix 232B) (Scherer J.: rejected landlord's argument that notice to quit was not retaliatory because tenant's emergency tenant remedies action were dismissed for non-appearance, where landlord was aware of tenant's actions in reporting disrepair and initiating court actions; notice to quit and unlawful detainer action were filed in that phase; unlawful detainer file expunged); *Rio Hot Properties, Inc. v. Judge*, No. UD-1981102522 (Minn. Ct. Dist. 4th Dist. Nov. 19, 1998) (Appendix 362C) (landlord failed to prove a non-retaliatory purpose); *Mattson v. Harmon*, No. UD-1961203552 (Minn. Dist. Ct. 4th Dist. Jan. 28, 1997) (Appendix 269) (Retaliation for tenant's efforts to resolve the furnace problem); *Hardy v. Cannady*, No. UD-1960802598 (Minn. Dist. Ct. 4th Dist. Sep. 30, 1996) (Appendix 258) (Retaliation for tenant's oral complaints to landlord and mutual friend about repair needs; landlord did not prove a separate and distinct reason for the notice).

Examples include:

(a) *Wish to rent to others*

In *Judge v. Rio Hot Properties, Inc.*, Nos. UD-1981202903, UD-1981005518, and UD-1981104522 (Minn. Dist. Ct. 4th Dist. Dec. 18, 1998), (Appendix 362D), in consolidated unlawful detainer and emergency tenant remedies action, the court concluded that a notice to quit which was not effective but the parties agreed to litigate was retaliatory where the landlord only wished to rent to other tenants, and the landlords waived a no pet provision and could not rely on it to show a non-retaliatory purpose.

(b) *Wanting a higher rent*

See Okeakpu v. _____, No. HC 1020603511 (Minn. Dist Ct. 4th Dist. July 2, 2002) (Appendix 554) (Judge Sagstuen) (landlord failed to rebut presumption of retaliation for tenant's refusal to pay illegal side payments on top of the Section 8 rent where his claim that when he purchased the property he thought the tenant's rent was higher was not credible; expungement granted).

(c) *Late rent*

Payne v. _____, No. HC 1010801519 (Minn. Dist Ct. 4th Dist. Aug. 23, 2001) (Appendix 558) (presumption of retaliation applied even though tenant call for housing department inspection after notice was given, but had complained to landlord before notice was given; landlord failed to rebut presumption where rent payment history and clogged toilet problems paled in comparison to seriousness of habitability problems; expungement granted); *Leshoure v. O'Brian*, No. UD-01000303900 (Minn. Dist. Ct. 4th Dist. May 17, 2000) (Appendix 403) (rent escrow action: landlord failed to overcome presumption of retaliatory notice with claims that the rent was late, since landlord accepted late rent in the past, or that Section 8 repair

requirements were too expensive, since tenant had continuously asked for repairs); *Little v. Katzovitz,* No. UD-1970902903 (Minn. Dist. Ct. 4th Dist. Sep. 30, 1997) (Appendix 268) (Landlord did not prove a non-retaliatory purpose for eviction by claiming unreasonable pedestrian traffic or repeated late payment of rent).

(d) *Breach not known at time of notice*

Reis v. Clayburn, No. UD-1991102507 (Minn. Dist. Ct. 4th Dist. Nov. 22, 1999) (Appendix 417) (Landlord did not overcome presumption of retaliation where landlord knew of inspector ordered repairs, did not know of tenant breaches of the lease at the time the landlord gave the termination notice, and the landlord indicated retaliatory attitude in a notice to all tenants.

(e) *Traffic*

Little v. Katzovitz, No. UD-1970902903 (Minn. Dist. Ct. 4th Dist. Sep. 30, 1997) (Appendix 268) (Landlord did not prove a non-retaliatory purpose for eviction by claiming unreasonable pedestrian traffic or repeated late payment of rent).

(f) *Property sale.*

It seems increasingly common for landlords to defend a retaliation claim by asserting that they have sold or are going to sell the property. In *Coker v. Robinson*, Nos. UD-1971103525 and UD-1971103905 (Minn. Dist. Ct. 4th Dist. Dec. 15,1997) (Appendix 320), the notice from the landlord asserted it was being given because of the decision of the new owners. The purchase agreement required all but one tenant to vacate the property, and listed a different tenant. The purchaser also signed a letter making adverse claims against the tenant, which were based solely on information provided by the landlord. The court found that the landlord, rather than the buyer, made the determination to authorize the other tenant to stay but to require the defendant to vacate, thus the landlord had not proven that the notice to quit was not retaliatory. *See Project for Pride in Living, Inc. v.* _____, No. HC 1021121502 (Minn. Dist Ct. 4th Dist. Dec. 10, 2002, April 7, 2003) (Appendix 564) (landlord's desire to end residential use of building "cannot be used as a pretext to ignore the covenants of habitability; later expunged on judge review by stipulation, reversing referee denial of expungement); *Olasande v.* _____, No. HC 1020906533 (Minn. Dist Ct. 4th Dist. Oct. 24, 2002) (Appendix 555) (landlord failed to prove that alleged damage, over-occupancy, failure to allow access, and failure to maintain insurance were material breaches to warrant forfeiture; landlord failed to rebut presumption of retaliation where landlord failed to prove that sale of the property required removing the tenant, and the landlord's desire to sell in response to mortgage foreclosure actually was connected to the tenant's enforcement of habitability rights); *Boone v.* _____, No. HC 1010417504 (Minn. Dist Ct. 4th Dist. June 4, 2001) (Appendix 477) (Judge B. Peterson) (landlord failed to rebut presumption of retaliation where he listed the property for sale with his own company but did not show the property, and he failed to prove tenant violated the lease; expungement granted).

Landlords were successful in *Tamarack Court, Inc. v. Milliman*, No. C2-02-1787, 2003 WL 21911150 (Minn. Ct. App. Aug. 12, 2003) (unpublished) (affirmed holding of no retaliation, where trial court concluded that tenant did not prove retaliation when the presumption of retaliation applied, but also concluded that manufactured home park had a legitimate economic reason for eviction); *Aadland v. Jackson*, No. UD-1991101616 (Minn. Dist. Ct. 4th Dist. Nov. 19, 1999) (Appendix 375) (Landlord's retention of November rent without cashing it waived notice to quit effective October 31, as the landlord exercised dominion and control over the funds to the prejudice of the tenant; landlord rebutted presumption of retaliatory notice by proving a non-retaliatory purpose of frustration with tenant's failure to pay rent in a timely manner and landlord's impression of an unacceptable amount of foot traffic.; *Bossen Terrace v.*

Price, No. C5-98-434 and C1-98-480 (Minn. Ct. App. Oct. 6, 1998) (Appendix 312) (Unpublished: Landlord proved substantial non-retaliatory reason by proving three incidents where police arrested a tenant for domestic assault and disorderly conduct).

In *Nguyen v. Veit,* No. UD-1910401513 (Minn. Dist. Ct. 4th Dist. Apr. 15, 1991) (Appendix 14.C), the plaintiff established substantial non-retaliatory reason for eviction where defendant requested repairs, defendant assaulted plaintiff, and plaintiff issued a termination notice based on her fear for her safety. The landlord also could allege that there was no retaliation where landlord did not know of tenant's complaint. *Lehikoinen v. Salinas*, No. C3-95-60158 (Minn. Dist. Ct. 6th Dist. July 11, 1995) (Appendix 122).

c. Housing code provisions on retaliation

Local housing codes also may limit the ability of the landlord to evict a tenant without cause after the tenant seeks to enforce rights under the code. *See* Minneapolis Code of Ordinances § 244.80 (Appendix 138). Section 244.80 provides a presumption of retaliation where the landlord attempts to terminate the tenancy after the tenant complains to the inspection agency, or the tenant of City sues the landlord over housing conditions. *The presumption has no time limit.* The tenant also may be entitled to rent abatement for retaliation. *See* discussion, *supra*, at VI.E.1.d.(3) (Violation of covenants of habitability).

d. Litigating retaliatory notice in a tenant initiated case

With the advent of tenant screening companies and their access to eviction records, along with tight rent markets, tenants facing a retaliatory notice may fear fighting the notice in an eviction action. Tenants may wish to try to beat the landlord to court by filing their own action.

Where the tenant has defenses to a landlord's notice to quit and the landlord has not yet filed an eviction action, the tenant may wish to consider filing a rent escrow action to challenge the notice before the landlord files an eviction action. To do so, the tenant should send a letter to the landlord asserting why the notice is improper (i.e., inadequate time period, retaliation, etc.) and any repair problems or lease violations by the landlord. After fourteen days, the tenant may file a rent escrow action. Minn. Stat. § 504B.385 (formerly § 566.34). While the court may not be required to consider the notice issue, the court may choose to do so in the interests of judicial economy. *Dargay v. Cashman*, No. 1990825900 (Minn. Dist. Ct. 4th Dist. Sep. 17, 1999) (Appendix 387) (Rent escrow action; tenant proved failure to keep property in reasonable repair and awarded rent abatement; in interests of judicial economy, the court may decide whether pending notice to vacate is retaliatory when issue is pleaded in a rent escrow action; tenants may not be evicted or penalized for seeking police assistance, Minn. Stat. § 504B.205; tenant's call to police was a good faith attempt to secure or enforce rights under the laws of the state, Minn. Stat. § 504B.285; when retaliation is alleged and the burden is on the landlord to show a substantial non-retaliatory reason, "the landlord must do more than state a non-retaliatory reason for the eviction . . . [the landlord] must prove the truth of the allegations of loud noise with competent evidence, and prove that the noise has an adverse impact on other residents of the building or neighbors. Accepting less as proof of a non-retaliatory purpose would strip the retaliation statute of any meaning.")

In *Judge v. Rio Hot Properties, Inc.*, Nos. UD-1981202903, UD-1981005518, and UD-1981104522 (Minn. Dist. Ct. 4th Dist. Dec. 18, 1998), (Appendix 362D), in consolidated unlawful detainer and emergency tenant remedies action, the court concluded that a notice to quit which was not effective but the parties agreed to litigate was retaliatory where the landlord only wished to rent to other tenants, and the landlords waived a no pet provision and could not rely on it to show a non-retaliatory purpose. *See Leshoure v. O'Brian*, No. UD-01000303900 (Minn. Dist. Ct. 4th Dist. May 17, 2000) (Appendix 403) (rent

escrow action: landlord failed to overcome presumption of retaliatory notice with claims that the rent was late, since landlord accepted late rent in the past, or that Section 8 repair requirements were too expensive, since tenant had continuously asked for repairs); *Amsler v. Harris*, and *Harris v. Amsler*, Nos. UD-1990826901 and UD-1990902500 (Minn. Dist. Ct. 4th Dist. Sep. 20, 1999) (Appendix 376) (consolidated actions: landlord failed to prove a non-retaliatory purpose for an eviction complaint filed seven days after the tenant filed an emergency lockout petition).

e. Term leases

In *Dominium Management Services, Inc. v. C.L.,* No. HC-1021106500 (Minn. Dist. Ct. 4th Dist. Mar. 4, 2003) (Appendix 492), the trial court found that a Section 8 Voucher notice of lease termination required by term lease constituted notice to quit under Minn. Stat. § 504B.285 (formerly § 566.03), Subd. 2; and the defendant complained of conditions, some of which were found by the city inspector and plaintiff as well-founded. The court concluded that the plaintiff did not overcome the presumption of retaliation by claiming failure to allow the plaintiff to enter the apartment, where the tenant complied with her separate agreement over notice for apartment visits. The court also concluded that the plaintiff reasonably accommodated the defendant's disability in the past, but failed to comply with this ongoing obligation when the plaintiff failed to respond to the defendant's proposal of a mental health case management workers serving as a communication intermediary between plaintiff and defendant. The court dismissed that action and awarded the defendant costs and disbursements.

The Court of Appeals affirmed in *Dominium Management Services, Inc. v. C.L.,* No. A03-85, 2003WL 22890386 (Minn. Ct. App. Dec. 9, 2003). On the retaliation claim, the Court focused on the timing of the eviction, concluding that it was "significant that Dominium did not terminate C.L.'s year-to- year lease and file the resulting eviction action until 2002, after C.L. had reported numerous housing violations to the Richfield authorities and after the encounter with the regional property manager." On the reasonable accommodation claim, the Court affirmed the trial court's finding that the defendant was disabled, and concluded that the defendant's request for neutral third party involvement would not impose an undue hardship on the plaintiff.

4. Waiver of Notice to quit by acceptance of rent

There is disagreement over when payment and acceptance of rent waives a notice to quit. Landlords argue that acceptance of rent does not necessarily manifest the intent to waive notice. *See MCDA v. Powell*, 352 N.W.2d 532, 534 (Minn. Ct. App. 1984), citing *Arcade Investment Co. v. Gieriet*, 99 Minn. 277, 279, 109 N.W. 250, 252 (1906). In *Arcade Investment Co.*, the court stated that:

> The landlord may evidence his intention to waive the termination of the tenancy by such notice by any conduct sufficiently manifesting such intention. Thus if he gives a second notice, he thereby waives his right to proceed under the first notice. So also the subsequent acceptance of rent accrued after the giving of the notice is evidence competent to be submitted to the jury as intending to show waiver of the notice. By party of reasoning, if after the landlord has given notice to the tenant to quit, he subsequently agrees with the tenant for a continuance of the possession of the premises, he thereby waives the effect of the notice. That there may have been "no consideration, no agreement to pay rent, nor any of the elements of a contract for lease" in such a concession by the landlord, would affect the character of the right of the tenant holding over, but would not necessarily deprive the landlord's act of its natural tendency to show a waiver of the notice to quit previously given.

99 Minn. at 279, 109 N.W. at 252 (citations omitted). *See Burlington Coat Factory of Minnesota, LLC v. Chapman,* No. A07-1456, 2008 WL 4006736 *2 (Minn. Ct. App. Sept. 2, 2008) (unpublished).

Tenants argue that the payment and acceptance of rent constitutes unconditional waiver of a notice to quit. *King v. Durkee-Atwood, Co.*, 127 Minn. 452, 455, 148 N.W. 297, 298 (1914) (waiver of tenant's notice); *Pappas v. Stark*, 123 Minn. 81, 83, 142 N.W. 1042, 1047 (1913) (waiver of landlord's notice). *See Linden Corp. v. Simard*, No. 3-87-1599 (Minn. Ct. App. Feb. 9, 1988) (Appendix 15) (analysis of waiver of notice case, but citing waiver of breach cases; while it is questionable whether receipt of a check without cashing it constitutes waiver, receipt of a money order or cash constitutes waver of notice). None of these cases discuss *Arcade* nor a requirement to show intent. *See also Pham v.* _____, No. HC 030131517 (Minn. Dist Ct. 4th Dist. Feb. 13, 2003) (Appendix 560) (dismissal for failure to present lease for breach claim and notice for holdover claim, and for waiver of notice by acceptance of rent); *Rydrych v. Comer*, No. UD-01961125504 (Minn. Dist. Ct. 4th Dist. Dec. 6, 1996) (Appendix 291) (Waiver of notice by acceptance of rent); *Donovic v. Dodson*, No. C2-96-600607 (Minn. Dist. Ct. 6th Dist. Apr. 29, 1996) (Appendix 201); *Olowu v. Patterson*, No: UD-1950606520 (Minn. Dist. Ct. 4th Dist. July 3, 1995) (Appendix 142); *Etna Woods Apartment v. Ramgran,* No. C8-92-2614 (Minn. Dist. Ct. 2nd Dist. Mar. 25, 1992) (Appendix 15.D); *Buckeye Realty Co. v. Elias,* No. CX-91-0697 at 4-7 (Minn. Dist. Ct. 10th Dist. Aug. 6, 1991) (Appendix 15.E).

Tenants also should argue that the *Powell* Court discussed acceptance of rent in *dicta* and misstated Minnesota law on the subject. In *Powell*, the issue was whether a non-waiver clause in a public housing lease was valid. The court held that it was valid, but then went on to say in *dicta* that acceptance of rent does not necessarily manifest the intent to waive notice. The court did not discuss *King* or *Pappas*.

The *Powell* decision has received both support and criticism by the lower courts. *See Loring Towers Apartments Limited Partnership v. Ferrer*, No. UD-1901226507 at 4 (Minn. Dist. Ct. 4th Dist. Jan. 10, 1991) (Appendix 15.A); *Ewing Square Associates v. Koerner*, No. UD-2910104802 at 6-7 (Minn. Dist. Ct. 4th Dist. Feb. 4, 1991) (Appendix 15.B) (support of *Powell*); *Bigos Prop. v. Roby*, No. _____, Transcript of Proceedings at 2-3 (Ram. Cty. Ct. June 4, 1985) (Appendix 16) (criticism of *Powell*).

Even where a court accepts the *Arcade-Powell* analysis, under *Arcade* the tenant should assert that the acceptance of rent creates a rebuttable presumption of an intention to waive the termination notice, since it is inconsistent with an intention to declare the tenancy terminated. The payment and acceptance of rent indicates an intention by both parties of continued rental for another month. Even if a lease has been properly terminated, the payment and acceptance of rent indicates an intention to continue renting on a month-to-month basis. Under this analysis, the landlord may be able to rebut such a presumption by returning the rent to the tenant immediately after the landlord has received it. If the landlord retains the rent until the tenant raises the waiver defense in an eviction (unlawful detainer) action, the landlord's return of the rent at that time should not be relevant, since it does not relate to the landlord's intention at the time the rent originally was received. *See Loring Towers Apartments Limited Partnership v. Ferrer* at 3-4. (Appendix 15.A).

In some cases, such as in subsidized housing or in private housing where the lease requires a termination notice based on breach of the lease, the landlord may not have waived the notice, but may have waived the breach upon which the notice relies. In such cases, waiver of the breach should remove the basis for the notice, rendering the notice void.

Landlords have had some success avoiding the waiver defense by not cashing rent payments and then arguing that they had not accepted rent, or by alleging very serious lease violations which encouraged the court to look for an exception to the waiver doctrine. *Carriagehouse Apartments v. Stewart*, No. UD-

1970107501 (May 13, 1997) (Appendix 249) (No waiver of notice or breach where landlord received but did not cash, deposit or return money orders for rent, landlord instructed agents to not accept rent on the tenant's account, and landlord alleged tenant started a fire at the apartment); *Loring Towers Apartments Limited Partnership v. Ferrer*, No. UD-1901226507 (Minn. Dist. Ct. 4th Dist. Jan. 10, 1991) (Appendix 15.A).

However, landlord were not successful in *Aadland v. Jackson*, No. UD-1991101616 (Minn. Dist. Ct. 4th Dist. Nov. 19, 1999) (Appendix 375) (Landlord's retention of November rent without cashing it waived notice to quit effective October 31, as the landlord exercised dominion and control over the funds to the prejudice of the tenant; landlord rebutted presumption of retaliatory notice by proving a non-retaliatory purpose of frustration with tenant's failure to pay rent in a timely manner and landlord's impression of an unacceptable amount of foot traffic); *Heights Realty Assoc. v. Smith*, NEW YORK LAW JOURNAL (July 28, 1999) (www.nylj.com)(landlord's retention of rent by uncashed check, without a claim of inadvertence, attempt to return, or other act which showed the landlord's intent to preserve the right to terminate the tenancy, waived the notice).

If the landlord can prove ongoing lease violations which also are current lease violations, acceptance of rent might not waive the breach claim. *Christy v. Berends,* No. A07-1451, 2008 WL 2796663 *3-4 (Minn. Ct. App. July 22, 2008) (sublease is not an ongoing lease violation).

a. In public and government subsidized housing

Before August 1995, tenants had successfully argued that the landlord's acceptance of the government subsidy, or housing assistance payment (HAP), may waive the notice, depending on the circumstances. *Etna Woods Apartment v. Ramgran,* No. C8-92-2614 (Minn. Dist. Ct. 2nd Dist. Mar. 25, 1992) (Appendix 15.D) (acceptance of rent and subsidy waived breaches); *Buckeye Realty Co. v. Elias,* No. CX-91-0697 at 4-7 (Minn. Dist. Ct. 10th Dist. Aug. 6, 1991) (Appendix 15.E) (FmHA project: acceptance of tenant's rent (as opposed to HAP from HRA) vendored by social service agency; *Secretary of U.S. Dept. HUD v. Madison*, No. UD-1861104544 (Minn. Dist. Ct. 4th Dist. Nov. 18, 1986) (Appendix 17). *But see Loring Towers Apartments Limited Partnership v. Ferrer*, No. UD-1901226507 (Minn. Dist. Ct. 4th Dist. Jan. 10, 1991) (Appendix 25A).

But, in *Westminster Corp. v. Anderson*, 536 N.W.2d 340 (Minn. Ct. App. 1995), the Court held that in a breach of lease case, the acceptance of housing assistance payments (HAP) from the Minnesota Housing Finance Agency (MHFA) did not waive the tenant's alleged breach of the lease, holding that HAPs were not rent. The holding probably also applies to waiver of notice cases, so that acceptance of the HAP would not waive notice. However, the Court noted that it made no ruling on treatment of the tenant's rent payments, as opposed to the HAP, implying that the subsidized and public housing tenant rent would be treated the same as rent by private tenants for waiver purposes.

Counsel should argue that where the landlord accepts the *tenant's rent*, regardless of whether the landlord accepted the *HAP*, waiver has occurred, under *Westminster Corp.*, the private housing waiver appellate cases, and the subsidized housing lower court decisions where the tenant paid rent in addition to the housing authority paying the HAP.

b. Manufactured (mobile) home park lot tenancies

Minn. Stat. § 327C.11, subd. 2 (emphasis added), provides that acceptance of rent: (1) after notice of violations or repeated serious violations of park rules or certain laws, or notice of park improvements or

closure, does not waive the notice; (2) for a period after expiration of a final notice to quit waives the notice, unless the parties agree otherwise in writing.

In *Lea v. Pieper*, 345 N.W.2d 267 (Minn. Ct. App. 1984), the court held that rent received before expiration of the notice to quit, but covering a period extending beyond the expiration date, waived the notice. *Id.* at 271. *Howard Lake Mobile Home Park v. Reinke*, No. C1-01-2272 (Minn. Dist Ct. 10th Dist. Nov. 19, 2001) (Appendix 516) (waiver of notice to terminate manufactured home lot rental by receiving, retaining, and intending to negotiate rent check; plaintiff notice was in retaliation for defendant's complaints to police and resident association; plaintiff's claims did not meet the various statutory grounds for eviction; expungement not awarded as case was under Minn. Stat. Ch. 327C and not Ch. 504B).

It appears that where a notice of violations includes a notice to vacate, it will be treated as a final notice for purposes of waiver. *See Rainbow Terrace, Inc. v. Hutchens*, 557 N.W.2d 618 (Minn. Ct. App. 1997) (MINN. STAT. Ch. 327C applies to manufactured (mobile) home park lot tenancies, regardless of whether the parties have a written lease; acceptance of rent after expiration of a notice to vacate waived the notice; notice to quit was invalid because it did not state the reason for termination, depriving the tenants of an opportunity to remedy the violation). In *Hedlund v. Davis,* No. C1-91-1687 (Minn. Dist. Ct. 10th Dist. Dec. 31, 1991) (Appendix 15.F), the court held that acceptance and retention of rent check by landlord and failure to return it prior to hearing waived notice to quit. *But see Hi Vue Park v. Schneider*, No. CX-99-83 (Minn. Ct. App. July 27, 1999) (unpublished) (affirmed manufactured (mobile) home eviction judgment for park owner; residents threatening behavior constituted endangerment, substantial annoyance and repeated serious violations; notice which did not include times for alleged violations was proper where it referenced court records discussing the events; notice was proper where residents had sufficient information to know what conduct was unacceptable and what needed to be done to avoid eviction; owners acceptance of rent during the notice period did not waive breaches as there was no showing that the owner intended to waive its right to evict; receipt of rent after the effective date of the notice did not waive the notice where the owner stated in the notice that it would not accept rent and a later letter stated that it refused the rent payment and would return it at the court hearing..

5. Waiver of notice by issuing a later notice, extending a notice or executing a new lease

See generally, discussion, *supra* at VI.F.4 (waiver of notice by acceptance of rent). If a landlord gives a second notice to quit, the landlord automatically waives the right to proceed under the first notice. *Arcade Investment Co. v. Gieriet,* 99 Minn. 277, 279, 109 N.W. 250, 252 (1906); *Ewing Square Associates v. Koerner,* No. UD-2910104802 at 3 (Minn. Dist. Ct. 4th Dist. Feb. 4, 1991) (Appendix 15.B). If the landlord subsequently agrees to a continuance of possession of the premises, as in executing a new lease, the landlord waives the effect of the notice. *Arcade Investment Co.,* 99 Minn. at 279, 109 N.W. at 252. *See Hegg v. Martinez*, UD-1951206549 (Minn. Dist. Ct. 4th Dist. Jan 19, 1996) (Appendix 219) (waiver of notice by agreeing to extend notice).

6. Waiver of notice by demanding subsequent rent in an eviction (unlawful detainer) action

An eviction (unlawful detainer) action based upon nonpayment of rent "is equivalent to a demand for rent. . ." Minn. Stat. § 504B.291 (formerly 504.02). Generally, the defendant can redeem by paying the rent, interest, costs, $5.00 in attorney's fees, and performing other lease covenants, until the court issues an order dispossessing the tenant and permitting re-entry by the landlord. *See* discussion, *supra* at VI.E.20 (redemption).

Based upon Minn. Stat. § 504B.291 (formerly 504.02) and the waiver of notice cases, *see* discussion, *supra* at VI.F.4, an eviction (unlawful detainer) action based upon both notice to quit and nonpayment of rent accrued after the notice constitutes a waiver of the notice and should go forward only as a nonpayment of rent case, in which the defendant has the right to redeem the tenancy. Alternatively, based upon the same grounds, an eviction (unlawful detainer) action based upon both notice to quit and nonpayment of rent creates the right to redeem the tenancy, and redemption waives the notice to quit. *See Stevens Avenue Limited Partnership v. Hodge*, No. UD-1891108521 at 2 (Minn. Dist. Ct. 4th Dist. Nov. 21, 1989) (Appendix 18A) (rent claim waives notice to quit and known lease violations). *See also Stevens Avenue Limited Partnership v. Armstrong*, No. 1890426508 (Minn. Dist. Ct. 4th Dist. May 5, 1989) (Appendix 18) (by tendering the rent to the court, defendant redeemed her tenancy and plaintiff waived the alleged lease violations); *Yauch v. Caine,* No. UD-1900403548, slip op, at 3-4 (Minn. Dist. Ct. 4th Dist. Apr. 20, 1990) (Appendix 11D); *Nguyen v. Veit,* No. UD-1910401513 at 4 (Minn. Dist. Ct. 4th Dist. Apr. 15, 1991) (Appendix 14.C).

In 1993, the Minnesota Legislature amended the redemption statute to allow landlords to alternatively plead nonpayment of rent and *breach of lease* claims. Minn. Stat. §§ 504.02 (now § 504B.291), 504B.285 (formerly § 566.03), subd. 5. The statute did not authorize pleading alternatively nonpayment of rent and *holding over after notice to quit*. While the Legislature originally considered a bill that would have allowed landlords to plead nonpayment of rent and claims *on other grounds*, H.F. 1058, the final statute limited alternative pleading to nonpayment of rent to *only breach of lease*. 1993 JOURNAL OF THE HOUSE at 701-02 (Mar. 25, 1993); 1993 JOURNAL OF THE SENATE at 1809-10 (Apr. 15, 1993). The courts may consider amendments to legislation as evidence of the legislative intent. *McKee-Johnson v. Johnson*, 444 N.W.2d 259, 264 (Minn. 1989). Legislative materials on this issue are available from Robin Williams, Southside Office of the Legal Aid Society of Minneapolis (827-3774).

Based on the statute, legislative history and case law, the landlord's claim of nonpayment of rent along with holding over after notice grants the tenant the right to redeem the tenancy and waive the notice. *Hegg v. Martinez*, UD-1951206549 (Minn. Dist. Ct. 4th Dist. Jan 19, 1996) (Appendix 219) (waiver of notice by demanding rent in the action). *See Mattson v. Harmon*, No. UD-1961203552 (Minn. Dist. Ct. 4th Dist. Jan. 28, 1997) (Appendix 269) (Waiver of notice effective November 30 by claiming December rent); *Kral v. Traylor*, Defendant's Memorandum of Law, Nos. UD-1970912509 (Minn. Dist. Ct. 4th Dist.) (Appendix 342) (Discussion of legislative history of Minn. Stat. § 504.02 (now § 504B.291).

7. Manufactured (mobile) home park lot tenancies

   a. The tenancy may be terminated by the landlord only for cause. Minn. Stat. § 327C.09. *See* discussion, *infra* at VI.G.11. Different notices are required, depending on the reason for the termination. *Id.*

   b. Waiver of notice. *See* discussion, *supra* at VI.F.4.

   c. Retaliatory eviction. *See* discussion, *supra* at VI.E.9 and VI.F.3.

8. Discrimination

Discrimination on the basis of the tenants' status as a member of a protected class is a defense to an eviction (unlawful detainer) action. *Barnes v. Weis Management Co.,* 347 N.W.2d 519, 522 (Minn. Ct. App. 1984). *See Ellis v. Minneapolis Commission on Civil Rights,* 319 N.W.2d 702, 704 (Minn. 1982). The claim

may be analyzed within the confines of the retaliatory eviction statute. Minn. Stat. § 504B.285 (formerly § 566.03), subd. 2; *see* discussion, *supra* at VI.F.3.

The defendant's "protected activity" is enforcement of the right to rent the premises without illegal discrimination. *Barnes*, 347 N.W.2d at 522. If the notice to quit is served within ninety (90) days of the defendant's protected activity, the plaintiff must establish by a fair preponderance of the evidence a substantial non-retaliatory purpose, arising at or shortly before the notice to quit, which is wholly unrelated to and unmotivated by the defendant's protected activity. *Id.* at 521-22, citing *Parkin v. Fitzgerald*, 307 Minn. at 430, 240 N.W.2d at 832-33. The defendant should have the right to rebut the allegedly non-retaliatory purpose by showing it actually was a pretext used as a cover for discrimination. 347 N.W.2d at 522.

Tenants and tenants' counsel should carefully consider whether they can adequately prove discrimination in the limited time available to prepare for an eviction (unlawful detainer) trial, since unsuccessful prosecution of the discrimination defense may preclude a subsequent discrimination lawsuit or administrative complaint with the United States Department of Housing and Urban Development, Minnesota Human Rights Department, or Minneapolis Civil Rights Department. *See* discussion, *supra* at V.N. (collateral estoppel). One option would be to remove the action along with the discrimination claim to federal court. *See* Defendant's Memorandum In Opposition to Plaintiff's Motion to Remand, *Bossen Terrace v. Ewing*, No. 4-91-Civ. 824 (D. Minn. Nov. 6, 1991) (discussion of cases; action settled in federal court) (Appendix 28).

9. Reasonable accommodation of disabilities. *See* discussion, *infra* at VI.G.9.

10. Public and government subsidized housing.

Notice requirements vary depending on the programs, but where the landlord is required to give notice, it must be written notice before commencement of an eviction (unlawful detainer) action in all cases, even nonpayment of rent. Also, good cause is required in most cases.

a. Section 8 existing housing certificate and voucher programs.

(1) No notice required for breach cases

Before 1995, tenants had successfully argued that the landlord must give the tenant notice in all cases *before* filing an eviction (unlawful detainer) action, and that failure to give such notice *before* filing the action required dismissal.[14] However, in *Eden Park Apartments v. Weston*, 529 N.W.2d 732 (Minn. Ct. App. 1995), *affirming* No. UD-1940701506 (Minn. Dist. Ct. 4th Dist. Sep. 7, 1994) (Appendix 60), the Court held that the unlawful detainer summons and complaint satisfied the requirements of notice. The new regulations governing the programs now also do not require a termination notice before filing the action. 24 C.F.R. §

[14]42 U.S.C. § 1437f(d)(2)(B)(iv); S. REP. NO. 101-316, 100th Cong., 1st Sess., 127, *reprinted in* 1990 U.S.C.C.A.N. 5763, 5889. (Appendix 11.H); *Mollins v. Persaud*, No. UD-1940712552 (Minn. Dist. Ct. 4th Dist. July 22, 1994) (Appendix 73); *Rifley v. Pearson*, No. UD-1940504530 (Minn. Dist. Ct. 4th Dist. May 20, 1994) (Appendix 58); *Fragale v. Sims*, No. UD-1930802515 (Minn. Dist. Ct. 4th Dist. Aug. 11, 1993) (Appendix 4.D.1); *Country Inn, Inc. v. Hoffman,* No. UD-4921009901 (Minn. Dist. Ct. 4th Dist. Oct. 26, 1992) (Appendix 11.H.1). *But see Flikeid v. Darrough*, No. UD-1940328501 (Minn. Dist. Ct. 4th Dist. May 3, 1994) (Appendix 59) (unlawful detainer summons and complaint satisfied the requirements of notice).

982.310(e), 60 Fed. Reg. 34,704-05 (July 3, 1995) (Appendix 109). The lack of a requirement to give notice before filing the action now makes even more important the requirement that the landlord specifically plead the grounds for eviction with sufficient detail. *See* discussion, *supra*, at VI.D.6 (failure to state the facts that authorize recovery of the premises).

(2) Notice for business reasons

During the first year of the lease, the landlord cannot evict the tenant for a business or economic reason, as opposed to the tenant's violation of the lease. 24 C.F.R. § 982.310(d)(2), 60 Fed. Reg. 34,704-05 (July 3, 1995) (Appendix 109) (replacing 24 C.F.R. §§ 882.215(c)(3), 887.213(b)(2). In *Rohlfing v Baker*, No. C4-96-124 (Minn. Dist. Ct. 1st Dist. May 29, 1996) (Appendix 224), the court held that the landlord's attempt to terminate the lease during the first year for a business or economic reason violated the regulation and prevented eviction, even though the lease did not specifically contain the prohibition. The court noted that the lease addendum incorporated the regulations by reference, and even if the regulations were not incorporated into the lease, the doctrine of mutual mistake prevented the landlord from voiding the lease because the landlord bore the risk of mistake by not seeking out information on the regulations.

Before 1996, the law was that after the first year, the landlord may terminate the lease for a business or economic reason after giving the tenant, HUD and the housing authority a 90 day notice.[15] *On April 26, 1996*, Congress passed as part of a continuing resolution on budget matters a suspension of the 90 day notice requirement. Pub. L. No. 104-134, 110 Stat. 1321 (1996). The suspension was extended through September 30, 1997. Pub. L. No. 104-204, § 302(e), 110 Stat. 2893 (!996). Congress later made permanent the suspension of the 90 day notice requirement. While most Section 8 leases do not include the 90 day notice requirement, those that do may bind the landlord until a new lease is used by the parties.

(3) The endless lease?

Until recently, the Section 8 lease was an endless lease that could be terminated by the landlord only for good cause. However, *on April 26, 1996*, Congress passed as part of a continuing resolution on budget matters a suspension of the requirement, allowing termination without cause at expiration of the lease term. Pub. L. No. 104-134, 110 Stat. 1321 (1996). The suspension was extended through September 30, 1997. Pub. L. No. 104-204, § 302(e), 110 Stat. 2893 (!996). All pre-existing Section 8 leases included the old good cause requirement, and they should bind the landlord until a new lease is used by the parties.

In *Douglas v. Sparby*, No. C8-96-601471 (Minn. Dist. Ct. 6th Dist. Sep. 10, 1996) (Appendix 221), the parties entered into a Section 8 certificate lease in 1994 which, consistent with regulations in effect at the time, provided for an endless lease which could be terminated only for good cause. The landlord issued a termination notice without cause for eviction, arguing that regulatory and statutory changes allowed the

---

[15]The housing authority then must approve the lease termination, and the landlord must give the tenant notice of the housing authority's decision. 42 U.S.C. § 1347f(c)(9); 24 C.F.R. §§ 982.310(e)(3), 982.455, 60 Fed. Reg. 34,704-05, 713-14 (July 3, 1995) (Appendix 109). Failure to follow these procedures should result in dismissal. *Rifley v. Pearson*, No. UD-1940504530 (Minn. Dist. Ct. 4th Dist. May 20, 1994) (Appendix 58); *Karlson v. Ellis*, No. UD-1931102538 (Minn. Dist. Ct. 4th Dist. Nov. 26, 1993) (Appendix 61); *Chapter Federal Savings and Loan Assoc. v. Rogalski,* No. SNBR-326 (Conn. Super. Ct. May 23, 1989) (Appendix 17.A); *Cardaropoli v. Perez,* No. 88-SP-6243-S (Mass Trial Ct. Sept. 7, 1988) (Appendix 17.B). *See* Letters from Stephen J. Gronewold, HUD Chief Counsel, to Shawn Fremstad and Michael Corkill-Bomgars (Dec. 29, 1993) (Appendix 62).

landlord to create a month to month tenancy after expiration of the first year. The court held that since the landlord did not offer a new lease to the tenant, the old lease remained in effect and the landlord had not properly terminated it. The court also held that the landlord must provide a year termination notice required by Minn. Stat. § 504.32 (now § 504B.255) to terminate or not renew the lease. *See Johnson v. Reed*, No. UD-1961001524 (Minn. Dist. Ct. 4th Dist. Nov. 7, 1996) (Appendix 262) (Current endless lease still in effect was not modified by legislative changes; current lease could not be terminated upon 30 day notice without good cause); *Villa Del Coronado Associates v. West,* No. UD-1960910522 (Minn. Dist. Ct. 4th Dist. Sep. 30, 1996) (Appendix 222) (statutory change from endless leases to one year leases which continue on a month to month basis did not change the existing endless lease between the parties); *Eden Park Apts. v. Gilmore*, No. UD-1960913533 (Minn. Dist. Ct. 4th Dist. Oct. 1, 1996) (Appendix 223) (followed *Villa Del Coronado Associates*).

(4) State one year notice requirement

Now that there is no federal requirement for notice, and the life of the endless lease may be short, a little used state statute requiring a one year notice may become significant. Section 504B.255 (formerly § 504.32) states that the subsidized housing owner must give the tenant a one year notice for (1) expiration of the Section 8 contract, (2) owner termination or non-renewal of a Section 8 contract or mortgage, (3) owner prepayment of a mortgage that would terminate federal housing use restrictions, or (4) owner termination of a housing subsidy program. The owner must give the notice at commencement of the lease if any of these events would occur in less than a year. Tenant should argue that the landlord must give the notice to terminate or not renew the lease where the tenant's conduct is not at issue.

In *Occhino v. Grover*, 640 N.W.2d 357 (Minn. Ct. App. 2002), the court held that the requirement for a one year notice to terminate subsidized housing leases under Minn. Stat. § 504B.255 (formerly § 504.32) applies to subsidized projects, but not portable Section 8 assistance. *Contra Douglas v. Sparby*, No. C8-96-601471 (Minn. Dist. Ct. 6th Dist. Sep. 10, 1996) (Appendix 221) (landlord must provide a year termination notice required by Minn. Stat. § 504.32 (now § 504B.255) to terminate or not renew Section 8 certificate lease).

California enacted a statute which requires a landlord who terminates participation or fails to renew a tenant-based Section 8 contract to give a 90 day written notice to the tenant. CAL. CIV. CODE § 1954.535. *See* 30 HOUSING LAW BULLETIN at 28 (National Housing Law Project February 2000, www.nhlp.org) (analysis and conclusion that statute is not preempted by federal law).

(5) Mortgage foreclosure

Mortgage foreclosure might not terminate the Section 8 contract. *See Bristol Savings Bank v. Savinelli*, CV-95-0377478-S (Conn. Super. Ct. Mar. 21, 1996), 1996 WL 16,396, 1996 Conn. Super LEXIS 742, HDR CURRENT DEVELOPMENTS at 791 (Apr. 22, 1996) (Appendix 225) (Connecticut Superior Court decision holding that §8 tenancy survived automatic termination by foreclosure). In *Webster Bank v. Occhipinti*, No. CV-970059147S, 1998 WL 846105 (Conn. Sup. Ct. Nov. 20, 1998) (Appendix 372), the court held that federal Section 8 law preempted state mortgage foreclosure law, which provided that foreclosure terminated the interest of the tenant of the mortgagor. Thus, the foreclosing mortgagee or the purchaser at the foreclosure sale could terminate the Section 8 lease only in accordance with the Section 8 statutes and regulations.

(6) Section 8 voucher subsidy termination

Historically eviction of the tenant does not require termination of the tenant's rent subsidy. The tenant may have been able to retain the subsidy and look for housing with another landlord who is willing to contract to receive the housing subsidy. However, the subsidy administrator, often called a Section 8 office or public housing authority, sometimes would try to terminate the tenant's subsidy for the same reasons as the landlord tried to evict the tenant.

The regulations have changed to require termination in some cases. The agency "must terminate program assistance for a family evicted from housing assisted under the program for serious violation of the lease." 24 C.F.R. 982.552(b)(2); *Cole v. Metropolitan Council HRA*, 686 N.W.2d 334 (Minn. Ct. App. 2004) (HRA must terminate Section 8 benefits for a family evicted for a serious violation of the lease, regardless of whether the decision was by default).

These reasons can include failure to supply certain information to the housing authority, serious or repeated violation of the lease, drug related or violent criminal activity, housing assistance fraud, and owing monies to the housing authority. 24 C.F.R. §§ 982.551 - 982.553; *Gibbs v. Metropolitan Housing and Redevelopment Authority*, No. A06-1612, 2007 WL 4563920 (Minn. Ct. App. Dec. 31, 2007) (unpublished) (Affirmed administrative hearing decision that failure to pay rent was a serious violation supporting termination of assistance).

If the housing authority decides to terminate the tenant's housing subsidy, the housing authority must give written notice to the tenant and the right to contest the termination at an informal hearing. 24 C.F.R. § 982.555. The tenant can appeal a Section 8 voucher termination by certiorari to the Court of Appeals under Minn. R. Civ. App. P. §115. The petition for review deadline is 60 days from date of final decision in the administrative hearing to perfect the appeal and serve the writ of certiorari. Minn. Stat. § 606.01; *Barkhudarov v. Rensenbrink*, No. A06-1734, 2007 WL 2703049 (Minn. Ct. App. Sept. 18, 2007) (unpublished) (agencies which administer Section 8 voucher programs are part of the executive branch, and parties cannot challenge their decisions in District Court, but must appeal by certiorari to the Minnesota Court of Appeals within 60 days of receiving notice of the decision).

In *Carter v. Olmstead County Housing and Redevelopment Authority*, 574 N.W. 2d 725 (Minn. Ct. App. 1998), the court closely reviewed the lay hearing officer's determination to terminate the Section 8 voucher, and concluded that the findings were insufficient and that they failed to mention or explain the basis for failing to credit evidence in support of the tenant's claim, and that the housing authority failed to prove substantial evidence to sustain the termination. See *Hicks v. Dakota County Community Development Agency*, No. A06-1302, 2007 WL 2416872 (Minn. Ct. App. Aug. 28, 2007) (unpublished) (agency decision reversed and remanded where hearing officer failed to make adequate findings and failed to consider mitigating circumstances); *Olchefski v. Metropolitan Council*, No. C4-95-2337 (Minn. Ct. App. Apr. 30, 1996), FINANCE AND COMMERCE at 27 (May 3, 1996), 1996 WL 208484 (Appendix 228) (Unpublished: Reversing and remanding termination of Section 8 certificate where hearing officer's decision stated no factual or legal basis for termination). *See generally Edgecomb v. Housing Authority of Town of Vernon*, 824 F. Supp. 312 (D. Conn. 1993).

But see Johnson v. Washington County Housing Authority, No. C5-00-1021, 2001 WL 214190 (Minn. Ct. App. 2001) (unpublished) (affirmed termination of subsidy claiming failure to report household members, concluding that administrative findings, reliance on hearsay, and failure to subpoena witnesses were proper, citing *Carter v. Olmstead County Housing and Redevelopment Authority*, 574 N.W. 2d 725 (Minn. Ct. App. 1998)); *Thigpen v. Housing and Redevelopment Authority of St. Cloud*, No. CX-96-1753 (Minn. Ct. App. Jan. 21, 1997), FINANCE AND COMMERCE at 36 (Jan. 24, 1997), 1997 WL 20307 (Appendix

296) (Unpublished: hearing officer not required to address all evidence submitted by the tenant, even though policy manual required decision based upon all material issues raised by the parties).

The agencies decision to reverse the hearing officer's decision is susceptible to challenge on appeal. *Winston v. Minneapolis Public Housing Authority*, No. A06-1641, 2007 WL 2245777 (Minn. Ct. App. Aug. 7, 2007) (unpublished) (reversed agency determination, where agency overturned hearing officer decision that alleged involvement in criminal activity was an insufficient basis for terminating assistance).

The court have been divided over the issue of consideration of mitigating factors by the agency hearing officer. *See Gibbs v. Metropolitan Housing and Redevelopment Authority*, No. A06-1612, 2007 WL 4563920 (Minn. Ct. App. Dec. 31, 2007) (unpublished) (housing agency may consider mitigating circumstances in determining whether to terminate assistance, but is not required to do so); *Cole v. Metropolitan Council HRA*, 686 N.W.2d 334 (Minn. Ct. App. 2004) (hearing officer is not permitted to consider hardships that would result from termination of Section 8 benefits).

Recently tenants have had mixed results in the Court of Appeals in challenging subsidy terminations. Favorable decisions to tenants include *Pittman v. Dakota County Community Development Agency,* No. 07-2063, 2009 WL 112948 *2-4 (Minn. Ct. App. Jan. 20, 2009) (held agency failed to make findings of fact to support its decision to terminate benefits and the legal basis for termination was unclear, citing *Carter*); *Rinzin v. Olmsted County Housing and Redevelopment,* No. A07-2344, 2008 WL 4977576 *2-4 (Minn. Ct. App. Nov. 25, 2008) (held hearing officer's decision was unsupported by substantial evidence, citing *Carter*); *Hennepin County Community Development Agency*, No. A06-1302, 2007 WL 2416872 (Minn. Ct. App. Aug. 28, 2007) (unpublished) (agency decision reversed and remanded where hearing officer failed to make adequate findings and failed to consider mitigating circumstances); *Winston v. Minneapolis Public Housing Authority*, No. A06-1641, 2007 WL 2245777 (Minn. Ct. App. Aug. 7, 2007) (unpublished) (reversed agency determination, where agency overturned hearing officer decision that alleged involvement in criminal activity was an insufficient basis for terminating assistance).

Unfavorable decisions include *Wilhite v. Scott County Housing and Redevelopment,* _____ N.W.2d _____, 2009 WL 65595 *2-4 (Minn. Ct. App. 2009) (failure to vacate a leased residential premises upon the expiration of the lease constitutes a serious lease violation mandating the termination of assistance); *Gibbs v. Metropolitan Housing and Redevelopment Authority*, No. A06-1612, 2007 WL 4563920 (Minn. Ct. App. Dec. 31, 2007) (unpublished) (affirmed administrative hearing decision that failure to pay rent was a serious violation supporting termination of assistance); *Colliers v. Dakota County Development Agency*, No. A06-1993, 2007 WL 4107906 (Minn. Ct. App. Nov. 20, 2007) (unpublished); *Barkhudarov v. Rensenbrink*, No. A06-1734, 2007 WL 2703049 (Minn. Ct. App. Sept. 18, 2007) (unpublished) (affirmed dismissal of district court challenge to calculation of section 8 voucher benefits); *Rawlings v. Washington County Housing and Redevelopment Authority*, No. A06-1257, 2007 WL 2034356 (Minn. Ct. App. July 17, 2007) (unpublished) (affirmed termination); *Blumer v. Dakota County Community Development Agency,* No. A03-1702, 2005 WL 353986 (Minn. Ct. App. Feb. 15, 2005) (unpublished) (affirmed termination); *Williams v. Dakota County Community Development Agency*, No. A04-6, 2004, WL 2340084 (Minn. Ct. App. Oct. 19, 2004) (unpublished); *Schultz v. Dakota County Community Development Agency*, No. A03-1099, 2004 WL 2283586 (Minn. App. Oct. 12, 2004) (unpublished) (affirmed termination).

(7) Landlord notice to the Section 8 Office.

See discussion, *supra*, VI.D.11.

b. Subsidized housing projects

(1) HUD Handbook No. 4350.3 projects

The notice must state that the tenancy is terminated on a specific date, state the reasons for the eviction with sufficient specificity so as to enable the tenant to prepare a defense, advise the tenant that if a judicial for eviction is instituted, the tenant may present a defense, and state that the landlord may seek to enforce the termination only by bringing a judicial action. 24 C.F.R. § 247.4. HUD Handbook 4350.3 also adds the requirement that the notice must advise the tenant that the tenant has ten days in which to discuss the proposed termination of the tenancy with the landlord. *Id*. at ¶ 4-20 (Appendix 143). The provisions apply to subsidized and *market rate units*.

In the Rent Supplement Section 236, Rental Assistance, Section 221(d)(3) BMI, and Section 8 Loan Management Set-Aside Programs, the notice must be served on the tenant both by first class mail and personal service, with service not be effective until both notices have been served. *See Westfalls Housing Ltd. Partnership v. Scheer*, No. C8-93-227 (Minn. Dist. Ct. 5th Dist. Nov. 30, 1993) (Appendix 26) (notice mailed but not personally served). In all other Section 8 Programs, the notice may be served in accordance with state and local law.

The notice must comply with the notice content requirements. *Chalet v.* _____, No. HC-03026513 (Minn. Dist Ct. 4th Dist. July 17, 2003) (Appendix 483) (expungement granted where HUD subsidized project landlord agreed that it did not give notice required by HUD Handbook No. 4350.3, citing *Housing and Redev. Auth. of Waconia v. Chandler*, 403 N.W.2d 708, 711 (Minn. Ct. App. 1987); *Hoglund-Hall v. Kleinschmidt*, 381 N.W.2d 889, 895 (Minn. Ct. App. 1986)); *Normandale Partners v. Humbert,* No. UD-1920519523 (Minn. Dist. Ct. 4th Dist. June 2, 1992) (Appendix 11.I.4) (notice failed to state grounds for termination with enough detail, gave tenant nine rather than ten days to present objections rather than to discuss proposed termination, and failed to advise tenant of right to defend unlawful detainer action); *Owner's Management Co. v. Stern*, No. 67445 (Ohio Ct. App. Jan. 19, 1995) (Appendix 144) (termination was inadequate for not stating dates of and witnesses to alleged lease violations). *See generally* 24 C.F.R. § 247.4; HUD Handbook 4350.3 ¶¶ 4-17 - 4-21 (Appendix 143).

The length of the notice period depends on the basis for the eviction. 30 days notice is required in terminations based on good cause. *Id*. In material noncompliance evictions, the landlord may not commence the eviction (unlawful detainer) action until expiration of the ten day period. *Ewing Square Associates v. Koerner*, No. UD-2910104802 at 2-6 (Minn. Dist. Ct. 4th Dist. Feb. 4, 1991) (Appendix 15.B) (unlawful detainer action dismissed where it was commenced contemporaneously with issuance of the ten day notice of termination). *See Shamrock Court Apartments v. Stafford*, No. C1-95-3974 (Minn. Dist. Ct. 2d Dist. May 25, 1995) (Appendix 226) (Action dismissed where notice was dated April 6, termination date was April 13, 10 day informal conference period lasted until April 16, but action filed on April 13); *Loring Towers Apartments Limited Partnership v. Redcloud*, No. UD-1921210529 (Minn. Dist. Ct. 4th Dist. Jan 20, 1993) (Appendix 11.I.5); *Loring Towers Limited Partnership v. Seamon,* No. UD-1920810515 (Minn. Dist. Ct. 4th Dist. Aug. 31, 1992) (dismissal for giving only four days notice) (Appendix 11.I.1); *Loring Towers Limited Partnership v. Sheehy,* No. UD-1920810513 (Minn. Dist. Ct. 4th Dist. Sept. 4, 1992) (dismissal for giving only four days notice) (Appendix 11.I.2).

There are no exceptions to the notice requirement. *Sentinel Management Co. v. Kraft,* No. UD-1920806546 at 3 (Minn. Dist. Ct. 4th Dist. Aug. 12, 1992) (Appendix 11.I.3). In *Common Bond Housing v. Beier,* UD-1951204625 (Minn. Dist. Ct. 4th Dist. Feb. 23, 1996) (Appendix 227), the court found no proof of pre-eviction notice. The court distinguished *Eden Park Apartments v. Weston*, 529 N.W.2d 732 (Minn.

Ct. App. 1995), which held no notice was required for Section 8 certificates, noting the different regulations and the fact that the notice requirement was in the lease.

The landlord also must comply with the requirement to meet with the tenant on the tenant's request to discuss the proposed eviction, and to discuss it with the tenant in good faith. *Gorsuch Homes, Inc. v. Wooten*, 597 N.E.2d 554 (Ohio Ct. App. 1992).

The complaint in the eviction (unlawful detainer) action may not rely on any grounds which are different from the reasons set forth in the termination letter, except that the landlord is not precluded from the relying on grounds of which the landlord had no knowledge at the time the termination letter was sent. 24 C.F.R. § 247.6; HUD Handbook 4350.3 REV-1, Chapter 8,¶8.13.B.5 at 15.

(2) Moderate rehabilitation projects

The landlord must serve the tenant a written notice of lease termination stating the date the tenancy shall terminate, and the reasons for termination was enough specificity to enable the tenant to prepare a defense, and advise the tenant that if a judicial proceeding is institute, the tenant may present a defense at the proceeding. 24 C.F.R. § 882.511(b)-(c); *Project for Pride in Living v. Kvanli*, No. UD-1930122520 (Minn. Dist. Ct. 4th Dist. Feb. 11, 1993) (Appendix 11.I.6) (landlord's letter asking tenant to re-tender rent payment did not terminate tenancy).

However, the issue has been confused by a recent decision stating that the eviction (unlawful detainer) summons and complaint satisfied the regulatory notice requirement. In *Bakke v. Bolin*, No. UD-1940321522 (Minn. Dist. Ct. 4th Dist. July 5, 1994) (Appendix 63), the district court judge reversed the decision of the housing court referee and held that a summons and complaint satisfied the regulation, relying on a similar interpretation of the Section 8 certificate program in *Flikeid*. *See* discussion, *supra* at VI.F.10.a. The court distinguished *Hoglund-Hall v. Kleinschmidt*, 381 N.W.2d 889 (Minn. Ct. App. 1986), since the regulations under the Farmers Home Administration program at issue in *Hoglund-Hall* required a 30-day notice, as opposed to the moderate rehabilitation program requirement of five days.

