

CHAPTER 9

**LOUISIANA
LANDLORD-TENANT LAW**

Mark Moreau

About The Author

Mark Moreau, Co-Director, Southeast Louisiana Legal Services, New York University School of Law, LL.M. in Taxation, 1982, Buffalo Law School, J.D., 1975, Brown University, A.B., 1971. Mr. Moreau has worked as a legal aid attorney for 35 years. He started Louisiana's first Low Income Taxpayer Clinic in 2000 and serves as the Clinic's Director at Southeast Louisiana Legal Services.

Mr. Moreau is a member of the Louisiana and New York bars. He was the 1992-93 Chairman of the Louisiana State Bar Association Consumer Protection, Lender Liability and Bankruptcy Section and has served on the Advisory Subcommittee on Lease for the Louisiana State Law Institute. Mr. Moreau is the recipient of the Louisiana State Bar Association's Career Public Interest Award, the New Orleans CityBusiness Leadership in Law Award, the National Taxpayer Advocate's Award and the Louisiana Coalition Against Domestic Violence's Into Action Award.

Acknowledgments

Special thanks to David Williams, Amanda Golob and Eric Foley of Southeast Louisiana Legal Services and to Walter McClatchey of Acadiana Legal Service for their comments and contributions to *Louisiana Landlord-Tenant Law*,

1. INTRODUCTION

This manual discusses Louisiana landlord-tenant law issues that commonly affect indigent tenants. The subjects covered are:

- Sources of Landlord-Tenant Law
- Eviction Defenses
- Lockouts & Utility Terminations
- Tenant's Lease Cancellation Rights
- Repairs
- Tenant Damage Claims
- Housing Discrimination Remedies
- Security Deposits
- Internet Research
- Other Treatises

The section on Eviction Defenses includes a checklist on how to assess an eviction case and a quick reference guide to the most common eviction defenses. A more detailed discussion of eviction procedures and defenses follows the checklist and quick reference guide. In addition, the appendix has a model pro se eviction answer that lists possible defenses for a tenant to select as appropriate.

2. SOURCES OF LANDLORD-TENANT LAW

In analyzing clients' housing problems, you should determine whether they have a landlord-tenant relationship with the adverse party.¹ A landlord-tenant relationship exists when there is a lease between the parties. A lease is an oral or written contract by which one party consents to give the other party enjoyment of a thing at a fixed price. La. Civ. Code art. 2668, 2681.

The legal relationship between the landlord and tenant is a mixture of contractual, tort and statutory duties. Generally, the lease is the law between the landlord and tenant unless it violates the law or public policy.² Therefore, each relevant provision in the lease must be analyzed to determine its proper interpretation and applicability. La. Civ. Code arts. 1983, 2045-57. As a contract, a lease may also be governed by Civil Code articles on obligations and contracts. La. Civ. Code art. 2669.

Some notable principles of lease analysis are:

- Uncertain or ambiguous lease provisions must be construed against the landlord and in favor of maintenance of the lease. *New Orleans Minority Business Center, Ltd. v. Duong*, 703 So.2d 157 (La. App. 4 Cir. 1997).
- Oral modifications or the parties' course of conduct can change a written lease. *Karno v. Fein Caterer*, 846 So.2d 105 (La. App. 4 Cir. 2003); *Quigley v. T.L. James & Co.*, 595 So.2d 1235 (La. App. 5 Cir. 1992); *Aghili v. Strother*, 2007 WL 865413 (La. App. 1 Cir. 2007).
- If the lease does not govern a particular problem, then Louisiana Civil Code arts. 2668-2744 or other applicable laws will govern.

¹ Other possible legal relationships include owner-occupant, innkeeper-guest, employer-employee, owner-trespasser, owners in indivision.

² *Carriere v. Bank of Louisiana*, 702 So.2d 648 (La. 1996).

- The lease provision may be unenforceable or prohibited if it violates the law or public policy. La Civ. Code art. 1968. (Examples of unenforceable lease provisions can be found at § 5.7.10 herein).

3. HOW TO DEFEND JUDICIAL EVICTIONS: A CHECKLIST

1. Ascertain client's objective—more time or defeat eviction?

- Explain possible eviction dates and state court eviction process
- Advise on possible defenses

2. What stage is the eviction at?

- Pre-lawsuit
- Pre-judgment
- Post-judgment

3. If post-judgment, does client have time and grounds for appeal, motion for new trial or petition for nullity of judgment?

Most common grounds for petition for nullity are:

- No notice of eviction lawsuit received
- Landlord accepted rent, but proceeded with eviction
- Eviction was for “no cause” and lease or law only allows eviction for cause

Petitions for nullity of judgment can be filed within the eviction lawsuit. They are ordinary proceedings. Therefore, you must immediately apply for a temporary restraining order and preliminary injunction to stop the eviction.

4. If no judgment yet, explore possible settlement with landlord.

- Assess whether pre-trial negotiations are consistent with defense strategies and client objectives.
- What is the landlord's price (rent, costs) for dismissal of eviction?
- If eviction is for “no cause”, will landlord agree to extension of move-out date and under what conditions?
- Section 8 voucher tenants can lose their vouchers if evicted for cause. Therefore, settlement is important
- Landlord's fears about vitiation of eviction can be allayed by entering consent judgment with extended executory date.
- Compromise agreements should be in writing or recited and recorded in open court to be enforceable. La. Civ. Code art. 3071.

5. Analyze client's defenses and remedies:

- Is there a landlord-tenant relationship?
- Does plaintiff have the right to evict by summary process?
- Any leases or other agreements that govern the eviction?
- If subsidized housing, what federal laws govern the eviction?
- Procedural defenses?
- Substantive defenses?
- Affirmative lawsuits, e.g., housing discrimination or bankruptcy, to stop the eviction?

- If housing discrimination exists (look for failure to accommodate tenants with disabilities or evictions based on association with minorities or children), file suit in state or federal district court before eviction lawsuit is filed and secure injunction or lis pendens bar.
- Damage claims? They do not defeat evictions, but may provide settlement leverage.

6. Prepare for Trial

- Select all defenses to be pleaded.
- Identify evidence (witnesses and documents) needed for trial.
- Subpoena evidence needed for proof of defenses.
- Apply for continuances if evidence cannot be timely produced for trial
- Draft pauper affidavits and verified answer and exceptions (sworn to by client before notary) that specially plead affirmative defense(s) entitling tenant to retain possession in a suspensive appeal. La. Code Civ. Proc. art. 4735.
- Generally, judicial control doctrine should be pleaded, if applicable, since it is indisputably an affirmative defense.
- File verified answer with clerk of court prior to trial.

7. Prepare for Appeal in Advance

- Preliminarily assess merits of appeal if eviction ordered
- Discuss requirements for appeal with client
- Prepare motion for appeal and appeal bond
- Explain that landlord may seek eviction on new grounds during appeal

8. Trial

- Consider pre-trial conference for settlement purposes
- Ask court to transcribe testimony in parish or city court eviction
- Try exceptions before merits
- Insist on dismissal if notice to vacate defective, rule for possession premature or if rent has been accepted
- Limit landlord's case to grounds raised in rule for possession
- If the landlord has not proven a right to relief after presentation of his evidence, move for dismissal under La. Code Civ. Proc. art. 1672 (B)
- Present evidence necessary to support your defenses; make a proffer of evidence if the court refuses to admit the evidence or allow the testimony³
- Preserve grounds for appeal

9. Appeal

- Within 24 hours of judgment (a) file suspensive appeal motion and bond with city or parish court if city or parish court was the trial court or (b) file petition for suspensive appeal by trial de novo and bond with district court or parish/city court if trial court was justice of peace.
- Ask for alternative bond (payment of rent into court registry) if tenant does not have surety. Tenant has right to surety or cash bond.

³ La. Code Civ. Proc. art. 1636.

- Advise client of need to timely pay rent to court registry or landlord during pendency of appeal
- Make sure that estimated costs of appeal are timely paid if client is not proceeding *in forma pauperis*

4. EVICTION DEFENSES: QUICK REFERENCE GUIDE

Common eviction defenses and supporting case citations are:

1. Notice to vacate for “no cause eviction” less than 10 days before end of current rental month. *Solet v. Brooks*, 30 So.3d 96, 101 (La. App. 1 Cir. 2009); *Houston v. Chargois*, 732 So.2d 71 (La. App. 4 Cir. 1999).
2. Less than 90 days written notice to vacate given to tenant in foreclosed property. Protecting Tenants at Foreclosure Act, 12 U.S.C. § 5220 note; *Bank of New York Mellon v. De Meo*, 254 P.3d 1138 (Ariz. App. 2011).⁴
3. Notice to vacate fails to provide tenant with sufficient notice of grounds for eviction. *Louisiana State Museum v. Mayberry*, 348 So.2d 1274 (La. App. 4 Cir. 1977).
4. Notice to vacate (contents and/or service) fails to comply with federal regulations for subsidized housing evictions. *Apollo Plaza Apts. v. Gosey*, 599 So.2d 494 (La. App. 3 Cir. 1992); *Versailles Arms Apts. v. Pete*, 545 So.2d 1193 (La. App. 4 Cir. 1989).
5. Rule for possession premature because filed before expiration of notice to vacate. *Owens v. Munson*, 2009 WL 3454507 (La. App. 1 Cir. 2009); *Lichtentag v. Burns*, 258 So.2d 211 (La. App. 4 Cir. 1972), *writ denied* 259 So.2d 916 (La. 1972).
6. Acceptance of rent after notice to vacate defeats eviction. *Billiot v. Hue*, 2011 WL 1944120 (La. App. 1 Cir. 2011); *Housing Authority of Town of Lake Providence v. Allen*, 486 So.2d 1064 (La. App. 2 Cir. 1986).
7. Delay in returning rent after notice to vacate defeats eviction. *Four Seasons, Inc. v. New Orleans Silversmiths, Inc.*, 223 So.2d 686 (La. App. 4 Cir. 1969).
8. Acceptance of partial rent after notice to vacate defeats eviction. *Adams v. Dividend, Inc.*, 447 So.2d 80 (La. App. 4 Cir. 1984); *Housing Authority of Town of Lake Providence v. Burks*, 486 So.2d 1068 (La. App. 2 Cir. 1986); *Thompson v. Avenue of Americas Corp.*, 499 So.2d 1093 (La. App. 3 Cir. 1986).
9. Timely tender of rent constitutes payment of rent which defeats eviction for nonpayment of rent even if landlord refuses to accept rent. *Cantrell v. Collins*, 984 So.2d 738, 740-41 (La. App. 1 Cir. 2008); *Adams v. Dividend, Inc.*, 447 So.2d 80, 83 (La. App. 4 Cir. 1984).
10. A late rent payment defeats eviction if there was a custom of accepting rent late. *Versailles Arms Apts. v. Pete*, 545 So.2d 1193 (La. App. 4 Cir. 1989).
11. A partial rent payment defeats eviction if there was a custom of accepting partial rent. *Grace Apts. v. Hill*, 428 So.2d 862 (La. App. 1 Cir. 1983).

⁴ Notice to vacate must be at least 90 days or the duration of the lease, whichever is longer. 12 U.S.C. § 5220. The Protecting Tenants at Foreclosure Act, expires on December 31, 2014 unless extended. See Pub. L. No. 111-22, Div. A, tit. VII, §§ 701-704, Stat. 1632, 1660-62 as amended by the Protecting Tenants at Foreclosure Extension and Clarification Act, Pub. L. No. 111-203, tit. XIV, § 1484, 124 Stat. 1376, 2204.

12. Section 8 tenant's payment of her portion of rent may defeat eviction if housing authority failed to pay its portion due to abatement. *Cf. McMillian v. Anderson*, 57 So.3d 422 (La. App. 2 Cir 2011) (tenant's claim failed because she did not submit evidence of abatement).
13. Acceptance of rent waives right to evict for lease violation. *A & J v. Ackel Real Estate*, 831 So.2d 311 (La. App. 5 Cir. 2002); *Quinn Property v. Sabine River*, 676 So.2d 639 (La. App. 3 Cir. 1996).
14. Evictions are subject to judicial control and may be denied even if a lease violation exists. *Carriere v. Bank of Louisiana*, 702 So.2d 648 (La. 1996); *Ergon v. Allen*, 593 So.2d 438 (La. App. 2 Cir. 1992).
15. Unexpired fixed term lease cannot be terminated for "no cause." La. Civ. Code art. 2728, 1983; *Shell Oil v. Siddiqui*, 722 So.2d 1197 (La. App. 5 Cir. 1998).
16. Public housing, low income tax credit housing, rural housing leases may not be terminated at end of lease absent good cause. 24 C.F.R. § 966.4 (public housing); Rev. Rul. 2004-82 ; (low income tax credit housing); *Carter v. Maryland Management Co.*, 835 A.2d 158 (Md. App. 2003) (low income tax credit housing); 7 C.F. R. § 3560.159 (rural housing).
17. The landlord failed to prove lease agreement, lease violation or expiration. *Monroe Housing Authority v. Coleman*, 70 So.3d 871 (La. App. 2 Cir. 2011); *Owens v. Munson*, 2009 WL 3454507 (La. App. 1 Cir. 2009); *Kenneth and Allie Caluda Realty Trust v. Fifth Business LLC*, 948 So.2d 1137, 1138 (La. App. 5 Cir. 2006); *PTS Physical Therapy Service v. Magnolia Rehabilitation Service, Inc.*, 920 So.2d 997, 1000 (La. App. 2 Cir. 2006); *Houston v. Chargois*, 732 So.2d 71 (La. App. 4 Cir. 1999).
18. Tenant not afforded opportunity to cure lease violation per rectification clause in lease or law. *D & D Investment v. First Bank*, 831 So.2d 488 (La. App. 5 Cir. 2002); *Shell Oil v. Siddiqui*, 722 So.2d 1197 (La. App. 5 Cir. 1998); *Rain-tree Court Apts. v. Bailey*, No. 98-C-1138 (La. App. 5 Cir. 1998); *see also Meriaux & Nunez v. Houck*, 13 So.2d 233 (La. 1943).
19. Domestic violence victims in Section 8 and public housing can't be evicted for domestic violence committed against them. 42 U.S.C. § 3604(b); 42 U.S.C. § 1437f(c)(9); 42 U.S.C. § 1437f(o)(7)(D)(i).
20. Unlawful discrimination. *Mascaro v. Hudson*, 496 So.2d 428 (La. App. 4 Cir. 1986). However, it is generally better to litigate such claims in federal or state district court before the eviction lawsuit is filed.
21. Failure to accommodate disabled tenant. *Boston Housing Authority v. Bridgewater*, 898 N.E.2d 848 (Mass. 2009); S. Trafford, *Using Reasonable Accommodations to Preserve Rights of Tenants with Disabilities*, 33 Clearinghouse Rev. 131 (July-Aug 1999).⁵
22. Plaintiff is not the owner or landlord or failed to prove ownership or lease. *Savoy v. Jones*, 484 So.2d 233 (La. App. 3 Cir. 1986); *Fradella Construction, Inc. v. Roth*, 503 So.2d 25 (La. App. 4 Cir. 1986); *Reynolds v. Brown*, 84 So.3d 655 (La. App. 5 Cir. 2011).

⁵ The article can be viewed or purchased at www.povertylaw.org

23. The alleged tenant or occupant is a co-owner. *Millaud v. Millaud*, 761 So.2d 44 (La. App. 4 Cir. 2000) (jurisdiction lies with district court); *Matthews v. Horrell*, 977 So.2d 62 (La. App. 1 Cir. 2007) (succession representative can't evict co- heir).
24. Possessor, whether in good faith or bad faith, may retain possession until he is reimbursed for expenses and improvements which he is entitled to claim. La. Civ. Code art. 592; *Broussard v. Compton*, 36 So.3d 376 (La. App. 3 Cir. 2010).
25. Usufructuary may retain possession until he is reimbursed for expenses and advances he is entitled to claim from naked owner. La. Civ. Code art. 627; *Barnes v. Cloud*, 82 So.3d 463 (La. App. 2 Cir. 2011).
26. Res judicata or issue preclusion bars relitigation of eviction. La. R.S. 13:4231 *et seq.*; *Avenue Plaza LLC v. Falgoust*, 676 So.2d 1077 (La. 1996).
27. Lis pendens bars second eviction suit. *Enterprise Property Grocery, Inc. v. Selma, Inc.*, 886 So.2d 614 (La. App. 2 Cir. 2004); *Spallino v. Monarch Sign*, 771 So.2d 784 (La. App. 3 Cir. 2000); *cf. Revel v. Charamie*, 926 So.2d 582 (La. App. 4 Cir. 2006). Lis pendens also bars (1) an eviction suit which should be brought as a reconventional demand in prior litigation between parties, *cf., Trahan v. 2010 Beglis, LLC*, 81 So.3d 192 (La. App. 3 Cir. 2011) and (2) an injunction filed after an eviction, *see 800 Canal St. Ltd. Partnership v. Stoville Dist. New Orleans, LLC*, 75 So.3d 958 (La. App. 4 Cir. 2011) .
28. Executive Order during disaster bars eviction or suspends delay periods for eviction. *Cf. Dendy v. City National Bank*, 977 So.2d 8 (La. App. 1 Cir. 2007).
29. Bankruptcy stay prohibits eviction until stay lifted. *In re Burch*, 401 B.R. 153 (Bankr. E.D. Pa. 2008).
30. Bankruptcy Code, 11 U.S.C. § 525, prohibits public housing authority eviction for non-payment of discharged rent. *In re Stoltz*, 315 F.3d 80 (2d Cir. 2002); *contra Housing Authority v. Eason*, 12 So.3d 970 (La. 2009) *rev'g* 9 So.2d 269 (La. App. 4 Cir. 2009).

5. EVICTIONS

5.1 JURISDICTION

Justice of the peace and district courts have jurisdiction over evictions of residential tenants and occupants regardless of the amount of monthly or yearly rent, or the rent for the unexpired term of the lease. La. Code Civ. Proc. art. 4912 (A).

City and parish courts have jurisdiction over tenants if the monthly rental is less than \$3,000 or the annual rental less than \$36,000. La. Code Civ. Proc. art. 4844. City and parish courts are courts of limited jurisdiction. A jurisdictional oddity exists in that these courts do not have express statutory jurisdiction over evictions of tenants where the lease term is other than a day, week, month or year. Jurisdiction is not specified for evictions involving, for example, a lease with a six month term. This is significant because the landlord must prove jurisdiction in order to use the summary eviction procedure in a city or parish court.⁶ City and parish courts have jurisdiction over evictions of occupants where the annual value of the occupancy is less than \$36,000. La. Code Civ. Proc. art. 4844 (A)(5).

⁶ *Northeast Realty v. Jackson*, 824 So.2d 1264 (La. App. 2 Cir. 2002); *Arnona v. Arnona*, 477 So.2d 120 (La. App. 4 Cir. 1985), writ denied 479 So.2d 367; *see also Home Distribution, Inc. v. Dollar Amusement, Inc.*, 754 So.2d.1057, n. 2 (La. App.1 Cir. 1999) (law no longer provides a catchall jurisdiction clause for city and parish court evictions).

As a practical matter, city and parish courts will have jurisdiction over virtually all evictions of residential tenants. Jurisdictional disputes will arise where the eviction lawsuit does not involve a “tenant” or “occupant” as defined by La. Code Civ. Proc. art. 4704. For example, city and parish courts may lack jurisdiction where there is disputed title to the property or the defendant is a part owner.⁷

5.2 PROCEDURE FOR PROSECUTING AN EVICTION

5.2.1 Notice to Vacate

The first step in the eviction procedure is to deliver written notice to the tenant to vacate the premises. La. Code Civ. Proc. art. 4701. Most landlords use the form notice to vacate provided by the courts. However, they may draft their own notices. The notice must specify the grounds for termination of the lease.⁸ La. Code Civ. Proc. art. 4701 provides for the written waiver of the notice to vacate. Such waivers have been enforced by the courts.⁹ However, the notice to terminate a month-to-month lease for “no cause” may not be waived in advance. La. Civ. Code art. 2718. The notice must be in writing. La. Civ. Code art. 2719.

The notice to vacate comes into play when a tenant’s right of occupancy has ceased because of the termination of the lease by expiration of its term, by the landlord’s action, by nonpayment of rent, or for any other reason. The grounds for eviction are generally (1) tenant’s failure to pay rent as due, (2) tenant’s violation of the lease, or (3) tenant’s refusal to vacate the premises upon expiration or non-renewal of the lease.

This statement of grounds for lease termination must be placed in the notice to vacate, and subsequently in the citation to appear or rule to show cause.¹⁰ Louisiana courts have held that constitutional due process requires the statement to be in the notice to vacate to permit the tenant to prepare his defense.¹¹ See *Apollo Plaza Apts. v. Gosey*, 599 So.2d 494 (La. App. 2 Cir. 1992) for a helpful case on what constitutes sufficient specificity. Therefore, if a tenant does not receive the statement of grounds in the notice to vacate, he should argue a due process violation and/or lease violation if also applicable. Notices to vacate to federally subsidized housing tenants must also comply with applicable federal laws.¹²

The notice to vacate must be delivered not less than 5 days nor more than 30 days before the premises are to be vacated. La. Code Civ. Proc. art. 4701. The time for delivery of the notice to vacate will be determined by the grounds for the eviction. If the eviction is for good cause, such as failure to pay rent, 5 days notice to vacate is required. *Tete v. Hardy*, 283 So.2d 252 (La. 1973).

No cause evictions of month-to-month tenants require 10 days notice prior to the end of the rental month. La. Civ. Code art. 2728.¹³ *Solet v. Brooks*, 30 So.3d 96, 101 (La. App. 1 Cir. 2009). The fact that a tenant is given more than 10 days notice is not a fatal defect. The statute only requires a minimum of 10 days. *Lilly*

⁷ See e.g., *Fradella Construction, Inc. v. Roth*, 503 So.2d 25 (La. App. 4 Cir. 1986); *St. Pierre v. Hirschfeld*, 569 So.2d 222 (La. App. 1 Cir. 1990).

⁸ *Louisiana State Museum v. Mayberry*, 348 So.2d 1274 (La. App. 4 Cir. 1977).

⁹ See, e.g. *Guidry v. Castillo*, 995 So.2d 50 (La. App. 5 Cir. 2008).

¹⁰ La. Code Civ. Proc. art. 4731 (A) (rule must state grounds for eviction).

¹¹ See e.g. *La. State Museum v. Mayberry*, 348 So.2d 1274 (La. App. 4 Cir. 1977).

¹² See e.g. *Versailles Arms Apartments v. Pete*, 545 So.2d 1193 (La. App. 4 Cir. 1989); 24 C.F.R. § 982.310 (e) (notice for Section 8 voucher housing).

¹³ Prior to 2005, Civil Code articles 2685-86 governed terminations of month-to-month leases.

v. Angelo, 523 So.2d 899 (La. App. 4 Cir. 1988). Thus, a landlord who wants a month-to-month tenant out of his apartment, for any or no reason, merely needs to give 10 days written notice to vacate before the end of the rental month.¹⁴ *Torco Oil Co. v. Grif-Dun Group, Inc.*, 617 So.2d 102 (La. App. 4 Cir. 1993).

The notice to vacate can be delivered by the landlord or served by the sheriff. In either case, the notice and service returns must be filed in the record. However, if the premises are abandoned or closed, or if the whereabouts of the tenant or occupant is unknown, the notice may be attached to a door of the premises. This is service by tacking. La. Code Civ. Proc. art. 4703. Other state or federal laws may impose additional requirements for the service of a notice to vacate on a subsidized tenant.

5.2.2 Rule For Possession

If the tenant fails to comply with the notice to vacate, a judicial eviction may be commenced by filing a rule for possession of premises with a proper court. La. Code Civ. Proc. art. 4732. This rule requires the tenant or occupant to show cause why he should not be ordered to deliver possession of the premises to the landlord or owner. The rule must state the grounds on which eviction is sought. La. Code Civ. Proc. art. 4731(A); *St. Pierre v. Hirschfeld*, 569 So.2d 222, 227 (La. App. 1 Cir. 1990).

Written pleadings are not required for evictions in justice of peace court. La. Code Civ. Proc. art. 4917.¹⁵ The court must issue a citation or order to show cause to the tenant. La. Code Civ. Proc. art. 4919. Either La. Code Civ. Proc. art. 4731 or due process should require the court to state the grounds on which eviction is sought by the landlord. However, many justices do not include any reasons in the citation or order.

The rule for possession must be served by the sheriff or constable. Under current Louisiana statutory law, the rule may be served by tacking. La. Code Civ. Proc. art. 4703. A federal court judgment requires that all eastbank Orleans Parish rules be served by regular mail in addition to tacking.¹⁶ The rule may be heard no earlier than the third day after service of the rule on the tenant. La. Code Civ. Proc. art. 4732.

5.2.3 Trial

The rule to show cause why the tenant should not deliver possession is a summary proceeding. La. Code Civ. Proc. art. 2592 (3). Trial of the rule should be conducted quickly and without observing all of the formalities of an ordinary proceeding. La. Code Civ. Proc. art. 2591. Jury trials are not available in Louisiana eviction proceedings. La. Code Civ. Proc. art. 1732 (3).

At the trial, the landlord has the burden of establishing a prima facie case of his right to possession.¹⁷ There are three essential elements to a landlord's cause of action for eviction:

¹⁴If no lease exists, e.g., the evictee is only an occupant, Civil Code art. 2728 does not apply and a 5 day notice to vacate would suffice. See *Northeast Realty v. Jackson*, 850 So.2d 947 (La. App. 2 Cir. 2003)(case decided under pre-2005 Civil Code article 2686).

¹⁵The landlord must still give a written notice to vacate that complies with due process, applicable laws or lease provisions. The trial should be limited to the grounds stated in the notice to vacate.

¹⁶See *Sylbester v. Detweiler*, USDC No. 84-3399 (E.D. La. 1985); see also, *Hughes v. Sanders*, 847 So.2d 165 (La. App. 2 Cir. 2003) (J. Caraway, dissenting).

¹⁷The reality in many trial courts is that the judge places the burden on the tenant, does not require proof of a prima facie case, and conducts a trial that is "conversational" at best.

- (1) the relation of landlord and tenant between the parties,
- (2) the expiration or termination of the lease,
- (3) that due notice to vacate has been served upon the tenant, as required by law.

See *Miller v. White*, 162 So. 638 (La. 1935); *Owens v. Munson*, 2009 WL 3454507 (La. App. 1 Cir. 2009); *Kenneth and Allicen Caluda Realty Trust v. Fifth Business LLC*, 948 So.2d 1137, 1138 (La. App. 5 Cir. 2006); *PTS Physical Therapy Service v. Magnolia Rehabilitation Service, Inc.*, 920 So.2d 997, 1000 (La. App. 2 Cir. 2006).

The landlord must prove the notice, the landlord-tenant relationship, violation of the lease or expiration of the lease. If there is a lease, it is the landlord's burden to prove the lease and the lease violation. Sworn testimony and admissible documents must be introduced into evidence for the landlord to establish a prima facie case of entitlement to eviction. See *Owens v. Munson, supra*; *Kenneth and Allicen Caluda Realty Trust v. Fifth Business LLC, supra*; *PTS Physical Therapy Service v. Magnolia Rehabilitation Service, Inc., supra*. An eviction can't be granted absent evidence. *Poydras Center LLC v. Intradel Corp.*, 81 So.3d 80 (La. App. 4 Cir. 2011).

In addition, the landlord must show jurisdiction. *Arnona v. Arnona*, 477 So.2d 120 (La. App. 4 Cir. 1985), *writ denied* 479 So.2d 367 (La. 1985); *PTS Physical Therapy Service v. Magnolia Rehabilitation Service, Inc.*, 920 So.2d 997, 1000 (La. App. 2 Cir. 2006).

After the landlord establishes a prima facie case, the burden shifts to the tenant to refute the landlord's case and to prove any affirmative or special defenses pleaded.

Some justices of the peace enter eviction judgments without ever holding a trial. This is egregious legal error and violates the Code of Judicial Conduct. A judge who does this will probably be suspended by the Supreme Court. See *e.g., In re Justice of the Peace Landry*, 789 So.2d 1271 (La. 2001). A call to the judge may secure a rescission of the unlawful judgment.¹⁸

5.2.4 Judgment

The judgment of eviction must be rendered "immediately" after the trial of the rule. La. Code Civ. Proc. art. 4732. The failure to immediately render judgment probably makes the judgment invalid if it prejudices or prevents a timely appeal by the losing party.¹⁹ The judgment must be in writing. La. Code Civ. Proc. arts. 1911, 4923.

Notice of the judgment must be given to the tenant. La. Code Civ. Proc. arts. 1913, 4905, 4922. The judgment of eviction against the tenant is also binding on sublessees. *Scott v. Kalip*, 197 So. 205 (La. App. 2 Cir. 1940) (sublessee has right to sue sublessor for damages, if any, as a result of the eviction). Judgment must be effective for at least 90 days. La. Code Civ. Proc. art. 4732.

¹⁸Do not threaten the judge with disciplinary charges for his violation of the Code of Judicial Conduct. See Rules 8.4 (g), 8.3 (b), Louisiana Rules of Professional Conduct.

¹⁹*Cf. Versailles Arms Apts. v. Granderson*, 377 So.2d 1359, 1362 (La. App. 4 Cir. 1979); *Edenborn Partners v. Korndorffer*, 652 So.2d 1027 (La. App. 5 Cir. 1995); *Flores v. Gondolier, Ltd.*, 375 So.2d 400, 403 (La. App. 3 Cir. 1979).

5.2.5 Execution of Eviction Judgment

Under La. Code Civ. Proc. art. 4733, an eviction judgment is executed by applying for a warrant for possession if the tenant does not vacate within 24 hours after the “rendition” of judgment. “Rendition” means when a written judgment is signed.²⁰ Execution of the judgment requires the tenant to remove not only himself and his possessions, but also to deliver the property free of other occupants.²¹

The warrant for possession typically directs the sheriff or constable to immediately execute the eviction judgment. They can force open doors and windows, and seize and sell the property to pay for the costs.

5.3 PROCEDURE FOR DEFENDING A JUDICIAL EVICTION

5.3.1 Verified Answer and Affirmative Defense

A verified answer pleading an affirmative defense must be filed prior to the trial of the rule for possession to preserve the tenant’s right to suspensively appeal an eviction judgment.²² Thus, as a practical matter, the first step in defending an eviction is the preparation of a verified answer to the rule for possession. The answer must be written, signed and sworn to by the tenant under oath.²³

The answer must plead an affirmative defense entitling the tenant to retain possession of the premises.²⁴ An affirmative defense should be specially pleaded and as specific as possible.

An affirmative defense in an eviction proceeding has been held to be one which raises a new matter not covered by the plaintiff’s petition and which would defeat the plaintiff’s demand on the merits, even if the plaintiff proves all of the allegations in his petition. *Newport-Nichols Enterprises v. Grimes, Austin & Stark, Inc.*, 463 So.2d 111 (La. App. 3 Cir. 1985) (held that defendant’s defense of judicial control entitled the tenant to a suspensive appeal.) In *Newport*, the tenant pleaded good faith efforts to comply with the lease and that the breach of failing to furnish evidence of insurance was immaterial. You should always plead the defense of judicial control.

In *Modicut v. Bremer*, 398 So 2d 570 (La. App. 1 Cir. 1980), the plaintiff sued for eviction claiming non-payment of rent, and the defendant answered contending that he had complied with all of the terms and conditions of his lease. The court held that the defendant’s assertion of compliance was merely a general denial of the plaintiff’s allegation of non-payment. The plea of compliance was held not to have raised a new matter which would defeat the plaintiff’s claim, even if the claim was found to be true. The court held that a general denial is not an affirmative defense under La. Code Civ. Proc. art. 1005.

Modicut appears to be contrary to the Supreme Court’s decision in *Trist v. Ravain*, 98 So.2d 169 (La. 1957) where a defense of rent payment was held to be

²⁰*Housing Authority of City of Lake Charles v. Minor*, 355 So.2d 270 (La. App. 3 Cir. 1977).

