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HUD DUE PROCESS DETERMINATION

for the

STATE OF ILLINOIS

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ANALYSIS

- I. Jurisdiction: State of Illinois.
- 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 [public housing agency] 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 Illinois to determine if an action for eviction under Illinois law requires a hearing which comports with all of the regulatory "elements of due process," as defined in ⁺ 966.53(c).

In Illinois, a public housing agency (PHA) may evict a tenant by an action for forcible entry and detainer ("FED"). Ill. Ann. Stat. ch. 110, paras. 9-101 et seq. (Smith-Hurd 1992) ("FED Statute").

In addition to the general authority for eviction under the FED Statute, there are two special procedures for drug evictions under the FED Statute:

- (1) A PHA may bring an FED action to evict the tenant for drug-trafficking under Ill. Ann. Stat. ch. 110, para. 9-118.
- (2) A landlord may bring an FED action to evict the tenant under the Illinois Controlled Substance and Cannabis Nuisance Act, Ill. Ann. Stat. ch. 100-1/2, paras. 13.9 et seq. (Smith-Hurd 1992) ("Nuisance Act").

The present due process determination covers Illinois eviction proceedings under the FED Statute, including the special procedures for drug evictions (under Paragraph 9-118 and under the Nuisance Act). HUD finds that the requirements of Illinois law governing an action for forcible entry and

detainer under the FED Statute include all of the elements of basic due process, as defined in 24 CFR ¹ 966.53(c).

III. Eviction proceedings under the Illinois Detainer statute ("FED statute") Forcible Entry and

A. Overview of the Illinois FED statute

FED Action

Under Illinois law, an action for possession under the FED Statute is brought in the Illinois circuit court. An action under the FED Statute may be maintained when:

any lessee of the lands or tenements, or any person holding under such lessee, holds possession without right after the termination of the lease or tenancy by its own limitation, conditions or terms, or by notice to quit or otherwise. Ill. Ann. Stat. ch. 110, para. 9-102(a)(4) (Smith-Hurd 1992.)

To commence an FED action, a complaint by the party entitled to possession of the premises is filed in the circuit court of the county where the premises are located. The complaint must state that the filing party is entitled to possession of the premises described, and that the named defendant unlawfully withholds possession. On the filing of such a complaint, a summons will be issued by the clerk of the court. Ill. Ann. Stat. ch. 110, para. 9-106 (Smith-Hurd 1992).

The Illinois Code of Civil Procedure (Ill. Ann. Stat. ch. 110, para. 2-101 et seq. (1992)), and the Illinois Supreme Court Rules (Ill. Ann. Stat. ch. 110A (Smith-Hurd 1992)), are applicable to the FED Statute, except to the extent that a like procedure is specifically provided in the FED Statute. Ill. Ann. Stat. ch. 110, para. 1-108 and ch. 110A, para. 1 (Smith-Hurd 1992).

FED action under Paragraph 9-118:
PHA drug-trafficking eviction -- Accelerated docket

Paragraph 9-118 of the FED Statute authorizes a special FED procedure for use in drug-trafficking evictions by Illinois PHAs. (This provision was signed by the Governor on August 28, 1992, and was effective on January 1, 1993.) Paragraph 9-118 provides an accelerated docket for PHA eviction cases premised on allegations of drug trafficking.

Under Paragraph 9-118, a PHA must file a sworn complaint alleging direct evidence of drug trafficking within or upon the premises by or with the knowledge and consent of or in concert with the defendant named in the complaint. The PHA must serve the defendant with the complaint and demand for possession of the type specified in Paragraph 9-104 of the FED Statute at least 14 days before a hearing on the complaint is held.

At the hearing, a trial must be held immediately, the same as in other proceedings for possession. The matter may not be continued beyond seven days from the date set for the first hearing on the complaint except by agreement of the parties. After a trial, if the court finds by a preponderance of the evidence that the PHA has proven the allegations in the complaint, the court must enter judgment for possession in the PHA's favor. The judgment may not be stayed for more than 7 days, and must order that the PHA is entitled to re-

enter the premises immediately thereafter.

FED action under the Illinois Controlled Substance and Cannabis Nuisance Act ("Nuisance Act")

The Nuisance Act (as amended effective January 1, 1992) allows a landlord, including a PHA, to terminate a lease where:

[A]ny lessee or occupant, on one or more occasions, shall use leased premises for the purpose of unlawful possessing, serving, storing, manufacturing, cultivating, delivering, using, selling or giving away controlled substances or shall permit them to be used for any such purposes

Ill. Ann. Stat. ch. 100-1/2, para. 24(a) (Smith-Hurd 1992).