Counsel should argue that the *Bakke* decision is wrong, and that the landlord must issue a lease termination notice before filing the action. The fact that the regulations state that the termination notice must advice the tenant that "*if* a judicial proceeding for eviction is instituted, the tenant may present a defense in that proceeding," implies that the termination notice is separate from and a precondition of the eviction (unlawful detainer) action. *See* 24 C.F.R. § 882.511(c)(2) (emphasis added).

Some projects in Minneapolis have been using a Section 8 certificate lease, which does not have the notice requirement. If a tenant is in a subsidized project and the lease does not require notice, counsel should check the directory of subsidized projects or call the local housing authority to find out which program the tenant is in. The landlord would be bound to the notice requirements of the program, even if the landlord is using the wrong lease.

(3) Rural Housing and Community Development Service (RHCDS) and Rural Housing Service (RHS), formerly Farmers Home Administration FmHA Projects

For a list of notice defenses, *see* Forms Appendix, Answer No. A-7. *See also Lindstrom Parkview Apts. v, _____*, No. C5-01-546 (Minn. Dist Ct. June 15, 2001) (Appendix 531) (Judge Swenson) (landlord must comply with program requirements, citing *Hoglund-Hall v. Kleinschmidt*, 381 N.W.2d 889, 895 (Minn.

Ct. App. 1986); landlord's notice failed to comply with regulations requiring violation notice reference to lease terms, right to cure, eviction if no cure, and right to defend eviction in court, and termination notice reference to the conduct upon which eviction was based); *Buckeye Realty Co. v. Elias*, No. CX-91-0697 at 2-5, 7 (Minn. Dist. Ct. 10th Dist. Aug. 6, 1991) (Appendix 15.E) (improper notice); *National Partnership Management Inc. v. Owen,* No. 3-PA-90-709-CIV (Alaska Dist. Ct. 3rd Dist. Nov. 8, 1990) (Appendix 15.E.1) (improper service of notice).

In *Ridgemont Apartments v. Englund*, No. C3-96-68 (Minn. Dist. Ct. 10th Dist. Apr. 1, 1996) (Appendix 191), the landlord of a RHCDS Sect. 515 subsidized housing project sought to terminate the tenant's subsidy and increase the tenant's share of the rent to the market rent for failing to recertify on time. The landlord brought an unlawful detainer action, and the tenant defended the action while bringing an affirmative action as well. The court held that while the landlord gave the tenant several notices, the notice which contained the required information that failure to recertify would result in termination of the subsidy was not given thirty days before the due date, as required by the program handbook. Since the two actions were consolidated, in addition to dismissing the unlawful detainer action for non-payment of the market rent, the court granted additional affirmative relief, including ordering the landlord to recalculate the tenant's share of the rent, immediately reinstate the subsidy if a subsidy slot was available, credit defendant's rent for an amount equal to the subsidy even if a subsidy slot is not available, and notify the tenant of the amount of past rent due, and ordered the tenant to pay that amount within 10 days after notice from the landlord.

In *Horning Properties v. Wang*, No. C3-98-1211 (Minn. Dist. Ct. 10th Dist. Jun. 23, 1998) (Appendix 337) (Meyer, J.), the landlord of a Rural Housing and Community Development Service Subsidized Housing Project filed an action for nonpayment of rent and breach of lease. The court concluded that there was no lease violation where the tenant tendered but the landlord refused April rent, so this event did not support the eviction notice. The court noted that the landlord did not give the required warning notice, and concluded that the termination notice was improper where given after commencement of the unlawful detainer action but before the hearing. The court found that the tenant legally resided on the property during her incarceration so as to not breach the lease. Finally, the court concluded that the landlord improperly removed her subsidy and increased her rent.

(4) Low Income Housing Tax Credit Projects

In *Bowling Green Manor L.P. v. Kirk*, No. WD 94-125, 1995 WL 386,476, 1995 Ohio Appendix LEXIS 2707 (June 30, 1995) (Appendix 83), the Ohio Court of Appeals held that a low income housing tax credit project landlord could not evict the tenant without first giving notice of good cause for eviction. The court found the requirement by implication in the covenant between the landlord and the state finance agency. The Court also concluded that the regulatory relationship between the landlord and the state agency rendered the eviction action by the landlord to be state action, affording due process rights to the tenant. Because of the similarities between the tax credit landlord-tenant relationship and that of other subsidized project landlords and tenants, the Court concluded that the tenant protections under 24 C.F.R. § 880.607 for the Section 8 New Construction Program. *See* discussion, *supra*, at VI.F.10.b.(1) (HUD Handbook No. 4350.3 projects). For a list of defenses available to Section 8 New Construction Program tenants, *see* Forms Appendix, Answer No. A-4.

In *Eden Park Apartments, L.P. v. St. John*, No. UD-1980701510 (Minn. Dist. Ct. 4th Dist. Jul. 31, 1998) (Appendix 328) (Crump, J.), the court concluded that since the parties' documents for a low-income tax credit property did not state a good cause for eviction requirement, there was none. However, in *Cimarron Village Townhomes, Ltd. v. Washington ,* No. C3-99-118, 1999 WL 538110 (Minn. Ct. App. July 27, 1999) (unpublished), the court ruled that Section 42 low income tax credit tenancies could not be

terminated without cause, citing the clear language of 26 U.S.C. §§ 42(h)(6)(B)(i), 42(h)(6)(E)(ii)(I) as well as the legislative history.

c. Public housing

For a list of notice defenses, *see* Forms Appendix, Answer No. A-8. Fourteen days notice is required in a nonpayment of rent case. *See Public Housing Authority v. Swickard,* No. UD-1920812518 (Minn. Dist. Ct. 4th Dist. Sept. 1, 1992) (Appendix 15.G) (rent reminder notice failed to satisfy eviction notice requirement). In the case of creation or maintenance of a threat to the health and safety of other tenants or staff, a reasonable time is required. In all other cases, 30 days notice is required. In cases other than nonpayment of rent, the tenant may request a grievance hearing. 24 C.F.R. Part 966. *See Minneapolis Public Housing Authority v. Papasodora*, No. UD-1960611515 (Minn. Dist. Ct. 4th Dist. Jul. 17, 1996) (Appendix 213) (Public housing notice to increase rent is equivalent to notice to terminate month to month lease and initiate new lease with new rent under Minn. Stat. Section 504.06 (now § 504B.135); notice mailed February 29 could not be received in February and was untimely for an April 1 rent increase; void notice could not be a basis for a future rent increase).

The notice must state specific grounds for termination. *Cuyahoga Metropolitan Housing Authority v. Younger*, No. 65302 (Ohio Ct. App. Apr. 28, 1994) (Appendix 64) (affirmed decision finding termination notice insufficient, where notice contained vague and broad allegations, allegations of possible illegal activities, no notice of dates of alleged incidents, and no notice of individuals involved in alleged incidents. *See Community Development Authority of Madison v. Yoakum*, No. 91-0641-FT, 1992 WL 50167 (Wis. Ct. App. Jan. 16, 1992) (Appendix 321) (unpublished: public housing tenant was entitled to 30 day notice rather than 14 day notice where landlord alleged claims other than nonpayment of rent; notice also was improper in that it did not include notice to right to review documents; trial court erred in granting judgment on grounds not listed in the complaint).

The grievance process includes an informal conference and a formal hearing before the public housing authority may file an eviction (unlawful detainer) action. 24 C.F.R. Part 966. *See Minneapolis Public Housing Authority v. Otto*, No. UD-1970326517 (Minn. Dist. Ct. 4th Dist. May 9, 1997) (Appendix 279) (Public housing administrative procedure may not constitute sufficient due process opportunity where tenant offered at the informal conference and formal hearings to get rid of his dog which offended neighbors, the Housing Authority proceeded with eviction, and the tenant got rid of the dog); *Millville Housing Authority v. Brown*, No. A-6317-94T3 (N.J. Super. Ct. App. Div. June 19, 1996), CLEARINGHOUSE REVIEW 660 (Oct. 1996) (Appendix 272) (Dismissal where public housing notice failed to state tenant's right to reply and examine documents, even though tenant had the opportunity to do them). *See generally* 42 U.S.C. § 1437d(l)(3); 24 C.F.R. §§ 966.4(l), 966.51-966.57. *See generally Waconia Housing and Redevelopment Authority v. Chandler*, 403 N.W.2d 708 (Minn. Ct. App. 1987) (grievance hearing); *Norton v. Johnson*, No. 93-1263-CIV-T-21A (M.D. Fla. Aug. 17, 1993) (Appendix 282) (notice and informal hearing); *Edgecomb v. Housing Authority of the Town of Vernon*, 824 F. Supp. 312 (D. Conn. 1993) (notice and formal hearing); *Dial v. Star City Public Housing Authority*, 8 Ark. App. 65, 648 S.W.2d 806 (1983) (informal conference); *Buczko v. Lucas Metropolitan Housing Authority*, No. C-78-26 (D.N.D. Ohio Mar. 10, 1978) (Appendix 283) (formal hearing); *Scarpitta v. Glen Cove Housing Authority*, 48 A.D.2d 657, 367 N.Y.S.2d 542 (1975) (formal hearing); *Escalera v. New York City Housing Authority*, 425 F.2d 853 (2d Cir. 1970) (formal hearing); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (due process hearings).

Recently, the Minnesota Court of Appeals has not been receptive to tenant claims of violations of their pre-eviction notice and administrative rights. *See Mankato & Blue Earth County Housing & Redevelopment Authority v. Critzer*, No. C2-92-1712 (Minn. Ct. App. Mar. 28, 1995), FINANCE AND

COMMERCE 48 (Mar. 31, 1995) (Appendix 101) (unpublished: rejected defective notice claim); *Minneapolis Public Housing Authority v. Holloway*, No. C0-95-391 (Minn. Ct. App. Aug. 15, 1995), FINANCE AND COMMERCE 46 (Aug. 18, 1995) (Appendix 145) (unpublished: rejected defective administrative hearing claim). *But see Olchefski v. Metropolitan Council,* C4-95-2337 (Minn. Ct. App. Apr. 30, 1996), FINANCE AND COMMERCE at 27 (May 3, 1996) (Appendix 228) (reversing and remanding termination of §8 certificate where hearing officer's decision stated no factual or legal basis for termination).

Public Housing Authorities must keep a file of grievance hearing decisions with identifying references deleted, which is available for inspection by public housing tenants. 24 C.F.R. Sec. 966.57(a).

Public housing authorities may bypass or expedite the administrative grievance procedure, where HUD determines that state eviction court provides the minimum elements of due process, in cases involving criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises of other tenants or employees of the public housing authority, or any drug related criminal activity on or near the premises. 42 U.S.C. § 1437d(k); 24 C.F.R. § 966.51. *Minneapolis Public Housing Authority v.* _____, No. UD-1970221508 (Minn. Dist. Ct. 4th Dist. Mar. 26, 1997) (Appendix 273a) (Dismissal of second unlawful detainer action where Public Housing Authority based complaint on grounds other than listed in the termination notice; Public Housing Authority improperly bypassed grievance process for case involving petty misdemeanor drug violation which is not "criminal" activity; action dismissed with prejudice so as to not allow the Public Housing Authority to file yet a third case on the same claims); *Housing Authority of Newark v. Raindrop*, 670 A. 2nd 1087, 287 N.J. Super 222 (1996) (Housing Authority gave improper notice to bypass the grievance process where the notice failed to advise tenant she was entitled to a grievance hearing, failed to identify court in which eviction would occur, and failed to advise tenant of HUD's determination that local court system satisfied federal public housing eviction due process requirements); *MPHA v. Scott,* UD-1950623520 (Minn. Dist. Ct. 4th Dist. July 19, 1995) (Appendix 229) (process for by-passing administrative grievance process in cases involving criminal activity and drug related criminal activity does not require criminal prosecution be commenced, but bypass should happen only in serious cases).

In cases where a public housing authority alleges criminal activity or drug-related criminal activity, it is important to determine whether the activity meets the definition of a crime. Possession of a small amount of marijuana, a petty misdemeanor and not a "crime" under state law, is not "criminal activity" and not subject to bypass of the public housing grievance process, *Minneapolis Public Housing Authority v.* _____, No. HC020710513 (Minn. Dist. Ct. 4th Dist. Aug. 2, Sept. 16, 2002) (Appendix 547a), affirmed (Sep. 16, 2002) (Appendix 547b) , or subject to eviction. *Minneapolis Public Housing Authority v.* _____, No. HC-1020207506 (Minn. Dist Ct. 4th Dist. Mar. 18, 2002) (Appendix 543).

In *Housing and Redevelopment Authority of Duluth, Inc. v. Adams*, No. C7-99-601573 (Minn. Dist. Ct. 6th Dist. Sep. 13, 1999) (Judge Sweetland) (Appendix 395), a court concluded that since a crime is conduct prohibited by statute and for which the actor may be sentenced to imprisonment with or without a fine under Minn. Stat. 609.02, Subd. 1, municipal ordinance violations are not crimes because ordinances are not state statutes, and statutory petty misdemeanors are not crimes because of the limitation on sentencing. The court dismissed the action where petty misdemeanor drug charges against the tenant were dismissed, and the tenant pled guilty to an amended charge of assault under a municipal ordinance. The court added that there was no serious or repeated violation of a material term of the lease where the arrest took place one mile away from the premises, and the event did not constitute criminal activity.

Before making any changes in the lease or grievance procedure to allow the housing authority to bypass or expedite the grievance procedure, the housing authority must give thirty (30) days notice to tenants

and any resident organization, provide them with an opportunity to comment, and take their comments into consideration before adopting any changes. In Minneapolis, the Minneapolis Public Housing Authority (MPHA) revised its occupancy policies to enact these procedures. The status of Minnesota public housing authorities to bypass the grievance process is unclear. *Simmons v. Kemp*, 751 F. Supp. 815 (D. Minn. 1990), the Court held that bypass was not legal under federal law at that time, because Minnesota court procedures did not provide adequate opportunity for tenants facing eviction to discover documents of public housing authority, so that Secretary could not rely on state court procedures and administrative grievance procedure was required. The court ordered that the HUD determination that the Minnesota unlawful detainer procedure meets the elements of due process set out in the regulations be set aside. *Id*. at 822. While the federal statute and regulation at issue have been changed to deal with the issue in *Simmons*, none of the parties have moved to amend the injunction. *See Minneapolis Public Housing Authority v. Demmings*, No. C5-94-2045, 1995 WL 265061 (Minn. Ct. App. May 9, 1995) (Appendix 159) (Court noted *Simmons* but did not hold on issue since parties did not raise it). In *Yesler Terrace Community Council v. Cisneros*, 37 F.3d 442 (9th Cir. 1994), the court held that a housing authority did not obtain a proper due process determination by HUD that it could bypass the grievance procedure, because HUD did not provide for notice and comment before making the determination. Since then, HUD revised the regulation to remove the notice and comment requirements for HUD. 24 C.F.R. § 966.51.

The Quality Housing and Work Responsibility Act of 1998, Pub. L. No. 105-276 §575, 112 Stat. 2461, 2634-35 (Oct. 21, 1998) (amending 42 U.S.C. §1437d), expanded the types of public housing lease termination excluded from the grievance process to include terminations based on violent criminal activity on or off the premises and any activity resulting in a felony conviction. A 14 day notice still is required for nonpayment of rent. A reasonable notice up to 30 days is required if the health or safety of other tenants, public housing agency employees, or persons residing in the immediate vicinity of the premises is threatened, or in the event of any drug-related or violent criminal activity or any felony conviction. For lease terminations based on other grounds, the 30 day notice provision to allow for a shorter period if provided under state or local law. It is not clear whether this would allow for (1) no alternative, as Minnesota does not have a notice law for breach cases, (2) no notice, as in private breach cases, or (3) the notice required by Minn. Stat. § 504B.135 (formerly 504.06) for periodic tenancies, such as one month notice for a month to month tenancy.

For more information on the grievance process, *see* 24 C.F.R. Pt. 966; HUD HOUSING PROGRAMS: TENANT'S RIGHTS; Forms Appendix, Form Answer No. A-8 (public housing).

d. Revocation of tenant's notice to quit

Most public and subsidized housing programs allow the tenant to terminate the tenancy with a notice to quit. If the tenant voluntarily gave such notice or is coerced into doing so and then withdraws or revokes the notice, the landlord should have to comply with the eviction notice requirements rather than simply rely on the tenant's notice to quit.

In *Dakota County HRA v. Blackwell*, No. C7-98-1763 (Minn. Ct. App. May 4, 1999) (unpublished), the tenant requested an extension of a lease termination date by half a month, to which the landlord agreed. Before the date passed, the tenant rescinded the agreement, and the landlord filed an unlawful detainer action. The trial court held that the tenant did not violate her lease, but awarded the landlord specific performance for her failure to move. On appeal, the Court of Appeals affirmed, concluding that there was consideration for the agreement. The Court rejected tenant claims of mistake, unconscionable, and public policy, and held that specific performance was an appropriate remedy. Judge Foley argued in dissent that specific performance rendering the tenant homeless ignored equity. The Minnesota Supreme Court reversed

in *Dakota County HRA v. Blackwell*. 602 N.W.2d 243 (Minn. 1999), concluding that the district court abused its discretion in awarding specific performance. The Court noted that a party does not have an automatic right to specific performance for breach of contract, and the district court must balance the equities and determine whether the equitable remedy is appropriate. The Court added that its decision was limited to the facts presented.

See Hoglund-Hall v. Kleinschmidt, 381 N.W.2d 889, 895 (Minn. Ct. App. 1986) (FmHA project: tenant's notice to quit was not an effective waiver of rights, subsequent letter stating tenants would remain placed burden back on landlord to restart federally regulated eviction process); *Stuart Management Corp. v.* _____, No. C-7-01-00068 (Minn. Dist Ct. Apr. 12, 2001) (Appendix 580) (HUD subsidized project tenant rescinded notice to vacate, so landlord had to give notice to terminate tenancy, citing *Hoglund-Hall v. Kleinschmidt*, 381 N.W.2d 889, 895 (Minn. Ct. App. 1986), and distinguishing *Eden Park Apartments v. Weston*, 529 N.W.2d 732 (Minn. Ct. App. 1995); judge review reversal of referee decision); *BRI Associates v. Gangl*, C4-95-845 (Minn. Dist. Ct. 10th Dist. Apr. 24, 1995) (Appendix 88) (landlord's request that tenant sign notice to vacate without first giving lease termination notice evaded purpose of federal lease termination requirement; tenant's oral request to revoke notice was a valid revocation; tenant did not waive her eviction rights); *Public Housing Agency v. Bauer*, No. C1-93-10404 (Minn. Dist. Ct. 2d Dist. Oct. 28, 1993) (Appendix 12.B) (dismissed where public housing tenant's service of notice to quit and subsequent withdrawal did not waive plaintiff's requirement to serve pre-eviction notice).

But see Nouvelle Apartments v. Moore, No. UD-1930302522 (Minn. Dist. Ct. 4th Dist. Mar. 26, 1993) (Appendix 12.C) (writ granted where notice signed by both parties was valid notice to quit on which plaintiff relied and refused to rescind; plaintiff order to pay defendant $250.00 for failing to register trade name with Secretary of State); *Cecil Newman Corp. v. Eggleston*, No. UD-1930225505 (Minn. Dist. Ct. 4th Dist. Mar, 26, 1993) (Appendix 12.D) (writ granted where notice signed by both parties was valid notice to quit which plaintiff refused to rescind).

11. Contract for deed cancellation

The vendor must follow the service and notice requirements for cancellation of the contract. *Enga v. Felland,* 264 Minn. 67, 70-71, 117 N.W.2d 787, 789-90 (1962). Minn. Stat. § 559.21. *See Revels v. O'Neal*, No. UD-1960723503 (Minn. Dist. Ct. 4th Dist. Sep. 11, 1996) (Appendix 194) (contract for deed cancellation notice properly served; vendor's mortgagee is not a party which must be served; defenses of unjust enrichment, void and unenforceable contract for deed and fraudulent inducement could not be raised in the unlawful detainer action where vendee brought no action within the statutory sixty day period following notice of cancellation); *Swartwood v. Clark,* No. UD-1920928505 (Minn. Dist. Ct. 4th Dist. Oct. 15, 1992) (Appendix 16.C) (vendor failed to meet burden of proof regarding alleged service of cancellation notice); *Edwards v. Sagataw,* No. 31-C2-92-512 (Minn. Dist. Ct. Itasca Cty. Apr. 30, 1992) (Appendix 16.D) (quit claim deed obtained by vendor from vendee while vendee was not in default lacked consideration; allegations of default in payment of taxes by vendee implied continuing application of contract for deed; vendor, cannot evict vendees without foreclosing the contract). *See also* discussion, *supra* at V.N. (collateral estoppel).

Technical errors by the vendor in canceling the contract for deed or by the vendee in attempting to cure the default might not be held against the party making the error. In *Olsen v. Stevens*, No. CX-97-1827 (Minn. Ct. App. Mar. 31, 1998) (Appendix 355) (Unpublished), the defendant in a contract for deed unlawful detainer action claimed the cancellation notice was improper in that it included more money than was due. The court noted that it must determine whether the contract for deed was properly canceled. The court noted that absent a showing of prejudice, discrepancies in a cancellation notice will not automatically

render it ineffective. The court noted that the defendant did not attempt to tender any amount due under the contract, but had they tendered the amounts they conceded were owed and plaintiff had rejected the tender, the defendant could possibly have claimed prejudicial error. *See Metro Redevelopment, Inc. v. Shaviss*, No. UD-1970404529 (Minn. Dist. Ct. 4th Dist. Jun. 2, 1997) (Appendix 270) (It would be unjust and inappropriate to evict vendee where within the redemption period vendee cured the mortgage default and tendered payment to cure the contract for deed default to vendor's agent who rejected the payment because the payment had not been made to the office designated in the cancellation notice); *Thompson v. Stevens*, No. C6-96-650 (Minn. Ct. App. Dec. 10, 1996) (FINANCE AND COMMERCE at 76 (Dec. 13, 1996) (Appendix 299) (Unpublished: In unlawful detainer action based on contract for deed cancellation, trial court must determine if plaintiff complied with statutory cancellation procedures; plaintiff was not required to serve the cancellation notice on defendant's ex-husband, who had assigned his interest to her, even though the assignment contained an error in the legal description, and was not recorded). *See also Jordan v. Peterson*, No. C7-96-1757 (Minn. Ct. App. Mar. 18, 1997, FINANCE AND COMMERCE at 49 (Mar. 21, 1997) (Appendix 263) (Unpublished: Vendor gave proper notice, did not invalidate the notice, and equitable claims were not convincing).

In *Gale v. Winge*, No. C7-98-2279 (Minn. Ct. App. July 6, 1999) (unpublished) the court affirmed a determination as not clearly erroneous that husband continued to use property as his place of abode and substitute service on wife was proper; minor inaccuracies in contract-for-deed legal description do not render the cancellation notice ineffective; trial court did not abuse its discretion in denying motion to vacate default judgment where tenant did not present a defense on the merits nor a reasonable excuse for failure to act; attorney's testimony at trial regarding payment of money was not on a contested issue, and did not require disqualification; equitable rights were not at issue, but equities were not in the defendants' favor.

A contract for deed vendee may establish waiver of the cancellation notice on the grounds of acceptance of payments, where the vendee shows that the vendor had full knowledge of the facts, full knowledge of applicable legal rights, and an intention to relinquish these rights. *Knutson v. Seeba*, No. C7-98-1665 (Minn. Ct. App. Mar. 30, 1999) (Appendix 341) (Unpublished: Vendor's letter to vendee stating that vendor would hold the payments pending receipt of other amounts due indicated no relinquishing of rights).

The vendor must give proper notice to the tenant of the vendee following cancellation. One month written notice is required for tenants. Minn. Stat. § 504B.285 (formerly § 566.03), subd. 1. *See* discussion, *supra* at VI.F.1.c.

The vendor may waive the right to cancel by acceptance of payments, where the payment is made on one of the defaults listed in the notice. *Odegaard v. Moe*, 264 Minn. 324, 119 N.W.2d 281 (1961) (waiver); *Allen v. Harper*, No. UD-1950831512 (Minn. Dist. Ct. 4th Dist. Oct. __, 1995) (Appendix 146) (waiver); *Thomey v. Stewart*, 391 N.W.2d 533, 535-36 (Minn. Ct. App. 1986) (no waiver where notice listed default on balloon payment, vendee made payments on vendor's mortgage but did not make payments on balloon payment).

For a discussion of what issues can be litigated in an eviction (unlawful detainer) action, *see* discussion, *supra*, at VI.B.

12. Mortgage foreclosure

a. *Mortgagor Defendant*

The mortgagee must comply with the service and notice requirements for mortgage foreclosure. *Comerica Mortgage Corp. v. Gaddy*, No. UD-1950223514 (Minn. Dist. Ct. 4th Dist. Mar. 24, 1995) (Appendix 195) (mortgager did not prove that service of the notice of foreclosure sale was insufficient). In *WMC Mortgage Corp. v. Harris*, Nos. UD-1981223505 and 1981223503 (Minn. Dist. Ct. 4th Dist. Jan. 14, 1999) (Appendix 373), the court concluded that a defendant in an unlawful detainer action can raise defects in the mortgage foreclosure proceedings as a defense to the eviction if the defect would render the foreclosure void, as opposed to avoidable. The Court denied the plaintiff's motion *in limine* to preclude the defendant from raising the defense of failure to serve an occupant under Minn. State. §580.03, since lack of service on the occupant would be fatal to the foreclosure proceeding. In *WMC Mortgage Corp. v. Graham*, No. UD-01990415520 (Minn. Dist. Ct. 4th Dist. Apr. 29, 1999) (Appendix 430), the defendant asserted that the plaintiff mortgage company did not comply with the foreclosure notice service statute. The plaintiff moved for summary judgment, arguing that the sheriff's certificate of sale was *prima facie* evidence of plaintiff's title to the property, and that defendants answer raised a title or equitable matter aside the scope of an unlawful detainer. The court denied plaintiff's motion, concluding that the same rules should apply for contract for deed cancellations and mortgage foreclosures, and that defendants in either case may raise as a defense the plaintiff's failure to comply with statutory requirements for cancellation for foreclose. If the defect renders it void, noting that lack of service is fatal to foreclosure proceedings.

For a discussion of litigating title issues in eviction actions, *see* discussion, *supra*, at VI.B.

Mortgagees with mortgagors insured by the Federal Housing Administration (FHA) or the United States Department of Housing and Urban Development (HUD) have significant rights not available to persons with uninsured loans. *See* 24 C.F.R. Part 203 (1992); HUD Handbook No. 433.02; F. FUCHS, INTRODUCTION TO HUD PUBLIC AND SUBSIDIZED HOUSING PROGRAMS at 299-317 (National Clearinghouse for Legal Services, May 26, 1991).

However, the mortgagee should be able to challenge violations of the HUD Occupied Conveyance Program. Under the program, HUD may permit a foreclosed mortgagor or tenant of the foreclosed mortgagor to remain in the premises and rent from HUD under certain circumstances. The mortgagee must provide notice to the mortgagor and HUD that the mortgagee expects to acquire title to the property and that the occupant of the property might be eligible for the program. Notice must be given between 60 and 90 days prior to the date that the mortgagee expects to acquire title. 24 C.F.R. § 203.675 (1992). *See generally* 24 C.F.R. §§ 203.670-203.681 (1992). Since compliance with the program affects the tenancy of the mortgagor or tenant of the mortgagor, rather than title to the property, the parties should be able to litigate compliance with the program in an eviction (unlawful detainer) action. Since the actions of HUD may be an issue in litigating compliance with the program, dismissal for failure to join an indispensable party or continuance to file a third party complaint against HUD may be appropriate. *See generally*, discussion, *supra* at V.C. *See T. Conley, Outline of HUD Mortgage Assignment and Occupied Conveyance Programs* (May 21, 1993) (Appendix 12.E).

b. *Tenant of Mortgagor as Defendant*

A two month written notice (before August 1, 2008, one month written notice) is required for tenants of the mortgagor. Minn. Stat. § 504B.285 (formerly § 566.03), subd. 1. *See* discussion, *supra* at VI.F.1.c. For a discussion of what issues can be litigated in an eviction (unlawful detainer) action, *see* discussion, *supra*, at VI.B. *But see Bristol Savings Bank v. Savinelli*, CV-95-0377478-S (Conn. Super. Ct. Mar. 21, 1996), 1996 WL 16,396, 1996 Conn. Super LEXIS 742, HDR CURRENT DEVELOPMENTS at 791 (Apr. 22, 1996) (Appendix 225) (Connecticut Superior Court decision holding that §8 tenancy survived automatic termination by foreclosure).

In *Webster Bank v. Occhipinti*, No. CV-970059147S, 1998 WL 846105 (Conn. Sup. Ct. Nov. 20, 1998) (Appendix 372), the court held that federal Section 8 law preempted state mortgage foreclosure law, which provided that foreclosure terminated the interest of the tenant of the mortgagor. Thus, the foreclosing mortgagee or the purchaser at the foreclosure sale could terminate the Section 8 lease only in accordance with the Section 8 statutes and regulations. *See* discussion, *supra*, at VI.F.10.a.5.

As of August 1, 2008, the foreclosing mortgagee must include with the notice of commencement of foreclosure a notice of tenant rights and obligations with language specified by statute. A violation of the statute entitles a tenant at the time of commencement of foreclosure to $500, unless all of these factors are present: the violation was unintentional, was a result of a bona fide error, and reasonable procedures to avoid the error were adopted and maintained. Minn. Stat. § 580.042, 2008 Minn. Laws Ch. 341, Art. 5, §11. While a violation does not give the tenant a cause of action to stop the foreclosure if the mortgagee gives proper notice of commencement of the foreclosure, *id.*, the tenant may have a claim for $500 either in the eviction action or a damages action in conciliation court.

13. Subtenants *See* discussion, *supra*, at I.D.5.

14. Tenant revocation of tenant's notice to quit

Tenants should be able to revoke the tenant's notice to quit, where the tenant and landlord did not make an oral or written contract for the tenant to move, and where the landlord has not relied on the notice to the landlord's detriment. While most of the litigation on this issue has involved public or subsidized housing, those decisions are equally applicable to private housing. *Central Manor Apartments v. Beckman*, Nos. UD-1980609509, UD-1980513525 (Minn. Dist. Ct. 4th Dist. July 29, 1998) (Appendix 319B) (Tenant effectively retracted tenant's notice to quit prior to acceptance of landlord or any detrimental reliance by landlord). *See King v. Durkee-Atwood, Co.*, 127 Minn. 452, 148 N.W. 297 (1914) (tenant has the right to unilaterally withdraw a notice to quit).

In *Dakota County HRA v. Blackwell*, No. C7-98-1763 (Minn. Ct. App. May 4, 1999) (unpublished), the tenant requested an extension of a lease termination date by half a month, to which the landlord agreed. Before the date passed, the tenant rescinded the agreement, and the landlord filed an unlawful detainer action. The trial court held that the tenant did not violate her lease, but awarded the landlord specific performance for her failure to move. On appeal, the Court of Appeals affirmed, concluding that there was consideration for the agreement. The Court rejected tenant claims of mistake, unconscionable, and public policy, and held that specific performance was an appropriate remedy. Judge Foley argued in dissent that specific performance rendering the tenant homeless ignored equity. The Minnesota Supreme Court reversed in *Dakota County HRA v. Blackwell*. 602 N.W.2d 243 (Minn. 1999), concluding that the district court abused its discretion in awarding specific performance. The Court noted that a party does not have an automatic right to specific performance for breach of contract, and the district court must balance the equities and determine whether the equitable remedy is appropriate. The Court added that its decision was limited to the facts presented.

In *Real Estate Equities, Inc. v. Schmidt*, No. CX-00-297 (Minn. Dist. Ct. 10th Dist. Mar. 14, 2000) (Judge Mossey) (Appendix 415), the tenant was assaulted on the property both before and after she obtained a restraining order, leading her to call the police. The landlord sent a letter stating it would terminate the tenancy based on late payment of rent, damage to the property, and police calls to the unit. The parties then executed an agreement to vacate. The court concluded that the termination letter, and the resulting agreement, violated § 504B.205, rendering the agreement void as contrary to public policy. *See* discussion, *supra*, at VI.F.10.d.

15. Expiration of lease following tenant's failure to give proper notice of renewal

In general, where the tenant has the right to extend the lease by giving proper notice under the lease, the giving of the notice is a condition precedent in lease renewal. If the notice fails to comply with the notice provision, the lease expires and the landlord is entitled to possession. However, a court of equity may relieve the tenant against loss of the option to extend the lease where there has been excusable and inconsequential tardiness in giving the notice. The court may allow the tenant to renew the lease when the delay has been slight, the loss to the landlord is small, and hardship to the tenant would make it unconscionable to literally enforce the notice provision. *Trollen v. City of Wabasha*, 287 N.W. 2d 645 (Minn. 1979) (Commercial tenant allowed to renew lease where landlord and tenant had history of not enforcing formal obligations under the lease, tenant gave four months notice instead of six months notice, landlord was not prejudiced, and tenant would suffer hardship after investment in his business. *But see Garakani v. Five Lakes Centre, LLC*, No. C7-96-673, 1996 WL 636213 (Minn. Ct. App. Nov. 5, 1996) (Appendix 255) (Unpublished: No modification by conduct of lease renewal option notice where lease contained clear notice and non-waiver clauses and past conduct did not indicate the lease would not be formally enforced).

16. Uniform Relocation Act

The Uniform Relocation Act provides for additional notice to tenants where they are to be displaced as a result of receipt of state or federal monies. In *Project for Pride in Living, Inc. v. McCoy*, No. C7-99-4197 (Minn. Dist. Ct. 2nd Dist. May 21, Aug. 31, 1999) (Appendix 413), the owner obtained a loan with the Minnesota Housing Finance Agency for purchase and rehabilitation of the property. The owner then gave a 30 day notice to quit without alleging good cause for the termination. The tenant did not receive any notices for noncompliance with her lease during her tenancy. The court concluded that the Uniform Relocation Act applied since the owner executed a loan involving federal and state monies. 49 C.F.R. § 24 (1997); Minn. stat. §§ 117.51-117.52. The court then concluded that the 30 day notice to quit without cause violated the 90 day notice requirement and the requirement of cause for eviction. 49 C.F.R. §§ 24.203, 24.206. The referee's decision was affirmed on judge review. Order (Aug. 31, 1999).

G. BREACH OF LEASE DEFENSES

1. No right of reentry clause in the lease

The landlord may not recover possession of the premises in an eviction (unlawful detainer) action based upon alleged breaches of an oral or written lease, where the lease does not provide for the landlord's right to reenter and retake possession upon breach. *Bauer v. Knoble*, 51 Minn. 358, 359, 53 N.W. 805 (1892); *Salo v. Dodson*, No. CX-96-600886 (Minn. Dist. Ct. 6th Dist. Jul. 2, 1996) (Appendix 231) (summary judgment for tenant where lease did not contain a right of re-entry clause); *Jafer Enterprises Inc. v. Peters,* No. UD-1920701512 (Minn. Dist. Ct. 4th Dist. July 20, 1992) (Appendix 4.F); *Cheney v. Attaway,* No. UD-1910717523 (Minn. Dist. Ct. 4th Dist. July 30, 1991) (Appendix 11.K) (dismissal where oral lease did not contain covenants on behavior or a right of reentry clause); *See Nguyen v. Veit,* No. UD-1910401513 at 4 (Minn. Dist. Ct. 4th Dist. Apr. 15, 1991) (Appendix 14.C); *Edwards v. Swenson*, No. UD-1900730508 at 2 (Minn. Dist. Ct. 4th Dist. Aug. 9, 1990) (Appendix 17.C); *PCF Management v. Goodman*, No. UD-1881222537, Transcript at 3 (Minn. Dist. Ct. 4th Dist. Jan. 4, 1989) (Appendix 17.D).

The requirement of having a right of re-entry clause to commence an unlawful detainer action for breach of lease was confused by the *unpublished* decision in *C & T Properties v. McCallister*. In In *C. & T. Properties v. McCallister*, No. C9-98-940 (Minn. Ct. App. Jan. 12, 1999)(unpublished), the Court of

Appeals held that a right of reentry clause was not a precondition for an action for breach of lease, concluding that a phrase in Minn. Stat. § 566.03 (now § 504B.285) essentially overruled *Bauer*. The statute sets forth various grounds for subject matter jurisdiction in eviction actions, and following the section on retaliation, states "nothing contained herein shall limit the right of the lessor pursuant to the provisions of Subd. 1 [basis for subject matter jurisdiction] to terminate a tenancy for a violation of the tenant of a lawful, material provision of a lease or contract." Tenants should argue that there is nothing in the statute that indicated that the legislature intended to overrule *Bauer*. Read in the context of the entire statute, the provision was intended to indicate that the anti-retaliation provision of the statute would not limit the right of the landlord to evict a tenant for a violation of the lease. As an unpublished decision, it is not binding and is only persuasive authority. *See* discussion, *supra*, at I.A.3.

There is no indication that the Legislature intended to reverse *Bauer* in its recodification of landlord-tenant statutes in Chapter 504B. To the contrary, the comments of the drafting committee and testimony before the Legislature indicated that the drafters intended *Bauer* to remain good law. *See* Memorandum of Paul Birnberg (Appendix 406).

Trial courts have continued to follow *Bauer*. *See O'Brian v. _____,* No. HC 1010402506 (Minn. Dist Ct. 4th Dist. Apr. 18, 2001) (Appendix 552) (breach claims dismissed where oral lease contained no right of re-entry clause; notice claim dismissed where landlord failed to attached notice to complaint, and failed to prove notice was given; expungement granted); *Lowe v. Cotton*, No. UD-01990224515 (Minn. Dist. Ct. 4th Dist. Oct. 7, 1999 (Appendix 404) (Breach of lease claim dismissed where there was no written lease, parties recently entered into a written agreement that defendant would not have a pet but the memo did not include a right of reentry; plaintiff granted leave to amend complaint for nonpayment of rent as defendant admitted the claim; landlord agreed to give tenant eight days to redeem); *D & D Real Estate Investment, L.L.P. v. Hughes*, Nos. UD-1990311505 (Minn. Dist. Ct. 4th Dist. Mar. 30, 1999) (Appendix 323A) (Dismissal of breach of lease claim where there was no convincing evidence that the oral lease contained a right of re-entry clause, no convincing evidence as to the dollar amount of damage to a door to determine whether damage was material or *de minimis*, and the landlord failed to prove that the tenant or one of her guests damaged the door where the tenant claimed damage was caused by a burglar; tenant's names expunged from file); *Thomas v. Dobyne*, No. U-1980616536 (Minn. Dist. Ct. 4th Dist. Jul. 8, 1998) (Appendix 370B) (Combined action for breach and rent; breach claims dismissed for lack of a right of re-entry clause, and where landlord failed to prove tenant conduct on the property which amounted to breach of lease; matter rescheduled for trial on rent issues).

2. Implied modification of the lease or waiver of lease provisions

In absence of an express verbal agreement, subsequent acts and conducts of the parties may establish an implied waiver or modification of a lease term. *Northview Villa v. Gresens*, No. C9-90-175 (Minn. Ct. App. July 3, 1990), FINANCE & COMMERCE at B16 (July 6, 1990) (Appendix 17.E), citing *Mitchell v. Rende*, 225 Minn. 145, 148-49, 30 N.W.2d 27, 30 (1947). In *Northview Villa* the tenants lived in a manufactured (mobile) home park for over five years with their cats. Other tenants in the park also had pets. The tenants testified that they discussed a "no pet" rule with the park manager, and said that they would lease the premises only if they could keep their cats. The managers were aware that the tenants had cats, but continued to accept rent from the tenants without asking them to remove their cats, and without seeking to enforce the "no pet" rule for five years. The court concluded that the trial court did not err in finding that this course of conduct established a waiver to the "no pet" rule. *Id*. *See Kostakes v. Daly*, 246 Minn. 312, 318, 75 N.W.2d 191, __ (1956) (landlord could not enforce non-assignment provision where landlord knew of assignment and investment by assignee of large sum of money in the property but took no action for three months).

In *Kahn v. Greene*, No. UD-1940330506 (Minn. Dist. Ct. 4th Dist. May 5, 1994) (Appendix 65), the court found that the landlord intentionally relinquished the right to enforce "no pet" "over occupancy" provisions of the lease by failing to enforce them in a timely manner over a six month period. *Id.* at 7 (citing *Seavey v. Erickson*, 244 Minn. 232, 69 N.W.2d 889 (1955); *Anderson v. Twin City Rapid Transit Co.*, 250 Minn. 167, 84 N.W.2d 593 (1957); *Northview Villa; Mitchell; Kostakes*). *See McNair v. Doub*, No. UD-1960708524 (Minn. Dist. Ct. 4th Dist. Aug.12, 1996) (Appendix 205) (landlord waived right to evict tenant for possession of pets by accepting rent after knowledge of and acquiescence to possession of a pet); *Northview Villa M.H.P. v. Anderson,* No. C2-90-13460 (Minn. Dist. Ct. 10th Dist. Apr. 24, 1991) (Appendix 17.F) (plaintiff relinquished right to enforce no pet rule by failing to enforce the rule for nearly two years after discovering defendant had pets); S. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT § 5:10 (1980 and Supp. 2008). *See also Chaska Village Townhouses and Lifestyle, Inc. v. Edberg,* No. 91-27365 (Minn. Dist. Ct. 1st Dist. Apr. 1, 1991) (Appendix 11.L) (plaintiff induced defendant to believe that late rental payments would continue to be accepted without consequences.

In *Judge v. Rio Hot Properties, Inc.*, Nos. UD-1981202903, UD-1981005518, and UD-1981104522 (Minn. Dist. Ct. 4th Dist. Dec. 18, 1998), (Appendix 362D), in consolidated unlawful detainer and emergency tenant remedies actions, the court concluded that a notice to quit which was not effective but the parties agreed to litigate was retaliatory where the landlord only wished to rent to other tenants, and the landlords waived a no pet provision and could not rely on it to show a non-retaliatory purpose. *See Garakani v. Five Lakes Centre, LLC*, No. C7-96-673, 1996 WL 636213 (Minn. Ct. App. Nov. 5, 1996) (Appendix 255) (Unpublished: No modification by conduct of lease renewal option notice where lease contained clear notice and non-waiver clauses and past conduct did not indicate the lease would not be formally enforced); *Little v. Katzovitz,* No. UD-1970902903 (Minn. Dist. Ct. 4th Dist. Sep. 30, 1997 (Appendix 268) (Tenants proved that landlord consistently accepted late rent, amending the agreement to allow for late rent payments).

Some leases provide that acceptance of rent following breach of the lease shall not constitute a waiver of subsequent breaches. While such a provision may be enforceable on its face, it is unclear whether such a provision would be enforceable when compared with conduct over a significant period of time that is inconsistent with the provision. Even if there had been such a clause in *Northview Villa*, the conduct in that case might have established a waiver of the non-waiver clause, or supported a conclusion that application of a non-waiver clause in that case would have been unconscionable. *See* discussion, *infra* at VI.G.13-14 (unconscionable lease terms). *See McNair v. Doub*, No. UD-1960708524 (Minn. Dist. Ct. 4th Dist. Aug.12, 1996) (Appendix 205), the court found that proof of retaliation may void a landlord's non-waiver lease provision.

3. Plaintiff unilaterally modified the lease

Landlord may be attempting to enforce a change in the lease made unilaterally by the landlord during the term of the lease. In *Commonwealth Terrace Cooperative Inc. v. Jassim,* No. C6-90-8892 (Minn. Dist. Ct. 2nd Dist. Oct. 3, 1990) (Appendix 13.A), plaintiff unilaterally changed the term of the lease from seven years to five years. The court held that the landlord could not make such a material change in the lease without the consent of the tenants. *Id.* at 9-14, *aff'd.* (Nov. 16, 1990). *See Clark v. Urban Investments*, No. UD-1970821901 (Minn. Dist. Ct. 4th Dist. Sep. 10, 1997) (Appendix TR 145) (Late fees were not based on lease but on later notice to increase late fees; landlord did not prove it was entitled to unilaterally amend lease to increase late fees); *Urban Investments, Inc. v. Thompson*, No. UD-1950626525 (Minn. Dist. Ct. 4th Dist. Aug. 10, 1995) (Appendix 80). The consideration originally given for a lease cannot serve as consideration for new terms subsequently added to the lease. Where no consideration is apparent on the face

of the agreement, the party relying on it must prove consideration. *Bartl v. Kenyon*, 549 N.W. 2d 381, 383, (Minn. Ct. App. 1996).

4. Waiver of breaches by acceptance of rent

Generally, a tenant's breach of a rental agreement is waived by the landlord's subsequent acceptance of rent with knowledge of the breach. *Parkin v. Fitzgerald*, 307 Minn. 423, 431, 240 N.W.2d 828, 833 (1976); *Peebles & Co. v. Sherman*, 148 Minn. 282, 283, 181 N.W. 715, 716 (1921); *Zotalis v. Canneles*, 138 Minn. 179, 181, 164 N.W. 802, 807-08 (1917); *Westminster Corp. v. Anderson*, 536 N.W.2d 340 (Minn. Ct. App. 1995); *Priordale Mall Investors v. Farrington*, 411 N.W.2d 582, 584, (Minn. Ct. App. 1987) (hereinafter "*Priordale Mall II*"); *Burgi v. Eckes*, 354 N.W. 2d 514, 517 (Minn. Ct. App. 1984). In *Linden Corp. v. Simard*, 1988 WL 87503, 3-87-1599 (Minn. Ct. App. Feb. 9, 1988), (unpublished), the court analyzed a waiver of notice case, but citing waiver of breach cases. *See* discussion, *supra* at VI.F.4. (Waiver of notice by acceptance of rent).

The landlord's intent is irrelevant. *See Kenny v. Seu Si Lun*, 101 Minn. 253, 256-58, 112 N.W. 220, 221-22 (1907); *Common Bond Housing v. Beier,* UD-1951204625 (Minn. Dist. Ct. 4th Dist. Feb. 23, 1996) (Appendix 227).

The courts have found waiver in many cases. *Williams Holdings #4 LLC v. _____*, No. 27-CV-HC-08-9805, Order (Minn. Dist. Ct. 4th Dist. Nov. 25, 2008) (Appendix 625) (landlord claimed rent and breach; breach claim dismissed after landlord accepted rent following filing action; tenant allowed to redeem by paying landlord's filing fee); *Maryland Park Apartments v. _____,* No. CX-02-4044 (Minn. Dist. Ct. 2nd Dist. June 17, 2002) (Appendix 533) (federal law and *Rucker* do not preclude Minnesota statute with greater tenant protection; landlord failed to prove criminal activity occurred at or near tenant's residence, landlord failed to prove that tenant knew or had reason to know of criminal activity, landlord waived breach by accepting rent); *918 22nd Street Investors v. _____*, No. HC 010112553 (Minn. Dist Ct. 4th Dist. Feb. 6, 2001) (Appendix 460) (waiver of breach by acceptance of rent; breaches since acceptance not waived but would need to be listed in a new notice under the lease).[16]

---

[16] *Amsler v. Harris*, and *Harris v. Amsler*, Nos. UD-1990826901 and UD-1990902500 (Minn. Dist. Ct. 4th Dist. Sep. 20, 1999) (Appendix) (landlord waived breach by continuing to accept rent after knowledge); *H.R.S. Management v. Townsend*, No. UD-1930325423 (Minn. Dist. Ct. 4th Dist. Apr. 9, 1993) (Appendix 396) (acceptance of March rent waives breaches of lease, but continued breach in April was material and not waived); *McNair v. Doub*, No. UD-1960708524 (Minn. Dist. Ct. 4th Dist. Aug.12, 1996) (Appendix 205); *Anya v. Rulford*, UD-1960501506 (Minn. Dist. Ct. 4th Dist. May 24, 1996) (Appendix 220); *Common Bond Housing v. Beier,* UD-1951204625 (Minn. Dist. Ct. 4th Dist. Feb. 23, 1996) (Appendix 227); *McCrae v. Buckanaga*, UD-1951207519 (Minn. Dist. Ct. 4th Dist. Feb. 12, 1996) (Appendix 187) (judge review affirming referee's decision dismissing unlawful detainer action for waiver of breach by acceptance of rent).

Earlier decisions include *Plymouth Avenue Townhomes and Apts. v. Slayden*, No. UD-1950627513 (Minn. Dist. Ct. 4th Dist. July 31, 1995) (Appendix 147); *Johnson v. Baumbach*, No. C8-95-600844 (Minn. Dist. Ct. 6th Dist. May 19, 1995) (Appendix 148); *Northern Management, Inc. v. Bade*, C9-94-3915 (Minn. Dist. Ct. 7th Dist. Nov. 25, 1994) (Appendix 86); *Kahn v. Greene*, No. UD-1940330506 (Minn. Dist. Ct. 4th Dist. May 5, 1994) (Appendix 65); *Valley Manor Apts. v. Gullickson*, No. CX-94-10 (Minn. Dist. Ct. 8th Dist. Feb. 3, 1994) (Appendix 56); *DVN Properties v. Gammage*, No. UD-1930525546 (Minn. Dist. Ct. 4th Dist. June 23, 1993) (Appendix 4.C.6); *Carriage House Apartments v. Hoff*, No. UD-1921022511 (Minn. Dist. Ct. 4th Dist. Mar. 1, 1993) (Appendix 15.D.2) (motion to quash writ granted where plaintiff obtained writ on allegation that defendant

The landlord has accepted the rent when the rent was received. *See Gjersten Realty Co. v. Holland Investment Co.*, 148 Minn. 473, 474, 180 N.W. 774, 775 (1921) (action for rent dismissed where landlord's agent received rent and appropriated it to his own use). In *Linden Corp.*, the court stated that while it is questionable whether receipt of a check without cashing it constitutes waiver, receipt of a money order or cash constitutes waiver of notice. Slip. op. at 3-4, citing *Kenny v. Seu Si Lun*, 101 Minn. 253, 257, 112 N.W. 220, 221 (1907); *Priordale Mall Investors v. Farrington*, 411 N.W.2d 582, 584 (Minn. Ct. App. 1987).

Landlords have had some success avoiding the waiver defense by not cashing rent payments and then arguing that they had not accepted rent, or by alleging very serious lease violations which encouraged the court to look for an exception to the waiver doctrine. *Carriagehouse Apartments v. Stewart*, No. UD-1970107501 (May 13, 1997) (Appendix 249) (No waiver of notice or breach where landlord received but did not cash, deposit or return money orders for rent, landlord instructed agents to not accept rent on the tenant's account, and landlord alleged tenant started a fire at the apartment); *Loring Towers Apartments Limited Partnership v. Ferrer*, No. UD-1901226507 (Minn. Dist. Ct. 4th Dist. Jan. 10, 1991) (Appendix 15.A).

Acceptance of a partial payment of rent also may waive a breach of the lease. *Hillside Terrace Apartments v. Strommen*, No. C9-90-739 at 3 (Minn. Dist. Ct. 10th Dist. May 21, 1990) (Appendix 15.C).

There is some confusion between the waiver of breach and waiver of notice cases. In waiver of breach cases, the landlord's intent is irrelevant. In waiver of notice cases, there is disagreement over whether the landlord intent is relevant. *See* discussion, *supra* at VI.F.4. When a judge or referee believes that intent is relevant in waiver of notice cases and questions whether intent is relevant in waiver of breach cases, the tenant or tenant's counsel may distinguish the waiver of notice cases as follows. In a waiver of breach case, the landlord has continued to accept the tenant's rent with knowledge of the breach, and has taken no action inconsistent with continuing the tenancy until the landlord later files the eviction (unlawful detainer) action. On the other hand, in the waiver of notice case, by giving notice, the landlord has taken an action inconsistent with continuing to rent to the tenant, making it appropriate to consider what the landlord's intent was by accepting the rent. In the waiver of breach case, since the landlord has not taken such action, the court should not consider the landlord's intent in accepting the rent.

In some cases, such as in subsidized housing or in private housing where the lease requires a termination notice based on breach of the lease, the landlord may not have waived the notice, but may have waived the breach upon which the notice relies. In such cases, waiver of the breach should remove the basis for the notice, rendering the notice void.

a. In government subsidized housing

Before August 1995, tenants had successfully argued that the landlord's acceptance of the government subsidy, or housing assistance payment (HAP), should waive the prior breach.[17] But, in *Westminster Corp.*

---

violated court approved stipulation, but plaintiff accepted rent with knowledge or alleged breach); *Loring Towers Apartments Limited Partnership v. Ferrer*, No. UD-1901226507 at 2 (Minn. Dist. Ct. 4th Dist. Jan. 10, 1991).

[17]*Northern Management, Inc. v. Bade*, C9-94-3915 (Minn. Dist. Ct. 7th Dist. Nov. 25, 1994) (Appendix 86) (tenant payment of rent and HRA payment of HAP); *Oakwood Court Apartments v. Volk*, No. C6-94-1067 (Minn. Dist. Ct. 10th Dist. Sep. 2, 1994) (Appendix 66) (accepting and depositing rent from tenant and HUD on August 2, waived breach about which landlord knew by August 1); *Etna Woods Apartments v. Ramgran,* No. C8-92-2614

v. Anderson, 536 N.W.2d 340 (Minn. Ct. App. 1995), the Court held that in a breach of lease case, the acceptance of housing assistance payments (HAP) from the Minnesota Housing Finance Agency (MHFA) did not waive the tenant's alleged breach of the lease, holding that HAPs were not rent. However, the Court noted that it made no ruling on treatment of the tenant's rent payments, as opposed to the HAP, implying that the subsidized and public housing tenant rent would be treated the same as rent by private tenants for waiver purposes.

Counsel should argue that where the landlord accepts the *tenant's rent*, regardless of whether the landlord accepted the *HAP*, waiver has occurred, under *Westminster Corp.*, the private housing waiver appellate cases, and the subsidized housing lower court decisions where the tenant paid rent in addition to the housing authority paying the HAP. *Maryland Park Apartments v. _____,* No. CX-02-4044 (Minn. Dist. Ct. 2nd Dist. June 17, 2002) (Appendix 533) (federal law and *Rucker* do not preclude Minnesota statute with greater tenant protection; landlord failed to prove criminal activity occurred at or near tenant's residence, landlord failed to prove that tenant knew or had reason to know of criminal activity, landlord waived breach by accepting rent).

