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Subject: PH Due Process Determination: Oklahoma

December 3, 1991

HUD DUE PROCESS DETERMINATION

for the

STATE OF OKLAHOMA

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ANALYSIS

- I. Jurisdiction: State of Oklahoma.
- II. Elements of Due Process.

Section 6(k) of the United States Housing Act of 1937 (42 U.S.C. 1437d (k)), as amended by section 503(a) of the National Affordable Housing Act of 1990, Pub. L. 101-625, approved November 28, 1990), provides that:

For any grievance concerning an eviction or termination of tenancy that involves any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises of other tenants or employees of the public housing agency or any drug-related criminal activity on or near such premises, the agency may . . . exclude from its grievance procedure any such grievance, in any jurisdiction which requires that prior to eviction, a tenant be given a hearing in court which the Secretary determines provides the basic elements of due process . . .

The statutory phrase, "elements of due process," is defined by HUD at 24 CFR § 966.53(c) as:

. . . an eviction action or a termination of tenancy in a State or local court in which the following procedural safeguards are required:

- (1) Adequate notice to the tenant of the grounds for terminating the tenancy and for eviction;
- (2) Right of the tenant to be represented by counsel;
- (3) Opportunity for the tenant to refute the evidence

presented by the PHA including the right to confront and cross-examine witnesses and to present any affirmative legal or equitable defense which the tenant may have; and

(4) A decision on the merits.

HUD's determination that a State's eviction procedures satisfy this regulatory definition is called a "due process determination." The present due process determination is based upon HUD's analysis of the laws of the State of Oklahoma to determine if an action for forcible entry and detainer under those laws requires a hearing which comports with all of the regulatory "elements of due process," as defined in 966.53(c).

HUD finds that the requirements of Oklahoma law governing an action in the district court for forcible entry and detainer for noncompliance which materially affects health or safety include all of the elements of basic due process, as defined in 24 CFR 966.53(c). This conclusion is based upon requirements contained in the Oklahoma statutes, case law and court rules.

### III. Overview of Eviction Procedures in the State of Oklahoma.

In Oklahoma, a landlord may evict a tenant by action for forcible entry and detainer (FED), a special form of statutory proceeding under Oklahoma law. 12 Okl.St. 1148.1, 1148.2, 1148.6.B, 1148.14. The Oklahoma district courts have jurisdiction to hear all FED actions. 12 Okl.St. 1148.1.

In general, a FED action to recover possession of the property is placed on the small claims docket of the district court. 12 Okl.St. 1148.14. However, the small claims procedure may not be used if the plaintiff also seeks to recover money or personal property in excess of the jurisdictional limit for the small claims court (\$1,500). *Id.* and 12 Okl.St. 1751. The present due process analysis is limited to an action to recover possession by a FED action on the district court small claims docket.

A FED action is subject to special statutory procedures for this type of proceeding (at 12 Okl.St. 1148.1 to 1148.16), and to additional requirements under the statutory small claims procedure (at 12 Okl.St. 1751 to 1772). In addition, procedures in a FED action are subject to the general rules of civil procedure in the Oklahoma Pleading Code (OPC), unless a different procedure is specified by statute (such as an inconsistent procedure specified in the FED statute). 12 Okl.St.

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2001. (See Committee Comment to Section 2001 in Okl. Stat. Ann. 1988 Pocket Part.)

An action for forcible detainer is commenced by filing an

affidavit<sup>1</sup> with the clerk of court, in the form specified by the statute. 12 Okl.St. 1148.15. The affidavit recites that the defendant is wrongfully in possession of the property, and that the plaintiff is entitled to possession. Id. After the affidavit is filed, a summons is issued by the clerk of court (12 Okl.St. 1148.4 (FED), 12 Okl.St. 2004 (OPC)), in the form specified by the statute (12 Okl.St. 1148.4, 1148.16 (FED)). The summons is served on the defendant. 12 Okl.St. 1148.4, 1148.5, 1148.5A (FED); 12 Okl.St. 2004.C (OPC). The summons notifies the defendant of the time and place for trial, and apprises the defendant of the "nature of the claim" and of the "relief sought" by the plaintiff. 12 Okl.St. 1148.4, 1148.16.

