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**[Editor's Note:** This article is based on a training outline of the same title. Lawrence R. McDonough created the training outline with contributions from Mac McCreight and others. In 2006 McCreight significantly contributed to updating the training outline. McDonough revised the outline for this article with editing assistance from McCreight. The outline and an expanded version of this article are available at <http://povertylaw.homestead.com> (follow "Reading" hyperlink).]

**D**efending tenants in public and subsidized housing from criminal-activity evictions reached a new urgency following the U.S. Supreme Court's decision in *Department of Housing and Urban Development v. Rucker*.<sup>1</sup> Although some argue that tenants facing such evictions have no choice but to move, tenants have many available (and easily overlooked) federal, state, and local law defenses.

In this article, after noting the narrowness of relevant Legal Service Corporation (LSC) restrictions, we analyze the *Rucker* case and discuss the required elements for eviction from public housing and each federally subsidized program and relevant defenses. We then cover the exercise of discretion in eviction decisions, notice and procedure requirements, the interrelationship between criminal and civil proceedings, and defenses not specific to criminal activity. We explain state statutes and local ordinances providing tenants more protection than federal law and consider whether federal law preempts them. In the last section, we focus on what else attorneys and advocates for

<sup>1</sup>*Department of Housing and Urban Development v. Rucker*, 535 U.S. 125 (2002) (Clearinghouse No. 52,806). For additional discussion of *Rucker*, see Wendy L. Stasell, *Rucker v. Davis and Its Significance for Tenant Advocates*, 35 CLEARINGHOUSE REVIEW 144 (July–Aug. 2001). For a discussion of the "one strike" policy, see Barclay Thomas Johnson, Note, *The "One Strike" Policy in Public Housing*, *id.* at 159.

tenants in public and subsidized housing can do to protect and expand the rights of tenants facing allegations of criminal activity.<sup>2</sup>

**I. Get Involved: Legal Services Attorneys and Others Can Help**

The first misconception about criminal-activity cases involving public housing and subsidized housing tenancies is that legal services attorneys may not provide representation. Although there are some limitations on legal services representation in these cases, they are narrow in scope. LSC-funded attorneys may not represent in *public housing* evictions persons *convicted of or charged with drug crimes* when the *evictions are based on threats to health or safety of public housing residents or employees*.<sup>3</sup> An LSC-funded attorney may represent a person facing eviction because a *family member* was convicted of or charged with drug crimes because the attorney is not representing the person charged or convicted. The LSC prohibition on representation is *limited to public housing* and does not apply to Section 8 voucher or federally subsidized evictions. Nor does it apply to (1) drug activity that could have been charged but was not, (2) charged offenses that are not crimes, and (3) drug crimes that do not pose a threat to residents or employees. The LSC prohibition does not limit attorneys and advocates who work for legal aid programs that LSC does not fund, and it does not limit private attorneys and housing advocates.

**II. The Rucker Decision: A Bad Decision But Not as Bad as You Think**

Before analyzing how to defend criminal-activity eviction cases, tenant attorneys and advocates should review the criminal-activity statute and its legislative history. Attorneys and advocates also should consider what the *Rucker* Court decided and, more important, what the Court did *not* decide.

**A. The Statute and Legislative History**

At issue in *Rucker* is the effect of a federal statute providing that “[e]ach public housing agency [PHA] shall utilize leases which ... require the [PHA] to give adequate written notice of termination of the lease ... in the event of any drug-related or violent criminal activity or any felony conviction.”<sup>4</sup> Furthermore, leases shall

provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant’s household, or any guest or other person under the tenant’s control, shall be cause for termination of tenancy.<sup>5</sup>

The legislative history calls for eviction protection for innocent family members:

<sup>2</sup>Unpublished lower-court decisions from Minnesota with appendix numbers are available, after registering, from [www.projusticemn.org](http://www.projusticemn.org) (follow “Civil Law” hyperlink under “Practice Areas,” then “Library” hyperlink, then “Housing Law” hyperlink, then “Eviction Defense” hyperlink, then “Unreported Cases” hyperlink). Unpublished Massachusetts cases are available from [www.masslegalservices.org](http://www.masslegalservices.org). Where noted, some decisions are available from the Sargent Shriver National Center on Poverty Law’s Poverty Law Library; look up the Clearinghouse numbers specified in the citations.

<sup>3</sup>45 C.F.R. § 1633 (2006) (emphasis added); see *infra* notes 21–27 and accompanying text (offenses that are not crimes) and 28–34 (threatening acts). See generally Alan W. Houseman & Linda E. Perle, *What You May and May Not Do Under the Legal Services Corporation Restrictions*, in *POVERTY LAW MANUAL FOR THE NEW LAWYER* 242 (2002), available at [www.povertylaw.org/poverty-law-library/research-guides/poverty-law-manual/houseman-perle.pdf](http://www.povertylaw.org/poverty-law-library/research-guides/poverty-law-manual/houseman-perle.pdf) (published by the Sargent Shriver National Center on Poverty Law).

<sup>4</sup>42 U.S.C.A. § 1437d(l)(4)(A)(ii) (West 2006). PHA, or public housing agency, is the administering local agency both for federal public housing and for Section 8 tenant-based and moderate rehabilitation assistance. PHAs may go by different names, such as a public housing authority or housing and redevelopment agency. Particularly for Section 8 vouchers, the PHA may not be a public housing authority—it may be a statewide agency. In this article we use “PHA” to cover both housing authorities and other entities administering housing programs that the U.S. Department of Housing and Urban Development (HUD) funds or subsidizes.

<sup>5</sup>*Id.* § 1437d(l)(6).

This provision makes criminal activity grounds for eviction of public housing tenants if that action is appropriate *in light of all of the facts and circumstances....*

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 instance, eviction would not be the appropriate course if the tenant had no knowledge of the criminal activities of his/her guests or had taken responsible steps under the circumstances to prevent the activity.<sup>6</sup>

## B. What *Rucker* Decided, or, More Important, What It Did Not Decide

Tenants in Oakland, California, sued to enjoin the Oakland Housing Authority and the U.S. Department of Housing and Urban Development (HUD) from pursuing eviction cases unless the public housing authority could show that the tenant knew or should have known of household member or guest wrongdoing.<sup>7</sup> The plaintiffs raised claims under the Ameri-

cans with Disabilities Act (ADA) for several plaintiffs with disabilities, and the plaintiffs had state-law claims.<sup>8</sup> The federal district court granted an injunction against the defendants on the “tenant knowledge” claims and ADA claims.<sup>9</sup> A Ninth Circuit panel, finding no requirement of tenant knowledge under federal law, reversed the injunction.<sup>10</sup> The full court later reheard the case and affirmed the district court decision.<sup>11</sup> The Supreme Court granted certiorari and reversed the full Ninth Circuit decision and in effect the district court’s decision.<sup>12</sup>

So what does *Rucker* hold? Does it require eviction of tenants in households where criminal activity occurred? No. Does it foreclose defenses based on the specific requirements of the regulations? No. Does it preclude other defenses under federal and state law? No.

*Rucker* does hold 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.”<sup>13</sup> The Court rejected the claim that the statute includes a tenant-knowledge requirement and, finding no ambiguity in the statute, concluded that it did not need to review the legislative history.<sup>14</sup> The public housing authority *is not required to evict* even when, the Court noted, the tenant violates the lease provision.<sup>15</sup> The Court did not decide the ADA or state-law claims.<sup>16</sup>

<sup>6</sup>S. REP. No. 316, at 179 (1990), as reprinted in 1990 U.S.C.C.A.N. 5763, 5941 (app. 306) (emphasis added).

<sup>7</sup>*Rucker v. Davis*, No. C 98-00781 CRB, 1998 WL 345403, at \*2–3 (N.D. Cal. June 19, 1998).

<sup>8</sup>*Id.* at \*3; Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.*

<sup>9</sup>*Rucker*, 1998 WL 345403, at \*11–13.

<sup>10</sup>*Rucker v. Davis*, 203 F.3d 627, 636–50 (9th Cir. 2000).

<sup>11</sup>*Rucker v. Davis*, 237 F.3d 1113 (9th Cir. 2001).

<sup>12</sup>*Department of Housing and Urban Development v. Rucker*, 533 U.S. 976 (2001) (granting certiorari); *Rucker*, 535 U.S. 125 (reversing the full Ninth Circuit decision).

<sup>13</sup>*Rucker*, 535 U.S. at 130 (emphasis added).

<sup>14</sup>*Id.* at 130–36 (rejecting the claim that the statute included a tenant-knowledge requirement); 132–33 (concluding that it did not need to review the legislative history).

<sup>15</sup>*Id.* at 133–34 (citing 42 U.S.C. § 11901(2); 66 Fed. Reg. 28781, 28803 (May 24, 2001)).

<sup>16</sup>*Rucker*, 535 U.S. at 130 n.3.

The Ninth Circuit, on remand, left the injunction against eviction in place for the *Rucker* plaintiffs who raised the independent ADA claims against eviction.<sup>17</sup>

The *Rucker* decision is at odds with Congress' clearly expressed intent. The *Rucker* Court avoided addressing legislative intent by finding the statute unambiguous. However, the statute does not indicate intent either way on an innocent-tenant defense and a tenant-knowledge requirement. The decision, regardless of how one feels about it, remains the law of the land. Attorneys, advocates, and tenants still can do much to avoid and stop evictions claiming criminal activity by focusing on the elements of federal and state statutes and regulations, holding PHAs and landlords to their proof of the elements, and persuading the court to base its decisions on application of the elements.<sup>18</sup>

### III. Winning Winnable Cases: Focus on the Elements

Because most of the litigation of criminal activity in evictions involves public housing as opposed to other subsidized housing programs and because the requirements are similar for most of the programs, the attorney and advocate must master the elements of the public housing criminal-activity eviction.

#### A. Public Housing

Each PHA shall use leases that

provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's

control, shall be cause for termination of tenancy.<sup>19</sup>

The regulations require the tenant to assure that (1) no tenant, member of the tenant's household, or guest engages in any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other residents or any drug-related criminal activity on or off the premises; and (2) no other person under the tenant's control engages in any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other residents or any drug-related criminal activity on the premises.<sup>20</sup>

The main criminal-activity provisions of the statute and regulations may be broken down as follows: (1) criminal activity (2) that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any (3) drug-related (4) criminal activity (5) on or off such premises (6) engaged in by (7) a public housing tenant, (8) any member of the tenant's household, or (9) any guest or (10) other person under the tenant's control. The first elements concern the activity while others concern the actor.

#### 1. Criminal Activity

The activity must be criminal in nature or, in other words, a crime. Certain offenses might not be crimes under state law. Because a crime is conduct prohibited by statute and for which the actor may be sentenced to imprisonment with or without a fine under Minnesota law, 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 Minnesota state district court concluded in *Housing and Redevelopment Authority of Duluth v. [Redacted]*.<sup>21</sup> The court dismissed the action

<sup>17</sup>*Rucker v. Davis*, 304 F.3d 904 (9th Cir. 2002).

<sup>18</sup>For a discussion of *Rucker* and its impact, see NATIONAL HOUSING LAW PROJECT, HUD [U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT] HOUSING PROGRAMS: TENANTS' RIGHTS at 14/17–14/19 (2006–2007 Supp.), 14/49–14/61 (3d ed. 2004).

<sup>19</sup>42 U.S.C.A. § 1437d(l)(6) (West 2006); see *infra* notes 94–101 and accompanying text (domestic violence exception).

<sup>20</sup>24 C.F.R. § 966.4(f)(12) (2006). The regulations also discuss public housing evictions for methamphetamine convictions, other drug crimes, tenants who are fugitive felons, and alcohol abuse. *Id.* § 966.4(l)(5).

