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Subject: PH Due Process Determination: Indiana

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DUE PROCESS DETERMINATION

FOR THE

STATE OF INDIANA

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ANALYSIS

JURISDICTION: STATE OF INDIANA

I. 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 . . . .

For this purpose, HUD must determine that local law requires a court hearing with the basic "elements of due process." Under HUD regulations, the following are the basic "elements of due process":

- (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.

The same definition of due process elements is stated in the regulations for the regular public housing program at 24 CFR Section 966.53(c), and in the

regulations for the Indian housing program at 24 CFR Section 905.340(a)(3)(ii).

HUD's determination that eviction procedures satisfy this regulatory definition is called a "due process determination." This due process determination is based on HUD's analysis of the laws of the State of Indiana to determine if actions for ejection ("Ejection Actions") under Indiana laws require a hearing with all of the regulatory "elements of due process."

HUD finds that the requirements of Indiana law governing Ejection Actions in the following courts include all of the elements of basic due process, as defined in 24 C.F.R. Section 966.53(c) (public housing) and Section 905.340(a)(3)(ii) (Indian housing):

- (1) The small claims and misdemeanor division of the Circuit, Superior and County Courts.
- (2) The regular civil division of the Circuit, Superior and County Courts.

## II. Overview of Indiana Eviction Procedures

### A. Courts

Under the laws of the State of Indiana, a landlord may claim the right of possession of real property through a civil Ejection Action. Ind. Code Ann. Section 32-6-1.5-1 (Burns 1992). Ejection Actions are filed in:

- (1) A small claims and misdemeanor division of a Circuit Court or Superior Court when the rent due at the time the action is filed does not exceed \$3,000. Ind. Code Ann. Section 33-4-3-7 (Burns 1992); Ind. Code Ann. Section 33-5-2-3 (Burns 1992).
- (2) A small claims and misdemeanor division of a County Court when the rent does not exceed \$3,000. Ind. Code Ann. Section 33-10.5-7-1(B) (Burns 1992).
- (3) A regular civil division of a Circuit Court or Superior Court. See Ind. Code Ann. Section 33-4-4-3 (Burns 1992); Ind. Code Ann. Section 33-5-4.5-3 through Section 33-5-50-11 (Burns 1992).
- (4) A regular civil division of a County Court. Ind. Code Ann. Section 33-10.5-3-1 (Burns 1992). The regular civil divisions of the County Courts have original and concurrent jurisdiction in possessory actions between a landlord and tenant. Id.
- (5) The Municipal Court of Marion County. Ind. Code Ann. Section 33-6-1-2(a)(3) (Burns 1992).

Procedural and practice requirements in Ejection Actions filed in the above courts are governed by the Indiana Code, the Rules for Small Claims (S.C.) and the Indiana Rules of Trial Procedure (T.R.). Unless stated to the contrary, the Trial Rules of Indiana apply in all civil suits at law or in equity. T.R. 1. There is only one form of civil action, and equitable and legal defenses may be raised in the merged form of action. T.R. 2(a).

A local court may make and amend practice rules that are consistent with the Indiana Rules of Trial Procedure. T.R. 81. Additional rules of practice and procedure for the circuit and superior courts of Marion County, Lake County and Allen County are stated separately. See Indiana Court Rules, Marion County Local Rules of Court, *passim*; Lake County Local Rules of Court, *passim*; and Allen County Local Rules of Court. Proceedings in these courts are subject to the requirements of the Indiana Trial Rules and statutes which apply in the regular civil division of the circuit, superior or county courts of Indiana. Thus, the analysis of due process requirements for the regular civil division of the circuit, superior or county courts of Indiana applies to Marion, Lake and Allen County circuit and superior courts. *Id.*

B. Indiana Constitution -- Due Course of Law

Article I, section 12 of the Indiana Constitution states:

[all courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely and without purchase, completely, and without denial, speedily, and without delay.

An Indiana Ejectment Action must comply with the due course of law requirement under the Indiana State Constitution. The Indiana due course of law clause provides protections equivalent to the corresponding federal due process clause. *Kent v. Cook*, 637 F. Supp. 1005 (N.D. Ind. 1986).

