

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

Housing Justice Network (HJN) National Meeting,  
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# Presenter

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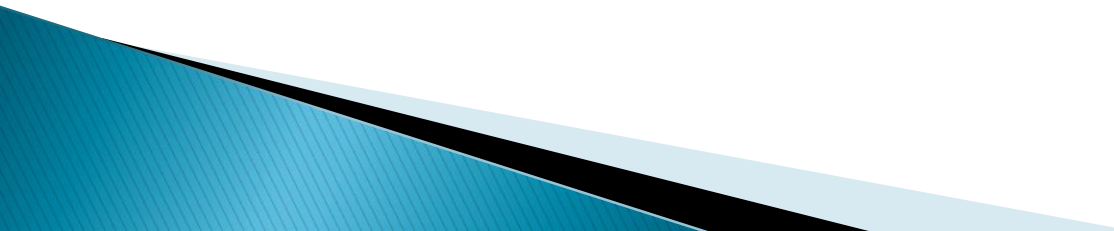
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# Agenda

- 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
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# 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](http://povertylaw.homestead.com/files/Reading/Wait_a_Minute_McDonough_PDF_M-J2007.pdf)

Chapter 11, *Eviction and Subsidy Terminations*, in HUD HOUSING PROGRAMS: TENANTS' RIGHTS (National Housing Law Project, 4th ed. 2012) (“Green Book”)

<http://nhlp.org/2012greenbook>

# State Materials (Example)

Housing Law in Minnesota

[http://povertylaw.homestead.com/ResidentialUnlawful  
Detainer.html](http://povertylaw.homestead.com/ResidentialUnlawfulDetainer.html)

Residential Eviction Defense in Minnesota

[http://povertylaw.homestead.com/files/Reading/Reside  
ntial\\_Eviction\\_Defense\\_in\\_Minnesota.htm](http://povertylaw.homestead.com/files/Reading/Residential_Eviction_Defense_in_Minnesota.htm)

If you do not have your own, start working on them!



# Get Involved: Legal Services Attorneys and Others Can Help

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. 45 C.F.R. § 1633.

# Get Involved, Continued

Break it down.

(1) LSC-funded attorneys may not

(2) represent

(3) in public housing

(4) evictions

(5) persons

...





# Get Involved, Continued

(6) convicted of or

(7) charged with

(8) drug

(9) crimes

(10) when the evictions are based on threats to health or safety

(11) of public housing residents or

(12) employees.

# Get Involved, Continued

This of what is not covered by this limitation.

*See Wait, supra*, at 56.

(1) Non-LSC-funded attorneys

(2) Not representing

(3) Not public housing

(4) Not an eviction

(5) Not a person

...



# Get Involved, Continued

(6) Not convicted of or charged

(7) Not drugs

(8) Not a crime

(9) Not an eviction

(10) Not based on threats to health or safety

(11) No public housing residents or employees  
threatened

# The Rucker Decision: A Bad Decision But Not as Bad as You Think

*Department of Housing and Urban Development v. Rucker*,  
535 U.S. 125 (2002)

*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.

# Rucker Continued

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.



# Public Housing

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(1)(6); 24 C.F.R. § 966.4(f)(12).

*See* Wait, *supra*, at 58-62; Green Book, *supra*, at 535-49 and Appendix 11B; Answer Form A8 at

<http://povertylaw.homestead.com/ResidentialUnlawfulDetainer.html>.

# 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 535-49 and Appendix 11B.

# Drug-Related Criminal Activity

(3) any drug-related

(4) *criminal* activity

(5) *on or off* such premises

*See* Wait, *supra*, at 61-62; Green Book, *supra*, at 535-49 and Appendix 11B.



# 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 535-49 and Appendix 11B.

# 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 535-49 and Appendix 11B.*

# 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 535-49 and Appendix 11B.

# 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 535-49 and Appendix 11B.*

# 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  
42 U.S.C.A. § 1437d(l)(4)(A)(ii); 24 C.F.R. § 966.4(l)(3)(i)  
(B)(2)–(3); 24 C.F.R. § 5.100

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 535-49 and Appendix 11B.

# 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)

Fleeing Prosecution:

42 U.S.C.A. § 1437f(d)(1)(B)(v); 24 C.F.R. § 982.310(c)(2)(ii)

*See* Wait, *supra*, at 63; Green Book, *supra*, at 535-49 and Appendix 11B; 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 535-49, 606-08, and Appendix 11B.

# 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 535-49, and Appendix 11B; 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.

42 U.S.C.A. §§ 1437f(d)(1)(B)(iii), 1437f(d)(1)(B)(v),  
13662(a)(1)

24 C.F.R. §§ 5.858, 5.859, 247.3(a)(3)

# 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

[http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/administration/hudclips/handbooks/hsg/4350.3](http://portal.hud.gov/hudportal/HUD?src=/program_offices/administration/hudclips/handbooks/hsg/4350.3)

*See Wait, supra*, at 65; *Green Book, supra*, at 535-49,  
and Appendix 11B; Answer Form A4 at

<http://povertylaw.homestead.com/ResidentialUnlawfulDetainer.html>.

# 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.

...

# Rural Housing Service–Subsidized Housing Programs

...

(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.

...



# Rural Housing Service—Subsidized Housing Programs

...

(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 Form A7 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 Form A4 at <http://povertylaw.homestead.com/ResidentialUnlawfulDetainer.html>.



# Violence Against Women Act

Tenant defenses include:

(1) Failure to give the tenant notice of rights under VAWA.

