Approved: March 9, 1999
Date

MINUTES OF THE SENATE JUDICIARY COMMITTEE.

The meeting was called to order by Chairperson Emert at 10:08 a.m. on March 4, 1999 in Room123-S of the Capitol.

All members were present except: Senator Bond (excused)

Committee staff present:
Gordon Self, Revisor
Mike Heim, Research
Jerry Donaldson, Research
Mary Blair, Secretary

Conferees appearing before the committee:
Carol Bonebrake, Assistant City Attorney, City of Topeka
Byron Endsley, Topeka Police Department
Mary Jane Johnson, Liveable Neighborhoods
Forrest Rhea, Neighborhood Advocate
Bob Butters, Landlord
Melissa Bynum, Leavenworth Neighborhood Association
Kathy Moore, Kansas City, Kansas
Sergeant Victor Webb, Kansas City Police Department
Cliff Pence, Apartment Council of Topeka
Representative Rick Rehorn
Ed Jaskinia, Associated Landlords of Kansas
Pat Delapp, Shawnee County Landlord Association

Others attending: see attached list

The minutes of the March 3 meeting were approved on a motion by Senator Donovan and seconded by Senator Goodwin; carried.

SB 286–an act concerning the landlord and tenant act; relating to the termination of the rental agreement; expedited eviction procedure act

Conferee Bonebrake testified in support of **SB 286.** She presented the City of Topeka's mission statement regarding it's provision of affordable housing to qualified citizens and discussed the city's need for tools to expedite the removal of lease violators. She reviewed **SB 286** which amends the Residential Landlord Tenant Act and she discussed how the bill gives standing to a landlord or the county or district attorney to bring an eviction action. She summarized the applicable notice provisions and made reference to a list of offenses listed in the bill. (attachment 1) Discussion followed whereby the conferee clarified language in the bill and answered questions regarding federal funding for public housing in Topeka.

Conferee Endsley testified in support of **SB 286.** He stated that drug house activity, which occurs primarily on rental property, is a major cause of neighborhood decay because it brings other crimes into the neighborhood. He recognized the important role of the property managers in helping to prevent criminal activity and pled for the tools necessary for them to act quickly against a tenant involved in crimes. He detailed three current remedies for tenant eviction but stated that the current law does not specifically address the issue of how to evict a tenant who has committed a violent crime or drug crime on the property. He summarized **SB 286** and identified the states that it is modeled after. He further discussed the difference between criminal procedure and civil procedure as it relates to the bill and addressed the displacement myth. (attachment 2)

Conferee Johnson stated she supported **SB 286** and she deferred to Conferee Rehorn. (no attachment)

Conferee Rhea testified in support of **SB 286** briefly relating his personal experience as a victim of neighborhood crime. (attachment 3)

Conferee Butters testified in support of **SB 286.** He briefly related his personal experience as a landlord attempting to "deal with" tenants involved in criminal activity. He stated that the bill would provide a tool to be used to protect his property, friends and neighbors. (attachment 4)

Conferee Bynum testified that she supported **SB 286** and she deferred to Conferee Rehorn.(no attachment)

Conferee Moore testified in favor of **SB 286.** She stated that in her area of Kansas City over 50% of housing is rental. She urged passage of the bill. (no attachment)

Conferee Webb stated he supported **SB 286** and he deferred to Conferee Rehorn (no attachment)

Conferee Pence testified in support of the intent of **SB 286.** He discussed concerns regarding a portion of the bill relating to recovery, from landlords, of District or County Attorney costs for eviction suggesting that recovery be from the offending tenants. (attachment 5)

Conferee Rehorn testified in support of **SB 286.** He addressed common misconceptions regarding the bill and discussed a prepared amendment to the bill and costs that may be assessed against landlords. (attachment 6) Discussion followed.

Conferee Jaskinia testified in opposition to **SB 286.** He reviewed portions of the bill commenting on several "questionable" areas. He questioned whether "we're opening ourselves up to selective prosecution" and lawsuits. He cited the following statistics: 69% of adults own their own home with 31% classified as tenants; 40% of all drug use occurs in cities and he stated that the bill doesn't address owner occupied properties. He suggested that instead of listing all the statutes on page 3 of the bill, the phrase "any suspected or alleged drug activity" be inserted. He recommended not tampering with the original 1974 Landlord-Tenant Act. (no attachment)

Conferee DeLapp testified in opposition to **SB 286.** He discussed various problems his association has with the bill and recommended the Kansas bill mirror the State of Illinois' bill. (attachments 7 & 8)

Written testimony in opposition to **SB 286** was submitted by Robin Tropper, Coordinator, Kansas Disability Rights Action Coalition for Housing. (attachment 9)

Staff passed out informational handouts from the Interim Committee on Judiciary relating to **SB 286.** (attachments 10 & 11)

The meeting adjourned at 11:02 a.m. The next scheduled meeting is Tuesday, March 9, 1999.

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: March 4, 1999

NAME	REPRESENTING
Forrest T. Allen	RDA, NCPP, UWSAofK, Hilltop
Kathy Wolfe	Mayor Carol Marinovich
Maryjane Johnson	Livable Neighborhoods
Dayle Dean	HUD-OIG-I
John R Bondurant	City of Topeka - Legal Dept
Byron L. Endsley	Topeka Police Dept.
Ohmi Vosseller	KCK Landlords, Talk
VICTOR A. WEBB	KCKPD - NCPP - R.A.C.E.
MELISSA A. BYNUM	LIVEABLE NEIGHBORHOODS LEAVENWORTH RD. ASSOC.
Robert Butler	Resident Armourdale Landlord Member C.C.A Armourdale
Marilyn Lou Smith	KMHA
JAMES CLARK	KCDAA
Erik Sartorius	Johnson Co. Board of Realtors
JAKE FISHER	WHITNEY DAMRON
Clifford Pence	Apartment Council of Topeka
Dave Hibbert	Apartment Council of Topeka
[illegible] DCCCA	SCLA. [illegible]
Kevin A. Graham	Kansas Sentencing Comm
Maraa Lesserden	

R. M Nehon — 32ND DISTRICT

Con Smith — KS Bar Assn

ED JASKINIA — TRI ASSC. LANDLORDS OF KS

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: March 4, 1999

NAME	REPRESENTING
Sheila Robles	KS Dept. of Commerce & Housing
Randy Speaker	KDOCH
Peggy Turner	—

Sjud 3-4-99 Att 1

CITY OF TOPEKA

CITY ATTORNEY
215 S.E. 7th Street Room 353
Topeka, Kansas 66603-3979
Phone 785-368-3883
FAX 785-368-3901

Linda P. Jeffrey
Elsbeth D. Schafer
David D. Plinsky
John J. Knoll
Todd E. Love
Carol R. Bonebrake
Mary Beth Mudrick

TO: Senate Judiciary Committee
FROM: Carol R. Bonebrake, Assistant City Attorney, Topeka, Kansas
RE: Senate Bill 286 – Residential Landlord Tenant Act
Date: March 4, 1999

The City of Topeka supports Senate Bill 286. The City is committed to providing decent, safe, affordable housing to qualified citizens. In order to accomplish this mission, it is important that we have the tools necessary to ensure that those individuals who violate the terms of their lease and compromise the decency and safety of the neighborhood be removed from the premises as expeditiously as the law will allow. A summary of the applicable notice provisions is included at the end of this testimony.

Senate Bill 286 amends the Residential Landlord Tenant Act by providing for an expedited eviction procedure, specifically a three (3) day notice without opportunity to remedy the breach. Conduct and offenses giving rise to the breach include the execution of a search warrant that produces evidence of or arrests for numerous violations of the Criminal Code, the majority of which are violent crimes. A listing of these offenses is provided at the end of this testimony.

Senate Bill 286 gives standing to a landlord *or* the county or district attorney to bring an eviction action. The proposed expedited procedure provides for eviction if the breach is committed by the tenant, a member of the tenant's household, a guest of the tenant, or a person under the control of the tenant on or within 1,000 feet of the leased premises. A partial eviction may be ordered if the tenant establishes that the tenant was unable to take action to prevent the breach because of verbal or physical coercion by the person conducting the breach.

Public housing residents, and others in the neighborhoods express concerns about safety and criminal activity. We believe that it is important to balance the individual rights of tenants arrested for criminal activity with the rights of other tenants and those in the neighborhood. We believe that Senate Bill 286 strikes this balance.

Sen. Jud
3-4-99
Att 1

STATE NOTICE PROVISIONS:

- 3 day notice for non-payment of rent

- "14/30" - Thirty (30) day notice with fourteen (14) days to remedy for tenant's material noncompliance with rental agreement or noncompliance with K.S.A. 58-2555 which identifies conditions which materially affect health and safety (building/housing codes; clean/safe as condition of premises permit; removal of ashes, rubbish, garbage/waste; plumbing, electrical, heating, ventilating, air-conditioning, appliances, elevators; destruction, defacement, damage caused by tenant or pet). K.S.A. 58-2564.

FEDERAL NOTICE PROVISIONS:

- 14 days for nonpayment of rent

- A reasonable time, but not to exceed 30 days --
    1. if the health or safety of other tenants or public housing employees, or persons residing in the immediate vicinity of the premises is threatened; or
    2. in the event of any drug-related or violent criminal activity or any felony conviction.

- 30 days in any other case, except that if a State or local law provides for a shorter period of time, such shorter period shall apply. 42 U.S.C. 1437d(l).

CITY OF TOPEKA (pursuant to Federal Court Consent Decree):

- 14 days for nonpayment of rent

- 30 days from the first day of the next rent paying period in any other case

OFFENSES LISTED IN SENATE BILL 286:

21-3401	Murder in the first degree	felony
21-3402	Murder in the second degree	felony
21-3403	Voluntary manslaughter	felony
21-3404	Involuntary manslaughter	felony
21-3410	Aggravated assault	felony
21-3411	Aggravated assault of a law enforcement officer	felony
21-3414	Aggravated battery	felony
21-3415	Aggravated battery against a law enforcement officer	felony
21-3420	Kidnapping	felony
21-3421	Aggravated kidnapping	felony
21-3426	Robbery	felony
21-3427	Aggravated robbery	felony
21-3442	Involuntary manslaughter while DUI	felony
21-3502	Rape	felony
21-3503	Indecent liberties with a child	felony
21-3504	Aggravated indecent liberties with a child	felony
21-3506	Aggravated criminal sodomy	felony
21-3510	Indecent solicitation of a child	felony
21-3511	Aggravated indecent solicitation of a child	felony
21-3512	Prostitution	misde
21-3513	Promoting prostitution	felony/misd
21-3515	Patronizing a prostitute	misde
21-3516	Sexual exploitation of a child	felony
21-3517	Sexual battery	misde
21-3518	Aggravated sexual battery	felony
21-3715	Burglary	felony
21-3716	Aggravated burglary	felony
21-3718	Arson	felony
21-3719	Aggravated arson	felony
21-3731	Criminal use of explosives [(b)(1) &(b)(2)]	felony
21-3812	Aiding a felon [(a) or (b)]	felony
21-3833	Aggravated intimidation of a witness or victim	felony
21-4201	Criminal use of weapons	felony/misd
21-4202	Aggravated weapons violation	felony
21-4204	Criminal possession of a firearm	felony/misd
65-4101 et seq.	Uniform Controlled Substances Act	felony/misd

PRESENTATION TO SENATE JUDICIARY COMMITTEE
REVISION TO THE KANSAS RESIDENTIAL LANDLORD TENANT ACT

Sgt. Byron Endsley
Topeka Police Dept

Chronic drug house activity is a major cause of neighborhood decay. Drug house activity brings other crime into the neighborhood such as burglaries, robberies, thefts, violent assaults and prostitution. Most drug house activity is done on rental property, because of the nature of the drug trade. Efforts to prevent criminal activity on rental property must include the involvement of those with the greatest leverage to stop the activity at a given location, the property management community. If we expect the property management community to help us in crime prevention measures, we must give them the ability to act quickly against a tenant who is involved in violent felony crimes or drug crimes. The property managers currently do not have that ability.

Currently there are three remedies available to a property manager when they have a tenant they must evict.

The first remedy is a thirty-day notice of non-renewal. This can only be used if the lease terms are on a month to month tenancy. It gives the property manager or the tenant the ability to end the lease agreement, without cause, with a thirty-day notice.

The second remedy is the Three Day Notice for nonpayment of rent. If the rent is not paid on the day it is due, the property manager serves this notice that states either they must pay the rent in full or they must vacate the property within 72 hours. If the tenant neither pays nor vacates the property the landlord must then file a claim in court asking for possession. The property manager must then prove to a judge that rent is due and owing and not paid. If the property manager proves his claims in court then the judge will order the sheriff to remove the tenant from the premises. That could take as long as 25 to 30 days after the expiration of the three-day notice.

The third remedy is used for lease violations not related to the payment of rent. It is known as the 14/30 day notice. This notice is used for lease violations, such as loud parties, unauthorized animals or unauthorized roommates. This notice tells the tenant that the tenant is violating the terms of the lease. It states that the tenant has 14 days from the notice to remedy the breach of the lease. If the breach is remedied then the tenant can stay. If the breach is not remedied then the tenant must vacate the property within thirty days of the notice. If the tenant neither cures the breach nor moves out the property manager must then file a claim in court for possession, thirty days after the notice was served. It will then take another 25 to 30 days for the sheriff

to remove the tenant if the property manager is successful in court.

The current Kansas Residential Landlord-Tenant Act gives the property manager the above statutory rights. The problem with the current Landlord-Tenant Act is that it does not specifically address the issue of how to evict a tenant who has committed a violent crime or drug crime on the property. Currently the property managers are using the 14/30 notice but as you see it is very ineffective. Senate Bill 286 specifically gives the property manager the ability to start eviction proceedings within 72 hours if the tenant, a guest of the tenant, or anyone under control of the tenant, commits a violent felony crime or is in possession of controlled substances on or within 1000 feet of the property. I want to reiterate here that it gives the property manager the **ability to start the eviction proceedings within 72 hours.** To complete the eviction, the property manager must still file a court action for immediate possession of the property and, if the tenant requests a trial, the property manager must prove in civil court by a preponderance of the evidence that the tenant violated the lease by committing a crime on the property. A preponderance of the evidence is a far lesser burden than that of a criminal trial which is proof beyond a reasonable doubt.

The Topeka Police Department has a program called the Crime Free Multi-Housing Program. It is a program that was started in Mesa, Arizona. Part of the program is a property manager training seminar in which we teach property managers drug recognition, fire safety codes, housing codes and the legalities of leases and evictions. Because I am the coordinator of this program, I have attended training classes in Arizona, New Mexico and Missouri. I found those states have all recently changed their laws giving the property manager an expedited eviction procedure when criminal activity is involved. Those changes occurred in Arizona in 1995, New Mexico in 1996 and Missouri in 1997. In 1998 the State of Illinois passed similar legislation.

The bill before you is modeled after the Statutes in those states. It gives the property manager the ability to serve a three day (72) hour eviction notice when violent criminal behavior or drug violations occur on or near the property. It also gives the District Attorney or County Attorney the standing to file an eviction on a tenant if the property manager refuses to evict, is too afraid to evict, or cannot be located. The District Attorney could only start the eviction after they have notified the property manager as explained in this bill.

What is so important here for you to understand is the difference between Criminal Procedure and Civil Procedure. Last year during the hearings the Lawrence Journal - World quoted someone as saying this was "eviction without conviction." Of course it is. There will be no criminal conviction when the three-day notice is served.

They should serve this the day after the search warrant was served or the arrest was made or the narcotics were found on the property. The criminal trial will not even start for 6 months to a year after I serve the search warrant, find controlled substances and make the arrest. Would you want to live next door to a drug house for a year waiting for the trial so the suspect could be convicted so the property manager could then evict the offender? I know I would not. I have worked too many shootings, robberies and burglaries related to drug houses. This is why our inner cities are crumbling.

How then should a property manager be able to evict someone whom we have not convicted in criminal court? It is simple and you must understand that it has nothing to do with the criminal court system. It is a **contractual matter between the property manager and tenant.** When the tenant signed the lease, he did so of his own free will. By the tenant's own free will the tenant warranted to the property manager that the tenant would pay the rent when due, would not damage the property, would maintain the property in a clean and habitable manner and that the tenant would abide by all applicable city and state statutes and **would not possess drugs on or near the property.** When the police serve a search warrant and find controlled substances, such as cocaine, on the property or arrest the tenant for shooting at a neighbor, the tenant violated the lease. Even if he never makes an appearance in criminal court, he still violated the lease. The property manager can serve the tenant an eviction notice based on that lease violation. The lease violation being that he committed a violent crime or a drug related crime on the property. The property manager must still prove in civil court that the violation occurred. To do that the property manager can obtain certain police reports and can subpoena the officers involved in the search warrant or the investigation of the criminal act to testify in the civil proceeding. The judge will then decide by the evidence presented if they should grant an eviction.

