

Legal Opinion: GCH-0027

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Subject: PH Due Process Determination: Utah

December 3, 1991

HUD DUE PROCESS DETERMINATION

for the

STATE OF UTAH

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ANALYSIS

I. Jurisdiction: Utah

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;

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- (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 Utah to determine if eviction procedures for unlawful detainer under those laws require 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 Utah law governing an action for eviction in district or circuit court under Utah Code Ann. 78-36-1 to 12.6 (1989 and 1990 Supp.) 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 Utah code, case law and court rules.¹

III. Overview of Utah Eviction Procedures

The eviction procedures for unlawful detainer in Utah are stated at Utah Code Title 78, Chapter 36 (sections 78-36-1 to 78-36-12.6). An unlawful detainer action under this title may be brought in district court or circuit court. Utah Code Ann.

78-3-4; 78-4-7 (1989 and 1990 Supp.). Except as otherwise provided in the unlawful detainer statute, such cases are governed by the Utah Rules of Civil Procedure. U.R.C.P. 1(a); U.R.C.P. 81(a).

A tenant is guilty of unlawful detainer in the circumstances specified in Utah Code Ann. 78-36-3 (1989). Unlawful detainer

¹This due process determination does not apply where plaintiff obtains possession by filing a possession bond pursuant to Utah Code Ann. 78-36-8.5. HUD expresses no opinion as to whether the Utah law requires a pre-eviction hearing which meets the requirements of 24 CFR 966.53(c) if the plaintiff obtains possession by filing a possession bond.

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lies where the tenant holds over after expiration of the term, defaults in payment of rent, or commits a violation of the lease. Id.

An action for unlawful detainer is also governed by the Utah Constitution. Article I, section 7 of the Utah Constitution provides: "No person shall be deprived of life, liberty or

property, without due process of law." The Utah Supreme Court has held that because this clause is substantially similar to the Fifth and Fourteenth Amendments to the United States Constitution, the decisions of the United States Supreme Court are highly persuasive as to its interpretation. *Vali Convalescent and Care Institution v. Industrial Commission of Utah*, 649 P.2d 33 (Utah 1982).

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

The following discussion will consider separately each element of the regulatory due process definition and demonstrate that each element is satisfied in the action for unlawful detainer in Utah district and circuit court under Utah law.

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

The plaintiff may commence a civil action, including an action for unlawful detainer, either by service of the summons on the defendant or by filing the complaint with the court. U.R.C.P. 3(a).

Under Utah law, the summons in a civil action for unlawful detainer notifies the defendant of the plaintiff's lawsuit and claim for possession and informs the defendant of the time by which the defendant is required to answer the complaint. U.R.C.P. 4(c); Utah Code Ann. 78-36-8 (1989). In an action for unlawful detainer, procedures for service of the summons are generally the same as "in other civil cases." *Id.* A summons must be served on the defendant by personal service, publication or mail. U.R.C.P. 4; Utah Code Ann. 78-36-8 (1989).

The summons may be served together with the complaint. However, Utah does not require that the complaint be served with the summons. U.R.C.P. 3(b); U.R.C.P. 4(c). If the summons is served before the complaint or by publication, the summons must state the relief demanded. *Id.* When service is by publication, the summons must describe the subject matter involved in the action. U.R.C.P. 4(c). In an unlawful detainer action, the

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defendant must appear and defend the action not less than three days (and not more than twenty days) from service of the summons. Utah Code Ann. 78-36-8 (1989).

The complaint gives notice of the facts which are grounds for termination and eviction. U.R.C.P. 8(a)(1); Utah Code Ann. 78-36-8 (1989). Under the general civil pleading rules, the complaint must contain "(1) a short and plain statement of the claim showing that the pleader is entitled to relief; and (2) a demand for judgment for the relief which the plaintiff deems himself entitled." U.R.C.P. 8(a). Furthermore, the unlawful

detainer statute provides that the complaint must set forth the "facts on which the plaintiff seeks to recover." Utah Code Ann. 78-36-8 (1989).

