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

Housing Justice Network (HJN) Conference
March 2019

Lawrence R. McDonough, Pro Bono Counsel, Dorsey & Whitney LLP
Lawrence R. McDonough
Pro Bono Counsel
Dorsey & Whitney LLP
Suite 1500, 50 South Sixth Street
Minneapolis, MN 55402-1498
612-492-6795
McDonough.Lawrence@Dorsey.com

Biography
http://povertylaw.homestead.com/Biolarrymcdonough.html
Panel

Mac McCreight, Lead Attorney, Housing Unit, Greater Boston Legal Services
197 Friend Street, Boston, Massachusetts 02114
617-603-1652 mmccreight@gbls.org
http://www.gbls.org/

Fred Fuchs, Housing Group Coordinator, Texas Rio Grande Legal Aid, Inc.
4920 North IH-35, Austin, TX 78751
512-374-2700 FFuchs@trla.org
http://www.trla.org/
I. Analyzing Cases
II. Advocacy in Courts, Legislatures, Counties, Cities, and PHAs
III. Open forum on participant work on the issue and ideas for federal and local action
National Resources

Wait a Minute: Slowing Down Criminal Activity Eviction Cases to Find the Truth, 41 CLEARINGHOUSE REVIEW 55 (May/June 2007) (“Wait”)
http://povertylaw.homestead.com/files/Reading/Wait_a_Minute_McDonough_PDF_M-
J2007.pdf


F. Fuchs, Defending Families and Individuals threatened with Eviction from Federally Subsidized Housing, HOME-Funded Properties, § 515 Rural Rental Housing, § 8 Moderate Rehabilitation, Shelter Plus Care Housing, Supportive Housing for the Elderly and Persons with Disabilities, Continuum of Care Housing, HOPWA, Tax Credit Housing, Section 8 Housing Choice Voucher Program, Public Housing, Project-Based Voucher Program, and Section 811 Project Rental Assistance (Texas RioGrande Legal Aid, Updated Sep. 1, 2018) (“Fuchs”).
State Materials (Example)

Housing Law in Minnesota
http://povertylaw.homestead.com/ResidentialUnlawfulDetainer.html

Residential Eviction Defense in Minnesota

If you do not have your own, start working on them!
Get Involved: Legal Services Attorneys and Others Can Help

“[LSC] Recipients are prohibited from defending any person in a proceeding to evict that person from a public housing project if:

(a) The person has been charged with or has been convicted of the illegal sale, distribution, or manufacture of a controlled substance, or possession of a controlled substance with the intent to sell or distribute; and

(b) The eviction proceeding is brought by a public housing agency on the basis that the illegal drug activity for which the person has been charged or for which the person has been convicted threatens the health or safety of other tenants residing in the public housing project or employees of the public housing agency.”

45 C.F.R. § 1633.3
Get Involved: Legal Services Attorneys and Others Can Help

Definitions.

“(a) Controlled substance has the meaning given that term in section 102 of the Controlled Substances Act (21 U.S.C. 802);

(b) Public housing project and public housing agency have the meanings given those terms in section 3 of the United States Housing Act of 1937 (42 U.S.C. 1437a);

(c) Charged with means that a person is subject to a pending criminal proceeding instituted by a governmental entity with authority to initiate such proceeding against that person for engaging in illegal drug activity.”

45 C.F.R. § 1633.2
Get Involved, Continued

Break it down.

(1) LSC-funded attorneys may not
(2) defend
(3) in public housing
(4) evictions
(5) persons

…
Get Involved, Continued

(6) convicted of or
(7) charged with (subject to a pending criminal proceeding)
(8) illegal sale, distribution, or manufacture of a controlled substance, or possession of a controlled substance with the intent to sell or distribute;
(9) when the evictions are based on threats to health or safety
(10) of public housing residents or
(11) employees.
Get Involved, Continued

This of what is not covered by this limitation. See Wait, supra, at 56.

(1) Non-LSC-funded attorneys
(2) If LSC-funded attorneys:
   (a) Not public housing
   (b) Not defending an eviction proceeding
   (c) Not a person charged or convicted
      (i) Can represent other household member
      (ii) Can represent person if not charged or convicted

...
Get Involved, Continued

(6) Not drugs (i.e. other criminal activity)
(7) If possession, no intent to sell or distribute
(8) No criminal proceeding
(9) Not based on threats to health or safety
(10) No public housing residents or employees threatened
The Rucker Decision: A Bad Decision But Not as Bad as You Think


Rucker held that the public housing eviction 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.”