Several years ago the legislature passed K.S.A. 22-3901. This statute defines several crimes and deems them nuisances. The statute states that if drugs are found on a property that property is deemed a nuisance and the property owner must abate that nuisance when requested by Law Enforcement. It says nothing about an arrest or conviction of the tenant. It states that if drugs are found on a property that property is a nuisance. We must give the property manager the expedited eviction procedure to enable them to abide by this statute.

I have heard the argument that by evicting drug criminals we do nothing but move the problem from house to house. Until the people of the State of Kansas are willing to pay for more prison space, this will be a problem, however a study done in Milwaukee, Wisconsin has shown that displacement does have an impact on drug dealing. I have attached a copy from the National Landlord Training Manual written

by John Campbell of Campbell Resources Inc. for you to read on your own since I do not want to take any more of your time.

In the Crime Free Multi-Housing Program, we tell the Property Managers that they are responsible for the behavior of their tenants. We demand that they abate drug nuisances before the problem is deeply rooted. This new bill will give the property manager the tool they need.

The changes in the Kansas Landlord Tenant Act that this bill will provide can affect the safety of our citizens and the health of our neighborhoods. Let us follow the lead of Arizona, New Mexico, Missouri and Illinois and pass this bill. It will give drug offenders and violent offenders the message that their behavior will not be tolerated in the State of Kansas.

peace or other violations, do not let the problem fester, serve the proper notices.

5. If you become confident your property is being used for criminal activity take immediate action by:

- Contacting the police and telling them what you are going to do about the problem.
- If you are on a Month to Month Lease, deliver a nonrenewal notice. It is a legal and non adversarial approach. The tenant has little to fight over because you are not claiming any non compliant action.
- If you have significant issues of a noncompliance of your lease agreement, such as disturbing the peace and have neighbors or the police willing to testify, serve a 14/30 day notice. If you have criminal activity, an inspection will likely reveal other issues of a noncompliance of the rental agreement such as, a failure to maintain the property as provided in the rental agreement, additional people living in the house or trash and cleanliness issues, if those types of violations are discovered, serve the 14/30 day notices.
- Mutual agreement to dissolve the lease.
- Serve a three-day nonpayment of rent notice if the tenant is not paying as stipulated in the rental agreement.

Finally, if you have evicted someone for criminal activity, share the information if you are contacted by another landlord. Managers who are screening tenants down the road may not find out about unless the information is documented. The best statement to share with other property managers is, *"I would/would not rent to this person again."* Make sure you have all of the problems you had with the tenant documented and keep them on file.

THE DISPLACEMENT MYTH

Underlying many citizens' reluctance to get involved in pushing crime out of a neighborhood is the belief that any action short of arrest and incarceration is pointless. That pushing drug dealers out of one location will only move the problem to another neighborhood. That assumption is what blocks many from understanding the impact of an involved community.

- **A qualitative argument for the benefits of "displacement."** Of course, displacement does occur. Hard core drug dealers will move out of one property nd move into another just to begin dealing again and eviction is only a temporary interruption of their business. The issue, however is much larger. Drug activity is not a static thing. If left alone, it grows larger. When drug dealers are allowed to continue in one place, the neighborhood children get more exposure to the wrong role models. Friends of the dealers see them

3-8

paying no penalties for their illegal activity and consider getting into the business themselves. Neighbors who have the resources to move out do so, leaving behind a community that is further destabilized. In contrast moving drug activity has the opposite effect. Children see bad role models paying prices. Long term renter and owner occupants will stay in the neighborhood. Screening out, or evicting drug dealers will not solve the whole problem, but it is a part of the solution. It increases community-wide resistance to illegal activity, a major goal of the Crime Free Multi Housing Program.

Supporting data from the Milwaukee, Wisconsin Police Department. Support for the importance of simple "displacement" is provided by the Milwaukee Police Department's Drug Abatement Program which conducted a tracking study of persons involved in drug activity who had been displaced from the location of the activity. The study was conducted by Milwaukee narcotics detectives and provides some compelling data to contradict the traditional concern that civil enforcement does nothing but displace the problem in a one for one fashion. The study suggests that, in Milwaukee's case, even though most displaced suspects remain in the city, surprisingly few continue to engage in the same type of high community impact drug activity.

The detectives conducting the study identified 138 individuals who had been involved in drug activity in the past year where the activity had been abated, yet the individuals were not incarcerated or on parole or probation, the persons were only "displaced.'

Investigating detectives stated that they used all means at their disposal to locate the 138 people and then to determine if they were still involved in dealing or manufacturing illegal drugs. For the purposes of the study, detectives did not require a criminal level of proof to count persons as likely to be involved in drug activity. They looked at all available behavioral indicators, including searching for any complaints against the person's address for behaviors commonly associated with drug activity. The results of the study follow:

- 13 of the people had left Milwaukee.
- 6 of the people could not be located and four of those six were wanted on felony arrest warrants. The remaining 119 were still living in Milwaukee.
- 17%, or 24 people were found to be still involved in drug dealing in Milwaukee, some were rearrested as a result of the study.
- 69% or 95 people were considered to be no longer dealing or manufacturing controlled substances. Detectives caution that they cannot with certainty prove that all 95 were not involved in drug activity. However, they believe they established with confidence that all 95 were no longer involved in the types of overt drug-related behavior that so substantially harms the livability of neighborhoods.

Even allowing for a substantial margin of error, this is strong evidence that improved civil enforcement against drug criminals, potentially causing "displacement" is a valuable tool contributing to the reductone of drug activity in a community.

Jud 3-4-99 att 3

March 4, 1999

My name is Forrest L. Rhea . . . thank you for allowing me to testify. I am a member of the Hilltop Neighborhood Association, the Rosedale Development Association, the Wyandotte County/KCKs Neighborhood Crime Prevention Patrol, and United We Stand America of Kansas.

I support SB 286. I see this as a crime fighting tool against drug dealers. I have bullet holes in my home. While my home was receiving those bullet holes, I watched people die in that same hail of bullets. All of this happened, while the landlords, both public and private, were trying to go through the long drawn out process of getting drug dealers off their property. In some cases, the landlords were intimidated. All of them had their property trashed, sometimes beyond being salvaged.

Give our landlords, our police, our courts, and our neighborhoods this tool to bring life-threatening crime under control in a timely manner.

I am open to any questions. Thank you.

Sen. Jud
3-4-99
att 3

5-Jud 3-4-99 att 4

March 4, 1999

My name is Bob Butters . . . . thank you for allowing me to testify. I am a resident and landlord in Armourdale. I am a member of the Concerned Citizens of Armourdale.

I see this bill, SB 286, as a tool to fight crime. As a landlord, I see this bill giving me the ability to not only protect my property, but to protect my friends and neighbors.

I try to screen all my potential tenants, but occasionally a bad person does get in one of my places despite my efforts. This tool would allow me to get rid of them faster. I will answer questions.

Thank you.

Sen Jud
3-4-99
att 4

Sjud
3-4-99
a

March 4, 1999

FROM: Apartment Council of Topeka

RE: Committee Statement of Position on House Bill 2436

My name is Clifford Pence, I am past President of the Apartment Council of Topeka, a local Association that represents over 8000 Apartment Units in Topeka. Also in attendance is Dave Hibbert, currently President of the Apartment Council of Topeka and a property manager for Sunburst Properties.

As an Association, we support the intent of the House Bill 2436, allowing a landlord to evict a tenant for such actions.

Our concern comes from the following, is in the section, allowing the District or County Attorney to recover costs from the landlord. This appears that it might put unnecessary expenses on the landlord and it is unclear how the cost would be calculated. We feel this could be changed to allow recovery from the tenants for such actions . It was the tenants actions that caused the eviction, they should be responsible for the costs associated with their actions to the District Attorney

Sen Jud
3-4-99
att 5

S Jud 3-4-99 #6

...ICK REHORN
REPRESENTATIVE, 32ND DISTRICT
WYANDOTTE COUNTY
STATE CAPITOL, ROOM 278-N
TOPEKA, KS 66612-1504
(785) 296-7680

STATE OF KANSAS

TOPEKA

HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
BUSINESS, COMMERCE AND LABOR
FEDERAL AND STATE AFFAIRS
JUDICIARY

TESTIMONY BEFORE SENATE
JUDICIARY COMMITTEE
SB 286
COMMON MISCONCEPTIONS REGARDING
SB 286

1. The bill is unconstitutional.

In every "due process" question, courts weigh the right being infringed upon vs. the due process afforded. For example, if a person is facing a prison sentence, he is offered full due process. (i.e. preliminary hearing, jury trial etc.) If a person is denied welfare benefits, the courts have held that an administrative hearing is sufficient due process.

In this bill, the right being infringed upon is a tenancy right, and the due process provided is the full civil eviction process, which includes both a trial to the bench and full rights of appeal.

This bill is aggressive but constitutional.

2. Landlords can evict tenants for criminal conduct under current law.

Under current law, a landlord must give a tenant 14 days to cure the default. If the tenant claims that he has stopped the criminal activity, the breach is cured and there would no longer be grounds for eviction.

It should also be noted that many landlords would be reluctant to proceed with eviction out of either fear or indifference.

3. SB 286 Will have wide ranging consequences.

It is my belief that this bill may never be used in some counties and will be used sparingly in other communities.

However, the bill could have a dramatic impact on crime in any individual neighborhood.

Sen Jud 3-4-99 att 6

APPENDIX A

CRIMES INCLUDED IN SB 286

K.S.A. 21-3401 1st Degree Murder
21-3402 2nd Degree Murder
21-3403 Voluntary Manslaughter
21-3404 Involuntary Manslaughter
21-3410 Aggravated Assault
21-3411 Aggravated Assault of Law Enforcement Officer
21-3414 Aggravated Battery
21-3415 Aggravated Battery Against Law Enforcement
21-3420 Kidnaping
21-3421 Aggravated Kidnaping
21-3426 Robbery
21-3427 Aggravated Robbery
21-3442 Involuntary Manslaughter While Drunk
21-3502 Rape
21-3503 Indecent Liberties with a Child
21-3504 Aggravated Indecent Liberties with a Child

K.S.A.21-3506 Aggravated Criminal Sodom
21-3510 Indecent Solicitation of a Child
21-3511 Aggravated Indecent Solicitation of a Child
21–3512 Prostitution
21-3513 Promoting Prostitution
21-3515 Patronizing a Prostitute
21-3516 Sexual Exploitation of a Child
21-3517 Sexual Battery
21-3518 Aggravated Sexual Battery
21-3715 Burglary
21-3716 Aggravated Burglary
21-3718 Arson
21-3719 Aggravated Arson
21-3731 Criminal Use of Explosives
21-3812 Aiding a Felon
21-3822 Aggravated Intimidation of Witness
21-4201 Criminal Use of Weapons
21-4202 Aggravated Weapons Violation
21-4204 Criminal Possession of a Firearm

Article 41/Chapter 65 - All Drug Crimes

APPENDIX B

PREPARED AMENDMENT

Pg. 4, line 17, add after word breach "or the tenant was without knowledge of the breach".

APPENDIX C

COSTS THAT MAY BE ASSESSED AGAINST LANDLORDS

1. Filing Fee
2. Service Fees
3. Witness Mileage Fees
4. Deposition Fees

Sjud .9
3
Att-1

RE: SENATE BILL No. 286

Dear Committee Members

I am Patrick DeLapp, and I am an Officer with the Shawnee County Landlords Association.

Although we do not want want Drugs or other criminal activity in our property we do not support this bill. There are better ways of getting the job done with out stepping on the rights of people.

Problems we have with this Bill are as follows:

-This bill will allow the county or district attorney to evict someone without even telling the owner. (line 28-32)

-The eviction is based not on a conviction but only an accusation. A conviction or even prosecution for the purported offense may not even take place, and we are being told to deny housing. Why don't we go ahead and ask Dillions not to sell food to them or KPL not to supply utility service?

-Currently, public housing is using "Federal policy of one strike and your out". People have been put out their homes under this policy. Some applicants have told the reason way they were put out of public housing, when the landlord tries to confirm this with the housing authority, they deny it and only say they moved voluntary.

Many feel the housing authority is afraid of liability for putting people out for non convictions. So this is why they deny using the one strike and your out policy.

Well, whats a better idea? Let's take a look at what the State of Illinois passed last session, (Public Act 90-0360).

In this law the lease is void at the option of lessor or his assignee, which could be a law enforcement agency. Reasons for evictions or voiding of lease would be for commission of any act that would constitute a felony or a Class A misdemeanor in their state.

We think the state of Illinois has a better idea, and should more mirror what they passed.

Patrick DeLapp

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Att 1

(4) The Department is authorized to enforce rules pertaining labeling, handling, packaging, transferring and transporting liation sources.

(5) The Department is authorized to require licensees, including those conducting activities involving by-product material as defined in subsection (a)(2) of Section 4 or possessing such material, to provide adequate financial assurances such as surety bonds, cash deposits, certificates of deposit, or deposits of government securities to protect the State against costs in the event of site abandonment or failure of a licensee to meet the Department's requirements, as well as the costs of site reclamation and long-term site monitoring and maintenance. In the event that custody of by-product material as defined in subsection (a)(2) of Section 4, and the site at which such material is disposed of, is transferred to the Federal Government, any financial assurances collected for reclamation and long-term monitoring and maintenance for that site shall be transferred to the Federal Government.

(6) The Department is authorized to promulgate rules establishing radiation exposure limits for given population groups, including differential exposure limits based on age.

(7) The Department is authorized to promulgate rules to provide specific standards for what training or equivalent experience it will require of a physician before approving a specific license for human use of sealed radiation sources.

(8) Rules and regulations promulgated to implement this Act may provide for recognition of other State or Federal licenses as the Department may deem desirable, subject to such registration requirements as the Department may prescribe.

(9) This Section shall not be applicable to radiation sources or materials regulated by the U.S. Nuclear Regulatory Commission until an agreement or agreements have been entered into pursuant to Section 11 of this Act.

(10) In the licensing and the regulation of by-product material as defined in subsection (a)(2) of Section 4, or of any activity which results in the production of such by-product material, the Department shall provide by rule or regulation, and shall require compliance with, standards for the protection of the public health and safety and the environment which are equivalent to, to the extent practicable, or more stringent than, standards adopted and enforced by the U.S. Nuclear Regulatory Commission for the same purpose, including requirements and standards promulgated by the U.S. Environmental Protection Agency.

(11) Not later than 30 days after submission to the Department of an application for a new license for a fixed location facility or a license amendment for a new location for a facility, the Department shall provide written notice of the application to the municipality where the facility is to be located. If the facility is to be located in an unincorporated area, the notice shall be provided to the county in which the facility is to be located and to each municipality located within one and one-half miles of the facility. As used in this subsection, "fixed location facility" or "facility" means a parcel of land or a site, including the structures, equipment, and improvements on or appurtenant to the land or site, that is to be used by the applicant for the utilization, manufacture, storage, or distribution of licensed radioactive materials or devices or equipment utilizing or producing

licensed radioactive materials, but shall not include a tempo job site.

(Source: P.A. 86-1341.)

Section 99. Effective date. This Act takes effect upon becoming law.

Passed in the General Assembly May 15, 1997.

Approved August 10, 1997.

Effective August 10, 1997.

PUBLIC ACT 90-0360
(House Bill No. 1140)

AN ACT to amend the Code of Civil Procedure by changing Section 9-106 and adding Section 9-120.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 5. The Code of Civil Procedure is amended by changing Section 9-106 and adding Section 9-120 as follows:

(735 ILCS 5/9-106) (from Ch. 110, par. 9-106)

Sec. 9-106. Pleadings and evidence. On complaint by the party or parties entitled to the possession of such premises being filed in the circuit court for the county where such premises are situated, stating that such party is entitled to the possession of such premises (describing the same with reasonable certainty), and that the defendant (naming the defendant) unlawfully withholds the possession thereof from him, her or them, the clerk of the court shall issue a summons.

The defendant may under a general denial of the allegations of the complaint offer in evidence any matter in defense of the action. *Except as otherwise provided in Section 9-120,* no matters not germane to the distinctive purpose of the proceeding shall be introduced by joinder, counterclaim or otherwise. However, a claim for rent may be joined in the complaint, and judgment may be entered for the amount of rent found due.