In *St. Cloud Housing and Redevelopment Authority v. Slayton*, No. C9-98-1671 (Minn. Dist. Ct. 10th Dist. Nov. 3, 1998) (Appendix 365) (Danforth, J.), the court concluded that the PHA's acceptance of rent from the tenant in a private agency along with the PHA's recertification and renewal of the lease constituted waiver of lease violations. The Court rejected the PHA's argument that *Westminster Corporation v. Anderson*, 536 N.W. 2d 340 (Minn. Ct. App. 1995), *Rev. Den.* Oct. 27, 1995, applied to this case. The Court distinguished *Westminster Corporation* in that it involved whether housing subsidies from a PHA were rent, holding that said subsidies were not rent and acceptance of them did not constitute waiver, while in this action, the payments were from a private entity, simply making rent payments on behalf of the tenants.

In *Housing Authority of Trumann v. Lively*, No. CA-99-543, 1999 WL 1203731 (Ark. App. Dec. 8, 1999), the court affirmed the trial court decision for the public housing tenant where a person selling drugs from the residence was not a resident of the premises, the tenant had no knowledge of the activity, and when she became aware of it, she excluded the person from the property. The court also noted that the housing authority did not commence the action until five months after the criminal activity occurred. *See Woodview Apartments Limited Partnership v. Bryant*, No. C7-98-616 (Minn. Dist. Ct. 10th Dist. Jul. 24, 1998) (Appendix 374) (Danforth, J.: Waiver of breach in subsidized housing by receipt of vendored welfare checks, where the landlord held the checks but stated that he intended to deposit them regardless of the decision of the court)

b. Exceptions

(Minn. Dist. Ct. 2nd Dist. Mar. 25, 1992) (Appendix 15.D) (acceptance of rent and subsidy waived breaches); *Ullstrom v. Parker*, No. UD-1920618541 (Minn. Dist. Ct. July 13, 1992) (Appendix 15.D.3); *Buckeye Realty Co. v. Elias*, No. CX-91-0697 (Minn. Dist. Ct. 10th Dist. Aug. 6, 1991) (Appendix 15.E) (FmHA project: acceptance of rent following notice of termination waived landlord's right to maintain action based on breaches of lease alleged in notice); *Z & S Management Co. v. Thielen*, No. UD-1901207517 at 2 (Minn. Dist. Ct. 4th Dist. Dec. 20, 1990) (Appendix 17.E) (receipt of the tenant's rent and the HAPs waived the alleged breaches of the lease); *Secretary of U.S. Dept. HUD v. Madison*, No. UD-1861104544 (Minn. Dist. Ct., 4th Dist., Nov. 18, 1986) (Appendix 17). *But see Loring Towers Apartments Limited Partnership v. Ferrer*, No. UD-1901226507 at 1-4 (Minn. Dist. Ct. 4th Dist. Jan. 10, 1991) (Appendix 15.A) (landlord who receives a Housing Assistance Payment (HAP) may return it to the government, therefore not accepting the HAP and avoiding the waiver claim).

(1) Breach of a fundamental lease term

One exception to waiver is where the breach is of a lease provision which is part of the consideration and not merely incidental nor collateral to the character of the occupancy. *Central Union Trust Co. of New York v. Blank*, 168 Minn. 312, 316, 210 N.W. 34, 36 (1926) (nonpayment of taxes where payment was in lieu of additional rent: no waiver); *Priordale Mall II*, 411 N.W.2d at 585 (lease provisions not expressly related to real consideration: waiver); *Common Bond Housing v. Beier,* UD-1951204625 (Minn. Dist. Ct. 4th Dist. Feb. 23, 1996) (Appendix 227).

(2) *MCDA v. Powell*

Some confusion has resulted from *MCDA v. Powell*, 352 N.W.2d 532 (Minn. Ct. App. 1984), where the Court of Appeals held that a non-waiver clause in a public housing lease was valid. The Court went on to comment in *dictum* that acceptance of rent does not necessarily manifest the intent to waive notice. The Court did not discuss waiver of breach. *Id.* at 534 (emphasis added). Even courts which agree with the *Powell* court's analysis on waiver of notice do not agree that an analysis of intent is necessary in a waiver of breach case. *See Loring Towers Apartments Limited Partnership v. Ferrer*, No. UD-1901226507 at 2 (Minn. Dist. Ct. 4th Dist. Jan. 10, 1991) (Appendix 15.A) ("intention of the landlord in accepting money tendered as rent is not material").

In *Priordale Mall II*, the Court distinguished *Powell*, noting that Priordale Mall's lease did not protect it from waiver of past breaches by acceptance of rent, and that it accepted rent knowing of the breaches and the tenant's intention to assert waiver. 411 N.W.2d at 585. The *Linden Corp* Court did not cite *Powell* or discuss intent to waive, and rather cited *Kenny* and *Priordale Mall II*. *Id.* at 3-4.

(3) The lease contains an enforceable nonwaiver clause

A nonwaiver clause can eliminate a waiver defense. *Las Americas, Inc. v. American Indian Neighborhood Development Corp.*, No. A04-505, 2004 WL 2710061 (Minn. Ct. App. Nov. 30, 2004) (unpublished) (affirmed ruling of no waiver of breach where lease contained broad non-waiver clause and landlord's payment of rent received from tenants into court did not constitute waiver); *Common Bond Housing v. Beier,* UD-1951204625 (Minn. Dist. Ct. 4th Dist. Feb. 23, 1996) (Appendix 227); *Loring Towers Apartments Limited Partnership v. Ferrer* at 2 (Appendix 15.A), citing *Priordale Mall Investors, 411 N.W.2d at 585;* Powell, 352 N.W.2d at 534.

However, there are two types of clauses in leases commonly called non-waiver clauses, but only one type may serve as a non-waiver clause for the purposes of the waiver of breach defense. A clause which protects the landlord from waiver of *past* breaches by acceptance of rent may be enforceable. *Priordale Mall Investors*, 411 N.W.2d at 585; *P*owell, 352 N.W.2d at 534; *Smithrud v. McDaniel*, No. UD-195050529 (Minn. Dist. Ct. 4th Dist. May 22, 1995) (Appendix 130) (waiver provision enforced).

However, a clause which states that acceptance of rent following breach of the lease shall not constitute a waiver of a *subsequent* breach does not protect the landlord from waiver of *past* breaches. *Priordale Mall Investors*, 411 N.W.2d at 584-85; *Buckeye Realty Co. v. Elias,* No. CX-91-0697 at 6-7 (Minn. Dist. Ct. 10th Dist. Aug. 6 1991) (Appendix 15.E) (election of remedies clause was not an express non-waiver clause and did not protect landlord from waiver of past breaches by acceptance of rent).

A lease provision stating that acceptance of rent does not waive rental payment obligations is not a non-waiver of breach clause. *Plymouth Avenue Town Houses & Apartments v. Toussaint*, No. UD-

1980707535 (Minn. Dist. Ct. 4th Dist. Jul. 27, 1998) (Appendix 358) (dismissal for waiver of breach where lease provision stating that acceptance of rent does not waive rental payment obligations was not a non-waiver of breach clause)

Because a non-waiver clause may be modified by subsequent conduct, the mere presence of a non-waiver clause does not automatically bar a waiver claim. *Pollard v. Southdale Gardens of Edina Condominium Assn.*, 698 N.W.2d 449 (Minn. 2005). *See McNair v. Doub*, No. UD-1960708524 (Minn. Dist. Ct. 4th Dist. Aug.12, 1996) (Appendix 205) (proof of retaliation may void a landlord's non-waiver lease provision). *See generally* Y. Rosmarin, *Stopping Defaults With Late Payments,* Clearinghouse Rev. 154 (May/June 1992) (Appendix 15.H) (discussion of waiver and estoppel theories and challenges to non-waiver clauses).

(4) Ongoing lease violations

If the landlord can prove ongoing lease violations which also are current lease violations, acceptance of rent might not waive the breach claim. *Bossen Terrace v. Price*, No. C5-98-434 and C1-98-480 (Minn. Ct. App. Oct. 6, 1998) (Appendix 312) (Acceptance of rent does not waive an accumulation of violations required to prove repeated violations of the lease); *Rogers v. Stewart*, No. UD-1961029511 (Minn. Dist. Ct. 4th Dist. Jan. 6, 1997) (Appendix 290) (Ongoing damage to apartment; tenant did not prove waiver of breach).

(5) Payment of rent into court

Payment of rent received from the tenant and paid into court might not constitute acceptance of rent and waiver. *Las Americas, Inc. v. American Indian Neighborhood Development Corp.*, No. A05-2004 WL 2710061 (Minn. Ct. App. Nov. 30, 2004) (unpublished) (affirmed ruling of no waiver of breach where lease contained broad non-waiver clause and landlord's payment of rent received from tenants into court did not constitute waiver).

c. *Waiver of a nonwaiver clause*

Because a non-waiver clause may be modified by subsequent conduct, the mere presence of a non-waiver clause does not automatically bar a waiver claim. *Pollard v. Southdale Gardens of Edina Condominium Assn.*, 698 N.W.2d 449 (Minn. 205). *See McNair v. Doub*, No. UD-1960708524 (Minn. Dist. Ct. 4th Dist. Aug.12, 1996) (Appendix 205) (proof of retaliation may void a landlord's non-waiver lease provision). *See generally* Y. Rosmarin, *Stopping Defaults With Late Payments,* Clearinghouse Rev. 154 (May/June 1992) (Appendix 15.H) (discussion of waiver and estoppel theories and challenges to non-waiver clauses).

5. Waiver of breaches by executing a new lease

If the landlord subsequently agrees to the continuance of the possession of the premises, as in executing a new lease, with knowledge of alleged breaches of the lease, the landlord may be waiving the alleged breaches in the same manner that the landlord waives the affect of a prior notice to quit. In *St. Cloud Housing and Redevelopment Authority v. Slayton*, No. C9-98-1671 (Minn. Dist. Ct. 10th Dist. Nov. 3, 1998) (Appendix 365) (Danforth, J.), the court concluded that the Public Housing Authority accepted the tenant's late recertification, and the PHA's acceptance of rent from the tenant in a private agency along with the PHA's recertification and renewal of the lease constituted waiver of lease violations. *See Arcade Investment Co. v. Gieriet,* 99 Minn. 277, 279, 109 N.W. 250, 252 (1906); *Common Bond Housing v. Beier,* UD-

1951204625 (Minn. Dist. Ct. 4th Dist. Feb. 23, 1996) (Appendix 227) (waiver of breach by renewing the lease). *See generally* discussion, *supra* at VI.F.4-5 (waiver of notice).

6. Waiver of breaches by demanding subsequent rent in an eviction (unlawful detainer) action

This defense has been eliminated in actions alleging both nonpayment of rent and breach of the lease. Minn. Stat. § 504B.285 (formerly § 566.03), subd. 5, added by 1993 Minn. Laws Ch. 165, § 3. *See* discussion, *supra* and *infra* at III., VI.E.19, VI.E.20.c., VI.G.21. However, this theory remains viable in cases where the action alleges nonpayment of rent and holding over after notice to quit. *See* discussion, *supra*, at VI.F.6.

7. Improper late fees. See discussion, *supra* at VI.E.10.

8. Discrimination

See Fair Housing Act, 42 U.S.C. § 364 (protected classes include race, color, religion, sex, affectional preference, familial status, disability, and national origin); Minnesota Human Rights Act, Minn. Stat. § 363.03 (federal protected classes plus receipt of public assistance); Minneapolis Civil Rights Ordinance, MPLS. CODE OF ORD. § 139.40 (state protected classes).

The discrimination defense can be raised in several contexts:

a. in a nonpayment of rent case, where the landlord has increased the rent or assessed late fees against protected class members differently than against others;

b. in a holding over case, where the landlord issued the termination notice because the tenant is a member of a protected class, or in retaliation against the tenant's efforts to protect the tenant from discrimination. *See* discussion, *supra*, at VI.F.3, 8; and

c. in a breach of lease case, where the landlord is enforcing the lease provision only against members of the protected class, or enforces a lease provision that only applies to members of a protected class.

In *Zeman v. West*, No. UD-1910402521 (Minn. Dist. Ct. 4th Dist. Apr. 30, 1991) (Appendix 16.B), plaintiff required recipients of government benefits to have the government vendor their rent to plaintiff, while not requiring the same of other tenants; defendant did not vendor her rent because she was concerned about repairs. Plaintiff issued a notice to quit allegedly based on not vendoring rent and not paying the entire security deposit. The court held that the lease provision violated Minn. Stat. § 363.03, and plaintiff failed to rebut defendant's *prima facie* case of discrimination). *See Rogers v. Stewart*, No. UD-1961029511 (Minn. Dist. Ct. 4th Dist. Jan. 6, 1997) (Appendix 290) (Requiring public assistance recipients to vendor rent without substantially similar requirement for non-public assistance recipients constitutes unlawful discrimination and is void); *Amsler v. Wright*, No. UD-1960502510 (Minn. Dist. Ct. 4th Dist. May 30, 1996) (Appendix 186) (lease requirement that tenant/recipient of public assistance have her rent vendored directly to the landlord is a discriminatory practice; landlord ordered not to require public assistance vendoring); *Hegenes Properties v. Reed,* No. UD-4920624902 (Minn. Dist. Ct. 4th Dist. Aug. 7, 1992) (Appendix 16.B.1) (landlord could not evict tenant, a single parent with three children, for allegedly violating lease provision prohibiting an adult from supervising more than two children at the swimming pool; provision discriminated on basis of marital and family status in violation of Minn. Stat. § 363.03, subd. 2, 42 U.S.C. § 3604 *et seq.* and 20 C.F.R. § 100.65).

Tenants and tenants' counsel should carefully consider whether they can adequately prove discrimination in the limited time available to prepare for an eviction (unlawful detainer) trial, since unsuccessful prosecution of the discrimination defense may preclude a subsequent discrimination lawsuit or administrative complaint with the United States Department of Housing and Urban Development, Minnesota Human Rights Department, or Minneapolis Civil Rights Department. *See* discussion, *supra* at V.N. (collateral estoppel). One option would be to remove the action along with the discrimination claim to federal court. *See* Defendant's Memorandum In Opposition to Plaintiff's Motion to Remand, *Bossen Terrace v. Ewing*, No. 4-91-Civ. 824 (D. Minn. Nov. 6, 1991) (discussion of cases; action settled in federal court) (Appendix 28).

9. Reasonable Accommodation of disabilities

Until recently, the analysis of a landlord's affirmative obligation to reasonably accommodate the disability of the tenant was limited to landlords receiving federal financial assistance. *See* The Rehabilitation Act of 1973, 29 U.S.C. §§ 706, 794; 24 C.F.R. Part 8. However, recent amendments to the Fair Housing Act extend the obligation to reasonably accommodate disabilities to private landlords. 42 U.S.C. § 3604(f)(3); 24 C.F.R. Part 100. The Minnesota Human Rights Act also makes it unlawful to discriminate in housing on the basis of disability. MINN. STAT. § 363.03, subds. 2-2a. *See* Wayman, *Housing Discrimination Against Persons With Disabilities* (Appendix 302).

The landlord also must not take action against the tenant based on a disability. *Neudecker v..Boisclair Corporation*, 351 F.3d 361 (8th Cir. 2003) (reversed dismissal of tenant's action for harassment based on disability, and ordered that tenant should be allowed to recast a claim under the Privacy Act of 1974, 5 U.S.C. § 552a, as a common-law privacy claim under *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 236 (Minn.1998)).

In *Dominium Management Services, Inc. v. C.L.,* No. HC-1021106500 (Minn. Dist. Ct. 4th Dist. Mar. 4, 2003) (Appendix 492), the trial court found that a Section 8 Voucher notice of lease termination required by term lease constituted notice to quit under Minn. Stat. § 504B.285 (formerly § 566.03), Subd. 2; and the defendant complained of conditions, some of which were found by the city inspector and plaintiff as well-founded. The court concluded that the plaintiff did not overcome the presumption of retaliation by claiming failure to allow the plaintiff to enter the apartment, where the tenant complied with her separate agreement over notice for apartment visits. The court also concluded that the plaintiff reasonably accommodated the defendant's disability in the past, but failed to comply with this ongoing obligation when the plaintiff failed to respond to the defendant's proposal of a mental health case management workers serving as a communication intermediary between plaintiff and defendant. The court dismissed that action and awarded the defendant costs and disbursements.

The Court of Appeals affirmed in *Dominium Management Services, Inc. v. C.L.,* No. A03-85, 2003 WL 22890386 (Minn. Ct. App. Dec. 9, 2003) (unpublished). On the retaliation claim, the Court focused on the timing of the eviction, concluding that it was "significant that Dominium did not terminate C.L.'s year-to- year lease and file the resulting eviction action until 2002, after C.L. had reported numerous housing violations to the Richfield authorities and after the encounter with the regional property manager." On the reasonable accommodation claim, the Court affirmed the trial court's finding that the defendant was disabled, and concluded that the defendant's request for neutral third party involvement would not impose an undue hardship on the plaintiff.

See Vesterstein v. Branley, No. C5-92-600723 (Minn. Dist. Ct. 6th Dist. May 8, 1992) (Appendix 18.G.1) (landlord failed to show that tenant committed material breach of lease by harassing and disturbing

neighbors and the landlord where landlord knew of tenant's mental condition when executing the second lease agreement). *But see Minneapolis Public Housing Authority v. Demmings*, No. C5-94-2045 (Minn. Ct. App. May 9, 1995), FINANCE & COMMERCE at 20 (May 12, 1995) (Appendix 159) (unpublished: public housing, possession and sale of illegal drugs; law does not preclude landlord from adopting reasonable rules, such as prohibition of possession of drugs; tenant admitted not using drugs for two years before alleged drug trafficking activity).

Some confusion has resulted from recent Court of Appeals decisions discussing reasonable accommodation. In *Housing and Redevelopment Authority of Winona v. Fedorko*, C4-94-884 (Minn. Ct. App. Nov. 22, 1994), FINANCE AND COMMERCE 43 (Nov. 25, 1994) (Appendix 91) (unpublished), the Court stated that the *McDonnell-Douglas* standard of shifting burdens in regular fair housing claims should be applied to reasonable accommodation claims. The standard does not fit a reasonable accommodation claim very well, since the reasonable accommodation claims asserts that the landlord did not undertake a specific fair housing obligation, while other discrimination claims assert that the landlord engaged in discrimination. On the other hand, in *Nicollet Towers, Inc. v. Georgiff*, C5-94-1364 (Minn. Ct. App. Feb. 7, 1995), FINANCE AND COMMERCE 53 (Feb. 10, 1995) (Appendix 89) (unpublished), the Court discussed reasonable accommodation cases, without mention of *McDonnell-Douglas*. *See Cornwell and Taylor, LLP v. Moore*, No. C8-00-1000, 2000 WL 1887528 (Minn. Ct. App. 2000) (unpublished) (affirmed trial court ruling that landlord has the burden to show that no reasonable accommodation will eliminate or acceptably minimize any risk that the tenant poses on other residents; remanded for findings on whether proposed accommodation was reasonable).

The tenant's reasonable accommodation claims was unsuccessful in *Anoka County Community Action Program v. Solmonson*, No. A05-1251, 2006 WL 1320332 (Minn. Ct. App. May 16, 2006) (unpublished) (affirmed trial court decision that tenant failed to prove landlord's failure to reasonably accommodate disability, where landlord granted one request to allow a companion animal on the property, but denied another request to relocate tenant because landlord had no other available appropriate housing that would fit tenant's needs).

A landlord may not have to accommodate a tenant's illegal drug use. *Public Housing Agency of St. Paul v. Ewig,* No. A07-1199, 2008 WL 2106692 (Minn. Ct. App. May 20, 2008) (unpublished).

Examples of a landlord's failure to reasonably accommodate a tenant with disabilities include:

a. *Failure to arrange for chore services to help a tenant prepare for spraying her apartment*

Central Community Housing Trust v. Anderson, No. UD-1901102531 (Minn. Dist. Ct. 4th Dist. Nov. 28, 1990) (Appendix 18.D);

b. *Insisting that the tenant clean up her apartment while she was physically unable to do so*

Schuett v. Anderson, 386 N.W.2d 249, 253 (Minn. Ct. App. 1986);

c. *Failing to forebear from eviction in order to give the tenant an opportunity to pursue a program or treatment that could mitigate further violations of the lease*

City Wide Associates v. Penfield, No. 89-SP-9147-S (Mass. Dist. Ct. Hampden Hous. Ct. Apr. 21, 1989, *aff'd* 409 Mass. 140, 564 N.E.2d 1003 (1991)) (Appendix 18.G); *Dominium Management Services, Inc. v. Farrell*, No. C5-96-5544 (Minn. Dist. Ct. 10th Dist. Mar. 14, 1997) (Appendix 253) (Action dismissed where landlord refused reasonable accommodation of tenant who had threatened others; a tenant is considered "otherwise qualified" in conjunction with reasonable accommodation, rather than being otherwise qualified before reasonable accommodation is attempted; tenant proposed she not return until her doctors stated she could live independently and without being a threat to others; other tenants' fear of mental illness does not justify eviction); *Dover Hill Co. v. Morris*, No. UD-1960705514 (Minn. Dist. Ct. 4th Dist. Jul. 31, 1996) (Appendix 233) (Section 8 Project: landlord did not prove that ten year old son of tenant assaulted another boy by inappropriately pretending to use a knife against himself; no express finding of disability but implication of disability; landlord did not work with tenant to facilitate resolution of any problems; future incidents taken with this event in considering future use of community resources, may constitute good cause for eviction). *But see MPHA v. Rozas*, C0-95-956 (Minn. Ct. App. Jan. 9, 1996), FINANCE AND COMMERCE at 30 (Jan. 12, 1996) (Appendix 232) (unpublished: PHA reasonably accommodated substance abuse by allowing tenant to retain lease during incarceration).

d. Failing to allow the tenant to pay rent late when the tenant received government benefits late

e. Failing to allow the tenant to withdraw a notice to quit if the landlord has not re-rented the apartment

f. Failure to make minor modifications in the lease or rules to accommodate the tenant's disability

A landlord may be required to grant an exception to a no pet policy to accommodate a tenant's mental or physical disability. *Whittier Terrace v. Hampshire*, 26 Mass. App. Ct. 1020, 532 N.E. 2d 712 (1989); *Exelberth v. River Bay Corporation*, No. 02-93-0320-1 (HUD Sept. 8, 1994) (ALJ) (Appendix 329); *Common Bond Housing v. Beier,* UD-1951204625 (Minn. Dist. Ct. 4th Dist. Feb. 23, 1996) (Appendix 227) (no breach of lease by keeping a cat as an appropriate doctor-prescribed accommodation); *See In re Harvey* (MPHA Sep. 30, 1994) (Appendix 67) (reversal of termination of Section 8 certificate where visually impaired tenant could not easily read housing authority information or be expected to remember verbatim what is read to him several months before).

g. Proceeding with eviction where the tenant had cured the violation

Minneapolis Public Housing Authority v. Otto, No. UD-1970326517 (Minn. Dist. Ct. 4th Dist. May 9, 1997) (Appendix 279) (Forfeiture of tenant's public housing lease, considering his disability, indigency, and his willingness to cure any claimed breaches, would be inappropriate).

h. Refusing to continue reasonable accommodations

Dominium Management Services, Inc. v. C.L., No. HC-1021106500 (Minn. Dist. Ct. 4th Dist. Mar. 4, 2003) (Appendix 492) (trial court also concluded plaintiff reasonably accommodated defendant's disability in the past, but failed to comply with this ongoing obligation when the plaintiff failed to respond to the defendant's proposal of a mental health case management workers serving as a communication intermediary between plaintiff and defendant), *affirmed*, *Dominium Management Services, Inc. v. C.L.,* No. A03-85, 2003 WL 22890386 (Minn. Ct. App. Dec. 9, 2003) (affirmed the trial court's finding that the

defendant was disabled, and concluded that the defendant's request for neutral third party involvement would not impose an undue hardship on the plaintiff).

i. Refusing to work through an intermediary

Dominium Management Services, Inc. v. C.L., No. HC-1021106500 (Minn. Dist. Ct. 4th Dist. Mar. 4, 2003) (Appendix 492) (trial court also concluded plaintiff reasonably accommodated defendant's disability in the past, but failed to comply with this ongoing obligation when the plaintiff failed to respond to the defendant's proposal of a mental health case management workers serving as a communication intermediary between plaintiff and defendant), *affirmed*, *Dominium Management Services, Inc. v. C.L.,* No. A03-85, 2003 WL 22890386 (Minn. Ct. App. Dec. 9, 2003) (affirmed the trial court's finding that the defendant was disabled, and concluded that the defendant's request for neutral third party involvement would not impose an undue hardship on the plaintiff).

j. Refusing to allow minor ordinance violation

Larson v. _____, No. HC 030324502 (Minn. Dist Ct. 4th Dist. Feb. 13, 2004) (Appendix 528) (referee will not reconsider judge's order on waiver; tenant meets definition of disabled; requiring mobility disabled tenant to park vehicle further away than other tenants is not a reasonable accommodation; while parking tenant's vehicle near the home violated an ordinance, most other tenants also violated the unenforced ordinance; tenant's ordinance violations were repeated but not serious; tenant may raise landlord's violation of the covenants of habitability as a cause of tenant violation of the lease, where park owner's park design violated a local ordinance and forces tenant to violate the same ordinance).

Each of the form answers in these materials lists reasonable accommodation defenses applicable to each type of housing. *See* Forms Appendix, Answer Forms.

10. Public and government subsidized housing

a. Notice and administrative process

Landlords participating in public and government subsidized housing programs must comply with the statutory and regulatory requirements of the program. *RFT & Assoc's. v. Smith,* 419 N.W.2d 109 (Minn. Ct. App. 1988); *Housing and Redevelopment Authority of Waconia v. Chandler,* 403 N.W.2d 708, 711 (Minn. Ct. App. 1987); *Hoglund-Hall v. Kleinschmidt,* 381 N.W.2d 889, 895 (Minn. Ct. App. 1986). All programs (except the Section 8 existing housing certificate and voucher programs) require issuance of a lease termination notice before the landlord may file the action. The complaint may not allege grounds not raised in the notice. *See* discussion, *supra* at VI.F.10. *See generally* F. FUCHS, INTRODUCTION TO HUD-PUBLIC AND SUBSIDIZED HOUSING PROGRAMS; HUD HOUSING PROGRAMS: TENANT'S RIGHTS.

b. Good cause for eviction

The trial court must make specific finding on material noncompliance. *Chancellor Manor v. Thibodeaux*, 28 N.W.2d 193 (Minn. Ct. App. 2001) (landlord must prove failure to report income was fraudulent by a preponderance of the evidence).

(1) Tenant's conduct

Most of the programs require materials lease violations or good cause for eviction related to the tenant's conduct. Many Minnesota decisions have discussed and applied these standards.

(a) *Decisions holding for the tenant include:*

(1) Alterations

Berry v. Lane, Nos. UD-1980629502 and UD-1980603900 (Minn. Dist. Ct. 4th Dist. Jul. 22, 1998) (Appendix 310A) (Landlord did not prove breaches of the lease to warrant termination, where tenant brought pets to the property to deal with mice but removed the pets at the landlord's request, a tenant removed a refrigerator which did not work and replaced it, the tenants and her children caused *de minimis* damage to the property); *Jorstad v. Connor*, No. UD-1951002514 (Minn. Dist. Ct. 4th Dist. Oct. 23, 1995) (Appendix 150) (Section 8 certificate/voucher, no material violation of the lease where tenant moved fixtures; court recommended mediation).

(2) Cure

Berry v. Lane, Nos. UD-1980629502 and UD-1980603900 (Minn. Dist. Ct. 4th Dist. Jul. 22, 1998) (Appendix 310A) (Landlord did not prove breaches of the lease to warrant termination, where tenant brought pets to the property to deal with mice but removed the pets at the landlord's request, a tenant removed a refrigerator which did not work and replaced it, the tenants and her children caused *de minimis* damage to the property); *Minneapolis Public Housing Authority v. Otto*, No. UD-1970326517 (Minn. Dist. Ct. 4th Dist. May 9, 1997) (Appendix 279) (Public housing: no good cause for eviction where tenant got rid of the dog and denied access to the guests who offended other tenants).

(3) Damage

Damage to the premises must be more than minimal to be a material breach or material non-compliance with the lease. *Crossroads of Edina v. _____,* No. HC-1011018513 (Minn. Dist Ct. 4th Dist. Nov. 16, 2001) (Appendix 491) (HUD subsidized project: damage was material non-compliance); *Stein v. _____,* No. HC-1940707539 (Minn. Dist Ct. 4th Dist. July 21, 1994) (Appendix 578) (Section 8 lease: damage not a material violation); *Friederrichs v. _____,* No. UD-1940608542 (Minn. Dist Ct. 4th Dist. June 1994) (Appendix 502) (damage was not material).

In *Teamster Retiree Housing of Minneapolis, Inc. v. Goldstein*, No. UD-1960919514 (Minn. Dist. Ct. 4th Dist. Oct. 21, 1996) (Appendix 238), the landlord of a Section 8 New Construction and Section 202 Elderly or Handicapped housing project sought to evict the tenant for various alleged lease violations. The court held that under 24 C. F. R. Sec. 247.3, the landlord could evict the tenant only for *substantial* lease violations or *material minor* violations. The court concluded that the landlord had not met this standard, where the damages caused by the tenant were minor, the tenant agreed to fix them, the landlord could have made repairs and assessed cost to the tenant, some problems were not caused by the tenant, and some storage problems were not hazardous. The Court noted that these disputes could and should be resolved by greater cooperation, better communication or mediation, but the tenant should not be evicted for these kinds of disputes. *See Ford v. _____,* No. HC-1020325505 (Minn. Dist. Ct. 4th Dist. Apr. 26, 2002) (Appendix 500) (Section 8 voucher, plaintiff failed to prove that loud cars belonged to tenant's guests, that defendant knew or should have known that guests had firearms, that children hanging around the property were defendant's guests, that trash in the yard was from defendant's apartment, that a basement electrical fire resulted from defendant's conduct, that the notice of intent to condemn resulted from defendant's conduct, and that the smell of marijuana came from defendant's apartment; plaintiff failed to allege drug use with any

particularity; action dismissed and defendant awarded costs and disbursements); *Berry v. Lane*, Nos. UD-1980629502 and UD-1980603900 (Minn. Dist. Ct. 4th Dist. Jul. 22, 1998) (Appendix 310A) (Landlord did not prove breaches of the lease to warrant termination, where tenant brought pets to the property to deal with mice but removed the pets at the landlord's request, a tenant removed a refrigerator which did not work and replaced it, the tenants and her children caused *de minimis* damage to the property); *Northgate Housing Ltd. v. McLeod*, No. S0441-94 CnC (Vt. Sup. Ct. Chitttenden Cty. Jan. 24, 1995) (Appendix 152) (no serious or repeated lease violations where landlord waived or did not prove tenant did not pay deposit five years earlier; allegations of damaging apartment, disturbing tenants, staling mulch, and abandoning lumber were not proven but would not have been sufficient; and fiancee was not an unauthorized resident following landlord's improper denial of his addition to the lease); *Regency Park Apartments v. Gidcumb*, No. 86-X-003 (Kty. Cir. Ct. Warren Cty. Apr. 3, 1986), *affirming* No. 86-C-062 (Kty. Dist. Ct. Warren Cty. Feb. 6, 1986) (Appendix 153) (no material non-compliance with lease where tenant paid rent late but landlord accepted it; and tenant caused $114 in damage, could not pay it within 15 days after receiving bill while receiving low income on AFDC, tenant offered to pay $78 before filing and had all of the money before hearing).

(4) Deposit

Northgate Housing Ltd. v. McLeod, No. S0441-94 CnC (Vt. Sup. Ct. Chitttenden Cty. Jan. 24, 1995) (Appendix 152) (no serious or repeated lease violations where landlord waived or did not prove tenant did not pay deposit five years earlier; allegations of damaging apartment, disturbing tenants, staling mulch, and abandoning lumber were not proven but would not have been sufficient; and fiancee was not an unauthorized resident following landlord's improper denial of his addition to the lease).

(5) Domestic violence

The Violence Against Women and Department of Justice Reauthorization Act of 2005, commonly called the Violence Against Women Act (VAWA), bars evictions for lease violations which are the result of domestic violence, dating violence or stalking of the tenant or immediate family members. 42 U.S.C. §1437d (l). *See Metro North Owners, LLC v. Thorpe,* _____ N.Y.S.2d _____, 2008 WL 5381477 (N.Y. City Civ .Ct Dec. 25, 2008) (dismissal of eviction claiming nuisance where tenant was victim of domestic violence and entitled to protection under VAWA).

(6) Failure to prove violation

Ford v. _____*,* No. HC-1020325505 (Minn. Dist. Ct. 4th Dist. Apr. 26, 2002) (Appendix 500) (Section 8 voucher, plaintiff failed to prove that loud cars belonged to tenant's guests, that defendant knew or should have known that guests had firearms, that children hanging around the property were defendant's guests, that trash in the yard was from defendant's apartment, that a basement electrical fire resulted from defendant's conduct, that the notice of intent to condemn resulted from defendant's conduct, and that the smell of marijuana came from defendant's apartment; plaintiff failed to allege drug use with any particularity; action dismissed and defendant awarded costs and disbursements); *Minneapolis Public Housing Authority v. Brown*, No. UD-1960306523 (Minn. Dist. Ct. 4th Dist. May 16, 1996) (Appendix 235) (landlord did not prove that tenant engaged in drug-related criminal activity on or near the premises); *Johnson v. Bostic*, No. 1950508539 (Minn. Dist. Ct. 4th Dist. June 5, 1995) (Appendix 151) (Section 8 certificate/voucher, landlord did not prove tenant did not shovel snow, provision prohibiting young boy and girl from sharing bedroom was invalid, neighbor disturbed by normal noise of small children); *Kray v. Humphrey*, No. UD-1950110500 (Minn. Dist. Ct. 4th Dist. Feb. 8, 1995) (Appendix 132) (landlord did not prove an unauthorized resident and failure to pay back rent, and tenant proved that part of the rent due resulted from housing authority abatement of rent).

(7) Housekeeping

Johnson v. Bostic, UD-1951205504 (Minn. Dist. Ct. 4th Dist. Feb. 12, 1996) (Appendix 234) (housekeeping problems and noise from tenant in §8 certificate housing did not amount to good cause); *Buckeye Reality Co., v. Elias*, No. CX-91-0697 (Minn. Dist. Ct. 10th Dist. Aug. 6, 1991) (Appendix 15.E) (minor housekeeping violations and occupancy by unauthorized persons who left the premises after verbal notice from the landlord probably did not constitute material noncompliance with the lease or other good cause); *Hilltop Lane Apartments v. Craddock*, No. C988667 (Minn. Dist. Ct. 5th Dist. Aug. 26, 1988) (Appendix 18.N) (housekeeping).

(8) ID

Bethune Associates v. Davis, No. C8-95-705 (Minn. Ct. App. Oct. 24, 1995), FINANCE AND COMMERCE 27 (Oct. 27, 1995) (Appendix 149) (unpublished: subsidized project, no material lease violation or repeated violations where tenant did not show identification to security guard upon request, and tenant defended himself when attacked by security guard).

(9) Invalid lease provision

Johnson v. Bostic, No. 1950508539 (Minn. Dist. Ct. 4th Dist. June 5, 1995) (Appendix 151) (Section 8 certificate/voucher, landlord did not prove tenant did not shovel snow, provision prohibiting young boy and girl from sharing bedroom was invalid, neighbor disturbed by normal noise of small children).

(10) Noise and disturbances

Ford v. _____, No. HC-1020325505 (Minn. Dist. Ct. 4th Dist. Apr. 26, 2002) (Appendix 500) (Section 8 voucher, plaintiff failed to prove that loud cars belonged to tenant's guests, that defendant knew or should have known that guests had firearms, that children hanging around the property were defendant's guests, that trash in the yard was from defendant's apartment, that a basement electrical fire resulted from defendant's conduct, that the notice of intent to condemn resulted from defendant's conduct, and that the smell of marijuana came from defendant's apartment; plaintiff failed to allege drug use with any particularity; action dismissed and defendant awarded costs and disbursements); *Johnson v. Bostic*, UD-1951205504 (Minn. Dist. Ct. 4th Dist. Feb. 12, 1996) (Appendix 234) (housekeeping problems and noise from tenant in §8 certificate housing did not amount to good cause); *Jankord v. Thompson*, No. UD-1950606524 (Minn. Dist. Ct. 4th Dist. June 26, 1995) (Appendix 166) (Section 8 certificate/voucher, landlord did not prove that tenant or her family had a history of disturbing neighbors by noise or other activities); *Johnson v. Bostic*, No. 1950508539 (Minn. Dist. Ct. 4th Dist. June 5, 1995) (Appendix 151) (Section 8 certificate/voucher, landlord did not prove tenant did not shovel snow, provision prohibiting young boy and girl from sharing bedroom was invalid, neighbor disturbed by normal noise of small children); *Vesterstein v. Branley,* No. C5-92-600723 (Minn. Dist. Ct. 6th Dist. May 8, 1992) (Appendix 18.G.1) (tenant did not commit material breach of lease by harassing and disturbing neighbors and the landlord where the landlord knew of the tenant's mental condition when executing the second lease agreement); *Hegenes Properties v. Reed,* No. UD-4920624902 (Minn. Dist. Ct. 4th Dist. Aug. 7, 1992) (Appendix 16.B.1) (tenant's disturbance of other tenant on one occasion and violation of city code on one other occasion did not constitute serious or repeated violations of the lease); *Northgate Housing Ltd. v. McLeod*, No. S0441-94 CnC (Vt. Sup. Ct. Chitttenden Cty. Jan. 24, 1995) (Appendix 152) (no serious or repeated lease violations where landlord waived or did not prove tenant did not pay deposit five years earlier; allegations of damaging apartment, disturbing tenants, staling mulch, and abandoning lumber were not

proven but would not have been sufficient; and fiancee was not an unauthorized resident following landlord's improper denial of his addition to the lease).

(11) Late fees

Central Community Housing Trust v. Anderson, No. UD-1900611534 at 3 (Minn. Dist. Ct. 4th Dist. July 6, 1990) (Appendix 18.B) ($20.00 late fee bore no relation to cost of landlord's preparation of form notice and slipping the notice under the tenant's door, triggering the tenant's prompt action in paying the rent).

(12) Recertification

Chancellor Manor v. Thibodeaux, 28 N.W.2d 193 (Minn. Ct. App. 2001) (trial court must make specific finding on material noncompliance; landlord must prove failure to report income was fraudulent by a preponderance of the evidence); *St. Cloud Housing and Redevelopment Authority v. Slayton*, No. C9-98-1671 (Minn. Dist. Ct. 10th Dist. Nov. 3, 1998) (Appendix 365) (Danforth, J.) (Public Housing Authority accepted the tenant's late recertification, PHA did not prove that the tenant's daughter's baby sitting job away from the premises constituted operation of a daycare business on the premises, the repayment agreement between the parties over back rent did not provide for eviction as a consequence for non-payment or late payment, and the PHA's acceptance of rent from the tenant in a private agency along with the PHA's recertification and renewal of the lease constituted waiver of lease violations).

(13) Rent

St. Cloud HRA v. Rothchild, No. C7-99-4306 (Minn. Dist. Ct. 7th Dist. Dec. 21, 1999) (Appendix 419) (Public housing authority filed eviction action based on nonpayment of rent and material lease violations by repeated late payment of rent; court held that tenant's statutory right to redeem could not be defeated by a claim of material violation related to rent.; *Horning Properties v. Wang*, No. C3-98-1211 (Minn. Dist. Ct. 10th Dist. Jun. 23, 1998) (Appendix 337) (Meyer, J.) (Rural Housing and Community Development Service Subsidized Housing Project; no lease violation where the tenant tendered but the landlord refused April rent, so this event did not support the eviction notice; tenant legally resided on the property during her incarceration so as to not breach the lease); *Stark Metropolitan Housing Authority v. Ruffin,* No. CA-8751, 1992 W.L. 147443 (Ohio Ct. App. June 15, 1992) (Appendix 11J.1) (tenant not at fault for nonpayment of rent); *Housing Authority of St. Louis County v. Boone*, 747 S.W.2d 311 (Mo. Ct. App. 1988) (public housing, tenant not at fault for nonpayment of rent); *Regency Park Apartments v. Gidcumb*, No. 86-X-003 (Kty. Cir. Ct. Warren Cty. Apr. 3, 1986), *affirming* No. 86-C-062 (Kty. Dist. Ct. Warren Cty. Feb. 6, 1986) (Appendix 153) (no material non-compliance with lease where tenant paid rent late but landlord accepted it; and tenant caused $114 in damage, could not pay it within 15 days after receiving bill while receiving low income on AFDC, tenant offered to pay $78 before filing and had all of the money before hearing); *Maxton Housing Authority v. McClean*, 313 N.C. 277, 328 S.E.2d 290 (1985) (public housing, tenant not at fault for nonpayment of rent).

(14) Self-defense

In *Public Housing Agency for the City of St. Paul v.* _____, No. HG-CV-08-4518, Order (Minn. Dist. Ct. 2nd Dist. Jan. 22, 2009) (Appendix 615) (Judge Monahan), the public housing landlord authority filed an eviction action, claiming that the police responded to call from the tenant about serious fight between tenant and guest involving knives, and found small amount of marijuana. The tenant claimed self defense and that she did not know about marijuana. The court concluded possession of a small amount of marijuana

is not criminal activity under state law, and that the landlord presented no evidence of criminal conduct, disturbance, or impairment of the physical or social environment, health, safety, or enjoyment. The landlord also claimed that defense under Minn. Stat. § 504B.171 was preempted by *Rucker* and *Lor.* The court declined to rule on the issue, as it found that the landlord had not proven a breach of lease under federal law. *See Bethune Associates v. Davis*, No. C8-95-705 (Minn. Ct. App. Oct. 24, 1995), FINANCE AND COMMERCE 27 (Oct. 27, 1995) (Appendix 149) (unpublished: subsidized project, no material lease violation or repeated violations where tenant did not show identification to security guard upon request, and tenant defended himself when attacked by security guard).

(15) Temporary absence

Housing and Redevelopment Authority of Winona v. Fedorko, 1994 WL 654525, C4-94-884 (Minn. Ct. App. Nov. 22, 1994), FINANCE AND COMMERCE 43 (Nov. 25, 1994) (Appendix 91) (unpublished: public housing, while remanded for further findings, implied that eviction was not supported where tenant temporarily moved to a nursing home while litigating state's refusal to approve his personal care attendant); *Horning Properties v. Wang*, No. C3-98-1211 (Minn. Dist. Ct. 10th Dist. Jun. 23, 1998) (Appendix 337) (Meyer, J.) (Rural Housing and Community Development Service Subsidized Housing Project; no lease violation where the tenant tendered but the landlord refused April rent, so this event did not support the eviction notice; tenant legally resided on the property during her incarceration so as to not breach the lease).

(16) Termination of tenant's employment

Pheasant Ridge Limited Partnership v. _____, No. CV-07-2894 (Minn. Dist. Ct. 10th Dist. May 21, 2007) (Appendix 614) (Judge Mossey) (eviction dismissed where landlord could not terminate RHS tenancy for good cause without opportunity to cure, and on grounds that tenant was no longer employed by landlord); *Mountainview Place Apartments v. Ford*, No. 94CV1492 (Colo. Cty. Ct. Mar. 24, 1994) (Appendix 179) (Section 8 project tenancy was unaffected by employment agreement; termination of employment was not good cause for eviction); *Mountainview Place Apartments v. Ford*, No. 94CV1492 (Colo. Cty. Ct. Mar. 24, 1994) (Appendix 179) (Section 8 project tenancy was unaffected by employment agreement; termination of employment was not good cause for eviction).

(17) Unauthorized resident

Kray v. Humphrey, No. UD-1950110500 (Minn. Dist. Ct. 4th Dist. Feb. 8, 1995) (Appendix 132) (landlord did not prove an unauthorized resident and failure to pay back rent, and tenant proved that part of the rent due resulted from housing authority abatement of rent); *Buckeye Reality Co., v. Elias*, No. CX-91-0697 (Minn. Dist. Ct. 10th Dist. Aug. 6, 1991) (Appendix 15.E) (minor housekeeping violations and occupancy by unauthorized persons who left the premises after verbal notice from the landlord probably did not constitute material noncompliance with the lease or other good cause); *Northgate Housing Ltd. v. McLeod*, No. S0441-94 CnC (Vt. Sup. Ct. Chitttenden Cty. Jan. 24, 1995) (Appendix 152) (no serious or repeated lease violations where landlord waived or did not prove tenant did not pay deposit five years earlier; allegations of damaging apartment, disturbing tenants, staling mulch, and abandoning lumber were not proven but would not have been sufficient; and fiancee was not an unauthorized resident following landlord's improper denial of his addition to the lease). *See Carriagehouse Apartments v. Stewart*, No. UD-1970107501 (May 13, 1997) (Appendix 249) (Subsidized project: good cause for eviction where tenant poured gasoline on clothing, started a fire, and obstructed the response to the fire; no good cause where a tenant allowed an unauthorized resident to live with her).

(18) Violation of settlement agreement

In re Application of Johnson, No. 2384 (New York Sup. Ct. Nov. 18, 1999) (Appendix 522) (termination of public housing tenancy denied for tenant's isolated violation of settlement agreement excluding emancipated son from the property, given tenant's record and household).

(b) *Minnesota decisions finding good cause for eviction include:*

(1) Generally

Minneapolis Public Housing Authority v. McKinley, Nos. UD-1980312507 (Minn. Dist. Ct. 4th Dist. Aug. 21, 1998) (Appendix 348B) (Oleisky, J.) (affirmed the referee's conclusion on causes for eviction).

(2) Assault and threats

Hoglund-Hall v. Kleinschmidt, 381 N.W.2d at 891-93 (tenant assaulting and threatening others); *Anoka County Community Action Program v. Solmonson*, No. A05-1251, 2006 WL 1320332 (Minn. Ct. App. May 16, 2006) (unpublished) (affirmed trial court decision finding material violations of aggressive behavior toward other tenants); *Rush Riverview Apartments v. _____*, No. C3-01-0996 (Minn. Dist. Ct. 10th Dist. Aug. 7, 2001) (Appendix 567) (Judge Clifford) (violent conduct and noise constituted material non-compliance in HUD subsidized project; writ stayed for 7 days and until plaintiff complies with the trade name registration statute and pays defendant $250 in costs).

(3) Damage

Damage to the premises must be more than minimal to be a material breach or material non-compliance with the lease. *Crossroads of Edina v. _____,* No. HC-1011018513 (Minn. Dist Ct. 4th Dist. Nov. 16, 2001) (Appendix 491) (HUD subsidized project: damage was material non-compliance); *Stein v. _____,* No. HC-1940707539 (Minn. Dist Ct. 4th Dist. July 21, 1994) (Appendix 578) (Section 8 lease: damage not a material violation); *Friederrichs v. _____,* No. UD-1940608542 (Minn. Dist Ct. 4th Dist. June 1994) (Appendix 502) (damage was not material).

Carriagehouse Apartments v. Stewart, No. UD-1970107501 (May 13, 1997) (Appendix 249) (Subsidized project: good cause for eviction where tenant poured gasoline on clothing, started a fire, and obstructed the response to the fire; no good cause where a tenant allowed an unauthorized resident to live with her); *Borts Apartments, Inc. v. Muse*, No. UD-1981015524 (Minn. Dist. Ct. 4th Dist. Nov. 12, 1998) (Appendix 379) (Subsidized project eviction granted where tenant permitted guest to stay more than 30 days per year, tenant disturbances required security guard intervention, and there was minor damage to the unit.

(4) Failure to report income

H & Val J. Rothschild, Inc. v. Sampson, No. CX-95 396 (Minn. Ct. App. Oct. 24, 1995), FINANCE & COMMERCE at 28 (Oct. 27, 1995) (Appendix 157) (unpublished: subsidized project, tenant under reported income and underpaid rent).

(5) Unauthorized resident

MPHA v. Rozas, C0-95-956 (Minn. Ct. App. Jan. 9, 1996), FINANCE AND COMMERCE at 30 (Jan. 12, 1996) (Appendix 232) (unpublished: substance abuse and unauthorized resident); *Borts Apartments, Inc. v. Muse*, No. UD-1981015524 (Minn. Dist. Ct. 4th Dist. Nov. 12, 1998) (Appendix 379) (Subsidized project

eviction granted where tenant permitted guest to stay more than 30 days per year, tenant disturbances required security guard intervention, and there was minor damage to the unit).

(6) Noise

Rush Riverview Apartments v. _____, No. C3-01-0996 (Minn. Dist. Ct. 10th Dist. Aug. 7, 2001) (Appendix 567) (Judge Clifford) (violent conduct and noise constituted material non-compliance in HUD subsidized project; writ stayed for 7 days and until plaintiff complies with the trade name registration statute and pays defendant $250 in costs).

(2) Repeated lease violations

Landlords often allege a series of unrelated minor lease violations to support eviction. Tenants should argue that the lease violations should be material and not *de minimis*, and that they need to be related to be repeated. In *Teamster Retiree Housing of Minneapolis, Inc. v. Goldstein*, No. UD-1960919514 (Minn. Dist. Ct. 4th Dist. Oct. 21, 1996) (Appendix 238), the landlord of a Section 8 New Construction and Section 202 Elderly or Handicapped housing project sought to evict the tenant for various alleged lease violations. The court held that under 24 C. F. R. Sec. 247.3, the landlord could evict the tenant only for *substantial* lease violations or *material minor* violations. The court concluded that the landlord had not met this standard, where the damages caused by the tenant were minor, the tenant agreed to fix them, the landlord could have made repairs and assessed cost to the tenant, some problems were not caused by the tenant, and some storage problems were not hazardous. The Court noted that these disputes could and should be resolved by greater cooperation, better communication or mediation, but the tenant should not be evicted for these kinds of disputes.

In *Waimanalo Village Residence' Corp. v. Young*, 956 P.2d 1285, 1300 (Haw. Ct. App. 1998), the court concluded that material noncompliance "requires a pattern of repeated minor violations of the lease, not isolated incidence." *See North Shore Plaza Associates v. Guida*, 459 N.Y.S.2d 685, 687 (N.Y. Civ. Ct. 1983) (Fight involving tenant's son and neighbor boys in which the son was not at fault, an altercation between the tenant, her boyfriend and the apartment security guard, and cursing by the boyfriend were neither individual substantial violations nor collectively repeated minor violations of the lease.; *Common Bond Housing v. Beier,* UD-1951204625 (Minn. Dist. Ct. 4th Dist. Feb. 23, 1996) (Appendix 227) (no breach of lease by keeping a cat as an appropriate doctor-prescribed accommodation, and altercation with another tenant was not repeated); *Mid Northern Management, Inc. v. Heinzeroth*, 234 Ill. App. 3rd 240, _ , 599 N.E.2d 568, 572-74 (1992).

Late rent may be good cause, depending on the circumstances. *Oak Glen of Edina v. Brewington*, 642 N.W.2d 481 (Minn. Ct. App. 2002) (late rent is a minor violation in a HUD subsidized project; repeated late payment of rent may constitute a material breach; landlord presented no evidence that late payment affected its rental business; "principal reason for the waiver rule is to instill a feeling of repose in the tenant; the landlord, by accepting the rent, effectively reaffirms the lease between parties;" landlord waives breach by late payment of rent by accepting timely rental payment following the last late payment); *Chancellor Manor v. Gates*, 649 N.W.2d 892 (Minn. Ct. App. Aug. 27, 2002) (In HUD subsidized project, 68 late rent notices and 8 eviction court cases for rent constituted repeated minor violations which had a adverse financial effect on the project, supporting eviction).

(3) Criminal activity by tenants and third parties

See L. McDonough, *Wait a Minute: Slowing Down Criminal Activity Eviction Cases to Find the Truth*, posted at http://www.povertylaw.homestead.com under Readings.

(a) *Public housing*

The Cranston-Gonzalez National Affordable Housing Act of 1990 amended the eviction statues for Public Housing programs to require leases which state as follows:

> any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy of the tenancy.

42 U.S.C. § 1437d(*l*)(6). The federal regulation is somewhat different, providing that the lease:

> assure that the tenant, any member of the household, a guest, or another person under the tenant's control, shall not engage in: (A) Any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the PHA's public housing premises by other residents or employees of the PHA, or (B) Any drug-related criminal activity on or near such premises. Any criminal activity in violation of the preceding sentence shall be cause for termination of tenancy, and for eviction from the unit.

24 C.F.R. § 966.4(f)(12). The regulations also provide for housing authority discretion.

> In deciding to evict for criminal activity, the PHA shall have discretion to consider all of the circumstances of the case, including the seriousness of the offense, the extent of participation by family members, and the effects that the eviction would have on family members not involved in the proscribed activity. In appropriate cases, the PHA may permit continued occupancy by remaining family members and may impose a condition that family members who engaged in the proscribed activity will not reside in the unit. A PHA may require a family member who has engaged in the illegal use of drugs to present evidence of successful completion of a treatment program as a condition to being allowed to reside in the unit.

24 C.F.R. § 966.4(l)(5).

The legislative history calls for eviction protection for innocent family members:

> Termination of Tenancy in Public Housing: The Committee bill would amend a provision of the U.S. Housing Act that was added by the Anti-Drug Abuse Act of 1988. This provision makes criminal activity grounds for eviction of public housing tenants if that action is appropriate in light of all the facts and circumstances. This language was limited to criminal activity on or near the public housing premises.
>
> This section would make it clear that criminal activity, including drug related criminal activity, can be cause for eviction only if it adversely affects the health, safety, and quiet enjoyment of the premises. The committee anticipates that each case will be judged on its individual merits and will require the wise exercise of humane judgment by the PHA and the eviction court. For example, eviction would not be the appropriate course if the tenant had no knowledge of the criminal activities of his/her guests or had taken reasonable steps under the circumstances to prevent the activity.

S. Rep.. 101-316, S. Rep. No. 316, 101ST Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 5763, 5941, 1990 WL 272745.

In *Minneapolis Public Housing Authority v. Lor*, No. UD-1970716525 (Minn. Dist. Ct. 4th Dist. Sep. 10, 1997) (Appendix 278), the trial court concluded that federal legislative history of public housing statutes gave the court discretion to not evict remaining household members who did not have knowledge of excluded household members' illegal activity. On appeal, in *Minneapolis Public Housing Authority v. Lor*, 578 N.W.2d 8 (Minn. Ct. App. 1998), the Court of Appeals affirmed the trial court decision. The Court of Appeals first concluded that since the lease and statute upon which the MPHA relied was not clear as to the appropriate exercise of discretion by the public housing authority and the courts, it would consider the applicable regulations, comments and legislative history. The Court of Appeals determined that the federal statute did not automatically require eviction in all cases, allowing a public housing authority to exercise discretion in determining whether eviction was appropriate. The Court reviewed the legislative history and concluded that Congress intended that the courts also would exercise judgment in reviewing these cases. The Court added that since the MPHA did not allow Ms. Lor to utilize its administrative grievance procedure, it was especially important that the district court consider all of the circumstances and review the MPHA's decision to evict Ms. Lor and the remaining household members. The Court found no error in the district court's ruling that eviction was inappropriate, because the factors considered by the trial court were consistent with the federal regulation setting out factors which a public housing authority may consider. Finally, the Court noted that forfeiture is not favored when great injustice is done and the party seeking forfeiture is adequately protected.