Under Utah law, the defendant in an unlawful detainer action must be given notice of the complaint (and therefore of the grounds for eviction stated in the complaint) either (1) by service of the complaint on the defendant (with or subsequent to service of the summons), or (2) by opportunity to examine the complaint on file with the court. The Utah rules provide that when the complaint is filed by the plaintiff, a copy is deposited with the court "for the benefit of the defendants not otherwise served with such copy at the time of the service of the summons." U.R.C.P. 3(b). If the complaint has not been filed with the court or served on the defendant, the defendant may demand a copy of the complaint from the plaintiff. The time for the defendant to respond to the complaint (a minimum of three days in an unlawful detainer) runs from the date a copy of the complaint is served on the defendant. U.R.C.P. 3(b).

In addition to the summons and complaint, the notice to quit also affords notice of the plaintiff's claim for repossession of the premises. Except for an unlawful detainer after expiration of a specified lease term, the plaintiff may not maintain the unlawful detainer action unless the plaintiff has served a notice to quit. Utah Code Ann. 78-36-3(1) (1989). Procedures for service of the notice to quit are specified in the Code. Utah Code Ann. 78-36-6 (1989).

The Utah Supreme Court has also held that due process of law as provided for in the Utah Constitution requires that a party be served with process which is calculated to give notice. *Naisbitt v. Herrick*, 76 Utah 575, 290 P. 950 (1930).

From the foregoing, HUD has determined that Utah law requires adequate notice to the tenant of the grounds for eviction.

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

While the right to be represented by an attorney is nowhere stated explicitly, the existence of this right may be inferred from references throughout the Utah Rules of Civil Procedure. For example, U.R.C.P. 5(b)(1) requires that whenever service is made upon a party represented by an attorney, the service must be made upon the attorney unless the court orders otherwise.

The right to representation by counsel is also provided by the due process clause of the Utah Constitution. Utah Const. art. I, 7.

Thus, HUD concludes that Utah law gives a tenant in an

unlawful detainer action the right to be represented by counsel.

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

In Utah courts ". . . all evidence shall be admitted which is admissible under the Utah Rules of Evidence or other rules adopted by the Utah Supreme Court." U.R.C.P. 43(a).

Except in limited circumstances specified in the Utah rules or statutes (such as the use of depositions and interrogatories at trial pursuant to U.R.C.P. 32 and 33), the testimony of witnesses must be taken orally in open court. U.R.C.P. 43(a). A deposition may only be used at trial, and only in specified narrow circumstances, against a person who had opportunity to be represented at taking of the deposition. U.R.C.P. 32(a). Provisions which allow the use of a deposition at trial in "exceptional circumstances" note "the importance of presenting the testimony of witnesses orally in open court." U.R.C.P. 32(a)(3)(E).

In general, a witness (other than an expert witness) must have personal knowledge of the matter on which the witness is called to testify. U.R.E. 602. Credibility of a witness may be attacked by any party. U.R.E. 607. Credibility of the witness may be refuted by evidence concerning the witness's character or conduct. U.R.E. 608; U.R.E. 609. Bias, prejudice or any motive to misrepresent may be shown to impeach the witness, either by examination of the witness or by evidence otherwise adduced. U.R.E. 608(c).

A party may interrogate witnesses, including cross-

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examination on matters affecting credibility of the witness. U.R.E. 611(b). The evidence rules permit a party to call a hostile witness, an adverse party or a witness identified with an adverse party, and interrogate the witness by leading questions. U.R.E. 611(c). A party may cross-examine an adverse party upon the subject matter of his examination in chief. U.R.E. 611(b). The court's control over the mode and order for interrogation of witnesses is intended to "make the interrogation and presentation effective for the ascertainment of the truth." U.R.E. 611(a)(1). Thus the defendant in an unlawful detainer action, as in other civil actions, has the right to confront and cross-examine witnesses, subject to the normal judicial control over conduct of the trial.