See Wait, supra, at 57, quoting Rucker, 535 U.S. at 130; Fuchs, supra, at 110-12.
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.
The main criminal-activity provisions of the statute and regulations may be broken down into 10 elements involving criminal activity not involving drugs, drug-related criminal activity, and the actor. 42 U.S.C.A. § 1437d(l)(6); 24 C.F.R. § 966.4(f)(12).

Criminal Activity Not Involving Drugs

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

See Wait, supra, at 58-60; Green Book, supra, at 544-59 and Appendix 11B at 637-43; Fuchs, supra, at 99-102.
Drug-Related Criminal Activity

(3) any drug-related
(4) *criminal* activity
(5) *on or off* such premises

The Actor

For both criminal activity not involving drugs and drug-related criminal activity, it must be:

(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

See Wait, supra, at 60-62; Green Book, supra, at 544-59 and Appendix 11B at 637-43; Fuchs, supra, at 99-102, 110-17.
The Actor

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.

See Wait, supra, at 60-62; Green Book, supra, at 544-59 and Appendix 11B at 637-43; Fuchs, supra, at 99-102, 110-17.
The Actor

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;
...

See Wait, supra, at 60-62; Green Book, supra, at 544-59 and Appendix 11B at 637-43; Fuchs, supra, at 99-102, 110-17.
The Actor

(3) a stranger;
(4) a person temporarily and infrequently on the premises solely for legitimate commercial purposes, absent evidence to the contrary; and
(5) a person in the category of “other person under the tenant’s control” commits drug-related criminal activity off the premises.

See Wait, supra, at 60-62; Green Book, supra, at 544-59 and Appendix 11B at 637-43; Fuchs, supra, at 99-102, 110-17.
Other Criminal Activity

Conviction of any household members for manufacturing or producing methamphetamine on the premises: mandatory eviction
42 U.S.C.A. § 1437n(f); 24 C.F.R. § 966.4(l)(5)(i)(A)

Violent criminal activity or felony conviction: mandatory eviction

Tenant fleeing to avoid prosecution, or custody or confinement after felony conviction, or violating a condition of probation or parole imposed under Federal or State law: permissive eviction
42 U.S.C.A. § 1437d(l)(9); 24 C.F.R. § 966.4(l)(5)(ii)(B)

See Wait, supra, at 62; Green Book, supra, at 544-59 and Appendix 11B at 637-43; Fuchs, supra, at 99-102.
Drug Paraphernalia

Although drug-related criminal activity is grounds for eviction, possession of drug paraphernalia does not constitute “drug-related criminal activity” under the governing federal regulations.


See Fuchs, supra, at 108-09.
Medical Marijuana

HUD issued a memo directed to federally subsidized owners reminding them that despite increasing decriminalization of marijuana at the state level, the “manufacture, distribution, or possession of marijuana is a federal criminal offense.” The memo also states, however, that owners have discretion whether to evict tenants for illegal drug use. The memo also states that owners cannot enact lease terms that permit occupancy by any individual who uses marijuana.

https://www.hud.gov/sites/documents/USEOFMARIJINMFASSISTPROPTY.PDF

Whether state laws decriminalizing marijuana protect public and subsidized housing tenants is an issue of preemption. See Wait, supra, at 76-77; Green Book, supra, at 557-58; Fuchs, supra, at 109-10.
Section 8 Tenant-Based Voucher Program: Eviction

Similar but not identical to public housing:

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

...
Section 8 Tenant-Based Voucher Program: Eviction

... (3) “any violent or drug-related criminal activity on or near such premises.”

42 U.S.C.A. § 1437f(d)(1)(B)(iii), 1437f(o)(7)(D); 24 C.F.R. § 982.310(c)(1), (2)(I); Tenancy Addendum Section 8 Tenant-Based Assistance Housing Choice Voucher Program, Form HUD-52641-A (8/2009).

Fleeing Prosecution:

See Wait, supra, at 63; Green Book, supra, at 544-59 and Appendix 11B at 637-43; Fuchs, supra, at 102-03; Answer Form A3 at http://povertylaw.homestead.com/ResidentialUnlawfulDetainer.html.
Section 8 Tenant-Based Voucher Program: Subsidy Termination

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

(1) any household member (including the tenant) is engaged in any illegal use of a drug,
(2) any family member violated the family’s obligation not to engage in any drug-related criminal activity,

…
Section 8 Tenant-Based Voucher Program: Subsidy Termination

... (3) any household member violated the family’s obligation not to engage in any violent criminal activity, or (4) the family committed any serious or repeated violation of the lease in violation of its family obligations. 24 C.F.R. §§ 982.551-.553.