III. Analysis of Indiana Eviction Procedures for Each of the Regulatory Due Process Elements

A. Small Claims and Misdemeanor Division: Circuit, Superior and County Courts

1. Adequate notice of the grounds for terminating the tenancy and for eviction  
(24 C.F.R. Section 966.53(c)(1))

In the State of Indiana, a civil ejectment action for the recovery of possession of premises in small claims and misdemeanor division is commenced by filing a notice of claim in the small claims and misdemeanor division of a court of competent jurisdiction. Rule S.C. 2(A).

Rule S.C. 2(B) provides that a notice of claim must contain:

- (1) The name of the court;
- (2) The name, address and telephone number of the claimant and defendant(s);
- (3) The place, date and time when the parties are to appear for trial of the claim, which date shall not be less than ten (10) days nor more than forty (40) days after service of said notice of claim;
- (4) A brief statement of the nature and amount of the claim and . . . if the claim arises out of written contract, a copy shall be attached; however, the fact that a copy of such contract is not in the custody of the plaintiff shall not bar the filing of the

claim; . . .

Rule S.C. 2(B)(1)-(4).

For notice purposes, the notice of claim serves as the summons. Rule S.C. 3. The notice of claim must be served upon each defendant. Id. Service may be made by sending a copy of the notice of claim to the defendant by registered or certified mail return receipt requested, or by delivering a copy to the defendant personally, or by leaving a copy at the defendant's dwelling house or usual place of abode (or by any other manner provided for in Trial Rules 4.1 through 4.16).

Whenever service is made by leaving a copy at the defendant's dwelling house or usual place of abode, the person making the service also shall send by first class mail a copy of the notice of claim to the last known address of the person being served. Id.

In an action for the recovery of possession of premises in the small claims and misdemeanor division, the notice of claim required under Indiana law gives the tenant adequate notice of the eviction action, and of the grounds for terminating the tenancy and eviction. Adequate notice is also required by the due course of law clause at Article I, Section 12 of the Indiana Constitution.

2. Right to be represented by counsel  
(24 C.F.R. Section 966.53(c)(2))

The court rules for small claims provide that "[a] natural person may appear pro se or by counsel in any small claims proceeding". Rule S.C. 8(c). The notice of claim must contain:

A statement that the parties may appear either in person or by an attorney . . .

Rule S.C. 2(B)(5).

In an action for the recovery of possession of premises in the small claims and misdemeanor division, the court rules grant the tenant a right to be represented by counsel. The due course of law clause of the Indiana Constitution also affords the right to representation by counsel. Article 1, Section 12.

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

Trials in the small claims court are informal, and are not bound by the rules of practice, procedure, pleadings or evidence, except those relating to privileged communication and offers of compromise. Rule S.C. 8(a). However, witnesses may be called, and the court has the power to issue subpoenas to compel attendance. Rule S.C. 8(b). All testimony must be given under oath or affirmation. Id.

In an action for the recovery of possession of premises in the small claims and misdemeanor division, the Indiana procedures require that the

tenant must be given opportunity to refute the evidence presented by the PHA including the right to confront and cross-examine witnesses. The due course of law clause of the Indiana Constitution also requires that the tenant must be given the opportunity to refute owner evidence against the tenant, and to confront and cross-examine witnesses. Article 1, Section 12.

4. Opportunity to present any affirmative legal or equitable defense  
(24 C.F.R. Section 966.53(c)(3))

The Indiana small claims rules provide that "[a]ll defenses shall be deemed at issue without responsive pleadings." Rule S.C. 4(a). There is no requirement to affirmatively plead any specific defenses. Moreover, there is no limitation on the tenant's right to raise any affirmative equitable or legal defense.

Thus, based on the court rules, in an action for the recovery of possession in the small claims and misdemeanor division, a tenant must be given the opportunity to raise any affirmative legal or equitable defense.

5. A decision on the merits  
(24 C.F.R. Section 966.53(c)(4))

The structure of the trial and hearing requirements under the Indiana small claims and trial rules implies that the court decision must be based on the legal and factual issues presented at the proceeding. For example, the rules provide for pleadings (Rule S.C. 4), discovery (Rule S.C. 6), and presentations by witnesses (Rule S.C. 8(b)). The rules establishing the procedural incidents of a trial in the small claims and misdemeanor division are designed to provide a forum for determining a case on the merits.