²¹*Miles v. Kilgore*, 191 So. 556 (La. App. 2 Cir. 1939).

²²A post-trial answer will not be considered. *Williams v. Bass*, 847 So.2d 80 (La. App. 2 Cir. 2003). However, an answer filed after trial but before judgment with leave of court may suffice. *Newport-Nichols Enterprises v. Grimes, Austin & Stark, Inc.*, 463 So.2d 111 (La. App. 3 Cir. 1985)

²³La. Code of Civ. Proc. art. 4735; *McMillan v. Chauvin*, 281 So.2d 181 (La. App. 4 Cir. 1973)(testimony under oath is insufficient); *writ denied* 283 So.2d 770 (La. 1973); *Papa v. Sullivan*, 268 So.2d 326 (La. App. 2 Cir. 1972).

²⁴La. Code Civ. Proc. art. 4735; *Sarpy v. de la Houssave*, 217 So.2d 783 (La. App. 4 Cir. 1968); *Soloman v. Hickman* 213 So.2d 96 (La. App. 1 Cir. 1968).

sufficient for a suspensive appeal.²⁵ Before *Modicut*, the rule applied in eviction appeals had been or is that an affirmative defense is one which, if proven, will have the effect of defeating the rule for possession on its merits.²⁶ To counter *Modicut*, one should plead the *Newport-Nicholls Enterprises* affirmative defense of judicial control of lease termination whenever possible.

5.3.2 Motion to Continue

A brief continuance of the eviction trial must be granted under La. Code Civ. Proc. art. 1602 if you are unable, with due diligence, to obtain evidence or witnesses material to the case. La. Code Civ. Proc. arts. 1602, 4831. In addition, due process requires that a tenant have a fair opportunity to present his case. *Pernell v. Southall Realty*, 416 U.S. 363, 385 (1974). Thus, subpoenae for witnesses and documents must be issued immediately so that the due diligence standard for an art. 1602 peremptory continuance will be met. Evictions involving federally subsidized tenants, the repair and deduct defense, or the abuse of right defense often require additional time to subpoena witnesses and documents.

Landlords and courts must accommodate the disabled and hospitalized. One court has held that the Fair Housing Act requires continuances where the tenant's disability prevents his attendance.²⁷ Other courts have found that the Americans with Disabilities Act may require a continuance as an accommodation.²⁸

A continuance should be granted in a public housing authority eviction where the authority has refused or failed to grant the pre-trial discovery required by federal law. See § 5.3.3, *infra*.

5.3.3 Pre-trial discovery

The trial of most residential evictions within 3 to 7 days of the filing of the rule for possession generally makes pre-trial discovery infeasible. However, in trial de novo appeals of justice of peace eviction judgments, there will often be 3 or more weeks before the trial date. This delay can provide sufficient time to notice a deposition. In addition, federal law creates a statutory right for public housing authority tenants to inspect any relevant documents, records or regulations directly related to the eviction before any grievance hearing or court trial. 42 U.S.C. § 1437d(l)(7); 24 C.F.R. § 966.4(m). The right to pre-trial examination of documents even applies to cases where the tenant does not have a right to a grievance hearing. 24 C.F.R. § 966.4 (m) expressly bars the housing authority from proceeding with eviction if it fails to make the documents available upon request by the tenant. Furthermore, federal law requires that the first notice of termination advise the tenant of the § 966.4 (m) right to pre-trial inspection. 24 C.F.R. § 966.4(k)(3)(ii). Thus, a court should continue or dismiss the eviction trial if the housing authority has failed to allow the required examination.

²⁵ It also appears contrary to *Versailles Arms Apartments v. Granderson*, 377 So. 2d 1359 (La. App. 4 Cir. 1979), in which the 4th Circuit held that an allegation of timely tender of the rent due constituted an affirmative defense to an eviction for nonpayment of rent. See also *Gennaro v. Royal Oldsmobile Co., Inc.*, 37 So.3d 1109, 1113 (La. App. 5 Cir. 2010) (payment of rent is affirmative defense); *Liggio v. Judeh*, 446 So.2d 402 (La. App. 4 Cir. 1984) (denial of lease violation not an affirmative defense).

²⁶ See e.g., *Versailles Arms Apts. v. Granderson*, 377 So.2d 1359 (La. App. 4 Cir. 1979). The *Modicut* decision, if applied, could deny tenants the right to retain possession in many eviction appeals. As such, it arguably constitutes a denial of the state constitutional right to appellate review, or a denial of equal protection. See, *Lindsey v. Normet*, 405 U.S. 56 (1972); La. Const. arts. I, §§ 19, 22.

²⁷ *Anast v. Commonwealth Apts.*, 956 F. Supp. 792 (N.D. Ill. 1997).

²⁸ *In re Marriage of James M. and Christine J.C.*, 158 Cal. App. 4th 1261 (2008); *Biscaro v. Stern*, 181 Cal. App. 4th 702 (2010); *Blackhouse v. Doe*, 24 A.3d 72 (Me. 2011).

5.3.4 Recordation of Testimony

A tenant has a state constitutional right to a verbatim recordation of the testimony in an eviction trial in a city, parish or district court. Also, you may require the Clerk of Court to take down the testimony in longhand. La. Code Civ. Proc. art. 2130.

A verbatim recordation of the testimony should always be obtained if you anticipate an appeal (other than an appeal which is trial de novo). Reliance on a narrative of facts is not advised because the judge or opposing counsel will often control the contents of the narrative of facts. In addition, the procedure for preparing and filing an approved narrative of facts by the return date of the appeal (typically, one week after the judgment when testimony was not recorded) is burdensome on appellant's counsel. See La. Code Civ. Proc. art. 2131.

5.4 APPEALS AND POST-JUDGMENT REMEDIES

5.4.1 Appellate Jurisdiction

A tenant may suspensively appeal an eviction judgment. La. Code Civ. Proc. art. 4735. To suspend the eviction, the appeal and appeal bond must be filed within 24 hours of rendition of the judgment. *Id.* Also, a tenant has the right to devolutive appeal an eviction judgment.²⁹ The devolutive appeal will not prevent execution of the eviction judgment. However, reversal of the eviction in a devolutive appeal will subject the landlord to a damages action for wrongful eviction. The delay period for a devolutive appeal of a city or parish court eviction judgment is 10 days.³⁰ The delay period for a devolutive appeal of a justice of peace eviction judgment is 15 days.³¹

Appeals of all eviction cases from city court or parish court are taken to the court of appeal in the same manner as an appeal from the district court. La. Code Civ. Proc. art. 5001; 2081 *et seq.*

Appeal from justice of the peace court is to the parish court or, if there is no parish court, to the district court of the parish where the justice of the peace is situated. La. Code Civ. Proc. art. 4924 (A). Appeals from justice of the peace court are tried de novo in parish or district court, and no further appeal is allowed. La. Code Civ. Proc. art. 4924 (B)-(C).

At a trial de novo in parish or district court, the whole case is open for decision and is retried as if there had been no prior trial whatsoever. A tenant may raise new defenses and present new evidence in the trial de novo.³² A district or parish court sitting as an appellate court in an eviction will also have supervisory jurisdiction over the justice of peace court.³³

Although no further appeals are allowed in "justice of peace" evictions, the court of appeal has supervisory jurisdiction over the parish or district court's

²⁹*Edwards v. Edwards*, 439 So.2d 478 (La. App. 1 Cir. 1983) (eviction judgment reversed on devolutive appeal); *Pledge Development Corp. v. Big Kahuna Enterprises, Inc.*, 376 So.2d 600 (La. App. 4 Cir. 1979) (suspensive appeal of eviction converted to devolutive appeal); *Vision Aviation LLC v. Airport Authority for Airport Dist. No. 1 of Calcasieu Parish*, 2009 WL 2246762 (La. App. 3 Cir. 2009) (same).

³⁰La. Code Civ. Proc. art. 5002(A)-(B); *Erazo v. Morton*, 33 So.3d 952, 954 (La. App. 5 Cir. 2010).

³¹La. Code Civ. Proc. art. 4925(A)-(B).

³²See *e.g.*, *The Home Depot v. State Workers Compensation Second Injury Board*, 934 So.2d 125, 127 ((La. App. 1 Cir. 2006).

³³La. Const. Art. 5, §§ 2, 16 (B); *In re Shintech*, 734 So.2d 772 (La. App. 1 Cir. 1999), writ denied 746 So.2d 601 (La. 1999).

appellate jurisdiction and may reverse the eviction. La. Code Civ. Proc. art. 4924.³⁴ A writ application to reverse an appellate decision by a parish or district court should be accompanied by a request for a stay of the eviction judgment.³⁵

5.4.2 Motion For Suspensive Appeal

5.4.2.1 Parish and City Court Evictions

Application must be made to the trial court for suspensive appeal by written motion or petition, filed within 24 hours after the rendition of a judgment of eviction. La. Code Civ. Proc. arts. 4735, 2121. Rendition of judgment means a signed written judgment, not when the judgment was orally announced.³⁶ Note that the appeal may be premature if it is filed before the written judgment. La. Code Civ. Proc. art. 1911; *but see Overmeir v. Traylor*, 475 So.2d 1094 (La. 1985) (signing of final judgment cures defect). An appeal bond must also be filed within 24 hours of judgment, in an amount set by the trial court. La. Code Civ. Proc. art. 4735.

The return day of the appeal is 30 days from the date costs are paid (45 days if there is testimony to be transcribed), unless the trial judge fixes a lesser period. The trial judge may grant only one extension for no more than 30 days. La. Code Civ. Proc. arts. 2125-2125.1. Counsel for appellant should check with the Clerk's office to ascertain if the record has been completed, and to pay the costs of filing an appeal, if an *in forma pauperis* order has not been obtained.

5.4.2.2 Justice of the Peace Court Evictions

La. Code Civ. Proc. arts. 4924-25 provide that appeals from judgments by a justice of peace require the filing of a suit for trial de novo in the district court or parish court. La. Code Civ. Proc. art. 4735 requires that suspensive appeals of evictions be applied for within 24 hours of rendition of an eviction judgment. The petition for appeal by trial de novo should include an order suspending the eviction. The order should be sent to the justice of peace and landlord.³⁷

Cases decided under the prior justice of peace appeal statutes held that a motion for appeal must be filed with the justice of peace court. *See Housing Authority of St. John the Baptist v. Butler*, 405 So.2d 1252 (La. App. 4 Cir. 1981). After the 1986 amendments to art. 4924 and 5003, a district court has ruled that a motion for appeal no longer has to be filed with the justice of peace court.³⁸

Butler was decided before Act 156 of 1986 when the current La. Code Civ. Proc. arts. 4924 and 5003 were respectively arts. 5002 and 5004. *Butler* cited art. 5004 as authority for the proposition that art. 2121 governed and that therefore only the justice of peace court could grant the appeal. However, prior art. 5004 (now art. 5003) expressly applied to the chapter governing appeals of city, parish and justice of the peace court judgments.

³⁴*Raintree Court Apts. v. Bailey*, No. 98-C-1138 (La. App. 5 Cir. 1998); *Sonnier v. Bourque*, 194 So.2d 78 (La. App. 1 Cir. 1940); *Lord v. Broussard*, 526 So.2d 458 (La. App. 5 Cir. 1988). *Raintree Court Apts.* can be found at 33 Clearinghouse Rev. 343 (Sept.-Oct. 1999).

³⁵A sample writ application can be found for *Bullins v. Covington Housing Authority* in probono.net/la.

³⁶*Housing Authority of City of Lake Charles v. Minor*, 355 So.2d 270 (La. App. 3 Cir. 1977).

³⁷In other states, the courts have generally held that an appeal by "trial de novo" (without the requirement for any other court order) suspends the original judgment. We are unaware of any Louisiana cases on this issue. Therefore, it is strongly recommended that tenants comply with the Code Civ. Proc. art. 4735 requirements for a suspensive appeal. Note, however, that in a related Louisiana context, the judicial grant of a new trial suspends the original judgment. *Wilson v. Compass Dockside, Inc.*, 635 So.2d 1171 (La. App. 4 Cir. 1994), *writ denied* 642 So.2d 1299 (La. 1994). Furthermore, the omission of suspensive appeals from La. Code Civ. Proc. art. 4924, the appeal procedure for justice of peace courts, strongly suggests that the art. 4924 statutory grant of a trial de novo suspends the original judgment.

³⁸A brief in opposition to a motion to dismiss appeal for failure to file a motion for appeal with the justice of peace court can be found at probono.net/la.

Act 156 of 1986 omitted justice of the peace courts from the chapter to which art. 5003 (previously art. 5004) applies while retaining the language of arts. 5002 and 5004 in the new arts. 4924 and 5003. The new chapter governing justice of the peace courts has no provision that makes art. 2121 applicable to appeals from justice of the peace courts. In addition, La. Code Civ. Proc. art. 2081 expressly states that art. 2121 is applicable to appeals to the courts of appeal and supreme court.

5.4.3 Appeal Bonds

Most judges fix the suspensive appeal bond in an amount equal to the rent that will accrue during the appeal. The motion for suspensive appeal should contain a provision for setting the amount of the appeal bond. *In forma pauperis* litigants are not exempted from the requirement of a suspensive appeal bond. La. Code Civ. Proc. art. 5185(B). However, the appeal bond may not include the costs of appeal.³⁹

A tenant may post a surety or cash bond. La. Civ. Code art. 3068.⁴⁰ For subsidized tenants, ask for the bond to be the tenant's share of the rent. Form appeal bonds may be provided by the court. The surety on the appeal bond must have net assets in excess of the amount of the bond, and must be a resident of the parish where the eviction is brought. La. Code Civ. Proc. art. 5122.⁴¹ The formalities of the bond must be strictly complied with, on penalty of subjecting the surety to possible false swearing charges.

Some trial judges will unlawfully seek to defeat a tenant's appeal. Examples are:

- An order requiring payment of ongoing rents in addition to the posting of a suspensive appeal bond. *A & J, Inc. v. Ackel Real Estate*, 831 So.2d 311 (La. App. 5 Cir. 2002).
- Including court costs for eviction and appeal in bond amount when tenant is *in forma pauperis*. La. Code Civ. Proc. art. 5181 (A) ; *Johnson v. Sauer*, 2012-C-0022, (La. App. 4 Cir. 1/12/12) *Filmore Parc Apartments v. Howard*, 2004-1299, (La. App. 4 Cir., 7/30/04).⁴²
- A recall of the appeal once the tenant has posted the bond. *Olivier v. Roland*, 2003-C- 1916 (La. App. 4 Cir. 10/31/03)⁴³; *Vaughn v. American Bank & Trust Co.*, 66 So.2d 4 (La. 1953).
- An order increasing the bond or to test its sufficiency on the judge's own motion. *Estate of Helis v. Hoth*, 137 So.2d 472 (La. App. 4 Cir.1962).
- Dismissal of an appeal for failure to pay estimated appeal costs without a contradictory hearing. *Ethel Kidd Real Estate, Inc., v. Abrams*, 2003-C-2000

³⁹*Johnson v. Sauer*, 2012-C-0022, (La. App. 4 Cir. 1/12/12); *Filmore Parc Apartments v. Howard*, 2004-1299 (La. App. 4 Cir. 7/30/04).

⁴⁰*Case v. Case*, 316 So.2d 418 (La. App. 2 Cir. 1975); *Filmore Parc Apartments v. Howard*, 2004-1299 (La. App. 4 Cir., 7/30/04). The tenant's brief in *Filmore Parc Apartments v. Howard* can be found at probono.net/la.

⁴¹The surety may be liable for damages from delay caused by appeal if the tenant loses the eviction appeal. Typically, damages include unpaid rent. The landlord has the burden of proving the delay damages. See e.g., *Urban Homeowners' Corp. v. Abrams*, 692 So.2d 673 (La. App. 4 Cir. 1997).

⁴²See also, *Brownell v. Brownell*, 799 So.2d 587 (La. App. 3 Cir. 2001)(pauper can't be ordered to pay court costs in installments); *Urban Homeowners' Corp. v. Abrams*, 692 So.2d 673 (La. App. 4 Cir. 1997)(appeal bond limited to damages sustained by landlord as result of delay from appeal); cf. *Matherne v. Matherne*, 808 So.2d 571 (La. App. 1 Cir. 2001)(only appeal costs may be included in the notice of estimated costs for appeal); *Johnson v. First National Bank*, 786 So.2d 84 (La. 2001)(writs appropriate to reduce excessive estimated costs of appeal).

⁴³The tenant's brief in *Olivier v. Roland* can be found at probono.net/la.

(La. App. 4 Cir. 11/14/03); *Paddio-Johnson v. St. Helena H. Start*, 610 So.2d 901 (La. App. 1 Cir. 1992); *Burks v. McKean*, 544 So.2d 502 (La. App. 2 Cir. 1989).

- Limiting a tenant to a cash bond only. La. Code Civ. Proc. art. 5121 *et seq.*, La. Civ. Code art. 3068; *Filmore Parc Apartments v. Howard*, 2004-1299 (La. App. 4 Cir. 7/30/04) (tenant has option of surety bond).

Furthermore, the judge may illegally try to defeat appellate review of his illegal dismissal orders by taking *ex parte* action with little or no notice to the tenant. Sample writ argument inserts or briefs on such issues can be found at www.probono.net/la. If the landlord obtains an unlawful dismissal of a suspensive appeal of an eviction from a court, it may be liable for the damages caused by the tenant's eviction.⁴⁴

Under the jurisprudence, a trial court clearly loses jurisdiction to consider a motion to dismiss the suspensive appeal or convert to a devolutive appeal when the appeal bond is timely posted.⁴⁵ Therefore, you should immediately file the appeal and bond. Also, it appears that a trial court is divested of jurisdiction to convert a suspensive appeal to a devolutive appeal in an eviction case when the bond is not timely filed.⁴⁶

The landlord may test the sufficiency, solvency, or legality of the bond by a rule to show cause. La. Code Civ. Proc. art. 5123. If the surety is found insufficient or invalid, the tenant has 4 days to correct the deficiency by filing a new or supplemental bond. La. Code Civ. Proc. art. 5124; *Hoerner v. Paul*, 392 So.2d 191 (La. App. 4 Cir. 1981) (4 day rule applies to eviction appeals). The tenant has two opportunities to correct a deficient bond. La. Code Civ. Proc. art. 5126. The tenant may file a corrected bond at any time prior to the filing of a rule to test the original bond. La. Code Civ. Proc. art. 5124.

If your client is unable to obtain a surety bond, be prepared to file a motion for an alternative bond, e.g., payment of each month's rent as due into the court registry. See, e.g., *Steward v. West*, 449 F. 2d 324 (5th Cir. 1971) (as long as the tenant continued to pay rent, it was very unlikely that the landlord would suffer any harm during the pendency of the appeal). Louisiana courts have authorized the use of such alternative bonds. See, e.g., *Robinson v Ventures LLC v. Dowl*, 901 So.2d 587 (La. App. 4 Cir. 2005) (payment of \$300 monthly rent into court registry); *Lakewind East Apts. v. Poree*, 629 So.2d 422 (La. App. 4 Cir. 1993) (payment of monthly rent). In *Gross v. Williams*, 99-C-1865 (La. App. 4 Cir. 1999), the appellate court reduced a subsidized tenant's appeal bond to monthly payment of her share of the rent into the court registry where the housing authority continued the payment of rent subsidies to the landlord.⁴⁷

Failure to move for the dismissal of a suspensive appeal within 3 days of the appeal record lodging may waive objections to the timeliness of a bond. La. Code Civ. Proc. 2161; *Wright v. Jefferson Roofing, Inc.* 630 So.2d 773 (La. 1994); *but see Lakewind East Apts. v. Poree*, 629 So.2d 422 (La. App. 4 Cir. 1993) (rule does not apply to "continuing" bond of monthly rental payments).

⁴⁴*Harding v. Monjure*, 1 So.2d 116 (Orl. App. 1941).

⁴⁵*Robertson v. Aztec Facility Services, Inc.*, 20 So. 3d 492, 494 (La. App. 4 Cir. 2009).

⁴⁶La. Code Civ. Proc. art. 2088 (B) as amended by Act 658 §1 of 2008.

⁴⁷The trial court had set the bond as monthly payments of the contract rent rather than the tenant's rent share.

5.4.4 Effect of Suspensive Appeal

A suspensive appeal stays the effect or execution of the eviction judgment. If the tenant's eviction appeal is denied by the court of appeal, the judgment becomes final and executory in 30 days, unless the tenant applies for a writ of certiorari. Timely application to the Louisiana Supreme Court for a writ of certiorari precludes execution of the eviction judgment until the Supreme Court rejects the writ application or appeal.⁴⁸ Note that tenants appealing justice of the peace decisions apparently do not have a statutory suspension (similar to art. 2166) when they seek supervisory review of a district or parish court appeal decision. However, the higher court's supervisory jurisdiction allows them to stay the eviction pending review.

A final appellate judgment may be executed in the trial court without further notice after the landlord has filed a certified copy of the appellate judgment with the clerk of trial court. La. Code Civ. Proc. art. 2167.

The lease is not dissolved until the judgment decreeing cancellation becomes final. A suspensive appeal not only stays execution, it stays the "effect" of a judgment. Thus, the landlord's and tenant's obligations remain in effect during the suspensive appeal.⁴⁹ If the landlord attempts to evict or eject a tenant in violation of the suspensive appeal or a stay order, he may be subject to a contempt action for violation of a court order or damages for lease violations.⁵⁰

5.4.5 Rent obligation during pendency of appeal

One court has held that a suspensive appeal does not suspend a tenant's obligation to pay rent as it becomes due during the appeal. Thus, failure to pay rent in a subsequent month can constitute a separate cause of action for which the landlord can sue to evict the tenant, despite the pendency of a suspensive appeal. *Sarpy v. Morgan*, 426 So.2d 293 (La. App. 4 Cir. 1983). Given *Sarpy*, a tenant should timely tender the rent as it becomes due during the appeal. Also, failure to timely pay rent to the court registry pursuant to an appeal bond could result in dismissal of the tenant's suspensive appeal. *Lakewind East Apts. v. Poree*, 629 So.2d 422 (La. App. 4 Cir. 1993).

5.4.6 Motion to dismiss appeal

The following scenario threatens tenants with the loss of their constitutional rights of appellate review of eviction judgments:

- tenant's suspensive appeal is dismissed because of lack of an affirmative defense, *Modicut v. Brewer, supra*, or inability to pay bond
- landlord executes the eviction judgment
- tenant moves out to avoid trespass charges, etc.
- the tenant's devolutive appeal is then dismissed for mootness. See, *Curran Place Apts. v. Howard*, 563 So.2d 577 (La. App. 4 Cir. 1990).

⁴⁸La. Code Civ. Proc. art. 2166; but see *Nathans v. Vuci*, 443 So.2d 690, 695 (La. App. 1 Cir 1983).

⁴⁹*Cf. Reed v. Classified Parking System*, 324 So.2d 484, 490 (La. App. 2 Cir. 1975); but see, *Smith v. Castro Brothers Corp.*, 443 So. 2d 660 (La. App. 4 Cir. 1983), writ denied 446 So.2d 1229, 1231 (La. 1984).

⁵⁰A suspensive appeal order suspends or stays the effect or execution of the judgment. La. Code Civ. Proc. art. 2123. Violation of a suspensive appeal order is punishable as contempt. See La. Code Civ. Proc. 224-27. Violation of a stay order is punishable as contempt. See La. Code Civ. Proc. art. 3611 (violations of injunctions punishable as a contempt of court; court may undo whatever was done in violation of an injunction and aggrieved party may recover damages).

Howard was incorrectly decided. In *New Orleans Hat Attack, Inc. v. N.Y. Life Insurance Co.*, 665 So.2d 1186 (La. App. 4 Cir. 1995), the court held that an evicted tenant who takes a devolutive appeal does not acquiesce in the judgment when he vacates the premises and that, as a general rule, does not forfeit his right to a devolutive appeal by compliance with the judgment.

New Orleans Hat Attack distinguished *Howard* and similar cases by noting that they involved expired leases. Under *New Orleans Hat Attack*, the devolutive appeal of a tenant with an unexpired lease would not be mooted out by his vacating the premises. At trial, introduce the lease and evidence about the type of housing involved. Leases of public and certain subsidized housing do not expire at the end of their terms. Therefore, eviction appeals involving such leases should not become moot.

It is also important to demonstrate that the tenant is not acquiescing in the eviction judgment by moving out. One suggestion is to write a letter to the landlord or the landlord's attorney saying that the tenant does not intend to forfeit his appeal rights, and that he is only moving out to avoid a trespass charge.

A landlord who evicts a tenant during a devolutive appeal is monetarily liable for wrongful eviction if the judgment is ultimately reversed.⁵¹ Ask the landlord to agree to defer execution of eviction pending appeal. It is imprudent for a subsidized landlord to evict during a devolutive appeal since he could lose his subsidies during the appeal. A tenant who moves out should record a notice of his devolutive appeal (notice of *lis pendens*) in the parish mortgage office under La. Code Civ. Proc. art. 3751 *et seq.* in order to protect his rights against third parties.⁵²

In addition, a devolutive appeal is not moot because the eviction judgment may be *res judicata* as to any subsequent suit for wrongful eviction.⁵³ Note, however, that one court has held that ordinary claims asserted in defense of an eviction do not constitute *res judicata* to a subsequent ordinary action for damages.⁵⁴ Another court has held that an eviction judgment is not *res judicata* to a subsequent suit for wrongful eviction since the tenant could not have asserted her claims in the eviction.⁵⁵

5.4.7 Supervisory Writs

If a tenant cannot comply with the requirements for a suspensive appeal, consider an application for supervisory writs and stay order. See, Uniform Rules - Courts of Appeal 4.4; *Doullut v. Rush*, 77 So. 110 (La. 1917). Both the court of appeal and the trial court have the discretion to stay the eviction pending the determination of the supervisory writ application.⁵⁶

⁵¹ *Mangelle v. Abadie*, 19 So. 670 (La. 1896); *New Orleans Hat Attack, Inc. v. N.Y. Life Insurance Co.*, 665 So.2d 1186 (La. App.4 Cir. 1995); see also *Smith v. Shirley*, 815 So.2d 980 (La. App. 3 Cir. 2002) *writ denied* 816 So.2d 308 (La. 2002).

⁵² See *Ducote v. McCrossen*, 675 So.2d 817 (La. App. 4 Cir. 1996).

⁵³ *Mangelle v. Abadie*, 19 So. 670 (La. 1896); *Olivier v. Roland*, 03-1988 (La. App. 4 Cir. 6/22/04); *New Orleans Hat Attack, Inc. v. N.Y. Life Insurance Co.*, *supra*; see also *Avenue Plaza LLC v. Falgoust*, 676 So.2d 1077, 1082 (La. 1996); La. R.S. 13:4231 *et seq.*

⁵⁴ *Graci v. Gasper John Palazzo, Jr., LLC*, 30 So.3d 915, 918 (La. App. 5 Cir. 2009) *writ denied* 31 So3d 394 (La. 2010).

⁵⁵ *Horacek v. Watson*, 934 So.2d 908 (La. App. 3 Cir. 2006) (landlord wrongfully evicted tenant before it obtained eviction judgment).

⁵⁶ Uniform Rules - Courts of Appeal, Rule 4.4; A. Tate, *Supervisory Powers of the Louisiana Courts of Appeals*, 38 Tul. L. Rev. 429, 435 (1954); see also *Livingston Downs Racing Association v. Louisiana State Racing Com'n*, 675 So.2d 1214, 1216 (La. App. 4 Cir. 1996) (stay issued pursuant to supervisory jurisdiction in devolutive appeal); but see *Veillon v. Veillon*, 517 So.2d 941 (La. App. 3 Cir. 1987) (supervisory writs cannot be used as a substitute for suspensive appeal).

A district or parish court hearing an appeal of a justice of peace court eviction also has supervisory jurisdiction incidental to its appellate jurisdiction.⁵⁷ As such, the district or parish court should have discretion to issue a stay to prevent irreparable injury. Irreparable injury exists for evictions of indigents.⁵⁸

5.4.8 Motion for new trial

Sometimes, a tenant may come to you for help after judgment. A motion for new trial must be granted if the judgment is contrary to the law and evidence. La. Code Civ. Proc. art. 1972. A new trial may be granted for good cause. La. Code Civ. Proc. art. 1973. The denial of a new eviction trial was reversed on appeal where the notices of the hearing date were confusing.⁵⁹

As a practical matter, you should file immediately for a new trial since evictions are often executed within 24 to 48 hours of judgment. New trials in parish or city courts must be applied for within 7 days of the mailing or service of the notice of judgment. La. Code Civ. Proc. art. 4907. The delay for a new trial motion in a justice of peace court is also 7 days. La. Code Civ. Proc. arts. 4925, 4922, 4831. A motion for new trial does not extend the deadline for a suspensive appeal of an eviction.⁶⁰ Therefore, it should include a motion for stay. If a new trial is granted, the original judgment is set aside or suspended.⁶¹

5.4.9 Petition for nullity of judgment

If a motion for new trial or appeal is not available, the only other post-trial remedy is a petition for nullity of judgment. This remedy presents most commonly when a default judgment has been rendered against the client, and the client alleges nonreceipt of service of process, payment of the rent before the eviction judgment, or that the landlord told him not to attend the trial.

A petition for nullity of judgment may be appropriate if there are arguable grounds for nullification. See, La. Code Civ. Proc. art. 2001-2006; *Hughes v. Sanders*, 847 So.2d 165 (La. App. 2 Cir. 2003); *CA One/Pampy's v. Brown*, 982 So.2d 909 (La. App. 4 Cir. 2008); *Joiner v. Housing Authority of New Orleans*, 238 So.2d 196, 197 (La. App. 4 Cir. 1970).

Default judgments of eviction based only on tacking service of the rule could be subject to nullification because the United States Supreme Court has held that tacking service is constitutionally inadequate in eviction cases. *Greene v. Lindsey*, 456 U.S. 444 (1982); La. Code Civ. Proc. art. 2002; but see, *French Quarter Realty v. Gambel*, 921 So.2d 1025 (La. App. 4 Cir. 2005). The Constable of First City Court for the City of New Orleans must also serve Rules for Possession by regular mail pursuant to *Sylvester v. Detweiler*, USDC No. 84-3399 (E.D. La.) (class action consent judgment based on *Greene*).

Misrepresentations by the landlord that are material to obtaining the default judgment are grounds for nullification. Cf., *Temple v. Jackson*, 376 So.2d 972 (La. App. 1 Cir. 1979). The typical misrepresentations that occur in eviction defaults

⁵⁷ La. Const. Art. 5, §§ 2, 16 (B); *In re Shintech*, 734 So.2d 772 (La. App. 1 Cir. 1999), writ denied 746 So.2d 601 (La. 1999).

⁵⁸ See e.g., *Park Village Apartment Tenants Association v. Mortimer Howard Trust*, 636 F.3d 1150, 1159 (9th Cir. 2011).

⁵⁹ *Housing Authority of City of Ferriday v. Parker*, 629 So.2d 475 (La. App. 3 Cir. 1993). A denial of a new trial is an interlocutory order that may be reviewed in an appeal of a final judgment. *Id.*

⁶⁰ Caveat: you must file the motion for suspensive appeal within 24 hours of rendition of the eviction judgment in order to preserve the right to appeal suspensively. See also., *Castagna v. Gonnet*, 4 Peltiers Orl. App. Dec. 574 (Orl. App. 1920), 1920 WL 3122. (granting new trial does not suspend eviction judgment).

⁶¹ *Wilson v. Compass Dockside, Inc.*, 635 So.2d 1171 (La. App. 4 Cir. 1994) writ denied 642 So.2d 1299 (La. 1994); *Oliver v. Oliver*, 411 So.2d 596, 597 (La. App. 1 Cir. 1982).

are (1) that the lease is only month-to-month when the tenant has a written lease for a fixed term, which precludes no cause evictions, and (2) nonpayment of rent when the landlord has, in fact, accepted the rent.