Conviction for manufacturing or producing meth: 24 C.F.R. § 982.553(b)(1)(ii)

See Wait, supra, at 63-64; Green Book, supra, at 544-59 and Appendix 11B at 637-43; Fuchs, supra, at 102-03.
Section 8 Moderate Rehabilitation Program

Similar to Section 8 Vouchers

24 C.F.R. §§ 882.511, 882.518

See Wait, supra, at 64-65; Green Book, supra, at 544-59 and Appendix 11B at 637-43; Answer Form A5 at http://povertylaw.homestead.com/ResidentialUnlawfulDetainer.html.
HUD-Subsidized Multifamily Housing Projects

Similar to Section 8 Vouchers, but methamphetamine convictions are not separately regulated in these programs.

HUD-Subsidized Multifamily Housing Projects

U.S. Department of Housing and Urban Development, HUD Handbook 4350.3: Occupancy Requirements of Subsidized Multifamily Housing Programs, Ch. 8

See Wait, supra, at 65; Green Book, supra, at 544-59 and Appendix 11B at 637-43; Fuchs, supra, at 102; Answer Form A4 at http://povertylaw.homestead.com/ResidentialUnlawfulDetainer.html.
The criminal activity provisions of 24 CFR § 5.850 et seq. don’t apply to Shelter Plus Care, HOPWA, HOME, or McKinney supportive housing programs (now HEARTH and Continuum of Care) if no Section 8 funding is involved. 24 CFR §§ 5.850, 5.100 (lists of covered programs).

Evictions based on alleged criminal activity must comply with program standards. See Green Book at 507-08; Answer Forms A4x and A5x at http://povertylaw.homestead.com/ResidentialUnlawfulDetainer.html.
Rental Assistance Demonstration (RAD) Program

The Rental Assistance Demonstration (RAD) gives owners of public housing and four HUD “legacy” programs (Rental Supplement (Rent Supp), Rental Assistance Payment (RAP), Section 8 Moderate Rehabilitation (Mod Rehab), and Section 202 properties with Project Rental Assistance Contracts (PRACs)) the option to enter into long-term project-based Section 8 contracts that facilitate the financing of necessary repairs.

https://www.nhlp.org/resources/rental-assistance-demonstration-rad/
The owner may evict and terminate assistance with written notice for drug-related or violent criminal activity or any felony conviction. Notice PIH-2012-32 (HA) H-2017-03, REV-3, at 58, 75, 136, 207, and 226 (January 12, 2017). There is no discussion of eviction or assistance termination for non-violent criminal activity, or criminal activity near to or off the property. 

Rural Housing Service–Subsidized Housing Programs

The regulations for Rural Housing Service programs contain the most protection for tenants facing criminal-activity claims. Tenant defenses include:

(1) The tenant, household member, guest, or person under the tenant’s control did not admit to and was not convicted for involvement with illegal drugs.

(2) The tenant, household member, guest, or someone under the tenant’s control did not conduct illegal drug activity on the premises.
(3) The tenant took reasonable steps to prevent or control illegal drug activity committed by a non-adult 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.
(4) The adult person conducting the illegal drug activity vacated the unit within the time frames established by the landlord and did not return to the premises without the landlord’s prior consent.

7 C.F.R. pt. 3560, subpt. D, in particular §§ 3560.156(b)(15), 3560.159(a)(1)(iii), 3560.159(d)

See Wait, supra, at 65-66; Answer Forms A7 (RHS) and A7x (RHS with HUD Subsidies) at http://povertylaw.homestead.com/ResidentialUnlawfulDetainer.html.
Low-Income Tax Credit Program

The program requires good cause for eviction but does not have separate requirements for criminal-activity cases. 26 U.S.C.A. § 42 (h)(6)(e)(ii)(I)

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.

See Wait, supra, at 66; Answer Forms A6x (LITC), A4 (HUD Subsidized Projects), and A8 (Public Housing) at http://povertylaw.homestead.com/ResidentialUnlawfulDetainer.html.
Violence Against Women Act

Tenant eviction defenses include:

Failure to give the tenant include the VAWA Notice of Occupancy Rights under the Violence Against Women Act and a certification form (Form HUD 5383).


(2) The landlord failed to state facts that authorize recovery by failing to state any allegations that are not related to or the result of an incident(s) of domestic violence, dating violence, sexual assault or stalking that the federal Violence Against Women Act (VAWA) prohibits as a basis for eviction.

