SUMMARY EJECTMENT FOR CRIMINAL ACTIVITY

A landlord who wants to evict a tenant because of criminal activity has two potential legal grounds. First, GS Ch. 42, Art. 7, establishes a statutory procedure for dealing with criminal activity on or near rental property in order to protect the right of the public to "the peaceful, safe, and quiet enjoyment of their homes." This statute applies to all residential rental agreements in North Carolina, regardless of the contents of any individual lease. GS 42-59. Second, the landlord may simply include a forfeiture clause in the lease triggered by criminal activity

G.S. CH. 42, ART. 7: EXPEDITED EVICTION OF DRUG TRAFFICKERS AND OTHER CRIMINALS

WHAT activity is "criminal" under the statute?

- Conduct that would constitute a drug violation under G.S. 90-95 (except possession of a controlled substance);
- Any activity that would constitute conspiracy to violate a drug provision; OR
- Any other criminal activity that threatens the health, safety, or right of peaceful enjoyment of premises by employees of landlord or other residents.

WHOSE activity is regulated by the statute?

- Tenants (they have signed the lease),
- Residents (they have not signed the lease, but they live with the tenant),
- Guests (they are on the premises with permission of an authorized occupant),

WHERE did the activity occur?

- Within the rental premises (i.e., an apartment or individual dwelling leased to a particular tenant),
- In or on the *entire premises* (i.e., house, building, mobile home, or apartment, and all connected real property, including streets, sidewalks, and common areas.)

PROCEDURE

An action filed pursuant to this statute is "a civil action to remove tenants or other persons from leased residential premises." It may be filed either in small claims or district court. While the same basic procedure is used in these cases as in summary ejectment cases when the action is filed in small claims court, the action is not technically based on the summary ejectment statute, but instead on Ch. 42, Art. 7.

What's the Same: The same rules related to service of process and real party in interest apply. An agent for the landlord may sign the complaint. The burden of proof is the same, i.e., preponderance of the evidence. Discovery is not allowed.

What's Different:
Proper defendants include the tenant, an adult or minor member of the household, a guest, and a resident. If a defendant's name is not known, the plaintiff may use a fictitious name, identified as such, accompanied by a description sufficient to identify the person.

The court has authority to protect the identity of witnesses, ordering the concealment of their names, addresses, and other identifying information, upon a showing of violent acts or threats of violence by defendants. GS 42-71.

The statute's reference to "Expedited Eviction" reflects a number of procedural differences at the district court level, whether the action is filed there originally or by appeal from small claims. GS 42-68. The procedure for eviction in small claims court is already "expedited," and no additional procedures are available to make the process even speedier.

COMPLETE EVICTION

Grounds:
The landlord must prove one of the following five things to evict the tenant (which includes everyone taking under the tenant):

- Criminal activity occurred on or within the individual rental unit leased to the tenant.
- The individual rental unit was used to further or promote criminal activity.
- The tenant, any member of the tenant's household, or any guest engaged in criminal activity on or in the immediate vicinity of any portion of the entire premises.
- The tenant consented to a person's return to the property after that person was barred either by a proceeding under this Article or by reasonable rules of a publicly-assisted landlord.
- The tenant failed to notify a law enforcement officer or the landlord immediately upon learning that a barred person had returned to the tenant's rental unit.

Defense #1 [GS 42-64(a)]:
The tenant may avoid complete eviction by proving that he or she:

- was not involved in the criminal activity, AND
- neither knew nor had reason to know about it.

OR

- had done everything that reasonably could have been expected under the circumstances to stop or prevent it. Examples include (1) asking the LL to take the person's name off the lease, (2) reporting the activity to law enforcement, (3) seeking help from social

service or counseling agencies, (4) denying permission, if feasible, for the offending household member to reside in the unit, or (5) seeking assistance from church or religious organizations.

If the tenant establishes this defense, the court shall not order a complete eviction.[1]

Defense #2 [GS 42-64(c)]:
If the grounds for eviction are established and the affirmative defense described above does not apply, the court shall order the eviction unless the tenant establishes by clear and convincing evidence that:

- Immediate eviction would be a serious injustice in light of the circumstances of the criminal activity and the condition of the tenant . . .
- . . . to such a degree that it overrides the need to protect the rights, safety, and health of the other tenants and residents.

Not a defense: That the criminal activity was an isolated incident, or that the wrongdoer no longer lives with the tenant. Evidence such as this might well be relevant, however, to a tenant's efforts to establish Defenses #1 and/or #2, above.