<sup>21</sup>*Housing and Redevelopment Authority of Duluth v. [Redacted]*, No. C7-99-601573, at 3–6 (Minn. Dist. Ct. Sept. 13, 1999) (app. 395) (party name redacted from court order); MINN. STAT. § 609.02, subd. 1 (2006).

where petty misdemeanor drug charges against the tenant were dismissed, and the tenant pleaded guilty to an amended charge of assault under a municipal ordinance.<sup>22</sup> The court found that no serious or repeated violation of a material term of the lease occurred where the arrest took place one mile away from the premises and the event did not constitute criminal activity.<sup>23</sup>

Juvenile offenses might not constitute crimes under state law. Massachusetts law generally treats juveniles under 17 “not as criminals, but as children in need of aid, encouragement, and guidance. Proceedings against children ... shall not be deemed criminal proceedings.”<sup>24</sup> A separate issue is whether juvenile offenses are “criminal activity” under federal law and thus whether the *Rucker* decision even applies at all to juvenile activity where the juvenile is not adjudicated as an adult under state, local, or federal law.<sup>25</sup>

Beyond whether the activity claimed is criminal in nature is whether the plaintiff can prove the elements of the crime alleged.<sup>26</sup> The tenant should have all defenses available under criminal law.<sup>27</sup>

## 2. That Poses a Threat

The statute refers to “criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants.”<sup>28</sup> The applicable regulations are inconsistent concerning who is protected from threats to health, safety, and peaceful enjoyment posed by prohibited criminal activities. The lease must provide for a tenant assurance of no “criminal activity that threatens the health, safety or right to peaceful enjoyment of the premises *by other residents*.”<sup>29</sup> The regulation then states that the PHA must give notice of termination within a reasonable period of time

(1) [i]f the health or safety of *other residents, PHA employees, or persons residing in the immediate vicinity of the premises* is threatened; or (2) [i]f any member of the household has engaged in any drug-related criminal activity or violent criminal activity; or (3) [i]f any member of the household has been convicted of a felony.<sup>30</sup>

<sup>22</sup>*Housing and Redevelopment Authority of Duluth*, No. C7-99-601573, at 4–6.

<sup>23</sup>*Id.* Possession of drug paraphernalia is not criminal activity or illegal activity under MINN. STAT. § 504B.171 (2006) (formerly § 504.181). However, possession of drug paraphernalia may violate a lease provision specifically prohibiting possession. *Southgate Mobile Village v. [Redacted]*, No. HC-0205315400, at 2–3 (Minn. Dist. Ct. July 2, 2002) (app. 575) (party name redacted from court order).

<sup>24</sup>MASS. GEN. LAWS. ch. 119, § 53 (2006). But see *Cincinnati Metropolitan Housing Authority v. Browning*, No. C-010055, 2002 WL 63491, at \*3–5 (Ohio Ct. App. Jan. 18, 2002) (Clearinghouse No. 55,041) (holding that juvenile delinquent acts are “criminal” acts under state law for public housing eviction).

<sup>25</sup>See 18 U.S.C.A. §§ 5031, 5038 (West 2006); *United States v. Frasquillo-Zomosa*, 626 F.2d 99, 101 (9th Cir. 1980) (stating that, under federal law, the court adjudicates whether the juvenile is a delinquent, and prosecution results in an adjudication of status—not a criminal conviction). Courts consistently define juvenile proceedings as noncriminal proceedings. See, e.g., *United States v. Three Juveniles*, 862 F. Supp. 651, 656 (D. Mass. 1994), order modified, 61 F.3d 86, 90 (1st Cir. 1995); *United States v. Brian N.*, 900 F.2d 218, 220 (10th Cir. 1990); *United States v. King*, 482 F.2d 454, 456 (6th Cir. 1973) (Clearinghouse No. 10,617). Where Congress wanted juvenile activity to be treated as criminal activity, Congress stated so explicitly. See *United States v. Walters*, 225 F. Supp. 2d 684, 686 (E.D. Va. 2002).

<sup>26</sup>See *Minneapolis Public Housing Authority v. [Redacted]*, No. HC 10306313566 (Minn. Dist. Ct. July 31, 2003) (app. 539) (party name redacted from court order) (holding that landlord did not prove that police officer properly learned about marijuana where officer entered apartment with tenant’s consent to look for trespasser and did not prove that marijuana was in plain view; small amount of marijuana was not criminal activity; and landlord’s knowledge of alleged altercation was from a police report whose authors did not testify and that did not connect tenant to the incident); *Southgate Mobile Village*, No. HC-0205315400 (finding that plaintiff did not prove that drugs were on the property).

<sup>27</sup>See *infra* notes 168–80 and accompanying text.

<sup>28</sup>42 U.S.C.A. § 1437d(l)(6) (West 2006).

<sup>29</sup>24 C.F.R. § 966.4(f)(12) (2006) (emphasis added).

<sup>30</sup>*Id.* § 966.4(l)(3)(i)(B) (emphasis added).

And the lease

must provide that any criminal activity by a covered person that threatens the health, safety, or right to peaceful enjoyment of the premises by *other residents (including PHA management staff residing on the premises)* or threatens the health, safety, or right to peaceful enjoyment of their residences by persons residing in the immediate vicinity of the premises is grounds for termination of tenancy.<sup>31</sup>

The statute and various regulatory provisions all refer to the present tense of the word “threaten”:

- “criminal activity that threatens,”<sup>32</sup>
- if “the health or safety ... is threatened,”<sup>33</sup> and
- “criminal activity by a covered person that threatens....”<sup>34</sup>

By not choosing a past-tense form of “threaten,” such as “criminal activity that threatened” or “if the health or safety ... was threatened,” both Congress and HUD focused on a present threat as opposed to a past threat. Attorneys and advocates should argue that criminal activity that posed a threat to others in the past but no longer presents a threat should not be the

basis for termination. Examples would be where the tenant removes the wrongdoer from the household or takes steps to prevent the wrongdoer from coming to the property.

The PHA has the burden of showing the threat. In *Boston Housing Authority v. Bryant* the tenant engaged in credit card fraud against the property manager.<sup>35</sup> The state appellate court concluded that the trial court’s conjecture that fraud could have resulted in a health emergency for the manager’s family was pure speculation.<sup>36</sup> According to *Wellston Housing Authority v. Murphy*, the activity must have occurred under the current lease.<sup>37</sup> Courts differ on whether criminal activity away from the property poses a threat to residents and PHA staff on the property and neighbors.<sup>38</sup>

### 3. Engaged in by Whom

The statute and regulation apply to criminal activity “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.”<sup>39</sup> The regulations define each of these categories. Household “means the family and PHA-approved live-in aide.”<sup>40</sup> Guest “means a person temporarily staying in the unit with the consent of a tenant or other member of the household who has express or implied authority to so consent on behalf

<sup>31</sup>*Id.* § 966.4(l)(5)(ii) (emphasis added).

<sup>32</sup>42 U.S.C.A. § 1437d(l)(6) (West 2006); 24 C.F.R. § 966.4(f)(12) (2006).

<sup>33</sup>24 C.F.R. § 966.4(l)(3)(i)(B) (2006).

<sup>34</sup>*Id.* § 966.4(l)(5)(ii).

<sup>35</sup>*Boston Housing Authority v. Bryant*, 693 N.E.2d 1060, 1062 (Mass. App. Ct. 1998).

<sup>36</sup>*Id.*

<sup>37</sup>See *Wellston Housing Authority v. Murphy*, 131 S.W.3d 378, 380 (Mo. Ct. App. 2004).

<sup>38</sup>Compare *Maryland Park Apartments v. Robinson*, No. CX-02-4044 (Minn. Dist. Ct. June 17, 2002) (app. 533) (finding that landlord failed to prove criminal activity occurred at or near tenant’s residence), with *Minneapolis Public Housing Authority v. [Redacted]*, No. HC-1020213524 (Minn. Dist. Ct. June 11, 2002) (app. 540) (party name redacted from court order) (upholding eviction of tenant who shoplifted and assaulted store owner off the property). See also *Lowell Housing Authority v. Melendez*, No. 05-SP-01282, 2005 WL 4926562 (Mass. Housing Ct. Aug. 5, 2005) (finding assault and attempted robbery of patron at convenience store about a mile from tenant’s public housing development to constitute a threat to the health, safety, or right to quiet enjoyment of other residents), appeal docketed, No. SJC-0916 (Mass.) (oral argument presented March 5, 2007; case under advisement).

<sup>39</sup>42 U.S.C.A. § 1437d(l)(6) (West 2006) (emphasis added); 24 C.F.R. § 966.4(f)(12) (2006) (emphasis added).

<sup>40</sup>24 C.F.R. § 5.100 (2006); see *Boston Housing Authority v. Bruno*, 790 N.E.2d 1121, 1123–24 (Mass. Ct. App. 2003) (holding that tenant could not be evicted for drug activity of son listed on lease because evidence showed that son had moved out of unit before the activity and thus was no longer a household member).

of the tenant.”<sup>41</sup> “Other person under the tenant’s control”

means that the person, although not staying as a guest ... in the unit, is, or was at the time of the activity in question, on the premises ... because of an invitation from the tenant or other member of the household who has express or implied authority to so consent on behalf of the tenant. Absent evidence to the contrary, a person temporarily and infrequently on the premises solely for legitimate commercial purposes is not under the tenant’s control.<sup>42</sup>

The regulations do not define “staying ... in the unit” for the purposes of distinguishing guests and other persons under the tenant’s control. However, because a guest temporarily stays in the unit whereas another person under the tenant’s control is an invitee to the unit but does not stay in the unit, a closer nexus exists between the tenant and a guest than between the tenant and other persons under the tenant’s control.

Persons whose alleged criminal activity does not subject a public housing tenant to lease termination and eviction include (1) a visitor who was invited by a person who is not a member of the household or by a member of the household who does not have express or implied authority to so consent on behalf of the tenant; (2) a visitor who was not invited to the property; (3) a stranger; and (4) a person temporarily and infrequently on the premises solely for legitimate commercial purposes, absent evidence to the contrary.

#### 4. Drug-Related Criminal Activity

The statute and regulations treat drug-related criminal activity somewhat differently from regular criminal activity. They refer to “drug-related criminal activity on or off such premises” without any reference to any threat posed by it.<sup>43</sup> The regulations add the threat element when referring to illegal drug use as opposed to criminal drug use.<sup>44</sup>

The PHA must prove that the drug-related activity is criminal.<sup>45</sup> Although the statute and regulations apply to activity on or off the premises, some leases do not include regulatory changes from the earlier provision for “on or near the premises” to the present provision for “on or off the premises.”<sup>46</sup>

The same definitions for a public housing tenant, any member of the tenant’s household, and any guest or other person under the tenant’s control discussed above for criminal activity apply to drug-related criminal activity.<sup>47</sup> However, when a person in the category of “other person under the tenant’s control” commits the drug-related criminal activity, the statute and regulations apply only when the activity occurs on the premises.<sup>48</sup>

Activities not covered by the statute and regulations and not subject to eviction include (1) drug-related activity that is not a crime, (2) drug-related activity committed off-site by a person under the tenant’s control, (3) drug-related activity committed anywhere by (a) a visitor invited by a person who is not a member of the household or invited by a member of the household who does not have express or implied authority to so consent on behalf of the tenant, (b) a visitor who

<sup>41</sup>24 C.F.R. § 5.100 (2006).

<sup>42</sup>*Id.*

<sup>43</sup>42 U.S.C.A. § 1437d(l)(6) (West 2006); 24 C.F.R. § 966.4(f)(12) (2006).

<sup>44</sup>24 C.F.R. § 966.4(l)(5)(l) (2006).

<sup>45</sup>See *supra* notes 21–27 and accompanying text.