(Source: P.A. 82-280.)

(735 ILCS 5/9-120 new)

Sec. 9-120. Leased premises used in furtherance of a criminal offense; lease void at option of lessor or assignee.

(a) If any lessee or occupant, on one or more occasions, uses or permits the use of leased premises for the commission of any act that would constitute a felony or a Class A misdemeanor under the laws of this State, the lease or rental agreement shall, at the option of the lessor or the lessor's assignee become void, and the owner or lessor shall be entitled to recover possession of the leased premises as against a tenant holding over after the expiration of his or her term.

(b) The owner or lessor may bring a forcible entry and detainer action, or, if the State's Attorney of the county in which the real property is located agrees, assign to that State's Attorney the right to bring a forcible entry and detainer action on behalf of the owner or lessor, against the lessee and all occupants of the leased premises. The assignment must be in writing on a form prepared by the State's Attorney of the county in which the real property is located. If the owner or lessor assigns the right to bring a forcible entry and detainer action, the assignment shall be limited to those rights and duties up to and including delivery of

the order of eviction to the sheriff for execution. The owner or lessor shall remain liable for the cost of the eviction whether or not the right to bring the forcible entry and detainer action has been assigned.

(c) A person does not forfeit any part of his or her security deposit due solely to an eviction under the provisions of this Section, except that a security deposit may be used to pay fees charged by the sheriff for carrying out an eviction.

(d) If a lessor or the lessor's assignee voids a lease or contract under the provisions of this Section and the tenant or occupant has not vacated the premises within 5 days after receipt of a written notice to vacate the premises, the lessor or lessor's assignee may seek relief under this Article IX. Notwithstanding Sections 9-112, 9-113, and 9-114 of this Code, judgment for costs against a plaintiff seeking possession of the premises under this Section shall not be awarded to the defendant unless the action was brought by the plaintiff in bad faith. An action to possess premises under this Section shall not be deemed to be in bad faith when the plaintiff based his or her cause of action on information provided to him or her by a law enforcement agency or the State's Attorney.

(e) After a trial, if the court finds, by a preponderance of the evidence, that the allegations in the complaint have been proven, the court shall enter judgment for possession of the premises in favor of the plaintiff and the court shall order that the plaintiff shall be entitled to re-enter the premises immediately.

(f) A judgment for possession of the premises entered in an action brought by a lessor or lessor's assignee, if the action was brought as a result of a lessor or lessor's assignee declaring a lease void pursuant to this Section, may not be stayed for any period in excess of 7 days by the court unless all parties agree to a longer period. Thereafter the plaintiff shall be entitled to re-enter the premises immediately. The sheriff or other lawfully deputized officers shall execute an order entered pursuant to this Section within 7 days of its entry, or within 7 days of the expiration of a stay of judgment, if one is entered.

(g) Nothing in this Section shall limit the rights of an owner or lessor to bring a forcible entry and detainer action on the basis of other applicable law.

Passed in the General Assembly May 16, 1997.
Approved August 10, 1997.
Effective January 1, 1998.

PUBLIC ACT 90-0361
(House Bill No. 1751)

AN ACT relating to arts organizations and cultural institutions.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 5. The School Code is amended by adding Section 2-3.120 as follows:

(105 ILCS 5/2-3.120 new)

Sec. 2-3.120. Arts and humanities organizations and cultural institutions. The State Board of Education is authorized to reimburse not-for-profit arts and humanities organizations and

cultural institutions of Illinois, including but not limited to, museums and theater or dance companies, for the costs of providing educational programs to public elementary and secondary school students.

Section 10. The Board of Higher Education Act is amended by adding Section 9.09a as follows:

(110 ILCS 205/9.09a new)

Sec. 9.09a. Arts and humanities organizations and cultural institutions. The Board of Higher Education is authorized to reimburse not-for-profit arts and humanities organizations and cultural institutions of Illinois, including but not limited to, museums and theater or dance companies, for the costs of providing educational programs to students of public institutions of higher education.

Passed in the General Assembly May 15, 1997.
Approved August 10, 1997.
Effective January 1, 1998.

PUBLIC ACT 90-0362
(Senate Bill No. 329)

AN ACT to amend the Children and Family Services Act by changing Section 5.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 5. The Children and Family Services Act is amended by changing Section 5 as follows:

(20 ILCS 505/5) (from Ch. 23, par. 5005)

(Text of Section before amendment by P.A. 89-507)

Sec. 5. To provide direct child welfare services when not available through other public or private child care or program facilities.

(a) For purposes of this Section:

(1) "Children" means persons found within the State who are under the age of 18 years. The term also includes persons under age 19 who:

(A) were committed to the Department pursuant to the Juvenile Court Act or the Juvenile Court Act of 1987, as amended, prior to the age of 18 and who continue under the jurisdiction of the court; or

(B) were accepted for care, service and training by the Department prior to the age of 18 and whose best interest in the discretion of the Department would be served by continuing that care, service and training because of severe emotional disturbances, physical disability, social adjustment or any combination thereof, or because of the need to complete an educational or vocational training program.

(2) "Homeless youth" means persons found within the State who are under the age of 19, are not in a safe and stable living situation and cannot be reunited with their families.

(3) "Child welfare services" means public social services which are directed toward the accomplishment of the following purposes:

(A) protecting and promoting the welfare

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Kansas Disability Rights *Action* Coalition for Housing

2401 E. 13th Street
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(785) 625-6942 (V/TTY)
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Written Testimony to Judiciary Committee
Senator Tim Emert, Chairman,
on SB 286 by
Robin Tropper, Coordinator, Kansas DRACH
March 4, 1999

Thank you Chairman Emert and Committee members for allowing me to testify today as an opponent of Senate Bill 286. I'm Robin Tropper, Coordinator of the Kansas Disability Rights Action Coalition for Housing (KDRACH). KDRACH is a state-wide grassroots, cross-disability group of individuals and organizations working to ensure that the civil rights of people with disabilities are fully honored and protected in all housing in Kansas. Our work mirrors that of national DRACH, and is based on the independent living philosophy, promoting individual choice, individual control and full integration in our communities.

The current provisions of the Kansas Residential Landlord and Tenant Act fairly and adequately protect the rights of landlords and tenants alike; it is imperative that the existing law remain intact as is.

The proposed expedited eviction procedure, Sec. 3(b) of SB 286, is a misguided attempt at controlling criminal and violent activities, that would likely penalize innocent parties. People with disabilities and their family members – who face an exceedingly difficult enough time in locating suitable, affordable, accessible housing units to move into – would number among those who could be unjustly evicted. The notion of evicting persons *arrested* for covered violations, before proven guilty, as well as other household members or tenants who had suspects merely visit them as guests, is unconscionable. So long as discrimination and hate crimes remain commonplace, so long as people of all protected classes are arrested frivolously on a daily basis, innocent tenants will be denied the housing protections currently afforded by the Landlord and Tenant Act.

The Landlord and Tenant Act must not be warped into a tool for prevention and enforcement of criminal activities; it must remain a fair and just *housing* law.

I urge you not to pass Senate Bill 286.

Thank you very much. If you have any questions, I would be happy to address them.

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Prosecuting and Defending Forcible Entry and Detainer Actions

By Stephen Kirschbaum

Introduction

Landlords wishing to evict unwilling residential tenants must use a summary proceeding called Forcible Entry and Detainer (FED). The law is well settled in Kansas that a landlord must strictly comply with all prerequisites of the Forcible Entry and Detainer statute, K.S.A. 61-2301 to 61-2311, before the Court may assume jurisdiction.[1] In *Goodin v. King*, the court, citing 36A C.J.S., Forcible Entry & Detainer, p. 996, §31, stated:

> Since ... the action of forcible entry and detainer is a special statutory proceeding, summary in its nature, and in derogation of the common law, it follows that the statute conferring jurisdiction must be strictly pursued in the method of procedure prescribed by it, or the jurisdiction will fail to attach, and the proceeding will be *coram non judice* and void, unless the defects in procedure may be, and are waived. There is no presumption in favor of the record.[2]

ce *Goodin* was decided in 1963, appellate decisions in as have not specifically taken up the issue of a landlord's strict compliance with conditions precedent and strict pursuit of remedies as jurisdictional requirements for FED actions. Although these requirements are still alive, the substantive law that constitutes the requirements has changed dramatically. The sources of these changes are the Kansas Residential Landlord and Tenant Act (KRLTA), K.S.A. 58-2540 to 58-2573, and the vast proliferation of federal law that controls federal housing programs ranging from public housing to the numerous government-subsidized programs administered by such agencies as the U.S. Department of Housing and Urban Development. Thus, both state and federal sources of law have specific requirements for termination of tenancies that bear heavily upon the jurisdictional mandate established by the earlier cases. In addition, they provide elaborate frameworks that define the landlord-tenant relationship in Kansas. The details of these frameworks often add important dimensions to the litigation of FED actions for both parties. Moreover, anti-discrimination legislation at both the state and federal level plays an increasingly important role in housing law in general and can have a strong impact upon FED actions. (See Defending against evictions that violate anti-discrimination legislation, page 31.).

The purpose of this article is to provide the practicing lawyer with a basic understanding of the mechanics of forcible entry and detainer actions in Kansas, from prosecution to the assertion of defenses and counterclaims by tenants. To this end, the article begins with an overview of the applicable substantive law contained primarily in the Kansas Residential Landlord and Tenant Act (KRLTA) and the case law interpreting it.[3] The eviction process will then be examined from beginning to end, *i.e.*, from meeting the mandatory conditions precedent for the filing of the suit, through the litigation, to the rendering, enforcement and appeal of judgment.

The landlord-tenant relationship

Based in part on the Uniform Residential Landlord-Tenant Act, the Kansas Residential Landlord and Tenant Act was enacted in 1975. The KRLTA is comprehensive legislation that determines the landlord-tenant relationship from initiation of the tenancy to its termination. Under the KRLTA, the rental agreement may include terms and conditions to w the parties agree so long as they are not prohibited by An explicit rental agreement between the parties is required. In the absence of an agreement, the tenant must pay as rent the fair-rental value for the use and occupanc of the dwelling.[5] Rent is payable without demand or noti at the time and place agreed upon by the parties. Unless otherwise agreed, it is payable at the dwelling unit at the beginning of any term of one month or less and otherwise in equal monthly installments at the beginning of each month.[6] A rental agreement that fails to fix a definite term creates a month-to-month tenancy, except a week-to-week tenancy is established in the case of a roomer who pays weekly rent.[7] K.S.A. 58-2546 provides that when a landlord or tenant fails to sign and deliver a rental agreement, the knowing acceptance of rent without reservation or the taking of possession of the premises, respectively, gives the agreement the effect of having been signed and delivered.

A departure from common law, K.S.A. 58-2552 requires the landlord at the commencement of the tenancy to deliver possession of the premises to the new tenant and, if necessary, bring an action for possession against any person wrongfully in possession. This statute also imposes a warranty of initial habitability on the landlord.[8] In the event that the landlord fails to deliver possession of the unit to the tenant, K.S.A. 58-2560 provides that rent abates and the tenant can either (a) terminate the tenancy with a five-day written notice to the landlord, in which case the landlord must return the security deposit, or (b) demand performance of the rental agreement and, if the tenant elects, institute an FED action against the landlord or any person wrongfully in possession and recover damages. Where the failure to del er possession is willful and not in good faith, the new ten is entitled to $1^1/_2$ months' rent or $1^1/_2$ times the actual damages, whichever is greater.[9]

The KRLTA also provides remedies when a tenant abandons the premises. In such a case, the terms of K.S.A. 58-2565 control. If, after the tenant has been 10 days in default for nonpayment of rent and has removed a substantial portion of the tenant's belongings, the landlord may assume, absent notice by the tenant to the contrary, that the tenant has abandoned the dwelling unit.[10] Subsection (c) requires the landlord to make reasonable efforts to rent the unit at a fair rental if the tenant abandons. If the landlord fails to mitigate damages in this manner or accepts the abandonment as

FOOTNOTES:

1. *Goodin v. King*, 192 Kan. 304, 387 P.2d 206 (1963). *See also, Bell v. Dennis*, 158 Kan. 35, 144 P.2d 938 (1944); *Gunter v. Eiznhamer*, 165 Kan. 510, 196 P.2d 177 (1948).

2. *Goodin*, 192 Kan. at 307-8.

3. In addition to the KRLTA, the legislature enacted the Mobile Home Parks Residential Landlord and Tenant Act, K.S.A. 58-25,100 to 58-25,126, to address the unique relationship between tenants and owners of mobile-home parks where the tenant rents the space on which the mobile home sits, as distinct from the mobile home itself. This relatively new legislation became effective Jan. 1, 1993. When both the mobile home and the space used to accommodate the mobile home are rented or leased by the same landlord, the KRLTA controls. K.S.A. 58-25,101. Space limitations do not allow a treatment of this statute. Conceptually, it does not differ significantly from the KRLTA. Because the latter is clearly the more widely used legislation, it will be the focus of this article.

4. K.S.A. 58-2545(a). However, K.S.A. 58-2547 prohibits certain terms from inclusion in a rental agreement and provides that where they have been included, they are unenforceable.

5. K.S.A. 58-2545(b).

6. K.S.A. 58-2545(c).

7. K.S.A. 58-2545(d).

8. With respect to the issue of habitability of the premises, the KRLTA sets forth three general obligations: the landlord must have the dwelling unit in a habitable condition at the time the tenant enters into possession; the landlord must maintain the premises in that condition; and the tenant must keep the dwelling unit as clean as the conditions permit.

9. K.S.A. 58-2560.

10. Subsection (a) permits a landlord to recover actual damages if the rental agreement requires the tenant to give notice of an absence in excess of seven days as required in K.S.A. 58-2558 and the tenant' failure was willful. Subsection (b) allows a landlord to enter the premise at times reasonably necessary when the tenant is absent from the premises in excess of 30 days.

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a[illegible]ender, the rental agreement is terminated as of the date the landlord has notice of the abandonment. Where the landlord does mitigate and the new tenancy begins prior to the expiration of the rental agreement, the latter is deemed to be terminated as of the date the former begins.

Most notable is the determination regarding whether a tenant has abandoned or retained legal possession of the premises.

Subsection (d) sets out the procedure for sale by the landlord of household goods, furnishings, fixtures or any other personal property left in or at the dwelling unit when a tenant abandons or surrenders possession. The landlord may take possession of the tenant's personal property, store it at the tenant's expense and sell or dispose of it after 30 days, if all notice requirements set out in this subsection are met prior to the sale.[11] Since distraint for rent was generally abolished with the passage of the KRLTA,[12] it is worth noting again that this procedure applies only in the limited situation of a tenant's abandonment or surrender of possession of the premises. Subsection (e) directs the priority of debts to which the proceeds of a landlord sale are to be applied. The statute permits the landlord to retain any [illegible]aining balance limited only by a liability to a creditor [illegible] a secured interest in the property if the creditor gave the landlord notice as specified in subsection (d).[13]

A decade ago, the court interpreted K.S.A. 58-2565 in *Davis v. Odell*,[14] noting that a landlord's right to dispose of a tenant's personal property pursuant to subsection (d) depends upon a showing that the tenant abandoned or surrendered possession of the dwelling unit and his or her personal property. The court stated, "Generally, abandonment is the act of intentionally relinquishing a known right absolutely and without reference to any particular person or for any particular purpose."[15] However, it qualified this general rule when it stated that mere nonuse of the property or the temporary absence of the owner without evidence of intention are not enough to constitute an abandonment.[16] Surrender, on the other hand, is "created by operation of law when the parties to a lease do some act so inconsistent with the subsisting relation of landlord and tenant as to imply that they have both agreed to consider the surrender as made."[17] The court found that the case law is clear that a tenant does not surrender a leasehold unless there is an agreement between the parties that the lease is terminated. Importantly, the court held that because there was no abandonment or surrender by the tenants, the landlord's disposal of the tenants' personal property was not proper under the KRLTA and constituted conversion as a matter of law.[18] Citing *Geiger v. Wallace*,[19] the court entertained the possibility that a landlord's malicious, willful or wanton violation of a tenant's rights by wrongfully disposing of personal property may give rise to punitive damages.[20]

The provisions set out in K.S.A. 58-2565 have obvious implications for FED actions. Most notable among them is the determination regarding whether a tenant has abandoned or retained legal possession of the premises. The KRLTA prohibits a landlord from otherwise recovering or taking possession of the dwelling unit except in rare circumstances, such as when the tenant abandons or surrenders the property. K.S.A. 58-2569 forbids such extrajudicial methods of reclaiming possession as willful diminution of services to the tenants by interrupting or causing the interruption of electric, gas, water or other essential service to the tenant. The KRLTA provides that upon termination of the rental agreement, the landlord may have a claim and file an action for possession, rent or both. It also permits a landlord to assert a separate claim for actual damages for breach of the rental agreement.[21]

The mechanics of FED actions

FED actions are commenced in state district court pursuant to the code of civil procedure for limited actions.[22] Statutory requirements for FED actions are found at K.S.A. 61-2301 to 61-2311. The required contents of the petition for eviction, set out in K.S.A. 61-2305, are identification of parties, description of premises and the grounds for eviction. A landlord must include a claim for rent whenever an FED action is instituted based on a failure to pay rent.[23] The landlord is not required, however, to bring a claim for property damage at the time of the FED suit. Service of the summons and petition must comply with Article 18, K.S.A. Chapter 61, except service must be accomplished at least three days before the appearance date instead of the 11 days required

11. Kansas Attorney General Opinion No. 85-177 (Dec. 16, 1985) looks to this statute in interpreting the obligations of a sheriff in enforcing a writ of execution pursuant to K.S.A. 61-2311 for a judgment for restitution of the premises. That opinion states that no statutes authorize the sheriff to take possession of any personal property that remains on the premises and he or she should only do so at the direction of the court in the writ of restitution or a subsequent order. To do otherwise, according to the attorney general, could subject the sheriff to an action for conversion.