However, the Minnesota Supreme Court reversed in *Minneapolis Public Housing Authority v. Lor*, 591 N.W.2d 700 (Minn. 1999) (Appendix 347). The Court reviewed the legislative history, and noted that "the court hearing required by HUD allows parties to raise equitable defenses in accordance with each state's existing law." *Id*. at 703 n.13. The Court added that the legislative history was vague, and since the regulations did not discuss the role the courts, the PHA and not the courts should consider "external circumstances." *Id.* at 704. The Court stated that "the trial court shall determine de novo whether the facts alleged in the complaint are true and whether those facts, under the terms of the lease, support termination of the lease and eviction." *Id.* The Court then went on to conclude as a matter of law that the tenant had materially breached the lease, essentially holding her strictly liable for her son's activity. The Court reversed and remanded to the trial court for further proceedings in accordance with this opinion. *Id.*

It is not clear whether the decision completely precludes consideration of equitable issues. The Court held that in determining whether a material breach occurred, the trial court should review the elements of the lease. The elements of the public housing lease include (1) whether there was criminal activity, (2) a threat caused by the criminal activity to health, safety, or peaceful enjoyment of the premises by other tenants, (3) the location of the criminal activity as relates to security on and enjoyment of the premises, and (4) whether the criminal activity was engaged in by a public housing tenant, member of the tenant's household, or guest or other person *within the tenant's control*. Since the Court stated that "the court hearing required by HUD allows parties to raise equitable defenses in accordance with each state's existing law," if the trial court determines that a material breach occurred, the court still could consider whether relief from forfeiture is appropriate, a remedy that is available in private unlawful detainer actions. *See* discussion, *infra*, VI.G.28.

In *Department of Housing and Urban Development v. Rucker*, 535 U.S. 125, 130 (2002), the United States Supreme Court held that the statute "*requires* lease terms that vest local public housing authorities with the discretion to evict tenants for the drug-related activity of household members and guests whether or not the tenant knew, or should have known, about the activity." The Court rejected that the statute

included a tenant knowledge requirement. *Id*. at 130-36. However, the public housing authority *is not required to evict* even when the tenant violat es the lease provision. "The statute does not *require* the eviction of any tenant who violated the lease provision. Instead, it entrusts that decision to the local public housing authorities, who are in the best position to take account of, among other things, the degree to which the housing project suffers from 'rampant drug- related or violent crime,' 'the seriousness of the offending action,' and 'the extent to which the leaseholder has ... taken all reasonable steps to prevent or mitigate the offending action.'" *Id.*. at 133-34, *citing* 42 U.S.C. § 11901(2) and 66 Fed. Reg., at 28803.[18]

---

[18]In *Charlotte Housing Authority v. Patterson*, 120 N.C. App. 552, ___, 464 S.E.2d 68, 72 (1995), the court held that even though the statute and lease did not mention personal fault, the legislative history of the amendments revealed

> a clearly expressed legislative intent that eviction is appropriate only if the tenant [to be evicted] is personally at fault for the breach of the lease ... [and] makes clear that Congress did not intend the statute to impose a type of strict liability whereby the tenant is responsible for all criminal acts regardless of her knowledge or ability to control them.

Id. at ___, 464 S.E.2d at 72. The court held that eviction of the tenant-head of household was not appropriate for actions of an adult son and household member, where the household head had no knowledge of the act and had no reason to know that her son would commit the act, and the public housing authority consented to adding son to lease following investigation. *Id.*

Charlotte Housing Authority v. Fleming, 473 S.E.2d 373 (N.C. Ct. App. 1996) (public housing: no good cause to evict tenant where tenant's adult son, who did not live with her, was arrested on the grounds of the building and charged with the possession of cocaine and the tenant had not invited him to the grounds and did not invite him into her apartment; tenant's son was not her guest); *Syracuse Housing Authority v. Boule*, 172 Misc. 2d 254, 257-59, 658 N.Y.S.2d 776, 778-80 (N.Y. City Ct. 1996) (following *Patterson*); *Housing Authority of New Orleans v. Green*, 657 S.2d 552, 555-56 (La. Ct. App. 1995) (Ciaccio, J., dissenting). *See* Mock, *Punishing the Innocent: No-Fault Eviction of Public Housing Tenants for the Actions of Third Parties*, 76 TEXAS L. REV. 1495, 1519-20 (May 1998) *Contra*; *Housing Authority of New Orleans v. Green*, 657 S.2d at 554. *See also One Strike and You're Out*, at 8 (Appendix 307); Office of Communications, the White House, *Cisneros Briefing on Public Housing Policy* at 4-6, 1996 WL 139523 (Mar. 27, 1996); *Review Finds Flaws in Get-Tough Rules for Public Housing*, USA TODAY, Tuesday, December 9, 1997, at 4A. *See generally* E. Lauer, *Housing and Domestic Abuse Victims: Three Proposals for Reform in Minnesota*, 15 LAW AND INEQUALITY 471 (Spring 1997).

Housing Opportunities Commission of Montgomery County v. Lacey, 322 Md. 56, 585 A.2d 219 (1991) (Appendix 18.I) (public housing tenant was not in constructive possession of illegal drugs found in her adult son's bedroom, and other items found were not paraphernalia intended to be used in conjunction with illegal drugs); *Brown v. Popolizio*, 569 N.Y.S.2d 615, 623 (Appendix Div. 1991); *Chicago Housing Authority v. Rose*, 203 Ill. Appendix 3rd 208, 560 N.E.2d 1131 (1990) (Appendix 18.J) (evidence satisfied tenant's burden of rebutting presumption that tenant knew of presence of guns in public housing apartment; hearsay testimony of officer about statements of confidential informant properly excluded); *Moundsville Housing Authority v. Porter*, 370 S.E.2d 341, 343 (W. Va. 1988) (disruptive assault on tenant by boyfriend was not good cause to evict tenant, where particular disturbance was not a repeat occurrence and was beyond tenant's control, and where tenant took action to avoid another occurrence); *Maxton Housing Authority v. McLean*, 313 N.C. 277, 283, 329 S.E.2d 290, 294 (1985) (ejection of tenant where there is no causal nexus between the eviction and her own conduct "would indeed shock one's sense of fairness"); *Tyson v. N.Y. City Housing Authority* 369, F. Supp. 513, 520-21 (S.D.N.Y. 1984) (alleged conduct of public housing authority in evicting tenants because of crime committed by tenants'

In cases where a public housing authority alleges criminal activity or drug-related criminal activity, it is important to determine whether the activity meets all of the elements of the statute.

1. criminal activity that

    a. threatens
    b. the health, safety, or right to peaceful enjoyment
    c. of the premises
    d. by other tenants (regulation adds employees of the PHA)

2. or any drug-related

    a. criminal activity
    b. on or off such premises (regulation states on or near such premises)
    c. engaged in
    d. by a public housing tenant,
    e. any member of the tenant's household, or any guest or other person
    f under the tenant's control

See L. McDonough, *Wait a Minute: Slowing Down Criminal Activity Eviction Cases to Find the Truth*, posted at http://www.povertylaw.homestead.com under Readings.

The activity must be "criminal." In *Housing and Redevelopment Authority of Duluth, Inc. v. Adams*, No. C7-99-601573 (Minn. Dist. Ct. 6th Dist. Sep. 13, 1999) (Judge Sweetland) (Appendix 395), a court concluded that since a crime is conduct prohibited by statute and for which the actor may be sentenced to imprisonment with or without a fine under Minn. Stat. 609.02, Subd. 1, municipal ordinance violations are not crimes because ordinances are not state statutes, and statutory petty misdemeanors are not crimes because of the limitation on sentencing. The court dismissed the action where petty misdemeanor drug charges against the tenant were dismissed, and the tenant pled guilty to an amended charge of assault under a municipal ordinance. The court added that there was no serious or repeated violation of a material term of the lease where the arrest took place one mile away from the premises, and the event did not constitute criminal activity.

Possession of a small amount of marijuana is a petty misdemeanor. Minn. Stat. § 152.027, subd. 4. Minn. Stat. § 152.01, subd. 16, defines "small amount" as "42.5 grams or less" of marijuana. A petty misdemeanor is not a "crime" under state law. Minn. Stat. § 609.02, subds. 1, 4a. The weight of marijuana is exclusive of the weight of mature stalks. *State v. Gallus*, 481 N.W.2d 116 (Minn. Ct. App. 1992). Possession is not "criminal activity" and not subject to bypass of the public housing grievance process, *Minneapolis Public Housing Authority v. _____,* No. HC020710513 (Minn. Dist. Ct. 4th Dist. Aug. 2, Sept. 16, 2002) (Appendix 547a), affirmed (Sep. 16, 2002) (Appendix 547b) , or subject to eviction. *Minneapolis Public Housing Authority v. _____,* No. HC-1020207506 (Minn. Dist Ct. 4th Dist. Mar. 18, 2002) (Appendix 543). In *Public Housing Agency for the City of St. Paul v. _____*, No. HG-CV-08-4518, Order (Minn. Dist. Ct. 2nd Dist. Jan. 22, 2009) (Appendix 615) (Judge Monahan), the public housing landlord authority filed

---

emancipated children, if proven, would violate federal regulations); *Spence v. Gormley*, 387 Mass. 258, 439 N.E.2d 741 (1982) (tenant should not be evicted if the special circumstances are present to negate the inference that the tenant could have averted the lease violation). *See* National Housing Law Project, *Security, Crime and Drugs* (1990) (Appendix 20.C).

an eviction action, claiming that the police responded to call from the tenant about serious fight between tenant and guest involving knives, and found a small amount of marijuana. The tenant claimed self defense and that she did not know about marijuana. The court concluded possession of a small amount of marijuana is not criminal activity under state law, and that the landlord presented no evidence of criminal conduct, disturbance, or impairment of the physical or social environment, health, safety, or enjoyment. The landlord also claimed that defense under Minn. Stat. § 504B.171 was preempted by *Rucker* and *Lor.* The court declined to rule on the issue, as it found that the landlord had not proven a breach of lease under federal law. *See Minneapolis Public Housing Authority v.* _____, No. HC 10306313566 (Minn. Dist Ct. 4th Dist. July 31, 2003) (Appendix 539) (Judge Doty) (public housing eviction denied and expunged; landlord did not prove that police officer properly learned about marijuana where officer entered apartment with consent of tenant to look for trespassed person, and did not prove that marijuana was in plain view; small amount of marijuana was not criminal activity; landlord's knowledge of alleged altercation was from a police report whose authors did not testify, and did not connect tenant to the incident).

Possession of drug paraphernalia is not criminal activity or illegal activity under Minn. Stat. § 504B.171 (formerly § 504.181), but may violate a lease provision specifically prohibiting possession. *Southgate Mobile Village v.* _____, No. HC-0205315400 (Minn. Dist Ct. 4th Dist. July 2, 2002) (Appendix 575).

Some leases did not include regulatory changes from "on or near the premises" to "on or off the premises." *Minneapolis Public Housing Authority v.* _____, No. HC-1001229506 (Minn. Dist Ct. 4th Dist. Jan. 25, 2001) (Appendix 541) (dismissal where activity occurred off-site, and the lease did not incorporate regulatory change in focus from "on or near" to "on or off" the property); *Maryland Park Apartments v.* _____, No. CX-02-4044 (Minn. Dist. Ct. 2nd Dist. June 17, 2002) (Appendix 533) (federal law and *Rucker* do not preclude Minnesota statute with greater tenant protection; landlord failed to prove criminal activity occurred at or near tenant's residence, landlord failed to prove that tenant knew or had reason to know of criminal activity, landlord waived breach by accepting rent).

Activity off of the property may constitute a threat to tenant. *Minneapolis Public Housing Authority v.* _____, No. HC-1020213524 (Minn. Dist Ct. 4th Dist. June 11, 2002) (Appendix 540) (eviction of tenant who shoplifted and assaulted a store owner off of the property).

Violations may be waived. *Maryland Park Apartments v.* _____, No. CX-02-4044 (Minn. Dist. Ct. 2nd Dist. June 17, 2002) (Appendix 533) (federal law and *Rucker* do not preclude Minnesota statute with greater tenant protection; landlord failed to prove criminal activity occurred at or near tenant's residence, landlord failed to prove that tenant knew or had reason to know of criminal activity, landlord waived breach by accepting rent).

Courts have looked at the significance of the activity, and where it is isolated. *Bennington Housing Authority v.* _____, No. 203-6-02 (Vt. Super. Ct. Jan 14, 2003) (Appendix 466) (public housing eviction dismissed; isolated incident of tenant's visiting son shooting an owl protected by the Endanger Species Act; lease gave landlord authority to evict but did not mandate eviction; landlord failed to demonstrate meaningful consideration of tenant's ability to supervise son in future or consequences of eviction on innocent siblings).

The landlord must prove the activity. *Minneapolis Public Housing Authority v.* _____, No. HC 10306313566 (Minn. Dist Ct. 4th Dist. July 31, 2003) (Appendix 539) (Judge Doty) (public housing eviction denied and expunged; landlord did not prove that police officer properly learned about marijuana where officer entered apartment with consent of tenant to look for trespassed person, and did not prove that

marijuana was in plain view; small amount of marijuana was not criminal activity; landlord's knowledge of alleged altercation was from a police report whose authors did not testify, and did not connect tenant to the incident); *Southgate Mobile Village v. _____,* No. HC-0205315400 (Minn. Dist Ct. 4th Dist. July 2, 2002) (plaintiff did not prove drugs were on the property) (Appendix 575).

Eviction defense should be coordinated with criminal defense. In *Minneapolis Public Housing Authority v. _____,* No. HC 1020213525 (Minn. Dist Ct. 4th Dist. Mar. 21, 2002) (Appendix 544), the parties agreed to a continuance of 19 days for trial. The landlord then sought another continuance beyond the date of a criminal trial concerning the tenant's son, and when it could not locate a witness. When the court would not grant another continuance, the landlord moved to dismiss without prejudice. The court dismissed the action with prejudice, holding that a dismissal without prejudice would circumvent the statutory limitation on continuances to 6 days.

In *Minneapolis Public Housing Authority v. Folger*, No. UD-1971114532 (Minn. Dist. Ct. 4th Dist. Jan. 23, 1998) (Appendix 346A), the tenant's guest consumed drugs and died of an overdose while the tenant was sleeping. The Court concluded that the public housing authority did not prove that the tenant violated the lease, as the tenant did not "allow" his guest to use drugs or engage in criminal activity, and the tenant did not violate Minn. Stat. § 504.181 (now § 504B.171) because the tenant did not know or have reason to know of his guest's prohibited activity. The decision was affirmed on judge review (Minn. Dist. Ct. 4th Dist. Apr. 13, 1998) (Appendix 346B) (Oleisky, J.).

Other decisions holding for the tenant include *Minneapolis Public Housing Authority v. Her*, No. UD-1981016519 (Minn. Dist. Ct. 4th Dist. Nov. 20, 1998) (Appendix 349) (Action dismissed where Public Housing Authority did not prove that a household member's action, conduct or behavior gave rise to or otherwise enabled a drive by shooting to occur on the premises, the PHA did not prove that disturbances between children of two different households was material, and PHA did not prove that the tenant's child had written intimidating materials in a neighbor's mailbox); *Housing and Redevelopment Authority of Duluth v. Henski*, No. C6-96-601484 (Minn. Dist. Ct. 6th Dist. Sep. 4, 1996), *affirmed* No. C7-96-1872) (Minn. Ct. App. Feb. 11, 1997) (Appendix 261) (Lower court found drugs present but no evidence that tenant knew or participated in drug activity and tenant excluded offender from the property; affirmed by unpublished order not to be cited as precedent); *Minneapolis Public Housing Authority v. Eberhardt*, No. UD-1970204642 (Minn. Dist. Ct. 4th Dist. Mar. 17, 1997) (Appendix 275) (Public housing: landlord did not prove that elderly tenant knew or had reason to know of drug possession by guests where tenant admitted knowledge of guests' drug use but denied knowledge of use or possession in his apartment, there was no evidence that the tenant knew of the guests' drug use or the tenant's familiarity with drugs, and the small amount of drugs found; distinguished *Minneapolis Public Housing Authority v. Greene*; six day notice was unreasonable where there was no evidence of a threat to others' safety); *Minneapolis Public Housing Authority v. Henry*, No. UD-1970122503 (Minn. Dist. Ct. 4th Dist. May 23, 1997) (Appendix 276) (Public housing: affirmed referee decision that elderly tenant did not violate state drug covenant where police found trace amount of drugs and paraphernalia with no evidence of the tenant's involvement or knowledge of drug activity; possession of drug paraphernalia with intent to sell or use it is not drug related *criminal* activity under federal regulations); *Minneapolis Public Housing Authority v. Lafayette*, No. UD-190627501 (Minn. Dist. Ct. 4th Dist. Aug. 7, 1997) (Appendix 277) (Discovery of illegal drugs in common area near where tenant had been did not prove possession of illegal drugs); *Minneapolis Public Housing Authority v. Drumgoole*, No. UD-1970325514 (Minn. Dist. Ct. 4th Dist. Jul. 2, 1997) (Appendix 274) (Public Housing: landlord could not evict tenant for alleged assault at another building operated by landlord which was not in the surrounding neighborhood); *Minneapolis Public Housing Authority v. Brown*, No. UD-1960306523 (Minn. Dist. Ct. 4th Dist. May 16, 1996) (Appendix 235) (landlord did not prove that tenant engaged in drug-related criminal activity on or near the premises); *Housing Authority of Decatur v. Brown*, 180 Ga. App. 483, 349

S.E.2d 501 (1986) (Eviction would be a disproportionate penalty for the activity, considering all of the circumstances, for misdemeanor drug offense).

Decisions holding for the public housing authority include *Minneapolis Public Housing Authority v. Holloway*, No. C0-95-391 (Minn. Ct. App. Aug. 15, 1995), FINANCE AND COMMERCE 46 (Aug. 18, 1995) (Appendix 145) (unpublished: rejects reasonably foreseeability standard; tenant responsible for drive by shooting at party while she was out of town, and argument with boyfriend in which he damage the home); *Minneapolis Public Housing Authority v. Greene*, 463 N.W.2d 588 (Minn. Ct. App. 1990) (drugs on the property); *MPHA v. Rozas*, C0-95-956 (Minn. Ct. App. Jan. 9, 1996), FINANCE AND COMMERCE at 30 (Jan. 12, 1996) (Appendix 232) (unpublished: substance abuse and unauthorized resident); *Minneapolis Public Housing Authority v. Barron*, No. C9-95-454 (Minn. Ct. App. Aug. 22, 1995), FINANCE & COMMERCE at 41 (Aug. 25, 1995) (Appendix 158) (unpublished: public housing, eviction for seizure of drugs; dissent concluded that evidence did not support conclusion that the tenant knew or should have known about drugs); *Minneapolis Public Housing Authority v. Demmings*, No. C5-94-2045 (Minn. Ct. App. May 9, 1995), FINANCE & COMMERCE at 20 (May 12, 1995) (Appendix 159) (unpublished: public housing, possession and sale of illegal drugs); *MPHA v. Scott,* UD-1950623520 (Minn. Dist. Ct. 4th Dist. Aug. 1, 1995) (Appendix 230) (analyzed conduct specifically under criminal statute and also noted that a crime in and of itself is not good cause); *Minneapolis Public Housing Authority v. Greenlaw*, No. UD-1940413507 (Minn. Dist. Ct. 4th Dist. June 8, 1994); *Minneapolis Public Housing Authority v. Smith*, No. UD-1940304518 (Minn. Dist. Ct. 4th Dist. Mar. 25, 1994).

In the aftermath of *Minneapolis Public Housing Authority v. Lor*, public housing authorities may take the position that the District Court may not consider whether a tenant knew or should have known of criminal activity on the property. However, in Minn. Stat. § 504B.171 (formerly § 504.181) provides for the defense in cases alleging unlawfully allowing controlled substances, allowing prostitution or prostitution-related activity, allowing the unlawful use or possession of firearms, or allowing stolen property or property obtained by robbery on the premises, the common area, or curtilage. *See* discussion, *infra*, VI.G.16 (unlawful activity).

Public housing authorities may argue that the state statute is preempted by the statute and regulation discussed in *Lor*. In *Leonard v. Northwest Airlines, Inc.*, No. C0-99-948, 605 N.W.2d 425 (Minn. Ct. App. 2000), the Court of Appeals analyzed whether federal statute preempted claims that airline ticket reissuing charges were illegal penalties under state law. In concluding that the federal statute preempted the state claims, the Court noted that it first must review the text of the statute, and if the text does not resolve the preemption question, then analyze the structure and purpose of the act. The statute in question contained a preemption clause stating that a state "may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier." 49 U.S.C. § 41714(b)(l). The public housing criminal activity statute does not contain a preemption provision. *See* L. McDonough, *Wait a Minute: Slowing Down Criminal Activity Eviction Cases to Find the Truth*, posted at http://www.povertylaw.homestead.com under Readings, 30 HOUSING LAW BULLETIN at 28 (National Housing Law Project February 2000, www.nhlp.org) (analysis and conclusion that California subsidized housing notice statute is not preempted by federal law).

Preemption has been raised a couple of times. In *Public Housing Agency for the City of St. Paul v. _____*, No. HG-CV-08-4518, Order (Minn. Dist. Ct. 2nd Dist. Jan. 22, 2009) (Appendix 615) (Judge Monahan), the public housing landlord authority filed an eviction action, claiming that the police responded to call from the tenant about serious fight between tenant and guest involving knives, and found small amount of marijuana. The tenant claimed self defense and that she did not know about marijuana. The court concluded possession of a small amount of marijuana is not criminal activity under state law, and that

the landlord presented no evidence of criminal conduct, disturbance, or impairment of the physical or social environment, health, safety, or enjoyment. The landlord also claimed that defense under Minn. Stat. § 504B.171 was preempted by *Rucker* and *Lor.* The court declined to rule on the issue, as it found that the landlord had not proven a breach of lease under federal law. In *Maryland Park Apartments v. _____,* No. CX-02-4044 (Minn. Dist. Ct. 2nd Dist. June 17, 2002) (Appendix 533), the court held that federal law and *Rucker* do not preclude Minnesota statute with greater tenant protection.

(b) *Section 8 certificates and vouchers*

While *Minneapolis Public Housing Authority v. Lor*, 591 N.W.2d 700 (Minn. 1999) specifically only applies to public housing, it may be applied to Section 8 certificates and vouchers as well, given the similar statutory and regulatory provisions, as well as the legislative history ignored by the *Lor* court. The Cranston-Gonzalez National Affordable Housing Act of 1990 amended the eviction statues for Section 8 Existing Housing Certificate and Voucher subsidized housing programs to require leases which state as follows:

> 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 drug-related criminal activity on or near such premises, engaged in by a tenant of any unit, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy.

42 U.S.C. § 1437f(d)(1)(B)(iii). The committee report discussed the assumptions underlying the new lease provision requirement for Section 8 Existing Housing Certificate and Voucher housing:

> Termination of tenancy. - The bill includes language to permit evictions from Section 8 Existing Housing for criminal activity, including drug-related criminal activity. It is based on a similar provision contained in the Anti-Drug Abuse Act of 1988 governing public housing leases .... *The Committee assumes that if the tenant had no knowledge of the criminal activity or took reasonable steps to prevent it, then good cause to evict the innocent family members would not exist.*

S. Rep. No. 316, 101st Cong., 2d Sess. 179 (1990), *reprinted in* 1990 U.S.C.C.A.N. 5763, 5889 (Appendix 306) (emphasis added). The regulations provide that

> Any of the following types of criminal activity by the tenant, any member of the household, a guest or another person under the tenant's control shall be cause for termination of tenancy: (1) Any criminal activity that threatens the health, safety or right to peaceful enjoyment of the premises by other residents; (2) 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 (3) Any drug-related criminal activity on or near the premises.

24 C.F.R. § 982.310(c).

As with cases public housing authority, where a Section 8 certificate or voucher landlord alleges criminal activity or drug-related criminal activity, it is important to determine whether the activity meets all of the elements of the statute.

1. any criminal activity

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

2. any criminal activity

a. that threatens
b. the health, safety, or right to peaceful enjoyment
c. of their residences
d. by persons residing
e. in the immediate vicinity of the premises,

3. any drug-related

a. criminal activity
b. on or near such premises,

4. engaged in

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

See L. McDonough, *Wait a Minute: Slowing Down Criminal Activity Eviction Cases to Find the Truth*, posted at http://www.povertylaw.homestead.com under Readings.

See also American Apartment Management Co. v. Phillips, 653 N.E.2d 834 (Ill. Ct. App. 1995) (Section 8 certificate, affirmed dismissal, holding provision under federal regulation governing conduct of "a guest or other person under the tenant's control" was ambiguous, concluding that the guest must be under the tenant's control; tenant did not have knowledge of drug-related criminal activity of one-time guest); *Diversified Realty Group, Inc. v. Davis*, 628 N.E.2d 1081 (Ill. Appendix Ct. 1993) ("materiality" and "good cause" provisions of the federally assisted lease precluded the landlord from evicting the tenant where the facts indicated that the tenant was without any knowledge or fault for her guest's criminal conduct); *Henry v. Wild Pines Apts.*, 359 S.E.2d 237, 238 (Ga. Ct. App. 1987) (reversal of eviction of tenant based upon uninvited and unknown person firing a gun).

(c) *HUD subsidized projects*

24 C.F.R. § 247.3, which covers most subsidized projects, provides for lease termination for

> Any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other residents; 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; any criminal activity that threatens the health, or safety of any on-site property management staff responsible for managing the premises; or any drug-related criminal activity on or near such premises, engaged in by a resident, any member of the resident's household, or any guest or other person under the resident's control shall be grounds for termination of tenancy.

As with other types of subsidized housing, where landlord alleges criminal activity or drug-related criminal activity, it is important to determine whether the activity meets all of the elements of the statute.

1. Any criminal activity that

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

2. any criminal activity that

    a. threatens
    b. the health, safety, or right to peaceful enjoyment
    c. of their residences
    d. by persons residing
    e. in the immediate vicinity of the premises

3. any criminal activity that

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

4. any drug-related

    a. criminal activity
    b. on or near such premises

5. engaged in

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

See L. McDonough, *Wait a Minute: Slowing Down Criminal Activity Eviction Cases to Find the Truth*, posted at http://www.povertylaw.homestead.com under Readings.

See Phillips Neighborhood Housing Trust v. Brown, 564 N.W.2d 573 (Minn. Ct. App. 1997) (Affirmed eviction of entire household when one co-tenant violated the lease by engaging in illegal drug activity), affirming *Phillips Neighborhood Housing Trust v. Brown*, No. UD-1960705508 (Minn. Dist. Ct. 4th Dist. Aug. 19, 1996) (Appendix 236) (Section 8 Moderate Rehabilitation Program: landlord proved that one co-tenant possessed drugs without the knowledge of the other co-tenant and family members, but the other co-tenant was responsible for his actions justifying eviction of the entire household); *Hodess v. Bonefont*, 401 Mass. 693, ___, 519 N.E.2d 258, 260 (1988) (tenant could not be evicted based upon son's isolated break-in and theft in another unit and storage of stolen items in tenant's apartment absent evidence

that tenant could have reasonably foreseen and prevented that conduct); *ABC Management v. Gamble,* No. 83 Ap-788 (Ohio Ct. App. Dec. 15, 1983) (Appendix 68) (reversing eviction based upon property damage caused by non-resident father of tenant's child, and uninvited visitor); *Associated Estates Corp. v. Bartell*, 24 Ohio Appendix 3d 6,___, 492 N.E.2d 841, 847 (1985) (reversing judgment of eviction due to property damage and disturbance caused by uninvited visitors, citing *Gamble*); *Johnson v. Acres*, No. 94-XX-10 (Kty. Cir. Ct. Warren Cty. June 22, 1994) (Appendix 156) (subsidized project, no material noncompliance with lease where tenant did not permit and was unaware of illegal activity, and called police to remedy the situation).

(d) *Rural Housing and Community Development Service (formerly Farmers Home Administration) subsidized housing projects*

The regulations for RHCDS programs contains the most protection for tenants facing criminal activity claims. 7 C.F.R. pt. 3560, subpt. D (2006); see in particular *id.* §§ 3560.156(b)(15) (lease provision regarding drug violations), 3560.159(a)(1)(iii) (termination of tenancy for drug violations on the premises), 3560.159(d) (criminal activity); 69 Fed.Reg. 69032 (Nov. 26, 2004) (revision of regulations).

Tenant defenses to eviction from Rural Housing Service–subsidized housing programs include the following:

1. The tenant, household member, guest,or person under the tenant's control did not admit to and was not convicted for involvement with illegal drugs. *Id.* § 3560.159(a)(1)(iii).

2. The tenant, household member, guest,or someone under the tenant's control did not conduct illegal drug activity on the premises. *Id*.

3. The tenant took reasonable steps to prevent or control illegal drug activity committed by a nonadult household member; such steps might include that the person is either actively seeking or receiving assistance through a counseling or recovery program, is complying with court orders related to a drug violation, or completed a counseling or recovery program within the time frames specified by the owner. *Id.* § 3560.156(c)(15).

4. The adult person conducting the illegal drug activity vacated the unit within the time frames established by the landlord and did not return to the premises without the landlord's prior consent. *Id.* § 3560.156(b)(15).

Before terminating the lease, the owner must give the tenant written notice of the violation and give the tenant an opportunity to correct the violation. *Id.* § 3560.159(a);

See L. McDonough and M. McCreight, *Wait a Minute: Slowing Down Criminal Activity Eviction Cases to Find the Truth*, 41 CLEARINGHOUSE REVIEW 55 (May/June 2007), posted on line at http://www.povertylaw.homestead.com under Readings.

(e) *Search and seizure*

See discussion, *infra*, at VI.G.16.h.

(4) Other actions of third parties

One issue that is litigated often in evictions is whether good cause exists where the non-criminal actions of third parties, including other household members, guests, and strangers, are at issue. Counsel should argue that tenants should not be evicted for events that the tenant could not reasonably foresee, prevent or control.

Minnesota courts remain divided on when the actions of one household member or guest justify eviction of the remaining household members.

(a) *Decisions holding for the tenant include*:

(1) Children

Ford v. _____, No. HC-1020325505 (Minn. Dist. Ct. 4th Dist. Apr. 26, 2002) (Appendix 500) (Section 8 voucher, plaintiff failed to prove that loud cars belonged to tenant's guests, that defendant knew or should have known that guests had firearms, that children hanging around the property were defendant's guests, that trash in the yard was from defendant's apartment, that a basement electrical fire resulted from defendant's conduct, that the notice of intent to condemn resulted from defendant's conduct, and that the smell of marijuana came from defendant's apartment; plaintiff failed to allege drug use with any particularity; action dismissed and defendant awarded costs and disbursements); *RFT & Assoc's. v. Smith*, 419 N.W.2d 109 (Minn. Ct. App. 1988) (Section 8 Existing Housing Certificate: no good cause for eviction based on child of tenant playing with fire, where landlord did not show that the lease had been violated, that a police or fire report had been filed, or that property was damaged); *Cardona v. Franco*, 699 N.Y.S.2d 383 (N.Y. App. Div. Dec. 9, 1999) (Public housing tenants breach of settlement agreement where excluded adult son visited while the tenant was away was a *de minimum* violation with respect to an elderly and disabled 30 year resident.; *Minneapolis Public Housing Authority v. Her*, No. UD-1981016519 (Minn. Dist. Ct. 4th Dist. Nov. 20, 1998) (Appendix 349) (Action dismissed where Public Housing Authority did not prove that a household member's action, conduct or behavior gave rise to or otherwise enabled a drive by shooting to occur on the premises, the PHA did not prove that disturbances between children of two different households was material, and PHA did not prove that the tenant's child had written intimidating materials in a neighbor's mailbox); *Dover Hill Co. v. Morris*, No. UD-1960705514 (Minn. Dist. Ct. 4th Dist. Jul. 31, 1996) (Appendix 233) (Section 8 Project: landlord did not prove that ten year old son of tenant assaulted another boy by inappropriately pretending to use a knife against himself; no express finding of disability but implication of disability; landlord did not work with tenant to facilitate resolution of any problems; future incidents taken with this event in considering future use of community resources, may constitute good cause for eviction; a criminal conviction is not necessary to prove criminal activity); *Anoka County Community Action Program, Inc. v. _____*, No. C9-94-12587 (Minn. Dist. Ct. 10th Dist. Dec. 6, 1994) (Appendix 155) (Section 8 certificate, no serious or repeated violations or other good cause where landlord alleged that tenant did not supervise children at all times, tenant's guests parked in the parking lot without inconveniencing other tenants, landlord did not prove that tenant had anything to do with another person's threat to management, and tenant was a victim of a domestic assault by her ex-boyfriend and had every right to call the police);

(2) Guests

Minneapolis Public Housing Authority v. Folger, No. UD-1971114532 (Minn. Dist. Ct. 4th Dist. Jan. 23, 1998) (Appendix 346A) (the tenant's guest consumed drugs and died of an overdose while the tenant was sleeping. The Court concluded that the public housing authority did not prove that the tenant violated the lease, as the tenant did not "allow" his guest to use drugs or engage in criminal activity, and the tenant did not violate Minn. Stat. § 504.181 (now § 504B.171) because the tenant did not know or have reason to know

of his guest's prohibited activity)(Minn. Dist. Ct. 4th Dist. Apr. 13, 1998) (Appendix 346B) (Oleisky, J.) (affirmed on judge review); *Housing Authority of Trumann v. Lively*, No. CA-99-543, 1999 WL 1203731 (Ark. App. Dec. 8, 1999) (the court affirmed the trial court decision for the public housing tenant where a person selling drugs from the residence was not a resident of the premises, the tenant had no knowledge of the activity, and when she became aware of it, she excluded the person from the property. The court also noted that the housing authority did not commence the action until five months after the criminal activity occurred); *Minneapolis Public Housing Authority v. Eberhardt*, No. UD-1970204642 (Minn. Dist. Ct. 4th Dist. Mar. 17, 1997) (Appendix 275) (Public housing: landlord did not prove that elderly tenant knew or had reason to know of drug possession by guests where tenant admitted knowledge of guests' drug use but denied knowledge of use or possession in his apartment, there was no evidence that the tenant knew of the guests' drug use or the tenant's familiarity with drugs, and the small amount of drugs found; distinguished *Minneapolis Public Housing Authority v. Greene*; six day notice was unreasonable where there was no evidence of a threat to others' safety); *Uni-B Partnership v. Baker*, No. UD-1950404522 (Minn. Dist. Ct. 4th Dist. May 2, 1995) (Appendix 154) (Section 8 voucher, no serious or repeated violation where daughter's guest caused fire but his action was not foreseeable and daughter responded appropriately); *Teamster Retiree Housing of Minneapolis, Inc. v. Petroske*, No. UD-1960919515 (Minn. Dist. Ct. 4th Dist. Nov. 7, 1996) (Appendix 237) (Section 8 new construction and Section 202 elderly and handicapped housing: single argument between mentally disabled adult son-guest of tenant and adult son-guest of neighboring tenant, and tenant's failure to keep his son off the premises was not a substantial lease violation or repeated minor lease violations affecting livability, health, safety or quiet enjoyment); *Anoka County Community Action Program, Inc. v.* _____, No. C9-94-12587 (Minn. Dist. Ct. 10th Dist. Dec. 6, 1994) (Appendix 155) (Section 8 certificate, no serious or repeated violations or other good cause where landlord alleged that tenant did not supervise children at all times, tenant's guests parked in the parking lot without inconveniencing other tenants, landlord did not prove that tenant had anything to do with another person's threat to management, and tenant was a victim of a domestic assault by her ex-boyfriend and had every right to call the police);

(3) Tenant not responsible for incident

Carriage House Apartments v. Boakai, No. UD--1920602507 (Minn. Dist. Ct. 4th Dist. Aug. 27, 1992) (Appendix 18.L) (tenant not responsible for fight and took actions to resolve the problem);

(4) Victim

West Bank Homes v. McGregor, No. UD-18912121520 (Minn. Dist. Ct. 4th Dist. Jan. 22, 1990) (Appendix 18.K) (being a victim of an assault does not constitute good cause, especially in light of the fact that defendant vigorously aided in a prosecution of the assailant); *Secretary of U.S. Dept. HUD v. Madison*, No. UD-1861104544 (Minn. Dist. Ct. 4th Dist. Nov. 18, 1986) (Appendix 17);

(5) Visitors

Minneapolis Public Housing Authority v. Jivens, No. UD-1920720559 (Minn. Dist. Ct. 4th Dist. Sept. 9, 1992) (Appendix 18.M) (public housing, tenant not responsible for illegal drugs on the premises brought by a person who was on the premises without the tenant's knowledge or consent, but with the consent of a guest of the tenant);

(b) *Decisions finding good cause for eviction involving third parties include:*

Minneapolis Community Development Agency v. Smallwood, 379 N.W.2d at 555-56 (tenant's family members damaging property and threatening others); *Borts Apartments, Inc. v. Muse*, No. UD-1981015524 (Minn. Dist. Ct. 4th Dist. Nov. 12, 1998) (Appendix 379) (Subsidized project eviction granted where tenant permitted guest to stay more than 30 days per year, tenant disturbances required security guard intervention, and there was minor damage to the unit.; *Hwang v. Jones*, No. UD-1960319526 (Minn. Dist. Ct. 4th Dist. Apr. 4. 1996) (Appendix 215) (Section 8 certificate: landlord proved that tenant and family members engaged in a pattern and history of disturbing and nuisance behaviors including excess guests, excess traffic, excess noise, a physical assault, and threats).

(5) Verification requirements

In all subsidized housing and public housing programs, except the Section 236 and 221(d)(3) Programs that do not receive federal assistance under another program, tenants who do not comply with the Social Security Number disclosure and documentation requirements and do not sign consent forms along the housing authority or landlord to verify employee income information may have their housing subsidy assistance terminated or may be evicted. 24 C.F.R. Part 5.

(6) Laundry list of allegations

It is not uncommon for a subsidized housing landlord or public housing authority to allege many events to justify eviction. The tenant should urge the court to look closely at the evidence supporting each allegation to determine whether they support eviction. *Bloomington Associates v. Wade*, No. UD-1990706521 (Minn. Dist. Ct. 4th Dist. Aug. 19, 1999) (Judge Francis Connolly) (Appendix 378) in HUD subsidized project eviction action, court individually analyzed each of the lease violation allegations, concluding that most were the fault and responsibility of other tenants or persons on the property not connected with the tenant; two remaining violations concerning noise and a children's curfew violations were separate minor violations which were not repeated; action dismissed, judgment entered for tenant, and costs and disbursements awarded to tenant).

(7) Tenant waiver of rights

In *Dakota County HRA v. Blackwell*, No. C7-98-1763 (Minn. Ct. App. May 4, 1999) (unpublished), the tenant requested an extension of a lease termination date by half a month, to which the landlord agreed. Before the date passed, the tenant rescinded the agreement, and the landlord filed an unlawful detainer action. The trial court held that the tenant did not violate her lease, but awarded the landlord specific performance for her failure to move. On appeal, the Court of Appeals affirmed, concluding that there was consideration for the agreement. The Court rejected tenant claims of mistake, unconscionable, and public policy, and held that specific performance was an appropriate remedy. Judge Foley argued in dissent that specific performance rendering the tenant homeless ignored equity. The Minnesota Supreme Court reversed in *Dakota County HRA v. Blackwell*. 602 N.W.2d 243 (Minn. 1999), concluding that the district court abused its discretion in awarding specific performance. The Court noted that a party does not have an automatic right to specific performance for breach of contract, and the district court must balance the equities and determine whether the equitable remedy is appropriate. The Court added that its decision was limited to the facts presented.

(8) Pets

Minn. Stat. § 504B.261 (formerly § 504.36) provides:

In a multiunit residential building, a tenant of a handicapped accessible unit, in which the tenant or the unit receives a subsidy that directly reduces or eliminates the tenant's rent responsibility, must be allowed to have two birds or one spayed or neutered dog or one spayed or neutered cat. A renter under this section may not keep or have visits from an animal that constitutes a threat to the health or safety of other individuals, or causes a noise nuisance or noise disturbance to other renters. The landlord may require the renter to pay an additional damage deposit in an amount reasonable to cover damage likely to be caused by the animal. The deposit is refundable at any time the renter leaves the unit of housing to the extent it exceeds the amount of damage actually caused by the animal.

c. Section 8 Existing Housing Certificate and Voucher Programs

The landlord may terminate the tenancy only for serious or repeated violation of the terms and conditions of the lease, violation of federal, state or local law which imposes obligations on the tenant in connection with the occupancy of the building, or other good cause. 24 C.F.R. § 982.310, 60 Fed. Reg. 34,704-05 (July 3, 1995) (replacing 24 C.F.R. § 882.215, 887.213). 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 the conduct of the tenants.

Congress extended suspension of the requirement for good cause to terminate the lease at the end of its term, allowing termination without cause at expiration of the lease term. All pre-existing Section 8 leases included the old good cause requirement, and they should bind the landlord until a new lease is used by the parties. *Johnson v. Reed*, No. UD-1961001524 (Minn. Dist. Ct. 4th Dist. Nov. 7, 1996) (Appendix 262) (Current endless lease still in effect was not modified by legislative changes; current lease could not be terminated upon 30 day notice without good cause). *See* discussion, *supra*, VI.F.10.

d. Government subsidized housing projects

In most government subsidized housing projects, the landlord may terminate the tenancy only for material noncompliance with the rental agreement, material failure to carry out obligations under any state, landlord and tenant law, or other good cause. 24 C.F.R. Part 247 (1995). Material noncompliance includes (1) one or more substantial violations of the rental agreement, and (2) repeated minor violations which disrupt the livability of the project, adversely affect the health or safety of any person or the right of any tenant to the quiet enjoyment of the leased premises, interfere with the management of the project, or have an adverse financial affect on the project. Nonpayment of rent or any other financial obligation under the lease is a substantial violation of the lease. Failure to timely supply all required information on income and family composition also is a substantial lease violation. Payment of rent after the due date but within a grace period shall constitute a minor violation.

e. Public housing

A public housing authority may terminate the lease only for serious or repeated violation of the material terms of the lease, or for other good cause. 24 C.F.R. Part 966 (1995). Failure to pay rent is a serious violation of a material lease term. However, good cause does not exist if the tenant can show lack of fault. *See Maxton Housing Authority v. McClean*, 313 N.C. 277, 328 S.E.2d 290 (1985); *Housing Authority of St. Louis County v. Boone*, 747 S.W.2d 311 (Mo. Ct. App. 1988). Failure of the tenant to fulfill tenant obligations required by the regulations to be in the lease also is a serious lease violation.

Public Housing Authorities often use information obtained from the tenant in a case against the tenant. It appears that Public Housing Authorities are covered by the Minnesota Government Data Practices Act, Minn. Stat. Ch. 13. The Act applies to state agencies, statewide systems, and political subdivisions, including counties, cities, boards, commissions, authorities created by law, ordinance or charter provision, community action agencies, and nonprofit social service agencies performing services under contract to any political subdivision, statewide system or state agency. Minn. Stat. §§ 13.01-13.02. Generally, data collected on recipients of benefits or services of housing programs is private. Minn. Stat. § 13.31. Other Public Housing Authority data classifications are contained in Minn. Stat. § 13.54.

When an individual is asked to supply private or confidential data concerning the individual, the individual must be informed of the purpose and intended use of the data, whether the individual may refuse or is legally required to supply that data, any known consequence arising from supplying or refusing to supply the data, and the identity of other persons or entities authorized by law to receive the data. Minn. Stat. § 13.04. The tenant should be able to raise as a defense in an eviction action that the Public Housing Authority collected private or confidential information in violation of the statute. Either in requesting dismissal of the action, or exclusion of the information obtained.

f. Low Income Housing Tax Credit properties

In *Cimarron Village Townhomes, Ltd. v. Washington ,* No. C3-99-118, 1999 WL 538110 (Minn. Ct. App. July 27, 1999) (unpublished), the court ruled that Section 42 low income tax credit tenancies could not be terminated without cause, citing the clear language of 26 U.S.C. §§ 42(h)(6)(B)(i), 42(h)(6)(E)(ii)(I) as well as the legislative history.

g. Violence Against Women Act (VAWA)

The Violence Against Women Act (VAWA) bars evictions for lease violations which are the result of domestic violence, dating violence or stalking of the tenant or immediate family members. 42 U.S.C. §1437d (l). *See* Answers A3-8 for specific defenses.

11. Manufactured (mobile) home park lot tenancies

A manufactured (mobile) home park is land on which two or more occupied mobile or manufactured homes are located and where facilities are open more than three seasons. Minn. Stat. § 327C.01, 327.14.

a. Termination of tenancy

The tenancy may be termination by the landlord only for the reasons specified in Minn. Stat. § 327C.09.

(1) Nonpayment of rent following ten days written notice

(2) Violation of manufactured (mobile) home ordinances, rules and laws, following a reasonable time after written notice of noncompliance

(3) Rule violations, after failure to cure following thirty (30) days written notice

(4) Endangerment or substantial annoyance after notice

In *Pepin/Summit Partnership v. Mach*, No. 6794 (Goodhue Cty. Ct., 1987) (App. 19), the court approved a jury instruction which defined "substantial annoyance" as endangerment of other persons in the park, causing substantial damage to park property, or substantially annoying other residents. "Thus, substantial annoyance is something more than simply offending or being bothersome to someone. It means that a resident has engaged in conduct which works significant and substantial harm." *Id.*, Jury Instruction No. 1, citing Minn. Stat. § 327C.09, subd. 5; *Osness v. Diamond Estates, Inc.* 615 P.2d 605 (Alaska 1980).

(5) Repeated serious violations of the lease or certain laws, following written notice and warning and continued violation

Lea v. Pieper, 345 N.W.2d 267 (Minn. Ct. App. 1984).

(6) Material misstatement in the application, if termination occurs within one year of when the tenant first paid rent

(7) Improvement of the park, after ninety (90) days written notice

(8) Park or lot closing, after nine months written notice. Relocation within the lot may be permitted in certain circumstances

Minn. Stat. § 327C.095, subd. 1.

b. Defenses

(1) Inadequate notice period

Lea, 345 N.W.2d at 271; Minn. Stat. § 327C.09. *But see D. H. Gustafson Co. v. Rasmussen*, No. C2-00-540, 2000 WL 1742111 (Minn. Ct. App. 2000) (unpublished: Minn. Stat. § 504B.171 (formerly § 504.181) on illegal activity applies to manufactured home park lot rental, and does not require notice under § 327C.09).

(2) Notice did not specify the reasons for termination

Id. See Hedlund v. Potter, No. C3-91-1383 (Minn. Dist. Ct. 10th Dist. Oct. 22, 1991) (App. 19.A) (generalized notice that was not specific as to time, date or nature of lease or rule violation and did not provide required time to remedy the conduct was not sufficient).

(3) The plaintiff has not alleged or proven cause for termination

MINN. STAT. § 327C.09. *Countryview Mobile Home Park v. Oliveras*, No. A04-160, 2004 WL 20049986 (Minn. Ct. App. Sept. 14, 2004) (unpublished) (affirmed district court conclusion that mobile home park lot owner did not prove that conviction for possession of child pornography was grounds for evictions).

(4) Nonpayment of rent defenses

See discussion, *supra* at VI.E.11.

(5) The rule is unreasonable

Minn. Stat. § 327C.10, subd. 3. A reasonable rule is: (a) Designed to: 1.1). Promote resident convenience, safety or welfare, 2.2) promote good appearance and efficient operation of the park, 3.3) protect and preserve the premises, or 4.4) fairly distribute services and facilities, (b) reasonably related to its purpose, (c) not retaliatory nor unjustifiably discriminatory in nature, and (d) sufficiently explicit in prohibition, direction or limitation of conduct to fairly inform the resident of what constitutes compliance. Minn. Stat. § 327C.01, subd. 8. Rules presumed unreasonable includes any rule which: (a) prohibits the resident from displaying a "for sale" sign, (b) requires an existing or potential resident to purchase goods or services from a particular vendor, (c) requires a resident to use the services of a particular dealer or broker in a park sale, (d) requiring more than one occupant to have an ownership interest in the home, or (e) violates the definition of a reasonable rule. Minn. Stat. § 327C.05, subd. 2, 3. *See Lea*, 345 N.W.2d at 271-72; *North Star Estates Manufactured Home Community v.* _____, No. C1984931 (Minn. Ct. App. Apr. 22, 1999) (Appendix 551) (unpublished order which shall not be cited as precedent: referee found after trial that manufactured home park rule was unreasonable or park waived its application; judge ruled after hearing without testimony that tenant materially breached rules; Court of Appeals reversed and held that no one raised and judge failed to consider whether the tenant received proper notice, and whether the rules were reasonable or had be substantially modified); *Northview Villa M.H.P. v. Henderson,* No. C2-90-13460 (Minn. Dist. Ct. 10th Dist. Apr. 24, 1991) (Appendix 17.F) (plaintiffs no pet rule was a reasonable rule).

(6) The rule constitutes a substantial modification of the original lease or rules

Minn. Stat. § 327C.02, subd. 2. After a resident initially enters into a rental agreement, a new or modified rule may be enforced against the resident only if the new or amended rule is: (1) Reasonable and (2) not a substantial modification of the original agreement. Substantial modification means a rule which: (1) Significantly diminishes or eliminates any material obligation of the park owner, (2) significantly diminishes or eliminates any material right, privilege, or freedom of action of a resident, or (3) involves a significant new expense for a resident. Minn. Stat. § 327C.01, subd. 11. The court may consider the following additional factors: (1) Any significant changes in circumstances which have occurred since the original rule was adopted, and which necessitated the rule change, and (2) any compensating benefits which the rule change will produce for the residents.

The following do not constitute a substantial modification of the rental agreement: (1) A reasonable rent increase, (2) a rule change necessitated by government action, (3) a rule change requiring all residents to maintain their homes, sheds, and other appurtenances in good repair and safe condition. This exception applies to property of the tenants and not to property of the landlord. *Lemke v. Van Ness*, 236 N.W.2d 784, 787 (Minn. Ct. App. 1989). In *Lemke* the lease required the landlord to repair damage from ordinary wear and tear. The new rule required the tenants to make such repairs. The court held that the rule was a substantial modification of the lease, and unenforceable. *Id.* at 787. In *Kjellberg's, Inc. v. Smith*, No. C4-87-0931 (Minn. Dist. Ct. 4th Dist. Wright Cty. July 7, 1989) (attached as Appendix 20), the court held that the trailer skirting required by the park owner was a substantial modification of the lease which the tenant had not accepted. The court noted that the rule contained no statement indicating that there was a rational basis for the rule change.

See Hop v. Skyline Village Mobile Home Community, No. C8-88-491, 1988 WL 64498 (Minn. Ct. App. June 28, 1988) (unpublished) (affirmed trial court's conclusion that the provision of amended rental agreement authorizing attorneys' fees is an unenforceable "substantial modification" of the initial lease); *North Star Estates Manufactured Home Community v.* _____, No. C1984931 (Minn. Ct. App. Apr. 22, 1999) (Appendix 551) (unpublished order which shall not be cited as precedent: referee found after trial that manufactured home park rule was unreasonable or park waived its application; judge ruled after hearing without testimony that tenant materially breached rules; Court of Appeals reversed and held that no one

raised and judge failed to consider whether the tenant received proper notice, and whether the rules were reasonable or had be substantially modified). *But see South Valley Investment Company v. Krogstad*, No. C2-01-631, 2001 WL 1117865 (Minn. Ct. App. Sept. 25, 2001) (unpublished) (lease amendment which requires residents to maintain their homes, decks, and sheds to meet "reasonable standards for appearance and general condition," is not a substantial modification and can be enforced against resident).

Changes in utility billing have been held to be substantial modifications to the lease. *See Renish v. Hometown America LLC*, No. A05-2384, 2006 WL 2474090 (Minn. Ct. App. Aug. 29, 2006) (unpublished) (affirmed district court decision that imposing separate utility bills was a substantial modification of the lease and was arbitrary and capricious); *Cavanaugh v. Hometown America LLC*, No. A05-595, 2006 WL 696259 (Minn. Ct. App. Mar. 21, 2006), (*review denied*) (May 24 2006) (unpublished) (affirmed district court judgment for class action tenants claiming violations by installing meters and charging separately for sewer and water); *Schaff v. Chateau Communities, Inc.,* No. A04-1246, 2005 WL 1734031 (Minn. Ct. App. July 26, 2005), *(review denied)* (sept. 28, 2005) (unpublished) (affirmed district court ruling granting class certification and awarding attorneys fees, evidentiary rulings, and jury award in class action for utility charges based on changes in metering and billing); *Schaff v. Chateau Communities, Inc.*, No. 19-CX-03-6402, 2004 WL 1908209 (Minn. Dist. Ct. May 27, 2004) (jury found separate metering for utilities unreasonable and awarded damages; District Court awarded an incentive award, held that separate metering substantially modified class members' leases and was unenforceable, and manufactured park home lot owner violated Minn. Stat. § 327C.14 when it entered lots to install meters, and violated § 327C.04 when it charged rates higher than the city would charge; court awarded attorneys fees under Minn. Stat. §§ 327C.15 and 8.31).

If the court finds for the plaintiff, the court shall order the defendant to comply with the rule within ten (10) days. If the defendant does not comply, the park owner may move the court, on three (3) days written notice to the residents, for a writ of restitution. Minn. Stat. § 327C.02, subd. 2a.

(7) Improper notice to adopt or amend a rule

The park owner must give sixty (60) days written notice. Minn. Stat. § 327C.02, subd. 2. *See Hedlund v. Davis,* No. C1-91-1687 (minn. Dist. Ct. 10th Dist. Dec. 31, 1991) (Appendix 15.F) (landlord's request for additional fees was improper because there was no notice informing the tenants that such charges could be imposed under the rental agreement).