<sup>46</sup>See *Minneapolis Public Housing Authority v. [Redacted]*, No. HC-1001229506, at 1 (Minn. Dist. Ct. Jan. 25, 2001) (app. 541) (party name redacted from court order) (dismissing case 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).

<sup>47</sup>See *supra* notes 39–42 and accompanying text.

<sup>48</sup>24 C.F.R. § 966.4(l)(5)(i)(B) (2006).



was not invited, (c) a stranger, and (d) a person temporarily and infrequently on the premises solely for legitimate commercial purposes, absent evidence to the contrary.

### 5. Other Criminal Activity

The statute and regulation require eviction if any member of the household has ever been convicted of manufacturing or producing methamphetamine *on the premises* of federally assisted housing.<sup>49</sup> PHAs do not have discretion in these cases and must pursue lease termination and eviction.

The PHA must give a lease termination notice within a “reasonable period of time,” not to exceed thirty days, in the event of “any ... violent criminal activity or felony conviction.”<sup>50</sup> “Violent criminal activity” means “any criminal activity that has as one of its elements the use, attempted use, or threatened use of physical force substantial enough to cause, or be reasonably likely to cause, serious bodily injury or property damage.”<sup>51</sup>

Federal law provides that

cause for immediate termination of the tenancy [exists] if *such tenant*: (A) is fleeing to avoid prosecution, or custody or confinement after conviction, under the laws of the place from which the individual flees, for

a crime or attempt to commit a crime, which is a felony under the laws of the place from which the individual flees, or which, in the case of the State of New Jersey, is a high misdemeanor under the laws of such State, or (B) is violating a condition of probation or parole imposed under Federal or State law.<sup>52</sup>

Because the statute and regulation focus only on the tenant, a household member’s or guest’s flight or breach of the provisions of probation or parole is not listed as cause for eviction.

No provision requires eviction of persons subject to a lifetime registration requirement under state law as a sex offender. Federal law does provide for denying admission to public housing for registered sex offenders.<sup>53</sup>

Advocates need to think about whether the facts of their public housing cases are such that the PHA should be required to give an opportunity for a grievance hearing because of the activity, because of the PHA’s lease and grievance procedure, or because of separate state-law requirements on grievance rights.<sup>54</sup>

### B. Section 8 Vouchers and Section 8 Moderate Rehabilitation Program

Many of the concepts and standards for criminal activity in public housing apply

<sup>49</sup>42 U.S.C.A. § 1437n(f) (West 2006); 24 C.F.R. § 966.4(l)(5)(i)(A) (2006). The statute and regulation do not cover convictions for activity off the premises and activity that did not lead to a conviction, but these types of convictions may be covered under the general drug-related activity provisions. See *supra* notes 43–48 and accompanying text.

<sup>50</sup>42 U.S.C.A. § 1437d(l)(4)(A)(ii) (West 2006); 24 C.F.R. § 966.4(l)(3)(i)(B)(2)–(3) (2006).

<sup>51</sup>24 C.F.R. § 5.100 (2006).

<sup>52</sup>42 U.S.C.A. § 1437d(l)(9) (West 2006) (emphasis added); 24 C.F.R. § 966.4(l)(5)(ii)(B) (2006).

<sup>53</sup>42 U.S.C.A. § 13663 (West 2006); 24 C.F.R. §§ 5.856, 960.204(a)(4) (2006); see [U.S. Department of Housing and Urban Development] Notice H 2002-22 (HUD) (Oct. 29, 2002), available at [www.hudclips.org/sub\\_nonhud/html/pdf-forms/02-22h.doc](http://www.hudclips.org/sub_nonhud/html/pdf-forms/02-22h.doc) (“Screening and Eviction for Drug Abuse and Other Criminal Activity—Final Rule”) (stating that households already living in federally assisted housing units are not subject to the provisions of 24 C.F.R. § 5.856). (Although this Notice expired on October 31, 2003, HUD indicates that owners should continue to use the Notice because it contains some material that HUD did not include in its HANDBOOK 4350.3 (see *infra* note 77) and that HUD intends to incorporate into a revised version of its HANDBOOK. See U.S. Department of Housing and Urban Development, Final Multifamily Mailbox: [HUD HANDBOOK] 4350.3 Rev. 1 Summary of Questions (last visited March 28, 2007) (Question 62), [www.hud.gov/offices/hsg/mfh/rhiip/4350\\_faqs.pdf](http://www.hud.gov/offices/hsg/mfh/rhiip/4350_faqs.pdf).) But see *Spring Valley Housing Authority v. Lamarre*, No. 035-06, (N.Y. Justice Ct. April 27, 2006) (unpublished) (Clearinghouse No. 56,117) (dismissing an eviction proceeding that PHA brought against registered sex offender whom PHA had admitted before adoption of the federal statute); *Cuyahoga Metropolitan Housing Authority v. Stewart*, No. 06-3698 (Ohio Mun. Ct. March 1, 2006) (Clearinghouse No. 56,118) (dismissing eviction of registered sex offender where tenant was not at fault for housing authority’s failure to obtain the criminal record before admission).

<sup>54</sup>See *infra* notes 130, 132–41 and accompanying text.

to the Section 8 Voucher and Section 8 Moderate Rehabilitation Programs.<sup>55</sup> The standards are slightly different for eviction by the owner and termination of assistance by the PHA, as discussed below.

### 1. Eviction for Section 8 Tenant-Based Voucher Program

There is cause for eviction where a tenant, member of the tenant's household, guest, or other person under the tenant's control engages in (1) "any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants," (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 violent or drug-related criminal activity on or near such premises."<sup>56</sup> There is cause for termination of tenancy if a tenant

(i) is fleeing to avoid prosecution, or custody or confinement after conviction, under the laws of the place from which the individual flees, for a crime, or attempt to commit a crime, which is a felony under the laws of the place from which the individual flees, or which in the case of the State of New Jersey is a high misdemeanor; or (ii) is violating a condition of probation or parole imposed under Federal or State law.<sup>57</sup>

HUD's comment in the preamble to the final "one-strike" rule states that an

owner's lease may authorize eviction for other types of criminal activity not associated with the premises so long as the lease is consistent with state and local law and applies equally to voucher holders and other tenants.<sup>58</sup>

### 2. Subsidy Termination for Section 8 Tenant-Based Voucher Program

Federal law provides for both mandatory and permissive termination of assistance. PHAs must establish standards that allow them to terminate assistance for a family under the program if they determine that any household member has ever been convicted of drug-related criminal activity for manufacturing or producing methamphetamine on the premises of federally assisted housing.<sup>59</sup> The PHAs also must establish standards that allow them to terminate assistance for a family under the program if the family is evicted for serious lease violations from housing assisted under the Section 8 program.<sup>60</sup>

Termination of assistance is permitted if the PHA determines any of the following:

- Any household member (including the tenant) is engaged in any illegal use of a drug.<sup>61</sup>
- Any family member violated the family's obligation not to engage in any drug-related criminal activity.<sup>62</sup>
- Any household member violated the family's obligation not to engage in any violent criminal activity.<sup>63</sup>

<sup>55</sup>See *supra* notes 19–53 and accompanying text.

<sup>56</sup>42 U.S.C.A. § 1437f(d)(1)(B)(iii), 1437f(o)(7)(D) (West 2006); 24 C.F.R. § 982.310(c)(1), (2)(i) (2006). HUD provided the following interpretation of "on or near" when it published final regulations for the Section 8 voucher program in 1995: "In general, this standard would cover drug crime in a street or other right of way that adjoins the project or building where a Section 8 unit is located." 60 Fed. Reg. 34660, 34673 (July 3, 1995). If the activity did not take place close to the tenant's apartment or development, it may not be cause for eviction. However, it still may be a basis for termination of subsidy by the PHA. See *infra* notes 59–69 and accompanying text.

<sup>57</sup>42 U.S.C.A. § 1437f(d)(1)(B)(v) (West 2006); 24 C.F.R. § 982.310(c)(2)(ii) (2006).

<sup>58</sup>66 Fed. Reg. 28776, 28783 (May 24, 2001).

<sup>59</sup>24 C.F.R. § 982.553(b)(1)(ii) (2006).

<sup>60</sup>*Id.* § 982.552(b)(2). An eviction by an owner for criminal activity under the provisions covered by 24 C.F.R. § 982.310 would come within this provision.

<sup>61</sup>*Id.* § 982.553(b)(1)(i)(A).

<sup>62</sup>*Id.* §§ 982.551(i), 982.553(b)(1)(iii).

<sup>63</sup>*Id.* §§ 982.551(i), 982.553(b)(2); see *supra* note 51 and accompanying text (regarding the definition of violent criminal activity).

- The family committed any serious or repeated violation of the lease in violation of its family obligations.<sup>64</sup>

Although PHAs must establish standards for termination of assistance for criminal activity, they are not required to terminate assistance. Deciding whether they want to proceed with termination or to permit continued assistance as an exercise of their discretion is up to the PHAs.<sup>65</sup>

May a PHA terminate assistance for “other criminal activity”? At least one trial court construed the regulations as not authorizing the PHA to terminate for other criminal activity; the more specific language in 24 C.F.R. § 982.553(b) (providing for termination of assistance for drug-related or violent criminal activity) trumps the more general language in 24 C.F.R. § 982.551(l) (providing that members of the family may not engage in drug-related criminal activity, violent criminal activity, or other criminal activity that threatens the health, safety or right to peaceful enjoyment of other residents and persons residing in the immediate vicinity of the premises), the court found.<sup>66</sup>

Although HUD regulations authorize termination of assistance for a variety of grounds, establishing local standards allowing termination is up to the PHA, and the PHA must include those standards in its Section 8 administrative plan.<sup>67</sup> If a PHA did not include the full range of permissible grounds for termination of assistance in its administrative plan or

did not revise the plan, the PHA may be limited to the grounds that it did include. Moreover, the PHA must give tenants written notice of their family obligations under the Section 8 program and the grounds on which it may terminate the family’s assistance because of family action or failure to act.<sup>68</sup> If a PHA fails to give such notice or does not revise the notice to include all of the grounds that the regulations permit, the PHA may not proceed with termination.<sup>69</sup>

### 3. Section 8 Moderate Rehabilitation Program

The lease must provide that drug-related criminal activity engaged in on or near the premises by any tenant, household member, or guest and any such activity engaged in on the premises by any other person under the tenant’s control is grounds for termination of tenancy.<sup>70</sup> The owner may terminate the tenancy when the owner determines that a household member is illegally using a drug.<sup>71</sup> The PHA may terminate assistance under any of the following circumstances:

- Any tenant, household member, or guest engages in drug-related criminal activity on or near the premises or any other person under the tenant’s control engages in any such activity on the premises.<sup>72</sup>
- Any member of the household has ever been convicted of drug-related criminal activity for manufacturing or producing methamphetamine on the premises of federally assisted housing.<sup>73</sup>

<sup>64</sup>*Id.* §§ 982.551(e), 982.552(c)(1)(i). While 24 C.F.R. § 982.552(c)(1)(i) permits, but does not require, a PHA to terminate Section 8 voucher assistance for breach of a lease provision, 24 C.F.R. § 982.552(b)(2) requires that a PHA terminate assistance where the family is evicted for a serious or repeated lease violation.

<sup>65</sup>Compare *id.* § 982.553(a) (distinguishing between mandatory and permissive prohibitions on admission) with *id.* § 982.553(b) (containing no similar language with the exception of the methamphetamine language).

<sup>66</sup>*Costa v. Fall River Housing Authority*, No. 04-CV-00193, 2005 WL 5142647 (Mass. S.E. Housing Ct. Jan. 26, 2005).

<sup>67</sup>24 C.F.R. § 982.54(d)(4)(iii) (2006).