Note also: Defense of waiver of breach does not apply. G.S. 42-73 specifically provides that landlord is "entitled to collect rent due and owing with knowledge of any illegal acts that constitute criminal activity without such collection constituting waiver of the alleged defaults."

PARTIAL EVICTION

Magistrate may order removal of a person other than the tenant (and not the tenant) when the magistrate finds that person has engaged in criminal activity on or in the immediate vicinity of some portion of the entire premises.

For the magistrate to have jurisdiction to remove a person other than the tenant (and not the tenant), the person to be removed must have been named as a defendant in the action. If the person's name is unknown, the complaint may name defendant as "John (or Jane) Doe," stating that the name is fictitious and adding a description to identify him or her. GS 42-62(b).

Unanswered Question: How must this defendant be served? Is service by posting available?

AOC-CVM-403, the form judgment available for use in these cases, states that defendants subject to a partial eviction order who fail to immediately vacate the premises and/or return after being barred are subject to being found in contempt or charged with a criminal offense.

[1] A second time is harder: A tenant may not successfully use one of these affirmative defenses if the eviction is a second or subsequent proceeding brought against the tenant for criminal activity unless the tenant can prove by clear and convincing evidence that no reasonable person could have foreseen the occurrence of the subsequent criminal activity or that the tenant had done everything reasonably expected under the circumstances to prevent the commission of the second instance of criminal activity.

AOC-CVM-406 is the form used instead of the customary writ of possession in these cases, ordering the sheriff to remove the defendant from the premises.

CONDITIONAL EVICTION

Often a partial eviction is ordered in combination with a conditional eviction. The partial eviction is directed at the person responsible for the criminal activity, while the conditional eviction is directed at the tenant and addresses the tenant's responsibility in avoiding the risk of criminal activity in the future. In addition, a conditional eviction may be appropriate when the magistrate finds that a resident or guest has engaged in criminal activity, but that person is not named as a party in the action.

A conditional eviction order does not immediately evict the tenant, but rather provides for future eviction if the tenant allows the barred person to reenter any portion of the entire premises. AOC-CVM-403, the form judgment to be used in these cases, contains an acknowledgment which must be signed by the tenant that s/he understands the terms of the court order and that violation of the court's order will result in termination of the tenancy.

PRACTICE NOTE: Be aware of the pragmatic issue arising from reserving judgment and then ordering a conditional eviction, i.e., obtaining the tenant's signature on the judgment form.

A landlord who believes that a tenant has violated a conditional eviction order may file a motion in the cause in the original eviction case. That motion shall be heard on an expedited basis and within fifteen days of service of the motion. Instead of a motion, the landlord may elect to file a new summary ejectment action.

At the hearing, the magistrate shall order the eviction of the tenant if the magistrate finds that:

- the tenant has given permission to or invited a person removed or barred from the premises to return to or reenter any portion of the entire premises; or
- the tenant has failed to immediately notify appropriate law enforcement authorities or the landlord upon learning that a person who has been removed and barred has returned to or reentered the tenant's individual rental unit; or
- the tenant has otherwise knowingly violated an express term or condition of any order issued by the court under this statute.

Any person removed is barred from returning to or reentering any portion of the entire premises.

CONNECTION BETWEEN EVICTION AND CRIMINAL CHARGES

A landlord may pursue an eviction for criminal activity even though no criminal charge has been brought. If criminal charges have been brought, the eviction may go forward before the criminal proceeding is concluded or if the defendant was acquitted or the case dismissed. If a criminal prosecution involving the

criminal activity results in a final conviction or adjudication of delinquency, that conclusively establishes in the eviction proceeding that the criminal activity took place.

BREACH OF A LEASE CONDITION:

STEP 1: DETERMINE WHETHER THE LEASE CONTAINS A FORFEITURE CLAUSE.

Note: Public housing cases will always have written lease with forfeiture clause.

> Example:
>
> *The Landlord may terminate this lease for. . .*
>
> *(1) Drug-related criminal activity engaged in, on, or near the premises, by any tenant, household member, or guest, and any such activity engaged in or on the premises by any other person under the tenant's control; . . .*
>
> *2) Criminal activity by a tenant, any member of the tenant's household, a guest or another person under the tenant's control that threatens the health, safety, or right to peaceful enjoyment of the premises by other residents, or that threatens the health of persons residing in the immediate vicinity of the premises.*

STEP 2: DETERMINE WHETHER THERE HAS BEEN A BREACH

It is helpful to analyze the facts in light of the following questions:

Criminal activity by whom?
Activity by a tenant or household member is usually straightforward.
The HUD definition of a *guest* is "a person temporarily staying in the unit with the consent of a tenant or other member of the household who has express or implied authority to so consent on behalf of the tenant."