In such cases, the owner or lessor may bring a forcible entry and detainer action under the FED Statute. Two important provisions of the Nuisance Act apply to such evictions:

- The Nuisance Act provides that a lessor may institute an action under the FED Statute where the tenant has not vacated the premises within five days after receipt of a written notice to vacate. Ill. Ann. Stat. ch. 100-1/2, para. 24(c) (Smith-Hurd 1992).
- The Nuisance Act provides a rebuttable presumption that if a controlled substance is found or used anywhere in the premises of an apartment, then the controlled substance was either used or possessed by a lessee or occupant or that a lessee or occupant permitted the premises to be used for that use or possession. Ill. Ann. Stat. ch. 100-1/2, para. 24(b) (Smith-Hurd 1992).

Due process clause of Illinois Constitution

Any action or proceeding under the FED Statute must comply with Article I, Section 2 of the Illinois State Constitution (entitled "Due Process and Equal Protection"). Article I, Section 2 requires that "[n]o person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws."

- B. Analysis of the FED Statute under each of the regulatory due process elements
 - 1. Adequate notice to the tenant of the grounds for terminating the tenancy and for eviction
(24 CFR [±] 966.53(c)(1))

Paragraph 9-118 drug evictions:
PHA demand for possession and complaint

In Paragraph 9-118 drug trafficking cases, the PHA must serve the tenant with a notice demanding immediate possession of the premises. Notice is governed by Paragraph 9-104, which provides for the following demand for possession:

I hereby demand immediate possession of the following described

premises: (describing the same.)

PHA drug trafficking evictions involve a situation that the Illinois legislature has determined to be an "imminent danger and peril to the lives, safety, health and mental and physical well being of the [PHA] residents." Preamble to IL. S.B. 2178, enacted as Ill. Ann. Stat. ch. 110, para. 9-118 (Smith-Hurd 1992).

To commence a drug eviction under Paragraph 9-118, a PHA must serve a verified complaint on the defendant. The complaint must allege that there is direct evidence of trafficking in cannabis, narcotics or controlled substances within or upon the premises by or with knowledge and consent of, or in concert with the person or persons named in the complaint. The complaint must set forth the relevant facts (Paragraph 9-118). Thus, the grounds for terminating the tenancy and for eviction are set forth in the complaint. The PHA must serve the defendant with the complaint at least 14 days before a hearing on the complaint is held.

Other FED actions: Notice to quit and complaint

Notice to quit

In FED actions (other than cases brought under Paragraph 9-118 or the Nuisance Act), the landlord must give 10 days notice to quit prior to commencement of the action.

When default is made in any of the terms of a lease, it is not necessary to give more than 10 days notice to quit, or of the termination of such tenancy, and the same may be terminated on giving such notice to quit at any time after such default in any of the terms of such lease. Ill. Ann. Stat. ch. 110, para. 9-210 (Smith-Hurd 1992).

In FED actions under the Nuisance Act, the landlord must give five days notice to vacate prior to commencement of the action.

According to Paragraph 9-210, the notice should be in substantially the following form:

To A.B.: You are hereby notified that in consequence of your default in (here insert the character of the default) of the premises now occupied by you, being, etc., (here describe the premises) I have elected to terminate your lease, and you are hereby notified to quit and deliver up possession of the same to me within 10 days of this date (dated, etc.).

Under the FED Statute, when termination of a tenancy is sought for violation of the lease provisions, notice of the landlord's intent to terminate must be given in order to maintain an action for possession, unless the lease contains forfeiture or waiver of notice provisions which cause the lease to terminate by its own limitation. *Westerman v. Gilmore*, 17 Ill.App.2d 455, 150 N.E.2d 660, 663 (1958).

Under the FED Statute, the notice to quit must state the character of the tenant's default. The notice must be served in accordance with Ill. Ann. Stat. ch. 110, para. 9-211 (Smith-Hurd 1992).

Complaint

A complaint must contain substantial allegations of fact necessary to state the cause of action. Ill. Ann. Stat. ch. 110, para. 2-601 (Smith-Hurd 1992). The allegations in a complaint must be sufficiently specific to reasonably inform the defendant by factually setting forth the elements necessary to state the cause of action. People ex rel. Scott v. College Hills Corp., 91 Ill.2d 138, 435 N.E.2d 463, 467 (1982).