<sup>68</sup>*Id.* § 982.552(d)(1)–(2).

<sup>69</sup>*Aikens v. District of Columbia Department of Housing and Community Development*, 515 A.2d 712, 718–19 (D.C. 1986) (Clearinghouse No. 41,764).

<sup>70</sup>24 C.F.R. § 882.511(a)(2) (2006).

<sup>71</sup>*Id.*

<sup>72</sup>*Id.* § 882.518(c)(1)(i).

<sup>73</sup>*Id.* § 882.518(c)(1)(ii). The PHA “must immediately terminate” assistance in this instance (i.e., termination is mandatory rather than permissive). *Id.*

- Any household member is engaged in criminal activity that threatens the health, safety, or right of peaceful enjoyment of the premises by other residents or by persons residing in the immediate vicinity of the premises.<sup>74</sup>
- A member of the household is fleeing to avoid prosecution, or custody or confinement after conviction, for a felony or an attempt to commit a felony.<sup>75</sup>
- any drug-related criminal activity engaged in on or near the premises by a tenant, household member, or guest, or on the premises by any other person under the tenant's control;<sup>79</sup>
- a household member or tenant illegally using a drug;<sup>80</sup> and
- a tenant fleeing to avoid prosecution, or custody or confinement after a conviction, for a crime or attempt to commit a crime that is a felony under the laws of the place from where the individual flees.<sup>81</sup>

Only the first of these four provisions applies to nonhousehold members.

### C. HUD-Subsidized Multifamily Housing

Many of the concepts and standards for criminal activity in public housing apply to HUD-subsidized multifamily housing.<sup>76</sup> However, there are separate statutes and regulations.<sup>77</sup> Activities constituting a legal basis for lease termination and eviction include the following:

- any criminal activity that threatens the health, safety, or right to peaceful enjoyment either of the premises by other residents (including property management staff residing on the premises) or of residences by persons residing in the immediate vicinity of the premises;<sup>78</sup>

Methamphetamine convictions are not separately regulated in these programs.<sup>82</sup>

### D. Rural Housing Service-Subsidized Housing Programs

Although HUD provides funding and regulates the programs discussed above, the U.S. Department of Agriculture provides funding and regulates the Rural Housing Service-subsidized housing programs.<sup>83</sup> The regulations for Rural Housing Service programs contain the most protection for tenants facing criminal-activity claims.<sup>84</sup> However, HUD recently revised its regulations to provide less protection to tenants. HUD regulations on terminating tenancies for criminal activity

<sup>74</sup>*Id.* § 882.518(c)(2).

<sup>75</sup>*Id.* § 882.518(c)(2)(ii). For federal public housing or tenant-based Section 8, the parallel regulation on “fleeing felons” is limited to the tenant’s own conduct. *Id.* §§ 966.4(l)(5)(ii)(B), 982.310(c)(2)(ii). The Section 8 moderate rehabilitation regulation, by extending authorization for termination to conduct of persons other than the tenant, may be inconsistent with the statute (which is also limited to “the tenant”). See *supra* note 57 and accompanying text.

<sup>76</sup>See *supra* notes 19–53 and accompanying text.

<sup>77</sup>42 U.S.C.A. §§ 1437f(d)(1)(B)(iii), 1437f(d)(1)(B)(v), 13662(a)(1) (West 2006); 24 C.F.R. §§ 5.858, 5.859, 247.3(a)(3) (2006); see U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, HUD HANDBOOK 4350.3: OCCUPANCY REQUIREMENTS OF SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS, Rev. 1, § 8-14 (2003), available at [www.hudclips.org/cgi/index.cgi](http://www.hudclips.org/cgi/index.cgi) (follow “Library” hyperlink, then follow “Handbooks and Notices,” then search Housing (Handbooks), and enter “4350.3”) [hereinafter HUD HANDBOOK 4350.3] (stating actions that owners should take where drug abuse or other criminal activity occurs in federally subsidized multifamily housing).

<sup>78</sup>42 U.S.C.A. § 1437f(d)(1)(B)(iii) (West 2006); 24 C.F.R. § 5.859(a)(1)–(2) (2006).

<sup>79</sup>42 U.S.C.A. § 1437f(d)(1)(B)(iii) (West 2006); 24 C.F.R. § 5.858 (2006); see *supra* note 57.

<sup>80</sup>42 U.S.C.A. § 13662(a)(1) (West 2006); 24 C.F.R. § 5.858 (2006).

<sup>81</sup>42 U.S.C.A. § 1437f(d)(1)(B)(v) (West 2006); 24 C.F.R. § 5.859(b) (2006).

<sup>82</sup>The regulations for public housing and Section 8 tenant-based voucher and moderate rehabilitation programs do not apply to other HUD-subsidized programs. See *supra* notes 49, 59, and 73 and accompanying text.

<sup>83</sup>The Rural Housing Service was formerly the Rural Housing and Community Development Service and, before that, the Farmers Home Administration.

<sup>84</sup>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).

exclude Rural Housing Service programs from their scope.<sup>85</sup> But the Rural Housing Service regulations now specifically incorporate by reference those same HUD regulations.<sup>86</sup>

Tenant defenses to eviction from Rural Housing Service–subsidized housing programs include the following:

- 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.<sup>87</sup>
- The tenant, household member, guest, or someone under the tenant’s control did not conduct illegal drug activity on the premises.<sup>88</sup>
- 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.<sup>89</sup>
- 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.<sup>90</sup>

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.<sup>91</sup>

### E. Low-Income Tax Credit Program

The low-income housing tax credit program, administered through the Internal Revenue Service, provides tax credits to support the operation of privately owned low-income housing.<sup>92</sup> The program requires good cause for eviction but does not have separate requirements for criminal-activity cases, although one court applied the regulations for HUD-subsidized housing to tax credit programs.<sup>93</sup> Low-income tax credits often are used in conjunction with other programs (such as federal public housing or HUD multifamily subsidized housing), and those programs’ eviction and termination of subsidy rules overlap with tax credit rules.

### F. Violence Against Women Act

The Violence Against Women and Department of Justice Reauthorization Act of 2005 (commonly called the Violence Against Women Act) amended statutes governing evictions for criminal activity in public and subsidized housing.<sup>94</sup> The Act provides that

criminal activity directly relating to domestic violence, dating

<sup>85</sup>24 C.F.R. § 5.850(c) (2006).

<sup>86</sup>7 C.F.R. § 3560.159(d) (2006) (referring to 24 C.F.R. §§ 5.858, 5.859, 5.860, 5.861); see *supra* notes 77–82 and accompanying text.

<sup>87</sup>See *id.* § 3560.159(a)(1)(iii).

<sup>88</sup>See *id.*

<sup>89</sup>See *id.* § 3560.156(c)(15). If a nonadult household member commits a further drug violation, the owner may require the member to be severed from the tenancy as a condition for the household’s continued occupancy. *Id.*

<sup>90</sup>See *id.* § 3560.156(b)(15).

<sup>91</sup>*Id.* § 3560.159(a); see *infra* notes 165–67 and accompanying text.

<sup>92</sup>26 U.S.C.A. § 42 (West 2006).

<sup>93</sup>*Id.* § 42(h)(6)(e)(ii)(I); *Cimarron Village Townhomes v. Washington*, No. C3-99-118, 1999-WL-538110 (Minn. Ct. App. July 27, 1999) (unpublished) (holding that landlord should not terminate Section 42 low-income tax credit tenancies without cause); see also *Bowling Green Manor L.P. v. Kirk*, No. WD 94-125, 1995 WL 386476, at \*4–6 (Ohio Ct. App. June 30, 1995) (app. 83) (concluding that, because of similarities between the tax credit landlord-tenant relationship and that of other subsidized project landlords and tenants, tenant protections under 24 C.F.R. § 880.607 for the Section 8 New Construction Program applied), and *infra* notes 160–64 and accompanying text (HUD-subsidized multifamily housing).

<sup>94</sup>Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, tit. VI, §§ 606–7, 119 Stat. 2960, 3042–51 (amending 42 U.S.C. §§ 1437d, 1437f); see also Pub. L. No. 109-271, § 5(f), 120 Stat. 761 (2006) (providing technical corrections of relevant portions of the Act); 72 Fed. Reg. 12696, 12696–12700 (March 16, 2007) (Violence Against Women and Department of Justice Reauthorization Act of 2005: Applicability to HUD Programs).

violence, or stalking, engaged in by a member of the tenant's household, or any guest or other person under the tenant's control shall not be cause for termination of assistance, tenancy or occupancy rights if the tenant or an immediate member of the tenant's family is the victim or threatened victim of that domestic violence, dating violence, or stalking.<sup>95</sup>

For the Section 8 program, "criminal activity directly related to domestic violence, dating violence, or stalking shall not be considered a serious or repeated violation of the lease by the victim or threatened victim of that criminal activity justifying termination of assistance to the victim or threatened victim."<sup>96</sup> The PHA or owner may bifurcate a lease to evict, remove, or terminate assistance to any individual who is a tenant or lawful occupant and who engages in criminal acts of physical violence against family members or others without evicting, removing, terminating assistance to, or otherwise penalizing the victim of such violence where the victim is also a tenant or lawful occupant.<sup>97</sup>

The Act does not limit the authority of a PHA or owner, when notified, to honor court orders addressing rights of access to or control of the property; such court orders include civil protection orders issued to protect the victim and issued to address the distribution or possession of property among the household members in the case of family breakup.<sup>98</sup> Nothing

in the Act limits any otherwise available authority of the PHA or owner to evict a tenant or terminate assistance for any violation not premised on the act or acts of violence in question against the tenant or a member of the tenant's household, provided that the PHA or owner does not subject an individual who is or has been a victim of domestic violence, dating violence, or stalking to a more demanding standard than other tenants in deciding whether to evict or terminate assistance.<sup>99</sup> The PHA's or owner's authority to evict or terminate assistance is not limited if the PHA or owner can demonstrate "an actual and imminent threat to other tenants or those employed at or providing service to the property" if that tenant is not evicted or terminated from assistance.<sup>100</sup> HUD has not yet issued regulations, but it has informed PHAs that they must implement the Violence Against Women Act.<sup>101</sup>

#### IV. Exercise of Discretion: Who Decides?

An issue left unresolved by the *Rucker* decision is who or what retains discretion to decide whether to evict and whether that decision is reviewable.

##### A. Exercise of Discretion

For the tenant-based Section 8 voucher program, the owner exercises discretion in eviction decisions.<sup>102</sup> However, the PHA exercises discretion in termination-of-assistance decisions.<sup>103</sup> For the HUD-subsidized multifamily housing programs, the owner exercises discretion

<sup>95</sup>42 U.S.C.A. §§ 1437d(l)(6)(A), 1437f(d)(1)(B)(iii), 1437f(o)(7)(D) (West 2006).

<sup>96</sup>*Id.* § 1437f(o)(20)(B).

<sup>97</sup>*Id.* § 1437d(l)(6)(B).

<sup>98</sup>*Id.* § 1437d(l)(6)(C).

<sup>99</sup>*Id.* § 1437d(l)(6)(D).

<sup>100</sup>*Id.* § 1437d(l)(6)(E).

<sup>101</sup>PIH [HUD's Office of Public and Indian Housing] Notice 2006-23 (June 23, 2006), [www.hudclips.org/sub\\_nonhud/html/pdf/forms/06-23PIH.doc](http://www.hudclips.org/sub_nonhud/html/pdf/forms/06-23PIH.doc) (informing public housing agencies of the passage of the Violence Against Women and Department of Justice Reauthorization Act of 2005); see also PIH Notice 2006-42 (Dec. 27, 2006) (transmitting HUD Form 50066), [www.hud.gov/offices/pih/publications/notices/06/pih2006-42.pdf](http://www.hud.gov/offices/pih/publications/notices/06/pih2006-42.pdf); HUD Form 50066 (Certificate of Domestic Violence, Dating Violence, or Stalking).