Under the law of the State of Indiana, the judge or jury must determine if the plaintiff is entitled to possession of the premises. See Rule S.C. 11; T.R. passim. A determination that the plaintiff is entitled to possession implies that the determination of the court must be based on the facts and the law. All judgments are reduced to a writing signed by the court, and are entered by the clerk in the small claims judgment docket. Rule S.C. 11(A).

In an action for the recovery of possession in the small claims and misdemeanor division, the Indiana court rules require a decision on the merits. The due course of law clause of the Indiana Constitution also requires a decision on the merits. Article 1, Section 12.

B. Regular Civil Division: Circuit, Superior, and County Courts

1. Adequate notice of the grounds for terminating the tenancy and for eviction  
(24 C.F.R. Section 966.53(c)(1))

In the State of Indiana, an action for the recovery of possession of premises in the regular civil division is commenced when the person seeking possession files a complaint for recovery with the clerk of the proper court. T.R. 3. A summons with a copy of the complaint must be served on the defendant. T.R. 4(B).. The summons must contain:

- (1) The name and address of the person to be served.

- (2) The name of the court and the cause number assigned to the case.
- (3) The title of the case.
- (4) The name, address, and telephone number of the attorney for the person seeking service.
- (5) The time in which the person served must respond, and a clear statement that in case the defendant does not respond, judgment by default may be rendered against defendant for the relief demanded in the complaint.

T.R. 4(C).

Under T.R. 4.1(A), the summons may be served on an individual by any of the following means:

- (1) Sending a copy of the summons and complaint by registered or certified mail, or other public means by which a written acknowledgment of receipt may be requested and obtained, to defendant's residence, place of business or employment with return receipt requested and returned showing receipt of the letter.
- (2) Delivering a copy of the summons and complaint to defendant personally.
- (3) Leaving a copy of the summons and complaint at defendant's dwelling house or usual place of abode.
- (4) Serving defendant's agent as provided by rule, statute, or valid agreement.

Where service is made by leaving a copy of the summons and complaint at the dwelling house or place of abode, the person making the service must also send a copy of the summons without the complaint by first class mail to the last known address of the person being served. T.R. 4.1(B).

In an ejectment action, the complaint must meet the pleading requirements in Section 34-1-48-4 of Indiana Code Annotated (Burns Cum. Supp. 1992). The complaint must state that the plaintiff is entitled to possession of the premises, particularly describe the premises and the interest that the plaintiff claims in the premises, and also state that the defendant is unlawfully keeping the plaintiff out of possession. In accordance with the general pleading requirements of the Indiana Trial Rules, the complaint must contain a "short and plain statement that the pleader is entitled to relief". T.R. 8(a)(1).

For an eviction action in regular civil division, Indiana law and court rules require adequate notice of the grounds for terminating the tenancy and for eviction. Adequate notice is also required under the due course of law clause of the Indiana State Constitution. Article I, Section 12.

2. Right to be represented by counsel  
(24 C.F.R. Section 966.53(c)(2))

Although the right to representation by counsel in civil proceedings is

not explicitly stated, many provisions of the Trial Rules of the State of Indiana imply that a tenant has the right to be represented by counsel. The following are some examples:

- (1) Contemporaneously with the filing of the complaint or equivalent pleading, the person seeking service or his attorney shall promptly prepare and furnish to the clerk as many copies of the complaint and summons as are necessary. T.R. 4(B).
- (2) The summons shall contain the name, address, and telephone number of the attorney for the person seeking service. T.R. 4(C).
- (3) The person seeking service or his attorney may designate the manner of service upon the summons. T.R. 4(D).
- (4) If the parties or their attorneys of record . . . consent to trial by the court sitting without jury, . . . the court shall try those issues without a jury. T.R. 39(A)(1).
- (5) The clerk shall issue a subpoena, . . . to a party requesting it or his attorney, who shall fill it in before service. T.R. 45(A).

The right to representation by counsel in civil actions is also required by the due course of law clause of the Indiana State Constitution. Article 1, Section 12.

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

Under the Trial Rules of the State of Indiana, the defendant has the right to present evidence and cross-examine witnesses. T.R. passim. In all trials, testimony of witnesses must be taken "orally in open court" (unless otherwise specifically permitted by the trial rules). T.R. 43(A).