Oklahoma Constitution -- Due Process Clause.

The Oklahoma State Constitution (Art. 2, 7) contains a due process clause in the same language as the due process requirement of the Federal Constitution:

No person shall be deprived of life, liberty, or property, without due process of law.

IV. Analysis of Oklahoma Eviction Procedures for Each of the Regulatory Due Process Elements.

- A. Adequate notice to the tenant of the grounds for terminating the tenancy and for eviction (24 CFR 966.53(c)(1)).

To determine whether Oklahoma law requires adequate notice to the tenant of the grounds for eviction, we consider two types of procedure under Oklahoma law:

- Notice before commencement of the eviction action: notice to terminate the tenancy, or demand for payment of rent.
- Initial process in the eviction action: summons and affidavit.

For each procedure, it is necessary to consider both:

- The content of the notice: whether the notice is an adequate statement of the grounds for eviction.

<sup>1</sup>Unlike an ordinary civil action, which is commenced by filing a "petition." 12 Okl.Stat. 2003.

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- What procedure is used to communicate the information to a tenant: whether the procedure is reasonably designed to give notice to the tenant, by service or otherwise.

Notice before commencement of action.

The Oklahoma Landlord and Tenant Act provides that the landlord must give thirty days' written notice to terminate a month-to-month tenancy or a tenancy at will. 41 Okl.St. 111.A. Thirty days' notice is also required to terminate the tenancy for material noncompliance -- with the lease or a tenant's statutory duties -- which materially affects health or safety. 41 Okl.St. 132.B. However, if the noncompliance threatens "imminent and irreparable harm" to the premises or any person, the landlord may terminate the rental agreement immediately upon service of notice to the tenant. 41 Okl.St. 132.C.

Oklahoma law apparently does not require that a notice of termination state the "grounds" for termination, as needed to satisfy this element of HUD's due process definition. The termination notice must advise the tenant of the termination, but not of the reasons for termination. Thus, the general requirements governing notice for termination of tenancy do not meet this element of the HUD due process definition.

However, in a notice of termination for a noncompliance materially affecting health or safety, the notice to tenant must "specify the acts and omissions constituting the noncompliance." 41 Okl.St. 132.B. For these health and safety terminations, the required content of the notice is an adequate statement of the grounds for termination.

The Oklahoma law mandates use of acceptable procedures for service of the termination notice. 41 Okl.St. 111.E. Thus, in a termination for noncompliance affecting health and safety, the termination notice would satisfy the notice requirement in HUD's due process definition.

Summons and Affidavit.

As in other civil actions, the landlord must serve a summons on the defendant. The FED statute states that "the summons shall be issued and returned as in other cases . . . ." 12 Okl.St.

1148.4 (FED). Cf. 12 Okl.St. 2004 (OPC). For procedures on service of the summons, see 12 Okl.St. 1148.5, 1148.5A (FED); 12 Okl.St. 2004.C (OPC).

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The FED statute affirms, in 12 Okl.St. 1148.4, that the summons must "apprise the defendant of the nature of the claim that is being asserted" against the defendant. In 12 Okl.St.

1148.16, the law states that the summons must be in the specific form provided in that section. The statutory form of summons informs the defendant of the opportunity to appear and defend against the owner's claim for possession. However, a summons in the form required by the Oklahoma law does not state the grounds supporting an owner's claim for possession. Thus it appears that the requirement to apprise defendant of the "nature

of the claim" means only that the summons must inform defendant that the landlord is seeking to divest defendant from possession of the property. The summons does not include a statement of the "grounds" supporting the owner's claim, and will not satisfy this element of HUD's due process definition.