12. K.S.A. 58-2567(b). Distraint is a common-law right of a landlord to seize personal property on the premises in a nonjudicial proceeding to satisfy a tenant's arrearage in rent.

13. K.S.A. 58-2565(e)(3).

14. 240 Kan. 261, 729 P.2d 1117 (1986).

15. *Id.* at 269.

16. *Id.*

17. *Id.* at 270.

18. *Id.* at 271.

19. 233 Kan. 656, 661-62, 664 P.2d 846 (1983).

20. *Davis*, 240 Kan. at 271.

21. K.S.A. 58-2568. An action for such damages may also be filed prior to the termination date of the rental agreement.

22. K.S.A. 61-1603(b)(3), 58-2542. Where possession of the premises is not at issue, landlord and tenant claims seeking recovery of money or personal property in an amount that does not exceed $1,800 meet the definition of small claims and may be litigated pursuant to the Small Claims Procedure, K.S.A. 61-2701 to 61-2714. See *Barton v. Miller*, 225 Kan. 624, 625, 592 P.2d 921 (1979).

23. K.S.A. 61-2305 reads in part: "If an action is brought for the purpose of recovering possession of said premises from a tenant for non-payment of rent the petition shall allege this fact, and the plaintiff in the action shall set forth a statement of the amount the plaintiff claims to be due from the defendant as rent of said premises."

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K.S.A. 61-1802 for other Chapter 61 cases.[24] Trial must place within eight days of the appearance or answer date stated in the summons unless the tenant assumes an obligation to the landlord supported by sufficient security approved by the court for the payment of all damages and rent that may accrue if judgment is ultimately entered against the tenant.[25] A landlord may in rare cases obtain possession prior to trial.[26]

As noted in the introduction, the court does not acquire jurisdiction in an FED action unless the landlord first strictly complies with all applicable procedures to terminate the tenancy. Quoting *Kellogg v. Lewis*, 28 Kan. 535, Syl. ¶1, the court in *Bell v. Dennis*[27] reaffirmed the rule that, "[t]o maintain an action of forcible detainer, the plaintiff must have a perfect right of possession at the time" an eviction action is commenced.[28] The court referred to the requirements that, when met by a landlord, give rise to a perfect right of possession as "conditions precedent to the institution or maintenance" of an eviction action.[29] The holding in *Bell* is that "unless excused or waived conditions precedent to the maintenance of an action, whether arising from statute, agreement or circumstances, must ordinarily be performed or complied with before the action may be instituted."[30]

Bell and related cases are particularly important where notice is concerned. Notice requirements arise under state and, where federal housing programs are involved, federal law. Landlords and their attorneys often fail to strictly comply with various notice requirements. As a result, this is an area that attorneys on both sides should understand well because it may literally determine whether the landlord can get through the door to the courtroom. One source of confusion is the failure to understand that notice requirements arise under both the KRLTA and the FED statute and both sets of requirements must be strictly met. Thus, in all cases, two notices are required before an FED petition may be filed.

The first notice terminates the tenancy in accordance with the KRLTA and, where applicable, federal law. The second, directed by the FED procedure, is a notice to quit the premises.[31] The latter notice must be served at least three days before filing suit, by leaving a written copy with the tenant or a person older than 12 years of age residing at the premises, by posting in a conspicuous place at the premises if no one is found at home or by certified mail. Statutorily sufficient notice is found at K.S.A. 61-2605, Form No. 14. The notice to quit may not be served until the tenancy has been properly terminated except that it may be combined with a three-day notice to terminate in nonpayment cases. Interpreting the three-day notice to quit requirement, the court in *Gunter v. Eisenhamer* stated that "three clear days must elapse between the date of serving the notice and the date the action is commenced."[32] Thus, a notice served Oct. 1 followed by a suit filed Oct. 4 resulted in a reversal of judgment for eviction.[33]

"[t]o maintain an action of forcible detainer, the plaintiff must have a perfect right of possession ..."

The notice to terminate the tenancy is not a constant and depends upon the type of tenancy involved and the circumstances that occasion the termination. In general, this notice is determined by the KRLTA. *Schartz v. Foster*[34] illustrates the importance of determining the statute that controls the termination of the tenancy. In *Schartz*, the tenant entered into a one-year lease and when the year ended, she held over with the landlord's consent. The court ruled that the KRLTA controls over the general provisions in K.S.A. 58-2501 to 58-2533 and, thus, the tenant held the premises pursuant to a month-to-month tenancy in accordance with K.S.A. 58-2545(d) since there was no rental agreement fixing a definite term.[35] To terminate the agreement, the landlord had simply to serve the tenant with a 30-day notice as required by K.S.A. 58-2570(b). The court rejected the tenant's argument that termination of the tenancy was controlled by K.S.A. 58-2501 to 58-2533. The tenant had argued that, since K.S.A. 58-2502 provides that a tenant with a one-year lease holding over with a landlord's consent becomes a tenant from year-to-year, and because K.S.A. 58-2505 provides that year-to-year tenancies can only be terminated by a 30-day notice served prior to the expiration of the year, the landlord's attempted termination was improper. The court, construing the two bodies of legislation, held that:

> These two statutes [*i.e.*, K.S.A. 58-2502 and 58-2505], however, govern landlord-tenant relationships generally and are not part of the more specific Residential Landlord and Tenant Act.[36] "'Where there is a conflict between a statute dealing generally with a

24. K.S.A. 61-2306.

25. K.S.A. 61-2308. The statute qualifies this requirement as follows: "[I]n an action for ejectment of a tenant for the non-payment of rent, no continuance shall be granted on account of the absence of evidence, unless the defendant shall file an affidavit showing the nature of the absent evidence, and if an absent witness, the name and residence of the absent witness and what facts he or she believes the absent witness will prove, and that he or she believes them to be true." The statute further provides that if the landlord stipulates to the facts in the affidavit, no continuance may be granted the tenant.

26. K.S.A. 58-2570(d). Upon a proper motion served in a manner prescribed by the statute, a judge who is satisfied that granting immediate possession of the dwelling unit to the landlord is in the interest of justice and will properly protect the interests of all the parties may award immediate restitution of the premises to the landlord upon the landlord giving an undertaking and surety in an amount required by the court for the payment of damages if judgment is entered in favor of the tenant.

27. 158 Kan. 35, 144 P.2d 938 (1944).

28. *Id.* at 37.

29. *Id.*

30. *Id.*

31. K.S.A. 61-2304.

32. *Gunter*, 165 Kan. at Syl. ¶5.

33. *Id.* at 516.

34. 15 Kan. App. 2d 213, 805 P.2d 505 (1991).

35. *Id.* at 215.

36. K.S.A. 58-2501 to 58-2533 addresses landlord and tenant relations in general and is not specific to residential tenancies. The statutes in this section control those arrangements such as farm tenancies, which are excluded from coverage of the KRLTA. K.S.A. 58-2541 sets forth seven general categories of arrangements that are not governed by the KRLTA.

subject and another dealing specifically with a certain phase of it, the specific legislation controls.'" *Read v. Miller*, 14 Kan. App. 2d 274, 276, 788 P.2d 883 (1990). Also, the Act was enacted in 1975, after the enactment of K.S.A. 58-2502 and K.S.A. 58-2505, and the pertinent portions of that Act have not been amended. See L. 1978, ch. 217, § 3. Where there is a conflict between two statutes which cannot be harmonized, the later legislative expression controls. *Asay v. American Drywall*, 11 Kan. App. 2d 122, 126, 715 P.2d 421 (1986).[37]

Schartz made it clear that all residential tenancies must be terminated according to the requirements of the KRLTA. K.S.A. 58-2564(b) permits a landlord to terminate the rental agreement if the tenant fails to pay rent within three days after receiving the landlord's written notice stating the fact of nonpayment and the landlord's intention to terminate the rental agreement if the rent is not paid within the three-day period. In nonpayment of rent cases, the notice to terminate and the notice to quit may be combined so long as the requirements of K.S.A. 58-2564(b) and K.S.A. 61-2304 are met. The combined notice must state that the tenant must move or pay the amount of rent stated in the notice within three days. The notice must also state that a suit for eviction will be instituted if the tenant does neither of the above. Three days is defined as 72 hours.[38] The time begins upon delivery or posting.[39] If mailed, two days is added to the time limit.[40] The distinction between the 72-hour requirement in the notice to terminate and the "three clear days" requirement for the notice to quit as discussed in *Gunter*, above, is a critical one, especially since landlords typically combine the two notices in rent cases. A landlord is justified in terminating a tenancy when the rent due has not been tendered within 72 hours of the time the notice has been served. Nonetheless, jurisdiction to institute the FED action does not exist until three full days have passed.

In situations in which nonpayment of rent is not an issue, a landlord may terminate a month-to-month tenancy by first serving the tenant with a written notice ...

In situations in which nonpayment of rent is not an issue, a landlord may terminate a month-to-month tenancy by first serving the tenant with a written notice stating that the tenancy shall terminate upon a periodic rent-paying date not less than 30 days after the receipt of the notice. Week-to-week tenancies may be terminated with a written notice at least seven days prior to the termination.[41] In both month-to-month and week-to-week tenancies, the landlord may terminate for any reason or for no reason, except that terminations that would violate anti-discrimination legislation or are retaliatory are not permitted. K.S.A. 58-2570(c) provides a statutory penalty of $1^1/_2$ months' periodic rent or not more than $1^1/_2$ times the actual damages sustained, whichever is greater, against a tenant whose holdover is willful and not in good faith.[42]

A rental agreement for a definite term of more than 30 days may not be construed as a month-to-month tenancy even where the rent is reserved payable at intervals of 30 days.[43] A landlord has the right to terminate a tenancy of longer than one month in duration for material noncompliance by the tenant in accordance with K.S.A. 58-2564. If there is a material noncompliance by the tenant with the rental agreement or with K.S.A. 58-2555 materially affecting health and safety,[44] the landlord may deliver a written notice to the tenant specifying the acts and omissions constituting the breach. The written notice should state that the rental agreement will terminate upon a date not less than 30 days after receipt of the notice if the breach is not remedied in 14 days. If the tenant cures the breach within the provided time, the tenancy will not terminate. However, if the tenant subsequently commits the same or a similar breach, the landlord may terminate the tenancy with a 30-day notice and the 14-day notice to cure is not required. K.S.A. 58-2564(c) permits a landlord to recover damages and obtain injunctive relief for any noncompliance by the tenant with the rental agreement or K.S.A. 58-2555. Subsection (d) provides that this statute does not limit terminations by a landlord or tenant pursuant to K.S.A. 58-2570, thus making clear that month-to-month and week-to-week tenancies are not subject to the requirements of K.S.A. 58-2564 and may be terminated without cause. Where cause exists no notice to cure is mandated.[45]

The court in *Fenn v. Windsor at Kingsborough, Inc.*[46] found that K.S.A. 58-2564(a) contains three notice requirements. The notice must inform the tenant of: (1) the act or omission constituting the breach; (2) the landlord's intention to terminate the rental agreement on a date at least 30 days after the tenant's receipt of the notice; and (3) the tenant's

37. *Schartz*, 15 Kan. App. 2d at 215.
38. K.S.A. 58-2564(b).
39. *Id.*
40. *Id.*
41. K.S.A. 58-2570(a).
42. Kansas appellate courts have rendered no written decisions that construe when holdovers are willful and not in good faith under this statute.
43. K.S.A. 58-2570(b).
44. K.S.A. 58-2555 requires a tenant to comply with all obligations imposed by building and housing codes materially affecting health and safety and prescribes basic standards of care for the premises and appliances.
45. Leases in the federal public housing program create a unique problem in terms of identifying the termination requirements under state law. Public housing leases operate on a month-to-month arrangement but renew so long as there is not good cause to terminate. Accordingly, neither K.S.A. 58-2564 nor K.S.A. 58-2570 exactly apply. The legislature seemed not to have contemplated such an arrangement. Technically, the lease creates a month-to-month tenancy since rent is paid monthly and there is no definite term. On the other hand, the protections of a 14-day cure provision under K.S.A. 58-2564 would seem to be warranted since such an ongoing lease was apparently designed to be more protective to tenants than even a yearly lease term.
46. 226 Kan. 653, 603 P.2d 188 (1979).

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it to remedy the breach within 14 days. In *Fenn*, the landlord gave a 30-day notice without the 14-day notice to cure. After moving out, the tenants requested their security deposit and when they didn't get it, they filed a suit against the landlord. The landlord had rerented the premises and filed a counterclaim against the tenants for rent up to the point of the rerental. Because the landlord failed to provide the 14-day notice to cure, the court would not entertain the issue of whether such tenants had a duty to pay ongoing rent during the time the landlord was trying to rerent. The court stated, "The written notice which we are considering gave the lessees no alternative, it simply stated 'within thirty days you must quit and surrender possession.'"[47] The court found that the landlord's notice terminated the rental agreement effective the date the tenants vacated the premises. Therefore, the landlord was not entitled to recover rent accruing after the date the lease was cancelled by the landlord's statutorily defective notice.[48] Perhaps *Fenn's* greatest impact in an FED context is that its three requirements for termination notices provide the minimum standards for conferring jurisdiction on an eviction suit.

Federally subsidized housing programs add another layer of substantive law to the FED procedure. This comes about primarily through the federal requirements for terminating tenants from those programs. As a recipient of federal funds, a landlord must follow applicable federal statutes and regulations. Thus, these tenants are entitled to the protections afforded by both Kansas law and the federal law, which is derived from the program in which the tenant participates. Landlords of federally subsidized housing who fail to identify and conform to applicable termination procedures prescribed by federal law run the risk of having their eviction petitions dismissed for lack of jurisdiction. (See Litigating when federal programs are involved, page 32).

Finally, FED proceedings are limited by K.S.A. 61-1724, which provides that where title to real estate is sought to be recovered or an equitable or legal interest in real estate is sought to be established, the action in a limited actions proceeding shall be stayed.[49] This is significant in FED actions in certain contract for deed situations in which it is unclear whether the parties are landlord and tenant or seller and purchaser. For example, such contracts may specify a purchase price with a monthly amount to be paid by the tenant-vendee. The contract may further provide that upon default, whatever amounts have been paid to the owner-vendor are to be considered as rent for the premises and the tenant-vendee is subject to removal in an FED action. Defendants who have made substantial payment toward the purchase may be able to implicate this statute on equitable principles and thereby succeed in having the suit transferred to the civil department where more extensive rights may be ac than are available in a summary eviction proceeding.[50]

Tenant defenses

Tenant defenses may be asserted as to either possession of the premises or monetary damages claimed by the landlord. For obvious reasons, the issue of possession is often the more important one. Moreover, it is the central and defining aspect of an FED action. Therefore, this section of the article will concentrate on the defenses directed toward that issue.

Federally subsidized housing programs add another layer of substantive law to the FED procedure.