The Utah statutes and civil rules do not restrict the right of a defendant, including a defendant threatened with eviction in an action for unlawful detainer, to impeach or contradict the plaintiff's evidence by argument, evidence or cross-examination. A tenant has the right to present evidence and witnesses to

refute the case presented by the plaintiff, subject to reasonable judicial control over the "mode and order" for presentation of witnesses. See U.R.E. 611(a). Relevant evidence may only be excluded if its probative value is outweighed on grounds of prejudice, confusion or waste of time. U.R.E. 403. The tenant may use a subpoena to obtain the attendance of witnesses or production of documentary evidence at the trial. U.R.C.P. 45.

The right to confront and cross-examine witnesses is also guaranteed by the due process clause of the Utah Constitution. Utah Const. art. I, 7.

Thus, in Utah courts, the tenant has the opportunity to refute the evidence presented by the PHA including the right to confront and cross-examine witnesses.

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

The Utah Rules of Civil Procedure provide for one form of action, known as a "civil action." U.R.C.P. 2. The rules abolish the distinction between actions at law and suits at equity. *O'Neill v. San Pedro, L.A. & S.L.R. Co.*, 38 U. 475, 114 P. 127 (1911). Further, pursuant to U.R.C.P. 2, the defendant may raise both legal and equitable defenses. *Williamson v. Wanless*, 545 P.2d 1145 (1976).

The Utah Rules of Civil Procedure 8(b) and 8(c) require the

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defendant to state his defenses to each claim asserted. In addition, when responding to the complaint, the defendant must set forth all of his affirmative defenses, whether equitable or legal in nature. Utah law does not restrict the right of the defendant to raise any available defense to the plaintiff's claim to possession of the property, including any of the specific "affirmative defenses" specified in the rules.

From the above, HUD has concluded that Utah law provides the tenant with the opportunity to present any legal or equitable defense.

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

The Utah unlawful detainer statute specifically provides that except upon default a judgment must be entered "upon the merits." Utah Code Ann. 78-36-10(1) (1989).

The structure and procedural incidents of a trial under the Utah Rules of Civil Procedure and the Utah Rules of Evidence are designed to the end that a trial shall lead to a decision on the merits, based on the evidence presented bearing on the legal and factual issues framed by the complaint and defenses presented. A

final judgment must grant "the relief to which the party in whose favor it is rendered is entitled." U.R.C.P. 54(c)(1). The Utah Civil Rules are construed "to secure the just . . . determination of every action." U.R.C.P. 1(a). Similarly, the Utah Rules of Evidence are construed "to the end that the truth may be ascertained and proceedings justly determined." U.R.E. 102.

The judgment is entered upon the verdict of the jury or decision of the court. U.R.C.P. 58A; See U.R.C.P. 47 to 52. In a jury trial, the jurors are sworn to "try the matter in issue" and to render a true verdict "according to the evidence and the instructions of the court." U.R.C.P. 47(h). At the request of any party, the court is required to instruct the jury as to the applicable law. U.R.C.P. 51. In a bench trial, the court must make findings of fact and conclusions of law. U.R.C.P. 52(a).

Under the Utah Rules of Civil Procedure, whether the decision is by the judge or the jury, the decision must be made on the merits of the law and facts as presented to the court. A decision on the merits is also guaranteed by the due process clause of the Utah Constitution. Utah Const. art. I, 7.

V. Conclusion

Utah law governing the eviction procedures for unlawful

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detainer in the district or circuit court 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 966.53(c) of the HUD regulations.

By virtue of this due process determination under section 6(k) of the U.S. Housing Act of 1937, a PHA in Utah may evict a public housing tenant pursuant to a district or circuit court decision in an eviction proceeding for any grievance involving 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, and is not required to first afford the tenant the opportunity for an administrative hearing on the eviction.

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