Also, a judgment may be annulled where its enforcement would be unconscionable and inequitable and in impairment of one's legal right, even if no intentional wrongdoing is found. *Bradford v. Thomas*, 499 So.2d 525 (La. App. 2 Cir. 1986), writ denied 503 So.2d 480 (La. 1987) (judgment placing universal legatee under will in possession of testator's estate was properly annulled for legatee's failure to present entire succession record to court, which would have informed court that legatee's right to possess was under formal attack).

Default judgments in which the record itself discloses an insufficient notice to vacate, or a premature rule date, can usually be nullified since eviction court judges generally recognize that a default judgment should not have been entered. See generally, La. Code Civ. Proc. arts. 4732, 1701-03; *Baham v. Faust*, 382 So.2d 211 (La. App. 4 Cir. 1972), writ denied 259 So.2d 916 (La. 1972).

A petition for nullity of judgment and injunctive relief should generally be brought in the trial court that rendered the eviction judgment. La. Code Civ. Proc. art. 2006. The petition for nullity of judgment may be filed in the eviction case.

A petition for nullity of judgment is an ordinary proceeding and does not stay the execution of the allegedly null judgment. Therefore, such petitions should be verified and include an application for a temporary restraining order and preliminary injunction. The tenant may be able to obtain a stay pending an appeal of the preliminary injunction denial.⁶²

The verified petition for nullity of judgment should include factual allegations which show that the tenant will suffer irreparable injury if a temporary restraining order is not granted. Irreparable injury is present in virtually all evictions involving indigents. See e.g., *Park Village Apartment Tenants Association v. Mortimer Howard Trust*, 636 F.3d 1150, 1159 (9th Cir. 2011); *Jackson v. Jacobs*, 971 F. Supp. 560, 565 (N.D. Ga. 1997). Irreparable injury is not required if the landlord has violated a prohibitory law. See e.g., *St. Charles Gaming v. Riverboat Gaming*, 648 So.2d 1310 (La. 1995).

A preliminary injunction requires irreparable injury and a "prima facie" case on the merits. Since irreparable injury generally exists in an eviction, the critical issue for a preliminary injunction is whether the tenant has a "prima facie" case on the merits. This is a relatively easy standard for a tenant to meet.⁶³ Preliminary injunctions are often tried on affidavits. For an annulment at the trial on the merits, the tenant needs to prove a "fraud or ill practice" by a preponderance of evidence. The court may award attorney fees if the eviction judgment is annulled for fraud or ill practices.⁶⁴

5.5 FEDERAL REMEDIES AND DEFENSES

5.5.1 Fair Housing Act

Eviction of tenants based on unlawful discrimination can be enjoined under the Fair Housing Act and 42 U.S.C. § 1982. See e.g., *Bill v. Hodges*, 628 F.2d 844, 845 (4th Cir. 1980).⁶⁵

⁶² See e.g., *Housing Authority of New Orleans v. Lee*, 480 So.2d 998 (La. App. 4 Cir. 1985).

⁶³ See, e.g., *Continental Titles, Inc. v. U.S. Fire Insurance Co.*, 413 So.2d 216 (La. App. 4 Cir. 1982).

⁶⁴ La. Code Civ. Proc. art. 2004 (C); *Filson v. Windsor Court Hotel*, 990 So.2d 63 (La. App. 4 Cir. 2008).

⁶⁵ The Anti-Injunction Act does not prohibit a federal court from enjoining a landlord from filing a state court eviction lawsuit. However, the courts are split as to whether a federal court may enjoin a state court eviction lawsuit that was filed before the tenant obtained an injunction in a federal Fair Housing Act lawsuit.

Federal injunctive relief may not be feasible if the tenant's entitlement depends on contested factual issues. *See, e.g., Higbee v. Starro*, 698 F.2d 945 (8th Cir. 1983) (injunction of retaliatory eviction denied because of difficulty of proving that retaliation was substantial motivating factor in decision to evict). Housing discrimination cases involving contested factual issues and a discriminatory eviction may be better litigated in state district court where *lis pendens* will require the eviction to be litigated in district court if the tenant's affirmative lawsuit is filed first.⁶⁶

5.5.2 Age Discrimination Act of 1975

The Age Discrimination Act of 1975 prohibits discrimination based on age in programs or activities that receive federal assistance.⁶⁷ HUD regulations implement the ADA and provide examples of how it applies.⁶⁸ A complainant must exhaust administrative remedies by first filing a complaint with HUD.⁶⁹ A complainant may file a lawsuit to enforce the ADA only (1) after 180 days have passed since the complainant filed an age discrimination complaint with HUD or (2) after HUD issues a finding in favor of the federal assistance recipient.⁷⁰ The ADA also prohibits retaliation for filing a complaint with HUD or advocating for rights protected under the ADA.⁷¹

5.5.3 Bankruptcy Code

Finally, evictions are automatically stayed by the filing of a bankruptcy petition. 11 U.S.C. § 362 (a)(3).⁷² There are two exceptions to a § 362 bankruptcy stay of evictions: (1) the eviction judgment was obtained prior to bankruptcy filing and (2) an eviction based on "endangerment" of property or illegal drug use on the property by tenant within 30 days prior to the filing of the bankruptcy. 11 U.S.C. § 362(b)(22)-(23).

A complaint to enforce the stay should be filed with the bankruptcy court in order to bar any attempted state court eviction. Violations of the stay create a private cause of action for damages.⁷³ Bankruptcy petitions, particularly Ch. 13 reorganizations, can be a powerful remedy for public housing tenants who face eviction for nonpayment of rent.⁷⁴

The landlord's efforts to evict, seize tenant property or collect rent after the tenant has filed a petition in bankruptcy violates the automatic stay and justifies the award of damages and attorney's fees. *See In re Ozenne*, 337 B.R. 214 (9th Cir. BAP 2006). Attorneys acting on behalf of landlords or other creditors may be personally held in contempt for their participation in stay violations.

However, the bankruptcy code provides relief from the automatic stay in certain cases. 11 U.S.C. § 362(d). Many housing issues will be litigated through opposition to relief from the stay or motions to vacate the stay.

⁶⁶ *Cf. Spallino v. Monarch Sign*, 771 So.2d 784 (La. App. 3 Cir. 2000).

⁶⁷ 42 U.S.C. 6101 *et seq.*

⁶⁸ 24 C.F.R. § 146. For examples of the 4 part test for age discrimination, see 51 Fed. Register 45264-01 (Dec. 17, 1986).

⁶⁹ *See* 24 C.F.R. §§ 146.33, 146.39, 146.45.

⁷⁰ U.S.C. § 6104(f); 24 C.F.R. § 146.45; *Parker v. Board of Supervisors*, 296 Fed. Appx. 414 (5th Cir. 2008).

⁷¹ 42 U.S.C. § 6103; 24 C.F.R. § 146.41.

⁷² *In re Smith Corset Shops, Inc.*, 696 F.2d 971, 976 (1st Cir. 1982); *In re Burch*, 401 B.R. 153 (Bankr. E.D. Pa. 2008)

⁷³ *Pettite v. Baker*, 876 F.2d 456 (5th Cir. 1989).

⁷⁴ *In re Stoltz*, 315 F.3d 80 (2d Cir. 2002); *contra Housing Authority v. Eason*, 12 So.3d 970 (La. 2009) *rev'g* 9 So.2d 269 (La. App. 4 Cir. 2009); *see M. Moreau, State Appellate Court Recognizes Bankruptcy as Public Housing Defense*, 39 Housing Law Bulletin 137 (June 2009).

5.5.4 Violations of federal law

Occasionally, a tenant may be able to obtain a federal court injunction against an eviction. For example, execution of a default eviction judgment based only on tacking service should be enjoinable in federal court. *Cf. Greene v. Lindsey*, 456 U.S. 444 (1982); *Porter v. Lee*, 328 U.S. 246 (1946). Subsidized housing tenants may be able to enjoin evictions brought in violation of constitutional rights or federal regulations. *See generally*, National Housing Law Project, *HUD Housing Programs*, Ch. 14 (4th ed. 2012).

Under the Supremacy Clause, state courts must consider and apply any relevant federal law defenses to evictions.⁷⁵ For public or subsidized housing, federal law may provide defenses which limit the grounds for eviction, prohibit non-renewal of lease or prescribe notice and other procedural prerequisites to eviction. Other violations of federal law in the subsidized housing context could include retaliatory evictions, failure to give pre-termination grievance hearings, pre-trial discovery or unequal treatment.⁷⁶

5.6 DEFENSES TO JUDICIAL EVICTION

5.6.1 Introduction

Your client's eviction will be based on either (1) "no cause", i.e., the expiration of the lease, (2) nonpayment of rent, or (3) "good cause", i.e., a material violation of the lease. No cause evictions most commonly involve 10 day terminations of month-to-month leases.

Defenses vary according to the type of eviction. The most common defenses to the major types of eviction are discussed below. Procedural defenses, e.g., inadequate notice to vacate or premature rule for possession, apply to all evictions. See discussion below.

5.6.2 No Cause Eviction

5.6.2.1 Inadequate Notice to Vacate

A notice to vacate must be timely, written and properly served. La. Civ. Code art. 2728; La. Code Civ. Proc. art. 4701-03. An improper notice to vacate should result in the dismissal of the rule for possession. *Versailles Arms Apartments v. Pete*, 545 So.2d 1193, 1195 (La. App. 4 Cir. 1989).⁷⁷ For public and subsidized housing, always check if any federal laws for notice and service have been met.

Termination of a month-to-month lease requires at least 10 days notice before the end of the rental month. La. Civ. Code art. 2728; *Solet v. Brooks*, 30 So.3d 96, 101 (La. App. 1 Cir. 2009).⁷⁸ The notice to terminate a month-to-month lease for "no cause" may not be waived in advance. La. Civ. Code art. 2718.⁷⁹ If the notice is untimely for a rental month, the landlord may not evict until the end of the next

⁷⁵*Thorpe v. Housing Authority of the City of Durham*, 393 U.S. 268 (1969); *Testa v. Katt*, 330 U.S. 386 (1947).

⁷⁶*Samuels v. District of Columbia*, 770 F.2d 184 (D.C. Cir. 1985) (federal statutory right to grievance hearing)

⁷⁷If a prematurity exception is sustained for an improper notice to vacate, the premature lawsuit must be dismissed. La. Code Civ. Proc. art. 933 (A); *Lichtentag v. Burns*, 258 So.2d 211 (La. App. 4 Cir. 1972) writ denied 259 So.2d 916 (La. 1972); *Leger v. Lancaster*, 423 So.2d 88, 89 (La. App. 1 Cir. 1982). Prematurity of a lawsuit cannot be cured by an amended pleading. *Duncan v. Duncan*, 359 So.2d 1310 (La. App. 1 Cir. 1978). But see *River Garden Apts. v. Robinson*, ___ So.3d ___, 2013 WL 264633 (La. App. 4 Cir. 2013) (eviction judgment not reversed where inadequate notice did not harm or prejudice tenant).

⁷⁸*See also Doland v. ACM Gaming Co.*, 921 So.2d 196, 202 (La. App. 3 Cir. 2005); *Houston v. Chargois*, 732 So.2d 71 (La. App. 4 Cir. 1999).

⁷⁹The written waiver of the notice required by La. Code Civ. Proc. art. 4701 (last paragraph) may not waive the 10 day notice required to terminate a month-to-month lease. La. Civil Code art. 2718 prohibits waiver of the 10 day notice.

rental month.⁸⁰ Leases that have reconducted on a month-to-month basis have been held to require only a 10 day notice even where the lease specifies a longer notice period. *May v. Alley*, 599 So.2d 459 (La. App. 2 Cir. 1992).⁸¹

Under federal law, a tenant in foreclosed property can't be evicted unless at least 90 days notice is given. 12 U.S.C. § 5220; *Bank of New York Mellon v. De Meo*, 254 P.3d 1138 (Ariz. App. 2011).⁸²

Untimely service of the notice to vacate is commonly accepted by the trial courts as a defense to a no cause eviction. The date of delivery of the notice to vacate should not be included in the computation of the 10 day period to terminate a month-to-month lease. La. Code Civ. Proc. art. 5059. The last day of the period should be included unless it is a legal holiday, in which case the period runs until the end of the next day which is not a legal holiday. La. Code Civ. Proc. art. 5059.

Service of the notice to vacate may be made by personal, domiciliary or tacking service. La. Code Civ. Proc. arts. 1231-34, 4703. In addition, a notice to vacate can sometimes be served by mail or fax.⁸³ The notice to vacate may not be served by a justice of the peace. La. Atty. Gen. Op. 97-295, 97-349. If this happens, the judge may have to recuse himself since he acted as the landlord's agent.

Tacking service of the notice to vacate by the sheriff or landlord has been upheld by Louisiana courts.⁸⁴ The sufficiency of tacking service of the notice to vacate is not altered by *Greene v. Lindsey*, 456 U.S. 444 (1982) because the Supreme Court only invalidated tacking service of eviction lawsuits. However, tacking service is theoretically permissible only in limited circumstances, i.e., "if the premises are abandoned or closed, or if the whereabouts of the lessee or occupant is unknown." La. Code Civ. Proc. art. 4703. Whether tacking service was properly used by a landlord is a factual question.⁸⁵

The defense of improper use of tacking service is difficult to prove because the sheriff's return showing service is presumed to be correct. The burden is on the tenant to prove the incorrectness of the sheriff's return by a preponderance of evidence. *Hall v. Folger Coffee Co.*, 874 So.2d 90, 96 (La. 2004).

It should be noted that no presumption of correctness applies when the notice to vacate is served by the landlord rather than the sheriff. Here, service of the notice must be proven by competent evidence. Where the credibility of neither is attacked, contradictory testimony by the landlord and the tenant requires a decision in favor of the tenant. See *Alphonso v. Alphonso*, 422 So.2d 210 (La. App. 4 Cir. 1982). If service was by regular mail, the landlord would probably be unable to establish the actual date of delivery.

The notice to vacate must be introduced into evidence for the court to consider it as part of the landlord's prima facie case for eviction. *Monroe Housing Authority v. Coleman*, 70 So.3d 871 (La. App. 2 Cir. 2011). For public or subsidized housing, always check if the federal rules for notice and service have been met.

⁸⁰ *Torco Oil Co. v. Grif-Dun Group, Inc.*, 617 So.2d 102, 104 (La. App. 4 Cir. 1993).

⁸¹ See also, La. Civ. Code art. 2724.

⁸² 12 U.S.C. § 5220 expires on December 31, 2014 unless extended.

⁸³ See *Maxwell, Inc. v. Mack Trucks, Inc.*, 172 So. 2d 297 (La. App. 4 Cir. 1965), writ denied 174 So.2d 131 (La. 1965)(mail); *Poydras Center LLC v. Intradel Corp.*, 81 So.3d 80 (La. App. 4 Cir. 2011) (fax).

⁸⁴ *Fairfield Property Mgt. v. Evans*, 589 So.2d 83 (La. App. 2 Cir. 1991); *Ernest Joubert Company v. Tatum*, 332 So. 2d 553 (La. App. 4 Cir. 1976); *Alaimo v. Hepinstall*, 377 So.2d 889 (La. App. 4 Cir. 1979).

⁸⁵ *Friedman v. Hofchar*, 424 So.2d 496, 498 (La. App. 5 Cir. 1982), writ denied 430 So.2d 74 (La. 1983).

5.6.2.2 Premature Rule for Possession

The landlord's rule for possession is premature if it is filed before the expiration of the applicable delay, 5 or 10 days, required for the notice to vacate. The landlord must allow the tenant a full 5 or 10 days from the date of service of the notice to vacate before filing a rule for possession in court. La. Code Civ. Proc. arts. 4701; 4731; *Owens v. Munson*, 2009 WL 3454507 (La. App. 1 Cir. 2009); *Lichtentag v. Burns*, 258 So.2d 211 (La. App. 4 Cir. 1972), writ denied 259 So.2d 916 (La. 1972). In addition, a rule may not be heard until the third day after valid service on the tenant. *South Peters Plaza, Inc. v. PJ Inc.*, 933 So.2d 876 (La. App. 4 Cir. 2006).

A legal holiday is not included in the computation of the period for a 5 day notice to vacate or where it would otherwise be the last day of the notice period (whether 5 days or 10 days). La. Code Civ. Proc. art. 5059 (definition of legal holidays per parish or court); La. Rev. Stat. 1:55; *Lichtentag v. Burns*, *supra* (5 day notice); *South Peters Plaza, Inc. v. PJ Inc. Bendana v. Stokes*, *supra* (3 day delay for rule for possession).

5.6.2.3 Lease or Other Agreement

An unexpired fixed term lease is a defense to a no cause eviction. *Monroe Housing Authority v. Coleman*, 70 So.3d 871 (La. App. 2 Cir. 2011) (eviction denied if unexpired lease and no proof of lease violation). A fixed term lease cannot be canceled for no cause by a 10 day notice to vacate (unless the lease has a "no cause" cancellation provision). La. Civ. Code arts. 2728, 1983; *Shell Oil v. Siddiqui*, 722 So.2d 1197 (La. App. 5 Cir. 1998). However, some eviction court judges mistakenly believe that any lease can be canceled for no cause on 10 days notice to vacate.

A lease may be either written or oral. La. Civ. Code art. 2681. Oral modifications or the parties' course of conduct can change a written lease.⁸⁶ Oral leases are binding if proved.⁸⁷ A lease may be inferred from the facts, circumstances and acts of the parties.⁸⁸ A lease agreement where the rent is the tenant's repair work has been construed as a lease with a term sufficient for the tenant to realize the fair value of his repairs. *See e.g., Wolf v. Walker*, 342 So.2d 1122 (La. App. 4 Cir. 1976). An unsigned lease can be evidence of a lease agreement.⁸⁹

A written or oral agreement to lease can be a defense to a no cause eviction even if the final agreement of lease has not been signed.⁹⁰ However, in order to enforce the agreement to lease, the tenant must be able to prove that all of the details and conditions of the lease were agreed to and understood by the parties.

A third party beneficiary can use a third party beneficiary contract (stipulation pour autrui), that confers a continued right of occupancy, as a defense to a no cause eviction. La. Civ. Code arts. 1978, 1987; La. Code Civ. Proc. arts. 424,

⁸⁶ *Karno v. Fein Caterer*, 846 So.2d 105 (La. App. 4 Cir. 2003). The proponent of oral modifications of a written lease should introduce written or oral evidence of the modifications. *Poydras Center LLC v. Intradel Corp.*, 81 So.3d 80 (La. App. 4 Cir. 2011) (e-mails not considered written lease amendments where not signed; proponent failed to introduce evidence of oral modifications).

⁸⁷ *Holt v. Bethany Land Co.*, 843 So.2d 606 (La. App. 2 Cir. 2003).

⁸⁸ *Southern Treats, Inc. v. Titan Properties, LLC*, 927 So.2d 677, 683 (La. App. 2 Cir. 2007).

⁸⁹ *Williams v. Bass*, 847 So.2d 80 (La. App. 2 Cir. 2003).

⁹⁰ *See, e.g., City of New Orleans v. Cheramie*, 509 So.2d 58 (La. App. 1 Cir. 1987), writ denied 512 So.2d 463; *City of New Orleans v. Hautot*, 185 So.2d 24 (La. App. 4 Cir. 1966); *Auto-Lec Stores v. Quachita Valley Camp No. 10 W.O.W.*, 171 So. 62 (La. 1936).

4732; *cf.*, *Miller v. White*, 162 So. 638 (La. 1935); *Tri- Parish Heating & Air Conditioning v. Brown*, 338 So.2d 126 (La. App. 1 Cir. 1976). For definitions of stipulation pour autrui and third party beneficiary contract, see *Hargroder v. Columbia Gulf Transmission Co.*, 290 So.2d 874 (La. 1974); *Logan v. Hollier*, 699 F. 2d 758 (La. App. 5th Cir. 1983); *Holbrook v. Pitt*, 643 F. 2d 1261 (7th Cir. 1981); *Free v. Landrieu*, 666 F. 2d 698 (1st Cir. 1981) (Section 8 HAP contract is a third party beneficiary contract).

5.6.2.4 Federally Subsidized Housing Programs

Of course, tenants in federally subsidized housing programs often cannot be evicted for no cause. See *e.g.*, *Thorpe v. Housing Authority of the City of Durham*, 393 U.S. 268 (1969); 42 U.S.C. § 1437f(o)(7)(C) (Section 8 voucher housing); 24 C.F.R. § 982.310 (Section 8 voucher housing); 42 U.S.C. § 1437d(l)(5) (public housing); 24 C.F.R. § 966.4 (public housing); Rev. Rul. 2004-82 (low-income tax credit housing); 24 C.F.R. § 247.3 (§§ 202, 221, 236 multifamily projects); 7 C.F.R. §3560.159 (rural housing). State courts have a duty to enforce federal laws that prohibit no cause evictions. U.S. Const. Art. VI; see *Testa v. Katt*, 330 U.S. 386 (1947); *Lee v. Florida*, 392 U.S. 378, 385-86 (1968). The Section 8 housing voucher program now allows termination for “no cause” after the expiration of the initial lease term.

5.6.2.5 Acceptance of Rent

Acceptance of the rent after the required notice to vacate, but before the judgment of eviction, vitiates the notice to vacate, and prevents the landlord from obtaining judgment based on the notice.⁹¹ Acceptance of rent after a notice to terminate a month-to-month lease vitiates the notice and reinstates the lease.⁹² The notice to vacate may even be vitiated if the landlord delayed in returning the tenant’s rent payment.⁹³ Acceptance of part of the rent vitiates the notice to vacate.⁹⁴

5.6.2.6 Failure to prove expired lease

Failure to prove expiration of the lease will defeat the eviction. *Monroe Housing Authority v. Coleman*, 70 So.3d 871 (La. App. 2 Cir. 2011). Even a “no cause” eviction requires evidence of the landlord’s right to possession. *Poydras Center LLC v. Intradel Corp.*, 81 So.3d 80 (La. App. 4 Cir. 2011).

5.6.2.7 Abuse of Right (Retaliatory Eviction)

An abuse of right is an act which objectively appears to be an exercise of an individual right, but which is not protected by the courts because it is exercised with a predominant intent to harm; or it is performed without a serious and legitimate interest; or it is contrary to good faith or moral rules. Cueta-Rua, *Abuse of Rights*, 35 La. L. Rev. 965 (1975). Retaliatory eviction is the refusal to renew a

⁹¹ *Billiot v. Hue*, 2011 WL 1944120 (La. App. 1 Cir. 2011); *Housing Authority of Town of Lake Providence v. Allen*, 486 So.2d 1064 (La. App. 2 Cir. 1986); *Passalaqua v. Mendez*, 388 So. 2d 1172 (La. App. 4 Cir. 1980); *Mitchell v. V-Co. Inc.*, 372 So.2d 645 (La. App. 1 Cir. 1979).

⁹² *Four Seasons, Inc. v. New Orleans Silversmiths, Inc.*, 223 So.2d 686 (La. App. 4 Cir. 1969); *Bowling v. USA, Inc. v. Genco*, 536 So.2d 814 (La. App. 1 Cir. 1988).

⁹³ *Four Seasons, Inc. v. New Orleans Silversmiths, Inc.*, 223 So.2d 686 (La. App. 4 Cir. 1969).

⁹⁴ *Adams v. Dividend, Inc.*, 447 So.2d 80 (La. App. 4 Cir. 1984); *Thompson v. Avenue of Americas Corp.*, 499 So.2d 1093 (La. App. 3 Cir. 1986); *Housing Authority of Town of Lake Providence v. Burks*, 486 So.2d 1068 (La. App. 2 Cir. 1986).

fixed term lease in retaliation for a tenant's attempt to secure his rights under the lease or applicable law. The abuse of right defense has been expressly recognized as an eviction defense.⁹⁵

The key to winning a retaliatory eviction defense is proving the landlord's retaliatory motive. The proof of retaliatory intent is often difficult. Unless the landlord issues actual threats, the evidence of his intent may amount to no more than the juxtaposition of a threat of some kind followed by a notice to vacate.

Legislation in some states creates a presumption that a notice which follows soon after an act by the tenant to secure his rights is retaliatory. G. Armstrong, *Louisiana Landlord and Tenant Law* (1988). Louisiana currently requires the tenant to prove that the notice to vacate was issued in retaliation for a good faith attempt by the tenant to secure his rights. *Real Estate Services, Inc. v. Barnes*, 451 So.2d 1229 (La. App. 4 Cir. 1981).

If the landlord is a government agency, it may not retaliate by evicting a tenant for exercising constitutional rights such as First Amendment rights. *McQueen v. Druker*, 317 F. Supp. 1122, 1131 (D. Mass. 1970) *aff'd* 438 F.2d 781 (1st Cir. 1971).

5.6.2.8 Owner-Occupant Relationship

Occasionally, a no cause eviction can be delayed if it is brought as a rule to evict a tenant when there is an owner-occupant relationship, rather than a landlord-tenant relationship, between the litigants. A rule to evict a tenant may be subject to a defense of no cause of action if the defendant is an occupant rather than a tenant. *See, e.g., Edwards v. Edwards*, 439 So.2d 478 (La. App. 1 Cir. 1983); *Stroughter v. Shepard*, 207 So.2d 865 (La. App. 4 Cir. 1968). To evict, an owner must prove that the defendant is an occupant as defined by Code Civ. Proc. art. 4704 and that the purpose of the occupancy has ceased. *Moody Inv. Corp. v. Occupants of 901 East 70th St.*, 990 So.2d 119, 122 (La. App. 2 Cir. 2008).

5.6.3 Eviction for Nonpayment of Rent

5.6.3.1 Unauthorized use of summary proceedings and prematurity of eviction suit

Civil Code art. 2704 provides that if a tenant fails to pay rent, the landlord may seek dissolution in accordance with Civil Code art. 2013-24, and may regain possession in the manner provided by La. Code Civ. Proc. art. 4701-05, 4731-35. Significantly, the 2004 revisions to art. 2704 eliminated the landlord's right under the repealed Civil Code art. 2712 to seek immediate eviction for non-payment of rent under the Code of Civil Procedure's summary eviction procedures. If the lease does not have an express dissolution clause for non-payment of rent, the landlord must first serve the tenant with a notice to perform within a certain time before seeking eviction. *Solet v. Brooks*, 30 So.3d 96, 101 (La. App. 1 Cir. 2009).⁹⁶ Since most leases have dissolution clauses, this defense or exception will most commonly present in oral leases, poorly drafted leases or where the written lease is not introduced into evidence.

⁹⁵*Owens & Sons v. Casey*, 659 So.2d 541 (La. App. 4 Cir. 1995); *Capone v. Kenny*, 646 So.2d 510 (La. App. 4 Cir. 1994); *see also, Illinois Central R. Co. v. International Harvester*, 368 So.2d 1009, 1013-15 (La. 1979); *Housing Authority of City of Abbeville v. Hebert*, 387 So.2d 693 (La. App. 3 Cir. 1980), *writ refused* 394 So.2d 275 (La. 1980), *writ not considered* 396 So.2d 882 (La. 1981).

⁹⁶Marie Moore, *New Civil Code Lease Articles: New Words; New Rules; New Issues* (2004).

5.6.3.2 Determination of Rent Due

Rent may not legally be increased during the term of a lease in the absence of a valid rent escalation clause. La. Civ. Code art. 1983. Escalation clauses can be invalidated if the price is not readily ascertainable, or is dependent on the landlord's whim.⁹⁷ A landlord cannot unilaterally increase a month-to-month tenant's rent unless 10 days notice is given prior to the expiration of the current rental month. La. Civ. Code arts. 2728, 1983.

In the case of a federally subsidized tenant, the determination of the rent due may be a complex legal and factual question which could be dispositive of the eviction lawsuit.⁹⁸ Public housing evictions can also be defeated by the defense of rent abatement. *HANO v. Wilson*, 503 So.2d 565 (La. App. 4 Cir. 1987). In the public housing context, "rent abatement" means extinguishment of the rent obligation (not a mere suspension of the obligation) for the months that abatement was ordered.

Some judges will not allow an eviction for nonpayment of rent if the rent has been tendered, but refused because it was not accompanied by payment of nonrent charges, e.g., alleged late fees or property damage. *Cf.* La. Civ. Code art. 2704.

5.6.3.3 Payment

This defense is self-explanatory. However, several issues merit investigation:

1. Was payment tendered, but refused? *See Cantrell v. Collins*, 984 So2d 738 (La. App. 1 Cir. 2008).
2. Has the landlord wrongfully applied a rent payment to a nonrent obligation? *See* La. Civ. Code arts. 1864-1867.
3. Are there any circumstances surrounding the nonpayment of rent which would persuade a court to exercise its equitable discretion not to evict?
4. Has the landlord accepted the rent prior to the eviction trial or delayed in returning a tenant's rent payment? *See Pasalaqua v. Mendez*, 388 So 2d 1172 (La. App. 4 Cir. 1980); *Four Seasons, Inc. v. New Orleans Silversmiths, Inc.*, 223 So.2d 686 (La. App. 4 Cir. 1969).
5. Has the tenant paid the rent through an agreement to make repairs in lieu of rent? *Wolf v. Walker*, 342 So.2d 1122 (La. App. 4 Cir. 1976).

Acceptance of the rent after the judgment generally does not vitiate the notice to vacate. *Nathans v. Vuci*, 443 So.2d 690 (La. App. 1 Cir. 1983). *But see, Deslonde v. O'Hern*, 1 So. 286 (La. 1887) (improper for landlord to execute judgment if acceptance of rent created a new lease obligation).

5.6.3.4 Tender

A landlord cannot evict a tenant for nonpayment of rent if he improperly refused the tenant's tender of rent. A timely tender of rent constitutes payment. *See* La. Civ. Code art. 1869.⁹⁹ The tenant should take the necessary steps to perfect a valid tender. Generally, it is not necessary to deposit the rent in the court registry.¹⁰⁰

⁹⁷ *See, e.g.*, La. Atty. Gen. Op. 79-1295 (Dec. 3, 1979); 78-937 (July 21, 1978); *Arata v. Louisiana Stadium and Exposition District*, 225 So. 2d 362, 366 (La. 1969), *cert. denied* 396 U.S. 279 (1970).

⁹⁸ *See, e.g.*, *Peoria Housing Authority v. Sanders*, 298 N.E. 2d 173 (Ill. 1973); *see also* National Housing Law Project, *HUD Housing Programs*, Ch. 3 (4th ed. 2012).

⁹⁹ *Cantrell v. Collins*, 984 So2d 738 (La. App. 1 Cir. 2008); *Adams v. Dividend, Inc.*, 447 So.2d 80 (La. App. 4 Cir. 1984); *Herman Investments, Inc. v. Lighthouse Club, Inc.*, 378 So.2d 515 (La. App. 4 Cir. 1979); *Saxton v. Para Rubber Co. of Louisiana*, 118 So. 64 (La. 1928).

¹⁰⁰ *Adams v. Dividend, Inc.*, 447 So.2d 80, 83 (La. App. 4 Cir. 1984).

Under present Louisiana law, a private landlord has the right to evict a tenant who tenders the rent after the due date, even if the tender occurred prior to the notice to vacate or rule for possession (absent a rectification period clause, application of Civil Code art. 2013-15, or custom of late payment).¹⁰¹ Nonetheless, some courts will refuse to evict a tenant if the rent was offered prior to the notice to vacate, rule for possession, or trial.

5.6.3.5 Rectification Period

Payment of rent within a rectification or curative period provided by the lease agreement (oral or written), or other law, would bar an eviction for nonpayment of rent.¹⁰² Failure to give a proper “cease and desist” notice for an alleged lease violation bars the landlord from seeking eviction for that violation.