Attorneys representing tenants in FED actions may find their most effective defenses in the strict compliance requirements enunciated by the *Bell v. Dennis* line of cases. Take the hypothetical case of the tenant who, in the third month of a one-year lease, has been served with an FED petition in which the landlord seeks eviction for a material breach of the rental agreement. Prior to filing the petition, the landlord served the tenant with a 30-day notice to terminate the tenancy pursuant to K.S.A. 58-2564(a). In scrutinizing the termination notice, the attorney finds that the required 14-day notice to cure was not gi despite the fact that this is the first time the landlord alleged such a breach. In such a case, a *Bell*-type defense would be available to the tenant. Since case law requires the court to inquire into whether the landlord's "statutory remedy was strictly pursued," the merits of the landlord's petition should not be determinative. Without the required 14-day notice to cure contained in the termination notice, the landlord is not in strict compliance with the KRLTA, and therefore, the landlord's petition must be dismissed. The landlord is not precluded from refiling the FED petition since the dismissal was jurisdictional and not based upon the merits. Thus, this defense will forestall an eviction only until the landlord has cured all procedural deficiencies.

Continuing with the hypothetical case, the tenant's attorney may find that the landlord's FED petition was filed prior to the expiration of the three days provided for in the notice to quit. This would give rise to a *Bell*-type jurisdictional defense as well, since strict compliance with procedure is a condition precedent to institution as well as maintenance of

47. *Id.* at 656.

48. *Id.* at 657.

49. In such a case, the statute further directs that the judge shall notify the administrative judge of the district of the stay and, within 10 days after the action is stayed, shall transmit all papers and process in the action to the clerk of the district court for assignment to a district judge. The judge before whom the action is commenced shall require of the defendant setting up such a question to file a bill of particulars setting forth a full and specific statement of the facts constituting the defendant's defense of the real estate that is brought in question.

50. *See, e.g., Stevens v. McDowell*, 151 Kan. 316, 319, 98 P.2d 123 (1940), where the court in analyzing whether the premises that were being purchased pursuant to a contract for deed arrangement were properly part of an FED action, stated, "[I]f the monthly payments have been made with reasonable promptness and have been made for such a length of time that their aggregate amount constitutes the equivalent of a substantial payment on the purchase price, or where substantial improvements have been made by the tenant-vendee, then equity m not permit the interest of the tenant-vendee to be summarily extinguis in forcible detainer, but will deal with the situation according to equitab principles, and may require proceedings as in equitable foreclosure before the interest of the latter can be extinguished."

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an FED action. In cases other than for nonpayment of rent where the two notices may be combined, it is not uncommon to find that the landlord has simply neglected altogether to serve the tenant with a notice to quit required by K.S.A. 61-2304 prior to filing the FED petition. In nonpayment of rent cases, the attorney should scrutinize the combined notice to determine whether the contents are adequate under K.S.A. 58-2564 and K.S.A. 61-2304. In addition to reviewing all state law requirements, attorneys representing tenants living in federally subsidized housing situations should look for strict compliance with federally required notices and compare the method of service upon the tenant with the prescriptions of federal law.

The landlord's obligation to furnish the tenant a habitable dwelling and to maintain the premises in a habitable condition may play an important part in fashioning tenant defenses. The implied warranty of habitability was recognized by the Kansas Supreme Court prior to the passage of the KRLTA in *Steele v. Latimer*,[51] following the trend sparked by the landmark decision *Javins v. First Nat'l Realty Corp.*[52] In its well-known departure from common law in which it held that a residential lease "is essentially a contract containing reciprocal rights and obligations on the part of lessor and lessee,"[53] the *Steele* court determined that a landlord has a duty not to rent any property that poses a threat to the health or safety of the tenant.

... the obligations imposed upon the landlord are not absolute.

Upon its passage, the KRLTA codified the court's holding and subsequent case law has expanded upon both the holding in *Steele* and its codification by the legislature. K.S.A. 58-2549 states that "A rental agreement, assignment, conveyance, trust deed or security instrument may not permit the receipt of rent free of the obligation to comply with subsection (a) of K.S.A. 58-2553."[54] K.S.A. 58-2553 imposes mandatory duties on the landlord that may not be delegated to the tenant.[55] For example, city housing codes are incorporated into the Kansas Residential Landlord and Tenant Act pursuant to K.S.A. 58-2553(a)(1),[56] and code violations by a landlord that materially affect health and safety create a breach of duty under K.S.A. 58-2553.[57] K.S.A. 58-2559(b) permits a tenant to recover damages for any noncompliance with either the lease or K.S.A. 58-2553.

The availability of damages under K.S.A. 58-2559(b) is not dependent upon the landlord's lack of good faith and the statute does not require the tenant to give notice. The court in *Love v. Monarch Apts.*,[58] held that a landlord's breach of the statutory duties under K.S.A. 58-2553 is a breach of the contract with the tenant and the tenant is entitled to the traditional remedies for breach of contract, including recovery of damages. The court stated that the primary measure of damages is the difference between the fair rental value of the tenant's apartment as it should have been and the fair rental value of the apartment's true condition, insofar as the difference resulted from the landlord's breach of its statutory duties.[59] Consequential damages are available as well. The court found that where there was such a breach by the landlord, it is "obvious" that there were damages suffered by the tenant.[60] Accordingly, the case was remanded for a proper determination of whether a breach occurred and, if so, the amount of damages.[61]

Notwithstanding the general principle of the warranty of habitability, the obligations imposed upon the landlord are not absolute. For example, K.S.A. 58-2553(a)(5) requires the landlord to furnish running water and reasonable amounts of hot water at all times and reasonable heat unless the building is not required by law to be so equipped. Additionally this subsection makes clear that the rental agreement may provide that the tenant is obligated to pay for the utility services. Subsection (b) provides that in dwelling units with common areas that provide a residence to four households or fewer, the parties may agree in writing to the delegation to the tenant of certain landlord duties such as trash removal, the supplying of running water and specified repairs, maintenance tasks, alterations or remodeling if entered into in good faith and not for the purpose of evading the obligations of the landlord. Subsection (c) permits the delegation of the landlord's duty to perform specified repairs, maintenance tasks, alterations or remodeling so long as the parties' agreement is not for the purpose of curing noncompliance with housing code violations and the agreement does not diminish or affect the landlord's obligation to other tenants in the premises. Subpart (d) prohibits the landlord from treating the tenant's performance of the separate agreement contemplated by subsection (c) as a condition to any obligation or the performance of any rental agreement.

The warranty of habitability defense has a clear role in resisting a landlord's claim for back rent. Less certain is the defense's impact upon the claim for possession of the rented premises. All of the early landmark decisions establishing a landlord's warranty of habitability have concluded that the warranty is meaningless unless the tenant is able to enforce

51. 214 Kan. 329, 521 P.2d 304 (1974).

52. 428 F.2d 1071 (D.C. Cir. 1970).

53. *Steele*, 214 Kan. at Syl. ¶ 6.

54. This statute leaves one wondering whether the receipt of rent itself is free of these same obligations. In Patrick A. Randolph, Jr., "The Mortgagee's Interest in Rents: Some Policy Considerations and Proposals," 29 Kan. L. Rev. 2, 20-21 (1980), the author seems to answer this question affirmatively. In his discussion of rent assignments, he points out that the Uniform Land Transactions Act takes the position that when a mortgagee's assignment is a simple contract assignment of rights in a bilateral contract, the mortgagee is entitled to a specific flow of gross rents and has no responsibilities toward the lessee or the property. He contrasts this approach with that of the Uniform Residential Landlord and Tenant Act, specifically pointing to K.S.A. 58-2549, which "prohibits assignments that would permit the mortgagee to escape responsibility to meet the statutory duties to provide a habitable premises."

55. *State v. Mwaura*, 4 Kan. App. 2d 738, 610 P.2d 665 (1980).

56. *Aguirre v. Adams*, 15 Kan. App. 2d 470, 471, 809 P.2d 8 (1991).

57. *Joe v. Spangler*, 6 Kan. App. 2d 630, 631 P.2d 1243 (1981).

58. 13 Kan. App. 2d 341, 771 P.2d 79 (1989).

59. *Id.* at 345.

60. *Id.* at 346.

61. *Id.*

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by remaining in possession of the premises and withholding all or part of the rent.[62] Nonetheless, the KRLTA provides no such remedy for the tenant whose landlord is in violation of K.S.A. 58-2553, and the two Kansas appellate courts have neither created such a remedy nor ruled that it does not exist.[63] Thus, it is unclear whether habitability defects are a defense to a landlord's claim for possession in a rent case. Conceptually, the defense would seem to be sound in an FED case based upon nonpayment of rent where a tenant has failed to pay any rent during a period when the landlord's breach is so serious that rent has entirely abated.

Similarly, a tenant might argue that a partial withholding of rent based on the abatement of rent formula enunciated in *Love* justifies a dismissal of an FED petition which is based on nonpayment of rent. This position is bolstered by the KRLTA's departure from the common law and the establishment of rent and repair as mutually dependent covenants as evidenced by K.S.A. 58-2549.[64] Further, K.S.A. 58-2561(a) recognizes a tenant's right to retain possession where judgment on tenant counterclaims exceeds the landlord's claims for rent. On the other hand, despite its obvious departure from common law, modern landlord-tenant law retains some of the residue of the property theory rooted in 15th and 16th century England, which assumed a tenant's obligation to pay rent to be independent of any obligations imposed upon a landlord.[65] As a result, a judicially created tenant right to withhold rent in the face of habitability defects materially affecting health and safety is not an inevitable remedy. Given the absence of clear statutory or judicial guidelines, tenants who withhold full or partial rent, even for the purpose of undertaking the necessary repairs themselves, run the risk of being evicted.

The KRLTA provides a basis for other tenant defenses as well,[66] though one should also scrutinize the rental agreement, which may provide the tenant with more protection, and thereby defenses, than the KRLTA. The defense of waiver may be available to a tenant being sued for eviction based on nonpayment or untimely payment of rent as well as for material noncompliance with the rental agreement. K.S.A. 58-2566 provides that acceptance of late rent from a tenant without reservation by a landlord constitutes a waiver of the landlord's right to terminate the rental agreement. Similarly, acceptance of a tenant's performance, other than for payment of rent, that varies from the terms of the rental agreement, constitutes a waiver of the landlord's right to terminate the rental agreement for the breach in question unless otherwise agreed after the breach has occurred.[67]

A tenant may successfully mount a defense when a landlord's FED petition seeks to terminate the tenancy for a breach of an unconscionable lease term.[68] Landlord claims based on rental agreement provisions that are prohibited by the KRLTA are likewise defensible. K.S.A. 58-2547(a) sets out four categories of terms that are prohibited from being included in rental agreements. No rental agreement may provide that the tenant or landlord: (1) agrees to waive or to forego rights or remedies under the KRLTA; (2) authorizes any person to confess judgment on a claim arising out of the rental agreement; (3) agrees to pay either party's attorneys' fees; or (4) agrees to the limitation of any liability of either party arising under law or to indemnify either party for the liability or related costs, except that a rental agreement may provide that a tenant agrees to limit the landlord's liability for fire, theft or breakage with respect to common areas. K.S.A. 58-2547(b) forbids the enforcement of any such prohibited provisions, [illegible] a tenant who can show that the landlord deliberately knowingly used a rental agreement containing a prohibited provision may have a claim for actual damages.

... one should also scrutinize the rental agreement, which may provide the tenant with more protection ...

Tenants defending against a landlord's monetary claim for damages to the premises caused by the tenant may find K.S.A. 58-2548 of some limited assistance. This statute provides for an inventory to be jointly taken within five days of the initial date of occupancy or delivery of possession, but failure to do so, according to *Buettner v. Unrub*,[69] does not necessarily preclude a landlord from pursuing a claim for damages. In *Buettner*, the court reversed the trial court's conclusion that the failure of the parties to perform an initial

62. *See, e.g., Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970); *Jack Spring, Inc. v. Little*, 500 Ill.2d 351, 280 N.E.2d 208 (1972); *Rome v. Walker*, 38 Mich. App. 458, 196 N.W.2d 850 (1972). In "URLTA, Kansas, and the Common Law," 21 Kan. L. Rev. 387, 416 (1973), Michael J. Davis writing at a time prior to the passage of the KRLTA when the precise form of the legislation was being debated, argued that "a possession-and-rent-suspension rule" is a remedy that is "necessary to fulfill the promises of the rights provisions, to restore the balance struck elsewhere in the [uniform legislation], and ultimately to encourage maintenance and improvement of the enacting state's housing stock." Davis's admonition went unheeded by the Kansas legislature, however.

63. One commentator has read *Joe v. Spangler*, as "permitt[ing] a withholding of rent in the face of established housing code violations, one of which was characterized by the City Inspector as 'dangerous.'" Michael J. Davis, "Kansas Survey — Real Property," 32 Kan. L. Rev. 773, 780 (1984). Although such a conclusion might follow the court's reversal and remand of the tenant's counterclaims under K.S.A. 58-2553(a), it is by no means assured. In any event, the court of appeals did not reach the issue of whether a breach of the warranty of habitability acts as a defense against a landlord's claim for possession premised on a nonpayment of rent theory.

64. The comments to § 1.102 of the Uniform Residential Landlord and Tenant Act, of which the KRLTA is a modified version, state that "This Act recognizes the modern tendency to treat performance of certain obligations of the parties as interdependent." At common law, the tenant had no remedy allowing the withholding of rent even for the purpose of curing habitability defects. *But see, Murrell v. Crawford*, 102 Kan. 118, 122, 169 P. 561 (1917) ("If the repairs would cost but little, the tenant may make them himself, and offset the expense against the rent.")

65. James Charles Smith, "Tenant Remedies for Breach of Habitability: Tort Dimensions of a Contract Concept," 35 Kan. L. Rev. 505, fn. 2 (1987).

66. The defense based upon a landlord's retaliatory eviction prohibited by K.S.A. 58-2572 is discussed in "Tenant Counterclaims," below.

67. K.S.A. 58-2566.

68. K.S.A. 58-2544.

69. 7 Kan. App. 2d 459, 642 P.2d 124 (1982).

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joint inventory pursuant to K.S.A. 58-2548 completely foreclosed the landlord from bringing a damages action later. The court of appeals found that although the parties have a joint responsibility to perform the inventory, "the statute reflects the likelihood that the landlord will be the controlling party in the leasing transaction by stating that 'the tenant shall be *given* a copy of the inventory.'"[70] Thus, the court stated, the failure of the landlord to comply with the statute "could raise an inference that the damages pre-existed the tenancy, but there is no indication from the statute that the landlord is to be prohibited from producing evidence to overcome that inference."[71]

Tenant defenses may also arise outside of the FED context.

Attorneys representing tenants should raise a defense where the named plaintiff may not be the real party in interest when it comes time to testify.[72] To determine the availability of this defense, one must look to the definitions provided by the KRLTA. The term "landlord" includes the owner, lessor or sublessor of the dwelling unit, or the building of which it is a part, as well as a manger of the premises who fails to make the disclosures required by K.S.A. 58-2551 and amendments thereto.[73] "Owner" is defined as one or more persons, jointly or severally, in whom is vested: (1) all or part of the legal title to property; or (2) all or part of the beneficial ownership and a right to prevent use and enjoyment of the premises. Such term includes a mortgagee in possession.[74] Finally, scrutiny should also be given to whether the defendant meets the definition of a "tenant" as provided by K.S.A. 58-2543(o), *i.e.*, whether he or she is a person entitled under a rental agreement to occupy a dwelling unit to the exclusion of others.

Tenant defenses may also arise outside of the FED context. Most common are suits filed by landlords asserting monetary claims subsequent to the tenant's vacation of the premises. Landlord suits seeking to collect rent under the lease for the remainder of the lease term after a tenant has moved may be justified on a number of grounds. There are situations, however, where such a remedy is not available to the landlord. A tenant who has properly asserted the right to terminate a tenancy for material noncompliance by the landlord, K.S.A. 58-2559,[75] will foreclose the landlord's claim for the period following the termination. A landlord's failure to mitigate damages after a tenant departs the premises may give rise to a defense as well. A tenant has the right to terminate a rental agreement if the dwelling is damaged or destroyed by fire or casualty and becomes uninhabitable.[76] Month-to-month tenancies, of course, can generally be terminated by a tenant with a simple 30-day notice, pursuant to K.S.A. 58-2570(b). Where the tenant has properly terminated the tenancy, a defense is available against claims by the landlord for continuing rent.

Tenant counterclaims

Although the KRLTA does not explicitly authorize it, modern procedural rules allowing liberal joinder of claims[77] permit the tenant to raise counterclaims as well as defenses in an FED action. Moreover, Kansas has apparently always viewed the summary possession action as one in which all issues may be litigated.[78] More problematic, however, is the tenant's determination not to assert counterclaims, since a failure to do so may have preclusive effects in a subsequent case.[79] The general requirement of K.S.A. 61-2308 that all FED cases go to trial within eight days of the initial appearance makes it difficult for a tenant to develop complex

70. *Id.* at 361. (Emphasis in the original.)