A FED action is commenced by filing of an affidavit, in the form required by statute. 12 Okl.St. 1148.15. The statutory form of affidavit states that the defendant is in wrongful possession of the property, and has refused the owner's demand to vacate the property. The affidavit (like the summons) does not include a statement of the "grounds" supporting the owner's claim for possession. Thus, the affidavit does not satisfy the requirement to give notice of the grounds for termination of tenancy, as required by HUD's due process definition.

We have not found any provision of Oklahoma statute or court rule, or any case law, requiring that the FED affidavit be served on the defendant (either separately or attached to the summons). (We also do not know if Oklahoma courts assume that the affidavit must be served.) The general civil rules require simultaneous service with the summons of the "petition" that commences an ordinary civil action (12 Okl.St. 2004.D), but do not refer to or suggest any parallel requirement to serve the "affidavit" used to commence a FED action. The form of summons (12 Okl.St.

1148.16) mentions, but does not describe, what is contained in the "affidavit of the plaintiff." Since the summons affords notice of the affidavit, and the affidavit is filed with the court, and is presumably available for inspection by the defendant, we believe that such notice and availability furnish adequate notice of the affidavit. Nevertheless, as we have indicated, the contents of the affidavit do not appear to contain a statement of the grounds for termination.

Notice -- Conclusion.

We find that the termination notice required by State law prior to commencement of an eviction action for noncompliance

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which materially affects health or safety provides notice of the grounds for termination.

The due process clause of the Oklahoma Constitution (Art. 2, 7) prohibits deprivation of property without due process of law, in the same language as the Federal due process guarantee. Due process requires notice and opportunity to be heard (e.g., Board v. Weatherford, 565 P.2d 35 (Okl. Sup. Ct. 1977)). It appears that, to satisfy due process requirements of the Oklahoma Constitution, notice of a proposed eviction should include a statement of the grounds for eviction. However, the Oklahoma statutes only appear to require such notice on an eviction for noncompliance which materially affects health or safety (or an eviction for nonpayment of rent). We are not aware of any

Oklahoma decisions holding -- pursuant to the due process clause of the Oklahoma Constitution -- that the plaintiff landlord must provide notice of the grounds for eviction although omitted from the termination notice or statutory forms of FED affidavit and summons.

Adequate notice of the grounds for terminating the tenancy and for eviction is required by Oklahoma law on an eviction for noncompliance which materially affects health or safety. However, for other evictions we are presently unable to conclude that the State law requires notice procedures which satisfy HUD's due process definition.

B. Right to be represented by counsel (24 CFR 966.53(c)(2)).

Provisions of the Oklahoma code imply that there is a right to representation, although this right is not explicitly stated. The FED statute permits award of attorney fees to the prevailing party. 12 Okl.St. 1148.9. Provisions of the civil rules refer to the opportunity for representation by counsel. 12 Okl.St. 2005.B (service on party represented by counsel), 2011 (signature of pleading by attorney).

The right to be represented by counsel is also guaranteed by the due process clause of the Oklahoma Constitution. Art. 2, 7.

C. Opportunity for the tenant to refute the evidence presented by the PHA, including the right to confront and examine witnesses (24 CFR 966.53(c)(3)).

Under Oklahoma law, the tenant has the opportunity to refute PHA evidence. The form of summons for a FED action notifies the defendant of the opportunity to "appear and show cause" why the

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defendant should be permitted to retain possession. 12 Okl.St. 1148.16. The purpose of this notice is to allow the defendant an opportunity to refute the plaintiff's claim.

Under the Oklahoma Evidence Code, the tenant has the right to impeach plaintiff's witnesses. The Code provides that the credibility of a witness may be attacked by any party. 12 Okl.St. 2607. A party may present evidence to attack the credibility of a witness. 12 Okl.St. 2608.A. A party may compel testimony by an adverse party or agent. 12 Okl.St. 2611.B. The adverse witness "may be cross-examined" by the party who calls the witness, to the same extent as any opposition witness. Id. A witness may be cross-examined concerning a prior statement. 12 Okl.St. 2613.A.