Civil Code art. 2704 and 2015 may require a reasonable rectification period for non-payment of rent if the lease does not have a dissolution clause for non-payment of rent. *See Solet v. Brooks*, 30 So.3d 96, 101 (La. App. 1 Cir. 2009). 7 C.F.R. § 3560.159(a) mandates rectification clauses for rural housing.

5.6.3.6 Custom of Late or Partial Payment

The untimely tender of rent may be a defense if a custom of accepting late or partial payment has developed. In this situation, the landlord is deemed to have waived his right to demand strict compliance with the lease without first putting the tenant in default, or otherwise giving notice that timely payment will be required in the future.¹⁰³

However, there are cases that say that no custom of late payment is established if the landlord has made frequent and unsuccessful demands for punctual payment, or where acceptance of late payments is the result of unwilling indulgence on the landlord’s part.¹⁰⁴

5.6.3.7 Repair and Deduct

A tenant may use the repair and deduct provisions of Louisiana Civil Code art. 2694 as an affirmative defense to an eviction for nonpayment of rent.¹⁰⁵ A detailed discussion of the requirements for proper utilization of the repair and deduct remedy is provided in § 7.3 *infra*. Because of the technical nature of the repair and deduct law, it is best to carefully plan this defense with the tenant before the rent is withheld and the repairs are made. If the tenant fails to prove one or more elements of a repair and deduct defense, it may be possible to avoid lease cancellation by convincing the court that he acted in good faith.¹⁰⁶

¹⁰¹ *See, Noble v. Coleman*, 423 So.2d 776 (La. App. 4 Cir. 1982); *Dorsa v. Parent*, 352 So.2d 258 (La. App. 1 Cir. 1977); *Himbola Manor Apartments v. Allen*, 315 So.2d 790 (La. App. 3 Cir.1975).

¹⁰² *See, D & D Investment v. First Bank*, 831 So.2d 488 (La. App. 5 Cir. 2002); *Shell Oil v. Siddiqui*, 722 So.2d 1197 (La. App. 5 Cir. 1998); *Sands v. McConnell*, 426 So. 2d 218 (La. App. 4 Cir. 1982); *Ford v. Independent Bakers Supply, Inc.*, 385 So.2d 580 (La. App. 4 Cir. 1980).

¹⁰³ *See, e.g., Versailles Arms Apartments v. Pete*, 545 So.2d 1193 (La. App. 4 Cir. 1989); *Housing Authority v. Allen*, 486 So.2d 1064 (La. App. 2d Cir. 1986); *Housing Authority of St. John the Baptist Parish v. Sheperd*, 447 So.2d 1232 (La. App. 5th Cir. 1984); *Grace Apartments v. Hill*, 428 So.2d 862 (La. App. 1 Cir. 1983)(partial rent). Delay in payment beyond the customary payment date may defeat the custom defense. *Maestri v. Nall*, 145 So. 128 (Orl. App. 1937).

¹⁰⁴ *Himbola Manor Apartments v. Allen*, 315 So.2d 790 (La. App. 3 Cir. 1975); *cf. Shank-Jewella v. Diamond Gallery*, 535 So.2d 1207 (La. App. 2 Cir. 1988) (acceptance of late payments involuntary). However, see *Jones v. Paul*, 254 So.2d 915 (La. App. 1 Cir. 1971), where the court held that a custom was established even if the landlord “involuntarily” accepted late rent.

¹⁰⁵ *Lake Forest, Inc. v. Katz & Besthoff No. 9 Inc.*, 391 So.2d 1286 (La. App. 4 Cir. 1980); *Cameron v. Krantz*, 299 So.2d 919 (La. App. 3 Cir. 1974).

¹⁰⁶ *Plunkett v. D & L Family Pharmacy*, 562 So.2d 1048, 1052 (La. App. 3 Cir. 1990).

5.6.3.8 Equitable Discretion of Court or “Judicial Control”

Act 821 of 2004 may have broadened the court’s authority to judicially control an eviction for nonpayment of rent. Louisiana courts have always had equitable discretion not to cancel a lease. However, Act 821 substituted a new article 2704 for the prior article 2712 which governed evictions for nonpayment of rent. Article 2704 expressly incorporates the Civil Code articles on obligations and contracts as the manner for regaining possession. Civil Code article 2013 expressly allows the court to give the tenant additional time to perform.

A court has the equitable discretion to refuse to cancel a lease for nonpayment of rent in certain circumstances.¹⁰⁷ A tenant’s failure to pay rent timely does not automatically require termination of the lease.¹⁰⁸ The court’s equitable discretion is usually exercised in cases where the nonpayment of rent was not willful and where the landlord is immediately made whole. *See, Atkinson v. Richeson*, 393 So.2d 801 (La. App. 2 Cir. 1981) (tenant erroneously believed that his wife had paid rent and immediately attempted to cure default upon notice); *Housing Authority of Lake Charles v. Minor*, 355 So.2d 271 (La. App. 3 Cir. 1977) (tenant’s employment check bounced, but he immediately attempted to remedy the situation); *Edwards v. Standard Oil Co. of La.*, 144 So. 430 (La. 1932) (rent check unduly delayed in mail); *Belvin v. Sikes*, 2 So.2d 65 (La. App. 2 Cir. 1941) (tenant’s good faith reliance on receipt that rent was paid); *Rudnick v. Union Producing Co.*, 25 So.2d 906 (La. 1946) (legitimate dispute over additional rent payment claimed). It is also exercised in cases where the landlord’s acts or omissions have contributed to the delay in receiving the rent. *See, e.g. Bordelon v. Bordelon*, 434 So.2d 633 (La. App. 3 Cir. 1983); *Silas v. Silas*, 399 So.2d 778 (La. App. 3 Cir. 1981).

5.6.3.9 Public housing authority evictions—late payments or one-time defaults

Unlike private evictions, one-time failures to pay rent or late payments may not constitute “good cause” for eviction of a public housing tenant. The HUD regulations for eviction expressly state that the housing authority may only evict for serious or repeated violations of material terms of the lease such as “failure to make payments due under the lease.” 24 C.F.R. § 966.4(l)(2)(i)(A). The use of the plural for payments rather than the singular implies that a one-time default in payment of rent is insufficient to justify eviction.¹⁰⁹

5.6.4 Good Cause Eviction

5.6.4.1 Notice to Vacate

Due process requires that the notice to vacate specify the grounds for eviction.¹¹⁰ In addition, the lease or federal law may govern the contents of a notice to vacate.¹¹¹ A notice to vacate which did not contain grounds for eviction would

¹⁰⁷ *Porter v. Miller*, 782 So.2d 1123 (La. App. 3 Cir. 2001); *Ergon, Inc. v. Allen*, 593 So 2d 438 (La. App. 2 Cir. 1992); *Housing Authority of Lake Charles v. Minor*, 355 So.2d 271 (La. App. 3 Cir. 1977), *writ denied* 355 So.2d 1323 (La. 1978); *Metzinger v. Bundrick*, 503 So.2d 666 (La. App. 3 Cir. 1987), *writ denied* 505 So.2d 1142 (La. 1987).

¹⁰⁸ *Shreveport Neon Signs, Inc. v. Williams*, 5 So.3d 977, 981 (La. App. 2 Cir. 2009).

¹⁰⁹ *See e.g., Maxton Housing Authority v. McLean*, 328 S.E.2d 290 (N.C.1985) (PHA can’t evict for nonpayment where default was not tenant’s fault).

¹¹⁰ *Flores v. Gondolter, Ltd.*, 375 So.2d 400 (La. App. 3 Cir. 1979); *Louisiana State Museum v. Mayberry*, 348 So.2d 1274 (La. App. 4 Cir. 1977).

¹¹¹ *See e.g., Apollo Plaza Apts. v. Gosey*, 599 So.2d 494 (La. App. 3 Cir. 1992) (notice to vacate did not specify grounds for termination with enough detail to prepare a defense); *see also, Corpus Christi Housing Authority v. Love*, 267 S.W.3d 222 (Tex. App. 2008) (housing authority eviction dismissed for failure to advise tenant of judicial eviction procedure to be used, as required by federal law).

deny the tenant the opportunity to present a defense. The landlord's proof of grounds for eviction should be limited to those stated in the notice to vacate.¹¹²

A tenant in foreclosed property can't be evicted unless at least 90 days notice is given. 12 U.S.C. § 5220; *Bank of New York Mellon v. De Meo*, 254 P.3d 1138 (Ariz. App. 2011).¹¹³

5.6.4.2 Rule for Possession

If the rule for possession states different grounds for termination, it should be argued that this defect is fatal to a summary eviction action. *Cf.*, *J & R Enterprises-Shreveport, LLC v. Sarr*, 989 So.2d 235 (La. App. 2 Cir. 2008); *Arbo v. Jankowski*, 39 So 2d 458 (Orl. App. 1949). Issue switching between the mandatory notices and the trial should be viewed as a due process violation.

5.6.4.3 Acceptance of Rent

Acceptance of rent after the notice to vacate in an eviction for a lease violation cures the default and reinstates the lease. *A & J, Inc. v. Ackel Real Estate*, 831 So.2d 311 (La. App. 5 Cir. 2002)

5.6.4.4 Lease Violations

Cancellation of leases is not favored in Louisiana.¹¹⁴ A lease will be dissolved only when it is shown that the landlord is undoubtedly entitled to such cancellation.¹¹⁵ The tenant's dereliction of duty must be substantial and cause injury to the landlord.¹¹⁶ You should argue that a lease should not be canceled unless the violations of the terms of the lease are material and important.¹¹⁷ Civil Code article 2719 expressly authorizes the application of the rules in Civil Code articles 2013-2024 to terminations based on lease violations.

In public and subsidized housing evictions, certain criminal activities may be alleged as lease violations. The landlord has the burden of proving actual criminal misconduct by a preponderance of evidence. Arrest records and police reports are inadmissible. The fact of arrest alone, without some independent evidence of an actual crime, is insufficient to prove a crime.¹¹⁸

In *Monroe Housing Authority v. Coleman*, 70 So.3d 871 (La. App. 2 Cir. 2011), an eviction for an alleged lease violation or expiration was properly denied when the landlord failed to introduce the lease into evidence.

5.6.4.5 Good Cause

Some federally subsidized tenants can only be evicted for "good cause." See for example:

Public housing. 42 U.S.C. § 1437d(l)(5); 24 C.F.R. § 966.4

¹¹²*Cf. J & R Enterprises-Shreveport, LLC v. Sarr*, 989 So.2d 235 (La. App. 2 Cir. 2008); *Arbo v. Jankowski*, 39 So.2d 458 (Orl. App. 1949).

¹¹³12 U.S.C. § 5220, The Protecting Tenants at Foreclosure Act, expires on December 31, 2014 unless extended.

¹¹⁴*Tolar v. Spillers*, 2 So.3d 560, 563-64 (La. App. 2 Cir. 2009); *Ergon, Inc. v. Allen*, 593 So.2d 438 (La. App. 2 Cir. 1992).

¹¹⁵*Good v. Saita*, 967 So.2d 1161, 1172 (La. App. 4 Cir. 2007); *Housing Authority of Town of Lake Providence v. Burks*, 486 So.2d 1068 (La. App. 2 Cir. 1986); *Wahlder v. Osborne*, 417 So.2d 71, 73 (La. App. 3 Cir. 1982); *Atkinson v. Richeson*, 393 So.2d 654 (La. App. 1 Cir. 1978), *rev'd on other grounds*, 367 So.2d 773 (La. 1979).

¹¹⁶*Simmons v. Pure Oil Co.*, 124 So.2d 161, 166 (La. App. 2 Cir. 1960) *aff'd* 129 So.2d 786 (La. 1961).

¹¹⁷*See, e.g., Carriere v Bank of Louisiana*, 702 So.2d 648 (La. 1996); *Karno v. Fein Caterer, Inc.*, 846 So.2d 105 (La. App. 4 Cir. 2003); *Lillard v. Hulbert*, 9 So.2d 852 (La. App. 1 Cir. 1942), (overruled on other grounds); *Bodman, Murrell & Webb v. Acacia Found. of LSU*, 246 So.2d 323 (La. App. 1 Cir. 1971).

¹¹⁸*See e.g., Housing Authority of New Orleans v. Sylvester*, 2012-CA-1102 (La. App. 4 Cir. 2/27/13); *Nashua housing Authority v. Wilson*, 162 N.H. 358 (N.H. 2011); *Miles v. Fleming*, 214 P.3d 1054 (Colo. 2009); *cf. State v. Cockerham*, 522 So.2d 1245 (La. App. 4 Cir. 1988).

Section 8 voucher housing. 42 U.S.C. § 1437f(o)(7)(C); 24 C.F.R. § 982.310

Low income tax credit housing. Rev. Rul. 2004-82

§§ 202, 221, 236 multifamily projects. 24 C.F.R. § 247.3

Rural housing. 7 C.F.R. §3560.159.¹¹⁹

The Louisiana appellate courts have not defined what constitutes “good cause” for the eviction of a federally subsidized tenant.¹²⁰ You should argue that an isolated act of minor misconduct will not forfeit a lease. *See* 24 C.F.R. § 966.4 (public housing); 24 C.F.R. § 247.3(c) (§§ 202, 221, 236 multifamily projects); 24 C.F.R. §982.310 (d)(Section 8 voucher housing).

Other courts or HUD have held that the following do not constitute “good cause” for eviction of a federally subsidized tenant:

- Minor housekeeping problems
- Unauthorized pets
- Unauthorized guests
- Noise from apartment
- Profane language
- Disrespect for management (assuming no threats of bodily harm)
- Minor lease violations
- Violations of unreasonable rules or policies
- Late rent
- Minor damages to property
- Damages or misbehavior by children
- Tenant negligence that results in damage to property (but gross negligence could be problem)
- Actions protected by law (free speech, reports to government authorities)
- Immoral behavior (adultery, unwed children)
- Some reporting problems in lease application or recertification (that don't rise to level of fraud)
- Minor crimes
- Good faith mistakes by tenant
- Behavior related to tenant's mental or physical disabilities
- Pest or bed bug infestation (HUD memo)

5.6.4.6 Equitable Discretion or “Judicial Control”

Evictions are subject to judicial control and may be denied even if a lease violation exists. *Carriere v Bank of Louisiana*, 702 So.2d 648 (La. 1996); *Newport-Nichols Enterprises v. Grimes, Austin & Stark, Inc.*, 463 So.2d 111 (La. App. 3 Cir. 1985) (failure to obtain insurance). *See also*, La. Civ. Code art. 2013-24.

5.6.4.7 Rectification Clause

A lease may allow a tenant to cure a default or lease violation after notice by the landlord. In such cases, failure to allow rectification would defeat the

¹¹⁹*See also, Caulder v. Durham Housing Authority*, 433 F. 2d 998 (4th Cir. 1970), cert. denied 401 U.S. 1003 (1971).

¹²⁰Unpublished Louisiana appellate opinions have held that brief violations of no-pet rules do not constitute good cause for eviction.

eviction.¹²¹ The landlord must show a “notice to cure” before he has a right to evict. This defense can be raised as an exception of prematurity or no cause of action. In either case, the eviction should be dismissed since it can’t be cured by amended pleadings.¹²²

Without proof of a “notice to cure”, alleged lease violations are irrelevant. Therefore, you should object to evidence on alleged violations unless the landlord has first proved that a “notice to cure” was given and that violations occurred thereafter.

5.6.4.8 Res Judicata and Issue Preclusion

Res judicata and issue preclusion apply to eviction lawsuits.¹²³ If a tenant wins on the merits of an eviction for a lease violation, all causes of action existing at the time of the final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and the judgment bars a subsequent action on those causes of action. La. R. S. 13:4231 (2). Be sure to insist on a signed written judgment if the judge dismisses an eviction lawsuit. A notation of dismissal is insufficient to support a res judicata plea.¹²⁴ A second suit barred by res judicata may give rise to a Fair Debt Collection Practice claim if the landlord or its attorney acts as a “debt collector.”¹²⁵

5.7 OTHER EVICTION RELATED ISSUES

5.7.1 Disaster Executive Orders

A Governor’s Executive Order may suspend all deadlines in the Civil Code and Code of Civil Procedure. Thus, an Executive Order applies to the deadlines in eviction suits and briefly delays the running of the time periods for notices to vacate and rules for possession.

The delays required by an Executive Order, which orders a 15 day suspension ending on Friday, September 12, are illustrated by the following examples:

Example 1–Notice to vacate issued

Rent due on September 1. Landlord files 5 day notice to vacate on September 2. The Executive Order suspends the running of the notice to vacate through Sunday, September 14. The 5 days would run from Monday, September 15 to Friday, September 19. The first day that a landlord could file the rule for possession would be Monday, September 22.

Example 2–Notice to Vacate waived

Rent due on September 1. Tenant waived notice to vacate in writing. Landlord files and serves rule for possession on September 2. A rule can’t be heard until the third day after service. This 3 day period can’t begin running until Monday, September 15. Thus, Wednesday, September 17 would be the first day the rule for possession could be heard.

¹²¹ See, *D & D Investment v. First Bank*, 831 So.2d 488 (La. App. 5 Cir. 2002); *Shell Oil v. Siddiqui*, 722 So.2d 1197 (5 Cir. 1998); *Meraux & Nunez v. Houck*, 13 So.2d 233 (La. 1943); *Raintree Court Apts. v. Bailey*, No. 98-C-1138 (La. App. 5 Cir. 1998).

¹²² La. Code Civ. Proc. art. 933 (A); *Lichtentag v. Burns*, 258 So.2d 21 (La. App. 4 Cir. 1972), *writ denied* 259 So.2d 916 (La. 1972).

¹²³ *Avenue Plaza LLC v. Falgoust*, 676 So.2d 1077 (La. 1996); *Housing Authority of New Orleans v. Riley*, 691 So.2d 256 (La. App. 4 Cir. 1997).

¹²⁴ *Brown v. Boudreaux*, 21 So.2d 44 (La. 1945).

¹²⁵ *Montgomery v. Donnett*, 2006 WL 293727 (S.D. Oh. 2006).

5.7.2 Lease-Purchase Agreements and Bonds for Deed

5.7.2.1 Rights of bond for deed buyers

A bond for deed must be by authentic act or by act under private signature.¹²⁶ But occupancy plus sworn admission by the seller can substitute for the lack of a written agreement.¹²⁷

A rule to evict may be used to evict the buyer in a bond for deed or lease-purchase agreement. *Bennett v. Hughes*, 876 So.2d 862 (La. App. 4 Cir. 2004). A contract may be a “bond for deed” even if it is styled as something else.¹²⁸ The proper interpretation of a contract is a legal issue subject to de novo review. *Montz v. Theard*, 818 So.2d 181 (La. App. 1 Cir. 2002).

If an agreement is actually a “bond for deed”, the eviction can be defeated if the seller did not comply with the statutory requirements for cancelling a bond for deed. See La. R.S. 9: 2945; *Thomas v. King*, 813 So.2d 1127 (La. App. 2 Cir. 2002); *Tabor v. Wolinski*, 767 So.2d 972 (La. App.1 Cir. 2000).

R.S. 9: 2945 provides that a buyer has the right to cure a default within 45 days from the “mailing of the notice.” The notice must be by certified mail. Despite the literal language of R.S. 9: 2945, it may be argued that the 45 days do not run when the buyer never receives the certified mail notice. Courts have held that similar language in other statutes means completion of service and that the right to cancel is defeated if the non-receipt of the notice is shown.¹²⁹

A Chapter 13 bankruptcy may be used to cure a default in a bond for deed and pay arrearages.¹³⁰ If a bankruptcy reorganization is the best remedy for the buyer, it is important that the bankruptcy be filed before a judgment of possession or any cancellation of the buyer’s interests. A final eviction judgment may result in the loss of the § 362 bankruptcy automatic stay. Generally, a bankruptcy court can’t revive rights that have been finally terminated under state law.¹³¹ Also, the vendor may argue that the bond for deed is an executory contract or lease and that the remedies are limited to assuming or rejecting the contract pursuant to 11 U.S.C. § 365. However, the bankruptcy court should allow the buyer to treat the bond for deed as a secured debt that can be cured in a Chapter 13 bankruptcy.¹³²

A failed bond for deed is subject to certain adjustments:

1. The purchaser is entitled to return of all monies paid on the purchase price; and
2. The seller is entitled to the fair rental value for the buyer’s occupancy. *Berthelot v. Le Investment*, 866 So.2d 877 (La. App. 4 Cir. 2004).

A waiver of the purchaser’s right to return the monies paid violates public policy and is unenforceable.¹³³ Inclusion of such a waiver in a bond for deed contract may constitute an unfair trade practice.¹³⁴

¹²⁶ *Solet v. Brooks*, 30 So.3d 96,100 (La. App. 1 Cir. 2009)

¹²⁷ *Upton v. Whitehead*, 935 So.2d 746, 749 (La. App. 2 Cir. 2006).

¹²⁸ See e.g., *Bayou Fleet Partnership v. Phillip Family LLC*, 976 So.2d 794 (La. App. 5 Cir. 2008); *Tabor v. Wolinski*, 767 So.2d 972 (La. App. 1 Cir. 2000) (“lease-purchase agreement” was a bond for deed); *Mooers v. Sosa*, 798 So.2d 200 (La. App. 5 Cir. 2001) (“affidavit” was a bond for deed).

¹²⁹ *Broadway v. All-Star Ins. Corp.*, 285 So.2d 536 (La. 1973); *Manh An Bui v. Farmer’s Ins. Exchange*, 68 So.3d 656 (La. App. 1 Cir. 2011), writ denied 74 So.3d 212 (La. 2011).

¹³⁰ *In re Johnson*, 75 B.R. 927 (Bankr. N.D. Ohio 1987); cf. *In re Brown*, 325 B.R. 169, 174 (Bankr. E.D. La. 2005); *Auto Leasing, L.L.C. v. Little*, 392 B.R. 222 (W.D. La. 2008).

¹³¹ *In re Valentin*, 309 B.R. 715, 718, n. 3 (Bankr. E.D. Pa. 2004).

¹³² See footnote 128, *supra*.

¹³³ *Seals v. Sumrall*, 887 So.2d 91, 96 (La. App. 1 Cir. 2004); *Montz v. Theard*, 818 So.2d 181, 187 (La. App. 1 Cir. 2002).

¹³⁴ La. R.S. 51: 1403.

A buyer may sue for specific performance of the bond for deed and conveyance of title upon prepayment or payment of the price in full. *Lyons v. Pitts*, 923 So.2d 962 (La. App. 2 Cir. 2006) (buyer had right to prepay bond for deed where contract silent as to this issue).

5.7.2.2 How to determine if an agreement is a bond for deed

In a bond for deed, as defined by La. R.S. 9: 2941, the purchase price is paid in installments and the seller agrees to transfer title on completion of the payments.¹³⁵ Without a promise to transfer title, an agreement is not a “bond for deed.”¹³⁶ A contract requiring the buyer to obtain financing to pay off a mortgage can be a bond for deed.¹³⁷ An agreement can be a bond for deed even if it does not comply with statutory protections for the bond for deed buyer.¹³⁸ A document’s title is not determinative of whether it is a bond for deed or another type of contract.¹³⁹ The presence of a final nominal payment or a balloon payment does not prevent an agreement from being a bond for deed.¹⁴⁰

By comparison, Civil Code art. 2620 defines an option to buy as a contract whereby a party gives another the right to accept an offer to buy within a stipulated time. Thus, a document giving a term and varying purchase prices for an option to buy is not a bond for deed, but rather a lease with an option to buy.¹⁴¹ There is a 10 year limit on options to buy.¹⁴²

5.7.3 Eviction of “possessors” or usufructuaries

A possessor, whether in good faith or bad faith, may retain possession until he is reimbursed for expenses and improvements which he is entitled to claim. La. Civ. Code art. 592; *Broussard v. Compton*, 36 So.3d 376 (La. App. 3 Cir. 2010).

A usufructuary may retain possession until he is reimbursed for expenses and advances he is entitled to claim from naked owner. La. Civ. Code art. 627; *Barnes v. Cloud*, 82 So.3d 463 (La. App. 2 Cir. 2011). An exception of unauthorized use of summary proceeding should be filed against a rule to evict a usufructuary. Generally, a usufructuary does not occupy the property by permission or accommodation of the owner and would not be an “occupant” within the meaning of La. Code Civ. Proc. art. 4704. Therefore, La. Code Civ. Proc. art. 4702 and 4735 would not authorize the use of a rule for possession to summarily evict a usufructuary.¹⁴³

5.7.4 Eviction and rent claims by co-owners

A co-owner has the right to use co-owned property without payment of rent to other co-owners.¹⁴⁴ An co-owner in exclusive possession may only be liable for

¹³⁵ La. R.S. 9: 2941; *H.J. Bergeron, Inc. v. Parker*, 964 So.2d 1075, 1076 (La. App. 1 Cir. 2007); *Lyons v. Pitts*, 923 So.2d 962, 963 (La. App. 2 Cir. 2006) (agreement to give warranty deed sufficient for bond for deed to exist).

¹³⁶ *James v. Denham Springs Rent All, Inc.*, 2007 WL 4465620 (La. App. 1 Cir. 2007); *Solet v. Brooks*, 30 So.3d 96, 99-100 (La. App. 1 Cir. 2009); *Bradstreet v. Kinchen*, 10 So.3d 331, 336-37 (La. App. 4 Cir. 2009); *Williams v. Adams*, 2010 WL 4278275 (La. App. 1 Cir. 2010).

¹³⁷ *Cottingim v. Vliet*, 19 So.3d 26, 31 (La. App. 4 Cir. 2009).

¹³⁸ *Montz v. Theard*, 818 So.2d 181, 187 (La. App. 1 Cir. 2002).

¹³⁹ *Montz v. Theard*, 818 So.2d 181, 187 (La. App. 1 Cir. 2002); *Bayou Fleet Partnership v. Phillip Family, LLC*, 976 So.2d 794, 796 (La. App. 5 Cir. 2008).

¹⁴⁰ *Cottingim v. Vliet*, 19 So.3d 26, 31 (La. App. 4 Cir. 2009); *Tabor v. Wolinski*, 767 So.2d 972, 974 (La. App. 1 Cir. 2000); *Bennett v. Hughes*, 876 So.2d 862, 863-64 (La. App. 4 Cir. 2004).

¹⁴¹ *Bayou Fleet Partnership v. Phillip Family, LLC*, 93 So.3d 1112 (La. App. 5 Cir. 2012).

¹⁴² La. Civ. Code. art. 2628; *Bubola v. Stutts*, 2008 WL 4191020 (La. App. 1 Cir. 2008).

¹⁴³ *Cf. Millaud v. Millaud*, 761 So.2d 44 (La. App. 4 Cir. 2000); *Bond v. Green*, 401 So.2d 639, n. 1 (La. App. 3 Cir 1981) (rule to evict usufructuary had aspect of summary proceeding, but objection to use of summary proceeding was waived).

¹⁴⁴ La. Civ. Code art. 802; *McCarroll v. McCarroll*, 701 So.2d 1280, 1289 (La. 1997).

rent beginning on the date than another co-owner requests occupancy and has been refused.¹⁴⁵ A co-owner may not evict another co-owner who is authorized to occupy the property as a co-owner.¹⁴⁶

5.7.5 Suit for money and eviction

Money for damages or rent are not recoverable in a *summary* proceeding instituted by a rule for possession.¹⁴⁷ In addition, service of process by tacking does not subject a tenant to the requisite personal jurisdiction for entry of a money judgment.¹⁴⁸ However, a tenant should file an exception of unauthorized use of summary proceedings to the rent claims. *Garrett v. Cross*, 935 So.2d 845 (La. App. 2 Cir. 2006) (judgment for rent upheld where tenant failed to file exception).

5.7.6 Sale or foreclosure of property

A lease does not bind or affect third parties unless (1) it is filed for registry in the office of the parish recorder for the parish where the immovable is located,¹⁴⁹ or (2) assumed in the act of sale or purchase agreement,¹⁵⁰ or (3) the third party is a creditor who foreclosed on the landlord. Also, an unrecorded lease may be ratified when the new owner allows the tenant to remain and accepts rent for a time. La. Civ. Code art. 1843.¹⁵¹ However, the tenant may have a damages action against the original landlord if he sells the property to a third party who then evicts prior to lease expiration. La. Civ. Code art. 2712.¹⁵²

The Protecting Tenants at Foreclosure Act, 12 U.S.C. § 5220 note, requires that at least 90 days written notice to vacate be given to tenant in foreclosed property.¹⁵³ This federal law requires the foreclosing party or successor in interest to assume the leases of bona fide tenants, subject to a notice to vacate of at least 90 days or the duration of the lease, whichever is longer. This requirement even applies to oral leases, month-to-month leases and unrecorded leases.¹⁵⁴ A misleading notice to vacate, e.g., a 5 day notice to vacate, may not be cured by the mere passage of time.¹⁵⁵ Most courts have held that the landlord's successor in interest (usually the foreclosing bank) bears the burden of proving that the tenant is not a protected "bona fide tenant" as defined by the PTFA. Also, the PTFA expressly states that tenants whose rents are reduced by a subsidy are protected

¹⁴⁵ *McCarroll v. McCarroll*, *supra* at 1290.

¹⁴⁶ *Millaud v. Millaud*, 761 So.2d 44 (La. App. 4 Cir. 2000) (jurisdiction lies with district court).

¹⁴⁷ *Friedman v. Hofchar, Inc.*, 424 So.2d 496, 499 (La. App. 5 Cir. 1982), *writ denied* 430 So.2d 74 (La. 1983); *Himboldt Manor Apartments v. Allen*, 315 So.2d 790 (La. App. 3 Cir. 1975); *Manor v. Hall*, 263 So.2d 22 (La. 1972).

¹⁴⁸ *Friedman v. Hofchar, Inc.*, 424 So.2d at 499-500

¹⁴⁹ La. Civ. Code art. 2681, 2712, 1839. Prior rule codified at La. R.S. 9: 2721.

¹⁵⁰ *Means v. Comcast, Inc.*, 17 So.3d 1012, 1014 (La. App. 2 Cir. 2009); *Restaurant Indigo v. Thompson*, 733 So.2d 1271 (La. App. 4 Cir. 1999).

¹⁵¹ *Means v. Comcast, Inc.*, 17 So.3d 1012, 1014-15 (La. App. 2 Cir. 2009).

¹⁵² The 2005 adoption of Civil Code art. 2712 makes it clear that the lessee has a damages action against the landlord unless there was an agreement defeating the tenant's rights. *See also, Caballero Planting Co., Inc. v. Hymel*, 713 So.2d 1277 (La. App. 1 Cir. 1998); *High Plains Fuel Corp. v. Carto International Trading, Inc.*, 640 So.2d 609 (La. App. 1 Cir. 1994) *writ denied* 646 So.2d 402.

¹⁵³ *Bank of New York Mellon v. De Meo*, 254 P.3d 1138 (Ariz. App. 2011); *Curtis v. U.S. Bank National Ass'n*, 50 A.3d 558 (Md. 2012); 12 U.S.C. § 5220 expires on December 31, 2014 unless extended. *See* Pub. L. No. 111-22, Div. A, tit. VII, §§ 701-704, Stat. 1632, 1660-62 as amended by the Protecting Tenants at Foreclosure Extension and Clarification Act, Pub. L. No. 111-203, tit. XIV, § 1484, 124 Stat. 1376, 2204.

¹⁵⁴ *Joel v. HSBC Bank N.A.*, 420 Fed. Appx. 928, 931 (11th Cir. 2011)(month-to-month tenant entitled to 90 days notice under Protecting Tenants at Foreclosure Act).

¹⁵⁵ *Bank of New York Mellon v. De Meo*, 254 P.3d 1138 (Ariz. App. 2011); *Curtis v. U.S. Bank National Ass'n*, 50 A.3d 558 (Md. 2012).