71. *Id.* For a comment on the very real discrepancies between rights and remedies in a housing context, *see* Davis, 21 Kan. L. Rev. at 415.

72. K.S.A. 61-1725(b) incorporating K.S.A. 60-217.

73. K.S.A. 58-2543(e). K.S.A. 58-2551(a) requires the landlord or any person authorized to enter into a rental agreement on the landlord's behalf to disclose to the tenant in writing by the commencement of the tenancy the names of the person authorized to manage the premises and an owner of the premises or a person authorized to act for and on behalf of the owner for the purpose of receiving and receipting for notices and demands. Subsection (b) creates a duty to keep this information current and extends that duty to any successor landlord, owner or manager. Subsection (c) states that a person who fails to comply with subsection (a) becomes an agent of each person who is a landlord for the purpose of service of process and receiving and receipting for notices and demands, and performing the obligations of the landlord under the KRLTA or the rental agreement. Somewhat related is K.S.A. 58-2554 which deals with liability of landlords and managers when property is sold to another.

74. K.S.A. 58-2543(g).

75. K.S.A. 58-2559 permits a tenant to terminate a lease for material noncompliance by the landlord with the rental agreement or with K.S.A. 58-2553 materially affecting health and safety by a notice specifying the breach and stating that the rental agreement will terminate upon a periodic rent-paying date not less than 30 days after receipt of the notice. (*Cf.* K.S.A. 58-2564 which provides that for a material breach by the tenant, the landlord can terminate with a thirty-day notice that runs from the time the notice is received by the tenant.) If the breach is remediable and the landlord initiates a good faith effort to remedy the breach within 14 days after receipt of the notice, the rental agreement shall not terminate. However, for a subsequent breach that is the same or similar to the first breach, the notice of termination is sufficient irrespective of whether the landlord initiates a cure. K.S.A. 58-2559(a)(2) states that the tenant cannot terminate for a condition caused by an act or omission attributable to the tenant or a person, pet or animal on the premises with the tenant's express or implied permission or consent.

76. K.S.A. 58-2562. When it enacted this statute, the legislature repudiated the common law "fire rule," which, consistent with that law's two doctrinal foundations, the lease-as-conveyance and the independence of covenants, required a tenant to continue paying rent for the duration of the lease even when burned out in the interim. Under the modern legislation, when there is a fire that substantially impairs the habitability of the dwelling, the tenant may terminate the premises immediately and serve notice to the landlord within five days. On the other hand, if occupation is lawful, the tenant may choose to apportion the rent based on the diminution of the fair market value. Subsection (b) deals with return of the security deposit and landlord accounting of the rent.

77. K.S.A. 61-1725(c) incorporating K.S.A. 60-218 into the civil procedure.

78. *See, e.g., Mueller v. Seiler*, 158 Kan. 440, 148 P.2d 266 (1944); *Conway v. Gore*, 27 Kan. 122 (1882).

79. The determination regarding whether to assert counterclaims in an FED action is not entirely in the tenant's hands, however. Pursuant to K.S.A. 61-1709(a), upon the landlord's timely application and in the court's discretion, a tenant may with certain qualifications be required to plead all counterclaims which arise out of the transaction or occurrence that is the subject matter of the landlord's claim.

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unterclaims.[80] K.S.A. 58-2561(a), which applies in nonpayment of rent cases, requires the tenant to file all counterclaims for any amount that may be recovered under the rental agreement or the KRLTA or else the counterclaims are waived.[81] K.S.A. 61-2303, on the other hand, allows either party to file subsequent claims not included in the judgment rendered in the FED action. Kansas appellate courts have not considered this issue, but one might assume that the specific language of K.S.A. 58-2561(a) takes precedence, thereby carving out in rent cases a preclusive effect exception to the general rule, contained in K.S.A. 61-2303, that tenant counterclaims are not compulsory and will therefore not be *res judicata* in a subsequent independent suit. Given the uncertainty, the tenant should file all claims that are ripe at the time of the FED action. As a practical matter, tenants may have no choice but to assert their counterclaims, no matter how complex, where the counterclaims contain a defense aimed at the issue of possession.[82]

While a tenant may have counterclaims unrelated to housing law per se, there are certain counterclaims that arise through the specific tenant protections of the KRLTA. A landlord's breach of the implied warranty of habitability may serve as both a defense and a counterclaim. If the facts warrant it, the breach should be pleaded as both since the defense as to the issue of possession may depend upon the counterclaim for monetary damages exceeding the landlord's claim for rent. A tenant's monetary claims based upon this cause of action may also include a claim for rent previously paid, since the theory of the claim is that rent must abate in whole or in part, depending upon the degree of the breach during the time period in question. Thus, this part of the claim is to recover rent paid by the tenant to which the landlord was not entitled by virtue of the uninhabitability of the premises.

Landlord "self help" remedies, such as tenant lockouts or diminished services by interrupting or causing the interruption of electric, gas, water or other essential service to the tenant, are forbidden by the KRLTA.[83] Where a landlord has instituted such a remedy, the tenant may recover damages equal to [illegible] months' rent or actual damages sustained, whichever is greater. In addition, the tenant may terminate the tenancy or recover possession. A tenant electing [illegible]mer is entitled to the return of that portion of the [illegible]ty deposit recoverable under K.S.A. 58-2550. Punitive damages are also available if the landlord acted in a wanton or ma[illegible]cious manner.[84] Tenants seeking exemplary damages lockouts or diminution of essential utility services mi[illegible] attempt to show that this method of avoiding the use of the FED process conceptually approaches the violent means prohibited by *Walterscheid v. Crupper*.[85] Somewhat related, distraint for rent is abolished and prohibited except, as noted above, in the case of abandonment or surrender of personal property and possession of the premises by the tenant.[86] Where such violations by the landlord occur, the tenant may seek actual damages and, if the facts support it, punitive damages.

Certain retaliatory actions by the landlord are prohibited by K.S.A. 58-2572.[87] The landlord generally cannot raise rent or diminish services because the tenant has complained to a government agency of a violation materially affecting health and safety, complained to the landlord about a violation under K.S.A. 58-2553 or has organized or become involved with a tenants' union or similar organization.[88] Where such a violation occurs, subsection (b) provides that a tenant may recover 1½ months' rent or actual damages sustained, whichever is greater. Of perhaps even greater importance, the tenant may assert such violation as a defense against a landlord's claim for possession of the premises. Notwithstanding the general prohibition, however, the statute permits the landlord to raise the rent even where the tenant has complained about health and safety violations or has organized or become a member of a tenant organization so long as the increase does not conflict with a lease agreement in effect and is made in good faith to compensate the landlord for expenses incurred as a result of acts of God or increases in public utility service rates, property taxes or other operating costs.[89]

Landlord "self help" remedies ... are forbidden by the KRLTA.

80. Since K.S.A. 61-2308 places the eight-day time limitation on the court only where possession is at issue, one solution may be to request, where it is feasible to do so, that the court bifurcate the proceeding, hearing the matters that pertain only to the issue of possession and postponing for a future time the trial in which monetary claims and counterclaims will be asserted by the parties.

81. This provision applies in FED cases or in rent claims asserted by the landlord where the tenant is in possession. This statute also permits the court to require from time to time the accrued and accruing rent to be paid by the tenant into court. After judgment, the party to whom a net amount is owed shall be paid first from the money paid into court, and the balance shall be paid by the other party. If the balance comes out in the tenant's favor, judgment on the issue of possession may be entered in favor of the tenant. K.S.A. 58-2561(b) does not permit the judge to require the tenant to make such payment into court where the tenant asserts counterclaims but is no longer in possession of the dwelling unit.

82. For a more developed discussion of the *res judicata* aspects of FED cases, see, Comment, "Forcible Entry and Detainer Actions in Kansas: Some Observations on *Lindsey v. Normet*," 21 Kan. L. Rev. 71, [illegible]

83. K.S.A. 58-2563.

84. *Geiger v. Wallace*, 233 Kan. 656, 664 P.2d 846 (1983). *See also, Walterscheid v. Crupper*, 79 Kan. 627, 100 P. 623 (1909) in which exemplary damages were awarded when the landlord used violence to oust the tenant.

85. 79 Kan. 627, 100 P. 623 (1909). *See also*, Davis, 21 Kan. L. Rev. at 414.

86. K.S.A. 58-2567(b). Subsection (a) of this statute generally provides that a lien or security interest on behalf of the landlord in the tenant's household goods, furnishings, fixtures or other personal property is not enforceable unless perfected prior to the effective date of the act, *i.e.*, July 1, 1975.

87. The prohibition against retaliatory evictions is a departure from the common law, which permitted the landlord to terminate a tenancy for any reason at all. *See, e.g., Ritchie v. Johnson*, 158 Kan. 103, 144 P.2d 925 (1944). A turning point occurred with *Edwards v. Habib*, 397 F.2d 687 (D.C. Cir. 1968) in which the court found that public policy did not permit the termination of a tenancy if motivated by retaliation for complaints about housing code violations. See also, *Davis*, 21 Kan Rev. at 419.

88. K.S.A. 58-2572(a).

89. K.S.A. 58-2572 [illegible]

The statute further qualifies the prohibition against retaliatory actions by depriving the tenant of the defense that would have otherwise been available where the health and safety violation was caused by or was within the control of the tenant, the tenant is in default in rent or compliance with the applicable building or housing code requires alteration, remodeling or demolition that would effectively deprive the tenant of the use of the dwelling unit. A landlord who maintains an FED action under such circumstances, however, is not released from liability under K.S.A. 58-2559(b), and the tenant may recover damages for noncompliance by the landlord with the rental agreement or K.S.A. 58-2553.

K.S.A. 58-2550(d) prohibits a tenant from using or applying the security deposit in lieu of payment of rent.

A tenant's claim seeking recovery of a security deposit and associated damages pursuant to K.S.A. 58-2550(c) may be filed at a subsequent time since it is not a compulsory counterclaim under the KRLTA or the general statute, K.S.A. 60-213.[90] This claim will most likely be unripe at the time of the trial on the landlord's FED petition anyway. K.S.A. 58-2550(b) does not require a landlord to return the portion of the security deposit due the tenant until 30 days after the tenancy has terminated. Nonetheless, irrespective of whether such claims are asserted in an FED action or otherwise, the provisions of K.S.A. 58-2550 apply where security deposits are an issue. Generally, a tenant is entitled to statutory damages in the amount of $1^1/_2$ times the amount wrongfully withheld by the landlord in addition to the return of the wrongfully withheld portion of the security deposit.[91] Where the landlord has wrongfully withheld some portion of the security deposit, statutory damages are mandatory, not discretionary.[92]

K.S.A. 58-2550(d) prohibits a tenant from using or applying the security deposit in lieu of payment of rent. This typically occurs where a tenant seeks to apply or deduct some portion of the security deposit from the last month's rent. This subsection provides that a tenant who violates this prohibition shall forfeit the security deposit and the landlord may recover the rent due as if the deposit had not been applied or deducted from the rent due. In construing the forfeiture provision, the Kansas Supreme Court in *Clark v. Walker*[93] rejected the tenant's equal protection argument that tenants who abandon the premises are not subject to the forfeiture of their security deposit.[94] Nevertheless, the court refused to apply the forfeiture provision of K.S.A. 58-2550(d) to the facts in the case before it, reasoning that the forfeiture of the security deposit is such a drastic remedy that the forfeiture provisions of the statute must be strictly construed. Thus, the court read subsection (d) along with the definition of a security deposit ("any sum of money ... which ... may be forfeited under the terms of the rental agreement ...") and concluded that "in order to be effective, the forfeiture provision authorized by K.S.A. 58-2550(d) **must be actually set forth in the rental agreement** itself. The bold printing of the forfeiture provision in the lease would satisfy the requirements of a security deposit 'forfeited under the terms of the rental agreement' while also satisfying the fundamental notions of due process and essential fairness. The exact amount to be forfeited must be negotiated between the two parties to the lease."[95]

In addition to the above, common law remedies may be available to a tenant. Promises made by the landlord that are intended to induce a tenant into a rental agreement and that are then not kept may be actionable as fraudulent misrepresentation.[96] To successfully bring the claim of outrage, a tenant must prove severe emotional distress intentionally or recklessly caused by extreme and outrageous conduct.[97] Invasion of privacy requires an intentional interference in the solitude or seclusion of a person's physical being, or prying into his or her private affairs or concerns, that would be highly offensive to a reasonable person.[98] Unlike the tort of outrage, the tenant need not prove that the emotional distress suffered was severe.[99] The KRLTA may provide a tenant with an avenue to establish the elements of tort claims even where those provisions do not give the tenant a direct remedy.[100]

In fashioning counterclaims, attorneys representing tenants should be aware that Kansas Consumer Protection Act (KCPA) remedies for violations by landlords are not available in cases arising under the KRLTA, including FED actions.[101] In *Chelsea Plaza Homes, Inc. v. Moore*, the court rejected the tenant's attempt to expand the benefits of the KRLTA and the KCPA. The KCPA would have permitted the minimum civil damages pursuant to K.S.A. 50-636 and attorney fees pursuant to K.S.A. 50-634 whereas the KRLTA

90. *Asbury v. Mauk*, 9 Kan. App. 2d 699, 687 P.2d 31 (1984).

91. K.S.A. 58-2550(c).

92. *Love v. Monarch Apts.*, 13 Kan. App. 2d 341, 344, 771 P.2d 79 (1989).

93. 225 Kan. 359, 590 P.2d 1043 (1979).

94. K.S.A. 58-2550(d) allows a tenant who simply abandons the apartment to apply his or her security deposit to the final rental payment.

95. 225 Kan. at 367 (emphasis in the original). See also, *Burgess v. Stroud*, 17 Kan. App. 2d 560, 565, 840 P.2d 1206 (1992), in which the court held that the statutory forfeiture provision requires affirmative action on the part of the tenant and not simply inaction or silence.

96. *See, e.g., Anderson v. Heartland Oil & Gas, Inc.*, 249 Kan. 458, 819 P.2d 1192 (1991), *certiorari denied, Jones v. Anderson*, 112 S.Ct. 1946, 118 L.Ed.2d 550 (1992).

97. *See, e.g., Bradshaw v. Swagerty*, 1 Kan. App. 2d 213, 563 P.2d 511 (1977).

98. *See, e.g., Werner v. Kliewer*, 238 Kan. 289, 710 P.2d 1250 (1985).

99. *See, e.g., Monroe v. Darr*, 221 Kan. 281, 559 P.2d 322 (1977).

100. *See, e.g., McDermott v. Midland Management, Inc.*, 997 F.2d 768 (10th Cir. 1993), where a tenant sued her landlord on a negligence theory for injuries she received in an attack by a former prison inmate who was let into her apartment by the apartment manager. The court cited K.S.A. 58-2557, which limits a landlord's right to enter the rented premises, in analyzing whether the manager's actions might have been the proximate cause of the tenant's injury. The court also noted that the statute is a potential source for the legal duties of a plaintiff's negligence claim.

101. *Chelsea Plaza Homes, Inc. v. Moore*, 226 Kan. 430, 601 P.2d 1100 (1979).