42 U.S.C. § 1437d (u)(2)(B); Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, Title VI, 127 Stat. 54 (March 7, 2013); 24 C.F.R. §§ 5.2001-5.2009, 966.4.

# Violence Against Women Act

(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.

42 U.S.C. § 1437d (1)(6); Violence Against Women Reauthorization Act of 2013, 42 U.S.C. 14043e-11; 24 C.F.R. §§ 5.2001-5.2009, 966.4.

# 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.

42 U.S.C. § 1437d (1)(6); Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, Title VI, 127 Stat. 54 (March 7, 2013); 24 C.F.R. §§ 5.2001-5.2009, 966.4.

# Violence Against Women Act

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

42 U.S.C. § 1437d(1); Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, Title VI, 127 Stat. 54 (March 7, 2013); 24 C.F.R. § 5.2001-5, 2009, 966.4.

# 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.

42 U.S.C. §1437d (l); Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, Title VI, 127 Stat. 54 (March 7, 2013); 24 C.F.R. §§ 5.2001-5.2009, 966.4.

*See* Wait, *supra*, at 66-67; Green Book, *supra*, at 535-497, 569, 883-89, and Appendix 11B; Answer forms at

<http://povertylaw.homestead.com/ResidentialUnlawfulDetainer.html>

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# 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.

# Violence Against Women Act

(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

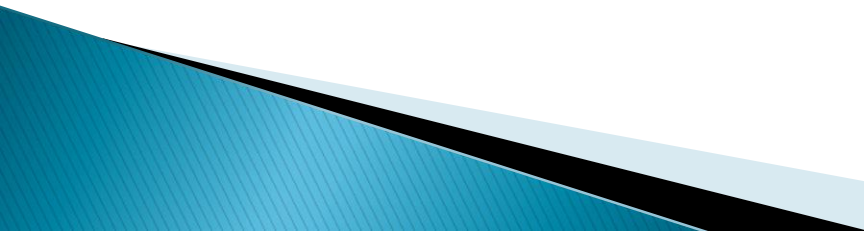
(4) Order the landlord to execute a new lease with the tenant that does not include the abuser/attacker/stalker, in the household. If the landlord has not established my eligibility for this housing program, order the landlord to allow the tenant to establish eligibility. If the tenant cannot establish eligibility for this housing program, then the landlord must provide the tenant with a reasonable time to find new housing.



# Violence Against Women Act

(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

Violence Against Women Act, 42 U.S.C. § 1437d (1)(6); Violence Against Women Reauthorization Act of 2013, 42 U.S.C. 14043e-11; 24 C.F.R. §§ 5.2001-5.2009, 966.4.

*See* Wait, *supra*, at 66-67; Green Book, *supra*, at 535-497, 569, 883-89, and Appendix 11B; Answer forms at

<http://povertylaw.homestead.com/ResidentialUnlawfulDetainer.html>.

# 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.

*See Wait, supra*, at 70-73; *Green Book, supra*, at 569-96, and Appendix 11A; Answer forms at <http://povertylaw.homestead.com/ResidentialUnlawfulDetainer.html>.

# 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

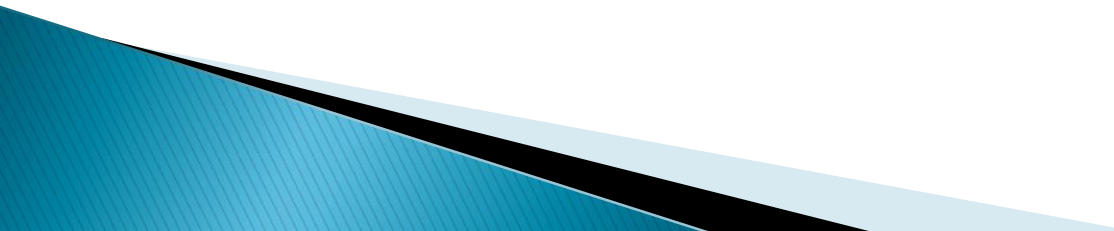
Fifth Amendment rights against self-incrimination can be asserted in the eviction trial and in pretrial stages, such as at an informal conference or grievance hearing.

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 548-50.

# Other Defenses Not Specific to Criminal Activity

## Federal Defenses:

- (1) Failure to reasonably accommodate disabilities
  - (2) Discrimination
  - (3) Servicemember rights
- 

# Other Defenses Not Specific to Criminal Activity

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

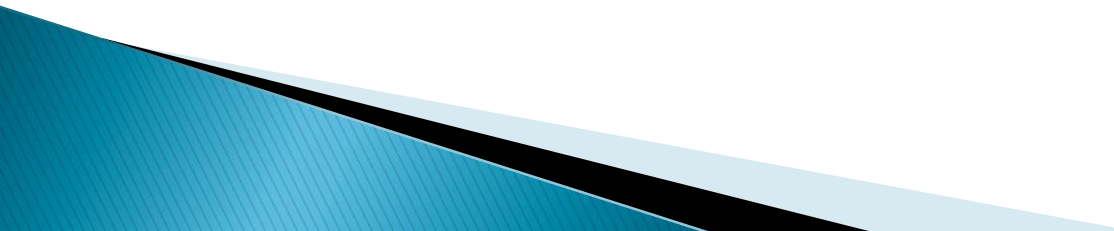
- (1) Waiver of notice
- (2) Waiver of breach
- (3) Equitable defenses
- (4) Cure
- (5) Improper service of process

*See* Wait, *supra*, at 75; Green Book, *supra*, at 559-69; 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 547-50.

# 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

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