“bona fide tenants” even though they don’t pay fair market rent. A federal PTFA defense is not a basis for removal of the eviction to federal court, rather it is a state court eviction defense.¹⁵⁶

Act 877 of 2004 enacts La. Code Civ. Proc. art. 2293 (B)(2)-(3) to require the sheriff to serve a written notice of seizure on tenants and occupants when the landlord’s property has been seized by a creditor. Act 127 of 2012 further extended the notice requirement to property sold in executory process. The sheriff’s failure to serve this notice shall prevent the purchaser of the property from using a La. R.S. 13: 4346 *ex parte* writ of possession to evict or eject occupants or tenants. However, the sheriff’s failure does not affect the rights of the purchaser or foreclosing creditor to use the eviction procedures in La. Code Civ. Proc. art. 4701 *et seq.*, which require a 5 day notice to vacate and a rule of possession to evict an art. 4704 “occupant,” (or the 90 day notice required by federal law).

5.7.7 Reconduct of Lease

A “reconducted lease” is a continuation of the lease under the same terms, except that the fixed term in the old lease is voided and the reconducted lease is considered to be month-to-month. La Civ. Code arts. 2721-24.¹⁵⁷ In 2005, Civil Code art. 2724 was amended to make it explicit in the Civil Code that all provisions of the lease provisions, other than the term, continue in effect.¹⁵⁸ Legal reconduction takes place when a fixed term lease expires, without opposition.¹⁵⁹

The presumption of reconduction (when the lessee remains in possession of the premises beyond the terms of the lease) is not to be used to force a contract on parties who are unwilling to contract. Its purpose is merely to establish a rule of evidence, or presumption, as to intent when contrary intent has not been expressed. Therefore, any intent not to renew the lease on the same terms defeats reconduction.¹⁶⁰ For example, no reconduction takes place where the tenant and landlord negotiate for a new lease prior to the expiration of the old lease, and such negotiations involve terms which differ substantially from the old lease.¹⁶¹

5.7.8 Landlord’s seizure of tenant’s property for unpaid rent

La. Civil Code art. 2707-10 grant the landlord a privilege on the tenant’s property located on the leased real estate to secure payment of rent and other lease obligations. Occasionally, a landlord will seize a tenant’s property for unpaid rent. However, a landlord may not use self-help to obtain possession of a tenant’s property on the leased premises except where the tenant clearly abandoned the premises.¹⁶² Enforcement of a lessor’s privilege requires judicial process, e.g., a writ of sequestration.¹⁶³ Wrongful seizure will subject the landlord to damages and

¹⁵⁶ *Wells Fargo Bank v. Hines*, 2012 WL 2467024 (E.D. Cal. 2012). However, a PFTA defense may arise as an issue in bankruptcy if the landlord’s forecloser seeks to lift the stay in order to evict.

¹⁵⁷ *Mays v. Alley*, 599 So.2d 459 (La. App. 2 Cir. 1992); *Baronne Street, Ltd. v. Pisano*, 526 So.2d 345 (La. App. 4 Cir. 1988); *Misse v. Dronet*, 493 So.2d 271 (La. App. 3 Cir. 1986); *King Plaza Inc. v. Richter*, 303 So. 2d 504 (La. App. 2 Cir. 1974), *writ denied* 307 So.2d 370 (La. 1975). Prior rules codified at La. Civ. Code art. 2685, 2689.

¹⁵⁸ Marie Moore, *New Civil Code Lease Articles: New Words; New Rules; New Issues* (2004).

¹⁵⁹ *See, Governor Claiborne Apartments, Inc. v. Attaldo*, 235 So.2d 574 (La. 1970); *Torco Oil Co. v. Grif-Dun Group, Inc.*, 617 So.2d 102 (La. App. 4 Cir. 1993).

¹⁶⁰ *Misse v. Dronet*, 493 So.2d 271 (La. App. 3 Cir. 1986).

¹⁶¹ *Divincenti v. Redondo*, 486 So.2d 959 (La. App. 1 Cir. 1986).

¹⁶² *Bunuel of New Orleans, Inc. v. Cigali*, 348 So.2d 993 (La. App. 4 Cir. 1977).

¹⁶³ La. Civil Code art. 2707, Official Revision Comment (d). The landlord does not have to post security for a writ of sequestration. La. Code Civ. Proc. art. 3575.

attorney fees.¹⁶⁴ Seizure of property exempt under La. R.S. 13: 3881 is a wrongful seizure.¹⁶⁵ Most of a tenant's property will be exempt from seizure under La. R. S. 13: 3881. Thus, a landlord who seizes property will often be liable for wrongful seizure.¹⁶⁶

5.7.9 Unpaid Rent and Attorney Fees

Generally, an obligation to pay rent is barred by a 3 year prescription, not a 10 year prescription for breach of contract. *Starns v. Emmons*, 538 So.2d 275 (La. 1989).

A landlord has a duty to mitigate damages when a tenant prematurely terminates a lease. La. Civ. Code art. 2002; La. R.S. 9:3260; *Easterling v. Halter Marine, Inc.*, 470 So.2d 221 (La. App. 4 Cir. 1985).

If the landlord terminates the lease, it forfeits the right to future rent under the lease. *1001 Harimaw Court East, LLC v. Blo, Inc.*, 66 So3d 1131, 1133 (La. App. 5 Cir. 2011). Lease provisions purporting to grant the landlord a right to future rentals after eviction or termination of the lease are unenforceable. *Id.*

La. R. S. 9:3534 (A) authorizes the award of attorney fees against a tenant in a suit for rent due under an oral lease. An incorrect statement of the amount due may be a defense to the attorney fee claim. *Cf. Dutel v. Succession of Touzet*, 649 So.2d 1084 (La. App. 4 Cir. 1995).

Attorneys or collection agencies who attempt to collect debts for landlords are subject to the Fair Debt Collection Practices Act. *See Romea v. Heiberger Associates*, 163 F.3d 111 (2d Cir. 1998).

5.7.10 Unenforceable Lease Provisions

These lease provisions are unenforceable:

1. Waiver of repair of/or liability for serious defects in residential lease. La. Civ. Code art. 2699 (3); *Shubert v. Tonti Development Corp.*, 30 So.3d 977, 985-86 (La. App. 5 Cir. 2009), *writ denied* 31 So.3d 393 (La. 2010).¹⁶⁷
2. Waiver of warranty of peaceable possession. *Entergy Louisiana, Inc. v. Kennedy*, 859 So.2d 74 (La. App. 1 Cir. 2003), *writ denied* 858 So.2d 430 (La. 2003).
3. Waiver of minimum notice to terminate lease. La. Civ. Code art. 2718, 2728-29.¹⁶⁸
4. Waiver of rights under rent deposit statute. La. R.S. 9: 3254.
5. Right to rent if eviction remedy elected. *United States Leasing Corp. v. Keiler*, 290 So.2d 427 (La. App. 4 Cir. 1974).
6. Waivers of liability for intentional or gross fault. La. Civ. Code art. 2004.
7. Certain prohibited lease provisions in public and subsidized housing. *See e.g.*, 24 C.F.R. § 966.6 (public housing); 7 C.F.R. § 3560.156(d) (rural housing).

¹⁶⁴La. Code Civ. Proc. art. 3506; *Horacek v. Watson*, 86 So.3d 766 (La. App. 3 Cir. 2012).

¹⁶⁵*Girgis v. Macaluso Realty Co., Inc.*, 778 So.2d 1210 (La. App. 4 Cir. 2001); *Belle v. Chase*, 468 So.2d 744 (La. App. 5 Cir. 1985); *Oubre v. Hinchman*, 365 So.2d 17 (La. App. 4 Cir. 1978).

¹⁶⁶*Oubre v. Hinchman*, 365 So.2d 17 (La. App. 4 Cir. 1978).

¹⁶⁷There is a distinction between liability for defects and who has the obligation to make repairs. *Compare, Stuckey v. Riverstone Residential SC, LP*, 21 So.3d 970 (La. App. 1 Cir. 2009), *writ denied* 24 So.3d 873 (La. 2010).

¹⁶⁸However, the 5 day notice to vacate required by La. Code Civ. Proc. art. 4701 may be waived for private tenants.

8. Any contract made in violation of the Louisiana Unfair Trade Practices Law. See La. R.S. 51: 1403.¹⁶⁹
9. Forfeiture or penalty clauses in bonds for deed that purport to forfeit the funds paid by the purchaser if the bond for deed is cancelled.¹⁷⁰

Other provisions may be unenforceable if their object or cause is to circumvent the law or public policy. La. Civ. Code art. 1968; *Bach Investment Co. v. Phillip*, 722 So.2d 122, 1223 (La. App. 5 Cir. 1998).

5.7.11 Tenant's Lease Cancellation Rights

Generally, absent contrary agreement, a month-to-month tenant may cancel his lease by giving the landlord written notice 10 days prior to the end of the current rental month. La. Code Civ. art. 2728. Tenants with fixed term leases may only cancel for reasons provided in the lease, Civil Code or other applicable laws. La. Civ. Code art. 2718.

Lease cancellation is not favored in Louisiana and, prior to 2005, could only be judicially ordered. This means that a canceling tenant runs the risk that his lease termination may ultimately be held invalid by a judge and thereby subject him to liability for rent. Act 821 of 2004 enacted Civil Code article 2719 to provide for extra-judicial means for canceling a contract, including a lease. A tenant who wants to extra-judicially cancel a lease should follow the procedures in Civil Code articles 2015 and 1991. However, according to the Revision Comments to article 2719, the tenant is still at risk that a court could find that the cancellation was improper.

Grounds for a tenant to cancel his lease may include:

- Landlord's failure to maintain the apartment in a habitable condition. *Freeman v. G.T.S. Corp.*, 363 So.2d 1247 (La. App. 4 Cir. 1978).
- Landlord's failure to make necessary repairs, depending on each party's fault or responsibility, the length of repair period and the extent of the loss of use. La. Civ. Code art. 2693, 2719.
- Landlord's failure to maintain tenant in peaceable possession. *Essen Development v. Marr*, 687 So.2d 98 (La. App. 1 Cir. 1995) (other tenant's barking dog rendered premises uninhabitable).
- Landlord's substantial violation of lease. La. Civ. Code art. 2719.
- Fraudulent misrepresentations about neighborhood safety. *Borne v. Edwards*, 612 So.2d 219 (La. App. 4 Cir. 1992).
- Destruction of premises by fire or flood. La. Civ. Code art. 2693, 2714-15.
- Verbal agreement (despite written term lease) allowing tenant to cancel at any time. *Harper v. Gorman*, 694 So.2d 1094 (La. App. 5 Cir. 1997).
- Certain military orders to relocate. La. R.S. 9:3261; 50 U.S.C. §500.
- Tenant's disability which requires early termination. *Samuelson v. Mid-Atlantic Realty Co.*, 947 F. Supp. 756 (D. Del. 1996). Early termination may be an appropriate remedy for other violations of the Fair Housing Act. If a disabled tenant can no longer use the apartment because it has become inaccessible, the landlord should allow early termination as an accommodation.
- Some federally subsidized housing programs may allow early termination for various grounds, e.g., loss of job, severe illness, victim of domestic violence.

¹⁶⁹ A lease with a clause that is prohibited by La. R.S. 51: 1403 may be unenforceable in its entirety or in part. See e.g., *Baierd v. McTiggart*, 629 N.W.2d 277 (Wis. 2001). An unlawful clause may be a deceptive trade practice. *Simpson v. MSA of Myrtle Beach, Inc.*, 644 S.E.2d 663, 671 (S.C. 2007), cert. denied 552 U.S. 990 (2007).

¹⁷⁰ *Seals v. Sumrall*, 887 So.2d 91, 96 (La. App. 1 Cir. 2004).

6. LOCKOUTS AND UTILITY TERMINATIONS

6.1 NONJUDICIAL EVICTIONS UNDER ACT 821 OF 2004?

Civil Code article 2719, enacted by Act 821 of 2004, appears to authorize nonjudicial eviction of tenants for alleged failure to perform lease or codal obligations.¹⁷¹ Article 2719 states that a party may obtain dissolution of the lease pursuant to Civil Code articles 2013-2024. In particular, articles 2015-17 provide a mechanism for extra-judicial dissolution of contracts. However, a Louisiana Law Institute attorney who was on the committee to revise the lease code assured the author that the revised lease code does not authorize nonjudicial evictions. In addition, since 2005, courts have continued to hold that judicial process is required for evictions.¹⁷²

For extra-judicial dissolution for a party's failure to perform, article 2015 requires that the other party serve a notice to perform, with a warning that, unless performance is rendered within that time, the contract shall be deemed dissolved. The time for performance allowed by the notice must be reasonable. The notice to perform must comply with Civil Code article 1991.

Any extra-judicial dissolution of a lease would be at the initiating party's own risk. Revision Comment b, Civ. Code art. 2719. Revision Comment c notes that under Civil Code article 2014, a contract may not be dissolved when the obligor has rendered a substantial part of the performance and the part not rendered does not substantially impair the obligee's interest. Comment c further states that prior jurisprudence on judicial dissolution of leases would be relevant for judging the propriety of extra-judicial dissolutions of lease. A landlord is liable for damages for a judicial dissolution that is reversed on devolutive appeal.¹⁷³ Presumably, a landlord would also be liable for damages for an extra-judicial eviction that is later declared improper. Thus, a landlord would be foolish to evict a tenant by extra-judicial means.

This new law could result in an increase in extra-judicial evictions, which are already a serious social evil. A tenant who is extra-judicially evicted may have to resort to injunctions, declaratory judgment and damage actions to regain possession and to recover property that is thrown out.

6.2 LAW PRIOR TO 2005

Prior to 2005, a landlord could only evict a tenant through judicial process. See, e.g., *Richard v. Broussard*, 495 So.2d 1291, n.1 at 1293 (La. 1986). Lock-outs, removal of the tenant's property, utility terminations or otherwise rendering the premises uninhabitable or inaccessible, are prohibited. The landlord cannot disturb the possession of the tenant in any way without first resorting to the judicial process. *Weber v. McMilian*, 285 So 2d 349, 351 (La. App. 4 Cir. 1973), writ denied 288 So.2d 357 (La. 1974). An eviction judgment after a self-help eviction does not cure the wrongful eviction. *Pelleteri v. Caspian Group*, 851 So.2d 1230 (La. App. 4 Cir. 2003).

Even if the rent is overdue, a landlord cannot exclude the tenant from the apartment or terminate utilities without resort to the judicial process. *Holmes v. DiLeo*, 184 So. 356 (Orl. App. 1938); *Vogt v. Jannarelli*, 198 So. 421 (Orl. App. 1940).

¹⁷¹ Note that 24 C.F.R. § 966.6 prohibits housing authority lease provisions that waive judicial eviction proceedings.

¹⁷² See e.g., *Horacek v. Watson*, 86 So.2d 766 (La. App. 3 Cir. 2012); *Platinum City LLC v. Boudreaux*, 81 So.3d 780 (La. App. 3 Cir. 2011).

¹⁷³ *Mangelle v. Abadie*, 19 So. 670 (La. 1896).

Self-help or nonjudicial eviction is permissible if the landlord can prove that the tenant abandoned the premises.¹⁷⁴ *Ringham v. Computerage of New Orleans, Inc.*, 539 So.2d 864 (La. App. 4 Cir. 1989) (tenant having loaded the contents of part of the leased premises onto a moving van, and moving the contents from the remainder of the premises amounted to abandonment of the premises); *Porter v. Johnson*, 369 So.2d 1141, (La. App. 1979) *writ denied* 371 So.2d 615 (where various items of considerable value were left at a leased camp, there was no abandonment); *Bunel of New Orleans, Inc. v. Cigali*, 348 So.2d 993 (La. App. 4 Cir. 1977), *cert. den.*, 350 So.2d 1210 (La. 1977) (where leased premises were empty and there was no response to the landlord's notices, the landlord could assume the premises were abandoned). A landlord may be liable if the wrongful eviction preceded the completion of the act of abandonment. *Mansur v. Cox*, 898 So.2d 446 (La. App. 1 Cir. 2004).

6.3 DISASTERS AND WRONGFUL EVICTION

In the post-Katrina context, a court has found that a landlord was not liable for wrongful eviction where a natural disaster rendered the apartment uninhabitable and the landlord disposed of the tenant's property after good faith efforts to contact him.¹⁷⁵

6.4 REMEDIES FOR WRONGFUL EVICTION

A tenant can enjoin or recover damages for a landlord's nonjudicial eviction or termination of utility services prior to a final eviction judgment.¹⁷⁶ Failure to comply with the statutory procedures for judicial eviction constitutes wrongful eviction and subjects the landlord to damages.¹⁷⁷ Damages for wrongful eviction may be recoverable even if a landlord executes an eviction judgment that is subsequently reversed on devolutive appeal.¹⁷⁸

Damages for wrongful eviction may include mental anguish, humiliation, embarrassment, inconvenience, loss or detention of personal property, physical suffering, or loss of use of the apartment.¹⁷⁹ A wrongful eviction may sound in tort and contract. Wrongful eviction has been held to constitute a bad faith violation of an obligation that subjects a landlord to both foreseeable and unforeseeable damages.¹⁸⁰ A wrongful eviction may constitute an unfair trade practice in violation of La. R.S. 51: 1401 *et seq.*¹⁸¹

¹⁷⁴ Another exception may be if the lease has expired and the lease expressly waived any notice to vacate. *Crawley v. Coastal Bridge Co., Inc.*, 871 So.2d 1271 (La. App. 5 Cir. 2004), *writ denied* 883 So.2d 1036 (La. 2004).

¹⁷⁵ *Strickland v. Gordon*, 33 So.2d 368 (La. App. 4 Cir. 2010).

¹⁷⁶ *See, Kite v. Gus Kaplan, Inc.*, 708 So.2d 473 (La. App. 3 Cir. 1998); *Gennings v. Newton*, 567 So. 2d 637 (La. App. 4 Cir. 1990); *Weber v. Bon March Pharmacy*, 378 So.2d 520 (La. App. 4 Cir. 1979), *writ denied* 381 So.2d 1220 (La. 1980); *Vogt v. Jannarelli*, 198 So. 421 (Orl. App. 1940).

¹⁷⁷ *White v. Board of Supervisors of Southern University*, 365 So.2d 583 (La. App. 1 Cir. 1978) (lock-out); *Buchanan v. Daspit*, 245 So. 2d 506 (La. App. 3 Cir. 1971) (illegal entry and removal of property); *Robinson v. Bonhaye*, 195 So. 365 (Orl. App. 1940) (removal of windows and doors).

¹⁷⁸ *See, e.g., Mangelle v. Abadie*, 19 So. 670 (La. 1896); *New Orleans Hat Attack, Inc. v. N.Y. Life Insurance Co.*, 665 So.2d 1186 (La. App. 4 Cir. 1995); *see also Smith v. Shirley*, 815 So.2d 980 (La. App. 3 Cir. 2002) *writ denied* 816 So.2d 308 (La. 2002).

¹⁷⁹ *See, e.g., Kite v. Gus Kaplan, Inc.*, 708 So.2d 473 (La. App. 3 Cir. 1998); *Gennings v. Newton*, 567 So.2d 637 (La. App. 4 Cir. 1990); *Navratil v. Smart*, 400 So.2d 268 (La. App. 1 Cir. 1981), *writ denied* 405 So.2d 320 (La. 1981).

¹⁸⁰ La. Civ. Code art. 1997; *Smith v. Shirley*, 815 So.2d 980 (La. App. 3 Cir. 2002) *writ denied* 816 So.2d 308 (La. 2002).

¹⁸¹ *Mosley & Mosley Builders v. Landin, Ltd.*, 389 S.E.2d 576 (N.C. App. 1990). Louisiana courts have held that self-help repossessions without judicial process are unfair trade practices. *See e.g., Tyler v. Rapid Cash, L.L.C.*, 930 So.2d 1135 (La. App. 2 Cir. 2006); *but see Pelletieri v. Caspian Group*, 851 So.2d 1230 (La. App. 4 Cir. 2003) (found without explanation that the wrongful eviction, on the facts of this case, was not an unfair trade practice).

Tenants with fixed term leases, and federally subsidized tenants could be entitled to large damage awards for wrongful evictions. For example, a tenant with a fixed term lease, who has made leasehold improvements may be entitled to damages in the amount of the value of the improvements, pro rated over the remainder of the lease term.¹⁸² A federally subsidized tenant should be entitled to damages in the amount of the rental subsidy from the date of the wrongful eviction until he is actually restored to subsidized housing.¹⁸³ Each person in the household could have a cause of action for damages.¹⁸⁴ Damages should be proven with sufficient specificity.¹⁸⁵

In New Orleans, tenants may be entitled to notice of a landlord's termination of the landlord's water account under the consent judgment in the class action. *Mathieu v. Brehm*, U.S.D.C. No. 74-1521 (E.D. La. 1975). The Sewerage & Water Board may be liable for damages if it fails to give the required notice.

7. REPAIR AND DEDUCT: CIVIL CODE ARTICLE 2694

7.1 USES

The Louisiana Civil Code provides that if the landlord does not make necessary repairs to the premises after reasonable notice, the tenant can make the repairs himself and deduct their cost from the rent due. La. Civ. Code art. 2694. The repair and deduct provision may be used by tenant:

- to effectuate necessary repairs to the leased premises;
- as an affirmative defense to an eviction for non-payment of rent. *Lake Forest, Inc. v. Katz & Besthoff No. 9, Inc.*, 391 So.2d 1286 (La. App. 4 Cir.1980); *Cameron v. Krantz*, 299 So.2d 919 (La. App. 3 Cir. 1974); *Evans v. Does*, 283 So.2d 804, 807 (La. App. 2d Cir. 1973); *Leggio v. Manion*, 172 So.2d 748 (La. App. 4 Cir. 1965);
- as a defense or set-off to an ordinary action for rent. *Brignac v. Boisdore*, 288 So.2d 31 (La. 1973) *aff'g* 272 So.2d 463 (La. App. 4 Cir. 1973); *Degrey v. Fox*, 205 So.2d 849 (La. App. 4 Cir. 1968)

The tenant must comply with the requirements of article 2694 in order to use these remedies and defenses.

7.2 CHECKLIST OF ARTICLE 2694 REQUIREMENTS

Prior to 2005, article 2694 of the Louisiana Civil Code stated:

If the lessor does not make the necessary repairs in the manner required in the preceding article, the lessee may call on him to make them. If he refuses or neglects to make them, the lessee may himself cause them to be made, and deduct the price from the rent due, on proving that the repairs were indispensable, and that the price which he has paid was just and reasonable.

¹⁸² See, e.g. *Provenzano v. Populis*, 428 So.2d 556 (La. App. 4 Cir. 1983); *Leake v. Hardie*, 245 So.2d 729 (La. App. 4 Cir. 1971); *Knapp v. Guerin*, 81 So. 302 (La. 1919).

¹⁸³ See, *Goler v. Metropolitan Apartments, Inc.*, 260 S.E. 2d 146 (N.C. App. 1979), cert. denied 265 So. 2d 395 (N.C. 1980).

¹⁸⁴ Cf. *Pizanne v. A.V.Dufor*, 112 So.2d 733 (Orl. App. 1959).

¹⁸⁵ *Platinum City LLC v. Boudreaux*, 81 So.3d 780 (La. App. 3 Cir. 2011); *Gennings v. Newton*, 567 So. 2d 637, 642-43 (La. App. 4 Cir. 1990).

Act 821 of 2004 amended article 2694 to read as follows:

If the lessor fails to perform his obligation to make necessary repairs within a *reasonable time* after demand by the lessee, the lessee may cause them to be made. The lessee may *demand immediate reimbursement of the amount expended for the repair* or apply that amount to the payment of rent, but only to the extent that the repair was *necessary* and the expended amount was reasonable. (emphasis added).

The 2004 amendment restates article 2694 with the modifications of “reasonable time”, “immediate reimbursement”, deletion of “due” from “rent due” and the substitution of “necessary” for “indispensable.” The most significant change appears to be the “immediate reimbursement” clause. This change may allow a tenant to be paid for repairs that are greater than the rent due and to immediately demand and sue for reimbursement.¹⁸⁶ Also, the 2004 amendments broadened the landlord’s repair obligations.

In summary, the requirements for the use of the “repair and deduct” remedy or defense are:

- (1) the repairs must be those that the landlord was obligated to make;
- (2) the tenant must call on the landlord to make repairs;
- (3) the landlord must refuse or fail to make these repairs after reasonable notice and demand;
- (4) the tenant must then make the repairs;
- (5) the cost of the repair is applied to the payment of rent;
- (6) proof that the repairs were necessary;
- (7) proof that the price paid for the repairs was reasonable.

Although the Code specifically permits the tenant to make repairs first and then deduct the cost, the Louisiana Supreme Court has held that a tenant may reverse the order of these actions. *Rhodes v. Jackson*, 109 So. 46 (La. 1926). The normal repair and deduct remedy would be of limited value to tenants with minimal excess cash if the law required them to perform and pay for the repairs before subtracting the cost from their rent.

Once the landlord has refused or neglected to correct a defect, the tenant may begin to withhold rent in anticipation of the expense of repair. *Rhodes, supra*. The tenant must intend to devote the sums withheld to the repair of the premises, and he must begin to remedy the defect within a reasonable time.¹⁸⁷

7.3 ANALYSIS OF ARTICLE 2694 REQUIREMENTS

7.3.1 Repair Obligations and Warranties

Act 821 of 2004 changes and simplifies the language of Code articles relative to repair obligations and waiver. However, the revision comments state that the new articles have the same philosophy as the prior law.

¹⁸⁶ One purpose of this 2005 amendment to Civil Code art. 2694 was to permit tenants with little time left on their leases to seek immediate reimbursement from their landlords for expensive repairs made at the landlord’s expense. Marie Moore, *New Civil Code Lease Articles: New Words; New Rules; New Issues* (2004).

¹⁸⁷ *Leggio v. Manion*, 172 So.2d 748 (La. App. 4 Cir. 1965); *New Hope Gardens, Ltd. v. Lattin*, 530 So.2d 1207 (La. App. 2 Cir. 1988).

Civil Code art. 2684 requires the landlord to deliver the leased property in “good condition suitable for the purpose for which it was leased.” Previously, the Code had required the property to be delivered in “good condition and free from any repairs.”

Civil Code articles 2691 and 2692 define the repair obligations for the landlord and tenant during the lease. The landlord must make most repairs. The landlord must make all repairs that become necessary to maintain the thing in a condition suitable for the purpose for which it was leased, except those for which the tenant is responsible.¹⁸⁸

Civil Code art. 2687 and 2692 limit the tenant’s repair duties to (1) deterioration from the tenant’s use that exceeds normal wear and tear and (2) damages caused by anyone who is on the premises with the tenant’s consent. In addition, Civil Code article 2688 requires a tenant to notify the landlord when the premises are damaged or require repairs. Failure to notify the landlord makes the tenant liable for damages sustained as a result.¹⁸⁹

Prior to the 2005 amendments, the Civil Code made the tenant responsible for necessary repairs to windows, shutters, partitions, doors, window glass (unless caused by hail storm or other inevitable accident), locks and hinges. Under the current Civil Code, a tenant would not be responsible for these repairs unless he or someone under his control damaged them or there was an agreement shifting the repair obligation.

Residential tenants cannot waive a landlord’s warranty as to (1) defects that affect health and safety and (2) defects of which the tenant did not know, but the landlord knew or should have known about. La. Civ. Code art. 2699. This statutory prohibition against waiver is new and was not recognized in prior jurisprudence. Other waivers are effective only if in clear and unambiguous language that is brought to the tenant’s attention. La. Civ. Code art. 2699.¹⁹⁰

Except as otherwise provided by Civil Code art. 2699, a landlord and tenant can broaden or restrict their repair obligations by agreement.¹⁹¹ Hence, a landlord could limit a tenant’s Article 2694 remedy by contractually shifting the obligations for many repairs to the tenant.

There are some methods for circumventing contracts that purport to relieve the landlord of his repair obligations under the Civil Code. First, it must be emphasized that it is the landlord’s duty to deliver the premises in good condition. La. Civ. Code art. 2684. If possible, argue that the defect existed at the commencement of the lease, and that the contractual clause concerning repair obligations is not applicable.¹⁹² The tenant is not responsible for repairs that were necessary prior to the inception of the lease. *Wolf v. Walker*, 342 So.2d 1122, 1123 (La. App. 4 Cir. 1976). For subsidized tenants, waivers of the landlord’s repair obligations may be overridden by the HUD tenancy addendum.

¹⁸⁸ The tenant’s repairs are exclusive and should be strictly construed. *Brunies v. Police Jury of Parish of Jefferson*, 110 So.2d 732, 735 (La. 1959).

¹⁸⁹ Compare *The French Eighth v. Watts*, 514 So.2d 553 (La. App. 4 Cir. 1987) (excess water bills from running toilet) with *Hebert v. Neyrey*, 432 So.2d 396 (La. App. 1 Cir. 1983) *rev’d* 445 So.2d 1165 (La. 1984).

¹⁹⁰ For a pre-2005 case on the necessity of bringing waiver to tenant’s attention, see *Equilease Corporation v. Hill*, 290 So.2d 423 (La. App. 4 Cir. 1974).

¹⁹¹ Cf., *Brunies v. Police Jury of Parish of Jefferson*, 110 So. 2d 732 (La. 1959).

¹⁹² See, e.g. *Houma Oil Co. Inc. v. McKey*, 395 So. 2d 828 (La. App. 1 Cir. 1981), *writ denied* 401 So. 2d 356 (La. 1981); *Barrow v. Culver Bros. Garage*, 78 So.2d 69 (La. App. 2 Cir. 1955); *Vignes v. Barbara*, 5 So.2d 656 (Orl. App. 1942).

In addition, a lease provision requiring the tenant to make all necessary repairs is not a valid disclaimer of the landlord's statutory warranty obligation to the tenant against all vices and defects of the leased property which may prevent its use. *Pylate v. Inabet*, 458 So.2d 1378 (La. App. 2 Cir. 1984) (defective sewage system is covered by landlord's obligation).

The burden of proving such a contract is on the landlord. The courts are generally willing to strictly construe any contract which modifies codal obligations and shifts severely onerous repair obligations to the tenant.¹⁹³ If you can defeat the contract provision, the Civil Code will govern the repair duties of the landlord and tenant. Also, note that an alleged waiver of tenant's rights under Articles 2684, 2691 and 2696-98 must be brought to the tenant's attention, or explained to him.¹⁹⁴

Where a landlord fails to accomplish repairs specifically set out in the lease, the tenant is entitled to have the repairs made himself and apply the amount of the repair to the payment of rent.

7.3.2 Adequate Notice And Demand on Landlord

Proper notice and demand for the necessary repairs is absolutely essential to the perfection of a remedy or defense under Article 2694. *See, Larsen v. Otalvano*, 391 So.2d 1378 (La. App. 4 Cir. 1980). The problem of "adequate notice" should be handled carefully because the jurisprudence has not been clear.

If there is a written lease provision on the method of notice, that provision will govern the issue of whether adequate notice was given. *See Brignac v. Boisdore*, 272 So.2d 463, 465 (La. App. 4 Cir. 1973), *aff'd* 288 So.2d 31 (La. 1974). For example, in *Calderon v. Johnson*, 453 So.2d 615 (La. App. 1 Cir. 1984), the court held that although the landlord failed to receive notice of the repairs made by the tenant, that the tenant complied with the terms of the lease by mailing the notice, under a term of the lease stating that "notices shall be served by mailing of such notice."

In the absence of a written lease provision or other agreement, one must decide on (1) the type of notice, (2) whom to notify, and (3) the length of delay before conducting repairs. Apparently, oral or written notice can be sufficient.¹⁹⁵ However, there can be serious proof problems with oral notice. The tenant has the burden of proving adequate notice and demand. Contradictory testimony by the landlord and tenant on the issue of notice, where the credibility of neither is attacked, may require a decision in favor of the landlord.¹⁹⁶

Hence, one should use a method of notice which will insure independent evidence that notice was given. Written notice by the tenant's attorney is certainly one method. *See Dickert v. Ruiz*, 231 So.2d 633 (La. App. 4 Cir. 1970). Competent evidence of the mailing and receipt of the letter will be required. *See, e.g. DiRosa v. Bosworth*, 225 So.2d 42 (La. App. 4 Cir. 1969), *writ refused* 227 So.2d 591 (La. 1969).