The rules permit the trial court to regulate the manner and order for interrogation of witnesses (12 Okl.St. 2611.A), and thus imply that there is a right to cross-examination, subject to

the direction of the court as to the manner and order for presentation of evidence.

In addition to cross-examination of plaintiff's witnesses, defendant tenant may present witnesses to refute the plaintiff's case. The rules in a small claims proceeding (and presumably therefore in a FED action on the small claims docket), explicitly provide that the parties have the "right to offer evidence in their behalf by witnesses appearing in such hearing." 12 Okl.St. 1761.

The provisions discussed above amply support the existence under Oklahoma statutory law of the tenant's right to refute the landlord's case, including the right to cross-examine witnesses. In addition, defendant's right to respond to and refute the plaintiff's claims are protected by the due process clause of the Oklahoma Constitution. Art. 2, 7.

- D. Opportunity to present any affirmative legal or equitable defense which the tenant may have (24 CFR § 966.53(c)(3)).

In an ordinary civil action, the defendant must plead defenses to claims asserted by the plaintiff (12 Okl.St. 2008.B), and must specifically plead in the answer the "affirmative defenses" listed in the law (12 Okl.St. 2008.C). In a FED action, however, the defendant is not required to submit any answer or other pleading prior to trial (12 Okl.St. 1148.6.C), and consequently there is no list of specific defenses which must be affirmatively pleaded by the defendant.

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Oklahoma law does not limit defenses that may be raised by the defendant in the FED trial. In particular, the defendant is free to present at trial any of the specific listed "affirmative defenses" which must be specially pleaded by the defendant in an ordinary civil action. In the FED action, the defendant may show any "cause" for rejecting the owner's claim to possession, that is, any available defense -- legal or equitable -- to the owner's claim for possession.

The allowable defenses may include any affirmative defense, without regard to whether the defense is deemed to have an "equitable" character. Under the Oklahoma Pleading Code there is only one form of civil action (12 Okl.St. 2002), and a defendant may raise any legal or equitable defense in the merged proceeding.

- E. A decision on the merits (24 CFR 966.53(c)(4)).

The judgment in an action is the final determination of the rights of the parties. 12 Okl.St. 681. The Oklahoma Code states that "a trial is a judicial examination of the issues, whether of law or of fact in an action." 12 Okl.St. 551. The

structure of statutory requirements governing a trial under Oklahoma law indicate that the court decision is based on the law and facts as determined in the action, and is therefore a determination on the merits.

The Oklahoma Pleading Code states that the rules of civil procedure under the Code are intended to secure a "just . . . determination" of every action. 12 Okl.St. 2001. The Oklahoma Evidence Code states that the Code is designed "to the end that the truth may be ascertained and proceedings justly determined." 12 Okl.St. 2102. Litigation procedures under Oklahoma law reflect the basic intention to establish a procedure leading to a just determination on the merits.

Oklahoma statutes require a determination on the merits. In addition, a determination on the merits is also mandated by the due process clause of the Oklahoma State Constitution. Art. 2, 7.

#### V. Conclusion.

Oklahoma law governing an action in district court for forcible entry and detainer to evict for noncompliance which materially affects health or safety requires that the tenant have the opportunity for a pre-eviction hearing in court which provides the basic elements of due process as defined in 24 CFR

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966.53(c) of the HUD regulations. In such FED proceeding, the defendant has the right to a hearing with all the basic elements of due process, including adequate notice of the grounds for eviction.

By virtue of this due process determination by HUD under section 6(k) of the U.S. Housing Act of 1937, a PHA in Oklahoma may evict a public housing tenant pursuant to a district court decision in a FED action for any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises of other tenants or employees of the PHA or any drug-related criminal activity on or near such premises, and is not required to first afford the tenant the opportunity for an administrative hearing on the eviction.