(8) Retaliatory eviction

Tamarack Court, Inc. v. Milliman, No. C2-02-1787, 2003 WL 21911150 (Minn. Ct. App. Aug. 12, 2003) (unpublished) (affirmed holding of no retaliation, where trial court concluded that tenant did not prove retaliation when the presumption of retaliation applied, but also concluded that manufactured home park had a legitimate economic reason for eviction); *Howard Lake Mobile Home Park v. _____,* No. C1-01-2272 (Minn. Dist Ct. 10th Dist. Nov. 19, 2001) (Appendix 516) (waiver of notice to terminate manufactured home lot rental by receiving, retaining, and intending to negotiate rent check; plaintiff notice was in retaliation for defendant's complaints to police and resident association; plaintiff's claims did not meet the various statutory grounds for eviction; expungement not awarded as case was under Minn. Stat. Ch. 327C and not Ch. 504B); *Larson v. Anderson*, No. C9-96-416 (Minn. Dist. Ct. 9th Dist. Oct. 11 and Nov. 8, 1996) (Appendix 264) (Rent abatement of $6,910 over five years failing to repair discharge of raw sewage on the premises in manufactured (mobile) home park; landlord's notice to quit was in retaliation for tenant's complaint to health department). *See* discussion, *supra* at VI.E.9, VI.F.3.

(9) Waiver of notice

Howard Lake Mobile Home Park v. _____, No. C1-01-2272 (Minn. Dist Ct. 10th Dist. Nov. 19, 2001) (Appendix 516) (waiver of notice to terminate manufactured home lot rental by receiving, retaining, and intending to negotiate rent check; plaintiff notice was in retaliation for defendant's complaints to police and resident association; plaintiff's claims did not meet the various statutory grounds for eviction; expungement not awarded as case was under Minn. Stat. Ch. 327C and not Ch. 504B). *See North Star Estates Manufactured Home Community v. _____*, No. C1984931 (Minn. Ct. App. Apr. 22, 1999) (Appendix 551) (unpublished order which shall not be cited as precedent: referee found after trial that manufactured home park rule was unreasonable or park waived its application; judge ruled after hearing without testimony that tenant materially breached rules; Court of Appeals reversed and held that no one raised and judge failed to consider whether the tenant received proper notice, and whether the rules were reasonable or had be substantially modified). *See generally* discussion, *supra* at VI.F.4.

(10) Implied modification of the lease

Northview Villa M.H.P. v. Gresens, No. C9-90-175 (Minn. Ct. App. July 3, 1990), in FINANCE & COMMERCE at B15 (July 6, 1990) (Appendix 17.E) (manufactured (mobile) home park "no pet" rule modified where landlord was aware of tenant's pets and accepted rent for five years: rule waived). *See generally* discussion, *supra* at VI.G.2. (implied modification of the lease).

(11) Defendant cured the violation

MINN. STAT. § 327C.09. *See Condodemetraky v. Walker,* No. 90-C-287 (N.H. Super. Ct., Granfton Cty. Nov. 21, 1990) (Appendix 20.A) (park tenant cured minor violations in a reasonable time).

(12) Violation repeated but not serious

Larson v. _____, No. HC 030324502 (Minn. Dist Ct. 4th Dist. Feb. 13, 2004) (Appendix 528) (referee will not reconsider judge's order on waiver; tenant meets definition of disabled; requiring mobility disabled tenant to park vehicle further away than other tenants is not a reasonable accommodation; while parking tenant's vehicle near the home violated an ordinance, most other tenants also violated the unenforced ordinance; tenant's ordinance violations were repeated but not serious; tenant may raise landlord's violation of the covenants of habitability as a cause of tenant violation of the lease, where park owner's park design violated a local ordinance and forces tenant to violate the same ordinance.

(13) Violation caused by owner's violation

Larson v. _____, No. HC 030324502 (Minn. Dist Ct. 4th Dist. Feb. 13, 2004) (Appendix 528) (referee will not reconsider judge's order on waiver; tenant meets definition of disabled; requiring mobility disabled tenant to park vehicle further away than other tenants is not a reasonable accommodation; while parking tenant's vehicle near the home violated an ordinance, most other tenants also violated the unenforced ordinance; tenant's ordinance violations were repeated but not serious; tenant may raise landlord's violation of the covenants of habitability as a cause of tenant violation of the lease, where park owner's park design violated a local ordinance and forces tenant to violate the same ordinance.

c. Cases

In *W. J. Properties, Inc. v. Schneider*, No. C6-01-1023, 2002 WL 206337 (Minn. Ct. App. 2002) (unpublished), the Court affirmed an eviction where landlord claimed material misstatement on application, the parties settled for tenant repairs and removal of pets, and the tenant violated of settlement, holding that subsequent statutory notice was not required.

In *Hi Vue Park v. Schneider*, No. CX-99-83 (Minn. Ct. App. July 27, 1999) (unpublished) the court affirmed the manufactured (mobile) home eviction judgment for park owner where residents threatening behavior constituted endangerment, substantial annoyance and repeated serious violations; notice which did not include times for alleged violations was proper where it referenced court records discussing the events; notice was proper where residents had sufficient information to know what conduct was unacceptable and what needed to be done to avoid eviction; owners acceptance of rent during the notice period did not waive breaches as there was no showing that the owner intended to waive its right to evict; receipt of rent after the effective date of the notice did not waive the notice where the owner stated in the notice that it would not accept rent and a later letter stated that it refused the rent payment and would return it at the court hearing.

In *Northstar Estates Manufactured Homes Community v. Davis*, No. CX-98-2339 (Minn. Ct. App. July 13, 1999) (unpublished), the manufactured home park owner amended a rule prohibiting play equipment on individual lots to prohibiting basketball backboards on individual lots. The Court of Appeals affirmed the District Court's decision for the tenant, noting that an amended rule can be enforced against a tenant who preceded the amendment if the amendment rule is reasonable, and that a reasonable rule cannot be unjustifiably discriminatory in nature. Minn. Stat. § 327C.02, Subd. 2, 327C.01, Subd. 8(c). The Court concluded that the District Court could properly conclude that total prohibition of basketball backboards on individual lots was unjustifiably discriminatory as compared with other activities by children.

In *Northstar Estates Manufactured Home Community v. Thompson*, No. C3-98-2005 (Minn. Ct. App. April 22, 1999) (unpublished opinion which shall not be cited as precedent) (Appendix) the court concluded that the district court, which was not alerted to application of § 327C.02, erred in its determination of material breach because of rule violations where the court made no findings as to the reasonableness of rules or whether the rules substantially modified a prior agreement, and the residents were not given ten days to comply with the rule by the court; district court reversed.

In *Steven Scott Management, Inc. v. Scott*, No. CA-98-09527 (Minn. Dist. Ct. 2d Dist. Oct. 28, 1998) (Appendix 367), after one tenant violently assaulted his domestic partner, he pled guilty to a felony, and was sentenced to workhouse incarceration, chemical dependency treatment and anger management counseling. The assailant complied with his sentence and committed no other assaults. The landlord found out about the incident six months later, gave notice for substantial annoyance and endangerment, and commenced an unlawful detainer action to evict both tenants. The court held that the claim against the victim was in response to her call to the police and prohibited by Minn. Stat. § 504.215 (now § 504B.205), the victim did not endanger others by allowing the assailant to remain in the household, it would be unconscionable to evict the assailant where he was sincere in his rehabilitative efforts and had complied with his sentence and had not endangered others in the manufactured (mobile) home park, and the tenants had cured any violation which had occurred. On appeal, in *Steven Scott Management, Inc. v. Scott*, No. C7-98-2024 (Minn. Ct. App. June 8, 1999) (unpublished), the Court of Appeals affirmed the finding that the victim had not violated Minn. stat. 327C.09 or committed a material violation of the lease, as there was no evidence of any annoyance or danger to other residents. However, the Court reversed the trial court as to the assailant, concluding that a finding that he violated the lease and the statute was sufficient to compel issuance of an order against him.

In *Oakwood Terrace Estates v. Heins*, No. C6-99-3116 (Minn. Dist. Ct. 3rd Dist. April 5, 2000) (Judge Birnbaum) (Appendix 410) the case was dismissed where eviction notice did not comply with § 327C.09 where it failed to state dates of violations, specific items to be removed, and that future serious violations within the next six months would be treated as cause for eviction; the notice lapsed six months later; a second notice one year after the first violated § 327C.09 in that it failed to state violations were being treated as cause for eviction within six months of a previous notice, it claimed violations different from the previous notice, and failed to provide residents with an opportunity to cure within 30 days; and within 30 days of the second notice, the residents were in compliance with the lease rules and regulations.

In *Haukos-Lund Partnership v. Borjon*, No. C3-98-632 (Minn. Dist. Ct. 1st Dist. Oct. 30, 1998) (Appendix 336) (Perkins, J.), the court entered judgment for the manufactured (mobile) home park lot tenant, where the landlord failed to give notices to the tenant specifying the date, approximate time, and nature of alleged parole violations, the landlord sought to evict the tenant for calling the police to respond to a domestic abuse situation, the tenant cured several alleged lease violations within a reasonable time and manner, there was no evidence that the tenant's day guests were unauthorized occupants, and the tenant's failure to cure a minor lease violation did not support eviction. The court noted that basing an eviction on a minor defect in manufactured (mobile) home skirting was unreasonable, even if the rule itself was reasonable. The court added that "if frequent day visitors are to be considered occupants as plaintiff suggests, this rule may be hinging on unreasonableness due to the fact that it has not been shown that disallowing frequent day guests is designed to promote the convenience, safety, or welfare of the residents."

See Rainbow Terrace, Inc. v. Hutchens, 557 N.W.2d 618 (Minn. Ct. App. 1997) (MINN. STAT. Ch. 327C applies to manufactured (mobile) home park lot tenancies, regardless of whether the parties have a written lease; acceptance of rent after expiration of a notice to vacate waived the notice; notice to quit was invalid because it did not state the reason for termination, depriving the tenants of an opportunity to remedy the violation); *Miller v. Kreitz*, No. UD-1970103500 (Minn. Dist. Ct. 4th Dist. Feb. 6, 1997) (Appendix 271) (Eviction denied where notice for rule violation which did not give tenant right to cure the problem, landlord waived notice by acceptance of rent, and landlord did not prove tenant's failure to move van constituted an endangerment or annoyance to other residents, and did not prove loud music, bothering other persons, or trouble with the police as suggested by eviction.

12. Illegal lease provisions

Lease provisions which waive or modify the provisions of the following statutes are void and unenforceable:

a. Minn. Stat. § 504B.145 (formerly § 504.21) (automatic renewal of leases), *see* I.D.10, *supra*;

b. Minn. Stat. § 504B.161 (formerly § 504.18) (covenants of habitability), *see* VI.E.1, *supra*;

c. Minn. Stat. § 504B.171 (formerly § 504.181) (tenant's covenant not to manufacture, sell or distribute illegal drugs), *see* VI.E.31 and VI.G.16, *supra*;

d. Minn. Stat. § 504B.178 (formerly § 504.20) (security deposits); *Powers v. Garcia*, No. UD-1950905643 (Minn. Dist. Ct. 4th Dist. Sept. 12, 1995) (Appendix 160) (9 month minimum tenancy for return of deposit stricken);

e. Minn. Stat. § 504B.204 (formerly § 504.245) (rental of condemned residential premises) *see* VI.E.1.g, *supra*;

f. Minn. Stat. § 504B.205 (formerly § 504.215) (prohibiting penalty on tenant for calling for police or emergency assistance in response to domestic abuse or any other conduct), *see* VI.G.31, *infra*;

g. Minn. Stat. § 504B.211 (formerly § 504.183) (notice of landlord entry onto premises), *see* VI.E.21, *supra*;

h. Minn. Stat. § 504B.215 (formerly § 504.185) (landlord's nonpayment of utility or essential services; shared meters), *see* VI.E.18.b, *supra*;

i. Minn. Stat. §§ 504B.221 (formerly § 504.26) (unlawful termination of utilities), *see* VI.E.18.c, *supra*;

i. Minn. Stat. § 504B.231 (formerly § 504.255) (lockouts and unlawful eviction). However, a *commercial* lease may require a commercial to waive damages for a lockout. *Duling Optical Corp. v. First Union Management, Inc.,* No. C5-95-2718 (Minn. Ct. App. Aug. 13, 1996), FINANCE & COMMERCE at 66 (Aug. 16, 1996) (Appendix 181) (unpublished decision), *see* VI.E.5, *supra*;

k. Minn. Stat. § 504B.271 (formerly § 504.24) (abandoned property), *see* VIII.C.2, *infra*;

l. Minn. Stat. § 504B.365 (formerly § 566.17) (execution of eviction (unlawful detainer) writ of restitution: landlord's entry and removal of tenant's property in violation of statute violates § 504B.231 (formerly § 504.255), which cannot be waived), *see* VI.E.5, *supra*; and VIII.B, *infra*;

m. Minn. Stat. § 325G.31 (plain language in contracts); *see* Minn. Stat. § 325g.36, subd. 1;

n. A lease requirement waiving the tenant's right to the eviction (unlawful detainer) process and the right to redeem the premises is void as a violation of public policy. *614 Co. v. D.H. Overmayer Co.,* 297 Minn. 395, 397-98, 211 N.W. 2d 891,894 (1973); *Duling Optical Corp. v. First Union Management, Inc.,* No. C5-95-2718 (Minn. Ct. App. Aug. 13, 1996), FINANCE & COMMERCE at 66 (Aug. 16, 1996) (Appendix 181) (unpublished decision), *see* VI.E.20, *supra*;

o. An agreement to agree in the future is illegal and unenforceable. *Upper Swede Hollow Neighborhoods Association v. Khatib*, No. C1-02-422, 2002 WL 31012235 (Minn. Ct. App. Sep. 10, 2002) (unpublished);

p. A violation of consumer laws may make the lease unenforceable. *See Baierl v. McTaggart*, 245 Wis.2d 632, 629 N.W.2d 277 (2001);

q. Minn. Stat. § 504B.177 (for leases beginning or renewed on or after January 1, 2011, the late fee must be in writing and not be for more than 8% of the overdue rent payment), *see* VI.E.10, *supra*;

r. Minn. Stat. § 504B.285 (formerly § 566.03) (retaliation), *see* VI.F.3, *supra*.

13. Unconscionable lease term

A contract is unconscionable where no decent, fair minded person would view the result of its enforcement without being possessed with a profound sense of injustice. *Zontelli and Sons, Inc. v. City of Washwauk*, 353 N.W.2d 600, 604 (Minn. Ct. App. 1984), *rev'd on other grounds*, 373 N.W.2d 744 (Minn. 1985). In other words a contract is unconscionable if it is "such as no man in his sentences and not under delusion would make on the one hand, and no honest and fair man would accept on the other." *In re Estate of Hoffbeck*, 415 N.W.2d 447, 449 (Minn. Ct. App. 1987), quoting *Hume v. United States*, 132 U.S. 406, 411 (1889). Unconscionability is a question of law. *RMJ Sales and Marketing v. Banfi Products Corp.*, 546 F. Supp. 1368, 1375 (D. Minn. 1982).

The party alleging unconscionability must show it had no meaningful choice but to accept the contract term as offered, and that the term is unreasonably favorable to the other party. *Dorso Trailer Sales v. American Body and Trailer*, 372 N.W.2d 412, 415 (Minn. Ct. App. 1985). The trial court should consider the contract terms and the circumstances. *See Pickerign v. Pasco Marketing Inc.*, 303 Minn. 442, 446, 228 N.W.2d 562, 565 (1975); *In re Estate of Hoffbeck*, 415 N.W.2d at 449. An unconscionable lease term is unenforceable. *Id*.

A lease was found not to be unconscionable in *In re Estate of Hoffbeck*, 415 N.W.2d at 449 (trial court's determination of unconscionability reversed, where tenant did not contest the fairness of the lease for four years, the issue was not raised until the end of trial, and there was no evidence on circumstances surrounding the signing of the lease or other provisions in the lease). Lease provisions were found to be unconscionable in *Pickerign*, 303 Minn. at 446, 228 N.W.2d at 565 (*dictum*: 30 day notice to service station operator); *Johnson v. Bostic*, No. 1950508539 (Minn. Dist. Ct. 4th Dist. June 5, 1995) (Appendix 151) (provision prohibiting young boy and girl from sharing bedroom was invalid); *Miller v. George*, No. UD-1941223501 (Minn. Dist. Ct. 4th Dist. Jan. 10, 1995) (Appendix 129) ($25.00 late fee for non-payment of $10.00 rent is unconscionable); *Spring Valley Gardens Associates v. Earle*, 112 Misc.2d 786, ____, 447 N.Y.S.2d 629, 630-31 (Rockland Cty. Ct. 1982) ($50.00 late fee for payment of $405.00 rent ten days late held unconscionable); *Weidman v. Tomaselli*, 81 Misc.2d 328, 335, 365 N.Y.S.2d 681, 689-91 (Rockland Cty. Ct. 1975), *aff'd* 84 Misc.2d 782, _____, 368 N.Y.S.2d 276, 277 (Appendix Term. 1975) ($100.00 in attorney's fees for commencement of an eviction action).

14. Adhesion contract.

An adhesion contract is drafted unilaterally by a business and forced upon an unwilling and often unknowing public for services that cannot readily be obtained elsewhere. *Schlobohm v. Spa Petite, Inc.* 326 N.W.2d 920, 924 (Minn. 1982). It generally is not bargained for, but is imposed on the public for a necessary service on a "take it or leave it" basis. However, a printed form contract offered on a "take it or leave it" basis alone does not establish an adhesion contract. *Id.*

The party alleging an adhesion contract must show that: a. The parties were greatly disparate in bargaining power, (b) there was no opportunity for negotiation, and (c) the services could not be obtained elsewhere. *Id.* at 924-25.

Two recent decisions of the Minnesota Supreme Court and Court of Appeals involving enforcement of exculpatory clauses indicate the difficulty in determining whether a contract is an adhesion contract. In *Schlobohm*, a health spa member sued the health spa for personal injuries sustained at the spa. A five member majority of the Supreme Court held that an exculpatory clause in the membership contract was not an adhesion contract, on the grounds that (1) the member voluntarily applied for and acceded to the terms of membership, (2) there was no showing that the service was necessary, and (3) there was no showing that the services could not be obtained elsewhere. *Id*. at 925. The court noted that in determining whether a service is public or essential, the courts consider whether the service is regulated by statute. *Id.*

Four Justices dissented. Justice Simonett, writing for the dissenting justices, concluded that the contract was an adhesion contract, on the grounds that (1) the parties were disparate in bargaining power, (2) the service was a community service, and (3) it appears that the service was not readily available elsewhere. *Id.* at 927.

In *Malecha v. St. Croix Valley Skydiving Club, Inc.*, 392 N.W.2d 727 (Minn. Ct. App. 1986), a skydiving course student sued the skydiving club for personal injuries sustained when his parachute failed to open properly. A two judge majority upheld the exculpatory clause, relying on the grounds asserted by the *Schlobohm* majority. *Id.* at 729-32.

Judge Randall dissented, and citing the dissent in *Schlobohm*, concluded the contract was an adhesion contract. *Id.* at 732-33. Regarding the issue of whether the services could be obtained elsewhere, Judge Randall noted that even if there were other business in the area providing the same services, they easily could use the same provisions to frustrate attempts to negotiate and shop around. *Id.* at 732.

In *Weidman v. Tomaselli*, 81 Misc. 2d 328, 334, 365 N.Y.S.2d 681, 689 (Rockland Cty. Ct.), *aff'd on other grounds*, 84 Misc. 2d 782, 386 N.Y.S.2d 276, 277 (Appendix Term. 1975), the court held that a provision for $00 in attorney's fees for commencement of an eviction action was an adhesion contract. The court found that shelter is a necessity, that the overwhelming need for affordable housing left the tenants with little bargaining power, and that the clause worked to the excessive benefit of the landlord. *Id.* at 332-33, 365 N.Y.S.2d at 687. The court distinguished *Ciofalo v. Vic Tanney Gyms, Inc.*, 10 N.Y.2d 294, 297-98, 220 N.Y.S.2d 962, 965, 177 N.E.2d 925, 926 (1961), which upheld an exculpatory clause in a gymnasium membership contract on the grounds discussed in *Schlobolm* and *Malecha*. 81 Misc. 2d at 331-32, 365 N.Y.S.2d at 687.

15. Oral leases

Generally, an oral lease's only terms are the amount of rent and when it is due. If the tenant complies with those terms, the landlord can terminate it only with proper notice. *Olowu v. Patterson*, No: UD-1950606520 (Minn. Dist. Ct. 4th Dist. July 3, 1995) (Appendix 142). The landlord cannot evict the tenant for breach of the lease, since no terms have been breached and since the oral lease does not have a right of reentry clause. *O'Brian v.* _____, No. HC 1010402506 (Minn. Dist Ct. 4th Dist. Apr. 18, 2001) (Appendix 552) (breach claims dismissed where oral lease contained no right of re-entry clause; notice claim dismissed where landlord failed to attached notice to complaint, and failed to prove notice was given; expungement granted); *D & D Real Estate Investment, L.L.P. v. Hughes*, Nos. UD-1990311505 (Minn. Dist. Ct. 4th Dist. Mar. 30, 1999) (Appendix 323A) (Dismissal of breach of lease claim where there was no convincing evidence that the oral lease contained a right of re-entry clause, no convincing evidence as to the dollar amount of damage to a door to determine whether damage was material or *de minimis*, and the landlord failed to prove that the tenant or one of her guests damaged the door where the tenant claimed damage was caused by a burglar; tenant's names expunged from file); *Jaffer Enterprises, Inc. v. Peters,* No.

UD-1920701512 (Minn. Dist. Ct. 4th Dist. July 20, 1992) (Appendix 4.F); *Edward v. Swenson*, No. UD-1900730508 (Minn. Dist. Ct. 4th Dist. Aug. 9, 1990) (Appendix 17.C); *PCF Management v. Goodman*, No. UD-1881222537, Transcript at 3 (Minn. Dist. Ct. 4th Dist. Jan. 4, 1989) (Appendix 17.D). *See* discussion, *supra* at VI.G.1, VI.F.1. (reentry clause) and (notice to quit). A written lease not signed by the parties does not govern the tenancy. *Ochoa v. Kenneth*, UD-1950919505 (Minn. Dist. Ct. 4th Dist. Oct. 20, 1995) (Appendix 79).

In *Butler v. Cohns*, No. C2-96-6599 (Minn. Dist. Ct. 2d Dist. Oct. 22, 1996) (Appendix 218), the referee ruled for the landlord on the claim that the tenants were a threat to the landlord and the landlord's property. On a request for judge review, the court noted that its scope of review was governed by Minn. R. CIV. P. 53.05 (b), and that the court must accept the facts found by the referee unless clearly erroneous, but questions of law are reviewed in *de novo.* The court concluded that whether or not there is an implied covenant in oral leases against threatening behavior, any termination of an oral lease must comply with MINN. STAT. Sec. 504.06 (now § 504B.135): a one month notice to quit for violations of an oral lease, and a fourteen day notice for failure to pay rent.

However, recent legislation allows for an eviction (unlawful detainer) action for breach of a covenant not to manufacture, acquire, or sell illegal drugs or possess illegal drugs for such purposes. *See* discussion, *infra* at VI.G.16. (Allegation of Illegal Drugs).

16. Allegations of unlawful activity

a. Covenant of landlords and tenants. Minn. Stat. § 504B.171 (formerly § 504.181).

When first enacted, the tenant covenanted that the tenant will not unlawfully allow controlled substances in the premises, and that common areas will not be used by the tenant or others under the tenant's control to carry out activities that are a violation of controlled substances laws. In 1997 the drug covenant was expanded to cover other types of unlawful activity, and to cover landlords as well as tenants. Minn. Stat. § 504.181 (now § 504B.171). Now, both the tenant and the landlord, as well as the licensor and licensee, covenant that neither will (1) unlawfully allow illegal drugs on the premises, the common area or curtilage, (2) allow prostitution or prostitution related activity to occur in the premises, common area or curtilage, or (3) allow the unlawful use or possession of certain firearms in the premises, common area, or curtilage. The parties also covenant that the common area and curtilage will not be used by them or persons acting under their control to carry out activities in violation of illegal drug laws.

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

The tenant can enforce the covenant in a tenant remedies, rent escrow or emergency action. The extension of liability under the covenant to landlords probably does not provide a defense to the tenant that the landlord's violation of the covenant excuses the tenant's violation of the covenant. A landlord's violation of the covenant may give rise to defenses in nonpayment of rent and notice to quit cases. *See* discussion, *supra*, at VI.E.31 and VI.F.3.

The plaintiff must prove a violation of the covenant by preponderance of the evidence. *See Reprise Associates v.* _____, No. 27-CV-HC-08-4325 (Minn. Dist. Ct. 4th Dist. July 10, 2008) (Appendix 617) (breach of lease claim dismissed where landlord showed only that police came to building for disturbance, but tenant was not arrested of involved but guest was arrested, and in response to anonymous call to police alleging illegal narcotics use, police found no evidence of use and made no arrest); *Johnson v.* _____, No. HC 1001005514 (Minn. Dist Ct. 4th Dist. Oct. 18, 2000) (Appendix 526) (directed verdict entered on drug claim where witness testified no drugs were found in raid, and testimony on earlier controlled purchase of drugs was not pled; nonpayment of rent was by Section 8 and not tenant, so tenant not required to pay filing fee to redeem); *Boone v. Huff*, No. UD-1940509508 (Minn. Dist. Ct. 4th Dist. May 24, 1994) (Appendix 69) (plaintiff failed to prove drugs were found on premises of the defendant). However, some Minnesota courts have found that under federal public housing regulations, the tenant is strictly liable for illegal drugs found on the premises. *Minneapolis Public Housing Authority v. Greenlaw*, No. UD-1940413507 (Minn. Dist. Ct. 4th Dist. June 8, 1994); *Minneapolis Public Housing Authority v. Smith*, No. UD-1940304518 (Minn. Dist. Ct. 4th Dist. Mar. 25, 1994).

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

Possession of drug paraphernalia is not criminal activity or illegal activity under Minn. Stat. § 504B.171 (formerly § 504.181), but may violate a lease provision specifically prohibiting possession. *Southgate Mobile Village v.* _____, No. HC-0205315400 (Minn. Dist Ct. 4th Dist. July 2, 2002) (Appendix 575) (plaintiff did not prove drugs were on the property).

The landlord may waive violation of a drug covenant in the lease by acceptance of rent with knowledge of the breach. *Southgate Mobile Village v.* _____, No. HC-0205315400 (Minn. Dist Ct. 4th Dist. July 2, 2002) (Appendix 575); *Maryland Park Apartments v.* _____, No. CX-02-4044 (Minn. Dist. Ct. 2nd Dist. June 17, 2002) (Appendix 533) (federal law and *Rucker* do not preclude Minnesota statute with greater tenant protection; landlord failed to prove criminal activity occurred at or near tenant's residence, landlord failed to prove that tenant knew or had reason to know of criminal activity, landlord waived breach by accepting rent).

The statute applies to manufactured home park lot rental, and does not require notice under § 327C.09. *D. H. Gustafson Co. v. Rasmussen*, No. C2-00-540, 2000 WL 1742111 (Minn. Ct. App. 2000) (unpublished).

In *Ford v.* _____, No. HC-1020325505 (Minn. Dist. Ct. 4th Dist. Apr. 26, 2002) (Appendix 500), the court found that the Section 8 voucher landlord failed to prove that loud cars belonged to tenant's guests, that defendant knew or should have known that guests had firearms, that children hanging around the property were defendant's guests, that trash in the yard was from defendant's apartment, that a basement electrical fire resulted from defendant's conduct, that the notice of intent to condemn resulted from defendant's conduct, that the smell of marijuana came from defendant's apartment and that the plaintiff failed to allege drug use with any particularity.

In *Minneapolis Public Housing Authority v. Folger*, No. UD-1971114532 (Minn. Dist. Ct. 4th Dist. Jan. 23, 1998) (Appendix 346A), the tenant's guest consumed drugs and died of an overdose while the tenant was sleeping. The Court concluded that the public housing authority did not prove that the tenant violated the lease, as the tenant did not "allow" his guest to use drugs or engage in criminal activity, and the tenant

did not violate Minn. Stat. § 504.181 (now § 504B.171) because the tenant did not know or have reason to know of his guest's prohibited activity. The decision was affirmed on judge review (Minn. Dist. Ct. 4th Dist. Apr. 13, 1998) (Appendix 346B) (Oleisky, J.). In *2717 Blaisdell Co. v. McKenzie*, No. UD-1950104525 (Minn. Dist. Ct. 4th Dist. Feb. 9, 1995) (Appendix 161), the police observed the tenant's unit, noting excess traffic. The police then arranged for a "controlled buy" of cocaine. After a search by the police, the tenant's nonresident brother was cited for possession of two marijuana cigarettes. There was no evidence introduced about the alleged cocaine (no chemical test, no chemist report, no police officer testimony about identification of substance as cocaine or how the officer determined that cocaine was purchased), the value of the substances seized, or the tenant's knowledge of his brother's possession of the marijuana or cash. The court concluded that the landlord had not proven violation of the drug covenant or a lease provision incorporating the seizure statute.

Other decisions holding for the tenant include *Housing and Redevelopment Authority of Duluth v. Henski*, No. C6-96-601484 (Minn. Dist. Ct. 6th Dist. Sep. 4, 1996), *affirmed* No. C7-96-1872) (Minn. Ct. App. Feb. 11, 1997) (Appendix 261) (Lower court found drugs present but no evidence that tenant knew or participated in drug activity and tenant excluded offender from the property; affirmed by unpublished order not to be cited as precedent); *Minneapolis Public Housing Authority v. Henry*, No. UD-1970122503 (Minn. Dist. Ct. 4th Dist. May 23, 1997) (Appendix 276) (Public housing: affirmed referee decision that elderly tenant did not violate state drug covenant where police found trace amount of drugs and paraphernalia with no evidence of the tenant's involvement or knowledge of drug activity; possession of drug paraphernalia with intent to sell or use it is not drug related *criminal* activity under federal regulations); *Minneapolis Public Housing Authority v. Eberhardt*, No. UD-1970204642 (Minn. Dist. Ct. 4th Dist. Mar. 17, 1997) (Appendix 275) (Public housing: landlord did not prove that elderly tenant knew or had reason to know of drug possession by guests where tenant admitted knowledge of guests' drug use but denied knowledge of use or possession in his apartment, there was no evidence that the tenant knew of the guests' drug use or the tenant's familiarity with drugs, and the small amount of drugs found; distinguished *Minneapolis Public Housing Authority v. Greene*; six day notice was unreasonable where there was no evidence of a threat to others' safety); *Minneapolis Public Housing Authority v. Lafayette*, No. UD-190627501 (Minn. Dist. Ct. 4th Dist. Aug. 7, 1997) (Appendix 277) (Discovery of illegal drugs in common area near where tenant had been did not prove possession of illegal drugs). *See also United States v. 121 Nostrand Avenue*, 760 Supp. 1015 (E.D.N.Y. 1991) (Under federal anti-drug forfeiture statute, court removed adult grandchild who sold drugs from public housing apartment and allowed grandmother and other household members to remain because she lacked knowledge of drug activity).

In *Minneapolis Public Housing Authority v. Greene*, 463 N.W.2d 558, 561-62 (Minn. Ct. App. 1990), the court affirmed the trial court's decision that seizure of cocaine from a public housing unit constituted good cause for termination of the lease. *See Phillips Neighborhood Housing Trust v. Brown*, 564 N.W.2d 573 (Minn. Ct. App. 1997), *rev. den.* (Affirmed eviction of entire household when one co-tenant violated the lease by engaging in illegal drug activity); *Minneapolis Public Housing Authority v. Barron*, No. C9-95-454 (Minn. Ct. App. Aug. 22, 1995), FINANCE & COMMERCE at 41 (Aug. 25, 1995) (Appendix 158) (unpublished: public housing, eviction for seizure of drugs; dissent concluded that evidence did not support conclusion that the tenant knew or should have known about drugs); *Minneapolis Public Housing Authority v. Demmings*, No. C5-94-2045 (Minn. Ct. App. May 9, 1995), FINANCE & COMMERCE at 20 (May 12, 1995) (Appendix 159) (unpublished: public housing, possession and sale of illegal drugs).

Cases alleging violations of the illegal drug covenant now receives priority in scheduling hearings and issuing and executing the Writ of Restitution. *See* discussion, *supra* and *infra* at V.Q, VI.G.24, VIII.B-C.

b. Seizure

Minn. Stat. § 504B.301 (formerly § 566.02) provides that a seizure of contraband or a controlled substance manufactured, distributed or acquired in violation of Ch. 152 and with a retail value of at least $100.00 constitutes unlawful detention by the tenant, unless there is a defense under § 609.5317. Laws Ch. 305, § 2. When contraband or a controlled substance manufactured, distributed or acquired in violation of Ch. 152 and with a retail value of at least $100.00 is seized on residential rental property incident to a lawful search or arrest, the county attorney shall give notice to the landlord and agent authorized to receive service under § 504B.171 (formerly § 504.181) within 30 days after seizure. With 15 days of notice, the landlord must bring an eviction (unlawful detainer) action, or assign to the county attorney the right to bring the action. The assignment is limited to those rights and duties up to and including delivery of the writ of restitution to the sheriff. Upon notice of a second seizure involving the same tenant, the property is subject to forfeiture unless an eviction (unlawful detainer) action has been commenced or the right to bring the action has been assigned. Minn. Stat. § 609.5317, subd. 1.

It is a defense for a tenant that the tenant had no knowledge or reason to know of the presence of the contraband or controlled substance, or could not prevent it from being brought into the property. § 609.5317, subd. 3. *See Minneapolis Public Housing Authority v. Jivens,* No. UD-1920720559 (Minn. Dist. Ct. 4th Dist. Sept. 9, 1992) (Appendix 18.M). In *Minneapolis Public Housing Authority v. Greene*, the court held that the defenses and notice requirements of the statute were not applicable where the trial court found that the retail failure of seized crack cocaine was $200.00, below the $1,000.00 threshold in effect at the time. 463 N.W.2d at 560-61. *See also Minneapolis Public Housing Authority v. Barron*, No. C9-95-454 (Minn. Ct. App. Aug. 22, 1995), FINANCE & COMMERCE at 41 (Aug. 25, 1995) (Appendix 158) (unpublished: public housing, eviction for seizure of drugs; dissent concluded that evidence did not support conclusion that the tenant knew or should have known about drugs).

In *2717 Blaisdell Co. v. McKenzie*, No. UD-1950104525 (Minn. Dist. Ct. 4th Dist. Feb. 9, 1995) (Appendix 161), the police observed the tenant's unit, noting excess traffic. The police then arranged for a "controlled buy" of cocaine. After a search by the police, the tenant's nonresident brother was cited for possession of two marijuana cigarettes. There was no evidence introduced about the alleged cocaine (no chemical test, no chemist report, no police officer testimony about identification of substance as cocaine or how the officer determined that cocaine was purchased), the value of the substances seized, or the tenant's knowledge of his brother's possession of the marijuana or cash. The court concluded that the landlord had not proven violation of the drug covenant or a lease provision incorporating the seizure statute.

The court may not stay issuance of the writ of restitution unless the court makes written findings specifying the extra-ordinary and exigent circumstances that warrant staying the writ for reasonable period, not to exceed seven days.

See generally National Housing Law Project, *Security, Crime and Drugs*, (1990) (Appendix 20.C); HUD HOUSING PROGRAMS: TENANT'S RIGHTS; discussion, *supra* at VI.G.10.

c. Public nuisance

Minn. Stat. § 617.81, subd. 2 includes unlawful sale or possession of controlled substances. Under § 617.85, a public nuisance is an additional ground to cancel a lease or acquire restitution of the premises. If the city or county attorney or attorney general seeks abatement of a public nuisance, the landlord may move to cancel the lease or secure restitution of the premises. *See City of St. Paul v. Como Rice Health Club*, No. C7-95-1120 (Minn. Ct. App. Oct. 24, 1995), FINANCE & COMMERCE at 37 (Oct. 27, 1995)

(Appendix 162) (landlord did not prove that nuisances were committed in portion of premises under tenant's control).

d. Public and subsidized housing.

Public and some subsidized housing programs have additional regulations governing drug related criminal activity on or near the premises. For a list of relevant defenses, *see* Forms Appendix, Answers Forms A-8. *See also* discussion, *supra*, at VI.G.10 (Breach of lease: public and subsidized housing).

e. Regulation prohibiting Legal Services Corporation recipients from representing tenants in certain drug allegation public housing cases

The Legal Services Corporation promulgated a regulation prohibiting recipient representation in eviction cases from public housing where the person has been recently convicted or prosecuted for drug offenses, and the person threatened or now threatens other public housing tenants' or employees' health and safety. The prohibition does not extend to other members of the person's household. 45 C.F.R. Part 1633 (Appendix 163).

f. Reasonable accommodation of disabilities

Reasonable accommodation of disabilities also may apply in chemical abuse cases. The defenses vary depending on the type of housing at issue. For a list of defenses, *see* Forms Appendix, Answer Forms. *See generally* discussion, *supra*, at VI.G.9.

g. Informants

In *Bossen Terrace v. Miller*, No. CX-982423 (Minn. Ct. App. June 1, 1999) (unpublished), the landlord alleged drug sales to a confidential reliable informant (CRI) based on testimony of police officers. The Court of Appeals affirmed the district court's refusal to order disclosure of the CRI employed by the police officers, concluding that the tenant had not explained precisely what testimony the tenant thought the informant would give and how this testimony would be relevant to the material issue. The court noted that the district court relied on the observations of the police officers, rather than statements made by the CRI. The court concluded that the district court did not err in inferring that the tenant knew or should have known of illegal activity on the property, where the police testified as to the illegal activity, and the tenant claimed sole access and control to her apartment.

h Search and seizure

In cases alleging criminal activity, an issue can be whether evidence allegedly obtained improperly by the police should be admitted in a civil proceeding.

There have been several criminal cases discussing whether a police search of a tenant's apartment or other rented property can be authorized by the landlord. In *State v. Licari*, 659 N.W.2d 243 (Minn. 2003), the court held that (1) the defendant had capacity to challenge search of rented storage unit based rental facility manager's consent; (2) the landlord's contractual right to inspect did not give her actual authority to consent to search; (3) the police officer's mistaken belief that the landlord had authority to consent to search was not reasonable for purposes of apparent authority exception to warrant requirement; (4) the intrusion was not justified under plain-view exception to warrant requirement; and (5) the manager's entry into storage unit at officer's request would have been subject to same constitutional constraints as

officer's entry. *See State v. Frey*, No. C3-01-718, 2002 WL 206628 (Minn. Ct. App. Feb. 12, 2002) (unpublished) (warrantless search improper where landlord unlocked apartment door for police and post-entry conduct exceeded the scope of the emergency exception to the warrant requirement). *But see State v. Herzog*, No. C3-01-802, 2002 WL 769215 (Minn. Ct. App. April 30, 2002) (unpublished) (pre-*Licari* decision: it was reasonable for officer to believe caretaker had authority to consent to the search of the garage; consent exception applies and the warrantless entry was permissible).

The propriety of the search has been considered in eviction cases. *Minneapolis Public Housing Authority v.* _____, No. HC 10306313566 (Minn. Dist Ct. 4th Dist. July 31, 2003) (Appendix 539) (Judge Doty) (public housing eviction denied and expunged; landlord did not prove that police officer properly learned about marijuana where officer entered apartment with consent of tenant to look for trespassed person, and did not prove that marijuana was in plain view; small amount of marijuana was not criminal activity; landlord's knowledge of alleged altercation was from a police report whose authors did not testify, and did not connect tenant to the incident); *Minneapolis Public Housing Authority v.* _____, No. HC000921508 (Minn. Dist. Ct. 4th Dist. Oct. 20, 2000) (Appendix 542) (the court excluded evidence from a warrantless search of the apartment).

Courts in other civil proceedings also have confronted the issue. In *State Patrol v. State, D.P.S.*, 437 N.W.2d 670, 676-77 (Minn. Ct. App. 1989), the court of appeals held that the exclusionary rule applied to a labor arbitration proceedings involving the possible loss of a job. The court noted:

> The primary purpose, if not the sole purpose, of the exclusionary rule is to deter future unlawful police conduct. To give effect to this deterrence function, we cannot allow one government agency to use the fruits of unlawful conduct by another branch of the same agency to obtain an employee's dismissal. Furthermore, the loss of a job is a very severe sanction which warrants special condition. We agree with Judge J. Skelly Wright of the Court of Appeals for the District of Columbia, who wrote: "It would seem wholly at odds with our traditions to allow the admission of evidence illegally seized by Government agents in discharge proceedings, which the Court has analogized to proceedings that "involve the imposition of criminal sanctions . . . . ""

Id. Citations excluded.

In *Alman v. Anderson*, 263 N.W.2d 651, 652 (Minn. 1978), the Minnesota Supreme Court affirmed as not clearly erroneous the trial court's ruling in a negligence action that blood alcohol tests would be excluded because the driver's consent was not knowingly given. However, the court stated that "We do not pass on the question of the use of blood samples in civil litigation where there has been no consent to the taking of the blood." *Id.*, n.1. In *Tucker v. Pahkala*, 268 N.W.2d 728, 730 (Minn. 1978), the court affirmed the trial court's admission of blood alcohol test results in a negligence action, concluding that the implied-consent statutes cannot be used to exclude material evidence and hinder a just result, where the party objecting to admission of the evidence had commenced the action and put the issue of negligence of the two drivers before the court. The court noted that the case was distinguishable from *Alman* without explanation. In *Matter of Welfare of C. Children*, 348 N.W.2d 94, 98 (Minn. Ct. App. 1984), the court of appeals held that "Without expressing any opinion as to the applicability of the exclusionary rule to civil cases, if any error occurred, it was merely harmless because substantial injustice did not occur. This evidence was clearly insignificant and was not even referred to by the trial judge in the findings." *Id.* (Citations omitted). While it is difficult to make firm conclusions based on these cases, it appears that the tenant has the strongest argument for excluding improperly obtained evidence in a public housing eviction, where the government is the landlord, another branch of the government obtained the evidence, and the branches may well have worked together.

17. Subtenants and assignees

The assignee is liable to the lessor for all covenants that run with the land. Kostakes v. Daly, 246 Minn. 312, 316, 75 N.W.2d 191, 194 (1956). The assignor may reenter and reclaim possession of the premises from the assignee only for breach of covenants of substantial advantage to the assignor. *Id*. at 317-18, 75 N.W.2d at 194-95.

18. Retaliation

While the retaliation protections of Minn. Stat. § 504B.285 (formerly § 566.03) appear to be limited to holding over after notice cases, Minn. Stat. § 504B.441 (formerly § 566.28) provides broader protection for tenants who have complained about violations of the covenants of habitability or violations of the lease. Section 504B.441 (formerly § 566.28) provides that the landlord may not evict the tenant, increase the tenant's obligations, or decrease services to the tenant as a penalty for the tenant's complaint of a "violation." A "violation" is defined as being a violation of a government health, safety, housing, building, fire prevention, or housing maintenance code applicable to the building, a violation of the landlord's statutory covenants to keep the premises in reasonable repair and fit for the use intended by the parties, or a violation of an oral or written agreement, lease or contract for the rental of a dwelling in the building. § 504B.001 (formerly § 566.18).

If the eviction, increase of obligations or decrease of services occurs within 90 days after the filing of the complaint, the landlord will have the burden of proving that the eviction, increase and obligations or decrease in services was *not* intended to be a penalty. After 90 days, the burden of proof shall be on the tenant. § 504B.441 (formerly § 566.28).

It is difficult for a tenant to prevail on a retaliation claim in a breach of lease case. Either the tenant may not be able to prove retaliation if the landlord has good faith claims of breach, or if the burden of proof is shifted to the landlord, the landlord may be able to prove that the allegations of breach overcome the presumption of retaliation. *Anoka County Community Action Program v. Solmonson*, No. A05-1251, 2006 WL 1320332 (Minn. Ct. App. May 16, 2006) (unpublished) (affirmed trial court decision that defendant failed to prove retaliation in breach of lease eviction action); *Smithrud v. McDaniel*, No. UD-195050529 (Minn. Dist. Ct. 4th Dist. May 22, 1995) (Appendix 130) (tenant did not prove retaliation; no discussion of shifting burden to landlord). *But see McNair v. Doub*, No. UD-1960708524 (Minn. Dist. Ct. 4th Dist. Aug.12, 1996) (Appendix 205) (children fighting does not equal unreasonable disturbance of neighbors; landlord waived right to evict tenant for possession of pets by accepting rent after knowledge of and acquiescence to possession of a pet; claim of "thirty-five police calls" was not proven; landlord's claim for eviction was in retaliation to tenant's initiation of rent escrow claim; proof of retaliation may void a landlord's non-waiver lease provision).

In *Amsler v. Harris*, and *Harris v. Amsler*, Nos. UD-1990826901 and UD-1990902500 (Minn. Dist. Ct. 4th Dist. Sep. 20, 1999) (Appendix 376), the court bifurcated trial on issues of breach of lease and other matters. The court found that the tenant did not breach material term of lease where provision on occupancy limit was an afterthought to the entire lease, was not in the body of the agreement, and was not initialed by the parties; landlord waived breach by continuing to accept rent after knowledge; and the landlord failed to prove a non-retaliatory purpose for an eviction complaint filed seven days after the tenant filed an emergency lockout petition. The ; remaining issues were scheduled for trial with payment of withheld rent into court.

Some local ordinances include protection against retaliation. Minneapolis Code of Ordinances § 244.80 (Appendix 138) provides a presumption of retaliation where the landlord attempts to terminate the

tenancy after the tenant complains to the inspection agency, or the tenant of City sues the landlord over housing conditions. *The presumption has no time limit.* The tenant also may be entitled to rent abatement for retaliation. *See* discussion, *supra*, at VI.E.1.d.(3) (Violation of covenants of habitability).

See also discussion, *supra* at VI.E.9, VI.F.3 (retaliatory rent increase or services decrease and retaliatory eviction).

19. The breach is not material.

In an unlawful detainer actions alleging breach of lease, the landlord must prove a material breach or substantial failure in performance. *Cut Price Super Markets v. Kingpin Foods, Inc.*, 256 Minn. 339, 351, 98 N.W.2d 257, 266 (1959); *Cloverdale Foods of Minnesota, Inc.,* 580 N.W.2d 46, 49 (Minn. Ct. App. 1998). To determine present possessory rights, it is necessary to determine not only the truth of the allegations in the complaint, but also whether the plaintiff demonstrates a "material" breach of the lease agreement. 580 N.W.2d at 49.

See Skogberg v. Huisman, No. C9-01-1131, 2002 WL 417185 (Minn. Ct. App. 2002) (unpublished) (affirmed findings that landlord failed to prove subletting where farmer-tenant farmed with his relative but did not assign control to him, and landlord accepted late payments; reversed finding that alteration was not a breach, but remanded to determine whether breach was material); *Skogberg v. Huisman*, No. C7-02-2059, 2003 WL 22014576 (Minn. Ct. App. 2003) (unpublished: on appeal from remand, affirmed finding that breach which improved land and did not damage the landlord was not material under a clear error rather than *de novo* review; rejected argument that any breach was material, citing *Cloverdale Foods of Minn., Inc. v. Pioneer Snacks*, 580 N.W.2d 46 (Minn. Ct. App.1998); a material breach is "[a] substantial breach of contract, usu[ally] excusing the aggrieved party from further performance and affording it the right to sue for damages" which ""goes to the root or essence of the contract" and is "so fundamental to the contract that the failure to perform that obligation defeats an essential purpose of the contract," citations omitted).

See also Larson v. _____, No. HC 030324502 (Minn. Dist Ct. 4th Dist. Feb. 13, 2004) (Appendix 528) (referee will not reconsider judge's order on waiver; tenant meets definition of disabled; requiring mobility disabled tenant to park vehicle further away than other tenants is not a reasonable accommodation; while parking tenant's vehicle near the home violated an ordinance, most other tenants also violated the unenforced ordinance; tenant's ordinance violations were repeated but not serious; tenant may raise landlord's violation of the covenants of habitability as a cause of tenant violation of the lease, where park owner's park design violated a local ordinance and forces tenant to violate the same ordinance); *Gustafson v.* _____, No. HC 030220546 (Minn. Dist Ct. 4th Dist. May 5, 2003) (Appendix 509) (dismissal where claim activity was not a lease violation); *Olasande v.* _____, No. HC 1020906533 (Minn. Dist Ct. 4th Dist. Oct. 24, 2002) (Appendix 555) (landlord failed to prove that alleged damage, over-occupancy, failure to allow access, and failure to maintain insurance were material breaches to warrant forfeiture; landlord failed to rebut presumption of retaliation where landlord failed to prove that sale of the property required removing the tenant, and the landlord's desire to sell in response to mortgage foreclosure actually was connected to the tenant's enforcement of habitability rights); *Amsler v. Harris*, and *Harris v. Amsler*, Nos. UD-1990826901 and UD-1990902500 (Minn. Dist. Ct. 4th Dist. Sep. 20, 1999) (Appendix 378) (Court bifurcated trial on issues of breach of lease and other matters; tenant did not breach material term of lease where provision on occupancy limit was an afterthought to the entire lease, was not in the body of the agreement, and was not initialed by the parties; landlord waived breach by continuing to accept rent after knowledge; landlord failed to prove a non-retaliatory purpose for an eviction complaint filed seven days after the tenant filed an emergency lockout petition; remaining issues scheduled for trial with payment of withheld rent into court.; *D & D Real Estate Investment, L.L.P. v. Hughes*, Nos. UD-1990311505 (Minn. Dist. Ct. 4th Dist.

Mar. 30, 1999) (Appendix 323A) (Dismissal of breach of lease claim where there was no convincing evidence that the oral lease contained a right of re-entry clause, no convincing evidence as to the dollar amount of damage to a door to determine whether damage was material or *de minimis*, and the landlord failed to prove that the tenant or one of her guests damaged the door where the tenant claimed damage was caused by a burglar; tenant's names expunged from file).

Damage to the premises must be more than minimal to be a material breach. *Friederrichs v. _____*, No. UD-1940608542 (Minn. Dist Ct. 4th Dist. June 1994) (Appendix 502) (damage was not material).

In actions alleging both nonpayment of rent and breach of the lease, the breach must be material. Minn. Stat. § 504B.285 (formerly § 566.03), subd. 5, added by 1993 Minn. Laws Ch. 165, § 3. *See* discussion, *infra*, at VI.G.21. The standard also has support in Minn. Stat. § 500.20 and *Kostakes v. Daly*, 246 Minn. 312, 317, 75 N.W.2d 191, ___ (1956) (landlord could not evict tenant for covenant violation unless covenant was of "substantial advantage" to landlord), to argue that the landlord may evict a tenant for breach of lease only if the breach is material.

Recent decisions have discussed breach of lease cases in the context of whether there was a materials violations of the lease. *Lloyd Management, Inc. v. Ajayi*, C-395-2636 (Minn. Ct. App. June 4, 1996), FINANCE AND COMMERCE at 56 (June 7, 1996) (Appendix 241) (unpublished: record supported the findings of material breach of lease); *Sammon v. Mayo*, No. UD-196-0405521 (Minn. Dist. Ct. 4th Dist. Apr. 24, 1996) (Appendix 239) (landlord did not prove that teenager's coloring of apartment wall later cleaned by the tenant, violated leased provisions prohibiting property damage and painting without consent); *Ridgewood Arches v. Williams*, No. UD-1950201501 (Minn. Dist. Ct. 4th Dist. Feb. 22, 1995) (Appendix 164) (landlord did not prove that loud music was not a material violation of the lease); *Valley Manor Apts. v. Gullickson*, No. CX-94-10 (Minn. Dist. Ct. 8th Dist. Feb. 3, 1994) (Appendix 56) (owner must show substantial violations of lease). The counter argument is that subdivision is general to all actions, while subdivisions 4 applies to retaliation cases and subdivision 5 applies to combined actions.

20. Cure

In a public housing case, the Court of Appeals held that the landlord's right of action is complete upon the tenant's breach of the lease, and subsequent remedial action cannot nullify the violation. *MCDA v. Smallwood*, 379 N.W.2d 554, 556 (Minn. Ct. App. 1985), petition for rev. denied, (Minn. Feb. 19, 1986). The *Smallwood* Court relied upon *First Minnesota Trust Co. v. Lancaster Corp.*, 185 Minn. 121, 131, 240 N.W. 459, 464 (1931), which followed earlier decisions and held that in a nonpayment of rent case, the landlord's right of action is complete upon the default in payment of rent, eliminating the need for a right of reentry clause in the lease.

More recently, in *Schuett Investment Co. v. Anderson*, 386 N.W.2d 249 (Minn. Ct. App. 1986), the Court may have indicated some rethinking of *Smallwood*. After summarizing the defendant's cure argument, the court stated that "[the defendant] removed the boxes creating the fire hazard prior to the time of hearing and thus therefore redeemed her tenancy." *Id.* at 252. However, the court decided the case based upon the landlord's failure to accommodate the defendant's disability. *Id.* at 253. *But see Willow Point Partners, LLC v. Willows on the Water, LLC*, No. A03-225, 2003 WL 22998880 (Minn. Ct. App. Dec. 23, 2003) (unpublished) (tenant was in default under the lease and tenant was not entitled to notice and an opportunity to cure; tenant failed to satisfy the settlement agreement when it issued a check with insufficient funds; tenant was not required to pay the full amount due under the lease for future months to redeem the property); *Castaways Marina, Inc. v. Dedrickson,* No. C1-02-1425, 2003 WL 1961861 (Minn. Ct. App. April 29, 2003)

(unpublished) (the right to redeem does not apply to an action for breach which does not include a claim for rent).

Allowing for cure of breaches is consistent with judicial abhorrence of forfeiture. *See 614 Co. v. D.H. Overmayer*, 297 Minn. 395, 398, 211 N.W.2d 891, 894 (1973). However, in *Lloyd Management, Inc. v. Ajayi*, C-395-2636 (Minn. Ct. App. June 4, 1996), FINANCE AND COMMERCE at 56 (June 7, 1996) (Appendix 241) (unpublished), the Court held that the landlord need not notify the tenant of lease violations to allow the tenant to correct the problem before lease termination.

The district courts appear willing to allow the tenant to cure the lease violation in some circumstances. *Berry v. Lane*, Nos. UD-1980629502 and UD-1980603900 (Minn. Dist. Ct. 4th Dist. Jul. 22, 1998) (Appendix 310A) (Landlord did not prove breaches of the lease to warrant termination, where tenant brought pets to the property to deal with mice but removed the pets at the landlord's request, a tenant removed a refrigerator which did not work and replaced it, the tenants and her children caused *de minimis* damage to the property); *Minneapolis Public Housing Authority v. Otto*, No. UD-1970326517 (Minn. Dist. Ct. 4th Dist. May 9, 1997) (Appendix 279) (Tenant cured alleged lease violation by getting rid of his dog).