<sup>102</sup>24 C.F.R. § 982.310(h) (2006).

<sup>103</sup>*Id.* § 982.552(c)(2).

in eviction decisions.<sup>104</sup> For the public housing program, the PHA exercises discretion in eviction decisions.<sup>105</sup>

Many of the factors that may be considered in exercising this discretion are the same for all of the housing programs: the PHA or owner (as applicable) may consider all circumstances relevant to a particular case; circumstances include the seriousness of the offending action, the extent of the leaseholder's participation in the offending action, and the effects of eviction or termination of assistance on family members who were not involved in the offending activity.<sup>106</sup> Moreover, in all of the programs, the PHA or owner may require a tenant to exclude a household member in order for the tenant to continue residing in the assisted unit (or as a requirement for continued subsidy) where the household member participated in or was culpable for action or failure to act warranting termination of assistance or eviction.<sup>107</sup> Where the eviction or termination is related to illegal drug use, the PHA or owner may consider whether the household member is participating in or completed a supervised drug rehabilitation program or is otherwise rehabilitated, and the household may be required to submit evidence of current participation in or completion of a supervised program or evidence of otherwise having been rehabilitated.<sup>108</sup>

There are some differences in the language about consideration of circumstances among the different programs. To terminate assistance in the Section 8 tenant-based voucher program, the PHA must consider mitigating circumstances

related to the disability of a family member.<sup>109</sup> For eviction decisions by Section 8 voucher landlords and in public housing and multifamily housing programs, another factor is the extent to which the leaseholder showed personal responsibility and took all reasonable steps to prevent or mitigate the offending action.<sup>110</sup> For eviction decisions by Section 8 voucher landlords and in multifamily housing, other factors are the effect of termination of assistance on the community or the failure of the owner to terminate assistance, the demand for assisted housing by families who will adhere to lease responsibilities, and the effect of the owner's action on the integrity of the program.<sup>111</sup>

## B. Review of Exercise of Discretion by Parties Other than the PHA or Owner

Conferring discretion on PHAs “does not constitute a conferral of discretion on local courts to consider factors other than those appropriate under the lease,” HUD states in the preamble to its 2001 regulation.<sup>112</sup> However, the “discretion” language itself is part of the lease: “A lease shall be entered into between the PHA and each tenant of a dwelling unit which shall contain the provisions described hereinafter.”<sup>113</sup>

After the *Rucker* decision, in *Oakwood Plaza Apartments v. Smith*, the Appellate Division of the New Jersey Superior Court recognized that *Rucker* did not mandate eviction and was therefore not inconsistent with an individualized evaluation by the trial court of the specific

<sup>104</sup>*Id.* § 5.852 (HUD-subsidized multifamily housing programs, including project-based Section 8, Section 202, Section 811, Section 221(d)(3), and Section 236 housing).

<sup>105</sup>*Id.* § 966.4(l)(5)(vii).

<sup>106</sup>*Id.* §§ 5.852(a)–(c), 966.4(l)(5)(vii)(B)–(D), 982.310(h), 982.552(c)(2).

<sup>107</sup>*Id.*

<sup>108</sup>*Id.*

<sup>109</sup>*Id.* § 982.552(c)(2)(l).

<sup>110</sup>*Id.* §§ 5.850(a)(6), 966.4(l)(5)(vii)(B), 982.310(h)(1)(vi).

<sup>111</sup>*Id.* §§ 5.850(a)(2), (5), (7); 982.310(h)(1)(ii), (v), (vii).

<sup>112</sup>66 Fed. Reg. 28776, 28783 (May 24, 2001).

<sup>113</sup>24 C.F.R. § 966.4 (2006).

circumstances of each case.<sup>114</sup> The court remanded the case to the trial court for consideration of whether eviction from a HUD-subsidized multifamily housing project was warranted on the facts of that particular case.<sup>115</sup> HUD criticized *Oakwood Plaza* as contrary to its reading of *Rucker*, which, HUD claimed, leaves the exercise of discretion solely to the PHA or owner; HUD stated that discretion should not be second-guessed by the courts.<sup>116</sup> In *Bennington Housing Authority v. Davis* the Vermont Superior Court dismissed a public housing eviction involving an isolated incident of tenant's visiting son shooting an owl protected by the Endangered Species Act.<sup>117</sup> The court concluded that the lease gave the landlord authority to evict but the lease did not mandate eviction and that the landlord failed to demonstrate meaningful consideration of tenant's ability to supervise her son in the future or the consequences of eviction on innocent siblings.<sup>118</sup> However, in *Scarborough v. Winn Residential LLP* the District of Columbia Court of Appeals rejected a claim that the owner's decision should be reviewed on an abuse-of-discretion standard; the court found that where criminal activity created a sufficient basis for eviction, courts did not review the owner's exercise of discretion.<sup>119</sup>

Courts reviewed the role of PHA grievance panels and hearing officers in re-

viewing PHA and landlord decisions on eviction. In *Wojcik v. Lynn Housing Authority* the Massachusetts Court of Appeals held that, in a case not involving criminal activity directly, a PHA hearing officer had the discretion to determine whether a Section 8 tenant-based voucher termination was warranted in light of the circumstances enunciated there and that the PHA was not free to override the hearing officer's judgment that termination was not warranted.<sup>120</sup> The court said that the PHA must exercise its discretion in light of the evidence submitted and that the PHA could not simply refuse to exercise its discretion.<sup>121</sup>

However, in *Carter v. Lynn Housing Authority* the same court found that, where the tenant had failed to introduce—at the Section 8 voucher-termination hearing—evidence of mitigating or extenuating circumstances, the hearing officer acted appropriately in permitting termination and that the trial court should not have substituted its judgment for the hearing officer's.<sup>122</sup> This case is under further appellate review. Where a PHA grievance panel or hearing officer has jurisdiction over a public housing eviction, the panel or officer may review the exercise of discretion and may decide that eviction is not warranted, several courts held.<sup>123</sup>

<sup>114</sup>*Oakwood Plaza Apartments v. Smith*, 800 A.2d 265, 270–71 (N.J. Super. Ct. App. Div. 2002).

<sup>115</sup>*Id.* at 271.

<sup>116</sup>Letter from Carole W. Wilson, Associate General Counsel for Litigation, HUD, to Charles J. Macellaro, Attorney (Aug. 15, 2002), [www.hud.gov/offices/pih/regs/rucker15aug2002.pdf](http://www.hud.gov/offices/pih/regs/rucker15aug2002.pdf) (HUD legal opinion issued to PHA for Yonkers, New York, regarding *Rucker* and HUD regulations). In the opinion, HUD repeats its position that a PHA is not required to apply or consider the discretionary factors in deciding whether to evict or to terminate assistance but is free to do so if it wishes to do so). *Id.* HUD also notes that in *Oakwood Plaza* the leaseholder herself committed the wrongdoing. *Id.* n.4.

<sup>117</sup>Endangered Species Act, 16 U.S.C. §§ 531 *et seq.*; *Bennington Housing Authority v. Davis*, No. 203-6-02, at 4–8 (Vt. Super. Ct. Jan 14, 2003) (app. 466) (Clearinghouse No. 55,142).

<sup>118</sup>*Id.*

<sup>119</sup>*Scarborough v. Winn Residential LLP*, 890 A.2d 249, 258–59 (D.C. 2006).

<sup>120</sup>*Wojcik v. Lynn Housing Authority*, 845 N.E.2d 1160, 1167–69 (Mass. App. Ct. 2006).

<sup>121</sup>*Id.* at 1167, n.10; see 24 C.F.R. § 982.552(c)(2) (2006) (permitting PHA to consider certain circumstances in determining whether to terminate assistance).

<sup>122</sup>*Carter v. Lynn Housing Authority*, 851 N.E.2d 437, 442–43 (Mass. App. Ct. 2006), appeal docketed, No. SJC-09785, 850 N.E.2d 583 (Mass. June 28, 2006) (oral argument presented March 5, 2007; case under advisement).

<sup>123</sup>See, e.g., *Housing and Redevelopment Authority of Waconia v. Chandler*, 403 N.W.2d 708, 712–13 (Minn. Ct. App. 1987); *Boston Housing Authority v. Figueroa*, No. 02-SP-03297, 2003 WL 24029487, at \*5 n.6 (Mass. Housing Ct., Winik, J., Oct. 10, 2003) (Clearinghouse No. 55,460); *Boston Housing Authority v. Grant*, No. 02-SP-03299, at 3–8 (Mass. Housing Ct., Chaplin, J., 2005).



## V. Still Required: Proper Notice and Procedure

The attorney or advocate for the tenant should not overlook other federal legal and regulatory requirements, and lease provisions concerning evictions apply to all cases, whether or not the PHA or landlord alleges criminal activity. PHAs or owners sometimes rely on older or unique leases. Their doing so may give tenants arguments that the basis being used for eviction is narrower than what federal law and regulations permit, that the PHA or owner must satisfy elements in addition to those that federal law requires, or that the leases establish specific defenses.<sup>124</sup>

Because most of the housing programs require specificity in the notice of termination of the lease, the PHA or owner is limited to the grounds stated in the notice so that the tenant can adequately prepare for the hearing.<sup>125</sup> However, the PHA or owner may not be barred from proceeding on different grounds in the future, particularly if the prior case was resolved solely on a procedural basis.

### A. Public Housing

The notice must be in writing and delivered to the tenant or to an adult member

of the tenant's household residing in the dwelling or sent by prepaid first-class mail properly addressed to the tenant.<sup>126</sup> The notice must state specific grounds for termination of the tenancy and give enough information that the tenant can prepare a defense.<sup>127</sup> This means both describing what lease provisions the tenant allegedly violated and what occurred.<sup>128</sup> The notice must give a reasonable amount of time, not to exceed thirty days, before the termination of the tenancy is effective.<sup>129</sup>

The notice must advise the tenant of the right to reply as the tenant may wish and the right to examine—either before a grievance hearing (if there is a right to a grievance hearing) or before trial—PHA documents directly relevant to the eviction.<sup>130</sup> HUD regulations make clear that the PHA may not proceed with eviction if the tenant requests documents and the PHA does not furnish them.<sup>131</sup>

If the notice states that the tenant has the right to request a grievance hearing, it must describe the way in which the tenant can request a hearing and any deadline for submitting the request.<sup>132</sup> If the tenant requests a grievance hearing, the tenant should have the opportunity for an informal conference with the PHA.<sup>133</sup>

<sup>124</sup>See *Housing Authority of Salt Lake v. Snyder*, 44 P.3d 724, 728–30 (Utah 2002) (holding that lease did not refer to grievance rights or exemptions and that tenant thus must have grievance hearing).

<sup>125</sup>See, e.g., 24 C.F.R. § 247.6(b) (2006); see also NATIONAL HOUSING LAW PROJECT, HUD HOUSING PROGRAMS: TENANTS' RIGHTS § 14.3.2.3 (3d ed. 2004 & 2006–2007 Supp.) (discussing situations in which PHA or owner seeks to assert a new basis for terminating tenancy); LAWRENCE R. McDONOUGH, RESIDENTIAL UNLAWFUL DETAINER AND EVICTION DEFENSE AND FORMS (2004), <http://povertylaw.homestead.com/ResidentialUnlawfulDetainer.html> (detailed analysis of preconditions to eviction under Minnesota law).

<sup>126</sup>42 U.S.C.A. § 1437d(l)(4) (West 2006) (requiring adequate written notice); 24 C.F.R. § 966.4(k)(1)(i) (2006).

<sup>127</sup>42 U.S.C.A. § 1437d(k)(1) (West 2006); 24 C.F.R. § 966.4(l)(3)(ii) (2006).