¹⁹³ *See, e.g., Clofourt v. Matmoor, Inc.*, 370 So.2d 1305 (La. App. 4 Cir. 1979); *see also Wolf v. Walker*, 342 So.2d 1122 (La. App. 4 Cir. 1976); *Brunies v. Police Jury of Parish of Jefferson*, 110 So.2d 732 (La. 1959).

¹⁹⁴ *See Equilease Corporation v. Hill*, 290 So.2d 423 (La. App. 4 Cir. 1974).

¹⁹⁵ *See, Rhodes v. Jackson*, 109 So. 46, 48 (La. 1926); *Freeman v. G.T.S. Corp.*, 363 So.2d 1247 (La. App. 4 Cir. 1978); *Dihert v. Ruiz*, 231 So.2d 633 (La. App. 4 Cir. 1970).

¹⁹⁶ *Johnson v. Johnson*, 296 So.2d 470, 471-72 (La. App. 2 Cir. 1974), *writ refused* 300 So.2d 183 (1974); *May v. Schepis*, 147 So. 717 (La. App. 2 Cir. 1933).

Correction orders issued by a city's division of housing improvements do not satisfy the tenant's contractual obligation to give the landlord written notice of defects in order to recover the cost of repairs. *Lee v. Badon*, 487 So.2d 118 (La. App. 4 Cir. 1986).

The tenant should attempt to make a demand for repairs directly on the landlord. There are several cases which seem to require direct contact with the landlord. *Teekell v. Drewett*, 103 So.2d 525 (La. App. 2 Cir. 1958); *Ellis v. Brenner*, 34 So. 2d 633 (La. App. 2 Cir. 1948). To avoid the harsh consequences of *Teekell* and *Ellis*, the tenant should pursue all available methods of directly placing the landlord in default. There may be some duty to investigate alternative methods of giving the landlord direct notice of the required repairs. *See, e.g. Giraud v. Clark*, 354 So.2d 752 (La. App. 4 Cir. 1978).

Teekell and *Ellis* exacerbate the problem of notifying an absent or inaccessible landlord. The better rule is that the tenant be required to take reasonable steps to notify the landlord. *See, Barrow v. Culver Bros. Garage*, 78 So.2d 69 (La. App. 2 Cir. 1955).

It should be noted that many rent collection agents only have a limited mandate (or power of attorney) from the landlord. This limited mandate may only authorize the agent to collect rent, and not to make repairs. The agent may not even forward a demand for repairs to the landlord. To be on the safe side, one should contact both the agent and landlord. In a case where only the agent was notified, it can be argued that notice to the agent constituted notice to the principal.¹⁹⁷

Article 2694 does not indicate how long a tenant must wait before commencing repairs after proper demand on the landlord. However, it is clear that the landlord must be given a reasonable period in which to make the repairs.¹⁹⁸ The determination of "reasonable period" is essentially factual and will depend on the individual circumstances of each case. Presumably, a "reasonable period" would vary according to the nature of the defect.¹⁹⁹

In *Davilla v. Jones*, the Louisiana Supreme Court found that a commercial landlord's failure to repair substantial water leakage in the roof and walls, within 2 weeks of the tenant's demand, did not justify the use of the repair and deduct remedy.²⁰⁰ The court found that the high cost of repairs (\$30,000+), and the business need to obtain additional bids, justified the landlord's delay in making the repairs. As such, there is a danger that courts will interpret *Davilla* to require a waiting period of more than 2 weeks before a tenant can make the repairs under Article 2694.

7.3.3 Application to Rent

The amount of repairs can be applied to the payment of rent. La. Civ. Code art. 2694. Under the pre-2005 law, deductions were limited to rent due after the landlord was properly put in default.²⁰¹ However, the new law deleted the term "deduct from the rent due" from the language in art. 2694.

¹⁹⁷ *Office Equipment, Inc. v. Hyde*, 145 So.2d 86 (La. App. 4 Cir. 1962); *see also Freeman v. G.T.S. Corp.*, 363 So.2d 1247, 1248-49 (La. App. 4 Cir. 1978).

¹⁹⁸ *New Hope Gardens, Ltd. v. Lattin*, 530 So.2d 1207 (La. App. 2d Cir. 1988); *Davilla v. Jones*, *supra*; *cf., Leggio v. Manion*, 172 So. 2d 748, 750 (La. App. 4 Cir. 1965).

¹⁹⁹ *See, e.g. Barrow v. Culver Bros. Garage*, 78 So 2d 69 (La. App. 2 Cir. 1955).

²⁰⁰ *Davilla v. Jones*, 436 So.2d 507 (La. 1983).

²⁰¹ *Mullen v. Kerlec*, 40 So. 46 (La. 1905). *See also, Rhodes v. Jackson*, 109 So. 46 (La. 1926).

If the tenant has a long term lease, he has a right to make deductions for repairs up to the amount due under the lease.²⁰² Under the new Article 2694, a tenant may immediately sue for reimbursement of repair costs in excess of the rent. As a practical matter, a tenant with a month-to-month lease is probably limited to making repairs which do not exceed the monthly rent. *Evan v. Does*, 283 So.2d 804, 808 (La. App. 2 Cir. 1973). A landlord may respond to a repair and deduct remedy by issuing a 10 day notice to terminate a month-to-month lease. Louisiana does not have a statutory prohibition against retaliatory evictions.

7.3.4 Proof That Repairs Were Necessary And That Price Was Reasonable

Finally, the tenant must be able to prove (1) that the repairs made were necessary and (2) that the price of the repairs was reasonable. The "necessity of the repairs" should be established through the testimony of a qualified person. See, e.g. *Scott v. Davis*, 56 So.2d 187 (Orl. App. 1952) (production of receipted bill for automobile repairs, allegedly necessitated as the result of a collision, is not alone sufficient proof; there must be testimony); *Ernis v. Government Employees Insurance Co*, 305 So.2d 620 (La. App. 4 Cir. 1975) (damage claim based on bill for medical expenses from a clinic was not proven where no doctor from the clinic testified).

How much evidence is required to prove that the price of the repairs was reasonable? The courts are split on this issue. The actual price of the repairs should be provable by testimony of payment, corroborated by introduction into evidence of the bills paid, and identification of them as expenses incurred because of the landlord's default.²⁰³

However, the tenant must also prove that the price paid for repairs was reasonable. The reasonableness of the price should be proved through the testimony of a person qualified and knowledgeable in the assessment of the values of repairs.²⁰⁴ It may be difficult, if not impossible, to obtain this quality of evidence for an eviction defense. In that event, the only alternative is to produce the best available evidence or secure a continuance. See *Coleman v. Victor*, 326 So.2d 344, 348-49 (La. 1976), which suggests that the Louisiana Supreme Court may be willing to reject inflexible evidentiary rules commonly used by some Courts of Appeal.²⁰⁵

If a repairman cannot be obtained for the trial, you should attempt to introduce other competent testimony on the nature of the defects, the amount of time spent on the repairs, and the costs of the labor and materials. You can attempt to introduce any estimates on the repair work. However, these estimates are ordinarily inadmissible as hearsay.²⁰⁶ Such estimates can probably be admitted without objection in those evictions which are prosecuted by a non-attorney.

²⁰² *Heirs of Merilh v. Pan American Films*, 200 So.2d 398, 402 (La. App. 4 Cir. 1967); *writ refused*, 203 So.2d 88 (La. 1967); *Lorenzon v. Woods*, 1 McGlain 373 (Orl App. 1881); see also *Cameron v. Krantz*, 299 So.2d 919, 923 (La. App. 3 Cir. 1974).

²⁰³ See, e.g. *Dickert v. Ruiz*, 231 So.2d 633 (La. App. 4 Cir. 1970); *Trinity Universal Insurance Company v. Normand*, 220 So.2d 583, 586 (La. App. 3 Cir. 1969). But see *Ducote v. Allstate Insurance Company*, 242 So.2d 103, 107 (La. App. 1 Cir. 1970), *writ refused* 243 So.2d 532 (La. 1971) and *Vezinat v. Marix*, 217 So.2d 416, 421 (La. App. 1 Cir. 1968) where it was held that a party's testimony alone is insufficient to establish a claim for damages. See also *Freeman v. G.T.S. Corp.*, 363 So.2d 1247, 1251 (La. App. 4 Cir. 1978).

²⁰⁴ See, e.g., *Ducote v. Allstate Insurance Co.*, 242 So.2d 103(La. App. 1 Cir. 1970), *writ refused* 243 So.2d 532 (La. 1971) *supra*; *Vezinat v. Marix*, 217 So.2d 416 (La. App. 1 Cir. 1968).

²⁰⁵ See, e.g. *Dickert v. Ruiz*, 231 So.2d 633 (La. App. 4 Cir. 1970); *Lambert v. Allstate Insurance Company*, 195 So.2d 698, 700-01 (La. App. 1 Cir. 1967).

²⁰⁶ *Thompson v. Simmons*, 499 So.2d 517 (La. App. 2 Cir. 1986), *writ denied* 501 So.2d 772; *Ordenez v. Maryland Casualty Company*, 312 So.2d 875 (La. App. 4 Cir. 1975); *Dikert v. Ruiz*, 231 So.2d 633 (La. App. 4 Cir. 1970).

Finally, note that a tenant should be able to make a rent deduction for the value of his own labor, if properly proved. *See, e.g., Lambert v. Allstate Insurance Company*, 195 So.2d 698 (La. App. 1 Cir. 1967); *Kopsco v. Allelo*, 32 So.2d 99 (1 Cir. 1947). Again, the value of the tenant's own repair work must be supported by competent testimony on the number of hours worked and the monetary value thereof. *Lambert, supra* at 700. The tenant should not make a claim greater than the price that a professional would have charged. *See, e.g., Kopsco, supra*.

7.4 PLEADING REQUIREMENTS FOR AN ARTICLE 2694 DEFENSE

All of the elements of an article 2694 defense should be pleaded. Several courts have strictly enforced the pleading requirements for an article 2694 defense. *See, e.g. Miami Truck & Motor Leasing Co. v. Dairyman, Inc.*, 263 So.2d 110, 112 (La. App. 1 Cir. 1972); *Duchain v. Ben Roumain, Inc.*, 176 So. 696 (La. App. 1 Cir. 1937).

7.5 ALTERNATIVE REMEDIES IN THE EVENT OF FAILURE UNDER ARTICLE 2694

7.5.1 The Defense of Good Faith

If the tenant fails to prove one or more elements of an article 2694 defense, he should avoid cancellation of the lease for nonpayment of rent by convincing the trial court that he acted in good faith. *Plunkett v. D & L Family Pharmacy*, 562 So.2d 1048, 1052 (La. App. 3 Cir. 1990)(eviction for withholding rent under art. 2694 reversed when tenant acted in good faith); *Brewer v. Forest Gravel Co.*, 135 So. 372 (La. 1931). Good faith has been found where the tenant, relying on counsel's advice, refused to pay more. *Brewer, supra* at 373.

7.5.2 The Right to Remove Improvements or to Be Reimbursed

What are the remedies of a tenant who is evicted before recouping the value of his improvements in rent? The tenant has the right to remove the improvements provided he restores the thing to its prior condition. La. Civ. Code art. 2695(1).²⁰⁷ Civil Code article 2694 expressly authorizes the tenant to sue for reimbursement. The tenant's right to sue for reimbursement is not terminated by his breach or abandonment of the lease.²⁰⁸

7.5.3 Damages

The landlord may be sued for damages for failure to maintain the apartment in habitable condition. See next section.

8. TENANT DAMAGE CLAIMS

Tenant damage claims may be *ex delictu* or *ex contractu*. *Potter v. First Federal S & L*, 615 So.2d 318 (La. 1993). Prescription is 1 year for torts and 10 years for contracts. Always file within 1 year if you can. The courts may classify what you think is a contractual claim as a tort claim and apply a 1 year prescription. *See e.g., Saylor v. Villcar Realty, LLC*, 999 So.2d 61 (La. App. 4 Cir. 2008).

²⁰⁷ *Riggs v. Lawton*, 93 So.2d 543 (La. 1957); *Leake v. Hardie*, 245 So.2d 729 (La. App. 4 Cir. 1971); *Pylate v. Inabet*, 458 So.2d 1378 (La. App. 2 Cir.1984).

²⁰⁸ *Leake v. Hardie*, 245 So.2d 729 (La. App. 4 Cir. 1971).

8.1 WARRANTY OF HABITABILITY

The landlord must deliver the premises to the tenant in good condition, and free from any repairs. La. Civ. Code art. 2684.²⁰⁹ A tenant may sue and recover damages from a landlord for violations of the warranty of habitability, i.e., failure to maintain apartment in good condition.²¹⁰ Assumption of risk is not a defense to a warranty of habitability lawsuit.²¹¹ However, under current law, a tenant's damage claim may be reduced if the tenant failed to notify the landlord of a defect that the landlord did not know about. La. Civ. Code art. 2697, 2688. Written notice of the defects is not required where the landlord had actual notice.²¹²

Unlike tenants in many states, Louisiana tenants may not use the landlord's violation of the warranty of habitability as an offset to their rent obligation. *Evans v. Does*, 283 So.2d 804 (La. App. 2 Cir. 1973). However, conventional public housing tenants have the remedy of rent abatement, which is an extinguishment of the rent obligation. See 24 C.F.R. § 966.4(h); *HANO v. Wilson*, 503 So.2d 565 (La. App. 4 Cir. 1987).

Courts are very reluctant to find a waiver of habitability. In the commercial leasing context, a court has held that the warranty of fitness may be waived only if clear and unequivocal language is used.²¹³ Another court has held that although a tenant accepts leased premises "as is", he is still entitled to the implied warranty of fitness afforded him by law.²¹⁴ Residential tenants may not waive defects that affect health and safety. La. Civ. Code art. 2699 (3).

If you intend to prove a housing code violation as part of a warranty of habitability lawsuit, you should introduce a certified copy of the ordinance into evidence. *Cantelupe v. City of Bossier*, 322 So.2d 344 (La. App. 2 Cir. 1975).

8.2 PEACEABLE POSSESSION

Failure to maintain a tenant in peaceable possession gives rise to a breach of contract. It may also give rise to a negligence claim if the landlord should have known of the disturbance. La. Civ. Code art. 2682, 2700-01.²¹⁵ Executory process and an order of seizure and sale is a disturbance of peaceable possession if there is an order to vacate or denial of tenant's access.²¹⁶ Landlords have an obligation to prevent their other tenants from disturbing a tenant's peaceable possession.²¹⁷ The warranty of peaceable possession may not be waived.²¹⁸

8.3 UNFAIR TRADE PRACTICES ACT

The Louisiana Unfair Trade Practices and Consumer Protection Law (LUTP), La. R. S. 51:1401 *et. seq.* may apply to leasing of residential property. LUTP pro-

²⁰⁹ Prior law codified at Civil Code art. 2693.

²¹⁰ See *Ganheart v. Executive House Apts.*, 671 So.2d 525 (La. App. 4 Cir. 1996), *writ denied* 678 So.2d 554; *Gennings v. Newton*, 567 So.2d 637 (La. App. 4 Cir. 1990); *Smith v. Castro Brothers Corp.*, 443 So.2d 660 (La. App. 4 Cir. 1983), *writ denied* 446 So.2d 1229, 1231 (La. 1984); see also La. Civ. Code art. 2682, 2684, 2691, 2696-99.

²¹¹ *Smith v. Castro Brothers Corp.*, 443 So.2d 660 (La. App. 4 Cir. 1983), *writ denied* 446 So.2d 1229, 1231 (La. 1984)

²¹² *Ganheart v. Executive House Apts.*, 671 So.2d 525 (La. App. 4 Cir. 1996), *writ denied* 678 So.2d 554

²¹³ *Pylate v. Inabet*, 458 So.2d 1378 (La. App. 2 Cir. 1984).

²¹⁴ *Moity v. Guillory*, 430 So.2d 1243 (La. App. 1 Cir. 1983), *writ denied* 437 So. 2d 1148 (La. 1983).

²¹⁵ Prior law codified at Civil Code art. 2692. *Potter v. First Federal S & L*, 615 So.2d 318 (La. 1993); *Walters v. Greer*, 726 So.2d 1094 (La. App. 2 Cir. 1999) (landlord liable for damages).

²¹⁶ *Plater v. Ironwood Land Co., L.L.C.*, 889 So.2d 475 (La. App. 2 Cir. 2004).

²¹⁷ See *e.g.*, La. Civ. Code art. 2700-01; *Essen Development v. Marr*, 687 So.2d 98 (La. App. 1 Cir. 1995).

²¹⁸ La. Civ. Code art. 2682(3); *Entergy Louisiana, Inc. v. Kennedy*, 859 So.2d 74 (La. App. 1 Cir. 2003), *writ denied* 858 So.2d 430 (La. 2003).

hibits “unfair and deceptive” acts or practices in the conduct of any trade or commerce. La. R. S. 51:1405(A). The definition of “trade or commerce” includes the sale or distribution of any services and any property, corporeal or incorporeal, immovable or movable, and any other article or thing of value. La. R. S. 51:1402 (9). Suits, with unfair trade practices claims, should be filed within one year of the unfair practice since these claims are subject to a one year peremption exception.²¹⁹

At a minimum, the victim of an unfair trade practice may recover actual damages and attorney’s fees. Knowing use of unfair or deceptive trade practices after notice by the attorney general subjects the violator to treble damages. *McFadden v. Import One, Inc.*, 56 So.3d 1212 (La. App. 3 Cir. 2011).

There is a dearth of Louisiana jurisprudence on unfair trade practices in the landlord-tenant context. A lessee’s failure to remove equipment at the end of the lease has been held to be an unfair trade practice. *Doland v. ACM Gaming Co.*, 921 So.2d 196, 202 (La. App. 3 Cir. 2005).

Louisiana courts have held that interpretations of the federal courts and the Federal Trade Commission relative to 15 U.S.C. § 45 should be considered to adjudge the scope and application of LUTP.²²⁰ 15 U.S.C. § 45 has been interpreted to apply to various aspects of the leasing transaction.²²¹ In addition, it should be noted that LUTP is identical or virtually identical to the unfair trade practices laws of many other states. Court decisions of other states on statutes identical, or similar to those of Louisiana are persuasive authority.²²² Many states with identical or similar unfair trade practices laws have held them applicable to unfair or deceptive acts committed in the leasing of residential property.²²³

A practice is unfair when it offends established public policy, and when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to customers. *F.T.C. v. Sperry Hutchinson Co.*, 405 U.S. 233 (1972); *Risk Management, LLC v. Moss*, 40 So.3d 176, 184- 85 (La. App. 5 Cir. 2010) *writ denied* 44 So.3d 683 (La. 2010). A practice is deceptive when it involves fraud, deceit or misrepresentation. *Moss, supra* at 185. Other state courts have held a variety of landlord abuses to be unfair or deceptive trade practices:

- lock-out ²²⁴
- disconnection of utilities to evict²²⁵
- demand for money not owed under threat of eviction ²²⁶
- deceptive eviction notice ²²⁷
- routine filing of groundless evictions to collect debts ²²⁸

²¹⁹The courts of appeal have held that unfair trade practice claims are barred by a one year peremption. The Louisiana Supreme Court has not ruled on this issue.

²²⁰*Moore v. Goodyear Tire and Rubber Co.*, 364 So.2d 630, 633 (La. App. 2 Cir. 1978); *Guste v. Demars*, 330 So. 2d 123 (La. App. 1 Cir. 1976).

²²¹*See, e.g., In the Matter of Hallmark Group Companies, Inc.*, 84 F.T.C. 1 (1974); *LaPeyre v. F.T.C.*, 366 F. 2d 117 (5th Cir. 1966), *aff’d. in part* 65 F.T.C. 799.

²²²*Fontenot v. New York Life Insurance Co.*, 357 So.2d 1185 (La. App. 3 Cir. 1978), *writ denied* 359 So.2d 622 (La. 1978).

²²³*See, e.g., Commonwealth v. Monumental Properties*. 329 A.2d 812 (Pa. 1974). *Commonwealth v. DeCotis*, 316 N. E. 2d 48 (Mass. 1994); *Commonwealth v. Isaacs*, 577 S.W. 2d 617 (Ky. 1979).

²²⁴*Mosley & Mosley Builders v. Landin, Ltd*, 389 S.E.2d 576 (N.C. App. 1990); *Dadonna v. Liberty Mobile Home Sales, Inc.*, 550 A.2d 1061, 1068 (Conn. 1988).

²²⁵*Shepard v. Bonita Vista Props. LP*, 664 S.E.2d 388 (N.C. App. 2008) *aff’d* 675 S.E.2d 332 (N.C. 2009).

²²⁶*Stringer v. Perales*, 2003 WL 1848594 (Tex. App. 1 Dist. 2003).

²²⁷*Atkinson v. Rosenthal*, 598 N.E.2d 666 (Mass. App. 1992).

²²⁸*Travieso v. Gutman, Mintz, Baker & Sonnenfeldt*, 1995 U.S. Dist. Lexis 17804 (E.D. N.Y. 1995).

- retaliatory eviction²²⁹
- violation of warranty of habitability²³⁰
- failure to repair

For more examples of the application of unfair trade practice laws to landlord-tenant practices, see National Consumer Law Center, *Unfair and Deceptive Acts and Practices* § 8.2 (8th ed. 2012). Note that some unfair trade practices may also violate the Federal Fair Debt Collection Practices Act if conducted by the landlord's attorney or a third party collector.

8.4 FEDERAL FAIR DEBT COLLECTION PRACTICES ACT

The federal Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.*, does not apply to landlords who are attempting to collect from their own tenants. However, it does apply to attorneys and collection agencies who attempt to collect debts for landlords.²³¹ Some unfair debt collection practices are:

- Demand for payment of amounts not due²³²
- Suit for eviction and rent barred by *res judicata*²³³
- Utility shutoffs and lockouts seeking to force a tenant to pay rent²³⁴
- Seizure of tenant's property without valid lien²³⁵
- Telephone or phone harassment, entry of premises to collect rent²³⁶
- Assertion of false claims as reason for withholding security deposit²³⁷

8.5 FEDERAL FAIR CREDIT REPORTING ACT

Denial of a lease because of a credit report or a tenant screening report is adverse action under the Fair Credit Reporting Act. See *Cotto v. Jenney*, 721 F. Supp. 5 (D. Mass. 1989). The tenant must be given notice of the adverse action and an opportunity to dispute inaccurate or incomplete information.

8.6 INVASION OF PRIVACY AND TRESPASS

A landlord can be liable for unlawful entering of the tenant's apartment. See, *Pizanie v. A. V. Dufour*, 112 So.2d 733 (Orl. App. 1959); *Lindsey v. Zibilich*, 153 So. 341 (Orl. App. 1934).

8.7 PROPERTY DAMAGE

A tenant may recover damage to personal property which is caused by the landlord's negligence, lease violation, or vices and defects in the premises. *Green v. Hodges Stockyard, Inc.*, 522 So.2d 435 (La. App. 4 Cir. 1989) (corrosive damage to vending machines caused by a hole on the premises); *Wilson v. Pou*, 436 So. 2d 599 (La. App. 4 Cir. 1983) (mildew damage due to air conditioning malfunction); *Daspit v. Swann*, 436 So. 2d 606 (La. App. 1 Cir. 1983) (fire damage due to electrical malfunction).

²²⁹ *Kendig v. Kendall Construction Co.*, 317 So.2d 138 (Fla. App. 1975).

²³⁰ *Haddad v. Gonzalez*, 576 N.E.2d 658 (Mass. 1991).

²³¹ *Goldstein v. Hutton Ingram*, 374 F.3d 56 (2d Cir. 2004) (attorney's 3 day notice demanding rent or departure); *Romeo v. Heiberger Associates*, 163 F. 3d 111 (2d Cir. 1998) (rent demand notice by attorney as predicate to eviction).

²³² *McGrath v. Mishara*, 434 N.E.2d 1215 (Mass. 1982); *Hodges v. Sasil Corp.*, 915 S.2d 1 (N.J. 2007).

²³³ *Montgomery v. Donnett*, 2006 WL 293727 (S.D. Oh. 2006).

²³⁴ *In re Aponte*, 82 B.R. 738 (Bankr. E.D. Pa. 1988).

²³⁵ *Clarkson v. DeCaceres*, 105 B.R. 266 (Bankr. E.D. Pa. 1989).

²³⁶ *Clarkson v. DeCaceres*, 105 B.R. 266 (Bankr. E.D. Pa. 1989).

²³⁷ *Kraus v. Trinity Mgmt Servs.*, 67 Cal. Rptr.2d 210 (Cal. App. 1997).

8.8 THIRD PARTY CRIMES

A landlord who provides substandard security may be liable for injuries caused by a third party criminal. *Veazey v. Elmwood Plantation Associates*, 650 So.2d 712 (La. 1994); *see also Wallmuth v. Rapides Parish School Bd.*, 813 So.2d 341 (La. 2002) (*Veazey* essentially reaffirmed after the 1996 amendments to comparative fault).

9. HOUSING DISCRIMINATION

9.1 INTRODUCTION

The federal Fair Housing Act is codified at 42 U.S.C. §§ 3601-3619 and 3631. §§ 3604-3606 and 3617 contain the substantive prohibitions of the Act. A key provision, § 3604(a), makes it unlawful to “refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.” § 3604(f)(1) also bans handicap discrimination. The phrase, “otherwise make unavailable or deny” has been broadly construed to include numerous housing practices unspecified in § 3604(a), e.g., redlining, steering, exclusionary zoning, etc. HUD regulations implementing the Act are codified at 24 C.F.R. § 100 *et seq.* The courts must generally defer to HUD’s interpretations of the Act.²³⁸

42 U.S.C. §§ 1981 and 1982 also outlaw private and public racial discrimination in housing. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). They even apply to housing that is exempt under the Fair Housing Act. The Louisiana Open Housing Act, La. R.S. 51:2601 *et seq.*, also prohibits housing discrimination. It is virtually identical to the FHA. Some advantages to filing in state court under the Open Housing Act would be an automatic *lis pendens* bar to subsequent eviction lawsuits and avoidance of *res judicata*, Anti-Injunction Act and Rooker-Feldman issues.²³⁹ On the other hand, the Open Housing Act does not have a body of case law interpreting it. Also, the Open Housing Act has an attorney’s fee provision that might be interpreted as “loser pays” rather than the FHA standard that limits attorney fees to losing plaintiffs whose lawsuits were frivolous.

9.2 PROPERTIES COVERED BY FAIR HOUSING ACT

9.9.2.1 Dwellings

The Fair Housing Act prohibits discrimination in transactions involving “dwellings.” 42 U.S.C. § 3602(b). “Dwelling” includes any building occupied or intended to be occupied as a residence.

The courts have held the following properties, in addition to houses and apartments, to be dwellings:

- a. Mobile home parks. *United States v. Warwick Mobile Home Estates*, 537 F.2d 1148 (4th Cir. 1976).
- b. Trailer courts. *Stewart v. Furton*, 774 F.2d 706 (6th Cir. 1985).
- c. Condominiums. *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032 (2^d Cir. 1979).

²³⁸ *Chevron USA v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984); *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 210 (1972).

²³⁹ Also, a state court lawsuit that only pleads a state law claim may defeat removal to federal court.

- d. Summer homes. *United States v. Columbus Country Club*, 915 F.2d 877 (3d Cir. 1990), *cert. denied* 501 U.S. 1205.
- e. Motel providing long-term shelter to homeless. *Red Bull Associates v. Best Western International*, 686 F. Supp. 447 (S.D. N.Y. 1988); *but see, Johnson v. Dixon*, 786 F. Supp. 1 (D.D.C. 1991).
- f. Home for AIDS patients. *Baxter v. City of Belleville, Illinois*, 720 F. Supp. 720 (S.D. Ill. 1989).
- g. Group homes. House Rep. 100-711, p. 24, 100th Cong., 2d Sess. (1988).
- h. Shelters and transitional housing. *Doe v. City of Butler, Pa.*, 892 F. 2d 315 (3d Cir. 1989).
- i. Timeshares. *Louisiana ACORN Fair Housing v. Quarter House*, 952 F. Supp. 352 (E.D. La. 1997).

Boarding houses, dormitories and all other facilities whose occupants remain for more than a brief period are presumably covered as “dwellings” under the Act.

9.2.2 Exempted Dwellings

- a. Owner’s direct sale or rental of his single family home. § 3603(b)(1). A fourplex is not a “single family home.” *Lincoln v. Case*, 340 F.3d 283 (5th Cir. 2003). The § 3603(b)(1) exemption only applies to § 3604(a), (b), (d)-(f). Also, the exemption has numerous exceptions. *See e.g., Dillon v. AFBIC Development Corp.*, 597 F.2d 556, 561 (5th Cir. 1979). An owner’s broker is not exempt.
- b. Owner-occupied buildings with no more than 4 units. § 3603(b)(2).
- c. Housing for “older persons” as to prohibition against familial discrimination. 3607(b)(2)-(3). Other forms of discrimination are, however, prohibited.
- d. Religious organizations’ noncommercial dwellings.
- e. Private clubs’ incidental noncommercial lodgings.

A defendant must plead and prove a FHA exemption as an affirmative defense. *United States v. Columbus Country Club*, 915 F. 2d 877, 885 (3d Cir. 1990), *cert. denied* 501 U.S. 1205. Exemptions are strictly construed. *Singleton v. Gendason*, 545 F. 2d 1224, 1227 (9th Cir. 1976). **Note:** A landlord exempted under § 3603 is still liable for racial discrimination under 42 U.S.C. §§ 1981-82.

9.3 PROHIBITED BASES OF DISCRIMINATION

9.3.1 Race or color.

9.9.3.2 National origin.

Espinoza v. Hillwood Square Mut. Ass’n, 522 F. Supp. 559 (E.D. Va. 1981) (Mexicans); *cf. Cutting v. Mazzey*, 724 F.2d 259 (1st Cir. 1984) (Italians).

9.3.3 Religion.

9.3.4 Sex or Sex Harassment

9.3.5 Handicap

The constitutionality of the FHA’s prohibition of handicap discrimination has been upheld by the courts. *See Groome Resources Ltd. v. Parish of Jefferson*, 234 F.3d 192 (5th Cir. 2000). Every legal services housing advocate should read the July 1999 Clearinghouse Review article, *Using Reasonable Accommodations to Preserve Rights of Tenants with Disabilities*.²⁴⁰

²⁴⁰ 33 Clearinghouse Rev. 131 (July-Aug. 1999). The article can be obtained from www.povertylaw.org. See also the Bazelon Center fact sheets on housing discrimination at www.probono.net/la.