Regardless of whether the tenant has a right to cure a breach, the landlord may not accept cure and later base an eviction (unlawful detainer) action on the breach. For instance, late fees for late payment of rent are liquidated damages, and are intended to serve as a reasonable forecast of damages resulting from the lease violation. *See* discussion, *supra*, VI.E.10 (improper late fees). By electing to accept payment of late fees, the landlord allows the tenant to cure the breach. *See Northwestern State Bank v. Foss*, 293 Minn. 171, ___, 197 N.W.2d 662, 665 (1972) (breach of contract damages and rescission are inconsistent remedies because former affirms a contract an latter terminates a contract).

Some lease provisions specifically provide for a period to cure lease violations. The court should enforce these provisions similar to other lease provisions. However, in *Carlson Real Estate Co. v. Soltan*, 549 N.W. 2d 376, 381 (Minn. Ct. App. 1996), the court held that a ten day cure provision in a commercial lease did not apply to the tenant's continuing breach despite appropriate warnings, since application of the cure provision would allow the tenant to continue prohibited conduct indefinitely so long as there were intermittent ten day cure periods.

21. Combined actions for nonpayment of rent and material lease violations

Section 504B.285 (formerly § 566.03), subd. 5 allows the landlord to combine actions for nonpayment of rent and material lease violations. These claims shall be heard as alternative grounds. The hearing is bifurcated to first cover material violations of the lease, and then nonpayment of rent if the landlord does not prevail on the material lease violations claim. The tenant is not required to pay into court outstanding rent, interest or cost to defend against the material lease violation claim. If the court reaches the nonpayment of rent claim, the tenant shall be permitted to present defenses. The tenant shall be given up to seven days to pay any rent and costs determined by the court to be due, either into court or to the landlord. *See Kahn v. Greene*, No. UD-1940330506 (Minn. Dist. Ct. 4th Dist. May 5, 9, and 25, 1994) (appendices 65, 55, and 46).

Minnesota cases involving combined claims for rent and breach of lease, with the court concluding that the tenant did not materially violate the lease, include: *St. Cloud HRA v. Rothchild*, No. C7-99-4306 (Minn. Dist. Ct. 7th Dist. Dec. 21, 1999) (Appendix 419) (Public housing authority filed eviction action based on nonpayment of rent and material lease violations by repeated late payment of rent; court held that

tenant's statutory right to redeem could not be defeated by a claim of material violation related to rent.; *Amsler v. Harris*, and *Harris v. Amsler*, Nos. UD-1990826901 and UD-1990902500 (Minn. Dist. Ct. 4th Dist. Sep. 20, 1999) (Appendix 376) (Court bifurcated trial on issues of breach of lease and other matters; tenant did not breach material term of lease where provision on occupancy limit was an afterthought to the entire lease, was not in the body of the agreement, and was not initialed by the parties; landlord waived breach by continuing to accept rent after knowledge; landlord failed to prove a non-retaliatory purpose for an eviction complaint filed seven days after the tenant filed an emergency lockout petition; remaining issues scheduled for trial with payment of withheld rent into court.; *Jorstad v. Connor*, No. UD-1951002514 (Minn. Dist. Ct. 4th Dist. Oct. 23, 1995) (Appendix 150); *Aker v. Kennedy*, No. UD-1950908541 (Minn. Dist. Ct. 4th Dist. Oct. 19, 1995) (Appendix 165); *Urban Investments, Inc. v. Thompson*, No. UD-1950626525 (Minn. Dist. Ct. 4th Dist. Aug. 10, 1995) (Appendix 80); *Lehikoinen v. Salinas*, No. C3-95-60158 (Minn. Dist. Ct. 6th Dist. July 11, 1995) (Appendix 122); *Olowu v. Patterson*, No: UD-1950606520 (Minn. Dist. Ct. 4th Dist. July 3, 1995) (Appendix 142); *Smithrud v. McDaniel*, No. UD-195050529 (Minn. Dist. Ct. 4th Dist. May 22, 1995) (Appendix 130); *Kray v. Humphrey*, No. UD-1950110500 (Minn. Dist. Ct. 4th Dist. Feb. 8, 1995) (Appendix 132); *Miller v. George*, No. UD-1941223501 (Minn. Dist. Ct. 4th Dist. Jan. 10, 1995) (Appendix 129).

22. Tenant guest and trespass rules

Some landlords have created trespass lists, under which the landlord seeks to exclude from the premises, persons whose names are contained on the list. In a tenancy, it is the tenant who has been given possession which is exclusive even against the landlord, with the only exceptions being the landlord's right to enter the premises to demand rent or make repairs, or exceptions provided by the lease. *Seabloom v. Krier*, 219 Minn. 362, ___, 18 N.W. 2d 88, 91 (1945).

It is the tenant who decides who may visit the tenant. The landlord does not have the right to exclude guests of the tenant without a court order, such as a harassment restraining order under Section 609.748. *See State v. Hoyt*, 304 N.W.2d 884 (Minn. 1981) (conviction for trespass reversed where guest had claim of right to visit nursing home resident after administrator revoked her privilege to enter the premises).

In *State v. Holiday*, 585 N.W. 2d 68 (Minn. Ct. App. 1998), the police gave the defendant a trespass warning form for trespassing on a Public Housing Authority property. The defendant signed the warning which stated that it applied to all property of the Public Housing Authority. Four days later, the defendant was charged with violating the warning by his presence on another public housing authority property. The Court concluded that the trespass warning could not apply to all of the public housing authority's property, and could apply only to a specific property. The court noted that the ordinance allows a lawful possessor of the property or the possessor's agent to issue a demand to depart. Since the tenant is the lawful possessor of the property, the police or the housing authority can only serve as agents for the tenant, and since the tenant could not exclude a person from all properties of the public housing authority, neither could the police or the public housing authority as an agent for the tenant. This decision underscores that a guest of a tenant cannot be a trespasser unless the tenant asks the guest to leave and the guest refuses. If a person is on the property and is not a guest of a tenant or the public housing authority, the public housing authority could exclude the person as an agent for all of the tenants. The only legal method for the landlord to exclude a guest of the tenant would be to obtain a restraining order against the guest, such as one available under the harassment statute.

See Teamster Retiree Housing of Minneapolis, Inc. v. Petroske, No. UD-1960919515 (Minn. Dist. Ct. 4th Dist. Nov. 7, 1996) (Appendix 237) (Section 8 new construction and Section 202 elderly and

handicapped housing: single argument between mentally disabled adult son-guest of tenant and adult son-guest of neighboring tenant, and tenant's failure to keep his son off the premises was not a substantial lease violation or repeated minor lease violations affecting livability, health, safety or quiet enjoyment). However, in some cases, the tenant may be responsible for the actions of a guest of the tenant. *See* discussion, *supra*, VI.G.9., 10., 16.

23. Nonpayment of utilities and other charges

Claims of nonpayment of utilities, insurance, taxes, or other charges that the tenant has agreed to pay, are claims for nonpayment of rent entitling the tenant to redeem the premises, rather than claims for breach of lease. *See* discussion, *supra*, VI.E.18. Counsel should consider asserting that landlord claims for damage or other items which the lease provides to tenant payment to the landlord make the claim one for nonpayment of rent.

24. Nuisance or serious endangerment of safety of other residents, their property, or the landlord's property

Along with claims of illegal drugs under Section 504B.171 (formerly § 504.181), claims that the tenant is causing a nuisance or seriously endangering the safety of other residents, their property, or the landlord's property shall receive a priority in the scheduling of hearings and execution of the Writ of Restitution. Minn. Stat. § 504B.321 (formerly § 566.05), 504B.335 (formerly § 566.07), 504B.345 (formerly § 566.09), 504B.361 (formerly § 566.16), 504B.365 (formerly § 566.17), *amended by* 1994 Minn. Laws Ch. 502, §§ 4-9. *See* discussion, *supra*, V.Q. Counsel should argue that if the plaintiff prevails on a claim of breach of lease but does not prove these specific classes of lease violations, the tenant is not barred from a stay of the Writ of Restitution. While it is unclear how the courts will interpret the term nuisance, nuisance is defined by Section 561.01 as follows: "Anything which is injurious to health, or indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance." There are scores of cases listed in the annotations to this statute.

25. Lack of clear rules or lease provisions

Whether a contract is ambiguous is a question of law, and if it is ambiguous, a fact question arises and construction depends upon extrinsic evidence and a writing. *Blattner v. Forster*, 322 N.W.2d 319, 321 (Minn. 1982); *Turner v. Alpha Phi Sorority House*, 276 N.W.2d 63, 66 (Minn. 1979); *MPHA v. Rozas*, C0-95-956 (Minn. Ct. App. Jan. 9, 1996), FINANCE AND COMMERCE at 30 (Jan. 12, 1996) (Appendix 232) (interpretation of public housing lease). In *Valley Manor Apts. v. Gullickson*, No. CX-94-10 (Minn. Dist. Ct. 8th Dist. Feb. 3, 1994) (Appendix 56), the court concluded that "the lease should clearly state all rules, or incorporate a separate list of rules. This was not shown at trial. Also, it is appropriate that the lease recite the consequences of the rule violations, i.e. eviction."

26. Plaintiff must prove lease violations by a preponderance of the evidence

While it may go without saying, the plaintiff must prove lease violations by a preponderance of the evidence. *Ford v. _____,* No. HC-1020325505 (Minn. Dist. Ct. 4th Dist. Apr. 26, 2002) (Appendix 500) (Section 8 voucher, plaintiff failed to prove that loud cars belonged to tenant's guests, that defendant knew or should have known that guests had firearms, that children hanging around the property were defendant's guests, that trash in the yard was from defendant's apartment, that a basement electrical fire resulted from defendant's conduct, that the notice of intent to condemn resulted from defendant's conduct, and that the smell of marijuana came from defendant's apartment; plaintiff failed to allege drug use with any

particularity; action dismissed and defendant awarded costs and disbursements); *Floy v. _____,* No. HC-010821507 (Minn. Dist Ct. 4th Dist. Sep. 13, 2001) (Appendix 499) (combined eviction and emergency relief action: dismissal of eviction breach claim since tenant actions did not violate the lease; dismissal of notice claim since notice was not attached to complaint and there was no evidence of when notice was given; tenant raising condemnation as a habitability defense did have to pay rent into court; landlord who rented out condemned property was liable for $1900 in rent and deposit paid plus $5700 additional treble damages, plus $500 in moving expenses, for $8100; deadlines for payment; expungement of eviction case); *D & D Real Estate Investment, L.L.P. v. Hughes*, Nos. UD-1990311505 (Minn. Dist. Ct. 4th Dist. Mar. 30, 1999) (Appendix 323A) (Dismissal of breach of lease claim where no convincing evidence as to the dollar amount of damage to a door to determine whether damage was material or *de minimis*, and the landlord failed to prove that the tenant or one of her guests damaged the door where the tenant claimed damage was caused by a burglar); *Okoiye v. Washington*, No. UD-1980909564 (Minn. Dist. Ct. 4th Dist. Oct. 2, 1998) (Appendix 354A) (Despite some discussion between the landlord and tenant regarding extra payment for additional residents, there was no agreement between the parties to supplement the written lease); *Thomas v. Dobyne*, No. U-1980616536 (Minn. Dist. Ct. 4th Dist. Jul. 8, 1998) (Appendix 370B) (Combined action for breach and rent; breach claims dismissed for lack of a right of re-entry clause, and where landlord failed to prove tenant conduct on the property which amounted to breach of lease; matter rescheduled for trial on rent issues); *Little v. Katzovitz,* No. UD-1970902903 (Minn. Dist. Ct. 4th Dist. Sep. 30, 1997) (Appendix 268) (Landlord did not prove tenants should be evicted for unreasonable pedestrian traffic); *Rogers v. Stewart*, No. UD-1961029511 (Minn. Dist. Ct. 4th Dist. Jan. 6, 1997) (Appendix 290) (Landlord proved that tenant, family or guests intentionally or negligently damaged the apartment).[19]

27. Written lease provisions may not continue after expiration of the lease

Upon expiration of an initial term lease, without any action by the parties to renew the lease, the parties' continuation of the landlord-tenant relationship becomes a month-to-month tenant fee, and cannot be based on the original written lease. *Urban Investments, Inc. v. Thompson*, No. UD-1950626525 (Minn. Dist. Ct. 4th Dist. Aug. 10, 1995) (Appendix 80).

---

[19]Earlier decisions include *Lloyd Management, Inc. v. Ajayi*, C-395-2636 (Minn. Ct. App. June 4, 1996), FINANCE AND COMMERCE at 56 (June 7, 1996) (Appendix 241) (unpublished: record supported the findings and conclusions of material breach of lease, and the trial court was within its discretion to refuse evidence of selective lease enforcement); *McNair v. Doub*, No. UD-1960708524 (Minn. Dist. Ct. 4th Dist. Aug.12, 1996) (Appendix 205) (children fighting does not equal unreasonable disturbance of neighbors; landlord waived right to evict tenant for possession of pets by accepting rent after knowledge of and acquiescence to possession of a pet; claim of "thirty-five police calls" was not proven); *JHCJ Associates v. Bryant*, No. UD-1960606502 (Minn. Dist. Ct. 4th Dist. Jul. 31, 1996) (Appendix 217) (Section 8 certificate: landlord did not prove tenant damaged property); *Anya v. Rulford*, UD-1960501506 (Minn. Dist. Ct. 4th Dist. May 24, 1996) (Appendix 220) (insufficient evidence of breach following acceptance of rent, including dates, nature and effect of alleged over occupancy and disturbances); *Sammon v. Mayo*, No. UD-1960405521 (Minn. Dist. Ct. 4th Dist. Apr. 24, 1996) (Appendix 239) (landlord did not prove that teenager's coloring of apartment wall later cleaned by the tenant, violated leased provisions prohibiting property damage and painting without consent); *Kahn v. Greene*, No. UD-1940330506 (Minn. Dist. Ct. 4th Dist. May 5, 1994) (Appendix 65) (plaintiff did not meet burden of proof by preponderance of evidence that defendants damaged property in violation of the lease); *O'Connor v. Miller*, UD-194-0211505 (Minn. Dist. Ct. 4th Dist. Mar. 24, 1994) (Appendix 178) (good faith resisting improper citizen arrest is not breach). *See generally*, discussion, *supra*, at VI.G.10-11, 16, 19, 21 (Breach of lease: public and subsidized housing, allegations of illegal drugs, manufactured (mobile) home park lot rental, breach is not material, and combined actions for nonpayment of rent and material lease violations).

28. Lease provisions providing for forfeiture should be strictly interpreted to avoid forfeiture

Since forfeitures are not favored, lease provisions that result in forfeiture are to be strictly construed, and will not be enforced when great injustice would be done and the party seeking forfeiture is adequately protected. *Naftalin v. John Wood Co.*, 263 Minn. 135, 147, 116 N.W.2d 91, 100 (1962); *Warren v. Driscoll*, 186 Minn. 1, 5, 242 N.W.2d 346, 347 (1932); *1985 Robert Street Associates v. Menard, Inc.*, 403 N.W.2d 900-03 (Minn. Ct. App. 1987) (forfeiture appropriate where tenant materially breached lease over long period of time without excuse); *Housing and Redevelopment Authority of Winona v. Fedorko*, C4-94-884 (Minn. Ct. App. Nov. 22, 1994), FINANCE AND COMMERCE 43 (Nov. 25, 1994) (Appendix 91). *See also 614 Co. v. D. H. Overmayer*, 297 Minn. 395, 398, 211 N.W.2d 891, 894 (1973) (forfeiture not favored); *Minneapolis Public Housing Authority v. Otto*, No. UD-1970326517 (Minn. Dist. Ct. 4th Dist. May 9, 1997) (Appendix 279) (Forfeiture of tenant's public housing lease, considering his disability, indigency, and his willingness to cure any claimed breaches, would be inappropriate). *But see Phillips Neighborhood Housing Trust v. Brown*, 564 N.W.2d 573 (Minn. Ct. App. 1997) (Affirmed eviction of entire household when one co-tenant violated the lease by engaging in illegal drug activity). Counsel should argue for avoidance of forfeiture where the landlord is adequately protected as an alternative argument to reasonable accommodation and cure. *See* discussion, *supra*, at VI.G.9, 20.

29. Tenant's breach was caused by landlord's breach.

Generally, a party who has breached a contract cannot sue on the basis of the other party's subsequent breach of the contract. *MTS Co. v. Taiga Corp.*, 365 N.W. 2d 321, 327 (Minn. Ct. App. 1985) (list of cases). In *MTS*, the court held that the landlord could not seek a remedy against the subtenant, where the landlord was still breaching the agreement at the time of trial, and the subtenant's breach of the agreement directly resulted from the landlord's initial breach of the agreement. *Id. See Larson v.* _____, No. HC 030324502 (Minn. Dist Ct. 4th Dist. Feb. 13, 2004) (Appendix 528) (referee will not reconsider judge's order on waiver; tenant meets definition of disabled; requiring mobility disabled tenant to park vehicle further away than other tenants is not a reasonable accommodation; while parking tenant's vehicle near the home violated an ordinance, most other tenants also violated the unenforced ordinance; tenant's ordinance violations were repeated but not serious; tenant may raise landlord's violation of the covenants of habitability as a cause of tenant violation of the lease, where park owner's park design violated a local ordinance and forces tenant to violate the same ordinance).

In *Carlson Real Estate Co. v. Soltan*, 549 N.W. 2d 376, 379-80 (Minn. Ct. App. 1996), the court affirmed an unlawful detainer judgment for the commercial landlord where the landlord's breach was not a direct cause or justification for the tenant's breach.

See discussion, *infra*, at VI.G.38.

30. Lease requirement for notice must be followed.

Unless the lease requires notice before filing the eviction action, no advance notice is required. *Anoka County Community Action Program v. Solmonson*, No. A05-1251, 2006 WL 1320332 (Minn. Ct. App. May 16, 2006) (unpublished) (one month notice not required for month-to-month tenancy in eviction action claiming breach of lease). Some leases require advance notice for breach or rent claims, and the landlord must follow the requirements. *Lawler v.* _____, No. HC 010817525 (Minn. Dist Ct. 4th Dist. Sep. 6, 2001) (Appendix 529) (notice to quit claim dismissed where landlord failed to prove he delivered notice; breach claim dismissed where landlord did not give three day notice with right to cure as required by lease; remaining claims settled); *Okoye v. Washington*, No. UD-1980909564 (Minn. Dist. Ct. 4th Dist. Oct. 2,

1998) (Appendix 354A) (Lease required 30 day termination notice for breach of lease); *O'Connor v. Miller*, UD-194-0211505 (Minn. Dist. Ct. 4th Dist. Mar. 24, 1994) (Appendix 178) (lease requirement of notices for breach must be followed). *See* Notice Defenses, *supra* at VI.F.

31. Eviction for emergency police calls

Under MINN. STAT. § 504B.205 (formerly § 504.215), a landlord may not "(1) bar or limit a tenant's right to call for police or emergency assistance in response to domestic abuse or any other conduct; or (2) impose a penalty on a tenant for calling for police or emergency assistance in response to domestic abuse or any other conduct." A tenant may not waive this right, and the landlord may not require the tenant to waive the right. Local ordinances which require eviction or penalize a landlord in response to tenant calls for police or emergency assistance are preempted. A tenant may bring a civil action for violation of the statute for the greater of $250 or actual damages, and reasonable attorney fees. The Attorney General also can investigate and prosecute violations of the statute. The statute became effective July 1, 1997. It applies to all leases entered into, modified, or renewed on or after that date, but provisions in other leases in conflict with the statute are unenforceable.

While the statute does not refer to unlawful detainer actions, the prohibition against landlord-imposed penalties on tenants for making emergency calls should allow the tenant to defend unlawful detainer actions where the landlord claims a right of eviction because of emergency calls, or where the tenant claims that the landlord's notice to quit is based upon the tenant's emergency calls.

In *Real Estate Equities, Inc. v. Schmidt*, No. CX-00-297 (Minn. Dist. Ct. 10th Dist. Mar. 14, 2000) (Judge Mossey) (Appendix 415), the tenant was assaulted on the property both before and after she obtained a restraining order, leading her to call the police. The landlord sent a letter stating it would terminate the tenancy based on late payment of rent, damage to the property, and police calls to the unit. The parties then executed an agreement to vacate. The court concluded that the termination letter, and the resulting agreement, violated § 504B.205, rendering the agreement void as contrary to public policy.

In *Steven Scott Management, Inc. v. Scott*, No. CA-98-09527 (Minn. Dist. Ct. 2d Dist. Oct. 28, 1998) (Appendix 367), After one tenant violently assaulted his domestic partner, he pled guilty to a felony, and was sentenced to workhouse incarceration, chemical dependency treatment and anger management counseling. The assailant complied with his sentence and committed no other assaults. The landlord found out about the incident six months later, gave notice for substantial annoyance and endangerment, and commenced an unlawful detainer action to evict both tenants. The Court held that the claim against the victim was in response to her call to the police and prohibited by Minn. Stat. § 504.215 (now § 504B.205), the victim did not endanger others by allowing the assailant to remain in the household, it would be unconscionable to evict the assailant where he was sincere in his rehabilitative efforts and had complied with his sentence and had not endangered others in the manufactured (mobile) home park, and the tenants had cured any violation which had occurred. On appeal, in *Steven Scott Management, Inc. v. Scott*, No. C7-98-2024 (Minn. Ct. App. June 8, 1999) (unpublished), the Court of Appeals affirmed the finding that the victim had not violated Minn. stat. 327C.09 or committed a material violation of the lease, as there was no evidence of any annoyance or danger to other residents. However, the Court reversed the trial court as to the assailant, concluding that a finding that he violated the lease and the statute was sufficient to compel issuance of an order against him.

See Haukos-Lund Partnership v. Borjon, No. C3-98-632 (Minn. Dist. Ct. 1st Dist. Oct. 30, 1998) (Appendix 336) (Perkins, J.) (judgment for the manufactured (mobile) home park lot tenant, where the landlord sought to evict the tenant for calling the police to respond to a domestic abuse situation); *Berry v. Lane*, Nos. UD-1980629502 and UD-1980603900 (Minn. Dist. Ct. 4th Dist. Jul. 22, 1998) (Appendix

310A) (Landlord asserted numerous 911 calls to the property but could not prove the reasons for the calls, while the tenant asserted the calls were initiated by her for her children's protection; held that landlord could not limit tenant's rights to call for emergency assistance). *But see Bossen Terrace v. Price*, No. C5-98-434 and C1-98-480 (Minn. Ct. App. Oct. 6, 1998) (Appendix 312) (Unpublished: While the landlord may not evict the tenant because police were called to the property, a landlord may evict based on the reason for the call to the police).

32. Public reports

Landlords and tenants often submit public documents to support their cases, such as landlords submitting police reports in breach cases, and tenants submitting inspection reports in habitability cases. While both documents probably comply with the public records exception to the hearsay rule in Minn. R. Evid. 803(8), they still must be authenticated or be self-authenticating under Rules 901 and 902. *State v. Northway*, 588 N.W.2d 180 (Minn. Ct. App. 1999) (affirmed trial court exclusion of federal report which was not authenticated).

Hearsay statements within the report should be excluded unless they meet an exception to the hearsay rule. *Countryview Mobile Home Park v. Oliveras*, No. A04-160, 2004 WL 20049986 (Minn. Ct. App. Sept. 14, 2004) (unpublished) (affirmed from district court ruling sustaining objection to police report containing observations of officers who were not present in court); *Minneapolis Public Housing Authority v. _____*, No. HC 10306313566 (Minn. Dist Ct. 4th Dist. July 31, 2003) (Appendix 539) (Judge Doty) (landlord's knowledge of alleged altercation was from a police report whose authors did not testify, and did not connect tenant to the incident).

33. Uniform Relocation Act

The Uniform Relocation Act provides for additional notice to tenants where they are to be displaced as a result of receipt of state or federal monies. In *Project for Pride in Living, Inc. v. McCoy*, No. C7-99-4197 (Minn. Dist. Ct. 2nd Dist. May 21, Aug. 31, 1999) (Appendix 413), the owner obtained a loan with the Minnesota Housing Finance Agency for purchase and rehabilitation of the property. The owner then gave a 30 day notice to quit without alleging good cause for the termination. The tenant did not receive any notices for noncompliance with her lease during her tenancy. The court concluded that the Uniform Relocation Act applied since the owner executed a loan involving federal and state monies. 49 C.F.R. § 24 (1997); Minn. stat. §§ 117.51-117.52. The court then concluded that the 30 day notice to quit without cause violated the 90 day notice requirement and the requirement of cause for eviction. 49 C.F.R. §§ 24.203, 24.206. The referee's decision was affirmed on judge review. Order (Aug. 31, 1999).

34. Eviction of one tenant but not the other

The court have been divided over whether it has the power to evict one tenant but not the other. In *Steven Scott Management, Inc. v. Scott*, No. C7-98-2024 (Minn. Ct. App. June 8, 1999) (unpublished), the Court of Appeals affirmed the finding that the victim had not violated Minn. Stat. 327C.09 or committed a material violation of the lease, as there was no evidence of any annoyance or danger to other residents. However, the Court reversed the trial court as to the assailant, concluding that a finding that he violated the lease and the statute was sufficient to compel issuance of an order against him. *See United States v. 121 Nostrand Avenue*, 760 Supp. 1015 (E.D.N.Y. 1991) (Under federal anti-drug forfeiture statute, court removed adult grandchild who sold drugs from public housing apartment and allowed grandmother and other household members to remain because she lacked knowledge of drug activity); *Akron Metropolitan Housing Authority v. Rice*, No. 88-CV-04013 (Ohio Mun. Ct., Akron, June 22, 1988), 23 CLEARINGHOUSE REV. 322

(1989) (Appendix 309) (Court could enter judgment in eviction against one household member but not the rest of the family, which was innocent).

Each tenant may have to be a party. In *Hanson v. Trom*, No. UD-1950926503 (Minn. Dist. Ct. 4th Dist. Nov. 3, 1995) (Appendix 82), the landlord alleged non-payment of rent against one co-tenant, without naming the other co-tenant. The court held that the landlord failed to name an indispensable party, since the court could not enter final judgment without affecting the interests of the co-tenant.

The argument for evict of only one tenant was rejected in *Phillips Neighborhood Housing Trust v. Brown*, 564 N.W.2d 573 (Minn. Ct. App. 1997) (Affirmed eviction of entire household when one co-tenant violated the lease by engaging in illegal drug activity).

35. Election of remedies

When a landlord accepts payments to compensate for lease violations, such as accepting late fees or payment for damage, the landlord should not be able to eviction for breach of the lease, based on the election of remedies doctrine. *See Northwestern State Bank v. Foss*, 197 N.W. 2d 662 (Minn. 1972).

36. Proof of the lease

Pham v. _____, No. HC 030131517 (Minn. Dist Ct. 4th Dist. Feb. 13, 2003) (Appendix 560) (dismissal for failure to present lease for breach claim and notice for holdover claim, and for waiver of notice by acceptance of rent).

37. Landlord's violation of covenants of habitability as defense to tenant breach

A tenant may raise landlord's violation of the covenants of habitability as a cause of tenant violation of the lease, where the manufactured (mobile) home park lot owner's park design violated a local ordinance and forces tenant to violate the same ordinance. *Larson v.* _____, No. HC 030324502 (Minn. Dist Ct. 4th Dist. Feb. 13, 2004) (Appendix 528). *See* discussion, *supra*, at VI.G.29.

CHAPTER VII:
REMEDIES AND REQUESTS FOR RELIEF

A. ORDINARY RELIEF

Possible requests for relief include the following:

1. deny restitution to plaintiff and enter judgment for defendant;
2. dismissal or summary judgment;
3. retroactive and/or future rent abatement, *see* discussion, *supra* at VI.E.1;
4. discovery, *see* discussion, *supra* at V.F;
5. continuance, *see* discussion, *supra* at V.E;
6. extension to pay rent, *see* discussion, *supra* at VI.E.20;
7. seven days to move, *see* discussion, *infra* at VIII.B;
8. 60 days to sell a manufactured (mobile) home in a park lot, *see* discussion, *infra* at VIII.B; and
9. do not award costs to plaintiff, but award costs to defendant, *see* discussion, *infra*, VIII.E.4.
10. sealing court records. *See* discussion, *infra*, VIII.E.5.

See generally Forms Appendix, Form Answers.

B. EXTRAORDINARY RELIEF

On occasion, courts will order extra ordinary relief against a landlord.

1. waiver of landlord's filing fee in future cases. *Chaska Village Townhouses Lifestyle Inc. v.* Edberg, No. 91-27365 (Minn. Dist. Ct. 1st Dist. Apr. 1, 1991) (Appendix 11.L);

2. striking illegal lease provisions. *Powers v. Garcia*, No. UD-1950905643 (Minn. Dist. Ct. 4th Dist. Sept. 12, 1995) (Appendix 160);

3. ordering the landlord to comply with lease. *Olson v. Brooks*, No. UD-1950209512 (Minn. Dist. Ct. 4th Dist. Mar. 7, 1995) (Appendix 112);

4. ordering the landlord to provide utility bills to the tenant upon which the landlord asserts that the tenant owes money, and giving the tenant time to make arrangement for payment. *Aker v. Kennedy*, No. UD-1950908541 (Minn. Dist. Ct. 4th Dist. Oct. 19, 1995) (Appendix 165);

5. encouraging the landlord and tenant to participate in mediation to resolve outstanding issues between them. *Jorstad v. Connor*, No. UD-1951002514 (Minn. Dist. Ct. 4th Dist. Oct. 23, 1995) (Appendix 150); *Jankord v. Thompson*, No. UD-1950606524 (Minn. Dist. Ct. 4th Dist. June 26, 1995) (Appendix 166);

6. payment of the tenant's attorney's fees. *See* discussion, *infra*, at VIII.E.4.

7. money judgment for the tenant. *Drews v. Ennis*, No. UD-1950512523 (Minn. Dist. Ct. 4th Dist. June 5, 1995) (Appendix 125) (the court ordered the landlord to pay rent abatement in excess of the amount the tenant paid into court within 14 days or a money judgment would be entered for the tenant).

8. payment plan on back rent. *JHCJ Associates v. Bryant*, No. UD-1960606502 (Minn. Dist. Ct. 4th Dist. Jul. 31, 1996) (Appendix 217) (Section 8 certificate: court hesitates to evict Section 8 tenant who has made timely rent payments recently, and will authorize prospective monthly payments on the back rent).

9. ordering landlord to end discriminatory or illegal practices. *Amsler v. Wright*, No. UD-1960502510 (Minn. Dist. Ct. 4th Dist. May 30, 1996) (Appendix 186) (landlord responsible for all utilities services which do not separately and accurately measure the tenant's sole use of utilities; landlord required to pay water bills where specific lease provisions state such, and general lease term permitting landlord to assess water bills from tenants is invalid; landlord ordered not to claim from tenant the costs of this case or rents abated as additional rent or a security deposit deduction; landlord ordered not to require public assistance vendoring; landlord ordered not to collect water bill payments from tenants).

10. ordering parties to cooperate. *Anya v. Rulford*, UD-1960501506 (Minn. Dist. Ct. 4th Dist. May 24, 1996) (Appendix 220) (ordering parties to clarify water service billing arrangements).

11. recalculation of subsidized tenant rent. *Ridgemont Apartments v. Englund*, No. C3-96-68 (Minn. Dist. Ct. 10th Dist. Apr. 1, 1996) (Appendix 191) (since the two actions were consolidated, in addition to dismissing the unlawful detainer action for non-payment of the market rent, the court granted additional affirmative relief, including ordering the landlord to recalculate the tenant's share of the rent, immediately reinstate the subsidy if a subsidy slot was available, credit defendant's rent for an amount equal to the subsidy even if a subsidy slot is not available, and notify the tenant of the amount of past rent due, and ordered the tenant to pay that amount within 10 days after notice from the landlord).

12. Eviction of one tenant but not the other. *See* discussion, *supra*, VI.G.35.

13. Sanctions. *Le v.* _____, No. HC 02-7952 (Minn. Dist Ct. 4th Dist. May 14, 2002) (Appendix 530) (ordered landlord who filed several actions again defendant and other tenants in violation of federal subsidized housing termination regulations to secure approval of Chief Judge prior to filing any eviction actions). *See* discussion, *supra*, VI.D.22.

Other decisions with interesting remedies include *Mattson v. Harmon*, No. UD-1961203552 (Minn. Dist. Ct. 4th Dist. Jan. 28, 1997) (Appendix 269) (Tenant not responsible for rent subsidy withheld by housing authority which is not due to tenant's conduct; landlord cannot require tenant to pay full rent or evict tenant for failing to pay full rent; landlord bound by housing authority's reinstatement of contract); *Minneapolis Public Housing Authority v.* _____, No. UD-1970221508 (Minn. Dist. Ct. 4th Dist. Mar. 26, 1997) (Appendix 273a) (Dismissal of second unlawful detainer action where Public Housing Authority based complaint on grounds other than listed in determination notice; Public Housing Authority improperly bypassed grievance process for case involving petty misdemeanor drug violation which is not "criminal" activity; action dismissed with prejudice so as to not allow the Public Housing Authority to file yet a third case on the same claims). *See generally* discussion at VI.E.1.j.

C. CONTEMPT OF COURT

Housing Courts are beginning to use contempt remedies, including confinement, to enforce court orders. Contempt is governed by Minn. Stat. Ch. 588, as well as the common law. Confinement as a civil

contempt remedy is available where (1) the court has jurisdiction over the subject matter and the party, (2) the party was given a clear definition of the acts to be performed, (3) the party received notice of the acts to be performed and time to comply, (4) the party failed to comply, (5) the opposing party sought enforcement with specific grounds, (6) the party was given an opportunity to show compliance or reasons for failure, (7) the court concludes after a hearing that the party failed to comply and that conditional confinement is reasonably likely to produce compliance fully or in part, (8) the party fails to prove inability to comply and a good faith effort to comply, and (9) the party can effect release by compliance or, in some cases, compliance to the best of the parties ability. *Hopp v. Hopp*, 278 Minn. 170, 156 N.W.2d 212 (1968). The court must appoint an attorney to represent an indigent party facing civil contempt when the court reaches a point in the proceedings that incarceration is a real possibility; and then conduct a trial de novo shall on the issue of contempt. *Cox v. Slama*, 355 N.W.2d 401 (Minn. 1984).

In *Harris v.* _____, No. HC 031022502 (Minn. Dist Ct. 4th Dist. Dec. 15, 2003, Jan. 9, and Feb. 6, Mar. 3, Mar. 17, 2004) (Appendix 514), the landlord agreed in and eviction settlement adopted by court to pay tenant $500 at move out and $1500 on week later, paid the first payment but did not pay the second. The court ordered the landlord to provide discovery on ability to pay, and after a trial, found the landlord in contempt of court for failing to pay the $1500, and fined the landlord and ordered the landlord to jail, staying the order until the end of the month for the landlord to comply. When the landlord did not comply, the court first issued a bench warrant for his arrest, and then ordered the landlord confined. *See* _____ *v. Floy,* No. HC-010829900 (Minn. Dist Ct. 4th Dist. Dec. 14, 2001) (Appendix 437) (combined eviction and emergency relief action: the landlord rented condemned property, the housing inspector ordered the tenant to vacate, the court awarded damages for rental of condemned property by a specific date, and the landlord failed but had the ability to pay: landlord held in contempt and ordered imprisoned unless award is paid); *Judge v. Rio Hot Properties, Inc.*, No. UD-1981202903 (Minn. Dist. Ct. 4th Dist. July 7, 1999) (Appendix 401) (tenants' motion in consolidated cases to add punitive damages denied where court found no independent tort, but tenant granted leave to proceed with claims for contempt where the landlord had failed to complete repairs for almost one year.

CHAPTER VIII:
POST TRIAL ISSUES

A. REDEMPTION. *See* discussion, *supra* at VI.E.20.

B. WRIT OF RECOVERY OR RESTITUTION.

1. Stay of the writ

If the court or jury finds for the plaintiff, the court shall issue a writ of recovery, formerly called a a writ of restitution. Minn. Stat. § 504B.345 (formerly § 566.09). The court shall stay the writ for a reasonable period not exceeding seven (7) days, where the defendant shows immediate restitution of the premises would work a substantial hardship upon the defendant or the defendant's family. *Id.* Tenants who do not contest the action still may request the stay. However, if the tenant does not appear, it is unlikely that the writ will be stayed for more than twenty-four (24) hours. In cases where the landlord proved violations of the illegal drug covenant, or that the tenant has caused a nuisance or has seriously endangered the safety of other residents, their property, or the landlord's property, the court may not stay issuance of the Writ of Restitution. Minn. Stat. § 504B.345 (formerly § 566.09), *amended by* 1994 Minn. Laws. 502, § 6.

In manufactured (mobile) home park lot tenancies under Minn. Stat. § 327C.11, subd. 4, the court may issue a conditional writ of restitution, which allows the home to remain on the lot for sixty (60) days for an in park sale, orders the resident household to vacate the park within a reasonable period not to exceed seven (7) days, and orders the park owner to notify any secured parties known to the park owner. The resident household must move out of the park, comply with all rules relating to home and lot maintenance, and pay all rent and utility charges owed to the park owner on time. The writ becomes unconditional and absolute by court order, if the resident violates the above obligations and the park owner moves the court for such relief, following three (3) days written notice, or sixty (60) days after issuance of the conditional writ. In *Marshall Plan, Inc. v. Miller*, No. _____ (Minn. Dist. Ct. 5th Dist. Aug. 28, 1990) (Appendix 20.E), the court denied a request for a temporary restraining order against a sheriff's sale of a manufactured (mobile) home in a lot park following execution of the writ of restitution. The court concluded that following execution of the writ, the park owner is entitled to enforce the lien against the manufactured (mobile) home and foreclose it by public sale.

In *Potvin v.* _____, No. C2-03-1604 (Minn. Dist Ct. 9th Dist. Sep. 19, 2003) (Appendix 562), the tenant first rent manufactured home (not in a park) and land under it, then purchased home and rented land, and fell behind on rent but landlord did not deliver title to tenant. the court stayed writ for one week after landlord delivers title to tenant.

The parties may stipulate to a stay of any duration. The writ is issued by the clerk of court. The writ may be stayed pending appeal. *See* discussion, *infra* at X.E.3.

2. Unavailability of writ for nonpayment of future rent

Landlords occasionally include in settlement agreements provisions on future payments of rent. While the landlord may obtain a writ and evict the tenant for failing to make installment payments on back rent, the landlord must file a new action if future rents are not paid.

In *Erin Realty v.* _____, No. HC 030918514 (Minn. Dist Ct. 4th Dist. Mar. 16, 2004) (Appendix 493), the payments in the settlement agreement beyond the first payment included future rents for eight months

as well as alleged past amounts due to the plaintiff. The defendant made all of the payments for five months. The plaintiff obtained a writ of recovery after the defendant made a partial payment in the sixth month, and the defendant moved to quash the writ.

The court concluded that

> When the parties to an eviction agree to a schedule of future payments to retire the debt alleged in the complaint, the landlord may obtain a writ of recovery if the tenant fails to make a payment. The landlord may not obtain a writ of recovery for failure to pay future rents not alleged as due in the complaint, as it would constitute a waiver of the tenant's right to the protections of the eviction process in Minn. Stat. Ch. 504B and the right to raise defenses to the landlord's claim as to nonpayment of future rents.
>
> In the absence of factual findings by the Court regarding amounts owing, a writ of recovery based on violation of a settlement agreement for future payments which do not distinguish between future rents and amounts found to be past due will not be enforced. In order to enforce rights under the agreement, the Plaintiff must file a new eviction action.

Id. See Erin Realty v. _____, No. HC 021008524 (Minn. Dist Ct. 4th Dist. Sep. 17, 2003) (Appendix 494) (motion for writ denied; "tenant cannot permanently waived the right to an unlawful detainer hearing for all future allegations of nonpayment of rent"); *Rupert House Co., Inc. v. Altmann*, 127 Misc.2d 115, 485 N.Y.S.2d 472 (1985) (stipulation which entitles a landlord to evict a residential tenant for nonpayment of amounts of rent exceeding the amount of rent sought in the petition is unconscionable and violates public policy; such a mode of coercing payments of rents not yet due would impede the tenant's ability to assert against the landlord future defenses such as a breach of the warranty of habitability).

C. EXECUTION OF THE WRIT

1. Service

The writ may not be enforced against a person who was not a party to the action nor named in the writ. *See* discussion, *supra* at VI.C.

The landlord must bring the writ to the sheriff or police for service on the defendant. Often, the landlord will have to schedule service on a later date. Some sheriffs or police or police require the landlord not only to prepay the sheriff or police for service, but to arrange for a bonded moving company to remove and store the tenant's possessions if they will be stored in a place other than the premises. The sheriff or police will serve the writ on the defendant, any adult member of the defendant's family holding possession of the premises, or any other person in charge of the premise. The sheriff or police will demand that the defendant and the defendant's family vacate the premises and remove their personal property within twenty-four (24) hours. In cases where the landlord prevails on claims of violations of the illegal drug covenant, or that the tenant caused a nuisance or seriously endangered the safety of other residents, their property, or the landlord's property, execution of the Writ of Restitution must receive priority. § 504B.365 (formerly § 566.17), *amended by* 1994 Minn. Laws Ch. 503, § 9.

The landlord might only have 30 days to enforce the writ. *DePetro v. DePetro*, No. A03-727, 2004 WL 885552 (Minn. Ct. App. April 27, 2004) (unpublished) (noted that housing court would not reissue writ of recovery which has not been executed within 30 days of original issuance.).

The sheriff may have immunity from liability where the writ is enforced incorrectly. In *Pahnke v. Anderson Moving and Storage*, 720 N.W.2d 875 (Minn. Ct. App. 2006), the sheriff executed the writ of recovery at the time it was served, rather than waiting 24 hours after service, because the writ required immediate removal. The Court of Appeals affirmed summary judgment against the tenant, concluding that the officers were performing ministerial function, and because they were relying on the terms of the writ.

2. Removal of the tenant and property

If the defendant does not comply with the demand, the landlord will have to arrange for the sheriff or police to return to the premises and remove the defendant, defendant's family, and their personal property. The landlord may not remove the tenant. *Veard-Brooklyn Center v.* _____, No. HC 1000512508 (Minn. Dist Ct. 4th Dist. Aug. 23, 2000) (Appendix 590a) (landlord illegally changed locks following posting of writ; tenant awarded treble the value of lost or damaged property and $500 in attorney fees).

There are only two alternatives for removing and storing the tenant's property, under Minn. Stat. § 504B.365 (formerly § 566.17). *See Gardner v. Lambert*, No. A08-0828, 2009 WL 1311664, at *2 (Minn. Ct. App. May 12, 2009) (unpublished) ("the two options set out in section 504B.365 are the exclusive remedies available to the [contract for deed] vendor who chooses to proceed with an eviction action under chapter 504B."). Because "section 504B.365 specifically governs the removal and storage of personal property after eviction, precisely the circumstances here, section 345.75 [governing abandoned tangible personal property that is not subject to any other provision of statute] does not apply." *Id.* at *3.

a. Storage of property off of the premises

When property is to be stored in a place other than the premises, the sheriff or police shall remove the property at the plaintiff's expense. Often the sheriff or police will require the plaintiff to use a bonded moving company. The plaintiff shall have a lien upon the personal property only for the reasonable costs and expenses incurred from removing and storing the property. The plaintiff may retain possession of the personal property until payment. If the defendant does not pay such costs and expenses within sixty (60) days after execution of the writ, the plaintiff may enforce the lien by holding a sale under Minn. Stat. §§ 514.18-514.22. Minn. Stat. § 504B.365 (formerly § 566.17). *See Alexander v. Daimlerchrysler Services North America, LLC,* No. A03-351, 2003 WL 22183564 (Minn. Ct. App. Sep. 23, 2003) (unpublished) (affirmed conclusion that plaintiff properly sold defendant's remaining property); *Lang v. Terpstra*, No. UD-1940207512 (Minn. Dist. Ct. 4th Dist. June 12, 1994) (Appendix 70) (notice of sale under Section 504.24 (now § 504B.271) did not amount to election of remedies precluding storage company from enforcing lien under Section 514.18 *et seq*, but notice did not comply with section 514.21 requirement of publication).

b. Storage of property on the premises

When property is to be stored on the premises, the plaintiff must send written notice to the defendant of the date and approximate time when the sheriff or police is scheduled to execute the writ. The notice must inform the defendants that they and their property will be removed if they do not vacate by the date and time stated in the notice. The notice must be mailed as soon as the plaintiff knows of the date and time for execution. The plaintiff also must attempt in good faith to notify the defendant by telephone.

After the sheriff or police enters the premises, the plaintiff may remove the property. In the officer's presence, the plaintiff must prepare, sign and date an inventory, which includes a listing of the items of personal property and description of their condition; the date, signature of the plaintiff or plaintiff's agent, and the name and telephone member of the person authorized to release the property; and the name and

badge number of the officer. The officer shall retain a copy of the inventory. The plaintiff must mail a copy of the inventory to an address provided by the defendant, or to the defendant's last known address.

In *Gardner v. Lambert*, No. A08-0828, 2009 WL 1311664, at *2 (Minn. Ct. App. May 12, 2009) (unpublished), the court concluded that in a post contract for deed cancelation eviction action, because "there is no evidence in the record that respondents prepared the required inventory, nor do respondents argue that they did so, we conclude that the district court's order did not comply with the provisions of the exclusive remedy provided by statute." The court remanded "for a hearing to determine the reasonable value, as of March 1, 2008, of those items of appellants personal property that (1) were left on the premises and (2) appellants have been unable to recover by the exercise of reasonable diligence. *Id.* at *3.

The plaintiff is responsible for proper removal, storage and care of the property, and is liable for damages for loss of or injury to the property caused by a failure to exercise care as a reasonably careful person would exercise under the circumstances. The abandoned property statute, § 504B.271 (formerly § 504.24), governs storage and return of the property. The landlord must store the property for 60 days. The landlord must notify the tenant at least 14 days before sale of the property. The landlord has only a claim, and not a lien, for the reasonable removal and storage costs. *Conseco Loan Finance Co. v. Boswell*, 687 N.W.2d 646, (Minn. Ct. App. 2004) (manufactured home park lot owner who stored tenant's manufactured home on the premises retained only a claim for storage costs, and not a lien); *City View v. Brooks*, No. UD-1950907539 (Minn. Dist. Ct. 4th Dist. Nov. 13, 1995) (Appendix 167) (landlord may not hold property to force payment of back rent; landlord ordered to return property).

If the landlord fails to allow the tenant to take possession of the property within 24 hours of the tenant's written demand, exclusive of weekends and holidays, the landlord is liable for punitive damages up to $300.00. The statute states four factors for the court to consider in determining the amount of punitive damages - the nature and value of the property, the effect of deprivation of the property on the tenant, and whether the landlord or landlord's agent unlawfully took possession of the property or acted in bad faith in not allowing the tenant to retake possession. § 504B.271 (formerly § 504.24).

In *Pentel v. Bakewell*, No. CX-95-1595, 1996 WL 45168 (Minn. Ct. App. Feb. 6, 1996) (Appendix 356), the prevailing unlawful detainer plaintiff executed the writ on October 15, sent notice of sale of the tenants' property on December 4, and sold the tenants' property on December 21. The tenants sent a notice to recover the property on December 26. The court affirmed the district court's conclusions that the plaintiff complied with the statute, noting that the statute allows the landlord to sell the property if it reasonably appears that the tenant abandoned the premises, and the tenants' notice came after the sale.

One court has held that the following a landlord's victory in an unlawful detainer action, not only can the tenant be removed from the property, but that the landlord can be paid costs from the seizure and sale of the tenant's property. In *Fradette v. Mettner*, No. C4-00-56 (Minn. Dist. Ct. 9th Dist. Jan. 26 and Mar. 14, 2000) (Appendix 389), the Court based its conclusion on the language of the form writ in Minn. Stat. § 504B.361 (formerly § 566.16), which provides for removal of the defendant from the premises, plaintiff recovery of the premises, and payment of costs to the plaintiff from personal property seized and sold. The Court rejected the argument that the more specific language regarding treatment of personal property seized in Minn. Stat. § 504B.365 (formerly § 566.17) required storage of the property with tenant rights to recover the property prior to sale. The Court essentially reasoned that the landlord could seize and sell property to recover costs, with remaining property to be held under § 504B.365. However, the Court noted that the tenant should be able to raise exemptions from seizure under Minn. Stat. § 550.37.

Tenants facing arguments such as those made by the Court should restate the arguments made by the tenant. Section 504B.365 is very specific in the treatment of personal property held in conjunction with execution of the writ. A proper reading of § 504B.365 and § 504B.361 is that once the time period for holding the property has expired and the landlord is entitled to sell it under § 504B.365, only then can the landlord be paid for costs from the sale proceeds under § 504B.361. However, tenants should be advised of the risk that some courts may allow the landlord to sell personal property left on the premises to satisfy a judgment for costs, notwithstanding the protections of § 504B.365.

c. Property motions and claims

Minn. Stat. § 504B.365 (formerly § 566.17) authorizes the housing courts in the Fourth and Second Districts (Hennepin and Ramsey counties) or retain jurisdiction in eviction (unlawful detainer) actions to decide disputes concerning removal of property following execution of the writ of restitution. *See Lang v. Terpstra*, No. UD-1940207512 (Minn. Dist. Ct. 4th Dist. June 12, 1994) (Appendix 70) (court entertained motion concerning disposition of property, granted motion to add storage company as a necessary party under Minn. R. Civ. P. 19, and enjoined sale of property until landlord gave proper notice under section 514.21). *See also City View v. Brooks*, No. UD-1950907539 (Minn. Dist. Ct. 4th Dist. Nov. 13, 1995) (Appendix 167) (landlord may not hold property to force payment of back rent; landlord ordered to return property; hearing scheduled on tenant's damages claim). The statute also specifically authorizes an award of expenses and attorney fees if the landlord refuses to return a tenant's properties after a proper demand under § 504B.271 (formerly § 504.24). For forms for motions regarding property disposition, *see* Forms Appendix, Form P.

Unless the premises have been abandoned, a plaintiff or plaintiff's agent who enters the premises and removes the defendant's property in violation of the statute is guilty of a misdemeanor for wrongful ouster and is liable to the tenant up to treble damages or $500, which ever is greater, and reasonable attorney's fees. The provisions of the statute may not be waived. Minn. Stat. § 504B.365 (formerly § 566.17).

Where the tenant was wrongfully evicted, the landlord must bear the expenses of removal, storage and return of the tenant's personal property. *See Kowalenko v. Haines*, No. C6-85-1365, Order at 2 (Minn. Ct. App. July 23, 1985) (Appendix 4); *Durigan v. Smith*, No. UD-80515 (Henn. Cty. Mun. Ct. July 25, 1977) (Appendix 3).

Since this process can be expensive for both parties, the parties should consider negotiating for a mutually agreeable date for the tenant's departure. However, it is possible that the sheriff or police would not follow such an agreement, if the plaintiff delivers the writ to the sheriff or police and requests execution. The defendant should file such a written agreement with the clerk of court and the sheriff or police. The defendant should regularly verify the plaintiff's compliance with such an agreement by calling the clerk of court and the sheriff or police, respectively, to find out whether the plaintiff has obtained the writ and arranged for execution.

D. WAIVER OF THE WRIT OR THE RIGHT TO RESTITUTION

If the landlord accepts payment of rent and/or rent arrearages after receiving judgment for restitution of the premises, the landlord may waive the right to execute the writ. By accepting payment of arrearages, the landlord is allowing the tenant to redeem. While the tenant's right of redemption is limited, *see* discussion, *supra* at VI.E.20, the landlord can agree to redemption beyond such limitations. By accepting rent as it becomes due, the landlord is (1) Waiving the notices to evict, including the complaint and the writ of restitution. *Central Brooklyn Urban Dev. Corp. v. Copeland*, 122 Misc. 2d 726, 729-30, 471 N.Y.S.2d

989, 993 (Civ. Ct., Kings Cty., 1984) (government subsidized housing: payment of government subsidy after issuance of writ waives the writ); discussion, *supra* at VI.F.4 (waiver of notice), or (2) Waiving alleged breaches which served as the basis for the action, *see* discussion, *supra* at VI.G.4 (waiver of breach).

In *Connelly v. Lewis*, No. C8-96-426 (Minn. Dist. Ct. 9th Dist. Aug. 21, 1996) (Appendix 240), the landlord filed an unlawful detainer action for non-payment of rent for May, and obtained a default judgment. The tenants paid rent to the landlord for May, June and July. In August, the landlord sought and obtained a writ of restitution. On the tenant's motion, the court first ordered an emergency stay of enforcement of the writ of restitution, and later vacated the writ and dismissed the case, based on the tenant's argument that the landlord waived the right to restitution by accepting rent for the month in question and for later months, and that the rent transactions created a new tenancy between the parties. *See Grimmer v. Svoboda*, No. UD-1960923520 (Minn. Dist. Ct. 4th Dist. Jan. 6, Jan. 15, and Mar. 14, 1997) (Appendix 257) (Writ stayed where landlord failed to execute stipulated reference, told tenants they could stay longer, and accepted rent beyond the move out date; landlord ordered to execute reference letter and tenant given extra month to move; damages and move out date settled).

The defendant should file a written agreement, receipt of payment, or copy of the check with the clerk of court and the sheriff or police, and notify the clerk and sheriff or police of the defendant's opinion on the effect of receipt of payment.

The part payment of rent statute, Minn. Stat. § 504B.291, subd. 1 (c) states "(c) Prior to or after commencement of an action to recover possession for nonpayment of rent, the parties may agree only in writing that partial payment of rent in arrears which is accepted by the landlord prior to issuance of the order granting restitution of the premises pursuant to section 504B.345 may be applied to the balance due and does not waive the landlord's action to recover possession of the premises for nonpayment of rent." A partial payment of rent received in violation of the statute after issuance of the writ should waiver the writ. *See* discussion, *supra*, at VI.E.13.

E. MOTIONS

1. Motions in anticipation of appeal

a. Motion for new trial or amended findings not required for appeal

It no longer is necessary to bring a motion for new trial or other post trial motion to preserve issues on appeal in an eviction (unlawful detainer) action. *Scroggins v. Solchaga,* 552 N.W.2d 248 (Minn. Ct. App. 1996); *Minneapolis Public Housing Authority v. Greene*, 463 N.W.2d 558, 560 (Minn. Ct. App. 1990), citing *Matter of Jost*, 437 N.W.2d 89, 90 (Minn. Ct. App. 1989), *rev. on other grounds*, 449 N.W.2d 719 (Minn. 1990); *Minneapolis Public Housing Authority v. Holloway*, C0-94-736 (Minn. Ct. App. Nov. 15, 1994), FINANCE AND COMMERCE 36 (Nov. 18, 1994) (Appendix 90) (review not conditioned on post trial motions); *Nicollet Towers, Inc. v. Georgiff*, C5-94-1364 (Minn. Ct. App. Feb. 7, 1995), FINANCE AND COMMERCE 53 (Feb. 10, 1995) (Appendix 89) (review not conditioned on post trial motions).