<sup>128</sup>*Escalera v. New York City Housing Authority*, 425 F.2d 853, 862 (2d Cir. 1970) (Clearinghouse No. 832).

<sup>129</sup>42 U.S.C.A. § 1437d(l)(4)(A) (West 2006); 24 C.F.R. § 966.4(l)(3) (2006); see *New York City Housing Authority v. Harvell*, 731 N.Y.S.2d 919, 920–21 (N.Y. App. Term 2001) (holding that eviction should be dismissed because of PHA's failure to give federally required notice period, even though no such period would be required by state law).

<sup>130</sup>42 U.S.C.A. § 1437d(k), (l)(7) (West 2006); 24 C.F.R. § 966.4(l)(3)(ii) (2006). The PHA must have an administrative grievance procedure available for public housing tenants and must inform tenants of the right to request a grievance hearing whenever the PHA takes an "adverse action" against the tenant with which the tenant disagrees. See *id.* pt. 966, subpt. B. Adverse action includes a decision by the PHA to terminate the lease. 42 U.S.C.A. § 1437d(k) (West 2006); 24 C.F.R. 966.4(e)(8) (2006) (defining "adverse action").

<sup>131</sup>24 C.F.R. § 966.4(m) (2006); see *Meriden Housing Authority v. Diaz*, No. SPM 9109-3204, 1992 WL 134612, at \*2–3 (Conn. Super. Ct. 1992) (dismissing eviction where PHA did not disclose to tenant about the right to examine documents).

<sup>132</sup>42 U.S.C.A. § 1437d(k)(2) (West 2006); 24 C.F.R. § 966.4(e)(8), 966.4(l)(3)(ii), (iv) (2006).

<sup>133</sup>24 C.F.R. § 966.54 (2006); see *Dial v. Star City Public Housing Authority*, 648 S.W.2d 806 (Ark. Ct. App. 1983) (holding that eviction was invalid because PHA failed to hold informal conference).

After the informal conference, the PHA should give the tenant a summary of the informal conference, its outcome, and the manner in which the tenant can request a formal hearing and the deadline for submitting such a request.<sup>134</sup> If the PHA does not give notice of grievance rights or starts an eviction before the time to request a grievance hearing elapses or before the grievance procedure is exhausted, a court may dismiss the eviction.<sup>135</sup> If the PHA believes that it is not required to afford the tenant an opportunity for a grievance hearing, the notice must state this, as well as all of the following, in addition to the other elements outlined above: the judicial eviction procedure that the PHA will use for eviction, HUD's determination that this eviction procedure meets HUD requirements for due process, and the finding of whether the eviction is for criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises of other residents or PHA employees or is for drug-related criminal activity.<sup>136</sup>

In public housing cases, a PHA may exclude from the administrative grievance procedure

any grievance concerning an eviction or termination of tenancy that involves (1) any criminal activity that threatens the health, safety, or right to peace-

ful enjoyment of the premises of other tenants or employees of the public housing agency; or (2) any violent or drug-related criminal activity on or off such premises; or (3) any activity resulting in a felony conviction.<sup>137</sup>

Bypass of the administrative grievance procedure is not automatic. A PHA must elect whether to exclude the full scope of excludable evictions from its grievance procedure and revise the grievance procedure to specify which evictions it excluded and must give residents a thirty-day notice-and-comment opportunity.<sup>138</sup>

Some state laws require grievance rights even where federal law does not require them.<sup>139</sup> The state's grievance procedure may require that the procedure be made available where the crime did not take place near the development or did not have an impact on other tenants or where a guest committed the crime.<sup>140</sup> Some states designate some offenses as noncriminal; this designation makes the commission of such offenses an improper basis for a PHA to bypass the required administrative grievance procedure for lease terminations.<sup>141</sup>

## B. Section 8 Voucher Program

The landlord must give any eviction notice required by state law or court papers

<sup>134</sup>42 U.S.C.A. § 1437d(k) (West 2006); 24 C.F.R. §§ 966.55–966.57 (2006). Some PHAs give the opportunity for an informal conference in all eviction cases, whether grievable or not, and then include notice of the further right to a formal hearing in only those cases where the tenant has a right to a grievance hearing.

<sup>135</sup>*Spence v. Reeder*, 416 N.E.2d 914, 926–27 (Mass. 1981).

<sup>136</sup>24 C.F.R. §§ 966.4(l)(3)(v), 966.51(a)(2)(i)(A)–(B) (2006); see *Housing Authority of Newark v. Raindrop*, 670 A.2d 1087 (N.J. Super. Ct. App. Div. 1996) (dismissing eviction because PHA did not give the required information).

<sup>137</sup>42 U.S.C.A. § 1437d(k) (West 2006); 24 C.F.R. § 966.51 (2006).

<sup>138</sup>24 C.F.R. §§ 966.4(l)(3)(v), 966.52(c) (2006).

<sup>139</sup>See, e.g., MASS. GEN. LAWS ANN. ch. 121B, § 32 (West 2006); R.I. GEN. LAWS § 45-25-18.7 (2006); see also *Spence*, 416 N.E.2d at 927 n.17 (holding that although federal law would have allowed PHA to skip conducting grievance hearing, state law did not so allow).

<sup>140</sup>See, e.g., *Boston Housing Authority v. Hunt*, No. 99-SP-05893 (Mass. Housing Ct. 2000) (holding that, under Massachusetts state law on grievance rights, PHA must give opportunity for hearing where the conduct was directed against neighbors and not PHA tenants).

<sup>141</sup>See, e.g., *Minneapolis Public Housing Authority v. [Redacted]*, No. HC020710513, at 1–2 (Minn. Dist. Ct. Aug. 2, 2002) (app. 547a) (party name redacted from court order) (deciding that possession of a small amount of marijuana—a petty misdemeanor and not a crime under Minnesota law—is not drug-related “criminal” activity and not appropriate for or bypass of the grievance process), aff'd (Sept. 16, 2002) (app. 547b) (referee's decision affirmed on judge review); *Southgate Mobile Village*, No. HC-0205315400 (holding that 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).

to the PHA.<sup>142</sup> If the PHA decides to terminate the tenant's housing subsidy, the PHA must give written notice to the tenant and the opportunity to contest the termination at an informal hearing.<sup>143</sup> The PHA must give the tenant the opportunity for a hearing before it terminates assistance payments under an outstanding subsidy contract.<sup>144</sup> If the tenant is no longer in an assisted unit, a court may nonetheless find that the PHA has a duty to conduct a speedy hearing.<sup>145</sup> The notice must contain a brief statement of reasons for the decision to terminate assistance, state that the family may request an informal hearing if it does not agree with the decision, and give the deadline by which the family may request an informal hearing.<sup>146</sup> The PHA's Section 8 administrative plan should describe the time frames for requesting informal hearings.<sup>147</sup> The notice must be sufficiently specific—such as stating the specific crime and the person who allegedly committed it and giving a brief factual statement concerning the incident—so that the tenant can prepare a rebuttal.<sup>148</sup>

The PHA must give the family the opportunity to examine, before the informal hearing, any PHA documents that are directly relevant to the hearing.<sup>149</sup> The

family must be permitted to copy any such document at the family's expense.<sup>150</sup> If the PHA does not make the document available for examination on request of the family, the PHA may not rely on the document at the hearing.<sup>151</sup> The PHA's policies may provide that the PHA have an opportunity to examine, at its offices before the hearing, any of the family's documents that are relevant to the hearing, with similar provisions for copying at the PHA's expense and exclusion if the family does not supply the document for review at the PHA's request.<sup>152</sup> Any person or persons whom the PHA designates may conduct the hearing except the person who made or approved the decision under review or a subordinate of that person.<sup>153</sup> The PHA and the family must have the opportunity to present evidence and to question any witnesses.<sup>154</sup> Although the regulations provide that the hearing officer may consider evidence without regard to its admissibility under the rules of evidence applicable to judicial proceedings, a court may later find that the PHA impermissibly rested too much of its case on unreliable hearsay or that the due process right to confront and cross-examine was denied.<sup>155</sup>

The hearing officer must issue a written decision that states briefly the reasons

<sup>142</sup>24 C.F.R. § 982.310(e)(2)(ii) (2006); *Santouse v. Scott*, No. HDSP137470, 2006 WL 1600385, at \*2–3 (Conn. Super. Ct. May 31, 2006) (dismissing eviction where landlord failed to prove compliance).

<sup>143</sup>24 C.F.R. § 982.555(a)(1)(v), 982.555(c)(2) (2006).

<sup>144</sup>*Id.* § 982.555(a)(2).

<sup>145</sup>*Lowery v. District of Columbia Housing Authority*, No. 04-1868 (RMC), 2006 WL 666840, at \*9 (D.D.C. March 14, 2006).

<sup>146</sup>24 C.F.R. § 982.555(c)(2)(i)–(iii) (2006).

<sup>147</sup>*Id.* § 982.54(d)(13).

<sup>148</sup>*Edgecomb v. Housing Authority of Vernon*, 824 F. Supp. 312, 315 (D. Conn. 1993) (Clearinghouse No. 49,093).

<sup>149</sup>24 C.F.R. § 982.555(e)(2)(i) (2006).

<sup>150</sup>*Id.*

<sup>151</sup>*Id.*

<sup>152</sup>*Id.* § 982.555(e)(2)(ii).

<sup>153</sup>*Id.* § 982.555(e)(4)(i); see *Fields v. Omaha Housing Authority*, No. 8:04CV554, 2006 WL 176629, at \*2 (D. Neb. Jan. 23, 2006) (holding that tenants have a claim under 42 U.S.C. § 1983 to the extent that hearing on the termination of their assistance was held before subordinates of the person who made the original decision).

<sup>154</sup>24 C.F.R. § 982.555(e)(5) (2006).

<sup>155</sup>*Id.*; see *Goldberg v. Kelly*, 397 U.S. 254, 269–70 (1970) (holding that due process requires opportunity for welfare recipients to confront and cross-examine those with evidence against them before their benefits are terminated); *Edgecomb*, 824 F. Supp. at 316 (holding that tenant was denied opportunity to confront and cross-examine witnesses where PHA relied solely on police report and newspaper articles in support of its Section 8 termination case).

for the decision.<sup>156</sup> Factual determinations relating to the family's individual circumstances must be based on a preponderance of the evidence presented at the hearing.<sup>157</sup> The PHA must give a copy of the hearing decision promptly to the family.<sup>158</sup> A hearing decision, just like a notice of proposed termination of assistance, must be sufficiently specific as to the basis for the action and the facts found or it may be found invalid on due process grounds.<sup>159</sup>

### C. HUD-Subsidized Multifamily Housing

The notice must state the date of termination of the tenancy, the grounds for termination with sufficient detail such that the tenant can defend the eviction in court, and the number of days—ten—that the tenant has to discuss the termination of the tenancy with the landlord.<sup>160</sup> The landlord must serve the notice personally and by mail.<sup>161</sup> The landlord must give the notice regardless of what type of legal action the landlord files to evict the tenant.<sup>162</sup> The landlord must comply with both federal and state notice requirements.<sup>163</sup> If the tenant requests the meeting—discussed in the notice—with the landlord, the meeting must be a meaningful opportunity for the tenant to discuss the eviction with the landlord.<sup>164</sup>

### D. Rural Housing Service–Subsidized Housing Programs

The landlord must give the tenant proper notice of an alleged lease violation with an opportunity to cure before giving a lease termination notice.<sup>165</sup> The landlord also must give the tenant a written lease termination notice before filing an eviction court case.<sup>166</sup> The notice must contain

- (1) [a] specific date by which lease termination will occur;
- (2) [a] statement of the basis for lease termination with specific reference to the provisions of the lease or occupancy rules that, in the borrower's judgment, have been violated by the tenant in a manner constituting material non-compliance or good cause;
- and (3) [a] statement explaining the conditions under which the borrower may initiate judicial action to enforce the lease termination notice.<sup>167</sup>

### VI. Interrelationship Between Criminal and Civil Proceedings

Some courts hold that evidence obtained from an illegal police search of the apartment may not be used in the eviction case.<sup>168</sup> Suppression may depend on whether the party involved in the illegal

<sup>156</sup>24 C.F.R. § 982.555(e)(6) (2006).