- a. **Definition:** (1) a physical or mental impairment which substantially limits one or more major life activities; (2) a record of having such impairment, or (3) being regarded as having such an impairment. Definition is virtually identical to § 504 of the Rehabilitation Act definition. Congress intended interpretations that are consistent with interpretation under § 504. **Note:** List of “major life activities” in 24 C.F.R. 100.201 is not all-inclusive. *United States v. Borough of Audobon*, 797 F. Supp. 353 (D.N.J. 1991) *aff’d* 968 F. 2d 14 (3d Cir. 1992).
- b. **Exceptions:** Transvestites and current illegal users of a controlled substance are excepted from the definition of “handicap.” Drug addiction is a “handicap” if not accompanied by current illegal use.
- c. **Examples:** Covered handicaps include alcoholism, AIDS, high blood pressure, emotional problems, mental illness or retardation, learning disabilities, cancer, epilepsy, cerebral palsy and many disabilities associated with old age. *See e.g., Cason v. Rochester Housing Authority*, 748 F. Supp. 1002 (W.D. N.Y. 1990) (elderly); *Oxford House Inc. v. Town of Babylon*, 819 F. Supp. 1179 (E.D. N.Y. 1993) (recovering alcoholics and drug addicts); *United States v. Southern Management Corp.*, 955 F. 2d 914 (4 Cir. 1992) (former addicts).
- d. Persons commonly “regarded as having an impairment” are the elderly, former substance abusers and HIV-positive persons.
- e. The handicap discrimination provisions also protect persons residing or associating with the handicapped, e.g., parents, children, spouses, roommates, etc.
- f. **Basic Prohibitions:** “Handicap” was added to all FHA prohibitions except 3604(a) and 3604(b). For the handicapped, the 3604(a)-(b) prohibitions are found in 3604(f)(1)-(2) with modifications to allow restriction of occupancy to the handicapped.
- g. **Modifications Required:** Handicapped tenants must be allowed, at their own expense, to make any reasonable modifications necessary for full enjoyment of premises, i.e., the unit, lobbies, main entrances, common areas, etc. 24 C.F.R. § 100.201. Landlord does not have absolute right to reject modifications but may condition approval of unit modification on restoration agreement.
- h. **Accommodation required:** Housing providers must make reasonable accommodations in rules, policies, practices or services necessary to afford handicapped persons “equal opportunity to use and enjoy a dwelling.” This means “feasible practical modifications” and is derived from case law and regulations interpreting § 504 of the Rehabilitation Act. Thus, the accommodation must be made unless it imposes an undue financial or administrative burden or requires a fundamental alteration in the nature of the provider’s program. HUD and the Department of Justice have issued a joint statement on reasonable accommodations that provides helpful guidance.²⁴¹
- i. Examples of required accommodations include (1) allowing seeing eye dog for blind tenant, (2) reserving parking place for mobility-impaired tenant, (3) waiving rules to allow handicapped tenant to have nontenant do his laundry.

²⁴¹Joint Statement of the Department of Housing and Urban Development and the Department of Justice, *Reasonable Accommodations under the Fair Housing Act* (May 17, 2004).

9.3.6 Familial Status

- a. **Definition:** “Familial status” is defined as one or more individuals under the age of 18 living with a parent, a person having legal custody, or the designee of such parent or legal custodian. The definition includes a person who is pregnant or about to obtain custody of a minor.
- b. **Basic Prohibitions:** All FHA prohibitions apply to familial status discrimination subject to the exemption for housing for older persons.
- c. **Occupancy Standards:** 42 U.S.C. § 3607(b)(1) allows providers to comply with “reasonable” local, state or federal occupancy standards. HUD has declined to define “reasonable.” A “totality of circumstances” analysis is generally applied to an occupancy standard. A trailer park’s “3 person per unit” and an apartment complex’s one person/one bedroom, two person/two bedroom restrictions have been held to violate the FHA. *HUD v. Mountain Side Mobile Estates*, FH-FL Rptr. 25,492-93 (HUD Secy 1993); *United States v. Badgett*, 976 F.2d 1176 (8th Cir. 1992). *Badgett* referred to HUD’s rule of thumb that occupancy limits of two persons per bedroom are presumptively reasonable. HUD has provided guidance by memorandum that indicates factors which may warrant deviation from the two person per bedroom standard such as size and configuration of the bedroom and unit.
- d. **Discriminatory Effects:** Familial status discrimination may apply to practices that have a disproportionate impact on families with children. **Note:** This could play a large role in familial status discrimination litigation.
- e. **Exemption:** Housing for “older persons” is exempted from the FHA prohibitions against familial status discrimination. 42 U.S.C. § 3607(b)(1)-(3). Detailed HUD regulations on this exemption are found at 24 C.F.R. § 100.300.

9.4 DISCRIMINATORY PRACTICES

1. Refusal to rent or negotiate. *HUD v. Pheasant Ridge*, HUD ALJ 05-94-0845-8 (10/25/96), FH-FL Rptr. ¶ 25,123 (Section 8 landlord assessed \$50,452 damages for failure to rent to mentally ill siblings).
2. False representation of availability.
3. Discriminatory terms, conditions, services:
 - Refusal to allow early lease termination to disabled tenant. *Samuelson v. Mid-Atlantic Realty Co.* 947 F. Supp. 756 (D.Del. 1996).
 - Higher security deposits. 24 C.F.R. § 100.203(a).
 - Discriminatory maintenance or delays in repairs. 24 C.F.R. § 65(b)(2).
 - No children policy. *Betsey v. Turtle Creek Associates*, 736 F.2d 983 (4th Cir. 1984)
4. Eviction:
 - Eviction of minorities for late payment of rent discriminatory if landlord has not evicted other tenants who paid late. *Khamaja v. Wyatt*, 494 F.Supp. 302, 303 (W.D.N.Y. 1980)
 - Whites cannot be evicted for associating with blacks. *Woods-Drake v. Lundy*, 667 F.2d 1198, 1201 (5th Cir. 1982); *Bill v. Hodges*, 628 F.2d 844 (4th Cir. 1980) (§1982 also prohibits such evictions).

- Eviction because of request to have foster children. *Gorski v. Troy*, 929 F.2d 1183 (7th Cir. 1991).
- 5. Steering. *Zuch v. Hussey*, 394 F. Supp. 1028 (E.D.Mich. 1975), *aff'd in relevant part* 547 F. 2d 1168 (6th Cir. 1977).
- 6. Retaliation
- 7. Coercion, intimidation, threats, interference.
- 8. Discriminatory advertising.
- 9. Rehabilitation of housing development. *Brown v. Artery Organization*, 654 F. Supp. 1106 (D.D.C. 1987).
- 10. Government's failure to seek subsidized housing. *United States v. City of Parma*, 661 F. 2d 562, 575 (6th Cir. 1981) *cert. denied* 456 U.S. 926.
- 11. Brokerage services. *United States v. Balistreri*, 981 F. 2d 916 (7th Cir. 1992), *cert. denied* 510 U.S. 812 (real estate agent showed black apt. seekers fewer units).
- 12. Poorer municipal services. *Campbell v. City of Berwyn*, 815 F. Supp. 1138 (N.D.Ill. 1993); *cf. Hawkins v. Town of Shaw, Mississippi*, 437 F. 2d 1286 (5th Cir. 1971) *aff'd on rehearing en banc* 461 F. 2d 1171 (5th Cir. 1972); *United Farm Workers of Fla. Housing Project v. City of Delray Beach*, 493 F. 2d 799 (5th Cir. 1974); *but see Vercher v. Harrisburg Housing Authority*, 454 F. Supp. 423 (M.D.Pa. 1978).

9.5 EXAMPLES OF DISCRIMINATORY PRACTICES

This section provides more examples of specific discriminatory practices by type of discrimination:

9.5.1 Familial Status Discrimination

- a. Eviction of families of four from two bedroom apartments. *HUD v. Denton*, FH-FL Rptr. 25,024 (HUD ALJ 1992).
- b. Policy prohibiting one adult/one child in one bedroom and one adult/three children in two bedrooms. *Glover v. Crestwood Lake Section 1 Holding Corp.*, 746 F. Supp. 301 (S.D.N.Y. 1990).
- c. Refusal to rent one bedroom apartment to parent and child. *HUD v. Properties Unlimited*, FH-FL Rptr. 25009 (HUD ALJ 1991).
- d. Policy of no more than 4 persons in 3 bedroom unit. *Hillcroft Partners v. Cm'n on Human Rights*, 205 Conn. 324 (1987).
- e. Children of certain ages cannot be banned. *HUD v. Edelstein*, FH-FL Rptr. 25237-39 (HUD ALJ 1991) *aff'd* 978 F.2d 1258 (6th Cir. 1992).
- f. Limitations based on number of children are illegal. *HUD v. Kelly*, FH-FL Rptr. 25357-58 (HUD ALJ 1992) *aff'd* 3 F. 3d 951 (6th Cir. 1993); *HUD v. Edelstein, supra*. However, "reasonable" occupancy standards are allowed.
- g. Families with children cannot be segregated within a complex. 24 C.F.R. 100.70 (c)(4).
- h. Occupancy restriction of 2 persons per unit. *Fair Housing Council v. Ayres*, No. SACV 93-149 (C.D.Cal, June 16, 1994), 1994 WL 278535.

- i. Increase in rent or security deposit based on number of children. *HUD v. Alfaya*, No. HUD ALJ 09-89-0766-1.
- j. Apartment rule prohibiting children from playing in common areas. 24 C.F.R. 100.65 (b)(4).
- k. Rules restricting children from using pool at certain times. *HUD v. Lerner*, No. HUD ALJ 09-89-1172-1 (7-20-90); *HUD v. Paradise Gardens*, FH-FL Rptr. 25388-91 (HUD ALJ 1992).
- l. Refusal to rent home because of concerns that property would pose danger to children. *United States v. Grishman*, 818 F. Supp. 21 (D.Me. 1993).
- m. Oral statement that indicates preference or discrimination based on familial status. *White v. HUD*, 475 F.3d 898 (7th Cir. 2007).

9.5.2 Handicap Discrimination

- a. Inquiries about handicap or nature/severity. 24 C.F.R. § 100.202(c); *Cason v. Rochester Housing Authority*, 748 F. Supp. 1002 (W.D.N.Y. 1990) (PHA can't inquire into applicant's ability to live independently).
- b. Eviction of mentally ill tenant without making reasonable efforts to accommodate. *Roe v. Sugar Mill Associates*, 820 F. Supp. 636 (D.N.H. 1993); *Citywide Associates v. Renfield*, 564 N.E. 2d 1003 (Mass. 1991).
- c. Eviction of mentally ill tenants for criminal activity without individualized assessment of whether reasonable accommodations would acceptably minimize risk to others. *Boston Housing Authority v. Bridgewater*, 898 N.E.2d 848 (Mass. 2009) (housing authority must show that no reasonable accommodation would minimize risk mentally ill tenant poses to others); *Housing Authority of City of Camden v. Williams*, 2011 WL 1261109 (N.J. App. 2011); *but see Housing Authority of the City of Lake Charles v. Pappion*, 540 So.2d 567 (La. App. 3 Cir. 1989) (§ 504 case).
- d. Termination of Section 8 tenant with dementia for failure to report receipt of Social Security income. *Cf. Bush v. Mulligan*, 869 N.Y.S.2d 569 (N.Y. A.D. 2008) (termination reversed without citation to Fair Housing Act, § 504 or ADA).
- e. Eviction for fire hazards without helping tenant get rid of problem. *Schuell Investment Co. v. Anderson*, 386 N.W. 2d 249 (Minn. App. 1986).
- f. Eviction of elderly or disabled tenants for poor housekeeping. *Rutland Court Owners, Inc. v. Taylor*, 997 A.2d 706 (D.C. 2010) (mentally disabled tenant must be given more time to clean); *Cordrey v. Housing Authority of Holyoke*, 14 Clearinghouse Rev. 1191 (May 1981).
- g. Discriminatory treatment of mentally ill applicants. *Doe v. Housing Authority of Pittsburgh*, 17 Clearinghouse Rev. 463 (Aug./Sept. 1983).
- h. Refusal to rent to disabled tenant unless she signed hold harmless agreement—a requirement not made of the non-disabled. *HUD v. Community Homes-Western Village*, HUD ALJ 10-90-0049-1 (7-10-91).
- i. No pets rule as to mentally disabled tenant who needed companionship of dog. *Majors v. Housing Authority of the County of Dekalb, Georgia*, 652 F. 2d 454 (5th Cir. 1981); *Whittier Terrace Associates v. Hampshire*, 532 N.E. 2d 712 (Mass. App. 1989).

- j. Refusal to waive guest fees for medical care required by handicapped tenant. *United States v. California Mobile Home Park Management*, No. 92-55568 (9th Cir., July 18, 1994).
- k. Refusal to give a disabled coop resident a ground floor parking space. *Shapiro v. Cadman Towers, Inc.*, 51 F. 3d 328 (2d Cir. 1995) (prelim. inj. grt'd).
- l. Refusal to allow tenant with emphysema to have an air conditioner. *Aegean Investors v. Walker*, 27 Clearinghouse Rev. 808 (Nov. 1993).
- m. HUD's refusal to transfer disabled Section 8 tenants to housing for the disabled. *Lidder v. Cisneros*, 823 F.Supp. 164 (S.D.N.Y.) (HUD's motion to dismiss denied).
- n. Refusal to rent or negotiate. *HUD v. Pheasant Ridge*, HUD ALJ 05-94-0845-8 (10/25/96), FH-FL Rptr. ¶ 25,123 (Section 8 landlord assessed \$50,452 damages for failure to rent to mentally ill siblings).
- o. Refusal to allow an indigent person with AIDS to reside in an apartment rented for him by his financially qualified mother. *Giebel v. M & B Associates*, 343 F.3d 1143 (9th Cir. 2003).

9.5.3 Sex Discrimination

- a. Refusal to rent to single women or working mothers. *Morehead v. Lewis*, 432 F. Supp. 674 (N.D.Ill. 1977) *aff'd* 594 F. 2d 867 (7th Cir. 1979).
- b. Discounting woman's income in evaluating family's ability to pay for housing. *Normal v. St. Louis Concrete Pipe Co.*, 447 F. Supp. 624 (E.D.Mo. 1978).
- c. Discounting alimony or child support payments. *United States v. Reece*, 457 F. Supp. 43 (D.Mont. 1978).
- d. Sex harassment. *Quigley v. Winter*, 598 F.3d 938 (8th Cir. 2010); *United States v. Presidio Investments, Ltd.*, 4 F. 3d 805 (9th Cir. 1993); *Honce v. Vigil*, 1 F. 3d 1085 (10th Cir. 1993); *Gaellhammer v. Lewallen*, 1 FH-FL Rptr. 15472 (N.D. Ohio 1983) *aff'd* 770 F. 2d 167 (6th Cir. 1985) (couple evicted because wife refused sex with landlord); *Chomicki v. Wittekind*, 381 N.W.2d 561 (Wis. App. 1985) (female tenant evicted after refusing landlord's demand for sex); *Greiger v. Sheets*, 689 F. Supp. 835 (N.D.Ill. 1988) (landlord damaged property, refused repairs after female tenant refused sex); *Genere v. Massachusetts Cm'n Against Discrimination*, 524 N.E.2d 84 (Mass. 1988) (landlord made offensive sexual comments, but never demanded sex or threatened adverse action). *See also* proposed 24 CFR § 100.500 at 65 Fed. Reg. 67666 (Nov. 13, 2000).

Note: Both "quid pro quo" and "hostile environment" sexual harassment are actionable.

- e. Eviction of domestic violence victim. *Lewis v. North End Village*, No. 2:07-cv-10757 (E.D. Mich. 2/26/08); *Bouley v. Young-Sabourin*, 394 F.Supp.2d 675 (D.Vt. 2005).

9.5.4 Racial Discrimination

- a. Delayed action on minority couple's apartment application. *Davis v. Mansards*, 597 F. Supp. 334 (N.D.Ind. 1984).
- b. Refusal to show available apartments. *Bradley v. John M. Brabham Agency, Inc.*, 463 F. Supp. 27 (D.S.C. 1978).

- c. "Grudging" sales techniques. *United States v. Pelzer Realty Co., Inc.*, 484 F. 2d 438 (5th Cir. 1973) *cert. denied* 416 U.S. 936.
- d. Showing blacks fewer units, quoting them higher rents and later dates of availability. *United States v. Balestrieri*, 981 F. 2d 916 (7th Cir. 1992), *cert. denied* 510 U.S. 812.
- e. Requirements that minority applicants be approved or recommended by current tenants or other neighbors. *Robinson v. 12 Lofts Realty, Inc.*, 610 F. 2d 1032 (2d Cir. 1979); *Grant v. Smith*, 574 F. 2d 252 (5th Cir. 1978).
- f. Sales person's influence of customer's decision on racial grounds. *Zuck v. Hussey*, 394 F.Supp. 1028 (E.D. Mich. 1975) *aff'd* 547 F.2d 1168 (6th Cir. 1977).
- g. Refusal to amend zoning ordinance to allow construction of multifamily housing outside of urban renewal area. *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir.) *aff'd per curiam* 488 U.S. 15 (1988).
- h. Closing private road to black neighbor but allowing whites to use it. *Evans v. Tubbe*, 657 F.2d 661 (5th Cir 1981).
- i. Providing poorer services over time period when white tenants being replaced by black tenants. *Concerned Tenants Ass'n v. Indian Trails Apts.*, 496 F.Supp. 522 (N.D. Ill. 1980).
- j. Substandard conditions in housing projects. *Durrett v. Housing Authority of the City of Providence*, 896 F.2d 600 (1st Cir. 1990).
- k. Poorer municipal services for blacks. *Campbell v. City of Berwyn*, 815 F.Supp. 1138 (N.D. Ill. 1993), *cf. United Farm Workers of Florida Housing Project, Inc. v. City of Delray Beach*, 493 F.2d 799 (5th Cir. 1974).
- l. False representation of unavailability. *Havens Realty Co. v. Coleman*, 455 U.S. 363 (1982).
- m. Vandalism of new black resident's property by white neighbor. 42 USC § 3617; *Stackhouse v. DeSatter*, 620 F.Supp. 208 (N.D. Ill. 1985); *see also Sofarelli v. Pinellas Cty.*, 931 F. 2d 718 (11th Cir. 1991)(neighbors' threats, obscenities, spitting).
- n. Intimidation tactics by local resident to discourage Jews from moving into town. *LeBlanc-Steinberg v. Fletcher*, 781 F.Supp. 261 (S.D.N.Y. 1991).
- o. Neighbor's verbal harassment of a Hmong who was inspecting next door house as a prospective tenant. 42 USC § 3617; *HUD v. Weber*, FH-FL Rpts 25041.
- p. Operation of segregated public housing and Section 8 housing programs in metropolitan area. *Walker v. HUD*, 912 F.2d 819 (5th Cir. 1990).
- q. Failure of PHA to locate replacement units in white areas. *Christian Community Action, Inc. v. City of New Haven*, Clearinghouse No. 52,438 (D.Conn. 1999).
- r. Refusal of apartment complex to accept Section 8 applicants. *Bronson v. Crestwood Lake Apts.*, 724 F.Supp. 148 (S.D. N.Y. 1989); *but see Salute v. Stratford Greens Garden Apts.*, 136 F. 3d 293 (2d Cir. 1998)(2-1)(FHA not violated by refusal to accept Section 8 tenants).

9.6 PROCEDURE

9.6.1 Jurisdiction

Private plaintiff may bring lawsuit pursuant to 42 U.S.C. § 3613 in any appropriate United States district court or state court of general jurisdiction. A federal court may hear related state law claims under supplemental jurisdiction. 28 U.S.C. § 1367(a).

9.6.2 Statute of Limitations

Private civil actions under 42 U.S.C. § 3613 must be filed not later than 2 years after the occurrence or termination of the discriminatory practice. 42 U.S.C. § 3613(a)(1)(A). HUD administrative complaints may interrupt or toll the statute of limitations. The U.S. Supreme Court has held that claims under 42 U.S.C. §§ 1981 are subject to the 4 year statute of limitation in 28 U.S.C. § 1658. *Jones v. R.R. Donnelly & Sons*, 541 U.S. 369 (2004). Claims under 42 U.S.C. § 1982 are subject to a one year statute of limitations. See *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 660-62 (1987); *Bradley v. Carydale Enterprises*, 707 F. Supp. 217, 220 (E.D. Va. 1989). Claims under the Louisiana Open Housing Act are subject to a 2 year statute of limitations. La. R.S. 51:2613.²⁴²

9.6.3 Standing to Sue

Standing to sue depends on the substantive law involved. Plaintiffs under the FHA have standing if they are injured in any way by the FHA violation and may even assert third party rights. Plaintiffs have been granted standing under the FHA for being deprived of the social and professional benefits of living in an integrated society. *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 109 (1979).

9.6.4 Jury Trials

FHA plaintiffs are entitled to jury trials in federal lawsuits for damages. *Curtis v. Loether*, 415 U.S. 189, 192 (1974). Jury trials are also available for 42 U.S.C. §§ 1981-82 actions. *Thronson v. Meisels*, 800 F.2d 136 (7th Cir. 1986).

9.6.5 Interlocutory Injunction

Rule 65 of the FRCP governs temporary restraining orders. Preliminary injunctions may be consolidated with the trial on the merits. Evidence received at the preliminary injunction becomes part of record and need not be repeated at trial. You should, however, take steps to preserve your jury trial. Discriminatory housing practices constitute irreparable injury. *Gresham v. Windrush Partners, Inc.*, 730 F.2d 1417, 1423-24 (11th Cir. 1984).

The Anti-Injunction Act bars federal courts from enjoining an already filed state court action except in certain cases. The courts are divided over whether the Anti-Injunction Act applies to FHA claims. Compare *Casa Marie, Inc. v. Superior Court of Puerto Rico*, 988 F. 2d 252 (1st Cir. 1993) with *Oxford House, Inc. v. City of Albany*, 819 F. Supp. 1168 (N.D.N.Y. 1993). Note, however, the Anti-Injunc-

²⁴² Many subsidized housing leases will have a contract provision whereby the landlord agrees not to unlawfully discriminate. Contract claims are subject to a 10 year statute of limitations in Louisiana. However, the courts will probably apply the shorter statute of limitations for fair housing act violations (1, 2 or 4 years as applicable), torts (1 year) and crimes of violence (2 years). See e.g., *Sterling v. Urban Property Co.*, 562 So.2d 1120 (La. App. 4 Cir. 1990).

tion Act would not apply if the defendant is a “state actor” subject to suit under 42 U.S.C. § 1983. But, abstention under *Younger v. Harris*, 401 U.S. 37, may bar the federal injunction.²⁴³

9.6.6 Rule 68 Offers

Note that *Marek v. Chesney*, 473 U.S. 1 (1980), may not apply to attorney fees in cases brought under the FHA. *Id.* at 23-27 (Brennan, J., dissenting).

9.6.7 Issue Preclusion

Res judicata and collateral estoppel issues may arise when the landlord has obtained an eviction judgment. In *Miller v. Hartwood Apts.*, 689 F.2d 1239 (5th Cir. 1982), the court held that a Mississippi eviction court judgment did not bar the federal court litigation of a § 1983 claim since these tenants’ constitutional claims could not have been litigated in the eviction lawsuit.²⁴⁴ Note that while tenants’ damage claims cannot be litigated in eviction lawsuits, discrimination can be asserted as a defense to possession in Louisiana. *Mascaro v. Hudson*, 496 So.2d 428 (La. App. 4 Cir. 1986). Failure to raise damage claims as a reconventional demand to an eviction brought as an ordinary action could, however, act as res judicata. *Lafreniere Park Foundation v. Broussard*, 221 F.3d 804 (5th Cir. 2000).

To avoid issue preclusion problems, you should file a housing discrimination lawsuit before the landlord files an eviction lawsuit and obtain a state court lis pendens or federal court injunction against any eviction.²⁴⁵

9.6.8 Rooker/Feldman Doctrine

The Rooker/Feldman doctrine deprives a federal court from jurisdiction to review state court judgments in cases brought by state-court losers complaining of injuries caused by a state court judgment rendered before the federal suit began. Rooker-Feldman does not apply to fair housing discrimination claims based on conduct that predates the state court judgment.²⁴⁶ However, some courts, including the Fifth Circuit, may apply Rooker/Feldman more broadly to bar actions that require review of validity of a state court eviction judgment.²⁴⁷

9.7 PROVING A VIOLATION

- 1. Overview:** There are 2 types of claims under the FHA: (1) disparate treatment and (2) discriminatory impact or effect. The proof required depends on the type of claim.

²⁴³ For examples of housing cases (non-FHA) where tenants have defeated *Younger v. Harris* abstention, see *Kemp v. Chicago Housing Authority*, 2010 WL 2927417 (N.D. Ill. 2010) (termination of public housing assistance); *Ayers v. Phila. Housing Authority*, 908 F.2d 1184, 1195, n. 21 (3d Cir. 1990) (due process); *McNeill v. New York City Housing Authority*, 719 F. Supp. 233, 255 (S.D.N.Y. 1989) (procedures for terminating rent subsidy).

²⁴⁴ Where a state court procedure permits counterclaims for equitable or monetary relief in an eviction, the eviction judgment may constitute res judicata. See e.g., *Poindexter v. Allegheny County Housing Authority*, 329 Fed Appx. 347 (3d Cir. 2009).

²⁴⁵ Caveat: It can be difficult to obtain appellate review of the second court’s improper denial of a lis pendens exception in a summary eviction proceeding. If the second court does not allow a brief period to apply for supervisory writs, you may be unlawfully forced to litigate the trial on the merits in the second court. A denial of lis pendens may be reviewed by supervisory writs. *Dean v. Delacroix Corp.*, 853 So.2d 769 (La. App. 4 Cir. 2003).

²⁴⁶ *Poindexter v. Allegheny County Housing Authority*, 329 Fed Appx. 347 (3d Cir. 2009); *Long v. Shore Bank Development Corp.*, 182 F.3d 548 (7th Cir. 1999).

²⁴⁷ See e.g., *Illinois Central R. Co. v. Guy*, 682 F.3d 381, 390-91 (5th Cir. 2012); *Babalola v. B.Y. Equities, Inc.*, 63 Fed. Appx. 534 (2d Cir. 2003); *Chambers v. Habitat Co.*, 215 F.3d 1329 (7th Cir. 2000).

2. Disparate Treatment (or Intentional Discrimination)

a. Pretext cases

This claim involves the housing provider treating a protected person differently. The issue is the provider's intent. The provider usually claims that there was a legitimate nondiscriminatory reason for his action. Evidence of discriminatory intent may be either direct or circumstantial.

Cases based on circumstantial evidence are guided by the "prima facie" concept. See *e.g. HUD ex rel Herron v. Blackwell*, 908 F.2d 864, 870-71 (11th Cir. 1990). To establish a prima facie case of disparate treatment, the plaintiff who has been denied housing must show:

- (1) he is a member of a protected class
- (2) he applied for²⁴⁸ and was qualified to rent/purchase the unit.²⁴⁹
- (3) he was rejected by the defendant
- (4) the housing opportunity remained available thereafter.²⁵⁰

The defendant must then show a legitimate nondiscriminatory reason for the adverse action. If this burden is met, the plaintiff must show that the "legitimate reasons were a pretext" for discrimination. Pretext may be proven with "testing" evidence. *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982).

For information on testing services that may be available in your area, contact the Greater New Orleans Fair Housing Action Center, Ph. (504) 596-2100.

b. Mixed Motive Cases

Mixed motive cases involve housing decisions that are based only in part on a prohibited motive. All of the courts of appeals have held that the FHA is violated even if race is just one of the motivating factors.²⁵¹ See *e.g., Payne v. Bracher*, 582 F.2d 17, 18 (5th Cir. 1978). In *Price Waterhouse v. Hopkins*, the Supreme Court held that a Title VII defendant could win if it could prove that the same decision would have been made if it had not taken race into account.²⁵² The Civil Rights Act of 1991 partially overruled the *Price Waterhouse* standard for "mixed motive" Title VII cases; however, the *Price Waterhouse* standard still applies to Title VIII Fair Housing Act cases. See *HUD v. Denton*, FH-FL Rptr. 25,024 (HUD ALJ 1992).²⁵³

3. Discriminatory Effect

The courts of appeals have unanimously held that the FHA covers practices that simply produce discriminating effect. See *e.g. United Stated v. Mitchell*, 580 F.2d 789, 791-92 (5th Cir. 1978). There have been 2 types of discrimi-

²⁴⁸ An application may be unnecessary under the futile gesture doctrine. *Punchback v. Armistead Homes Group*, 907 F.2d 1447 (4th Cir. 1990).

²⁴⁹ Plaintiff should be financially qualified for the unit.

²⁵⁰ Testers can be used to prove this element.

²⁵¹ However, it is possible that the Fair Housing Act no longer allows for mixed motive discrimination claims. See *Gross v. FBL Financial Services*, 557 U.S. 167 (2009) (no mixed motive claims for ADEA).

²⁵² 490 U.S. 228 (1989).

²⁵³ For more on mixed motive cases, see C. Giles, *Shaking Price Waterhouse: Suggestions for a More Workable Approach to Title VIII Mixed Motive Disparate Treatment Discriminatory Cases*, 37 Ind. L. Rev. 815 (2004).

natory effect cases: (1) perpetuation of segregation (*Town of Huntington*) and (2) discriminatory impact (*Betsey v. Turtle Creek Associates*). The Supreme Court has never ruled on the issue of whether discriminatory effect is actionable under the FHA. *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir.) *aff'd* 488 U.S. 15 (1988) (4-4).²⁵⁴ A good example of a discriminatory effects case is *Betsey v. Turtle Creek Associates*, 736 F.2d 983 (4th Cir. 1984) where a “no children” policy was found to have a discriminatory effect on minorities.

The key to proving a disparate impact claim is evidence that the defendant’s practice has a greater impact on the protected class than others. Proof of a prima facie case of disparate impact shifts the burden to the defendant to justify the challenged practice.

The courts of appeals have stated the defendant’s burden differently. *Huntington* said that there must be legitimate justifications with no less discriminatory alternative available. *Betsey v. Turtle Creek Associates*, 736 F.2d 983 (4th Cir. 1984) held that the defendant must show business necessity. It is, however, possible that defendant could now argue for the *Wards Cove* (490 U.S. 642) Title VII defense of “justification that serves its legitimate goals in a significant way.”

Note: Housing discrimination claims based solely on 42 USC § 1982 appear to be limited to discriminatory intent cases. Proof is generally governed by the same standards that apply in a FHA case.

9.8 RELIEF

9.8.1 Actual Damages

Tort principles apply to FHA damage suits. *Curtis v. Loether*, 415 U.S. 189 (1974). Damages vary from the nominal to \$500,000 or more. Data on damages in FHA cases can be found at www.fairhousing.com. Generally, the major components of actual damages in FHA cases are humiliation, embarrassment and emotional distress. For a discussion of damage awards, see *Maximizing Damage Awards in a Fair Housing Case*, 26 John Marshall L.R. No. 1 (1993).

9.8.2 Punitive Damages

The 1988 amendments to the FHA eliminated the \$1,000 cap for punitive damages. The 5th Circuit upheld a \$55,000 punitive damages award where the actual damages were only \$500. *Lincoln v. Case*, 340 F.3d 283 (5th Cir. 2003). The 8th Circuit recently used a multiplier of 4 in a sex harassment case. *Quigley v. Winter*, 598 F.3d 938 (8th Cir. 2010). The major Supreme Court case on punitive damages in civil rights cases is *Smith v. Wade*, 461 U.S. 30 (1983). At least 4 circuits have held that the *Smith v. Wade* standard for punitive damages applies to FHA claims. *Lincoln v. Case*, *supra*.

9.8.3 Equitable Relief

Under § 3613, the court may grant permanent and interlocutory injunctions. The courts are divided over whether the Anti-Injunction Act bars FHA injunctions of state court actions in progress. Compare *Casa Marie, Inc. v. Superior Court of*

²⁵⁴In 2011, the U.S. Supreme Court granted certiorari to review this issue. *Magner v. Gallagher*, 132 S.Ct. 548 (2011). However, the case has been dismissed. 132 S.Ct. 1306 (2012). At the time of publication, the Court has granted certiorari in another case presenting this issue. *Township of Mt. Holly, New Jersey v. Mt. Holly Gardens Citizens in Action*, 2012 WL 5289462 (2012).

Puerto Rico, 988 F.2d 252 (1st Cir. 1993) with *Oxford House, Inc. v. City of Albany*, 819 F.Supp. 1168 (N.D.N.Y. 1993). Given these uncertainties, it may be preferable to sue in state district court when a FHA plaintiff faces a state court summary eviction lawsuit.²⁵⁵ Lis pendens should bar the eviction action and force the litigation of said issues in the housing discrimination lawsuit.

9.8.4 Attorney's Fees

The 1988 FHA Amendments strengthened the attorney's fee provision and made it virtually identical to 42 U.S.C. § 1988. See 42 U.S.C. § 3613(a). Attorney's fees are also available under the Louisiana Open Housing Act. Note, however, that Act 687 of 1999 amended the LOHA to provide attorney's fees to both the prevailing plaintiff and defendant. Although, the sponsors of Act 687 said that their intent was to adopt the same attorney's fees standard as the FHA, it is possible that the courts will use a "loser pays" standard rather than the "frivolous" standard used in FHA cases.