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would have permitted only the recovery of actual damages under K.S.A. 58-2547. The court did not dispute that the KCPA was broad enough to cover leases of real estate. Nevertheless, it held that the KRLTA is specific legislation, complete in itself, which takes precedence over the broad KCPA and controls all transactions within its purview.[102]

Judgments

A judgment entered against the tenant may include possession, rent, costs and a hold-over penalty. A tenant who prevails in an FED action may not be legally excluded from the premises as self-help remedies are prohibited by the KRLTA.[103] When a landlord has obtained a judgment against a tenant for possession of the premises and so requests, the court must issue a writ of execution for possession of the premises.[104] The prescribed form is found at K.S.A. 61-2605, Form No. 16. Execution of the writ must take place within 10 days after receipt by the sheriff's department. The sheriff may levy on non-exempt property to collect the money judgment of either party.[105] Execution of a writ of execution is stayed by a notice from the judge that the proceedings have been stayed by appeal.[106]

Unlike other limited action appeals, tenants who wish to appeal that portion of the judgment pertaining to restitution of the premises must file their notice of appeal within five days of the entry of judgment.[107] Appeals from FED judgments of district magistrate judges are taken to a district court judge. Appeals from FED actions heard by district judges are taken to the court of appeals.[108] Appeals where restitution of the premises is not at issue proceed like all others from limited actions: notices of appeal must be filed within 10 and 30 days, respectively, of the entry of judgment from [illegible]rict magistrate judge, K.S.A. 60-2103a(a), or a district [illegible]dge, K.S.A. 60-2103(a). Where a defendant desires a stay on appeal from that portion of the judgment pertaining to [illegible] session of the premises, a supersedeas bond may be p[illegible] ed to the judge from which the appeal is taken and the stay is effective at the time the bond is approved by the court. The bond may be so presented at or after the time of filing the notice of appeal.[109] In addition, the supersedeas bond filed on appeal must be conditioned such that the appellant will not commit or allow waste to be committed on the premises, and the appellant will pay rent, damages and costs in an amount that the court may ultimately determine.[110]

Conclusion

FED actions in Kansas are not the summary proceedings they are in some states where the issue is limited solely to that of possession of the premises and the landlord is prohibited from even claiming back rent. Regardless, the expedited nature of FED actions is a certainty. This has its advantages and disadvantages. The issue of possession is confronted and resolved rapidly once an FED action has been initiated, though complex claims and defenses often cannot be fully developed. On the other hand, tenants who take the time to scrutinize whether their landlords have strictly pursued their remedies prior to commencing an eviction action against them may find a defense that will deprive the action of the jurisdiction to proceed. In any event, the complexities of procedural and substantive law at both the state and federal level indicate that though eviction suits may be one of the last remaining [illegible]s where justice is swift, they are far from simple.

102. *Id.* at 434.
103. *See, e.g.*, K.S.A. 58-2563.
104. K.S.A. 61-2310.
105. K.S.A. 61-2311.
106. *Id.*
107. K.S.A. 61-2102(a).
108. K.S.A. 61-2102(c).
109. K.S.A. 61-2105.
110. K.S.A. 61-2106.

Defending against evictions that violate anti-discrimination legislation

By Stephen Kirschbaum

Powerful state and federal anti-discrimination statutes can play a critical role in FED suits where a tenant claims to have suffered actionable discrimination at the hands of the landlord. This is especially true when the landlord's attempt to evict the tenant constitutes the alleged discrimination in whole or in part. The Kansas Act Against Discrimination, K.S.A. 44-1001 to 44-1044, provides protection against housing discrimination based on race, religion, color, sex, disability, national origin, ancestry or familial status. K.S.A. 44-1001. Persons aggrieved by an unlawful discriminatory housing practice may file complaints with the Kansas Human Rights Commission. In the alternative, they may elect to commence a civil action in state district court within two years of the discriminatory act. K.S.A. 44-1021(d)(1). If the court finds that a discriminatory housing practice has occurred or is about to occur, the court may award the plaintiff actual and punitive damages. Subject to certain limitations, the statute empowers the court to grant injunctive relief, including an order enjoining the defendant from engaging in specific discriminatory housing practices or requiring affirmative action. In its discretion, the court may allow the prevailing attorney fees and costs. K.S.A. 44-1021(d)(4).

The federal Fair Housing Act ("FHA") as amended, makes it unlawful to discriminate on the basis of race, color, religion, sex, familial status, disability, or national origin. 4

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U.S.C. 3604. Familial status and disability are the most recent protected classifications, having come into being with the passage of the Fair Housing Amendments Act of 1988. The prohibition of discrimination on the basis of familial status protects households in which a minor is domiciled with either a parent, a person having legal custody, or a designee of either the parent or the person who has legal custody of the minor. 42 U.S.C. 3602(k). The protection of persons with disabilities extends to those who are physically or mentally disabled, and those who are perceived as being disabled. 42 U.S.C. 3602(h). The federal regulations extend protection to people with HIV or AIDS. 24 C.F.R. 100.201. Disability also includes alcoholism and prior drug addiction, however, the FHA specifically states that it does not include current illegal use of, or addiction to, a controlled substance. 42 U.S.C. 3602(h). An aggrieved person may commence a civil action in an appropriate United States district court or state court. 42 U.S.C. 3613(a)(1)(A). If it finds that a discriminatory housing practice has occurred or is about to occur, the court may award damages and grant appropriate injunctive relief similar to that provided by the state legislation. 42 U.S.C. 3613(c)(1).

... the FED procedure is summary in nature.

Defenses and counterclaims grounded in anti-discrimination legislation may be asserted in an FED action but the practical problems in doing so may be daunting for two reasons. First, discrimination cases tend to be complex and thus require time to fully develop. In contrast, the FED procedure is summary in nature. In the usual case where possession is at issue, the trial must take place within eight days of the initial appearance date. Second, in developing a fair housing claim, attorneys will likely utilize a full array of discovery devices. Discovery permitted under the Code of Civil Procedure for Limited Actions may well be inadequate for the plaintiff's purposes because it is more constrained than the discovery permitted by Chapter 60 and the Federal Rules of Civil Procedure. More to the point, though, none of this limited discovery is even available to the tenant whose eviction trial can only be continued by statute for eight days.

As a result of such limitations, the attorneys representing tenants facing eviction proceedings may conclude that the FED procedure is simply not an adequate forum in which to assert fair housing defenses and counterclaims against a landlord. An attorney making such a determination might consider filing an affirmative fair housing suit on behalf of the tenant against the landlord in state court pursuant to K.S.A. Chapter 60 or in U.S. District Court utilizing the injunctive relief provided by the state and federal fair housing legislation to stay the FED action until the issue of a discriminatory eviction has been determined. Suits in federal court in which an injunction against an FED action in state court is sought must overcome barriers created by the federal Anti-Injunction Act, 28 U.S.C. 2283, and the related abstention doctrine, which generally requires federal courts to abstain from jurisdiction whenever federal claims have been or could have been presented in ongoing state judicial proceedings that concern important state interests. In order to avoid these barriers, the tenant, where it is possible, should file suit prior to the institution of the FED action, keeping in mind that in a race with the landlord to federal and state court, respectively, the finish line is determined by the time frames contained in the notices to terminate the tenancy and to quit the premises.

Litigating when federal programs are involved

By Stephen Kirschbaum

Attorneys representing landlords or tenants in eviction actions where a federal subsidy is involved must identify the program involved since each have specific requirements for terminating tenancies. Some of the best known examples of federally subsidized housing are the various "Section 8" housing programs. In the Housing and Community Development Act of 1974, Congress enacted Section 8 as the primary vehicle for the federal government's efforts to provide the nation with an adequate supply of housing for low-income families or individuals. 42 U.S.C.A. 1437f (West 1978 and Supp. 1991). In general, tenants receiving assistance under a Section 8 program pay 30 percent of their adjusted income and the difference between that amount and the approved contract rent for the dwelling unit is subsidized in the form of a housing assistance payment. Another widely known program is conventional public housing, which originated with the United States Housing Act of 1937, 42 U.S.C.A. 1437 (West 1978). In that program, the housing is owned and operated by a local public housing authority. Federal programs also provide subsidies to some mortgages of rental housing with low-income tenants owned by private landlords.

Some general examples illustrate the point. Federally subsidized housing programs often involve landlords in the private sector. Whether they arise from mortgage programs ("shallow" subsidies) or direct rent programs ("deep" subsidies) such as Section 8, federal requirements for terminating tenancies apply in FED actions in addition to those mandated by state law. The eviction procedures from subsidized dwellings must conform with the substantive and procedural requirements of the federal regulations. These regulations require that a landlord may not terminate a tenancy except when "good cause" exists. In many programs, the notice terminating a tenancy for good cause must be in writing and (1) state that the tenancy is terminated on a specified date; (2) state the reasons for the landlord's action with enough specificity so as to enable the tenant to prepare a defense; (3) advise the tenant that if he or she remains in the leased unit on the date specified for termination, the landlord may seek to enforce the termination only by bringing a judicial action, at which time the tenant may present a defense; and (4) be served on the tenant in a manner specified by the regulations. Federal regulations require both residential service and service by mail in order to be effective. In certain circumstances, good cause does not exist until the landlord has first given the tenant prior notice that said conduct would in the future constitute a basis for [illegible] tion of

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occupancy. Such a notice must be served in the same manner as the notice to terminate the tenancy.

Unlike federally subsidized housing owned by private sector landlords, conventional public housing programs are administered by local public-housing authorities (PHA's) in accordance with federal requirements that implement federal legislation and are set out in the Code of Federal Regulations. These regulations direct that prior to the institution of an FED action against a tenant, a PHA must establish a grievance procedure in which a tenant may challenge a proposed termination of tenancy. 24 C.F.R. 966.51(a)(1). In general, the PHA must provide the tenant with a notice of the right to utilize the grievance procedure as required by 24 C.F.R. 966.4(l)(3)(ii) and the right to examine PHA documents directly relevant to the proposed termination as required by 24 C.F.R. 966.4(m). In addition to these unique federal requirements for termination of tenancy, other al requirements mirror those found in the KRLTA. For ple, the KRLTA's 30-day notice requirement is also required by federal law. 24 C.F.R. 966.4(l)(3)(i). Federal law parallels the state law requirement that the landlord inform the ter of the specific acts and omissions constituting the alleg breach of the rental agreement that would justify the termination of the tenancy. 24 C.F.R. 966.4(l)(3)(ii).

A landlord must comply with both state and federal conditions precedent to obtain jurisdiction to institute or maintain an FED action. Tenants in subsidized housing whose landlords have filed FED actions without having complied with applicable federal requirements should assert the defense that the court lacks jurisdiction to hear the case pursuant to *Bell v. Dennis* even if the landlord is in compliance with the state requirements.

About the author

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Review of Selected 1996 California Legislation
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*663 A NEW WEAPON IN THE WAR ON DRUGS: USING CIVIL REMEDIES TO EVICT TENANTS ENGAGED IN ILLEGAL DRUG ACTIVITY RAPIDLY

Michael C. Weed

I. INTRODUCTION

In the realm of landlord and tenant relations, the legal system has sought to strike a balance between competing property interests that often conflict. The landlord is primarily interested in the preservation of his rights as an owner, while the tenant demands security in his rights as possessor of the property. At times, problems will arise that will cause the landlord to seek to evict a particular tenant, whether it be for nonpayment of rent or disruptive behavior that affects neighbors. However, the process that the landlord must utilize to accomplish the eviction can, at times, be lengthy and expensive. [FN1] Chapter 658 seeks to remedy the potential difficulties that occur when a landlord evicts a tenant who is disrupting the neighborhood or rental property through the illegal sale of controlled substances. [FN2]

II. THE CHANGES ENACTED BY CHAPTER 658

Existing law provides that a tenant may be evicted on three days' notice if that tenant has maintained or permitted a nuisance on the property. [FN3] Under this statute, a tenant committing a nuisance is deemed to have terminated the lease, thus allowing the landlord to seek restitution of possession after only three days' notice. [FN4]

Chapter 658 amends § 1161 of the California Civil Procedure Code to specifically include the illegal sale of a controlled substance as a nuisance. [FN5] Moreover, Chapter 658 amends California Civil Code § 3479, which sets forth the statutory definition of "nuisance" to include the illegal sale of a controlled substance. [***664** FN6] Thus, Chapter 658 clarifies and provides certainty to existing law, enabling a landlord to quickly evict a tenant based exclusively on the tenant's illegal sale of a controlled substance.

III. THE RATIONALE UNDERLYING THE CHANGES

The war on drugs in America is in full swing, and Chapter 658 represents another weapon in the struggle. Drug use and trafficking is viewed as one of the country's most serious problems, a problem that can encroach on every city and citizen in the nation. [FN7] Often, the drug problem is most acute in public housing, or multi-family housing developments. [FN8] Left unchecked, the drug problem in multi-family dwellings can spread, exposing all residents to the violence and crime that usually accompanies drug activity. [FN9] Chapter 658 creates a tool to aid in preventing the neighborhood erosion caused by drug activity. By enacting legislation that labels the illegal sale of controlled substances a nuisance per se, lawmakers hope to reduce the crime and violence caused by drug sales, making entire neighborhoods safer for law-abiding residents. [FN10]

Because traditional criminal sanctions have been ineffective in defeating illegal drug trafficking, law enforcement agencies are adopting new methods to fight the battle. [FN11] Among the weapons becoming more popular is the use of civil remedies to fight criminal activity. [FN12] Consistent with this trend, several states have enacted ***665** measures that declare the illegal sale of controlled substances to be a nuisance. [FN13] Chapter 658 enacts the

same declaration, [FN14] and expressly incorporates the illegal sale of drugs into California's unlawful detainer statute. [FN15] Incorporation into the unlawful detainer statute activates the faster eviction process of that provision. [FN16] Thus, Chapter 658 creates an efficient and effective tool to be utilized by landlords and law enforcement agencies in the effort to reduce the prevalence of drug activity and drug houses in California neighborhoods.

IV. Potential Difficulties with Chapter 658

The goals of Chapter 658, aiding in the war on drugs and making neighborhoods safer, [FN17] will clearly receive strong support. However, in practice, Chapter 658 may give rise to various concerns.

A. Due Process Concerns

First, because law enforcement is utilizing a civil remedy to address a criminal activity, the traditional safeguards in place for a criminal defendant [FN18] may be legally circumvented in the civil arena. [FN19] Lacking many of the burdens imposed by the criminal justice system, the civil remedy is more efficient, less costly and easier to utilize. [FN20] This makes civil remedies attractive to law enforcement officials, particularly ***666** when, as with Chapter 658, a specific goal is intended that can be achieved directly through implementation of a specific civil remedy. [FN21]

However, the ease with which the eviction process provided by Chapter 658 can be implemented also creates constitutional concerns. By providing a speedy eviction process, [FN22] Chapter 658 may raise due process concerns as tenants are evicted based on criminal activity without criminal conviction. [FN23] Yet, proponents of Chapter 658 point out that court and district attorney supervision will be involved in every eviction, and that probable cause evidence of illegal sales of controlled substances is required prior to implementation of the eviction process. [FN24] By providing these safeguards, Chapter 658 ensures that when evictions do occur, the affected tenants will be provided sufficient due process prior to being put out of their homes.

B. Double Jeopardy Concerns

A second concern raised by Chapter 658 is the possibility of exposing an evicted tenant to double jeopardy. [FN25] Although criminal conviction is not required to activate the eviction process created by Chapter 658, [FN26] if a tenant is prosecuted criminally and convicted, and also evicted through civil proceedings, double jeopardy issues are created. [FN27]

***667** In United States v. Ursery, [FN28] however, the Supreme Court recently held that in rem civil forfeiture proceedings, distinct from criminal prosecution but based on the same illegality, do not violate double jeopardy. [FN29] In that case, the Court found that the clear intent of Congress was that forfeiture be a civil, rather than criminal, remedy, and as such, civil forfeiture did not constitute punishment for double jeopardy purposes. [FN30] The civil forfeiture is viewed as distinct from the criminal sanction. [FN31] Because the civil sanction sought is remedial, rather than punitive, it does not violate the Double Jeopardy Clause. [FN32] Just as a private person may pursue civil compensation against a convicted criminal for one event or activity, so may the government seek compensation or recompense for one event or activity. [FN33]

The eviction process enacted by Chapter 658 is in the same vein. Because the rental property at issue has been used for illegal drug distribution, [FN34] the rental property is analogous to an "instrumentality" that is vulnerable to civil forfeiture. [FN35] Thus, because the tenant's leasehold can be viewed as being involved in drug trafficking, and thus subject to civil forfeiture, the resulting eviction would not amount to double jeopardy under Ursery, even in the event the tenant is criminally prosecuted for the activity. [FN36]

Alternatively, by declaring the illegal sale of a controlled substance a nuisance per se, Chapter 658 activates California's unlawful detainer statute, independent of the civil forfeiture label. [FN37] Under this statute, the tenant's lease is automatically terminated by the nuisance activity, and a three-day eviction may then be initiated. [FN38] Thus, the tenant illegally selling controlled substances is guilty of unlawful detainer ***668** under Chapter

658, and the eviction may proceed on that basis, independent from any potential criminal prosecution and free from controversy regarding double jeopardy.

Thus, whether viewed as a civil forfeiture, [FN39] or as a lease termination, [FN40] the eviction process of Chapter 658, and the resulting ouster of the tenant, is legally distinct from any criminal proceeding. Therefore, Chapter 658 should withstand any double jeopardy challenges that may be put forward.