Violence Against Women Act

(3) The landlord alleged breach by criminal activity that

(1) was directly related to domestic violence, dating violence, sexual assault or stalking,
(2) was done by a member of the household, guest, other person under the tenant’s control, and
(3) the tenant or a person affiliated with the tenant was the victim or threatened victim.

Violence Against Women Act

(4) The landlord’s alleged breach of the lease by damage to the premises that is the result of domestic violence, dating violence, sexual assault and stalking so cannot be the basis to evict the tenant.

Violence Against Women Act

(5) The landlord alleged breaches that are the result of domestic violence, dating violence, sexual assault or stalking of the tenant or tenant’s household members so they are not (1) serious or repeated violations of the lease, (2) material violations of the lease, or (3) other good cause.


Violence Against Women Act

Remedies:

(1) Order the landlord to (1) accept the tenant’s certification of domestic violence, dating violence, sexual assault or stalking, and (2) withdraw its termination notice and (3) dismiss this action with prejudice.
(2) Evict the abuser/attacker/stalker, but do not evict the tenant or the rest of the tenant’s household.

(3) Order the landlord to evict the abuser/attacker/stalker, but do not evict the tenant or the rest of the tenant’s household.
 Violence Against Women Act

(4) Order the landlord to execute a new lease with the tenant that does not include the abuser/attacker/stalker, in the household. If the landlord has not established my eligibility for this housing program, order the landlord to allow the tenant to establish eligibility. If the tenant cannot establish eligibility for this housing program, then the landlord must provide the tenant with a reasonable time to find new housing.
(5) Order the landlord to recertify/recalculate the tenant’s rent without the income of the abuser/attacker/stalker if no longer a member of the tenant’s household.

(6) Seal any information in this court file that contains information about any incidents of domestic violence, domestic abuse violence, sexual assault or stalking, including the tenant’s address, so it is not accessible to anyone but court employees, the tenant or the landlord for the purposes of the action.
Violence Against Women Act


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.

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.

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.
Interrelationship Between Criminal and Civil Proceedings

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.

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.

See Wait, supra, at 73-75; Green Book, supra, at 558-59.
Other Defenses under Federal Law Not Specific to Criminal Activity

(1) Failure to reasonably accommodate disabilities
(2) Failure to communicate with designated contact person
(3) Discrimination
(4) Servicemember rights
Other Defenses under State Law Not Specific to Criminal Activity

Defenses vary from state to state. But common defenses include:

(1) Improper notice
(2) Waiver of notice
(3) Waiver of breach
(4) Equitable defenses
(5) Cure
(6) Improper service of process
(7) Signing new lease

See Wait, supra, at 75; Green Book, supra, at 559-80; Answer forms at http://povertylaw.homestead.com/ResidentialUnlawfulDetainer.html.
State Statutes and Local Ordinances Providing More Protection to Tenants

Examples include:

(1) establishing a tenant’s right to notice of lease violations and right to cure them,
(2) limiting grounds for eviction to just cause,
(3) applying the innocent-tenant defense that the Rucker Court found not to be implied in the federal public housing lease statute, and
State Statutes and Local Ordinances Providing More Protection to Tenants

(4) establishing defenses to public housing evictions and subsidized-housing evictions.

Are they preempted by federal law? The courts are divided.

See Wait, supra, at 76-77; Green Book, supra, at 557-58.
Always Read the Lease

In all of the cases, arguments on precise language of the lease might be more persuasive with conservative judges.
Advocacy

A. Individual case representation

B. Legislation
   1. Enact city and county ordinances
   2. Enact state statutes
   3. Revise federal statute and regulations

C. PHAs
   1. Modify policies
   2. Nominate board members
Advocacy

D. Training
1. Staff
2. Advocates
3. Judges
4. Volunteer attorneys
5. Law students
6. Websites and forms

E. Media Coverage
1. Pros
2. Cons
Let’s Talk

Open forum on participant work on the issue and ideas for federal and local action
Contact Us

Lawrence R. McDonough, Pro Bono Counsel, Dorsey & Whitney LLP
Suite 1500, 50 South Sixth Street, Minneapolis, MN 55402-1498
612-492-6795  McDonough.Lawrence@Dorsey.com
http://povertylaw.homestead.com/Biolarrymcdonough.html

Mac McCreight, Lead Attorney, Housing Unit, Greater Boston Legal Services
197 Friend Street, Boston, Massachusetts 02114
617- 603-1652 mmccreight@gbls.org
http://www.gbls.org/

Fred Fuchs, Housing Group Coordinator, Texas Rio Grande Legal Aid, Inc.
4920 North IH-35, Austin, TX 78751
512-374-2700 FFuchs@trla.org
http://www.trla.org/