A *person under the tenant's control* is defined by HUD as "a person, although not staying as a guest . . . in the unit [who] was at the time of the activity in question on the premises because of an invitation from the tenant or other member of the household who has express or implied authority to so consent on behalf of the tenant."

Considerable litigation has focused on what it means to be "under the tenant's control." Consider whether the person was on the premises as result of invitation, or did she "just drop by"? Under the

"One Strike" policy endorsed by HUD, a tenant is strictly liable for a person's conduct while on the premises, if they are there with consent, even if the tenant is not aware of the specifics of the conduct, or could not have reasonably foreseen the conduct.

The "innocent tenant" situation was addressed in cases involving public housing authorities by HUD v. Rucker, 535 U.S. 125 (2002), in which the Supreme Court held that PHA can elect to evict even if tenant was without fault (overruling a number of cases holding that PHA must demonstrate fault on part of tenant in order to deprive tenant of property interest in leasehold)[2].

Note: Rucker upheld only the PHA's right to elect eviction. Immediately after the case was handed down, the Secretary of HUD sent the following letter to all PHA:

"I would like to urge you, as public housing administrators, to be guided by compassion and common sense in responding to cases involving the use of illegal drugs. Consider the seriousness of the offense and how it might impact other family members. Eviction should be the last option explored, after all others have been exhausted."

What activity is covered?

In the lease provision quoted above, there are several important things to notice about what activity may result in termination.

HUD's definition of "drug-related criminal activity" is use or possession with intent to sell, distribute or use." Some courts in other states have interpreted this language as excluding simple possession, but there is significant disagreement within the legal community about which interpretation is correct.

The impetus for including this lease provision in public housing leases was concern about those communities becoming overrun with drug traffickers, and these leases usually contain several provisions addressing the issue of substance abuse by tenants. The inclusion of "other criminal activity" expresses a more limited concern, and it is accordingly more limited. Other criminal activity is a breach of lease condition sufficiently severe to justify eviction only if the activity threatens the health, safety, or right to peaceful enjoyment of other tenants or neighbors. This wording indicates that the landlord must demonstrate more than criminal behavior—there must also be some reasonable basis for concluding that the activity itself threatens others within the scope of protection in *one of the specific ways.*

Notice that the typical lease provision refers to criminal activity. Federal law does not require that the defendant have been convicted of a crime, or even that the defendant have been charged. The court's determination of whether the lease provision has been breached is independent of the judicial system's criminal process. If a particular behavior HAS resulted in a conviction, that determination that the person

[2] Rucker applied to public housing authority cases. Whether it also applies to cases brought under Section 8 or other federally-supported housing has been debated, and the answer is not clear. No North Carolina law specifically addresses the issue.

engaged in that behavior is binding on the small claims magistrate. On the other hand, if a person has been acquitted, the magistrate may still find that the activity occurred, due to the lesser burden of proof applicable in civil court.

Some leases have specific provisions concerning "violent" criminal behavior and do not require that the behavior affect the health, safety, or peaceful enjoyment of the premises. The magistrate must carefully read the specific language to ascertain whether a breach of the lease occurred.

Where did the behavior occur?

One of the issues present in many cases involves where the activity occurred. In the above lease provision, note that a different rule applies depending on the status of the wrongdoer: drug-related criminal behavior may occur in, on, or near the premises if the person involved is a tenant, household member, or guest, but must occur in or on the premises if the person is a "other person under the tenant's control." Other lease provisions may contain language such as "on or off" the premises, applicable to certain types of activity. A determination of whether a lease condition is breached will require consideration not only of WHAT the behavior was, but also WHERE it occurred.

The location of the activity may be important in two other ways. First, behavior that happens away from the rental property may be much less likely to affect the health, safety, and right to peaceful enjoyment of protected persons. Second, as the specific language of the lease provision above indicates, the question of whether an invitee is "under the tenant's control" becomes much more difficult to demonstrate when that person is away from the rental premises.

When did the behavior occur?

Sometimes the timing of the activity is an issue that needs to be considered. Generally, criminal behavior occurring prior to the tenancy will not satisfy the requirement of "threatening the health, etc." In some cases, however, a magistrate might find that prior criminal behavior DOES support a finding that the health and safety of the other residents and neighbors are threatened. One example might be the case of a chronic sex offender. Often, the lease will contain specific provisions that may also apply, addressing chronic substance abuse, failure to disclose relevant information in the rental application, or violent behavior.

STEP 3: DETERMINE WHETHER PROPER PROCEDURE WAS FOLLOWED IN TERMINATING THE LEASE.