There is some question whether the court may entertain a motion for a new trial. In *Stock v. Beaulieu*, No. C4-95-989 (Minn. Ct. App. May 9, 1995) (unpublished) (Appendix 170), the Court granted a writ of prohibition precluding the district court from enforcing an order granting a new trial. The Court concluded that the unlawful detainer statute's creation of a summary proceeding did not contemplate a new trial, and that the petitioner would not be able to attack the order for a new trial on appeal from the decision in the second trial. The Court did not discuss whether the grounds for new trial had merit. The dissent

asserted that the statute does not deprive the district court of its authority under Minn. R. Civ. P. 60.02(f) to grant a new trial in the interest of justice.

While counsel may find this decision helpful when the tenant prevails and the landlord moves for new trial, it may be that tenants more often are in the position of moving for new trial or to vacate a default judgment. Counsel should argue that while the *published* decisions of the Court have stated that the appellant need not move for a new trial, *Minneapolis Public Housing Authority v. Greene*, 463 N.W.2d 558, 560 (Minn. Ct. App. 1990), and that the appellant may not appeal from the order denying a motion for new trial, *Tonkaway Limited Partnerships v. McLain*, 433 N.W.2d 443, 444 (Minn. Ct. App. 1988), they have not held that the trial court cannot grant a motion for new trial. In *Wong Kong Har Wun Sun Association v. Chin*, No. C8-87-2439 (Minn. Ct. App. Apr. 12, 1988) (Appendix 21) (unpublished), the Court held that the trial court abused discretion in refusing to vacate default unlawful detainer judgment due to mistake. *See Pirkola v. Bastie,* No. C1-95-602242 (Minn. Dist. Ct. 6th Dist. Feb. 20, 1996) (Appendix 196) (order for temporary stay and amended order to conform to settlement on the transcript).

If the defendant wishes to consider bringing a motion for a new trial, the defendant must act quickly. The short appeal time makes it difficult to complete a motion for new trial. Before the Court of Appeals clarified that a motion for new trial was not necessary to preserve the record for appeal, tenants were faced with the dilemma of bringing a motion for new trial to preserve the record but possibly missing the time for appeal. In *Tonkaway Limited Partnership v. McLain*, 433 N.W.2d at 443-44, appellant moved for a new trial the day judgment was entered. However, the district court did not deny the motion until after the 10 day period following entry of judgment. The appellant appealed from the order denying the motion. The Court of Appeals held that the appeal was not timely since it was filed more than 10 days after entry of judgment.

In 1998 Minn. R. Civ. App. P. 104.01 was amended to provide for stay the time for appeal upon filing and service of a certain post trial motions.

> Unless otherwise provided by law, if any party serves and files a proper and timely motion of a type specified immediately below, the time for appeal of the order or judgment that is the subject of such motion runs for all parties from the service by any party of notice of filing of the order disposing of the last such motion outstanding. This provision applies to a proper and timely motion:
>
> (a) for judgment notwithstanding the verdict under Minn. R. Civ. P. 50.02;
>
> (b) to amend or make findings of fact under Minn. R. Civ. P. 52.02, whether or not granting the motion would alter the judgment;
>
> (c) to alter or amend the judgment under Minn. R. Civ. P. 52.02;
>
> (d) for a new trial under Minn. R. Civ. P. 59;
>
> (e) for relief under Minn. R. Civ. P. 60 if the motion is filed within the time frame for a motion for new trial; or
>
> (f) in proceedings not governed by the Rules of Civil Procedure, a proper and timely motion that seeks the same or equivalent relief as those motions listed in (a)-(e).

Minn. R. Civ. App. P. 104.01(2).

It appears that the amendment may overrule *Tonkaway Limited Partnerships v. McLain*, 433 N.W.2d 443, 444 (Minn. Ct. App. 1988), which held that the appellant may not appeal from the order denying a motion for new trial in an unlawful detainer (now called eviction) action. However, the Rule starts by stating "Unless otherwise provided by law," so it is not clear whether *Tonkaway* excepts eviction actions from the Rule.

The post trial motion must be "authorized." *Madson v. Minnesota Mining and Manufacturing Co.*, ____ N.W.2d ____, No. CX-99-1508 (Minn. June 15, 2000); Minn. R. Civ. App. P. 104.01, 1998 Advisory Committee Comment. It is unclear whether and what post trial motions are "authorized" in eviction actions. While a divided court in the unpublished decision in *Stock v. Beaulieu*, No. C4-95-989 (Minn. Ct. App. May 9, 1995) (Appendix 170) held the motion for new trial was not authorized, previous published decisions simply stated that the motion was not necessary to preserve evidentiary issues, and did not hold the motion was unauthorized. *Scroggins v. Solchaga,* 552 N.W.2d 248 (Minn. Ct. App. 1996); *Minneapolis Public Housing Authority v. Greene*, 463 N.W.2d 558, 560 (Minn. Ct. App. 1990). However, the fact that motions for new trial are not necessary in eviction actions might mean that they do not toll the time for appeal. *See* Minn. R. Civ. App. P. 104.01, 1998 Advisory Committee Comment ("'motions for reconsideration' [excluded] because these motions are never required by the rules").

Unfortunately, while the amendment to Rule 104.01 may clarify post trial motion practice in most types of litigation, proper eviction action post trial practice still is unclear. In light of this confusion, and until the court clarify the issue, the appellant should move for new trial before entry of judgment and move to stay entry of judgment pending a decision under Minn. R. Civ. P. 58.02 and 62. *See Pirkola v. Bastie,* No. C1-95-602242 (Minn. Dist. Ct. 6th Dist. Feb. 20, 1996) (Appendix 196) (order for temporary stay and amended order to conform to settlement on the transcript). If entry of judgment was not stayed, appellant should appeal within 10 days of entry, regardless of whether the motion for new trial has been decided. The worst that would happen would be that the Court of Appeals would decide that the appeal was premature. Minn. R. Civ. App. P. 104.01, Subd. 3. The appellant also should contact the Court of Appeals Staff Attorney's Office for guidance on procedure.

b. *Motions on bonds, fees and staying eviction pending appeal*. *See* discussion, *infra* at X.E.

2. Motion to vacate judgments and stay or quash the writ of restitution

The court has authority entertain a motion to vacate a judgment in an eviction (unlawful detainer) action, either under either (a) the court's inherent power to review its own action, *Itaska County v. Ralph*, 144 Minn. 446, 449, 175 N.W. 899, 900 (1920); *Crosby v. Farmer*, 39 Minn. 305, 309, 40 N.W. 71, 73 (1888). *See Durigan v. Smith*, No. UD-80515 (Henn. Cty. Mun. Ct., July 25, 1977) (Appendix 3); or (b) Minn. R. Civ. P. 60.02. *Wong Kong Har Wun Sun Association v. Chin*, No. C8-87-2439 (Minn. Ct. App. Apr. 12, 1988) (unpublished: trial court abused discretion in refusing to vacate default unlawful detainer judgment due to mistake) (Appendix 21); *Minneapolis Public Housing Authority v. Gorman*, No. UD-1930823517 (Minn. Dist. Ct. 4th Dist. Oct. 20, 1993) (Appendix 71) (decision vacated where defendant's attorney did not appear at hearing, defendant's counsel failed to appear because of inadvertence, mistake, or neglect of counsel and not because of fault of defendant, defendant was prejudiced by lack of counsel, defendant appears to have defense on merits, and plaintiff will not be substantially prejudiced).

Where an eviction (unlawful detainer) judgment is vacated, if the writ has not been executed, it should be quashed. If the writ has been executed, the court should direct the plaintiff to return possession of the premises and seized personal property to the defendant, and order that the defendant is not liable for

the costs of removal, storage, and return of the property. *See Kowalenko v. Haines*, No. C6-85-1365, Order at 2 (Minn. Ct. App. July 23, 1985 (Appendix 4); *Durigan v. Smith*, No. UD-80515 (Henn. Cty. Mun. Ct., July 25, 1977) (Appendix 3).

However, denial of a motion to vacate the judgment may not be appealable. *See* discussion, *infra* at X.B. *But see Scroggins v. Solchaga,* 552 N.W.2d 248 (Minn. Ct. App. 1996) (since the judgment was by default and the tenant did not move to reopen the default judgment, the court's review of the default judgment was limited).

Given the rise of tenant screening agencies and the availability of expunging or sealing court records, tenants may be more interested in reopening default cases even after the tenant has moved. While a tenant should be able to litigate the merits involved in a default case within the context of a motion for expungement, some courts facing a high volume of expungement motions might direct tenants in default cases to move to reopen the defaults first. It is unclear just when a defaulting tenant may reopen a judgment after the tenant has moved. Generally, a defendant may not reopen a satisfied default judgment, unless the judgment was satisfied involuntarily. *Lyon Financial Services, Inc. v. Waddill*, 607 N.W.2d 453 (Minn. Ct. App. 2000). It would seem clear that when the landlord obtains a writ and forcibly removes a tenant through the sheriff, the judgment for possession has been satisfied involuntarily. It is unclear whether the tenant vacating the property before that point would be involuntary satisfaction of the judgment.

The court discretion is not without limits. *Imperial Premium Finance, Inc. v. G.K. Cab Co., Inc.*, 603 N.W.2d 853 (Minn. Ct. App. 2000) (reversed District Court decision vacating default judgment where defendant failed to demonstrate reasonable excuse and no substantial prejudice).

For forms for motions to vacate judgments, *see* Forms Appendix, Form V.

Grounds for vacating the judgment include:

a. Lack of personal jurisdiction

Where the court lacks personal jurisdiction over the defendant due to inadequate service, a judgment entered by default must be vacated unconditionally. *Lange v. Johnson*, 295 Minn. 320, ____, 240 N.W.2d 205, 208 (1973). No showing of a meritorious defense is necessary. *Hengel v. Hyatt*, 312 Minn. 317, 318, 252 N.W.2d 105, 106, (1977). *See Igherighe v. _____,* No. HC 1011015538 (Minn. Dist Ct. 4th Dist. Dec. 14, 2001 and May 22, 2002) (Appendix 520) (hearing scheduled on motion to quash writ where Section 8 tenant claimed no service by plaintiff, no notice to housing authority, and rent had been paid in full or part; expungement and award to tenant of costs and disbursements which can be credit against rent); *Tri Star Developers, LLC v. _____*, No. HC 010109514 (Minn. Dist Ct. 4th Dist. Oct. 17, 2001) (Appendix 584) (improper service on employee of business who was not an officer and not authorized to accept service; defendant business was incorrectly named; default judgment vacated and action dismissed and expunged); *Minneapolis Public Housing Authority v. Kline*, No. UD-1930712506 (Minn. Dist. Ct. 4th Dist. Aug. 5, 1993) (Appendix 3.B) (motion to quash writ granted where service was on child who did not reside on the premises). *But see Gale v. Winge*, No. C7-98-2279 (Minn. Ct. App. July 6, 1999) (unpublished) (affirmed determination as not clearly erroneous that husband continued to use property as his place of abode and substitute service on wife was proper; minor inaccuracies in contract-for-deed legal description do not render the cancellation notice ineffective; trial court did not abuse its discretion in denying motion to vacate default judgment where tenant did not present a defense on the merits nor a reasonable excuse for failure to act; attorney's testimony at trial regarding payment of money was not on a contested issue, and did not require disqualification; equitable rights were not at issue, but equities were not in the defendants' favor).

b. Substantial compliance with settlement agreement

In *Huntington Place v. Scott*, Partial Transcript, No. UD-1980409509 (Minn. Dist. Ct. 4th Dist. Apr. 30, 1998) (Appendix 338), the court ordered the tenant to pay rent that day. The tenant contacted county emergency assistance that day, which agreed to make payment but did not accomplish it that day. The court concluded that the tenant made a good faith effort to redeem, and in fact redeemed, and ordered the judgment and writ vacated. *See Park Pointe Apartments LLC v.* _____, No. 27-CV-HC-08-3778 (Minn. Dist. Ct. 4th Dist. June 3, 2008) (Appendix 613) (order stated that written guarantee from county for payment of rent would satisfy settlement agreement; tenant obtained guarantee and filed it by deadline; landlord obtained writ claiming it did not receive guarantee on time; court found tenant satisfied agreement and quashed writ); *Lawler v.* _____, No. HC 010817525 (Minn. Dist Ct. 4th Dist. Sep. 20, 2001) (Appendix 529) (judgment vacated where tenant made good faith effort to pay rent before issuance of writ); *Lang v.* _____, No. HC 1000107518 (Minn. Dist Ct. 4th Dist. June 15, 2000) (Appendix 527) (tenant made good faith effort to pay rent into court, where tenant paid part into court, obtained a letter of guarantee from State for balance, and State paid); *Patterson v. Heinecke*, No. C3-00-600301 (Minn. Dist. Ct. 6th Dist. Mar. 24, 2000) (Judge Oswald) (Appendix 412) (Writ vacated where the parties settled for payment of back rent but plaintiff refused to cooperate; plaintiff ordered to immediately cooperate with defendant to provide forms necessary to obtain rental assistance from the Salvation Army. "This Court is not going to act as Plaintiff's rent collection agency nor is it going to allow Plaintiff's own refusal to cooperate to frustrate the prior settlement of the parties); *MPHA v. Harding*, No. ____ (Minn. Dist. Ct. 4th Dist. Mar. 3, 1995) (Appendix 168) (writ vacated where tenant's failure to pay rent ordered by court was excusable neglect); *MPHA v. Watkins*, No. UD-1941229503 (Minn. Dist. Ct. 4th Dist. Jan. 31, 1995) (Appendix 169) (writ vacated where tenant's failure to pay rent ordered by court was excusable neglect).

c. Eviction grounds outside scope of complaint

In *Public Housing Agency of City of St. Paul v. Simpkins*, No. C7-97-2137 (Minn. Dist. Ct. 2d Dist. Jan. 30, 1998) (Appendix 359) (Faricy, J.), the public housing authority gave the tenant a 14 day non-payment of rent notice for $25.00. The tenant then paid the rent and a late fee. However, the PHA applied the payments to alleged arrearage for previous months, and filed an unlawful detainer action claiming non-payment of the February rent. The referee allowed the PHA to orally amend its claim, and ordered the tenant to pay $209 and court costs within seven days or move. The tenant moved and later obtained bank verification of deposit of the tenant's payment. The tenant moved to vacate the judgment, which was first denied by another referee, and then granted on judge review. The court concluded the first referee erred by going beyond the pleadings and ordering the tenant to pay more than had been pled, and the second referee erred in denying the motion to vacate. The court noted that it would be unjust to evict another tenant who moved into the unit vacated by the tenant, so the court ordered the PHA to place the tenant's name immediately at the top of the waiting list for the next available vacancy without requiring her to address claims for past due rents.

d. Tenant confusion

In *Central Brookland Urban Dev. Corp. v. Copeland*, 122 Misc. 2d 726, 730, 471 N.Y.S.2d 989, 993 (Civ. Ct., Kings Cty., 1984), the court granted a motion to vacate a default judgment, where the tenant appeared for the hearing but left when she believed she had obtained a continuance to obtain legal representation. The court noted the confusion suffered by *pro se* defendants at large eviction hearing calendar calls.

e. Landlord violation of settlement agreement

Grimmer v. Svoboda, No. UD-1960923520 (Minn. Dist. Ct. 4th Dist. Jan. 6, Jan. 15, and Mar. 14, 1997) (Appendix 257) (Writ stayed where landlord failed to execute stipulated reference, told tenants they could stay longer, and accepted rent beyond the move out date; landlord ordered to execute reference letter and tenant given extra month to move; damages and move out date settled); *Kedrowski v. Doe*, No.-UD 1950801514 (Minn. Dist. Ct. 4th Dist. Nov. 17, 1995) (Appendix 189) (default judgment vacated where landlord violated settlement agreement by obtaining the default judgment; good memorandum by tenant's counsel on fraud, misconduct and mistake).

f. Improper enforcement of writ

Zgodava v. Rodriquez, No. UD-1961210524 (Minn. Dist. Ct. 4th Dist. Jan. 7, 1997) (Appendix 305) (Lockout after writ of restitution issued but not served; tenant sought return of personal property; landlord ordered to allow tenant to retake possession of personal property).

g. Landlord waiver of tenant violation of settlement agreement

Carriage House Apartments v. Hoff, No. UD-1921022511 (Minn. Dist. Ct. 4th Dist. Mar. 1, 1993) (Appendix 15.D.2) (the motion to quash writ was granted where plaintiff obtained the writ on the allegation that defendant violated court approved stipulation, but plaintiff accepted rent with knowledge of alleged breach).

h. Improper plaintiff

Filas v. _____, No. HC 040115532 (Minn. Dist Ct. 4th Dist. Feb. 18, and Mar. 10, 2004) (Appendix 497) (motion to quash writ granted and eviction dismissed where "Plaintiffs were not the real parties in interest when the complaint was filed because they had executed a contract for deed, now cancelled, with another vendee", later expunged).

i. Improper notice to Section 8 Office

Igherighe v. _____, No. HC 1011015538 (Minn. Dist Ct. 4th Dist. Dec. 14, 2001 and May 22, 2002) (Appendix 520) (hearing scheduled on motion to quash writ where Section 8 tenant claimed no service by plaintiff, no notice to housing authority, and rent had been paid in full or part; expungement and award to tenant of costs and disbursements which can be credit against rent).

j. Rent had been paid

Pham v. _____, No. HC 102061505 (Minn. Dist Ct. 4th Dist. July 10, 2002) (Appendix 561) (motion to vacate default judgment granted where tenant was late for hearing because of disability, and tenant provided Section 8 documentation of payments during months at issue).

k. Unavailability of writ for nonpayment of future rent

See discussion, *supra*, at VIII.B.2.

3. Motion for return of personal property. *See* discussion, *supra* at VIII.C.

4. Motion for costs and attorney fees

a. Attorney fees

The appellate courts have inconsistently ruled on whether attorney's fees may be awarded in eviction (unlawful detainer) actions. In *Duling Optical Corp. v. First Union Management, Inc.,* No. C5-95-2718 (Minn. Ct. App. Aug. 13, 1996), FINANCE & COMMERCE at 66 (Aug. 16, 1996) (Appendix 181) (unpublished decision), the Court of Appeals affirmed the District Court's conclusion in a separate damages action that it lacked jurisdiction to award attorney's fees for separate unlawful detainer actions, since the issue of attorney's fees should have been decided in the unlawful detainer actions. However, in *Eagan East Ltd. Partnership v. Powers Investigations, Inc.*, 554 N.W. 2d 621 (Minn. Ct. App. 1996), the trial court ruled that the tenant was not entitled to attorney's fees under the lease. On appeal, the Court of Appeals held that the trial court's jurisdiction was limited to determining present possessory rights of the parties, and that the trial court exceeded its jurisdiction by ruling attorney's fee issues. The decision suggests that a tenant may not claim attorney's fees against a landlord in the action, even though the landlord may claim attorney's fees under the redemption statute. While residential tenants do not often request attorney's fees in eviction (unlawful detainer) actions, tenants might be able to make the claim in the form of rent abatement, which would be an issue related to present possessory rights.

Generally attorney fees are not awarded in an unlawful detainer action. *Rogers v. Stewart*, No. UD-1961029511 (Minn. Dist. Ct. 4th Dist. Jan. 6, 1997) (Appendix 290). Sometimes attorney fees up to $5 are awarded to the landlord claiming nonpayment of rent if the tenant redeems the property. *See* discussion, *supra*, at VI.E.20. There is no other provision for awarding attorney fees in unlawful detainer actions outside of statutes and rules governing frivolous litigation. *See* MINN. STAT. § 549.21; Minn. R. Civ. P. 11.

Fees were awarded in the following cases: *Nygren v. Nix*, No. C1-96-42 (Minn. Dist. Ct. 9th Dist. Jan. 25, 1996) (Appendix 199) (if the plaintiffs refiled the action, they must pay defendant's counsel attorney's fees as a condition to refile the action); *LeDoux v. Zanosko*, No. CX-95-1001 (Minn. Dist. Ct. 9th Dist. Oct. 16, 1995) (Appendix 124) (fees awarded after landlord terminated tenant's propane heating supply and filed unlawful detainer action); *L. Earl Bakke, Inc. v. O'Donnell*, No. UD-1941201517 (Minn. Dist. Ct. 4th Dist. Feb. 9, 1995) (Appendix 139) (fees awarded where landlord or landlord's attorney failed to appear at hearing, failing to return tenant's attorney's phone calls, filing an action for nonpayment of rent when tenant had offered payment of rent and landlord refused, mischaracterizing essential facts, and failing to dismiss the meritless action); *Lewis Properties v. Pruitt*, UD-1950315516 (Minn. Dist. Ct. 4th Dist. Sept. 22, 1995) (Appendix 92) (fees awarded where landlord unnecessarily prolonged litigation and acted frivolously when after agreeing to make repairs at an earlier hearing, the landlord did not make repairs resulting in condemnation, filed a separate unlawful detainer action which the court dismissed for failure to prove ownership change, and failed to provide notice of new ownership to the tenant or information required by the disclosure statute, § 504.22 (now § 504B.181)); *Minneapolis Public Housing Authority v. Gorman*, No. UD-1930823517 (Minn. Dist. Ct. 4th Dist. Nov. 10, 1993) (Appendix 72) (the court awarded the defendant's counsel costs of $61 and attorney's fees of $905, where the plaintiff voluntarily dismissed the action only two days before trial, after defendant's counsel had taken substantial efforts to prepare for trial).

In *Fisher v. Williams*, No. UD-19110703501 (Minn. Dist. Ct. 4th Dist. Aug. 21, 1991) (Appendix 20.D), the court denied defendant's motion for attorney's fees under Minn. Stat. § 549.21. The court concluded that while it could not condone the plaintiffs prosecution of the unlawful detainer action, the court could not conclude that the plaintiff acted in bad faith.

There are times when tenants face a series of eviction actions which are frivolous. Effective September 1, 1999, the Minnesota Supreme Court adopted Rule 9 of the General Rules of Practice for the

District Courts. Under Rule 9, the court, upon notice and hearing, may require a frivolous litigant to furnish security, or the court can impose preconditions on a frivolous litigant's filing of any new claims and motions.

Consolidation of the unlawful detainer action with a tenant initiated case, such as a rent escrow, tenant remedies, lockout, or emergency relief action, would give rise to attorney fees. *Smith v. Brinkman* and *Brinkman v. Smith*, Nos. HC-1000124900 and HC-1000202517 (Minn. Dist. Ct. 4th Dist. Mar. 9, 2000) (Appendix 418) (Consolidated eviction and rent escrow actions: landlord failed to prove statutory notice to quit, notice to increase rent given November 1 was not effective to increase rent December 1, presumption of retaliation applied to a rent increase notice with the landlord failing to prove a non-retaliatory purpose, habitability rent abatement of $800 over four months (38%) tenant awarded $300 in civil penalties for landlord visits without notice in which he was rude toward the tenant and her daughter, landlord ordered to make repairs with tenant's authorized to make repairs and submit bills for court approval, landlord restrained from harassing tenant and household members with landlord allowed to enter only to make repairs with written 24-hours notice, tenants awarded costs, disbursements and attorney's fees..

b. Costs and disbursements

Minn. Stat. § 549.02, subd. 1 provides that in actions commenced in the district court, costs *shall* be allowed to the defendant upon (1) discontinuance, (2) or dismissal or (3) when judgment is rendered in the defendant's favor on the merits, in the amount of $200.

Courts regularly awards costs to prevailing tenants. *Tower Terrace Park v. _____*, No. HC-040519527 (Minn. Dist. Ct. 4th Dist. July 14, 2004) (Appendix 623) (expungement granted and costs and disbursements awarded where mobile home park dismissed eviction action and failed to give statutory 10 day notice for rent before filing action); *Dominium Management Services, Inc. v. C.L.,* No. HC-1021106500 (Minn. Dist. Ct. 4th Dist. Mar. 4, 2003) (Appendix 492) (court dismissed that action and awarded the defendant costs and disbursements), affirmed, *Dominium Management Services, Inc. v. C.L.,* No. A03-85, 2003 WL 22890386 (Minn. Ct. App. Dec. 9, 2003); *Ford v. _____,* No. HC-1020325505 (Minn. Dist. Ct. 4th Dist. Apr. 26, 2002) (Appendix 500) (action dismissed and defendant awarded costs and disbursements); *Igherighe v. _____,* No. HC-1011001519 (Minn. Dist Ct. 4th Dist. Oct. 10, 2001 and Feb. 19, 2002) (Appendix 519) (costs awarded); *Walters v. _____*, No. HC 10101004526 (Minn. Dist Ct. 4th Dist. Oct. 26, 2001) (Appendix 593) (tenant entitled to costs and disbursements from successful Court of Appeal case).[20]

---

[20]*Connelly v. Schiff*, No. HC-1000417515 (Minn. Dist. Ct. 4th Dist. May 23, 2000) (Appendix 386) (dismissal without prejudice where landlord failed to secure rental license; tenant awarded $200 costs under § 549.02 and $40 in disbursements under § 549.04 for witness fees; expungement granted; plaintiff's motion to vacate and reopen treated as untimely motion for judge review under MINN. R. GEN. PRAC. 611 when filed 11 days after oral announcement of decision); *Franklin v. Rae*, No. HC-1000121503 (Minn. Dist. Ct. 4th Dist. March 9, 2000) (Appendix 392) (Judge Albrecht: $243 in costs and disbursements awarded.; *Smith v. Brinkman* and *Brinkman v. Smith*, Nos. HC-1000124900 and HC-1000202517 (Minn. Dist. Ct. 4th Dist. Mar. 9, 2000) (Appendix 418) (Consolidated eviction and rent escrow actions: landlord failed to prove statutory notice to quit, notice to increase rent given November 1 was not effective to increase rent December 1, presumption of retaliation applied to a rent increase notice with the landlord failing to prove a non-retaliatory purpose, habitability rent abatement of $800 over four months (38%) tenant awarded $300 in civil penalties for landlord visits without notice in which he was rude toward the tenant and her daughter, landlord ordered to make repairs with tenant's authorized to make repairs and submit bills for court approval, landlord restrained from harassing tenant and household members with landlord allowed to enter only to make repairs with written 24-hours notice, tenants awarded costs, disbursements and attorney's fees.; *Hurt v. Johnston*, No. HC-000103513 (Minn. Dist. Ct. 4th Dist. Feb. 9, 2000) (Appendix 398)

Costs are available for dismissal for lack of personal jurisdiction. *Nieszner v. St. Paul School District No. 625*, 643 N.W.2d 645 (Minn. Ct. App. 2002).

If the court finds for the defendant at any stage in the action, costs must be awarded to the defendant. *Franklin v. _____,* No. HC-001219503 (Minn. Dist Ct. 4th Dist. Mar. 29, 2001) (Appendix 501) (costs awarded to defendant after plaintiff discontinued (but did not dismiss) the action as being mistakenly filed).

The court may allow the tenant to credit an award of costs and disbursements against rent. *Svendsen v. _____*, No. HC 1031006570 (Minn. Dist Ct. 4th Dist. Dec. 3, 2003) (Appendix 582c) (award of $200 in costs which could be credited against rent where action dismissed for accepting partial payment in rent); *SJM Properties, Inc. v. _____,* No. HC 020402501 (Minn. Dist Ct. 4th Dist. Apr.. 11, 2002, Feb. 12, 2003) (Appendix 570) (dismissal; costs and disbursements awarded, which may be credited against rent; expungement granted later); *Igherighe v. _____,* No. HC-101101538 (Minn. Dist Ct. 4th Dist. Feb. 19, 2002) (Appendix 519) (costs and disbursement awarded and credit against rent and expungement ordered where dismissal based on settlement, where tenant raised many defenses).

The flip side of the issue is that landlord are beginning to request costs as well. In *Fradette v. Mettner*, No. C4-00-56 (Minn. Dist. Ct. 9th Dist. Jan. 26 and Mar. 14, 2000)(Appendix 389), the Court awarded the plaintiff $402 in costs and disbursements, including $200 in statutory costs under MINN. STAT. §§ 549.02 and 549.04.

(Tenant awarded $200 in costs and $69 in disbursements as a prevailing party. (Memorandum of Paul Birnberg attached.; *Franklin v. Rae*, No. HC-000103512 (Minn. Dist. Ct. 4th Dist. Feb. 9, 2000) (Appendix 392) ($200 in costs and $43 in disbursements awarded to tenant as prevailing party.; *Franklin v. Johnston*, No. HC-000103511 (Minn. Dist. Ct. 4th Dist. Jan. 18, 2000) (Appendix 391) (Same holding as *Hurt v. Johnston*.; *Green v. Formanek*, and *Formanek v. Green*, No. 1991001905 and 4991004400 (Minn. Dist. Ct. 4th Dist. Oct. 27, Nov. 8, 1999) (Judge Bruce Peterson) (Appendix 393) (Consolidated rent escrow and eviction actions: dismissal of eviction action where landlord's notice was not wholly without retaliatory motive; tenant awarded retroactive and prospective rent abatement, and costs and disbursements upon application and affidavit.; *Okoiye v. Washington*, No. UD-1990708534 (Minn. Ct. Dist. July 22, 1999) (Appendix 425) (dismissal for failure to file affidavit of service; expungement motion granted; tenant awarded costs); *Larson v. Anderson*, No. C9-96-416 (Minn. Dist. Ct. 9th Dist. Oct. 11 and Nov. 8, 1996) (Appendix 264) (Rent abatement of $6,910 over five years failing to repair discharge of raw sewage on the premises; landlord's notice to quit was in retaliation for tenant's complaint to health department; costs, disbursements and witness fees awarded to prevailing tenant, but attorney fees denied). *But see Rydrych v. Comer*, No. UD-01961125504 (Minn. Dist. Ct. 4th Dist. Dec. 6, 1996) (Appendix 291) (Tenant's request for $200 in costs under § 549.02 denied based on § 566.09 (now § 504B.345), which actually authorizes taxation of costs).

Earlier, in *Soderberg Apartment Specialists v. Mathis*, No. UD-1980421538 (Minn. Dist. Ct. 4th Dist. Jul. 17, 1998) (Appendix 363), the court awarded disbursements of $77.00 and costs of $100.00 to the tenant. The court did not award $200.00 in mandatory costs under MINN. STAT. §549.02, concluding that an unlawful detainer action was an equitable action, in which an award of cost is discretionary under §549.07. In *Bunn v. Oman*, Nos. UD-1980803902 and UD-1980805513 (Minn. Dist. Ct. 4th Dist. Nov. 20, 1998) (Appendix 314) (Arthur, J.), the tenant prevailed in consolidated rent escrow and unlawful detainer actions, but the referee denied the motion for disbursement. On judge review, the court ordered that the tenants, having prevailed in the actions and having incurred reasonable disbursements, were entitled to judgment for the disbursements.

5. Motion to Seal or Expunge Court Records

In some circumstances, the court may considering sealing or expunging the eviction (unlawful detainer) court records. The benefit for the tenant is keeping court records out of the reach of tenant screening agencies, since many landlords will not rent to rents who have even one case on their record, regardless of the outcome. *See* Affidavit of Sharlyn LaPlace, *Lumpkin v. Lewis*, No. 96-10295 (Minn. Dist. Ct. 4th Dist. July 12, 1996) (Appendix 184).

a. At common law

Until the passage of an expungement statute, the issue was one of common law, based on the court's inherent power to control court functions. Since expungement was unusual in civil cases, tenants reserves this issue for special cases, such as when the tenant has not unlawful detainer cases on record and the landlord's cases is frivolous or retaliatory. *Player v. King,* UD-1960306541 (Minn. Dist. Ct. 4th Dist. Apr. 3 & May 2, 1996) (Appendix 192) (in Emergency Tenant's Remedies and Lock-out Action, at compliance hearing, court ordered that the dismissed companion unlawful detainer action records be sealed). *See generally State v. C.A.*, 304 N.W.2d 353 (Minn. 1981); *State v. Schultz*, 676 N.W.2d 337 (Minn. Ct. App. 2004), *State v. T.M.B.*, 590 N.W.2d 809 (Minn. Ct. App. 1999) (courts may exercise their inherent authority to issue expungement orders affecting court records; judiciary may not order expungement of criminal records maintained by executive branch agencies absent evidence of an injustice resulting from an abuse of discretion in the performance of an executive function).

In *Rio Hot Properties, Inc. v. Judge*, No. UD-1981102522 (Minn. Ct. Dist. 4th Dist. Nov. 19, 1998) (Appendix 362C), the court concluded that the issue of expungement should be reserved to when closure is imminent.

(1) Action should not have been filed

The courts expunged or sealed unlawful detainer files where the court determined that the case should not have been filed. Sometimes expungement is jointly requested. *Richfield Housing Association v.* _____, Nos. UD-4990219410 (Minn. Dist. Ct. 4th Dist. Mar. 4, 1999) (Appendix 361) (Oleisky, J.: joint request for dismissal and expungement granted where landlord erroneously filed action for rent); *Geneva Village, L.P. v. Quinn*, No. C3-98-3358 (Minn. Dist. Ct. 10th Dist. Jul. 22, 1998) (Appendix 333) (Cass, J.: expungement ordered where parties agreed that filing action was unjust and would prevent tenants from finding decent, safe housing in the future); *Phillips Neighborhood Housing Trust, c/o Perennial Properties, Inc., v. Brown*, No. UD-1960705508 (Minn. Dist. Ct. 4th Dist. Mar. 2, 1998) (Appendix 357) (expungement of name of tenant on joint motion of parties where the landlord prevailed in action for breach of lease by the co-tenant, there was no question that the tenant seeking expungement was not at fault for the breach); *Eden Park Apartments Limited Partnership v. Dixon*, No. UD-01980114506 (Minn. Dist. Ct. 4th Dist. Feb. 17, 1998) (Appendix 327) (Granted parties' joint request for dismissal and expungement where Section 8 office failed to notify landlord of recalculation of tenant's subsidy); *LaSalle Group, Ltd._ v.* _____, No. UD-1970326507 (Minn. Dist. Ct. 4th Dist. Sep. 30, 1997) (Appendix 267) (Joint request for expungement); *Larson v.* _____, No. UD-1970805527 (Minn. Dist. Ct. 4th Dist. Sep. 30, 1997) (Appendix 266).

Other times only the defendant moved for expungement. *D & D Real Estate Investment, L.L.P. v. Hughes*, Nos. UD-1990311505 (Minn. Dist. Ct. 4th Dist. Mar. 30, 1999) (Appendix 323A) (Dismissal of breach of lease claim where there was no convincing evidence that the oral lease contained a right of re-entry clause, no convincing evidence as to the dollar amount of damage to a door to determine whether damage

was material or *de minimis*, and the landlord failed to prove that the tenant or one of her guests damaged the door where the tenant claimed damage was caused by a burglar; tenant's names expunged from file); *Hughes v. Schudi*, Nos. 1990208901 and UD-1990205510 (Minn. Dist. Ct. 4th Dist. Feb. 25, 1999) (Appendix 323B) (Scherer J.: rejected landlord's argument that notice to quit was not retaliatory because tenant's emergency tenant remedies actions were dismissed for non-appearance, where landlord was aware of tenant's actions in reporting disrepair and initiating court actions; notice to quit and unlawful detainer action were filed in bath faith; unlawful detainer file expunged); *Okoiye v. Washington*, No. UD-01981015513 (Minn. Dist. Ct. 4th Dist. Oct. 29, 1998) (Appendix 354B) (the court dismissed a second unlawful detainer action raising issues which had been litigated in the first one; the court also ordered that the landlord may not file another unlawful detainer action against the tenant without court approval, and ordered that the file be expunged); *Central Manor Apartments v. Beckman*, Nos. UD-1980609509, UD-1980513525 (Minn. Dist. Ct. 4th Dist. July 29, 1998) (Appendix 319B) ("The ends of justice would be best served by expunging" a second unlawful detainer action where landlord could have sought relief by motion in first unlawful detainer action); *Lamb v. DeCoteau*, No. C2-98-3304 (Minn. Dist. Ct. 10th Dist. Jul. 9, 1998) (Appendix 343) (expungement if rent paid); *Morris v. Jordan*, No. UD-1980406518 (Minn. Dist. Ct. 4th Dist. Jun. 18, 1998) (Appendix 352B) (dismissed Section 8 certificate unlawful detainer action for failing to serve a copy of the summons and complaint on the public housing authority, expunged name of minor as there was no reason to name him as a defendant).

(2) Defendant not at fault

Some tenants have been successful avoiding the restrictions of the expungement statute by citing *State v. C.A.*, 304 N.W.2d 353 (Minn. 1981). *JP Morgan Case Bank v.* _____, No. HC-040115527 (Minn. Dist. Ct. 4th Dist. April 30, 2004) (Appendix 605) (common law expungement granted where homeowner defendant in mortgage foreclosure sold redemption right to third party on understanding that it would redeem, third party did not timely redeem, bank filed eviction but continued case to allow third party to redeem, and third party redeemed and rented to defendant who remained in possession of property); *Bigos Management, Inc. v.* _____, No. HC-030423531 (Minn. Dist Ct. 4th Dist. July 11, 2003) (Appendix 469) (while tenant breached lease by failing to pay rent, subtenant of tenant did not; expungement granted for subtenants citing *State v. C.A.*, 304 N.W.2d 353 (Minn. 1981)). *See also Bigos Management, Inc. v.* _____, No. HC-030423532 (Minn. Dist Ct. 4th Dist. July 11, 2003) (Appendix 470); *Bigos Management, Inc. v.* _____, No. HC-030423533 (Minn. Dist Ct. 4th Dist. July 11, 2003) (Appendix 471); *Bigos Management, Inc. v.* _____, No. HC-030423536 (Minn. Dist Ct. 4th Dist. July 11, 2003) (Appendix 472); *Bigos Management, Inc. v.* _____, No. HC-030423537 (Minn. Dist Ct. 4th Dist. July 11, 2003) (Appendix 473); *Bigos Management, Inc. v.* _____, No. HC-030423539 (Minn. Dist Ct. 4th Dist. July 11, 2003) (Appendix 474); *Bigos Management, Inc. v.* _____, No. HC-030423540 (Minn. Dist Ct. 4th Dist. July 11, 2003) (Appendix 475).

(3) Unique circumstances outside the defendant's control

The courts have based expungement on the court's common law authority where unique circumstances outside the tenant's control led to the eviction, and where neither the landlord nor the tenant were at fault. *See St. Louis Park Place, LLC v.* _____, No. HC-1031015540 (Minn. Dist. Ct. 4th Dist. Nov. 12, 2004) (Appendix _____) (judge reversed referee denial of expungement where tenants failed to pay rent on time when they were traveling back and forth to their home town to attend the funerals of friends killed in a school shooting, and tenants later paid rent and remained tenants); *Brooklyn Park Housing Associates, LLP v.* _____, No. HC-040218503 (Minn. Dist. Ct. 4th Dist. Oct. 14, 2004) (Appendix _____) (judge reversed referee denial of expungement where tenant failed to pay rent on time when tenant

took leave from work to care for her child who was recuperating from brain surgery, and tenant later paid rent and reminded a tenant).

b. Expungement statute

In 1999, the Legislature enacted Minn. Stat. § 484.014. It defines "expungement" as the removal of evidence of the court file's existence from the publicly accessible records; "eviction case" as an action brought under sections 504B.281 to 504B.371; and "court file" as the court file created when an eviction case is filed with the court. The statute provides for discretionary expungement: "The court may order expungement of an eviction case court file only upon motion of a defendant and decision by the court, if the court finds that the plaintiff's case is sufficiently without basis in fact or law, which may include lack of jurisdiction over the case, that expungement is clearly in the interests of justice and those interests are not outweighed by the public's interest in knowing about the record."

As of August 1, 2008, the court must expunge the file in an eviction action filed by the foreclosing mortgagee or contract for deed canceling vendor if the court finds that the defendant vacated before commencement of the eviction action, or a tenant defendant did not receive a proper lease termination notice under Minn. Stat. § 504B.285. Minn. Stat. § 484.014, subd. 3, 2008 Minn. Laws Ch. 174. *See* discussion, *supra*, at VI.F.1.c.

In the Fourth District (Hennepin County) the Housing Court has scheduled a monthly calendar for expungement motions. Motions must be filed and served on the opposing party at least ten days before the hearing. However, on some occasions the court will grant an expungement at the same time that it dismisses an unlawful detainer action. Tenants should ask for expungement as part of the request for relief in an unlawful detainer action. The court either will consider it at the time it determines the outcome of the case, or may require the tenant to bring a separate motion on the monthly calendar. *See Hamid v.* _____, 27-CV-HC-08-5349 (Minn. Dist. Ct. 4th Dist. July 8, 2008) (Appendix 604) (nonpayment of rent eviction action dismissed and expunged where landlord has no rental license); *Sun Trust Mortgage Inc. V.* _____, No. 27-CV-HC-08-5044, Order (Minn. Dist. Ct. 4th Dist. June 25, 2008) (Appendix 622) (eviction filed by owner dismissed and expunged where property was under control of administrator in another action); *Smith v.* _____, No. 27-CV-HC-06-921 (Minn. Dist. Ct. 4th Dist. July 18, 2006) (Appendix 620) (referee ordered landlord did not need a rental license and terminated lease; judge reversed, concluding landlord without license did not have standing to file eviction, landlord constructively evicted tenant by obtaining restraining order against tenant in bad faith entitling tenant to $500 in damages and $500 in attorney fees, and ordering expungement); *MJD Enterprises, Inc. v.* _____, No. HC-1040406523 (Minn. Dist. Ct. 4th Dist. May 18, 2004) (Appendix 612) (eviction dismissed and expunged and costs awarded where property manager served defendant and filed false affidavit stating that another person served defendant; it was irrelevant that manager called herself an "independent contractor" when she handled all matters related to rental).

Occasionally court personnel may be reluctant to expunge a court file where there is a settlement agreement setting out actions or events that will occur in the future. The tenant should ask the court to order that expungement occur immediately. This is especially important during a period in which the tenant is seeking new housing. *Viking Properties of MN LLC v. Wesley*, Nos. UD-1990714563 and UD-1990709901 (Minn. Dist. Ct. 4th Dist. Aug. 11, 1999) (Judge Rosenbaum) (Appendix 421) (Action to be expunged immediately upon filing of order where unlawful detainer action was erroneously filed due to mistake or confusion; settlement providing that tenant would move in one and one-half months, tenant would not pay rent for two months and landlord would retain deposit plus interest, landlord would provide neutral reference, landlord would make repairs as ordered by the housing inspector, landlord would give 24 hours written notice of intention to make repairs, tenant would accommodate repair persons, landlord could contact

tenant's community liaison except all repair notices would be between the parties, the agreement did not waive other rights related to nuisance, illegal or criminal conduct, privacy, or discrimination, tenant would not pursue claims for rent abatement, landlord would not pursue claims for past rent, deposit, late fees, court costs, or court fees, the parties did not admit liability..

Some court administrators have questioned whether expungement applies to public access computer records as well as hard files. The statute defines "expungement" as the removal of evidence of the court file's existence from the publicly accessible records, which should include electronic records as well as paper records. *Minneapolis Public Housing Authority v. Dixon*, No. HC-000121514 (Minn. Dist. Ct. 4th Dist. May 12, 2000) (Appendix 408), (expungement granted where landlord and tenant agreed that a co-tenant, and not the tenant, was the culpable party for lease violations; tenant's name, but not co-tenant's name, removed from caption and computerized records).

Some courts have concluded that expungement is not appropriate if there is further court activity on the case. In _____ *v. Monanya*, N. HC 1991022901 (Minn. Dist Ct. 4th Dist. Sep. 26, 2001) (Appendix 444) , the court lifted an expungement order in a combined emergency relief action and rent escrow action when the tenant sought to collect on the court's award.

In *Cash v. Czock*, No. C4-01-2140, 2002 WL 980078 (Minn. Ct, App. 2002) (unpublished), the court affirmed the order for expungement, based on the parties settlement, and the district court's denial of the *pro se* tenants request to include with expungement the claim of illegal lockout.

Tenants may request that a case that is not expunged be correctly categorized. *Smith v.* _____, No. HC 1000703500 (Minn. Dist Ct. 4th Dist. Jan. 30, 2002) (Appendix 573) (summary changed from nonpayment of rent and breach of lease to holding over after notice).

For forms for expungement are in the Forms Appendix, Forms Exp.

Most decisions have focused on the basis of the landlord's action and proof for it. Examples of grounds for expungement include:

(1) Plaintiff's default

Christopherson Properties v. _____, No. HC 031205518 (Minn. Dist Ct. 4th Dist. Feb. 24, 2004) (Appendix 485) (expungement where "Plaintiff defaulted at first appearance, thereby failing to establish a legal or factual basis for the complaint"); *Huffman v.* _____, No. HC 00021522 (Minn. Dist Ct. 4th Dist. Nov. 15, 2000) (Appendix 517) (plaintiff did not appear or prosecute action, no evidence that service was perfected).

(2) Service defenses

(a) Improper service

Harris v. _____, No. HC 031014526, 031006514 (Minn. Dist Ct. 4th Dist. Jan. 16, 2004) (Appendix 513) (expungement and two awards of costs for two cases involving improper service); *Reid v.* _____, No. 0203155000, (Minn. Dist Ct. 4th Dist. Feb. 12, 2003) (Appendix 565) (expungement for defective complaint and improper service); *Stevens Community Assoc. v.* _____, No. HC 010003507 (Minn. Dist Ct. 4th Dist. Oct. 12, and Dec. 13, 2000) (Appendix 579) (dismissal where affidavit of service claimed service before action was filed; expungement granted later); *Bratton v. Cobb*, No. 8C-000222514 (Minn. Dist. Ct. 4th Dist.

Apr. 12, 2000) (Appendix 380) (parties agreed there was short service but executed move out agreement, case expunged due to short service); *Judge v. Rio Hot Properties, Inc.*, No. UD-1981202903 (Minn. Dist. Ct. 4th Dist. July 7, 1999) (Appendix 401) (unlawful detainer action dismissed for service less than seven days before the hearing; expungement granted on two unlawful detainer actions where one involved improper service and the other involved a plaintiff not entitled to possession of the premises; tenants proved landlord breach of covenants of habitability, while landlord failed to prove tenant negligence or commission in damage, or that tenants unreasonably denied access to the landlord; rent abatement to increase if repairs are not completed; tenants' motion in consolidated cases to add punitive damages denied where court found no independent tort, but tenant granted leave to proceed with claims for contempt where the landlord had failed to complete repairs for almost one year).

(b) No proof of service

Smith v. _____, No. HC 031124400 (Minn. Dist Ct. 4th Dist. Dec. 4, 2003) (Appendix 572) (expungement for no proof of service); *Huffman v.* _____, No. HC 00021522 (Minn. Dist Ct. 4th Dist. Nov. 15, 2000) (Appendix 517) (plaintiff did not appear or prosecute action, no evidence that service was perfected); *Greene v.* _____, No. 1000821516 (Minn. Dist Ct. 4th Dist. Nov. 14, 2000) (Appendix 506) (no proper affidavit of service, tenant moved before action was filed, action settled); *Okoiye v. Washington*, No. UD-1990708534 (Minn. Ct. Dist. July 22, 1999) (Appendix 425) (dismissal for failure to file affidavit of service; expungement motion granted; tenant awarded costs).

(c) Service by plaintiff

MJD Enterprises, Inc. v. _____, No. HC-1040406523 (Minn. Dist. Ct. 4th Dist. May 18, 2004) (Appendix 612) (eviction dismissed and expunged and costs awarded where property manager served defendant and filed false affidavit stating that another person served defendant; it was irrelevant that manager called herself an "independent contractor" when she handled all matters related to rental); *Sidal Realty Company, LLP v.* _____, No. HC 030114401 (Minn. Dist Ct. 4th Dist. Feb. 12, Feb. 24, and Apr. 7, 2003) (Appendix 569) (dismissal for service by employee of plaintiff; expungement denied by referee and on consideration, reversed by Judge Arthur).

(d) Lack of jurisdiction

Gustafson v. _____, No.0208030516 (Minn. Dist Ct. 4th Dist. Feb. 12, 2003) (Appendix 508) (expungement granted for lack of jurisdiction); *Norby v.* _____, No. HC 010502504 (Minn. Dist Ct. 4th Dist. June 12, 2001) (Appendix 550) (lack of jurisdiction).

(e) Improper mail and posting

Igherighe v. _____, No. HC 020208501 (Minn. Dist Ct. 4th Dist. Feb. 20, 2002) (Appendix 521) (improper mail and posting service where plaintiff filed no affidavit of posting, and affidavit of not finding defendant was ambiguous of whether service was attempted in the evening; dismissed and expunged).

(f) Improper substitute service

Tri Star Developers, LLC v. _____, No. HC 010109514 (Minn. Dist Ct. 4th Dist. Oct. 17, 2001) (Appendix 584) (improper service on employee of business who was not an officer and not authorized to accept service; defendant business was incorrectly named; default judgment vacated and action dismissed and expunged).

(3) Precondition defenses

(a) Insufficient pleading

Crofton v. _____, No. HC 031120528 (Minn. Dist Ct. 4th Dist. Mar. 16, 2004) (Appendix 490) (expungement where complaint lacked specificity on breach, and landlord failed to attach lease or bring it to first appearance); *Reid v.* _____, No. 0203155000, (Minn. Dist Ct. 4th Dist. Feb. 12, 2003) (Appendix 565) (expungement for defective complaint and improper service); *Igherighe v.* _____, No. HC-1011001519 (Minn. Dist Ct. 4th Dist. Oct. 10, 2001 and Feb. 19, 2002) (Appendix 519) (costs awarded and file expunged where action was dismissed where plaintiff landlord of Section 8 Voucher tenant failed to served Section 8 office, plaintiff disclosed only a post office box and not a street address to tenant, plaintiff pled rent due from Section 8 and not the tenant, and plaintiff named a non-tenant as a defendant).

(b) Failure to attached lease or notice

Crofton v. _____, No. HC 031120528 (Minn. Dist Ct. 4th Dist. Mar. 16, 2004) (Appendix 490) (expungement where complaint lacked specificity on breach, and landlord failed to attach lease or bring it to first appearance); *O'Brian v.* _____, No. HC 1010402506 (Minn. Dist Ct. 4th Dist. Apr. 18, 2001) (Appendix 552) (breach claims dismissed where oral lease contained no right of re-entry clause; notice claim dismissed where landlord failed to attached notice to complaint, and failed to prove notice was given; expungement granted).

(c) Plaintiff not entitled to possession

Sun Trust Mortgage Inc. V. _____, No. 27-CV-HC-08-5044, Order (Minn. Dist. Ct. 4th Dist. June 25, 2008) (Appendix 622) (eviction filed by owner dismissed and expunged where property was under control of administrator in another action); *Filas v.* _____, No. HC 040115532 (Minn. Dist Ct. 4th Dist. Feb. 18, and Mar. 10, 2004) (Appendix 497) (motion to quash writ granted and eviction dismissed where "Plaintiffs were not the real parties in interest when the complaint was filed because they had executed a contract for deed, now cancelled, with another vendee", later expunged); *Judge v. Rio Hot Properties, Inc.*, No. UD-1981202903 (Minn. Dist. Ct. 4th Dist. July 7, 1999) (Appendix 401) (unlawful detainer action dismissed for service less than seven days before the hearing; expungement granted on two unlawful detainer actions where one involved improper service and the other involved a plaintiff not entitled to possession of the premises; tenants proved landlord breach of covenants of habitability, while landlord failed to prove tenant negligence or commission in damage, or that tenants unreasonably denied access to the landlord; rent abatement to increase if repairs are not completed; tenants' motion in consolidated cases to add punitive damages denied where court found no independent tort, but tenant granted leave to proceed with claims for contempt where the landlord had failed to complete repairs for almost one year).

(d) Case is moot

Chase Home Finance, LLC v. _____, No .62HGCV09-403, Stipulation and Order (Minn. Dist. Ct. 2nd Dist. April 7, 2009) (Appendix 602) (expungement granted on stipulation that tenant vacated property before eviction action filed); *Mortgage Electronic Registration Systems Inc. v.* _____, 27-CV-HC-08-4118 (Minn. Dist. Ct. 4th Dist. May 29, 2008) (Appendix 628) (expungement granted where parties agreed that defendant did not have possessory interest in property when action was filed); *3601 13th Ave. S. Corp. v.* _____, No. HC-031230519 (Minn. Dist. Ct. 4th Dist. Feb. 23, 2004) (Appendix 596) (expungement granted where it appeared rent was paid before action was filed); *Ukatu v.* _____, No. HC 0307614501 (Minn. Dist Ct. 4th Dist. July 30, 2003) (Appendix 586) (dismissal for no license at time of filing, even though landlord

later obtained license; eviction case is moot when tenants have vacated; expungement granted); *Greene v. _____,* No. 1000821516 (Minn. Dist Ct. 4th Dist. Nov. 14, 2000) (Appendix 506) (no proper affidavit of service, tenant moved before action was filed, action settled); *Banker's Trust Company of California v. _____,* No UD 198128509 (Minn. Dist Ct. 4th Dist. July 1, 1999) (Appendix 465) (error to add name of defendant who had earlier moved).

(e) Foreign limited liability company had no state certificate of authority

Uptown Classic Properties JV1, LLC v. _____, No. HC 1030123529 (Minn. Dist Ct. 4th Dist. Apr. 9, 2003) (Appendix 588) (dismissal and expungement where foreign limited liability company had no state certificate of authority under Minn. Stat. § 322B.94).

(f) Failure to notify Section 8 Office

SJM Properties, Inc. v. _____, No. HC 020402501 (Minn. Dist Ct. 4th Dist. Apr.. 11, 2002, Feb. 12, 2003) (Appendix 570) (dismissal where Rental Assistance for Family Stabilization (RAFS) Program landlord failed to serve the Section 8 office; different notice periods for landlord and tenant might be proper; costs and disbursements awarded, which may be credited against rent; expungement granted later); *Igherighe v. _____,* No. HC-1011001519 (Minn. Dist Ct. 4th Dist. Oct. 10, 2001 and Feb. 19, 2002) (Appendix 519) (costs awarded and file expunged where action was dismissed where plaintiff landlord of Section 8 Voucher tenant failed to served Section 8 office, plaintiff disclosed only a post office box and not a street address to tenant, plaintiff pled rent due from Section 8 and not the tenant, and plaintiff named a non-tenant as a defendant); *McCampbell v. _____,* No. HC 000601500 (Minn. Dist Ct. 4th Dist. July 14, 2000) (Appendix 535) (expungement granted since Section 8 landlord's failure to serve the housing authority was a jurisdictional defect, depriving the court of jurisdiction); *Williams v. McCrimon*, No. HC-1991117529 (Minn. Dist. Ct. 4th Dist. Dec. 7, 1999) (Appendix 428) (Dismissal for failure to give notice to public housing authority under 24 C.F.R. § 982.310 (e)(2)(ii); defendants' names expunged).