Notice: Conclusion

Under Illinois law, both the complaint and either the notice to quit (in non-Paragraph 9-118 cases or the demand for possession in Paragraph 9-118 cases) provide adequate notice to the tenant of the grounds for terminating the tenancy and for eviction. Notice of the grounds for eviction is also required by the due process clause of the Illinois State Constitution. Article I, Paragraph 2.

2. Right to be represented by counsel (24 CFR ¹ 966.53(c)(2))

Although the right to representation by counsel in civil proceedings is not explicitly stated by Illinois statutes and court rules, many provisions imply a right of representation by counsel. The following are some examples:

- (1) Special appearances may be made by attorney for the purpose of objecting to the jurisdiction of the court over the person of the defendant. Ill. Ann. Stat. ch. 110, para. 2-301(a) (Smith-Hurd 1992).
- (2) The appearance and withdrawal of attorneys is governed by Ill. Ann. Stat. ch. 110A, para. 13 (Smith-Hurd 1992), which provides that an attorney must file a written appearance or other pleadings before the attorney addresses the court, that the attorney may not withdraw an appearance for a party without leave of the court, and that such motion may be denied by the court if granting it would be inequitable.
- (3) Opening statements may be made first by the attorney for the plaintiff, and then by the attorney for the defendant, as soon as the jury is empaneled. Ill. Ann. Stat. ch. 110A, para. 235 (Smith-Hurd 1992).
- (4) The duties of the attorney directing interrogatories are set forth in Ill. Ann. Stat. ch. 110A, para. 213 (Smith-Hurd 1992).
- (5) Reasonable notice of a standard of writing must be given to the opposite party or attorney before being admitted in evidence by the court for comparison. Ill. Ann. Stat. ch. 110, para. 8-1502 (Smith-Hurd 1992).
- (6) An opposing party, attorney and witnesses may be given reasonable opportunity to examine proposed standards before their introduction into evidence. Ill. Ann. Stat. ch. 110, para. 8-1503 (Smith-Hurd 1992).
- (7) Every pleading, motion and other paper of a party represented by an attorney must be signed by at least one attorney of record in the attorney's individual name. Ill. Ann. Stat. ch. 110A, para. 137 (Smith-Hurd 1992).

The right to representation by counsel in civil actions is fundamental and part of the due process of law guaranteed to all civil litigants in Illinois. See In re Marriage of Fahy, 208 Ill. App. 3d 677, 567 N.E.2d 552

(1st Dist. 1991). This right is required by the due process clause of the Illinois Constitution. Article I, Section 2.

3. Opportunity for the tenant to refute the evidence presented by the PHA, including the right to confront and cross-examine witnesses (24 CFR ¹ 966.53(c)(3))

A tenant, as party to the action, has the right to call and cross-examine the representatives of the PHA, in order to impeach their credibility or establish facts necessary to the presentation of the tenant's defense. A party may cross-examine an adverse party or the party's agent.

Upon the trial of any case any party thereto or . . . the officers, directors, managing agents or foreman of any party to the action, may be called and examined as if under cross-examination at the instance of any adverse party. The party calling for the examination is not concluded thereby but may rebut the testimony thus given by countertestimony and may impeach the witness by proof of prior inconsistent statements. Ill. Ann. Stat. ch. 110, para. 2-1102 (Smith-Hurd 1992).

Use of this provision has been held proper for the purpose, among others, of bringing out facts which a party might not otherwise be able to bring out. *Babcock v. Chesapeake and O. Ry. Co.*, 83 Ill.App.3d 919, 404 N.E.2d 265, 271 (1st Dist. 1979); *People v. Davis*, 11 App.3d 775, 298 N.E.2d 350, 352 (1st Dist. 1973).

The Illinois Supreme Court Rules provide that the credibility of a witness may be attacked by any party. Ill. Ann. Stat. ch. 110A, para. 238 (Smith-Hurd 1992). Depositions may be used for the purpose of impeaching the testimony of the deponent as a witness. Ill. Ann. Stat. ch. 110A, para. 212 (1992). However, under the rules of evidence, no party may be disqualified as a witness, except as provided in Ill. Ann. Stat. ch. 110, para. 8-101 (Smith-Hurd 1992), by reason of the person's interest in the action or proceeding, as a party or otherwise, or by reason of his or her conviction of a crime. Ill. Ann. Stat. ch. 110, para. 8-101 (Smith-Hurd 1992).