At trial, a deposition may only be used against a party who had the opportunity to be present at the taking of the deposition. T.R. 32(A). At taking of a deposition, cross-examination may proceed as permitted at trial. T.R. 30(c). Provisions which allow the use of a deposition at trial under "exceptional circumstances" note "the importance of presenting the testimony of witnesses orally in open court." T.R. 32(A)(3)(e).

At trial, a party may cross-examine any unwilling or hostile witness, including interrogation by hostile or leading questions. T.R. 43(b).

At trial, a defendant may produce evidence to rebut the plaintiff's case. See T.R. 43(G). The court must admit all admissible evidence. T.R. 43(A). The defendant may compel attendance of witnesses or production of documentary evidence by a subpoena. T.R. 45. A subpoena requiring attendance of a witness at trial must be issued by the clerk of court at a party's request. T.R. 45(A).

Opportunity for the tenant to refute evidence presented by the PHA is required by the Indiana court rules. Such opportunity is also required by the

due course of law article of the Indiana Constitution. Article I, section 12 of the Indiana Constitution. Based on the foregoing, a tenant in a civil ejectment action in regular civil division has the opportunity to refute the evidence presented by the PHA, including the right to confront and cross-examine witnesses.

4. Opportunity to present any affirmative legal or equitable defense  
(24 C.F.R. Section 966.53(c)(3))

Under the Indiana Trial Rules, the defendant may serve an answer to the complaint. T.R. 7(A)(1). The Indiana code states that:

The answer of a defendant [in an action for possession] may contain a denial of each material statement or allegation in the complaint; under which denial the defendant shall be permitted to give in evidence every defense to the action that he may have, either legal or equitable.

Ind. Code. Ann. 34-1-48-5 (Burns Cum. Supp. 1992); see also T.R. 8 passim.

The pleading must state all defenses to each claim of the plaintiff. T.R. 8(B). There are no restrictions on the assertion of any available defenses by a tenant or other defendant. Indiana law enumerates certain "affirmative defenses" which must be pleaded and proved by defendant in a civil possessory action, without regard to whether specific defenses might be deemed to have a "legal" or "equitable" character.

Based on the Indiana Code and trial rules, a tenant has the opportunity to present any affirmative legal or equitable defense to owner's eviction action in regular civil division.

5. A decision on the merits  
(24 C.F.R. Section 966.53(c)(4))

Under the Trial Rules of Indiana, the judge or jury will determine if the plaintiff is entitled to possession of the premises. T.R. 39. The rules state that:

[U]pon a general verdict of a jury, or upon a decision announced, the court shall promptly prepare and sign the judgment, and the clerk shall thereupon enter it."

T.R. 58.

Under Indiana law, court rules and rules of evidence, the structure of the trial and hearing requirements for an action in regular civil division imply that the decision by the court must be a decision on the merits -- based on evidence presented in the proceeding which bears on the legal and factual issues presented in the case. The Trial Rules must be construed to secure the "just . . . determination of every action." T.R. 1. A decision on the merits is also required by the due course of law of the Indiana Constitution. Article I, section 12.

C. Municipal Court of Marion County.

Ejectment Actions may be filed in the Municipal Court of Marion County.

See Ind. Code Ann. Section 33-6-1-2(a)(3) (Burns 1992). The analysis applied to the regular civil division of the circuit, superior and county courts of Indiana also applies to the Municipal Court of Marion County. See Marion County Rules and Procedure of the Circuit and Superior Courts. To the extent that the local rules of the municipal court differ from the Indiana Rules of Trial Procedure, the differences do not impact upon this due process analysis. *Id*; see T.R. *passim*. An action for the possession of premises in the Municipal Court of Marion County requires a hearing with all of the elements of due process as currently defined by HUD.

#### IV. Conclusion

Indiana law governing an action for ejectment in the following Indiana courts requires that the tenant have the opportunity for a pre-eviction hearing in court which provides all the basic elements of due process as defined in the HUD regulations:

- (1) The small claims and misdemeanor division of the Circuit, Superior and County Courts.
- (2) The regular civil division of the Circuit, Superior and County Courts.
- (3) The Municipal Court of Marion County

By this determination under section 6(k) of the U.S. Housing Act of 1937, a PHA in Indiana may evict a tenant pursuant to an action for ejectment in any of these courts, and is not required to first afford the tenant the opportunity for an administrative hearing on the eviction.