10. SECURITY DEPOSITS

10.1 SUMMARY OF RENT DEPOSIT RETURN ACT

The Rent Deposit Return Act, La. R. S. 9:3251 *et. seq.*, requires a landlord to return a tenant's deposit, minus any portion which is necessary to remedy a tenant's default, or to remedy unreasonable wear to the premises, within one month of the termination of the lease.

If any portion of the deposit is retained, the landlord must furnish the tenant an itemized statement accounting for the retained proceeds and giving the reason therefor, within one month after the tenancy terminates. The tenant must give the landlord a forwarding address to which the itemized statement may be sent.

If the landlord transfers his interest in the apartment during the lease term, he must transfer the security deposit to his successor in interest in order to be relieved of further liability with respect to the security deposit.

The statutory procedure created by La. R.S. 9:3251(A) for the return of security deposits does not apply if the tenant abandons the premises without giving the required notice or abandons it prior to the termination of the lease. La. R.S. 9:3251(C). Presumably, midterm cancellation of the lease for legal cause would relieve the tenant from the notice requirements of R.S. 9:3251 (C).

Willful failure to comply with the Rent Deposit Return Act subjects the landlord to an additional penalty of \$200 (or actual damages if greater) and attorney's fees. The \$200 penalty is in addition to the security deposit refund. See La. R. S. 9:3252 (A). *Miller v. Ecung*, 676 So.2d 656 (La. App. 3 Cir. 1996) (\$1,000 in attorney's fees); *Vinson v. Henley*, 864 So.2d 894 (La. App. 2 Cir. 2004) (additional \$1,250 attorney's fees for appeal). Note that some small claims courts may deny attorney's fee to a prevailing tenant or award an unreasonably low amount.

10.2 PRE-LITIGATION PLANNING

A tenant who seeks the return of a security deposit should always (1) give a timely notice of lease termination, (2) make a written demand for return of the deposit and (3) retain proof of the notice and demand.

²⁵⁵Note that a different situation would be presented if you also had a 42 U.S.C. § 1983 action against a governmental FHA defendant since a 1983 action is a recognized exception to the Anti-Injunction Act. But, you should also consider whether *Younger v. Harris* abstention applies.

Under La. R. S. 9:3251, a tenant must give the landlord notice of his intent to terminate the tenancy, as required by the lease or law. The lease (or other agreement) will normally govern the amount and type of notice. *Saladino v. Rault Petroleum Corp.*, 436 So.2d 714 (La. App. 4 Cir. 1983). In the absence of a lease provision (or other agreement) as to the required notice, Louisiana Civil Code article 2728 requires that the tenant give 10 days written notice of termination prior to the end of the current rental month. Thus, as a matter of course, the tenant should be advised to give timely notice of termination in writing and to retain a copy for proof at trial.

In order to maximize leverage for negotiation and litigation of a security deposit claim, a written demand for the refund should always be made on the landlord upon termination of the tenancy. This demand should include a "forwarding address" to which the landlord's itemized accounting of the damages and retained security deposit may be sent.

The written demand for refund will provide a basis for the court to impose an additional \$200 penalty plus attorney's fees on the landlord if he fails to remit within 30 days after the written demand. La. R. S. 9:3252-53. Several courts have held that the failure to make a written demand for refund bars the tenant from recovering the \$200 penalty and attorney's fees from the landlord.²⁵⁶

10.3 MAJOR ISSUES IN LITIGATION

10.3.1 Introduction

The common issues in security deposit litigation involve the various landlord defenses and whether the tenant is entitled to the additional \$200 penalty.

10.3.2 Landlord Defenses

10.3.2.1 Adequacy of Tenant's Notice of Termination

A tenant must give the landlord timely notice of termination as required by the lease or law. Notice by mail should be sufficient unless otherwise precluded by the lease. *Moore v. Drexel Homes, Inc.*, 293 So.2d 500 (La. App. 4 Cir. 1974), *writ denied* 295 So.2d 812 (La. 1974). Testimony by the tenant (or the mailer), that he personally mailed the notice, postage prepaid, properly addressed, and that the letter was not returned, creates a presumption that the landlord received the notice. *See, e.g. Moore, supra* at 502-04.

Prior to the enactment of La. R. S. 9:3251(C), an inadequate notice of termination was merely viewed as a breach of a lease obligation. It would not preclude recovery of a security deposit unless the landlord incurred actual damage from such default. *See, e.g., Garb v. Clayton-Kent Builders, Inc.*, 307 So.2d 813, 814-15 (La. App. 1 Cir. 1975) (failure to give 30 day notice required by lease did not forfeit security deposit). However, the courts generally interpret La. R. S. 9:3251(C) to bar recovery of a security deposit if the tenant did not provide proper notice of termination. *Low v. Bologna*, 11 So.3d 1246 (La. App. 1 Cir. 2009); *Mays v. Alley*, 599 So.2d 459 (La. App. 2 Cir. 1992).²⁵⁷ In *Bologna*, the court found that the ten-

²⁵⁶ *Maxie v. Juban Lumber Company*, 444 So.2d 181 (La. App. 1 Cir. 1983); *Trapani v. Morgan*, 426 So.2d 285 (La. App. 4 Cir. 1983), *writ denied* 433 So.2d 165 (La. 1983).

²⁵⁷ *See, R. Hersbergen, Developments in the Law, 1980-81: Consumer Protection*, 42 La. L. Rev. 513, 535 (1982). If it can be argued that La. R. S. 9:3251 does not supersede the tenant's underlying contractual cause of action, then failure to give the landlord proper notice would only render the statutory cause of action under La. R. S. 9:3251(A) -52 inapplicable and would not bar recovery of the security deposit under the contractual cause of action.

ants gave notice in December, but that it only terminated the lease for January. Since the tenants vacated in December, the court declined to order the refund of their security deposit. However, the court applied it as a credit toward the unpaid January rent.

Timeliness, form (written vs. oral) and method of service or delivery are the most common grounds for challenging the adequacy of a tenant's notice of termination. An arguably defective notice of termination may be overcome in certain circumstances. For example, waiver of a notice requirement or mutual cancellation of the lease, if provable, should remove any La. R. S. 9:3251(C) bar to recovery.²⁵⁸ Presumably, midterm cancellation of the lease for legal cause, e.g., violation of the warranty of habitability or constructive eviction, would also relieve the tenant from the notice requirements of La. R. S. 9:3251(C). *Cf. Nash v. LaFontaine*, 407 So.2d 783 (La. App. 4 Cir. 1981); *see also* La. Civ. Code art. 2714-19. Surrender of possession to the landlord at "the time at which the notice of termination shall be given under Article 2728" shall constitute sufficient notice. *See* La. Civ. Code art. 2729. Thus, for example, if a month-to-month tenant surrenders possession 10 calendar days before the end of the rental month, the surrender shall constitute adequate notice.

10.3.2.2 Abandonment

Abandonment of the apartment prior to lease expiration may be argued as a defense to a security deposit lawsuit. *Hood v. Ashby Partnership*, 446 So. 2d 1347 (La. App. 1 Cir. 1984) (court said that the statute simply required a tenant to abide by the lease terms). In *Curtis v. Katz*, 349 So.2d 362 (La. App. 4 Cir. 1977), *writ denied* 351 So.2d 179 (La. 1977), the court held that living at a new apartment prior to the expiration of the lease did not constitute abandonment where the tenant retained the key, and kept some property at the old apartment until the lease expired. The court defined "abandonment" as the voluntary relinquishment of the apartment with the intent of terminating possession, and without vesting ownership in any other person. *Curtis v. Katz*, *supra* at 363. *See also, Preen v. LeRuth*, 430 So.2d 825 (La. App. 5 Cir. 1983). Where a tenant gives the landlord notice of his intention to terminate the lease, but leaves the premises prior to the termination, and fails to pay rent for the remainder of the lease period, the tenant is not entitled to the return of his security deposit. *Borne v. Wilander*, 509 So.2d 572 (La. App. 3 Cir. 1987).

What if a tenant places a deposit, but does not move in? In *Barnes v. Smith*, 2007 WL 142920 (La. App. 2 Cir. 2007), the landlord testified that she had a policy of retaining half the deposit if tenants changed their minds and did not move in. The tenant disputed any discussion of this policy. The court treated the case as a R.S. 9: 3251 security deposit case and ordered the return of entire deposit upon finding that the landlord failed to prove any damages when the tenants placed their deposit on Saturday, changed their minds on Monday, and the apartment was not available to anyone until Friday.

²⁵⁸ *Cf. Bradwell v. Carter*, 299 So. 2d 853 (La. App. 1 Cir. 1974) (waiver of time requirement for notice); *Cantelli v. Tonti*, 297 So.2d 766, 768 (La. App. 4 Cir. 1974) (midterm cancellation of lease); *Audrey Apartments v. Kornegay*, 255 So.2d 792, 793 (La. App. 4 Cir. 1972); *Calix v. Whitson*, 306 So.2d 62, 64 (La. App. 4 Cir. 1974) (subsequent oral agreement to terminate at any time upon notice and payment of pro rata rent); *see also* La. Civ. Code arts. 1983, 2045-46.

10.3.2.3 Rent Due

If the tenant did not vacate by the lease expiration date, the landlord will claim an additional month's rent as an offset on the theory that the lease has reconducted for one month. *Ball v. Fellom*, 406 So.2d 781 (La. App. 4 Cir. 1981). The landlord would have the burden of proving reconduction in this situation. *Talambas v. Louisiana State Bd. of Education*, 401 So.2d 1051 (La. App. 3 Cir. 1981). Occupancy of the apartment for one week or less after the expiration of the lease would not constitute reconduction.²⁵⁹ A tenant's continued occupancy after lease termination would presumably entitle the landlord to the fair market rental value of the actual holdover period under an unjust enrichment theory.

The landlord should not be able to claim rent for the period after a tenant vacates the apartment pursuant to an eviction notice or after the issuance of a notice to vacate. *Sciacca v. Ives*, 952 So.2d 762 (La. App. 4 Cir. 2007); *McGrew v. Milford*, 255 So.2d 619 (La. App. 4 Cir. 1971). Landlords also claim an additional month's rent if the tenant does not return the keys prior to the lease expiration date. See, e.g., *Simkin v. Vinci*, 215 So.2d 404 (La. App. 4 Cir. 1968).

10.3.2.4 Damages to Premises

A landlord may retain the portion of the security deposit which is reasonably necessary to remedy unreasonable wear to the premises. La. R. S. 9:3251(A); see also La. Civ. Code art. 2683(3).²⁶⁰ The tenant is not responsible for reasonable wear, pre-existing damage, damage that was not his fault, or repairs that are the landlord's responsibility. See generally, *Provosty v. Guss*, 350 So. 2d 1239 (La. App. 4 Cir. 1977) (tenant not liable for certain cleaning, replastering and painting, a broken cabinet drawer, grease spots on the carpet, and dents in the threshold of the apartment); *Lugo v. Vest*, 336 So.2d 972 (La. App. 4 Cir. 1976) (tenant not liable for replacement of a few light bulbs or the patching of a couple of small holes in the screens). "Reasonable wear and tear" is a factual determination for the trial court. *Provosty v. Guss, supra*; *Lugo v. Vest, supra*.

A landlord's defense that a carpet had to be replaced due to damage from the tenant's smoking was rejected based on the tenant's evidence that the smoke damage could be repaired for \$50. The court ordered the deposit, minus \$50, refunded to the tenant. *Vinson v. Henley*, 864 So.2d 894 (La. App. 2 Cir. 2004).

The doctrine of *res ipsa loquitur* cannot be used to prove that the damage was caused by the tenant's negligence. *Calix v. Whitson*, 306 So.2d 62 (La. App. 4 Cir. 1977). Once the landlord has established proof of damage, the tenant has the burden of showing that the damages occurred prior to the lease's commencement or occurred without his fault during the lease. *Daigle v. Melancon*, 442 So.2d 657 (La. App. 1 Cir. 1983). The burden then shifts back to the landlord to show that the damage was caused by the fault of the tenant.²⁶¹

²⁵⁹ *Ball v. Fellom*, 406 So.2d 781 (La. App. 4 Cir. 1981); *Misse v. Dronet*, 493 So.2d 271 (La. App. 3 Cir. 1986); *Baronne Street Ltd. v. Pisano*, 526 So. 2d 345 (La. App. 4 Cir. 1988).

²⁶⁰ The inventory rule in prior Civil Code article 2720 (Rev. 1984) has been deleted in the 2004 revisions to Civil Code articles on lease. The new Code articles that are relevant to rent deposits are articles 2683 and 2692. They eliminate any reference to inventory and presumption of receipt of premises in good condition.

²⁶¹ *Perroncel v. Judge Roy Bean's Saloon, Inc.*, 405 So.2d 626 (La. App. 3 Cir. 1981), *rev'd on other grounds* 410 So.2d 745 (La. 1982) (statement of burden of proof specifically upheld by Supreme Court); *cf., Speirer v. McIntosh*, 342 So.2d 238 (La. App. 4 Cir. 1977); *Diaz v. Edward Levy Metals, Inc.*, 384 So.2d 581 (La. App. 4 Cir. 1980) (there must be a showing of some fault on tenant's part).

10.3.3 Adequacy of Landlord's Itemization

La. R. S. 9:3251 requires that the landlord provide a written itemization which includes (1) an accounting for the retained proceeds and (2) a statement of reasons.²⁶² An oral explanation or itemization will not suffice absent exceptional circumstances such as "bad faith" litigation.²⁶³ If the landlord's itemization is found to lack specificity, there will be a "willful failure" under La. R.S. 9:3252, and penalties will be appropriate.²⁶⁴ An adequate itemization must include a categorical specification which reasonably apprises the tenant of the nature of the elements of wear and tear, separately lists each aspect of wear and tear, and relates the damage to "unreasonable wear".²⁶⁵

The landlord's written itemization must be sent to the tenant or his duly authorized agent. *Altazin v. Pirello*, 391 So.2d 1267 (La. App. 1 Cir. 1980). Noncompliance with the written itemization requirement subjects the landlord to the additional \$200 penalty and fees. *Nwokolo v. Torrey*, 726 So.2d 1055 (La. App. 2 Cir. 1999).

A bona fide dispute as to the security deposit, or lease obligations, will not exculpate the landlord from strict compliance with the written itemization requirement.²⁶⁶ Specious or unjustified reasons for retaining a deposit, regardless of their specificity, can never satisfy La. R. S. 9:3251. *Altazin v. Pirello*, 391 So.2d 1267 (La. App. 1 Cir. 1980); *Calix v. Whitson*, 306 So. 2d 62 (La. App. 4 Cir. 1974).

10.3.4 Amount of Tenant's Recovery

A tenant is entitled to his security deposit, and an additional statutory penalty of \$200 or actual damages and attorney's fees if the landlord willfully fails to comply with the Rent Deposit Return Act. La. R. S. 9:3252.²⁶⁷

The 1st and 4th Circuits have held that failure to make a written demand for refund bars the tenant from recovering the \$200 statutory penalty and attorney's fees.²⁶⁸ This holding is unsupported by the statutory language of La. R. Stat. 9:3252 and contravenes prior jurisprudence. Properly construed, La. R. S. 9:3252 only creates a conclusive presumption that the landlord's failure to remit after a written demand for a refund, constitutes the "willful failure" which triggers the statutory penalty. La. R. S. 9:3252 conditions the statutory penalty on willful non-compliance with La. R. S. 9:3251 (duty to return deposit and provide written itemization). It does not limit the statutory penalty to cases where the tenant has made a written demand for a refund.²⁶⁹ Nonetheless, it would behoove the tenant to make a written demand for refund in order to ensure the landlord's liability for the \$200 statutory penalty.

²⁶² *O'Brien v. Becker*, 332 So.2d 563 (La. App. 4 Cir. 1976).

²⁶³ *Ball v. Fellom*, 406 So.2d 781 (La. App. 4 Cir. 1981); *Flynn v. Central Realty of Louisiana, Inc.*, 338 So.2d 774 (La. App. 4 Cir. 1976), writ denied 341 So.2d 417 (La. 1977).

²⁶⁴ See, e.g. *Woodery v. Smith*, 527 So.2d 389, writ denied 532 So.2d 178 (La. App. 4 Cir. 1988); *O'Brien v. Becker*, supra (no itemization, and the receipts, primarily for painting materials, could not be considered "unusual wear" after four years of occupancy); *Provosty v. Guss*, 350 So. 2d 1239 (La. App. 4 Cir. 1977) (sufficient specificity); *Garb v. Clayton-Kent Builders*, 307 So.2d 813 (La. App. 1 Cir. 1975) (landlord's written statement that he was retaining a tenant's \$50 deposit to "clean and vacuum the apartment" was held to be sufficient).

²⁶⁵ See *Woodery v. Smith*, supra; Note, 37 La. L. Rev. 458 (1977); but see, *Garb v. Clayton-Kent Builders*, supra at 815.

²⁶⁶ *Trapani v. Morgan*, 426 So.2d 285, 291 (La. App. 4 Cir. 1983), writ denied 433 So.2d 165 (La. 1983); *Ball v. Fellom*, 406 So.2d 781, 783 (La. App. 4 Cir. 1981); *Altazin v. Pirello*, 391 So.2d 1267 (La. App. 1 Cir. 1980).

²⁶⁷ See e.g., *Cantelli v. Tonti*, 297 So.2d 766, 769 (La. App. 4 Cir. 1974); *Nwokolo v. Torrey*, 726 So.2d 1055 (La. App. 1999).

²⁶⁸ *Maxie v. Juban Lumber Company* 444 So. 2d 181 (La. App. 1 Cir. 1983); *Trapani v. Morgan*, 426 So.2d 285 (La. App. 4 Cir. 1983), writ denied 433 So.2d 165 (La. 1983).

²⁶⁹ Cf. *Ball v. Fellom*, 406 So.2d 781, 783 (La. App. 4 Cir. 1981); *Altazin v. Pirello*, 391 So. 2d 1267 (La. App. 1 Cir. 1980); *Curtis v. Katz*, 349 So.2d 362 (La. App. 4 Cir. 1977), writ denied 351 So.2d 179 (La. 1977); *Provosty v. Guss*, 350 So.2d 1239 (La. App. 4 Cir. 1977).

The landlord can be liable for the \$200 statutory penalty if his retention of any portion of the security deposit is unjustified. *See, e.g., Lugo v. Vest*, 336 So.2d 972 (La. App. 1 Cir. 1976) (\$72.30 of \$100 deposit withheld for replacement of a few light bulbs and for patching a couple of small holes in the screen). However, in *Provosty v. Guss*, *supra*, a landlord who properly retained less than one-third of the security deposit escaped the statutory penalty imposed by La. R. S. 9:3252. As previously indicated, a landlord who does not provide a timely itemization can be liable for the statutory penalty even if he had a valid dispute as to the amount that is returnable. *See, e.g., Altazin v. Pirello*, 391 So.2d 1267 (La. App. 1 Cir. 1980).

10.4 MISCELLANEOUS ISSUES

10.4.1 Venue

A security deposit lawsuit may be filed in the parish in which the landlord is domiciled or in the parish where the property is situated. La. R. S. 9:3252 (B).

10.4.2 Prescription

Security deposit claims are not governed by any specific prescription statute. Presumably, they are only limited by the 10 year prescriptive period established for claims based on contracts or a personal action. *See* La. Civ. Code art. 3499.

10.4.3 Burden of Proof

A security deposit is the tenant's property. *Matter of Universal Sec. and Protection Service, Inc.*, 223 B.R. 88, 93 (E.D. La. 1998). *cf.* La. Civ. Code art. 2926. Therefore, the burden of proof is on the landlord to show cause for the retention of the tenant's deposit (property).

10.4.4 Security deposit claims against bankrupt landlord

In a Chapter 13 bankruptcy, the tenant's security deposit claim should be a priority claim. *Guarracino v. Hoffman*, 246 B.R. 130 (D. Mass. 2000). Generally, all priority claims must be paid in a Chapter 13 bankruptcy. A tenant should consider filing an objection to a Chapter 13 plan if it proposes to pay him less than 100% of his claim.

In a Chapter 7 bankruptcy, the tenant should argue that the security deposit is not part of the landlord's bankruptcy estate and that the deposit belongs to the tenant. *Matter of Universal Sec. and Protection Service, Inc.*, 223 B.R. 88, 93 (Bankr. E.D. La. 1998). If the security deposit no longer exists, the tenant should file a proof of claim. This may be filed without the payment of any court costs. A chapter 7 bankruptcy will discharge the debt. However, it is possible that a tenant's judgment lien, if any, will survive the bankruptcy.

11. INTERNET RESEARCH

The primary legal services websites for housing advocates are:

Louisiana ProBono.net	www.probono.net/la
Clearinghouse Review	www.povertylaw.org
National Housing Law Project	www.nhlp.org
National Consumer Law Center	www.consumerlaw.org

Helpful government websites for housing advocates include:

HUD Laws www.hudclips.org

HUD www.hud.gov

USDA Rural Housing www.rurdev.usda.gov

Fair housing cases and information can be found at:

National Fair Housing Advocate www.fairhousing.com

12. OTHER TREATISES OR PUBLICATIONS

G. Armstrong, *Louisiana Landlord and Tenant Law*

V. Palmer, *The Civil Law of Lease in Louisiana*

R. Schoshinski, *American Law of Landlord and Tenant*

J. Relman, *Housing Discrimination Practice Manual*

R. Schwemm, *Housing Discrimination: Law and Litigation*

National Housing Law Project, *HUD Housing Programs*, (4d ed.2012)

National Housing Law Project, *Housing Law Bulletin*,
back issues on-line at nhlp.org

13. SAMPLE EVICTION ANSWER

COURT FOR THE PARISH OF
STATE OF LOUISIANA

CASE NO. _____

Petitioner (or Plaintiff)

vs.

Defendant

SWORN ANSWER TO RULE FOR POSSESSION

1. My name is _____. I am a defendant in this Rule.
2. I admit my domicile and deny all other allegations in the Rule for Possession.
3. Petitioner (or Plaintiff) is not entitled to possession of my apartment or home for the reasons *checked* below:

Tenancy Not Properly Terminated and/or Rule Not Properly Brought

4. No Notice to Vacate was sent to me.
5. The Notice to Vacate was untimely. A longer notice period is required to end my lease.

LANDLORD-TENANT LAW

6. I am a bona fide tenant, whose lease may not be terminated by Petitioner under the Protecting Tenants at Foreclosure Act, 12 U.S.C. § 5220 note, except on 90 days advance written notice or the duration of my lease, whichever is longer.
7. The Notice to Vacate was not served in the manner required by the lease or law.
8. The Notice to Vacate and/or Rule for Possession are too vague for me to respond to. They do not state sufficient grounds to terminate the lease. La. Code Civ. Proc. art. 4731; *Louisiana State Museum v. Mayberry*, 348 So.2d 1274 (La. App. 4 Cir. 1977).
9. The Rule for Possession and the Notice to Vacate state inconsistent reasons for eviction.
10. The Rule for Possession was filed before the Notice to Vacate ran out. Thus, the Rule for Possession must be dismissed. La. Code Civ. Proc. art. 4701, 4731; *Lichtentag v. Burns*, 258 So.2d 211 (La. App. 4 Cir. 1972); *Owens v. Munson*, 2009 WL 3454307 (La. App. 1 Cir. 2009).
11. The Rule for Possession was not served on me in the way the law requires. La. Code Civ. Proc. art. 4732. [Note: Rules for Possession on the Eastbank of Orleans Parish must be served by mail in addition to tacking service. *Sylvester v. Detweiler*, U.S.D.C. No. 84-3399 (E.D. La. 1985) (class action judgment)].
12. I am living temporarily outside of Louisiana due to a recent natural disaster. I have not abandoned my apartment. The Rule for Possession must be served on me through the Long-Arm Statute, La. R.S. 13: 3204. Also, no trial can be held on the Rule for Possession until 30 days after service of the Rule. La. R.S. 13: 3205. Therefore, the Rule must be re-set for trial.
13. My lease requires a Notice to Cure before an eviction can be brought. The landlord did not give a Notice to Cure before filing this Rule for Possession.
14. The landlord accepted or held rent from me after the Notice to Vacate. *Adams v. Dividend, Inc.*, 447 So.2d 80, 83 (La. App. 4 Cir. 1984).
15. I have a lease that has not ended. I cannot be evicted for “no cause” before the end of my lease. La. Civil Code art. 1983, 2678, 2728.
16. The person who filed the Rule for Possession is not my landlord or the owner and cannot legally file this Rule.
17. I am a co-owner of the premises and cannot be evicted by this Court or the plaintiff.
18. I own a usufruct over the property in question. The Petitioner may not seek a termination of my usufruct by a Rule for Possession or summary proceeding.
19. I am a possessor or usufructuary of the property in question. I have made the following improvements or paid the following expenses for this property: _____.
Under the law, I have the right to retain possession of this property until I am fully reimbursed by the Petitioner for my improvements and/or expenses. See Civil Code art. 592 (possessor) or Civil Code art. 627 (usufructuaries).

20. My lease has a mediation or arbitration clause and this clause has not been complied with prior to the filing of this eviction lawsuit. Therefore, the suit is premature and must be dismissed.

Eviction for Non-Payment of Rent Should Not Be Granted in My Case

21. I paid the rent owed or offered to pay the rent on time or within the grace period or custom for payment of rent. *Cantrell v. Collins*, 984 So.2d 738, 740-41 (La. App. 1 Cir. 2008); *Adams v. Dividend, Inc.*, 447 So.2d 80, 83 (La. App. 4 Cir. 1984).
22. The rent claimed is not owed because my apartment was partially destroyed or substantially impaired by a recent natural disaster or fire. La. Civil Code art. 2715.
23. I do not owe the rent because my landlord is making repairs to my apartment which entitle me to a reduction or abatement of rent. La. Civil Code art. 2693.
24. The rent claimed is not owed because I properly or in good faith made repairs to the apartment. These repairs were made under the tenant's "repair and deduct" remedy provided by La. Civil Code art. 2694.
25. The rent claimed is not owed because the landlord does not have the right to increase the rent:
1. My lease does not allow him to increase the rent.
 2. My landlord's increase of the rent was untimely and therefore ineffective for the period claimed.
 3. The increase violates the Louisiana price gouging statute, La. R.S. 29: 732 *et seq.*
26. My lease states that I must be given a notice to cure or correct an untimely payment of rent. My landlord did not give me this notice.
27. This Court has equitable discretion not to terminate my lease for non-payment of rent. My alleged non-payment of rent was not willful or in bad faith. I am willing to make the landlord whole by paying the landlord the rent owed as determined by the courts. Under the equities and circumstances of my case, this Court should not terminate my lease for the non-payment of rent alleged by my landlord. [See *e.g., Porter v. Miller*, 782 So.2d 1123 (La. App. 3 Cir. 2001); La. Civil Code art. 2013].

**Special Rent Liability Defenses for Public and Subsidized Housing
Tenants Only**

28. My apartment is either:
- public housing, or
 - subsidized housing,
- and termination of tenancy is governed by federal laws for these programs.
29. The housing authority is responsible for its share of the rent. I am only responsible for my share of the rent. I cannot be evicted for its failure to pay the rent when I have paid or offered to pay my share of the rent. 24 CFR § 982.310 (b).

LANDLORD-TENANT LAW

30. The housing authority stopped payments of rent to the landlord because repairs were not made. In this case, the landlord cannot evict for a problem that his negligence created.
31. The landlord has charged me rent in excess of the amount allowed by the housing authority/agency, federal law or my lease.
32. I am a public housing tenant. The housing authority has failed to repair serious defects in my apartment within the required time after my notice of the defects to the housing authority. Therefore, my rent is abated or extinguished under federal law. [*Housing Authority of New Orleans v. Wilson*, 503 So.2d 565 (La. App. 4 Cir. 1987)].

Other Defenses for Public and Subsidized Tenants Only

33. I am a tenant in public or subsidized housing and:
- a. The landlord did not terminate my tenancy as required by the lease, program rules or federal law.
 - b. I am a Section 8 tenant and the landlord did not provide a copy of the Notice to Vacate to the public housing agency. 24 CFR § 982.310(e).
 - c. The landlord does not have good cause to evict me or refuse to renew my lease as required by my lease, program rules or federal law.
 - d. The landlord did not give me my right to a grievance hearing or conference as required by the lease, program rules or federal law.
 - e. I am a public housing tenant and the grievance decision on my proposed eviction was in my favor. Thus, my eviction is barred.
 - f. I am a public housing tenant and the housing authority failed to respond to my discovery requests as required by 42 U.S.C. § 1437d(e)(7) and 24 C.F.R. §966.4 (a). For this reason, the housing authority is barred from proceeding with this eviction at this time.
 - g. Domestic violence was committed against me and federal law, 42 U.S.C. § 3604(b), 42 U.S.C. § 1437f (c)(9), or 42 U.S.C. § 1437f(o)(7)(D)(i). prohibits my eviction for domestic violence committed against me.

Defenses to Alleged Lease Violations—All Tenants

34. I did not commit the lease violations claimed by the landlord. The landlord has failed to prove that I did things that were serious enough to end my lease.
35. Evictions are subject to judicial control and may be denied even if a lease violation is proved. [*Carriere v. Bank of Louisiana*, 702 So.2d 648 (La. 1996); *Ergon v. Allen*, 593 So.2d 438 (La. App. 2 Cir. 1992)]. Under the circumstances of my case, this Court should exercise its equitable discretion not to terminate my lease.

Other Defenses

36. The landlord may only evict for *total* destruction of the premises by a natural disaster or fire. My apartment is only partially destroyed. Thus, the landlord may not evict me for this reason. La. Civil Code art. 2714-15.

LANDLORD-TENANT LAW

37. This eviction is in violation of a disaster-related Governor's Executive Order or rule issued by the Supreme Court under La. R.S. 29: 721 *et seq.* in that minimum legal delays for evictions were suspended by the Executive Order or Supreme Court rule.
38. I filed for bankruptcy on _____. A bankruptcy stay order prohibits my landlord from seeking my eviction at this time. A copy of the bankruptcy order is attached.
39. I have a bond for deed for the premises. I have not been given my 45 day notice to cure. Thus, this eviction is barred. La. R.S. 9: 2945; *Thomas v. King*, 813 So.2d 1127 (La. App. 2 Cir. 2002).
40. I have a bond for deed for the premises. An agreement between the parties requires that termination of the bond for deed or eviction be resolved by arbitration. Therefore, this judicial eviction must be dismissed or stayed.
41. The landlord/owner cannot sue me for rent or damages in this Rule for Possession.
42. This eviction is barred by res judicata and should be dismissed with prejudice. The Petitioner sued me for eviction in a prior lawsuit based on the same facts and claims. A copy of the judgment in the prior lawsuit dismissing or denying the eviction is attached. I further request that the court take judicial notice of the prior judgment and lawsuit in its records and admit a copy of the judgment into evidence herein.
43. In addition to any of the defenses checked above, my landlord should be denied possession of my apartment for the following reasons (state the reasons below):

Relief Requested

Defendant requests that this Court:

1. Dismiss the Rule for Possession at Petitioner's costs, and
2. Grant all other relief that is just and proper.

Defendant or Defendant's Attorney
Address:

LANDLORD-TENANT LAW

VERIFICATION

STATE OF LOUISIANA

PARISH OF _____

BEFORE ME, the undersigned Notary, personally came and appeared the Defendant, _____, who after being duly sworn, did say that s/he has read the foregoing Answer (or had it read to her/him) and all of the allegations of fact therein are true and correct to the best of her/his information and belief.

Defendant's Signature Only

Sworn to and subscribed before me this _____
day of _____, 20__.

NOTARY PUBLIC

No.

My commission is for life.