(g) Failure to disclose address

Igherighe v. _____, No. HC-1011001519 (Minn. Dist Ct. 4th Dist. Oct. 10, 2001 and Feb. 19, 2002) (Appendix 519) (costs awarded and file expunged where action was dismissed where plaintiff landlord of Section 8 Voucher tenant failed to served Section 8 office, plaintiff disclosed only a post office box and not a street address to tenant, plaintiff pled rent due from Section 8 and not the tenant, and plaintiff named a non-tenant as a defendant); *Stein v. _____,* No. HC 000804513 (Minn. Dist Ct. 4th Dist. Nov. 8, 2000) (Appendix 577) (violation of landlord address disclosure statute, Minn. Stat. § 504B.181 (formerly § 504.22); *Gregerson v. _____*, No. HC 000908577 (Minn. Dist Ct. 4th Dist. Dec. 13, 2000) (Appendix 507) (expungement granted for noncompliance with address disclosure statute, Minn. Stat. § 504B.181 (formerly § 504.22).

(h) Premature filing

McCampbell v. _____, No. HC 000814500 (Minn. Dist Ct. 4th Dist. Nov. 8, 2000) (Appendix 536) (expungement granted where case filed prematurely).

(4) <u>Rent defenses</u>

(a) Dispute over amount of rent

Brooklyn Center Leased Housing v. _____, No. HC 031216540 (Minn. Dist Ct. 4th Dist. Mar. 10, 2004) (Appendix 481) (expungement granted where landlord's accounting records resulted in confusion of amount of rent due); *Brooklyn Center Leased Housing v. _____,* No. HC 030819518 (Minn. Dist Ct. 4th Dist. Sep. 16, 2003, and Mar. 10, 2004) (Appendix 480) (ambiguities in lease concerning the deposit, rent and pro-rated rent and lack of documentation construed against landlord, no late fees if not contained in lease, redemption; later expunged); *Anderson v. _____,* No. HC 020611540 (Minn. Dist Ct. 4th Dist. Aug. 16, 2002) (Appendix 464) (action had basis but not a substantial basis where there was confusion over the amount of rent due, and defendant had right to vindicate rights over the exact amount of rent due); *Drown v. Fineday*, No. C7-99-2863 (Minn. Dist. Ct. 7th Dist. Feb. 7, 2000) (Judge Boland) (Appendix 388) (Expungement granted where tenant said the landlord commenced the action so she could qualify for emergency assistance and the record of the action prevented her and her disabled daughter from qualifying for subsidized housing, and the landlord claimed that the tenant trashed the home).

(b) No license to rent

Hamid v. _____, 27-CV-HC-08-5349 (Minn. Dist. Ct. 4th Dist. July 8, 2008) (Appendix 604) (nonpayment of rent eviction action dismissed and expunged where landlord has no rental license); *Taylor v. _____*, No. HC 031202508 (Minn. Dist Ct. 4th Dist. Mar. 10, 2004) (Appendix 582b) (expungement where case brought without rental license, and facts of case are available in probate court records); *Smith v. _____*, No. 27-CV-HC-06-921 (Minn. Dist. Ct. 4th Dist. July 18, 2006) (Appendix 620) (referee ordered landlord did not need a rental license and terminated lease; judge reversed, concluding landlord without license did not have standing to file eviction, landlord constructively evicted tenant by obtaining restraining order against tenant in bad faith entitling tenant to $500 in damages and $500 in attorney fees, and ordering expungement); *Ukatu v. _____*, No. HC 0307614501 (Minn. Dist Ct. 4th Dist. July 30, 2003) (Appendix 586) (dismissal for no license at time of filing, even though landlord later obtained license; eviction case is moot when tenants have vacated; expungement granted); *Schudi v. Flax,* No. 021112506 (Minn. Dist Ct. 4th Dist. Feb. 12, 2003) (Appendix 568) (expungement for lack of rental license); *Tri Star Developers, LLC v. _____*, No. HC 1011002522 (Minn. Dist Ct. 4th Dist. Oct. 16, 2001) (Appendix 585) ("renting without a rental license requires dismissal;" securing license after filing the action does not purge the defect in filing without one; expungement granted).

(c) Landlord waived prompt payment of rent

Gardner Investments, Inc. v. _____, No. HC 040102502 (Minn. Dist Ct. 4th Dist. Jan. 15, and Mar. 10, 2004) (Appendix 504) (dismissal where landlord waived prompt payment of rent; later expunged).

(d) Landlord waived claim by accepting part payment of rent

Svendsen v. _____, No. HC 1031006510 (Minn. Dist Ct. 4th Dist. Dec. 3, 2003) (Appendix 582b) (expungement where tenant paid her share of rent under Section 8 lease and landlord accepted part payment of rent); *Valley Investment & Management, Inc. v. _____,* No. HC 000927525 (Minn. Dist Ct. 4th Dist. Dec. 19, 2000) (Appendix 589b) (dismissal of nonpayment of rent action since plaintiff accepted part payment of rent without a written agreement retaining the right to evict for the balance, under Minn. Stat. § 504B.291 (formerly 504.02)).

(e) Improper late fees

Brooklyn Center Leased Housing v. _____, No. HC 030819518 (Minn. Dist Ct. 4th Dist. Sep. 16, 2003, and Mar. 10, 2004) (Appendix 480) (ambiguities in lease concerning the deposit, rent and pro-rated

rent and lack of documentation construed against landlord, no late fees if not contained in lease, redemption; later expunged).

(f) Violation of covenants of habitability

Mar-Jil Corp. v. _____, No. HC 1020802508 (Minn. Dist Ct. 4th Dist. Oct. 28, 2002) (Appendix 532) (habitability defense to nonpayment of rent claim; parties settled and plaintiff agree to do repairs); _____ *v.* _____, No. _____ (Minn. Dist Ct. 4th Dist. Jan. 22, 2001) (Judge Alexander) (Appendix 433) (tenant raised habitability defense and court abated rent; expungement granted); *Snoddy v. _____,* No. HC 1010905500 (Minn. Dist Ct. 4th Dist. Dec. 27, 2001) (Appendix 574) (habitability defense to nonpayment of rent claim; settlement deferred rent until repairs were completing, implying that complaint was insufficient); *Huffman v. _____,* No. HC 1991119518 (Minn. Dist Ct. 4th Dist. Nov. 8, 2000) (Appendix 518) (settlement of nonpayment of rent case abating the rent, implying no basis for rent claim; landlord violated agreement to repair); *Harding v. _____,* No. HC 1000815508 (Minn. Dist Ct. 4th Dist. Nov. 13, 2000) (Appendix 511) (parties agreed that plaintiff filed nonpayment of rent action in error because of outstanding habitability problems); *Brinkman v. Smith*, No. HC-1000202517 (Minn. Dist. Ct. 4th Dist. May 10 and Mar. 9, 2000) (Appendix 418), (expungement granted where tenant prevailed on claims of improper and retaliatory notices, habitability, and privacy violations, and harassment); *Judge v. Rio Hot Properties, Inc.*, No. UD-1981202903 (Minn. Dist. Ct. 4th Dist. July 7, 1999) (Appendix 401) (unlawful detainer action dismissed for service less than seven days before the hearing; expungement granted on two unlawful detainer actions where one involved improper service and the other involved a plaintiff not entitled to possession of the premises; tenants proved landlord breach of covenants of habitability, while landlord failed to prove tenant negligence or commission in damage, or that tenants unreasonably denied access to the landlord; rent abatement to increase if repairs are not completed; tenants' motion in consolidated cases to add punitive damages denied where court found no independent tort, but tenant granted leave to proceed with claims for contempt where the landlord had failed to complete repairs for almost one year).

(g) Premature rent claim

Clark v. _____, No. HC 1001005513 (Minn. Dist Ct. 4th Dist. Oct. 23, 2000) (Appendix 486) (plaintiff filed nonpayment of rent case before rent was past due, tenant redeemed).

(h) Improper subsidized housing claims

Real World Development LLC v. _____, 27-CV-HC-07-8713 (Minn. Dist. Ct. 4th Dist. May 8, 2008) (Appendix 616) (expungement granted where eviction complaint was for Section 8 portion of rent); *Okeakpu v. _____*, No. HC 1020603511 (Minn. Dist Ct. 4th Dist. July 2, 2002) (Appendix 554) (Judge Sagstuen) (landlord failed to rebut presumption of retaliation for tenant's refusal to pay illegal side payments on top of the Section 8 rent where his claim that when he purchased the property he thought the tenant's rent was higher was not credible; expungement granted); *Beyene v. _____,* No. HC 1000818518 (Minn. Dist Ct. 4th Dist. Nov. 10, 2000) (Appendix 468) (plaintiff claimed nonpayment of rent, but all of the rent was vendored to plaintiff through the Rental Assistance for Family Stabilization (RAFS) Program.

(i) Privacy violations

Brinkman v. Smith, No. HC-1000202517 (Minn. Dist. Ct. 4th Dist. May 10 and Mar. 9, 2000) (Appendix 418), (expungement granted where tenant prevailed on claims of improper and retaliatory notices, habitability, and privacy violations, and harassment).

(j) Constructive eviction

Smith v. _____, No. 27-CV-HC-06-921 (Minn. Dist. Ct. 4th Dist. July 18, 2006) (Appendix 620) (referee ordered landlord did not need a rental license and terminated lease; judge reversed, concluding landlord without license did not have standing to file eviction, landlord constructively evicted tenant by obtaining restraining order against tenant in bad faith entitling tenant to $500 in damages and $500 in attorney fees, and ordering expungement).

(k) Rent already paid

3601 13th Ave. S. Corp. v. _____, No. HC-031230519 (Minn. Dist. Ct. 4th Dist. Feb. 23, 2004) (Appendix 596) (expungement granted where it appeared rent was paid before action was filed).

(5) Notice defenses

(a) Retaliation

McCampbell v. _____, No. HC 031002506 (Minn. Dist Ct. 4th Dist. Nov. 5, 2003, Jan. 22, 2004) (Appendix 537) (successful eviction defense gave rise to presumption of retaliation for subsequent notice to vacate; landlord's evidence of prior tenant claims again the landlord did not prove claims were in bad faith; expungement granted later on judge review, reversing referee denial of expungement); *Project for Pride in Living, Inc. v.* _____, No. HC 1021121502 (Minn. Dist Ct. 4th Dist. Dec. 10, 2002, April 7, 2003) (Appendix 564) (landlord's desire to end residential use of building "cannot be used as a pretext to ignore the covenants of habitability; later expunged on judge review by stipulation, reversing referee denial of expungement); *Okeakpu v.* _____, No. HC 1020603511 (Minn. Dist Ct. 4th Dist. July 2, 2002) (Appendix 554) (Judge Sagstuen) (landlord failed to rebut presumption of retaliation for tenant's refusal to pay illegal side payments on top of the Section 8 rent where his claim that when he purchased the property he thought the tenant's rent was higher was not credible; expungement granted); *Payne v.* _____, No. HC 1010801519 (Minn. Dist Ct. 4th Dist. Aug. 23, 2001) (Appendix 558) (presumption of retaliation applied even though tenant call for housing department inspection after notice was given, but had complained to landlord before notice was given; landlord failed to rebut presumption where rent payment history and clogged toilet problems paled in comparison to seriousness of habitability problems; expungement granted); *Boone v.* _____, No. HC 1010417504 (Minn. Dist Ct. 4th Dist. June 4, 2001) (Appendix 477) (Judge B. Peterson) (landlord failed to rebut presumption of retaliation where he listed the property for sale with his own company but did not show the property, and he failed to prove tenant violated the lease; expungement granted); *Howard Lake Mobile Home Park v.* _____, No. C1-01-2272 (Minn. Dist Ct. 10th Dist. Nov. 19, 2001) (Appendix 516) (waiver of notice to terminate manufactured home lot rental by receiving, retaining, and intending to negotiate rent check; plaintiff notice was in retaliation for defendant's complaints to police and resident association; plaintiff's claims did not meet the various statutory grounds for eviction; expungement not awarded as case was under Minn. Stat. Ch. 327C and not Ch. 504B); *Lowe v. Wilson*, HC000107530 (Minn. Dist. Ct. 4th Dist. Apr. 12, 2000)(Appendix 405) (expungement granted where defendant had a strong case of retaliation, even though there was no trial due to the parties' settlement; *Reis v. Clayburn*, No,. H991102507 (Minn. Dist. Ct. 4th Dist. Apr. 13, 2000) (Appendix 417), (just because a tenant prevails may not be sufficient to expunge, however expungement is appropriate where a notice to quit was retaliatory and plaintiff's credibility was questioned); *Brinkman v. Smith*, No. HC-1000202517 (Minn. Dist. Ct. 4th Dist. May 10 and Mar. 9, 2000) (Appendix 418), (expungement granted where tenant prevailed on claims of improper and retaliatory notices, habitability, and privacy violations, and harassment).

(b) Improper notice

McCampbell v. _____, No. HC 030804511 (Minn. Dist Ct. 4th Dist. Aug. 12, Oct. 8, 2003) (Appendix 536A) (dismissal for untimely notice to vacate; expungement later granted); *Brinkman v. Smith*, No. HC-1000202517 (Minn. Dist. Ct. 4th Dist. May 10 and Mar. 9, 2000) (Appendix 418), (expungement granted where tenant prevailed on claims of improper and retaliatory notices, habitability, and privacy violations, and harassment); *Osuji v. Coleman*, No. HC-1991118524 (Minn. Dist. Ct. 4th Dist. Dec. 10, 1999) (Appendix 411) (Expungement granted where tenant prevailed on motion to dismiss action where landlord failed to provide notice and opportunity to cure required by the lease.; *Coker v. Hulsey*, No. HC-1991001520 (Minn. Dist. Ct. 4th Dist. Dec. 10, 1999) (Appendix 384) (Expungement granted where plaintiff alleged false facts in complaint about delivery of notice to vacate, and timely notice had not been given).

(c) Improper subsidized housing notice

Chalet v. _____, No. HC-03026513 (Minn. Dist Ct. 4th Dist. July 17, 2003) (Appendix 483) (expungement granted where HUD subsidized project landlord agreed that it did not give notice required by HUD Handbook No. 4350.3, citing *Housing and Redev. Auth. of Waconia v. Chandler*, 403 N.W.2d 708, 711 (Minn. Ct. App. 1987); *Hoglund-Hall v. Kleinschmidt*, 381 N.W.2d 889, 895 (Minn. Ct. App. 1986)).

(d) Waiver of notice

Howard Lake Mobile Home Park v. _____, No. C1-01-2272 (Minn. Dist Ct. 10th Dist. Nov. 19, 2001) (Appendix 516) (waiver of notice to terminate manufactured home lot rental by receiving, retaining, and intending to negotiate rent check; plaintiff notice was in retaliation for defendant's complaints to police and resident association; plaintiff's claims did not meet the various statutory grounds for eviction; expungement not awarded as case was under Minn. Stat. Ch. 327C and not Ch. 504B).

(e) Premature notice claim

Clobes v. _____, No. HC 010301510 (Minn. Dist Ct. 4th Dist. Mar. 15, 2001) (Appendix 487) (action dismissed as premature where notice set vacate date as March 3 and landlord filed action March 1; costs and disbursements awarded).

(f) Mortgage foreclosures

As of August 1, 2008, the court must expunge the file in an eviction action filed by the foreclosing mortgagee or contract for deed canceling vendor if the court finds that the defendant vacated before commencement of the eviction action, or a tenant defendant did not receive a proper lease termination notice under Minn. Stat. § 504B.285. Minn. Stat. § 484.014, subd. 3, 2008 Minn. Laws Ch. 174. *See* discussion, *supra*, at VI.F.1.c.

(g) Manufactured and mobile home parks

Tower Terrace Park v. _____, No. HC-040206526 (Minn. Dist. Ct. 4th Dist. July 14, 2004) (Appendix 624) (expungement of tenant names but not file where mobile home park eviction was dismissed for failure to show cause for eviction, and other tenants have interest in knowing about case); *Tower Terrace Park v.* _____, No. HC-040519527 (Minn. Dist. Ct. 4th Dist. July 14, 2004) (Appendix 623) (expungement granted and costs and disbursements awarded where mobile home park dismissed eviction action and failed to give statutory 10 day notice for rent before filing action).

(6) Breach defenses

(a) Illegal activity violation not proven

Minneapolis Public Housing Authority v. _____, No. 1951117536 (Minn. Dist Ct. 4th Dist. Feb. 24, and Mar. 28, 2003) (Appendix 546) (referee denied expungement where tenant settled and move and raised in expungement motion defenses under illegal activity statute; reversed by Judge Arthur, holding that "adverse effect of even a 'settled' case outweighs the public interest").

(b) No right of reentry clause

O'Brian v. _____, No. HC 1010402506 (Minn. Dist Ct. 4th Dist. Apr. 18, 2001) (Appendix 552) (breach claims dismissed where oral lease contained no right of re-entry clause; notice claim dismissed where landlord failed to attached notice to complaint, and failed to prove notice was given; expungement granted).

(c) Manufactured (mobile) home park lot

Howard Lake Mobile Home Park v. _____, No. C1-01-2272 (Minn. Dist Ct. 10th Dist. Nov. 19, 2001) (Appendix 516) (waiver of notice to terminate manufactured home lot rental by receiving, retaining, and intending to negotiate rent check; plaintiff notice was in retaliation for defendant's complaints to police and resident association; plaintiff's claims did not meet the various statutory grounds for eviction; expungement not awarded as case was under Minn. Stat. Ch. 327C and not Ch. 504B).

(d) Unenforceable lease violation

Gray v. _____, No. HC 000612506 (Minn. Dist Ct. 4th Dist. July 14, 2000) (Appendix 505) (expungement granted where landlord dismissed action for breach of lease on claim that tenant signed document without landlord's permission).

(e) Tenant did not violate lease

Minneapolis Public Housing Authority v. Dixon, No. HC-000121514 (Minn. Dist. Ct. 4th Dist. May 12, 2000) (Appendix 408), (expungement granted where landlord and tenant agreed that a co-tenant, and not the tenant, was the culpable party for lease violations; tenant's name, but not co-tenant's name, removed from caption and computerized records).

(7) Stipulation

Heintzman v. Steinman, No. C7-99-1772 (Minn. Dist. Ct. 10th Dist. Dec. 29, 1999) (Appendix 394) (Based upon stipulation for dismissal, dismissal of action with prejudice and expungement..

(8) Mortgage foreclosures and cancelled contract for deeds

As of August 1, 2008, the court must expunge the file in an eviction action filed by the foreclosing mortgagee or contract for deed canceling vendor if the court finds that the defendant vacated before commencement of the eviction action, or a tenant defendant did not receive a proper lease termination notice under Minn. Stat. § 504B.285. Minn. Stat. § 484.014, subd. 3, 2008 Minn. Laws Ch. 174. *See* discussion, *supra*, at VI.F.1.c.

c. *Judge review of referee denial of expungement*

Tenants have had success challenging expungement denials on judge review. Statutory expungement decisions include *McCampbell v.* _____, No. HC 031002506 (Minn. Dist Ct. 4th Dist. Nov. 5, 2003, Jan. 22, 2004) (Appendix 537) (successful eviction defense gave rise to presumption of retaliation for subsequent notice to vacate; landlord's evidence of prior tenant claims again the landlord did not prove claims were in bad faith; expungement granted later on judge review, reversing referee denial of expungement); *Minneapolis Public Housing Authority v.* _____, No. 1951117536 (Minn. Dist Ct. 4th Dist. Feb. 24, and Mar. 28, 2003) (Appendix 546) (referee denied expungement where tenant settled and moved and raised in expungement motion defenses under illegal activity statute; reversed by Judge Arthur, holding that "adverse effect of even a 'settled' case outweighs the public interest"); *Sidal Realty Company, LLP v.* _____, No. HC 030114401 (Minn. Dist Ct. 4th Dist. Feb. 12, Feb. 24, and Apr. 7, 2003) (Appendix 569) (dismissal for service by employee of plaintiff; expungement denied by referee and on consideration, reversed by Judge Arthur); *Project for Pride in Living, Inc. v.* _____, No. HC 1021121502 (Minn. Dist Ct. 4th Dist. Dec. 10, 2002, April 7, 2003) (Appendix 564) (landlord's desire to end residential use of building "cannot be used as a pretext to ignore the covenants of habitability; later expunged on judge review by stipulation, reversing referee denial of expungement).

In *Oman v. Bunn*, Nos. UD-1980805513 (Minn. Dist. Ct. 4th Dist. Nov. 20, 1998) (Appendix 314) (Arthur, J.), the referee denied the prevailing tenant's motion for expungement, concluding that "the public's right to know outweighs any benefits the tenants may derive from expungement, and informed citizenry is essential to our democracy." The referee did not apply the balancing test of *State v. C.A.*, 304 N.W. 2d 253 (Minn. 1981) and *State v. P.A.D.*, 436 N.W. 2d 808 (Minn. Ct. App. 1989). On judge review, the Court vacated the referee's expungement ruling, and ordered that the District Court Administrator take all reasonable steps to remove the tenant's name permanently from computerized court records related to the case. *See Zion Originated Outreach Ministries v. Strickland*, No. HC-1980909514 (Minn. Dist. Ct. 4th Dist. Apr. 10, 2000) (Judge L. Arthur) (Appendix 431), (referee denial of expungement reversed, and expungement granted where defendant was not involved in lease violation, was made a party solely to confer jurisdiction of the lease to the court, and is unable to find housing in today's market); *Aadland v. Jackson*, No. H-1991101516 (Minn. Dist. Ct. 4th Dist. Dec. 10, 1999 and Feb. 25, 2000) (Appendix 375) (In unlawful detainer action for holding over after notice, landlord proved a non-retaliatory purpose for the notice, but tenant proved waiver of notice; motion for judge review denied without comment; on judge review of referee's denial, judge reversed and granted expungement because landlord's claim was waived by acceptance of rent).

Common law inherent authority expungement decisions reversed on judge review include *St. Louis Park Place, LLC v.* _____, No. HC-1031015540 (Minn. Dist. Ct. 4th Dist. Nov. 12, 2004) (Appendix _____) (judge reversed referee denial of expungement where tenants failed to pay rent on time when they were traveling back and forth to their home town to attend the funerals of friends killed in a school shooting, and tenants later paid rent and remained tenants); *Brooklyn Park Housing Associates, LLP v.* _____, No. HC-040218503 (Minn. Dist. Ct. 4th Dist. Oct. 14, 2004) (Appendix _____) (judge reversed referee denial of expungement where tenant failed to pay rent on time when tenant took leave from work to care for her child who was recuperating from brain surgery, and tenant later paid rent and reminded a tenant).

CHAPTER IX:
JUDGE REVIEW OF REFEREE DECISIONS

Judge review of the referee's decision is governed by Rule 611. A party not in default may seek judge review of referee decisions by serving and filing a notice of review within ten days after the referee orally announces the recommended decision in court, or within 13 days after service by mail of the written order as adopted by a judge, whichever occurs first. *Veard-Brooklyn Center v.* _____, No. HC 1000512508 (Minn. Dist Ct. 4th Dist. Sep. 20, 2000) (Appendix 590b) (denial of judge review where landlord filed by fax but did not pay the fax transmission fee); *Connelly v. Schiff*, No. HC-1000417515 (Minn. Dist. Ct. 4th Dist. May 23, 2000) (Appendix 386) (dismissal without prejudice where landlord failed to secure rental license; tenant awarded $200 costs under § 549.02 and $40 in disbursements under § 549.04 for witness fees; expungement granted; plaintiff's motion to vacate and reopen treated as untimely motion for judge review under Minn. R. Gen. Prac. 611 when filed 11 days after oral announcement of decision).

The judge review shall be based upon the record established before the referee. In *Butler v. Cohns*, No. C2-96-6599 (Minn. Dist. Ct. 2d Dist. Oct. 22, 1996) (Appendix 218), on a request for judge review, the court noted that its scope of review was governed by Minn. R. Civ. P. 53.05 (b), and that the court must accept the facts found by the referee unless clearly erroneous, but questions of law are reviewed in *de novo*. *See McCrae v. Buckanaga*, UD-1951207519 (Minn. Dist. Ct. 4th Dist. Feb. 12, 1996) (Appendix 187) (affirming referee's decision concluding that the landlord failed to show good cause why the referee's decision was contrary to law and against the weight of the evidence). The standard of review is whether evidence sustains the findings and the findings support the conclusions. The reviewing court will not set aside findings unless clearly erroneous, and gives due regard to referee's opportunity to judge witness credibility. *Carr v. Jerry Schlink, Associated Enterprises of Minneapolis*, No. UD-1980601900 (Minn. Dist. Ct. 4th Dist. Apr. 1, 1999) (Appendix 318) (Clearly erroneous standard for review of findings of fact); *Minneapolis Public Housing Authority v. Henry*, No. UD-1970122503 (Minn. Dist. Ct. 4th Dist. May 23, 1997) (Appendix 276).

In *Stewart v. Anderson*, No. A06-1878, 2007 WL 2366528 (Minn. Ct. App. Aug. 21, 2007) (unpublished), the landlord filed a combination eviction action and conciliation court action in housing court, and the tenant answered alleging habitability. At trial, the tenant attempted to testify about her observations about how her dryer worked, and rodent infestation. The housing court referee did not accept her testimony, since she was not an expert in dryer repair or pest control. The referee also refused to accept the tenant's documentary evidence while accepting the landlord's documentary evidence, even though both parties failed to comply with the discovery order in a timely fashion. After the referee ruled for the landlord, the tenant sought review by a district court judge. The district court reversed the referee, finding that the referee erred by requiring expert testimony for lay testimony, and by receiving the landlord's late exhibits but refusing to receive the tenant's late exhibits. On appeal to the Minnesota Court of Appeals, the Court affirmed the district court's reversal of the housing court referee.

In *Sakala v.* _____, No. 27-CV-HC-08-6156 (Minn. Dist. Ct. 4th Dist. Sep. 9, 2008) (Appendix 619), the eviction was based on claims of rent and breach. The plaintiff had attorney represented and the tenant appear *pro se*. In ruling for the landlord, the housing court referee ignored evidence of violations of the landlord address disclosure statute, and found breaches of the lease based on hearsay, and a pet violation raised by the referee and not even pled by the plaintiff. *See* Defendant's Transcript Citations in Support of Request for Judge Review (Aug. 28, 2008). On judge review, the court reversed the referee order for eviction, and dismissed the eviction action due to the landlord's failure to post address until two weeks after filing eviction action.

See also Smith v. _____, No. 27-CV-HC-06-921 (Minn. Dist. Ct. 4th Dist. July 18, 2006) (Appendix 620) (referee ordered landlord did not need a rental license and terminated lease; judge reversed, concluding landlord without license did not have standing to file eviction, landlord constructively evicted tenant by obtaining restraining order against tenant in bad faith entitling tenant to $500 in damages and $500 in attorney fees, and ordering expungement); *Meldahl and SJM Prop. v.* _____, No. 1050923509, Order on Referee Review at 28 (Minn. Dist. Ct. 4th Dist. Feb. 23, 2006) (Appendix 609) (judge reversed referee and ordered dismissal for improper service by maintenance person who was agent for landlord; agent was not authorized by principal; corporation represented by president; breach of lease claim in eviction case claimed breach of lease and nonpayment of rent; plaintiff failed to give notice to public housing authority; lease term requiring payment of $50 service call fee was illegal and unenforceable; tenant need not give written notice to the landlord of violations of covenants of habitability, regardless of provisions in the written lease; retroactive and prospective rent abatement beyond amounts abated by Section 8 voucher office to continue until Section 8 voucher office concludes repairs have been completed).

The notice of review does not stay entry of judgment nor vacate a judgment if already entered, unless the petitioner requests and the referee orders a bond, payments in lieu of a bond, or waiver of a bond or payments, based upon Minn. R. Civ. App. P. 108, subds. 1, 5.

Landlords sometimes argue at judge review that the tenant should have to pay into court rent which was withheld, in dispute, or not accepted by the landlord to avoid waiver, in order to have the right to judge review. Housing Court Rule 611(b) refers to Minn. R. Civ. App. P. 108 on the issue of whether to set or waive a bond or payment in lieu of bond during judge review. Rule 108.01, Subd. 5, refers to "the value of the use and occupation of the property from the time of the appeal until the delivery of possession of the property if the judgment is affirmed. . . ." The tenant is obligated only to pay rent which would come due during the appeal, rather than rent that was allegedly due before the appeal. *TNT Real Estate Investments, LLC v.* _____, No. 27CVHC 09-1523, Order Granting Stay (Minn. Dist. Ct. 4th Dist. Mar. 17, 2009) (Appendix 627) (Judge Zimmerman) (referee order conditioned stay of eviction during judge review on defendant paying rent in dispute; judge reserved referee order and stayed eviction on condition tenant pay current rent into court); *Minneapolis Public Housing Authority v.* _____, No. 27-CV-HC-08-10954 (Minn. Dist. Ct. 4th Dist. Jan. 22, 2009) (Appendix 611) (Judge DuFresne) (referee order conditioned stay of eviction during judge review on defendant paying rent already paid to landlord, and costs, sheriff and court fees; judge reserved referee order and stayed eviction on condition tenant pay rent as it comes due into court); *Minneapolis Public Housing Authority v.* _____, No. 27-CV-HC-06-2887 (Minn. Dist. Ct. 4th Dist. Aug. 25, 2006) (Appendix 610) (order reversing referee setting rent to be paid into court, tenant ordered to pay only rent as it comes due during judge review); *Caberallo, L.L.C v.* _____, No. HC-051207529 (Minn. Dist. Ct. 4th Dist. Dec. 23, 2005) (Appendix 601) (order reversing referee setting rent to be paid into court) (tenant ordered to pay only rent as it comes due during judge review, and not disputed rent); *Thompson v. Gates*, No. UD-197011509 (Minn. Dist. Ct. 4th Dist. Feb. 28, 1997) (Appendix 298) (On judge review tenant ordered to pay rent as it comes due into court, rather than alleged past due rent); *Phillips Neighborhood Housing Trust v. Brown*, No. UD-1960705508, transcript of proceedings at 4-6 (Minn. Dist. Ct. 4th Dist. Nov. 26, 1996) (Appendix 286a) (Denial of landlord's motion for pre-judge review rents not accepted by the landlord; tenant ordered to pay rent into court as it comes due).

The tenant may seek emergency judge review of the referee's scheduling order to challenge the amount the referee orders the tenant to pay into court. *TNT Real Estate Investments, LLC v.* _____, No. 27CVHC 09-1523, Order Granting Stay (Minn. Dist. Ct. 4th Dist. Mar. 17, 2009) (Judge Zimmerman) (referee order conditioned stay of eviction during judge review on defendant paying rent in dispute; judge reserved referee order and stayed eviction on condition tenant pay current rent into court); *Minneapolis Public Housing Authority v.* _____, No. 27-CV-HC-08-10954 (Minn. Dist. Ct. 4th Dist. Jan. 22, 2009)

(Appendix 611) (Judge DuFresne) (referee order conditioned stay of eviction during judge review on defendant paying rent already paid to landlord, and costs, sheriff and court fees; judge reserved referee order and stayed eviction on condition tenant pay rent as it comes due into court); *Minneapolis Public Housing Authority v.* _____, No. 27-CV-HC-06-2887 (Minn. Dist. Ct. 4th Dist. Aug. 25, 2006) (Appendix 610) (order reversing referee setting rent to be paid into court, tenant ordered to pay only rent as it comes due during judge review); *Caberallo, L.L.C v.* _____, No. HC-051207529 (Minn. Dist. Ct. 4th Dist. Dec. 23, 2005) (Appendix 601) (order reversing referee setting rent to be paid into court) (tenant ordered to pay only rent as it comes due during judge review, and not disputed rent); *Thompson v. Gates*, No. UD-197011509 (Minn. Dist. Ct. 4th Dist. Feb. 28, 1997) (Appendix 298) (On judge review tenant ordered to pay rent as it comes due into court, rather than alleged past due rent).

The current practice in Hennepin County on a request for judge review is for the referee to review the request for judge review and proposed order *ex parte*, and sign an order scheduling the hearing on the special term calendar and setting an amount to be paid into court by the appealing party, if necessary.

The petitioner must request a transcript from the referee's court reporter within one day after the notice of review is filed. The petitioner must make satisfactory arrangements for payment with the court reporter, or arrangement for payment *in forma pauperis*. The transcript must be provided within five business days after its purchase by the petitioner. The reviewing judge may extend any of the time periods in Proposed Rule 611 for good cause.

Forms and instructions for judge review requests are in the Forms Appendix, Section J.

CHAPTER X:
APPEAL

Forms for appeal are in the Forms Appendix, Section Ap.

A. TEN DAY APPEAL PERIOD.

The time period for appeal is 10 days. Minn. Stat. § 504B.371 (formerly § 566.12). However, if the eviction action is consolidated with a emergency relief action, Minn. Stat. § 504B.381 (formerly § 566.205), rent escrow action, Minn. Stat. § 504B.385 (formerly § 566.34), or a tenant remedies action, Minn. Stat. §§ 504B.395 (formerly § 566.19) - § 504B.471 (formerly § 566.33), the appeal period would be 60 days following adjudication of both actions and entry of judgment. *Sanchez v. Krey*, No. C7-99-2000 (Minn. Ct. App. Jan. 25, 2000) (Appendix 432) (60 day appeal period for consolidated eviction and tenant remedies actions), *citing Duluth Ready-Mix Concrete, Inc. v. City of Duluth*, 520 N.W.2d 775, 777 (Minn. Ct. App. 1994), *rev. den.* (Minn. Mar. 14, 1995) and Minn. R. Civ. App. P. 104.01, Subd. 1.

In *Richter v. Czock*, No. C7-01-1340, 2002 WL 338181 (Minn. Ct. App. 2002) (unpublished), the court consolidated an eviction action based on holding over after notice with a rent escrow action. The court affirmed trial court rulings that the lease required a 45 day notice, that $100 per month rent abatement would cover only the period in which the landlord knew of the habitability issues, and that the landlord did not violate the privacy statute where the tenants were present when the landlord came, and the landlord claimed an emergency. The court also held that the trial court did not err in not admitted evidence when the *pro se* tenants did request admission. The court noted that since the tenant appealed from the rent escrow action judgment but not the separate eviction action judgment, it would not consider whether the notice was retaliatory.

An appeal filed within 10 days after the district court's order reviewing a housing court referee's determination is timely, even though the appeal is filed more than 10 days after entry of the referee's eviction judgment. *JVI and Associates, Inc. v. Soltan*, No. A05-1031, 2006 WL 1229484 (Minn. Ct. App. May 9, 2006) (unpublished). The Court noted that a request for review of the referee's determination is comparable to a motion for amended findings, and tolls the appeal period until the district court rules on the request. Counsel still should request stay or vacation of entry of judgment during judge review, and entry of a new judgment following judge review, to avoid expiration of the appeal period while pursuing judge review.

B. THE APPEAL LIES FROM ENTRY OF JUDGMENT

The appeal lies from entry of judgment. Minn. Stat. § 504B.371 (formerly § 566.12); *University Community Properties Inc. v. Norton*, 311 Minn. 18, 21, 246 N.W.2d 858, 860 (1976); *Tonkaway Limited Partnerships v. McLain*, 433 N.W.2d 443, 444 (Minn. Ct. App. 1988) (exclusive mode of appeal).

Consistent with allowing appeals only from entry of the judgment, the courts have held that the following orders are not appealable:

1. order directing entry of judgment, *University Community Properties v. Norton*, 311 Minn. 18, 21, 246 N.W.2d 858, 860 (1976); *Northwest Holding Co.*, 265 Minn. at 562, 571, 122 N.W.2d at 597, 602;

2. order for issuance of writ of restitution, *Fritz v. Warthen*, 298 Minn. 54, 56, 213 N.W.2d 339, 340 (1973);

3. the writ of restitution, *Makela v. Peters,* 425 N.W.2d 605, 606 (Minn. Ct. App. 1988);

4. order overruling demurrer, Gray v. Hurley, 28 Minn. 388, 388, 10 N.W. 417, 417-18 (1881);

5. order overruling special appearance, Pushor v. Dale, 240 Minn. 179, 180, 60 N.W.2d 128, 128 (1953);

6. order denying a motion to set aside the writ of restitution, Northwest Holding Co., 265 Minn. at 562, 571, 122 N.W.2d at 597, 602; and

7. order denying a motion to vacate and set aside a judgment, Goldberg, 247 Minn. at 214, 215-16, 76 N.W.2d at 669, 670; Doyle v. Long, 205 Minn. 322, 324-25, 285 N.W. 832, 833 (1905). *Contra Wong Kong Har Wun Sun, Association v. Chin*, No. C8-87-2439 (Minn. Ct. App. April 12, 1988) (Appendix 21) (unpublished: appeal from order denying motion to vacate default judgment was timely).

8. order denying motion for new trial, *Tonkaway Limited Partnerships*, 433 N.W.2d at 444.

While the Minnesota Supreme Court was willing to hear cases not appealed from entry of judgment by discretionary review under Minn. R. Civ. App. P. 105, *University Community Prop., Inc. v. Norton*, 311 Minn. at 21, 246 N.W.2d at 860; *Fritz v. Warthen*, 298 Minn. at 56, 213 N.W.2d at 340, the Court of Appeals has not. In *Tonkaway Limited Partnership*, the court did not even respond to appellant's request for discretionary review. 433 N.W.2d at 443-44.

However, the court may construe an appeal based on an unappealable order to be from an appealable judgment. *Chancellor Manor v. Edwards*, No. C1-01-197, 2001 WL 826842 (Minn. Ct. App. July 24, 2001) (unpublished).

An appeal filed within 10 days after the district court's order reviewing a housing court referee's determination is timely, even though the appeal is filed more than 10 days after entry of the referee's eviction judgment. *JVI and Associates, Inc. v. Soltan*, No. A05-1031, 2006 WL 1229484 (Minn. Ct. App. May 9, 2006) (unpublished). The Court noted that a request for review of the referee's determination is comparable to a motion for amended findings, and tolls the appeal period until the district court rules on the request. Counsel still should request stay or vacation of entry of judgment during judge review, and entry of a new judgment following judge review, to avoid expiration of the appeal period while pursuing judge review.

C. In Some Districts, the Court Does Not Regularly Enter Judgment, but Merely Issues or Denies the Writ of Restitution Based upon the Order for Judgment

The prevailing party or appellant should request that judgment be entered, pursuant to Minn. Stat. § 504B.345 (formerly § 566.09); *Makela*, 425 N.W.2d at 606 (entry of judgment required). *See Dahlgren v. Caring and Sharing Hands*, 429 N.W.2d 706, 706 (Minn. Ct. App. 1988) (civil action: Court administrator required to enter judgment forthwith upon any order that denies all relief unless the court otherwise directs).

If the clerk refuses to enter judgment, the prevailing or appellant party should serve a notice of filing of order on the adverse party under Minn. R. Civ. App. P. 104.01. *Levine v. Hauser*, 431 N.W.2d 269, 270-71 (Minn. Ct. App. 1988) (discussed contents of notice). The time period for appeal from the notice is 30 days.

D. HOUSING COURT APPEAL V. JUDGE REVIEW

In Hennepin and Ramsey County housing courts, it appears that the parties have the option of directly appealing from entry of judgment following the decision of the referee, or seeking judge review of the referee's decision and then appealing from entry of judgment following the judge's decision on review. *See Hess v. Commissioner of Public Safety*, 392 N.W.2d 586 (Minn. Ct. App. 1986); *Warner v. Warner*, 391 N.W.2d 870 (Minn. Ct. App. 1986). However, a party seeking the latter option must request that entry of judgment following the referee's decision be stayed or vacated during judge review of the referee's decision, or the ten day period to appeal to the Court of Appeals will have expired by the time the judge issues a decision. *See* discussion, *supra* at V.G. (Housing Court Rules).

An appeal filed within 10 days after the district court's order reviewing a housing court referee's determination is timely, even though the appeal is filed more than 10 days after entry of the referee's eviction judgment. *JVI and Associates, Inc. v. Soltan*, No. A05-1031, 2006 WL 1229484 (Minn. Ct. App. May 9, 2006) (unpublished). The Court noted that a request for review of the referee's determination is comparable to a motion for amended findings, and tolls the appeal period until the district court rules on the request. Counsel still should request stay or vacation of entry of judgment during judge review, and entry of a new judgment following judge review, to avoid expiration of the appeal period while pursuing judge review.

E. MOTIONS IN ANTICIPATION OF APPEAL

1. Motion for new trial or amended findings not required.

See discussion, *supra* at X.E.1.

2. Notice of intent to appeal

After judgment is rendered for the plaintiff, if the defendant or the defendant's attorney states to the court the intention to appeal, the writ shall not issue for 24 hours after judgment. Minn. Stat. § 504B.371 (formerly § 566.11). The exception is(1) "In an action on a lease", based upon holding over after expiration of the lease or termination of the lease by notice to quit, and (2) "[t]he plaintiff give a bond conditioned to pay all [of the defendant's] costs and damages . . . [if] the judgment of restitution is reversed and a new trial ordered."

3. Motion to waive cost bond and set supersedeas bond: staying execution of the writ of restitution pending appeal

For most tenants, appeal will be pointless unless the tenant can retain possession of the premises pending appeal. Cost and supersedeas bonds affect the tenant's right to retain possession.

a. Cost bond

Bond to cover payment of all costs and disbursements awarded against the appellant, or $500. Minn. R. Civ. App. P. 107, subd. 1; Minn. Stat. § 504B.371 (formerly § 566.12). Prior to filing the notice of appeal, the appellant may move the trial court for an order waiving or reducing the required bond or deposit. *Id.* The respondent may waive the bond. *Id.* No bond is required when the trial court finds that the appellant is indigent, and that in the interest of the appellant's right to appeal, the bond shall not be required. Minn. R. Civ. App. P. 107, subd. 2(d). Additionally, under the *in forma pauperis* statute, Minn. Stat. § 563.01, subd. 3, the court shall allow appeal without prepayment of costs and security if the court finds that the action is not frivolous and the appellants affidavit is in proper form and not untrue.

b. Supersedeas bond

Minn. R. Civ. App. P. 108.01, subd. 5 states that "if the appeal is from a judgment directing the sale or delivery of possession of real property, the condition of the bond shall be the payment of the value of the use and occupation of the property from the time of the appeal until the delivery of possession of the property if the judgment is affirmed and the undertaking that the appellant shall not commit or suffer the commission of any waste on the property while it remains in the appellant's possession during the pendency of the appeal."

Minn. Stat. § 504B.371 (formerly § 566.12) states that the appealing defendant may remain in possession of the premises, and execution of the writ shall be stayed, if the defendant pays a cost bond and "pay all rents and other damages" of the plaintiff during the appeal.

The exception is "In an action on a lease", based upon holding over after expiration of the lease or termination of the lease by notice to quit, and "[t]he plaintiff give a bond conditioned to pay all [of the defendant's] costs and damages . . .[if] the judgment of restitution is reversed and a new trial ordered." *Id. See* Minn. Stat. § 504B.371 (formerly § 566.11), and in the limited cases where this exception applies, it is inconsistent with Minn. R. Civ. App. P. 108.01, subd. 5.

Since most tenants cannot afford to pay up front all of the anticipated rent accruing during appeal or a bond to cover such rent, the tenant should be allowed to pay the rent each month as it accrues. *See Buddhu v. Ellis*, No. UD-1880908580, Supplemental Order (Minn. Dist. Ct. 4th Dist. Sept. 30, 1988) (Appendix 22). Payment of past rent allegedly owed should not be included in the bond. In government subsidized housing, the bond should cover only the tenant's share of the rent. *See Tullahoma Village Apartments v. Cyree*, No. 85-206-II at 5 (Tenn. Ct. App. Feb. 7, 1986) (attached as Appendix 23).

Landlords sometimes argue that the tenant should have to pay into court rent which was withheld, in dispute, or not accepted by the landlord to avoid waiver, in order to have the right to judge review. Rule 108.01, Subd. 5, refers to "the value of the use and occupation of the property from the time of the appeal until the delivery of possession of the property if the judgment is affirmed. . . ." The tenant is obligated only to pay rent which would come due during the appeal, rather than rent that was allegedly due before the appeal. *Phillips Neighborhood Housing Trust v. Brown*, No. UD-1960705508, transcript of proceedings at 4-6 (Minn. Dist. Ct. 4th Dist. Nov. 26, 1996) (Appendix 286a) (Denial of landlord's motion for pre-judge review rents not accepted by the landlord; tenant ordered to pay rent into court as it comes due); *Thompson v. Gates*, No. UD-197011509 (Minn. Dist. Ct. 4th Dist. Feb. 28, 1997) (Appendix 298) (On judge review tenant ordered to pay rent as it comes due into court, rather than alleged past due rent); *Phillips Neighborhood Housing Trust v. Brown*, No. UD-1960705508, (Minn. Dist. Ct. 4th Dist. Oct. 24, 1996) (Appendix 286b) (order waiving cost bond and ordering tenant to pay monthly rent to landlord in lieu of supersedeas bond).

If the district court sets the bond in an excessive amount, the tenant should file the appeal and make a motion to the Court of Appeals to reduce the amount. *Sisto v. Housing and Redevelopment Authority*, 258 Minn. 391, 395, 104 N.W.2d 529, (1960).

c. Mootness on appeal

In *Lanthier v. Michaelson*, 394 N.W.2d 245, 246 (Minn. Ct. App. 1986), the tenant appealed but vacated the apartment without posting the bond nor paying rent into court. The court held that the case was moot. *Lanthier* should not be followed, since the tenant should be able to litigate on appeal the propriety of

the eviction, and if successful, regain possession of the premises. Payment of the bond acts only to stay the effect of the district court decision. *Lanthier* also should be distinguishable where the tenant does not pay the bond but moves on appeal to reduce the amount under *Sisto*.

In *Scroggins v. Solchaga,* 552 N.W.2d 248 (Minn. Ct. App. 1996), the court held that removing the tenant from the property under the Writ of Restitution did not moot the appeal, distinguishing *Lanthier* on the issue of whether the tenant voluntarily moves or is forced to move by execution of the writ. *Id.* (*citing Fish v. Toner*, 40 Minn. 211, 212, 41 N.W. 972, 972 (1889); *Pusher v. Dale*, 242 Minn. 564, 567, 66 N.W. 2d 11, 13,(1954).

In *Noonan v. Jacob Properties, Inc.*, C7-98-810 (Minn. Ct. App. Dec. 8, 1998) (Appendix 353) (Unpublished), the commercial tenant appealed from a judgment of restitution. Although the tenant consistently paid rent and posted a cost bond to suspend execution of the landlord's writ of restitution during the appeal, the tenant voluntarily vacated the premises at the end of the lease term and did not exercise its unilateral option to renew the lease. The Court dismissed the appeal as moot, noting that the tenant voluntarily vacated the premises, in contrast to the tenant who involuntarily vacated the premises in *Scroggins v. Solchaja*, 552 N.W. 2d 248, 253 (Minn. Ct. App. 1996). *Hybben v. Constantine*, No. C9-02-734, 2002 WL 31655335 (Minn. Ct. App. 2002) (unpublished: appeal moot where tenant decided at hearing to set supercedeous bond that he would voluntarily move, citing *Lanthier v. Michaelson*, 394 N.W.2d 245, 246 (Minn. Ct. App. 1986)).

In *CAMM Properties, Inc. v. Peacock*, No. C6-97-1128, C7-97-1168, C9-97-1365, C2-97-1420 (Minn. Ct. App. May 18, 1998) (Appendix 316) (Unpublished), the mortgagor argued that the appeal was moot because the defendant had vacated the commercial property, and since the foreclosure deprived the defendant of an interest in the property. The court denied the motions to dismiss the appeals as moot, concluding that the record did not indicate whether the defendant voluntarily left the commercial property, whether the foreclosure sale which occurred after the defendant filed the appeals actually extinguished all of the defendant's interests in the property, and the mortgagee failed to provide authority showing that foreclosure necessarily deprived the defendant of an interest in the property.

In *Beaumia v. Eisenbraun*, No. A06-1482, 2007 WL 2472298 (Minn. Ct. App. Sept. 4, 2007) (unpublished), the Court of Appeals noted that while appellant landlord argued that respondent tenants had vacated the property, nothing in the record showed that the tenants had left the property, comparing *Lanthier v. Michaelson*, 394 N.W.2d 245, 246 (Minn. Ct. App. 1986) (appeal moot where tenant voluntarily vacated the property), *review denied*. (Minn. Nov. 26, 1986), and *Real Estate Equity Strategies LLC v. Jones*, 720 N.W.2d 352, 355 (Minn. Ct. App. 2006) (appeal is not moot where tenant vacates property involuntarily).

4. Appeal after issuance of the writ: certificate to stay execution of the writ pending appeal

The court shall give the appealing defendant a certificate of appeal, which when served upon the sheriff or police, shall stay further execution of the writ. Minn. Stat. § 504B.371 (formerly § 566.13). Exception: "where judgment for restitution has been entered on a lease" in an action for holding over after expiration of the lease or termination of the lease by notice to quit.

5. Note on exceptions

The exceptions apply only to actions based upon holding over after expiration of the lease or termination of the lease by notice to quit. The exceptions should not apply to actions based upon: (1)

nonpayment of rent, (2) breach of the lease, or (3) holding over after lease expiration or termination, and nonpayment of rent or breach of the lease.

The exceptions should be susceptible to challenge as violative of equal protection. *See Lindsey v. Normet*, 405 U.S. 56, 74-79 (1972) (statute requiring tenant to post appellate bond equal to double the rent violated equal protection). However, in *Tonkaway Limited Partnership v. McLain*, No. C2-88-2222 (Minn. Ct. App. Oct. 31, 1988), the court held that appellant did not establish that the statutes were unconstitutional.

CHAPTER XI:
WRIT OF PROHIBITION

As an alternative to appeal, the defendant may request a writ of prohibition in some circumstances. *See* Minn. R. Civ. App. P. 120-121.

Recent requests for writs in eviction (unlawful detainer) actions involved issues such as challenges to the following actions.

1. trial court order for new trial. *Stock v. Beaulieu*, No. C4-95-989 (Minn. Ct. App. May 9, 1995) (Appendix 170) (writ granted).

2. execution of a writ of restitution against a tenant who was not a party to the eviction (unlawful detainer) action, nor named in the writ. *Kowalenko v. Haines*, No. C6-85-1365 (Minn. Ct. App. July 23, 1985 (Appendix 4) (writ granted). *See* discussion, *supra* at VI.C.

3. trial court order requiring the defendant to post full amount of past due rent alleged by the plaintiff, where the defendant disputed the arrearage. *Ted Glasrud Assoc. v. Balsimo*, No. C6-85-1821 (Minn. Ct. App. Oct. 1, 1985) (writ granted).

4. trial court's grant of an immediate writ of restitution following a brief bench discussion with the parties and counsel, but without the swearing of witnesses, formal introduction of evidence and cross examination of witnesses. *Butcher v. David Prop. 2*, No. C1-87-693 (Minn. Ct. App. April 17, 1987) (writ granted to vacate trial court order and writ of restitution and remand for trial; writ for removal of trial court judge denied).

Note: It should not be assumed that the results in these cases indicate that writs are routinely granted. Minn. R. Civ. App. P. 121 provides for making an oral request in emergency situations. In *Butcher*, the petitioner made a telephone request on April 14, 1987, and submitted a brief petition on April 15, 1987. The Court of Appeals issued its order on April 16, 1987 *Id.*

CHAPTER XII:
NUISANCE PROCEEDINGS

Public Nuisance Actions now are heard in Housing Court in Hennepin County. A prosecuting attorney many commence a public nuisance action by a verified petition to seek temporary or permanent injunctive relief after giving the defendant 30 days' notice about the alleged nuisance. Public nuisance includes two or more separate incidents within 12 months of one of more of the following acts within the building: prostitution-related activity, gambling-related activity, keeping or permitting a disorderly house, and certain illegal alcohol sales and firearm possession. Minn. Stat. §§ 617.80 - 617.83. In 1997 the list of public nuisances was expanded to include a violation by a commercial enterprise of local or state public nuisance business licensing regulations, ordinances or statutes, a violation of the general public nuisance and real property nuisance misdemeanor statutes, §§ 609.74 - 609.745. 1997 Minn. Laws Chs. 100 and 122 (Appendix 242). If the recipient of a notice abates the nuisance or enters into an agreed abatement plan within 30 days of receiving notice and complies with the agreement, the prosecuting attorney is prohibited from filing the action.

Within a public nuisance action, the owner, or the prosecuting attorney with permission by the owner, may file a motion or cancellation of the lease. Upon finding that the tenant has maintained or conducted a nuisance, the court shall order cancellation of the lease and grant restitution of the property to the owner. Section 617.85, *amended by* 1997 Minn. Law Ch. 239, Art. 12, Section 10.

The tenant should argue that in addition to procedural defenses which may be available under the public nuisance act, unlawful detainer defenses, especially in the area of breach of lease, should be available in public nuisance lease cancellation cases.

In *County of Hennepin v. 733 Lowry Avenue North and Okoiye*, UD-1980724506 (Minn. Dist. Ct. 4th Dist. Aug. 6, Sep. 16, Dec. 23, 1998, Feb. 9, Feb. 12, 1999) (Appendix 322), the county commenced a nuisance action, claiming drug activity, disturbances, excess traffic, and noise. The court found that the county gave proper notice, the nuisance occurred and the defendant landlord did not abate the nuisance. The court first issued a temporary injunction, in joining the landlord from residing on the property, selling or transferring his interests in the property, or conducting specified nuisance activities. (Aug. 6, 1998). The court late issued a permanent injunction in joining the landlord and some tenants from residing on the property or conducting specific nuisance activities on the property, canceled the lease between the landlord and one tenant, and enjoined the landlord from selling or transferring his interest. (Sep. 16, 1998). The Court later denied the landlord's motion to vacate the judgment (Dec. 23, 1998), allowed the landlord to present a plan for re-renting the upper unit (Feb. 8, 1999), and allowed the landlord to re-enter the property to conduct repairs (Feb. 12, 1999).