The tenant may subpoena any other witness, and require the production of documents or other tangible items at trial. Ill. Ann. Stat. ch. 110A, para. 237 (Smith-Hurd 1992). Unreasonable refusal to (1) comply with such subpoenas, or (2) answer any written question upon the taking of a deposition or any question propounded upon oral examination, or (3) otherwise to comply with the rules of the court relating to discovery and pretrial procedure, may cause the court, upon motion by the adversely affected party, to enter various orders against the offending party, including (1) barring a witness from testifying concerning that issue, (2) staying further proceedings, (3) striking the pleadings relating to that issue, and (4) entering a default judgment or dismissing the action as to any claims or defenses asserted in any pleading to which that issue is material. Ill. Ann. Stat. ch. 110A, para. 219(c) (Smith-Hurd 1992).

The defendant in a forcible entry and detainer action may aver matters by way of defense in refutation of the plaintiff's asserted right to possession. *Dobsons Inc. v. Oak Park Nat. Bank*, 86 Ill. App. 3d 200, 407 N.E.2d 993, 997 (1st Dist. 1980); *Clark Oil & Refining Corp. v. Banks*, 34 Ill. App. 3d 67, 339 N.E.2d 283, 287 (1st Dist. 1975).

Based upon the foregoing, a tenant in a proceeding under the FED Statute

must be given full opportunity to confront and cross-examine witnesses and refute the evidence presented by the PHA. Such right to refute PHA evidence is also guaranteed by the due process clause of the Illinois State Constitution. Article I, Section 2.

Eviction under Nuisance Act -- Rebuttable presumption

The FED Statute, as amended, provides the eviction procedures to be used under the Nuisance Act. HUD has determined that an action for eviction under the FED statute provides a defendant the opportunity to refute the evidence presented by the PHA, including the right to confront and cross-examine witnesses.

The Nuisance Act provides a rebuttable presumption that if a controlled substance is found or used anywhere in the premises of an apartment, then the controlled substance was either used or possessed by a lessee or occupant or that a lessee or occupant permitted the premises to be used for that use or possession.

Under Illinois law, a rebuttable presumption has the effect of creating a prima facie case as to the particular issue in question, and thus requires the party against whom the presumption operates to come forward with evidence to meet the presumption. *Diederich v. Walters*, 65 Ill. 2d 95, 357 N.E.2d 1128 (1976). Once the party opposing the presumption produces sufficient evidence, the presumption vanishes. *Id.* Thus, nothing in the presumption affects the tenant's right to refute evidence, confront and cross-examine witnesses, and present any defenses. Based on the foregoing, HUD finds that an FED action under the Nuisance Act provides the tenant an opportunity to refute the evidence presented by the PHA, confront witnesses, and present defenses in conformity with the HUD due process requirements.

4. Opportunity to present any affirmative legal or equitable defense which the tenant may have (24 CFR ¹ 966.53(c)(3))

The FED Statute provides that:

The defendant may under a general denial of the allegations of the complaint offer in evidence any matter in defense of the action. No matters not germane to the distinctive purpose of the proceeding shall be introduced by joinder, counterclaim or otherwise. Ill. Ann. Stat. ch. 110, para. 9-106 (Smith-Hurd 1992).

The purpose of a proceeding under the FED Statute is regaining possession of the property. Matters germane to this purpose may be introduced by the defendant. *Rosewood Corp. v. Fisher*, 46 Ill.2d 249, 263 N.E.2d 833, 837 (1970), cert. den., appeal dismissed by *Burton v. American Natl. Bank & Trust Co.*, 91 S.Ct. 924, 401 U.S. 928, 28 L.Ed.2d 209 (1971).

The language "or otherwise" has been held to mean that where there is a general denial a party is permitted to raise an issue by first presenting evidence at the hearing, even though the issue was not raised earlier by a proper pleading. *Samek v. Newman*, 164 Ill.App.3d 967, 518 N.E.2d 422, 424 (1st Dist. 1987); *Kelly v. Lunding*, 131 Ill. App. 3d 410, 475 N.E.2d 1093, 1095 (1st Dist. 1985). "Germane" has been defined as closely allied, closely connected, relevant, pertinent or appropriate. *Kelly* 131 Ill. App. 3d at 413; *Hareas v. Kyriakopoulos*, 101 Ill. App. 3d 393, 428 N.E.2d 500, 502 (1st Dist. 1981).