If the magistrate determines that the lease contains a forfeiture clause prohibiting certain behavior, and that that lease condition has been violated, the next inquiry is whether the landlord followed appropriate procedure in terminating the lease. How will the magistrate know what appropriate procedure is?

In subsidized housing cases the required procedure must be set out in the lease. For example, one lease provision required by a particular federal subsidy says:

> *The landlord's termination notice shall be accomplished by (1) sending a letter by first class mail, properly stamped and addressed, to the tenant at his/her address at the project, with a proper return address, and (2) serving a copy of said notice on any adult person answering the door at the leased dwelling unit, or if not adult responds, by placing the notice under or through the door, if possible, or else by affixing the notice to the door. Service shall not be deemed effective until both notices provided for herein have been accomplished*

This lease must contain other provisions concerning the content of the notice of termination, including a requirement that the tenant be advised of his right to meet with the landlord to discuss the proposed termination upon request during the ten days following the notice. The landlord must provide whatever the lease requires, in terms of procedural protections for tenants threatened with eviction, in order to satisfy the requirements for obtaining a judgment awarding possession. Remember that the appellate courts have emphasized that the landlord must demonstrate "*strict compliance"* with procedures set out in the lease as part of making a *prima facie* case.

In subsidized housing cases, HUD regulations are sometimes another source of information for the magistrate about what procedures are required. While these requirements should be incorporated into the lease, there are times when this may not be the case. If an attorney for the tenant attempts to defend on the grounds that proper HUD procedure was not followed, the magistrate should ask for a copy of the relevant regulations and give the landlord an opportunity to respond.

DOMESTIC VIOLENCE

When criminal activity involves domestic violence, an additional federal law comes into play. The Violence Against Women Act (42 USC 1437d) contains specific provisions enacted in response to the troubling situation created when an act of domestic violence is perpetrated against a public housing tenant on the premises. Prior to this legislation, this criminal activity often resulted in eviction of the tenant/victim. In addition to the harm caused to the evicted tenant, this response had a significant chilling effect on the willingness of other potential victims in subsidized housing to call law enforcement for help lest they be evicted as well. Federal law now provides that individuals cannot be evicted for domestic violence perpetrated by others unless the landlord demonstrates that continued tenancy would pose "an actual and imminent threat" to other persons on the property. Landlords have the option of a "bifurcated" lease (similar to NC's partial eviction), authorizing landlords to evict only the perpetrator. Landlords may require certain specified documentation of the tenant's status as a domestic violence victim. North Carolina statutes contain similar protections in cases involving victims of domestic violence.

WAIVER IS NOT A DEFENSE

Most public housing leases provide that a landlord does not waive the right to seek ejectment based on criminal activity by continuing to accept rent. G.S. 157-29(d) goes further and specifies that in North Carolina, whether or not the lease is silent about waiver, no waiver occurs regardless of the nature of the breach unless the housing authority fails to notify the tenant within 120 days that a violation has occurred or otherwise act to address the violation.

THE COMPLICATED STUFF

This seemingly-simple summary of legal bases for addressing criminal behavior is complicated by two additional issues. First, in a situation in which the lease addresses criminal behavior, how do those provisions interact with the statutory procedures and rules? GS 42-75 states that the remedies are cumulative, so long as the lease provisions are "not contrary to this Article." But what exactly does "not contrary" mean? In the Lofton case, the NC Supreme Court noted in a footnote that the action was originally brought under Art. 7, but that the complaint was later amended to add the ground of breach of a lease condition. The Court notes, "Thereafter, both parties proceeded solely under the lease violation theory. Thus, any argument pursuant to the statutory provision is not before this Court."

It is neither new nor surprising that an appellate court, just like a trial court, considers only what is before it -- a determination made by attorneys trying the case. In small claims court, of course, the absence of attorneys generally means that magistrates have an active role in determining whether a party is entitled to the requested remedy based on any theory. That's not new or surprising either, but it makes this question of the interaction of these two theories particularly challenging.

The second complicating issue is that the majority of leases with a criminal activity forfeiture clause arise in the context of subsidized housing. Importing all of the federal regulations and subsidy-specific rules associated with subsidized housing into an already-complicated legal landscape definitely ratchets up the potential complexity of a case. Added to that is the possibility of preemption issues present any time state and federal law overlap.

These potential complications are far too numerous to address specifically, and many of them have no definite resolution. The best a magistrate can do, in my opinion, is to proceed slowly and thoughtfully in these cases, paying careful attention to the underlying policy concerns which led to the adoption of these laws.