<sup>157</sup>*Id.*

<sup>158</sup>*Id.*

<sup>159</sup>*Goldberg*, 397 U.S. at 271; *Edgecomb*, 824 F. Supp. at 316; *Driver v. Housing Authority of Racine County*, 713 N.W.2d 670, 677–78 (Wisc. Ct. App. 2006).

<sup>160</sup>HUD HANDBOOK 4350.3, *supra* note 77, ch. 8 (replacing ch. 4), § 8-13. HUD HANDBOOK 4350.3 and 24 C.F.R. § 247.4 have virtually identical procedural requirements except that only the HANDBOOK provides for the ten-day meeting right.

<sup>161</sup>HUD HANDBOOK 4350.3, *supra* note 77, § 8-13 (specifying that these service requirements are only for Section 8 set-aside and property disposition, Section 202/8, Section 236, Section 221(d)(3), rent supplement, and rent assistance programs); see *Swords to Plowshares v. Smith*, 294 F. Supp. 2d 1067, 1070 (N.D. Cal. 2002) (dismissing eviction case because of, among other reasons, lack of proof of compliance with dual service requirements).

<sup>162</sup>*Sentinel Management Company v. Kraft*, No. UD-1920806546, at 3 (Minn. Dist. Ct. Aug. 12, 1992) (app. 11.1.3); *Jackson Terrace Association v. Paterson*, 589 N.Y.S.2d 141, 142 (N.Y. Dist. Ct. 1992).

<sup>163</sup>*Hedco Limited v. Blanchette*, 763 A.2d 639, 642–43 (R.I. 2000) (Clearinghouse No. 53,709).

<sup>164</sup>*Gorsuch Homes v. Wooten*, 597 N.E.2d 554, 559–60 (Ohio Ct. App. 1992).

<sup>165</sup>24 C.F.R. § 3560.159(a) (2006).

<sup>166</sup>*Id.* § 3560.159(b).

<sup>167</sup>*Id.*

<sup>168</sup>For a discussion of criminal search-and-seizure principles and their application to civil proceedings, see *Boston Housing Authority v. Guirola*, 575 N.E.2d 1100, 1104–5 (Mass. 1991).

search will profit from use of the evidence in the eviction case.<sup>169</sup>

The regulations do not require that the tenant or household member have been arrested or criminally convicted for the PHA or owner to proceed with eviction or termination of assistance. The burden of proof is preponderance of the evidence as to whether the person alleged to have committed the criminal activity engaged in the criminal activity.<sup>170</sup> The tenant or household member sometimes has a pending criminal case. Civil law attorneys and advocates representing tenants in criminal-activity evictions should consult and coordinate with criminal defense attorneys.<sup>171</sup> Fifth Amendment rights against self-incrimination can be asserted in the eviction trial and in pretrial stages, such as at an informal conference or grievance hearing. Tenants should be advised to confer with their criminal counsel about what they may or should say at any such conferences. Counsel may ask that the eviction case be postponed until the criminal action is disposed of so that the outcome of that case is clear and Fifth Amendment issues are resolved. However, the tenant does not have a right to postpone the eviction case, and the court may deny the request.<sup>172</sup> Although any adverse in-

ference drawn from the tenant's silence is insufficient by itself to prove the PHA's or owner's case, an adverse inference may be drawn after the PHA or owner presents its case.<sup>173</sup>

PHAs may obtain adult criminal records from law enforcement officials for lease enforcement and eviction, either for their own public housing and Section 8 programs or for owners of federally subsidized multifamily housing, with notice to the household before any eviction.<sup>174</sup> Where the PHA is performing the function of obtaining and reviewing adult criminal records for an owner of subsidized multifamily housing, the PHA may disclose criminal conviction records only if it determines that criminal activity by the household member as shown by such records received from a law enforcement agency may be a basis for eviction from a Section 8 unit and the owner certifies in writing that the owner will use the records only for eviction in a judicial proceeding based on such criminal activity.<sup>175</sup> State or federal laws may bar the use of any juvenile court determinations or any information from a juvenile docket against the juvenile except for very limited circumstances, such as later delinquency or criminal cases.<sup>176</sup> However, the PHA or landlord may use the juvenile records to

<sup>169</sup>Compare *CMJ Management Company v. Nunes*, No. 04-SP-01682, at 7–8 (Mass. Housing Ct. 2004) (not suppressing evidence based on defective search warrant where no showing that police would profit from wrongdoing if the evidence were used in the eviction case), with *Boston Housing Authority v. Andrews*, No. 05-SP-01781, at 6–9 (Mass. Housing Ct. 2006) (suppressing evidence where property manager's initial search was unreasonable and where PHA would profit from its wrongdoing if the court permitted PHA to use the evidence in the eviction). See also *Housing Authority of Stamford v. Dawkins*, 686 A.2d 994, 996–97 (Conn. 1997) (not suppressing evidence where the defect in the warrant was relatively minor); *Youssef v. United Management Company*, 683 A.2d 152, 156 (D.C. 1996) (not suppressing evidence where no showing that authorities intended to profit from improper search). See generally David H. Taylor, *Should It Take a Thief?: Rethinking the Admission of Illegally Obtained Evidence in Civil Cases*, 22 REVIEW OF LITIGATION 625 (2003).

<sup>170</sup>24 C.F.R. §§ 5.861, 882.518(c)(3), 966.4(l)(5)(iii)(A), 982.310(c)(3), 982.553(c) (2006).

<sup>171</sup>See *Minneapolis Public Housing Authority v. [Redacted]*, No. HC 1020213525 (Minn. Dist. Ct. March 21, 2002) (app. 544) (party name redacted from court order) (dismissing eviction where civil and criminal attorneys coordinated). See generally McGregor Smyth, *Bridging the Gap: A Practical Guide to Civil-Defender Collaboration*, 37 CLEARINGHOUSE REVIEW 56 (May–June 2003) (encouraging civil legal aid attorneys to collaborate with public defenders to provide better service to their clients).

<sup>172</sup>*54 West 16th Street Apartment Corporation v. Dawson*, 684 N.Y.S.2d 400, 403–5 (N.Y. Civ. Ct. 1998).

<sup>173</sup>*Baxter v. Palmigiano*, 425 U.S. 308, 316–20 (1976).

<sup>174</sup>42 U.S.C.A. § 1437d(q) (West 2006); 24 C.F.R. §§ 5.901–5.905 (2006).

<sup>175</sup>24 C.F.R. § 5.903(e)(2)(ii) (2006).

<sup>176</sup>See, e.g., MASS. GEN. LAWS ch. 119, §§ 60–60A (West 2006); see also 42 U.S.C.A. § 1437d(q)(1)(c) (West 2006) (stating that law enforcement agency shall give information relating to any criminal conviction of a juvenile only to the extent that the law of the applicable state, tribe, or locality authorizes release of such information). But see Katherine E. Walz, HUD v. Rucker *Opened Door to Kids' Juvenile Records*, 39 CLEARINGHOUSE REVIEW 144 (July–Aug. 2005) (discussing the “disturbing trend” of housing authorities illegally obtaining confidential juvenile court and arrest records or attempting to access them through court or legislative action in order to evict minors and their families).

contradict a claim that the adult guardian did not know or have any reason to know of wrongdoing.<sup>177</sup>

If the tenant is determined to be guilty in the criminal case after trial, the majority rule is that this determination collaterally estops the tenant from relitigating issues decided in the criminal case.<sup>178</sup> A plea bargain and admissions made during a plea bargain colloquy where the plea is ultimately accepted and not withdrawn are admissible against the tenant.<sup>179</sup> However, because a person may enter into a plea bargain for a variety of reasons, such as certainty of outcome, the tenant should have an opportunity to explain the circumstances of the plea bargain and why, despite the plea, the tenant should not be found to have engaged in criminal activity sufficient to result in eviction or termination of assistance.<sup>180</sup>

## VII. Other Defenses Not Specific to Criminal Activity

Whether or not the tenancy is subsidized, the attorney or advocate for the tenant should not overlook other federal and state statutory and common-law defenses that apply to eviction cases. One federal law defense is that the landlord or PHA did not reasonably accommodate

the tenant's disability.<sup>181</sup> Another is relief under the Servicemembers Civil Relief Act, which allows prevention of or stays of evictions of service members or their families in certain circumstances.<sup>182</sup>

State-law defenses vary from state to state. Examples of common defenses include the following:

- The landlord waived notice of the lease termination by accepting rent after the move-out date.<sup>183</sup>
- The landlord waived the alleged breach of the lease by accepting rent without reservation of rights after the alleged breach.<sup>184</sup>
- Tenant's forfeiture of the home would be a great injustice because the landlord's rights are adequately protected by the tenant's actions or assurances.<sup>185</sup>
- The court may evict a member of the household while allowing the others to remain.<sup>186</sup>

State statutes and common law may require for eviction other preconditions, such as proper service to obtain personal jurisdiction on the defendant, registration requirements on landlords, and statutes of limitations.<sup>187</sup>

<sup>177</sup>*Boston Housing Authority v. Tapia*, No. 05-SP-04324 (Mass. Housing Ct. March 14, 2006) (prohibiting PHA from obtaining juvenile records where proposed use does not fit into one of narrow statutory exceptions, but if court permits defense of parent's lack of knowledge of the wrongdoing, PHA may introduce records in rebuttal).

<sup>178</sup>See *Peabody Properties v. Sherman*, 638 N.E.2d 906, 908 (Mass. 1994), and cases cited there.

<sup>179</sup>*Id.*

<sup>180</sup>*Id.*

<sup>181</sup>42 U.S.C.A. § 3604(f)(3) (West 2006); 29 U.S.C.A. §§ 706, 794 (West 2006); 24 C.F.R. pts. 8, 100 (2006); see *Dominium Management Services v. C.L.*, No. A03-85 (Minn. Ct. App. Dec. 9, 2003) (affirming trial court's dismissal of eviction for landlord's failure to grant reasonable accommodation of tenant's disability).

<sup>182</sup>Servicemembers Civil Relief Act, Pub. L. No. 108-189, 117 Stat. 2835 (2003) (codified at 50 U.S.C. app. §§ 501-594). The Act extends coverage to members of the National Guard serving more than thirty consecutive days of active duty. 50 U.S.C.A. app. § 511(2)(A)(ii) (West 2006). 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. *Id.* § 531.

<sup>183</sup>*Housing Authority of Birmingham District v. Durr*, 735 So. 2d 469 (Ala. Civ. App. 1998).

<sup>184</sup>*Cuyahoga Metropolitan Housing Authority v. Hairston*, 790 N.E.2d 828 (Ohio Mun. Ct. 2003).

<sup>185</sup>*Naftalin v. John Wood Company*, 116 N.W.2d 91, 100 (Minn. 1962).

<sup>186</sup>*Steven Scott Management v. Scott*, No. C7-98-2024, 1999 WL 366596 (Minn. Ct. App. June 8, 1999) (unpublished). But see *Phillips Neighborhood Housing Trust v. Brown*, 564 N.W.2d 573 (Minn. Ct. App. 1997) (affirming eviction of entire household when one cotenant violated lease by engaging in illegal drug activity).

<sup>187</sup>See generally McDONOUGH, *supra* note 125.