The defendant may raise both equitable and legal defenses germane to the purpose of the proceeding. *Rodriguez v. Owaynat*, 137 Ill.App.3d 1017, 485 N.E.2d 438, 441 (1st Dist. 1985). By allowing certain germane equitable defenses to be considered, the FED Statute provides procedural due process. *Pleasure Driveway and Park Dist. of Peoria v. Kurek*, 27 Ill.App.3d 60, 325 N.E.2d 650, 655 (3d Dist. 1975). Among the defenses which have been permitted to be raised are civil rights violations and the existence of unconscionable contracts. *Johnson v. Illinois Dept. of Public Aid*, 467 F.2d 1269 (7th Cir. 1972); *Rosewood*, supra.

In addition, if a defendant appears at the time and place specified in a summons issued under the FED Statute, as amended, as required, "he need not file an answer unless ordered by the court; and when no answer is ordered, the allegations of the complaint will be deemed denied, and any defense may be proved as if it were specifically pleaded." Ill. Ann. Stat. ch. 110A, para. 181(b)(2) (Smith-Hurd 1992). Paragraph 2-613(a) of Chapter 110 further provides that the "[p]arties may plead as many causes of action, counterclaims, defenses, and matters in reply as they may have"

Based upon the statutes and case law, a tenant will have the opportunity to present affirmative defenses which are germane to the issue of possession under the FED Statute.

5. A decision on the merits (24 CFR ¹ 966.53(c)(4))

The Civil Practice Law of Illinois provides that "[t]he court shall determine the rights of the parties and grant to any party any affirmative relief to which the party may be entitled on the pleadings and the proof." Ill. Ann. Stat. ch. 110, para. 2-1301 (Smith-Hurd 1992). This provision requires a decision in the proceeding based upon the merits of the case.

Additional provisions of Illinois law confirm that the merits of an action must be the basis for a decision. Regardless of whether the FED action is tried as a jury or non-jury trial, the decision must be on the merits -- based on the facts and the law.

The FED Statute provides that either party may demand a jury trial in an eviction from residential premises. Ill. Ann. Stat. ch. 110, para. 9-108 (Smith-Hurd 1992). The jury is given written instructions, unless the parties agree otherwise, as to the law of the case. Provisions relating to trial by jury permit the parties to submit (i) written instructions on the law to guide the jury's deliberations (Ill. Ann. Stat. ch. 110, para. 2-1107 (Smith-Hurd 1992)) and (ii) specific questions of fact to be determined by the jury in its findings (Ill. Ann. Stat. ch. 110, para. 2-1108 (Smith-Hurd 1992)). The jury is permitted to take into the jury room for use during their deliberation all papers read or received into evidence, except depositions. Ill. Ann. Stat. ch. 110, para. 2-1107(a), (c) and (d) (Smith-Hurd 1992).

The verdict in a jury trial is based on questions of fact submitted to the jury. When there is no jury, the defendant may move for a finding or judgment at the close of plaintiff's case. "In ruling on the motion the court shall weigh the evidence, considering the credibility of the witnesses and the weight and quality of the evidence If the ruling on the motion is adverse to the defendant, the defendant may proceed to adduce evidence in support of his or her defense, in which event the motion is waived." Ill. Ann. Stat. ch. 110, para. 2-110 (Smith-Hurd 1992).

In addition, the right to a decision on the merits is guaranteed by the due process clause of the Illinois State Constitution. Article I, Section 2. Whether facts are determined by the court or by a jury, a case must be decided on the merits. Based upon the foregoing, a decision on the merits of a proceeding is required by Illinois law.

C. Conclusion

Illinois law governing a forcible entry and detainer proceeding commenced and tried in the 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 ¹ 966.53(c) of the HUD regulations. This conclusion applies to an ordinary FED action, to a PHA eviction for drug-trafficking under Ill. Ann. Stat. ch. 10, para. 9-118, and to an FED action under the Nuisance Statute.

By virtue of this determination under section 6(k) of the U.S. Housing Act of 1937, a PHA in Illinois may evict a public housing tenant pursuant to a circuit court decision in a forcible entry and detainer proceeding. In a forcible entry and detainer eviction 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 PHA, or involves any drug-related criminal activity on or near the public housing premises (including a PHA eviction for drug trafficking under Paragraph 9-118 of the FED Statute, or an FED action under the Nuisance Statute) the PHA is not required to first afford the tenant the opportunity for an administrative grievance hearing.