C. Fairness in Application

Apart from constitutional concerns, Chapter 658 raises issues of fairness in application. An eviction under Chapter 658, in practice, may not differentiate between the seller of the illegal drugs and other tenants residing in the same home or apartment. Tenants who are innocent, or even without knowledge, of the drug activity on which the eviction is founded, may be ousted, thus creating problems with unjustified dislocation of tenants. [FN41] Other states that have enacted similar eviction statutes [FN42] have encountered court challenges to the provisions. [FN43] Among the issues to emerge have been whether the tenant to be evicted must have had knowledge of the drug activity and whether a tenant can be held responsible for the illegal drug activities of their guests or children. [FN44]

In practice, Chapter 658 will confront some of the same issues. If used without restraint, the eviction weapon provided by Chapter 658 sweeps broadly enough to potentially evict some innocent tenants along with the undesirable. However, this result would be contrary to the goals of Chapter 658. [FN45] For this reason, it is likely that ***669** care will be taken to ensure that only those tenants who deserve eviction will be impacted by Chapter 658. [FN46] Even so, situations are sure to arise where a tenant sought to be evicted argues lack of knowledge or innocence regarding drug activity, that will lead to court battles over the eviction procedures enacted by Chapter 658.

D. The Potential for Abuse

Finally, because Chapter 658 provides such an efficient means of ridding properties of drug-dealing tenants, [FN47] it is possible that the tool will be abused. If so, Chapter 658 could be utilized to remove unruly or disruptive tenants who have not been engaged in illegal sales of controlled substances, but are undesirable for other reasons. [FN48] This development would make a reality out of the fear that Chapter 658, and laws like it, serve to diminish all tenants' rights. [FN49]

However, Chapter 658 requires that, prior to eviction, probable cause exists showing that the tenant to be evicted has engaged in illegal drug sales. [FN50] Before a tenant can be evicted on three days notice, under the unlawful detainer statute, a nuisance must be established. [FN51] Chapter 658 simply specifies that the illegal sale of a controlled substance is within the definition of nuisance, and thus qualifies for the rapid eviction process. [FN52] Beyond this clarification, Chapter 658 does not expand the bases for eviction. Thus, it is unlikely that tenants who are merely unruly, or disruptive for reasons other than illegal drug activity, can be evicted through the use of the provisions enacted by Chapter 658.

V. CONCLUSION

In summary, Chapter 658 will likely provide a workable and legitimate tool to aid in the war on drugs. By clarifying existing law, Chapter 658 creates a precise mechanism to remove drug-dealing tenants in hopes of making the neighborhood safer and improving the quality of life for the remaining tenants. Chapter 658 does ***670** not necessarily impact the volume of drug trafficking in a given city. It will, however, make it more difficult and less comfortable for drug-dealing tenants to set up shop and establish themselves in a particular area. At the minimum, Chapter 658 will make it more expensive for drug dealers, and will also, one block at a time, force drug-dealing tenants to relocate to other, perhaps less profitable areas.

FN1. See Laura C. Marks, Landlords Get Legal Advice in Lecture Series, HARTFORD COURANT, Oct. 27, 1995, at B4 (describing how the eviction efforts of landlords can be frustrated and delayed by tenants who know the loopholes in

the process).

FN2. See ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 2970, at 2 (May 20, 1996); see id. (stating that Chapter 658 seeks to aid landlords in evicting drug- selling tenants in a timely manner); see also Cal. Health & Safety Code §§ 11054-11058 (West 1991 & Supp. 1997) (enumerating the materials classified as "controlled substances," including marijuana, cocaine and heroine, as well as numerous prescription drugs).

FN3. See Cal. Civ. Proc. Code § 1161(4) (amended by Chapter 658).

FN4. See id.; 42 CAL. JUR. 3D, Landlord and Tenant § 258 (1978) (explaining how California Code of Civil Procedure § 1161 operates to terminate a tenant's lease for nuisance activity).

FN5. Cal. Civ. Proc. Code § 1161(4) (amended by Chapter 658); see id. (stating expressly that a tenant illegally selling a controlled substance is deemed to have committed a nuisance on the property).

FN6. Cal. Civ. Code § 3479 (amended by Chapter 658); see id. (incorporating the illegal sale of controlled substances into the statutory definition of nuisance); id. (defining "nuisance" as, for example, anything injurious to health, indecent or offensive to the senses, or interfering with the comfortable enjoyment of life or property).

FN7. See Michelle J. Stahl, Comment, Oscar v. University Students Cooperative Ass'n, 67 NOTRE DAME L. REV. 799, 800 n.4 (1992) (quoting Hearings Before the House Select Comm. on Narcotics Abuse and Drug Control, 101st Cong., 75 (1989) (statement of Kimi O. Gray, Chairperson, National Association of Resident Management Corporations)) (stating that illegal drug use has reached crisis dimensions which threaten the nation's very existence).

FN8. See id. at 799 & n.2 (quoting Drugs and Public Housing: Hearings Before the Senate Permanent Subcomm. on Investigations of the Comm. on Governmental Affairs, 101st Cong., 4-5 (1989) (statement of Sen. Roth)) (describing how serious the drug problem in public housing developments has become).

FN9. See ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 2970, at 2 (May 20, 1996) (describing the increase in crime and violence to which innocent residents are exposed when drug houses flourish in a neighborhood or building); see also Kellner v. Cappellini, 516 N.Y.S.2d 827, 830-31 (N.Y. City Civ. Ct. 1986) (articulating the court's fear that the use of real property for illegal drug sales will infect entire neighborhoods).

FN10. See ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 2970, at 2 (May 20, 1996) (describing the intent of Chapter 658 to enable landlords to quickly evict drug-selling tenants so that the quality of life for others may be preserved); see also Cal. Civ. Code § 3479 (amended by Chapter 658) (defining "nuisance" to include the illegal sale of a controlled substance). See generally 47 Cal. Jur. 3d, Nuisances § 9 (1979) (explaining that when a legislature validly declares a specific activity to be a nuisance, that activity is a nuisance per se).

FN11. See Mary M. Cheh, Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives, 42 HASTINGS L.J. 1325, 1332-33 (1991) (describing law enforcement's use of civil remedies, such as the remedies available in the Racketeering Influence Corrupt Organizations Act, to fight criminal activity).

FN12. See id. at 1325-26 (stating that civil remedies are being used in tandem with criminal remedies, and even supplanting criminal remedies entirely in certain situations); see also Elaine Bennett, Lease Tightens on Drugs, Violence, ORLANDO SENTINEL, Jan. 28, 1996, at K1 (detailing a new standardized lease for use in public housing rentals providing for eviction of a tenant charged with illegal drug sales); Claire Cooper, Praise, Court Test in Anti-Gang Fight, SACRAMENTO BEE, Mar. 4, 1996, at A1 (describing how San Jose used an 1872 nuisance law to sue alleged gang members in civil court); Joe Nixon, City Upping Stakes in War on Drugs, MORNING CALL (Allentown, Pa.), Mar. 21, 1996, at A1 (stating that city officials intend to utilize civil remedies to exert pressure on landlords to stop renting to tenants who engage in illegal drug activity); Norris P. West, Residents Hope Legal Action Against Drug Suspects Works, BALTIMORE SUN, Nov. 9, 1995, at 3B (announcing the filing of civil suits under a nuisance abatement law to fight drug activity in a Baltimore neighborhood).

FN13. See, e.g., Conn. Gen. Stat. Ann. § 47a-15 (West Supp. 1996) (declaring that illegal use or sale of a controlled substance is by definition a nuisance per se); Iowa Code Ann. § 657.2(6) (West 1987 & Supp. 1996) (same); Md. Code

Ann., Real Prop. § 14-120(a)(4) (Supp. 1996) (same); Miss. Code Ann. § 95-3- 1(c) (1994) (same); N.C. Gen. Stat. §§ 19-1(a), 19-6 (1996) (same); Or. Rev. Stat. § 105.555(1)(c) (1995) (same); Tex. Civ. Prac. & Rem. Code Ann. § 125.001 (West Supp. 1997) (same).

FN14. See Cal. Civ. Code § 3479 (amended by Chapter 658).

FN15. See Cal. Civ. Proc. Code § 1161(4) (amended by Chapter 658).

FN16. See id. (providing that the commission of a nuisance by a tenant operates to terminate the lease, enabling the landlord to evict with a three-day notice to quit).

FN17. See supra notes 7-10 and accompanying text (discussing the intent of Chapter 658 to provide a method to more easily rid neighborhoods of drug sellers, thus reducing the corresponding criminal activities).

FN18. See U.S. Const. amend. V (prohibiting double jeopardy and compelled self-incrimination, and providing for due process of law); U.S. Const. amend. VI (providing compulsory process for obtaining witnesses and assistance of counsel); Cal. Const. art. I, § 15 (providing protection to criminal defendants, including the right to counsel and due process of law, as well as prohibiting compelled self-incrimination and double jeopardy).

FN19. See Cheh, supra note 11, at 1329 (stating that civil remedies are not encumbered by many of the constitutional protections found in the criminal setting).

FN20. See id. at 1345.

FN21. See ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 2970, at 2 (May 20, 1996) (stating that the aim of Chapter 658 is to provide landlords and law enforcement with a means of evicting drug-dealing tenants in a timely manner); see also Cheh, supra note 11, at 1345 (stating that civil remedies are being increasingly utilized by governmental agencies to combat various criminal activities).

FN22. See supra notes 3-6 and accompanying text (detailing the three-day eviction process Chapter 658 makes applicable to tenants engaged in drug activity).

FN23. See Cheh, supra note 11, at 1338 n.64 (explaining the federal government's experience with due process difficulties regarding leasehold forfeiture in public housing developments). The federal government's civil forfeiture program was enjoined by a Virginia court, requiring the government to provide prior notice and an opportunity to be heard before implementing leasehold forfeiture actions against public housing residents. See id. (reviewing Richmond Tenants Organization v. Kemp, 753 F. Supp. 607 (E.D. Va. 1990)). Since then, the Department of Housing and Urban Development has rewritten its procedures, incorporating additional due process protection to tenants sought to be evicted. See id. (noting the changes reflected by DEP'T OF HOUSING AND URBAN DEVELOPMENT AND DEP'T OF JUSTICE, FORFEITURE OF LEASES FOR DRUG FREE NEIGHBORHOODS 3 (1990)). These additional safeguards include a requirement that the tenant to be evicted be the leaseholder, that compelling evidence be obtained regarding the drug offenses, and that the property be notorious for the drug activity. See id.

FN24. See Telephone Interview with Sgt. Paul Curry, San Bernardino County Sheriff Department (June 20, 1996) (notes on file with the Pacific Law Journal).

FN25. See U.S. Const. amend. V (prohibiting the prosecution of a criminal defendant twice for the same offense).

FN26. See Cal. Civ. Proc. Code § 1161(4) (amended by Chapter 658) (omitting any requirement that the tenant to be evicted be convicted of illegal controlled substance sales).

FN27. See Ana Kellia Ramares, Annotation, Seizure or Forfeiture of Real Property Used in Illegal Possession, Manufacture, Processing, Purchase, or Sale of Controlled Substances Under § 511(a)(7) of Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C.S. § 881(a)(7)), 104 A.L.R. FED. 288, 365-66 (1991) (reviewing how various courts have addressed the double jeopardy issues created by civil forfeiture remedies).

FN28. 116 S. Ct. 2135 (1996).

FN29. Ursery, 116 S. Ct. at 2149.

FN30. Id. at 2147-49.

FN31. See id. at 2142-47 (reviewing the Court's consistent history of holding that civil forfeiture proceedings are distinct from criminal proceedings for double jeopardy purposes). The holding in Ursery would seem limited to in rem forfeiture proceedings against property, where the property is actually the focus of the proceeding. However, termination of a leasehold, if viewed as a property interest, is analogous to civil forfeiture.

FN32. See id. at 2148-49 (explaining the Court's focus on whether the civil sanction sought to be imposed is clearly criminal, or rather, primarily serves other remedial purposes); see also Cheh, supra note 11, at 1373-75 (reviewing the historical position of the Supreme Court that remedial civil remedies do not encroach upon double jeopardy).

FN33. See Cheh, supra note 11, at 1373 (explaining that because the criminal and civil actions for the same crime have been held not to violate double jeopardy, a civil forfeiture action, even after a criminal conviction has been obtained, may be pursued by the government for the same event).

FN34. See Cal. Civ. Proc. Code § 1161(4) (amended by Chapter 658) (stating specifically that illegal sales of controlled substances from a rental property is a nuisance).

FN35. See Cheh, supra note 11, at 1341 (describing the expansion of "instrumentality" subject to civil forfeiture to include leasehold interests in property used for drug distribution).

FN36. See supra notes 28-33 and accompanying text (explaining that a civil proceeding against property, as held in Ursery, does not violate double jeopardy).

FN37. See Cal. Civ. Proc. Code § 1161(4) (amended by Chapter 658) (defining illegal sales of a controlled substance as a nuisance, thus providing the three-day eviction option created by the unlawful detainer statute).

FN38. See id.

FN39. See supra notes 34-36 and accompanying text (explaining that a tenant's leasehold property interest is analogous to an "instrumentality" that is vulnerable to civil forfeiture if used in the pursuit of drug activity).

FN40. See supra notes 37-38 and accompanying text (reviewing California's unlawful detainer statute and the provision of a three-day eviction process for nuisance activity, based on statutory lease termination).

FN41. See Thom Gross, Project 87 Renders Families Homeless, ST. LOUIS POST- DISPATCH, Nov. 26, 1995, at 1D (detailing how innocent renters had been evicted along with the targeted drug offenders under a city program aimed at cleaning up neighborhoods); Fred Kalmbach, C-P Gets Evictions from High-Crime Street, ADVOCATE (Baton Rouge, La.), Apr. 9, 1996, at 1B (describing tenant complaints that they were being wrongly evicted because the police had failed to drive the drug dealers from their neighborhood). This result, if it occurred, would result in Chapter 658 helping to solve the drug problem, only by adding to the significant social problem of homelessness.

FN42. See supra note 13 (listing various state statutes declaring illegal drug activity as a nuisance per se, thus activating each state's respective abatement or eviction process).

FN43. See, e.g., Housing Auth. of Norwalk v. Harris, 625 A.2d 816 (Conn. 1993).

FN44. See id. (holding that a mother without specific knowledge that her daughter was selling drugs from their apartment could not be evicted under Connecticut's rapid eviction statute based on serious nuisance). But see New Haven Hous. Auth. v. Bell, No. SP-NH-9006-25275, 1990 WL 290119, at *1 (Conn. Super. Ct. July 17, 1990) (holding that a tenant may be evicted when it is established that the tenant permitted the illegal drug activity to occur in

the rental property).

FN45. See ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 2970, at 2 (May 20, 1996) (stating that the aim of Chapter 658 is to remove drug-dealing tenants for the benefit of those remaining); Telephone Interview with Sgt. Paul Curry, supra note 24 (stating that Chapter 658 is designed to remove the problem tenants by requiring the drug dealers to vacate, rather than forcing the law- abiding tenants to choose between living among the crime and violence or making a costly and difficult relocation themselves to get away from the drug activity).

FN46. Chapter 658 forces those tenants who create the problem to move, rather than those affected by the problem. Thus, because of this moral foundation, it is safe to assume that the enforcing officials will make sure they do not evict the undeserving, as that result would be exactly contrary to the goals sought to be achieved. See supra notes 7-10 and accompanying text (discussing the goals of ridding neighborhoods of drug activity without forcing innocent citizens to relocate in order to avoid the drug atmosphere).

FN47. See supra notes 3-6 and accompanying text (detailing the three-day eviction process Chapter 658 makes applicable to tenants engaged in illegal drug activity).

FN48. See A Better Response to Neighborhood Nuisances, ST. LOUIS POST-DISPATCH, Oct. 30, 1995, at 6B (explaining how St. Louis's Project 87 program, designed to help evict drug-dealing tenants, had been abused by officials to rid neighborhoods of "nuisance houses" apart from drug activity).

FN49. See Peter J. Howe, Rights Concerns Stall Bill to Make Public Housing Safer, BOSTON GLOBE, Aug. 28, 1995, at Metro/Region 14 (detailing the concern regarding the potential erosion of tenant rights presented by a pending Massachusetts bill that provides for rapid eviction of problem tenants in public housing).

FN50. See Telephone Interview with Sgt. Paul Curry, supra note 24.

FN51. See Cal. Civ. Proc. Code § 1161(4) (amended by Chapter 658).

FN52. See id.

APPENDIX

Code Sections Affected

Civil Code § 3479 (amended); Code of Civil Procedure § 1161 (amended).

AB 2970 (Olberg); 1996 STAT. Ch. 658

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