### VIII. State Statutes and Local Ordinances Providing More Protection to Tenants and Whether Federal Law Preempts Them

Some states and localities have enacted eviction protection for tenants beyond what is available under federal law. Examples include the following:

- establishing a tenant’s right to notice of lease violations and right to cure them,<sup>188</sup>
- limiting grounds for eviction to just cause,<sup>189</sup> and
- establishing defenses to public housing evictions and subsidized-housing evictions.<sup>190</sup>

Some states have laws applying the innocent-tenant defense that the *Rucker* Court found not to be implied in the federal public housing lease statute.<sup>191</sup>

The question then becomes whether the *Rucker* conclusion that the federally mandated lease provision on criminal activity does not imply an innocent-tenant defense preempts states or localities from creating their own defense or other defenses that better protect tenants. The party seeking preemption has the burden of proof, and the presumption is against preemption.<sup>192</sup>

Congress may expressly state that state law is preempted.<sup>193</sup> Congress did not state that the federal lease provision should be read to preempt state law or defenses available in a public housing eviction pursuant to state law. Congress did preempt state law in other areas of the same legislation.<sup>194</sup> However, express preemption in one section supports an inference that silence in other sections meant that Congress did not intend preemption for the latter.<sup>195</sup>

An intent to preempt the field may be inferred where the scheme of the federal legislation is so comprehensive that it creates the inference that Congress “left no room” for state regulation in that area.<sup>196</sup> HUD issued regulations in 1988, 1991, and 2001 to implement the statutory provisions. In issuing these regulations, HUD recognized that there would be dual federal and state regulation of public housing tenancies and evictions and that HUD regulations would not affect defenses available under state law.<sup>197</sup>

Federal law may preempt state law to the extent that state law actually conflicts with the federal law where compliance with both state and federal regulations is physically impossible.<sup>198</sup> Conflict preemption also applies where the state statute stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.<sup>199</sup>

<sup>188</sup>CONN. GEN. STAT. ANN. § 47a-15 (West 2006); MICH. COMP. LAWS § 554.134 (2006); VA. CODE ANN. § 55-248.31(C) (West 2006); WASH. REV. CODE ANN. § 59.12.030 (West 2006).

<sup>189</sup>N.J. STAT. ANN. 2A:18-61.1, subd. p (West 2006); SEATTLE, WASH., MUN. CODE § 22.206.160(c) (2006).

<sup>190</sup>FLA. STAT. § 83.56(5) (2006); MASS. GEN. LAWS ch. 121B, § 32 (2006).

<sup>191</sup>ARIZ. REV. STAT. ANN. § 33-1368(g) (2006); COLO. REV. STAT. § 13-40-107.5(5)(b) (2006); CONN. GEN. STAT. ANN. § 47a-15 (West 2006); MINN. STAT. § 504B.171 (2006); N.J. STAT. ANN. § 2A:18-61.1, subd. p (West 2006); R.I. GEN. LAWS § 34-18-24(9) (2006); VA. CODE ANN. § 55-248.31(C) (West 2006).

<sup>192</sup>*Cipollone v. Liggett Group*, 505 U.S. 504, 518 (1992).

<sup>193</sup>*Jones v. Rath Packing Company*, 430 U.S. 519, 525 (1977).

<sup>194</sup>Pub. L. No. 101-625, tit. V, § 503(b), 104 Stat. 4181 (1990) (current version at 42 U.S.C. § 1437d(l)(7)).

<sup>195</sup>*Lorillard Tobacco Company v. Reilly*, 533 U.S. 525, 550 (2001).

<sup>196</sup>*California Federal Savings and Loan Association v. Guerra*, 479 U.S. 272, 281 (1987) (Clearinghouse No. 44,143).

<sup>197</sup>53 Fed. Reg. 33216, 33257 (Aug. 30, 1988); 56 Fed. Reg. 6248, 6252 (Feb. 14, 1991); 56 Fed. Reg. 51560, 51565, 51567, 51573, 51575 (Oct. 11, 1991); 66 Fed. Reg. 28776, 28791 (May 24, 2001).

<sup>198</sup>*Florida Lime and Avocado Growers v. Paul*, 373 U.S. 132, 142-43 (1963).

<sup>199</sup>*Id.*

Courts are usually reluctant to find that a state law stands as an obstacle to the “full purposes and objectives of Congress.”<sup>200</sup> Under federal regulations and *Rucker*, compliance simply means using the federal lease. *Rucker* does not require enforcement of the lease and does not require the landlord to evict for a violation of it. The federal statute does not create a federal right to evict regardless of state law but rather merely imposes no federal duty not to evict based on the tenant’s ignorance of wrongful activity.

The courts are divided over whether the federally mandated lease provision on criminal activity and the *Rucker* holding that it does not imply an innocent-tenant defense preempts states or localities from creating their own defense or other defenses that better protect tenants. In *Cuyahoga Metropolitan Housing Authority v. Harris* the Ohio Municipal Court affirmed the magistrate’s decision dismissing an action seeking to evict a public housing tenant for drug-related criminal activity of her guest.<sup>201</sup> The court concluded that the magistrate properly applied state law on equitable considerations in forfeiture, federal law did not preempt the court from doing so, and “*Rucker* does not alter this conclusion, and does not

provide a basis for preempting or limiting this Court’s equity powers.”<sup>202</sup> In *Maryland Park Apartments v. Robinson* the Minnesota district court held that federal law and *Rucker* did not preclude application of a Minnesota statute with greater tenant protection for illegal activity.<sup>203</sup> Similarly in *Newport Housing Authority v. Reynolds* the Rhode Island Supreme Court held that *Rucker* did not preempt application of a Rhode Island statute providing greater protection than federal law.<sup>204</sup>

However, other decisions have gone the other way, finding preemption of state and local laws. In *Scarborough v. Winn Residential LLP* the District of Columbia Court of Appeals held that enforcement of a local right-to-cure law would frustrate the objectives of the moderate rehabilitation program.<sup>205</sup> In *Boston Housing Authority v. Mulero* the Massachusetts housing court found that it did have to consider a “special circumstances” state law defense because, in federal housing, *Rucker* precluded an innocent-tenant defense.<sup>206</sup>

## IX. What Else Can Be Done?

Attorneys and advocates for tenants in public and subsidized housing can protect and expand in several ways the rights of tenants facing allegations of criminal

<sup>200</sup>*CTS Corporation v. Dynamics Corporation*, 481 U.S. 69, 79 (1987).

<sup>201</sup>*Cuyahoga Metropolitan Housing Authority v. Harris*, 861 N.E.2d 179, 180–82 (Ohio Mun. Ct. 2006). Harris relied in part on HUD’s statement when it adopted its final regulation that “[t]his final rule does not ... preempt State Law within the meaning of Executive Order 13132.” *Id.* at 181; see 66 Fed. Reg. 28776, 28791 (May 24, 2001) (stating that regulations would have no federalism implications under Executive Order 13132); Exec. Order No. 1313264 Fed. Reg. 43255, 43257, § 4(a) (Aug. 14, 1999) (stating that agencies shall construe federal law to preempt state law only where federal statute contains an express preemption provision or some other clear evidence that Congress intended preemption of state law or where the exercise of state authority conflicts with the exercise of federal authority under the federal statute).

<sup>202</sup>*Cuyahoga Metropolitan Housing Authority v. Harris*, 861 N.E.2d at 181.

<sup>203</sup>*Maryland Park Apartments v. Robinson*, No. CX-02-4044, at 4; see MINN. STAT. § 504B.171 (2006) (providing the defense that there was no unlawful activity on the property or tenant did not know or have reason to know that there was unlawful activity on the property).

<sup>204</sup>*Newport Housing Authority v. Reynolds*, No. ND2002-0290, at 2 (R.I. Super. Ct. Aug. 26, 2002) (Clearinghouse No. 55,021); see R.I. GEN. LAWS § 34-18-24 (9) (2006) (providing the defense that tenant had no knowledge of drug transaction or intent to effectuate it).

<sup>205</sup>*Scarborough*, 890 A.2d at 255–58; see also *Ross v. Broadway Towers*, No. E2006-00033-COA-R3-CV, 2006 WL 2681148 (Tenn. Ct. App. Dec. 14, 2006) (relying on *Scarborough* and holding that state statute waiver of landlord’s right to proceed with eviction if landlord accepts rent without reservation thwarts the objectives of Congress).

<sup>206</sup>*Boston Housing Authority v. Mulero*, No. 03-SP-03484, at 3 (Mass. Housing Ct. Feb. 10, 2004); see *Assenberg v. Anacortes Housing Authority*, No. C05-1836RSL, 2006 WL 1515603 (W.D. Wash. May 25, 2006) (holding that federal law authorizing eviction for illegal drug use in federal public housing preempts state law permitting medical use of marijuana); *Boston Housing Authority v. Garcia*, No.05-SP-01091 (Mass. Housing Ct. 2005) (holding that, in federal public housing, federal law preempts state law defense where household members’ wrongdoing was not foreseeable), appeal docketed, No. SJ-09753 (Mass. June 5, 2006) (oral argument presented March 5, 2007; case under advisement); *Boston Housing Authority v. Figueroa*, 2003 WL 24029487 (holding that, in federal public housing, federal law preempts state-law defense where household members’ wrongdoing was not foreseeable).



activity. They should focus on holding PHAs, landlords, and the court to the standards that federal, state, and local law require, as discussed above. They should work with PHAs and owners of HUD multifamily housing to establish policies about when the PHAs or owners will exercise discretion to permit nonwrongdoing household members to avoid eviction or loss of the subsidy.

Attorneys and advocates should propose local and state legislation to incorporate the concepts of mitigating factors against eviction and innocent-tenant defenses particularly as part of homeless prevention efforts.<sup>207</sup> However, until dust settles on preemption, local and state laws are likely to face legal challenge.<sup>208</sup>

Advocacy on the federal level could be done on several fronts. Congress could amend the statutes on criminal activity in the following ways:

- Adopt the innocent-tenant defense, such as the one available in Minnesota for a tenant who did not know or have reason to know of the activity.<sup>209</sup>
- Allow the tenant to remain if the violating household member or guest is excluded from the property.<sup>210</sup>
- Expand the exception in the Violence Against Women Act for victims of domestic violence, dating violence, or stalking to other groups, such as persons with disabilities and household members not involved in the criminal activity.<sup>211</sup>
- Adopt the congressional legislative history test requiring eviction if appropriate in light of all of the facts and circumstances and allowing defenses where the tenant had no knowledge of the activity

or took responsible steps to prevent the activity or recurrence of it.<sup>212</sup>

- Adopt the standards of the Rural Housing Service program.<sup>213</sup>
- Adopt a no-preemption standard in the HUD housing statutes and regulations in which state and local laws mandating prior notice or other requirements applicable to termination of tenancies or housing subsidies are not preempted, expressly or impliedly, by federal law.

Any of these changes would make the federal statutes and regulations consistent with the legislative history that the *Rucker* Court ignored.<sup>214</sup>

Through a combination of advocacy within the courts and with PHAs, landlords, cities, states, HUD, the Rural Housing Service program, and Congress, attorneys and advocates can help protect tenants from evictions that violate the law and from evictions of the truly innocent.

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<sup>207</sup>See *supra* note 191 and accompanying text.

<sup>208</sup>See *supra* notes 192–206 and accompanying text.

<sup>209</sup>See *supra* note 191 and accompanying text.

<sup>210</sup>See 7 C.F.R. § 3560.156(c)(15) (2006).

<sup>211</sup>See *supra* notes 94–101 and accompanying text.

<sup>212</sup>See *supra* note 6 and accompanying text.

<sup>213</sup>See *supra* notes 83–91 and accompanying text.

<sup>214</sup>See *supra* notes 4–6 and accompanying text.

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