

Landlord/Tenant

PRE-TRIAL PRACTICE

LANDLORD/TENANT

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LANDLORD/TENANT

I. INTRODUCTORY MATERIALS AND BACKGROUND ON ARKANSAS LANDLORD/TENANT LAW

A. Introduction

There has been little recent development in Arkansas landlord/tenant law when compared with other states. Many of Arkansas' landlord/tenant statutes were written for an earlier time and do not provide much substantive guidance today on the rental of residential property. One reason that case law has developed slowly may have to do with the frequent use of Arkansas' unique "failure to vacate" statute, A.C.A. '18-16-101, which subjects a rent delinquent tenant to criminal penalties for holding over beyond 10 days if served with a notice to vacate. The potential for criminal sanctions combined with local municipal court practices which discourage contested litigation may effectively deter tenants from asserting defenses or from filing affirmative lawsuits against landlords. The unraised issues may include retaliation, constructive eviction, warranty of habitability, as well as certain equitable defenses to non-payment.

Arkansas has no comprehensive landlord/tenant act. A civil summary eviction process known as unlawful detainer is found at A.C.A. "18-60-301, et seq. The landlord and tenant chapter to Title 18 (Property), at A.C.A. '18-16-101, et seq. contains many provisions that bear little relevance to present day realities between landlords and tenants. 1987 is the sesquicentennial year for the original landlord and tenant provisions. Chapter 88 of the Revised Statutes of 1987, now found as A.C.A. "18-16-103, 106, 107, 201-205; and 18-41-101. These sections contain the same wording today as they did at the time of statehood.

A security deposit law was enacted in 1979 and is codified as A.C.A. "18-16-301-306, but landlords who own five or fewer dwelling units are largely exempt from having to follow its provisions. There are no statutory procedures to cover security deposits paid to such landlords.

B. Scope of this Chapter

This chapter will survey Arkansas cases and statutes applicable to landlord/tenant law with emphasis on residential leases. It will not address issues more applicable to mineral leases or commercial leases (including farm leases). However, due to lack of precedent in residential lease situations, several of the cases cited herein involve commercial leases. This chapter will also focus on procedures, practicalities and defenses which may arise when tenants seek legal assistance on eviction or other disputes with landlords.

There is a significant public housing sector in Arkansas. In such instances state landlord/tenant law may be pre-empted by federal regulation. Dispute resolution in such situations may be subject to pre-termination or other administrative review. At the very least, there must be compliance with federal regulations before remedies under state law may be pursued. This chapter will include a brief survey of the major subsidized rental programs in Arkansas.

This chapter does not discuss housing discrimination which may be an issue in many landlord/tenant cases. The Fair Housing Act of 1968 (Title VIII) should be consulted when discrimination based on race, color, religion, sex or national origin is at issue. The Civil Rights Act of 1866 bars discrimination based on race and color in all real estate transactions. 42 U.S.C. '1982. There is a substantial body of federal case law interpreting these statutes.

Chapter 13 bankruptcy filings can be used to halt a criminal eviction or unlawful detainer by means of the automatic stay provision and will be addressed briefly in a separate section of this chapter.

C. The Landlord/Tenant Relationship

1. generally.

The relationship of landlord and tenant may be created by express agreement or it may be implied between the owner and occupant. *State v. Robinson*, 143 Ark. 456, 220 S.W. 836, (1920). A "lease" has been defined as a conveyance of a particular estate in lands for life or for years, or at will where reversion is left in the grantor. *Chittim v. Gossett*, 148 Ark. 654, 228 S.W. 393 (1921) (citing Blackstone).

2. Written and oral leases.

Subject to the Statute of Frauds, a lease agreement may be oral or in writing. Any lease agreement involving direct or indirect federal rent subsidies should always be in writing. As a practical matter, apartment lease agreements in Arkansas are nearly always written when the premises are part of an apartment complex or when the rental property is being managed by someone other than the owner. However, many lease agreements are still made orally. Written lease agreements can vary from multi-page contracts replete with boilerplate and fine print to scribbled memoranda. As between parties in a purely private (i.e., no rent subsidy) setting, there is no form lease which predominates across the state or among larger localities.

According to A.C.A. '16-31-104, an oral lease may not exceed one year in duration. In *Norton v. Hindsley*, 245 Ark. 966, 435 S.W.2d 788 (1969), where proof was insufficient to show a written three year lease agreement, the same proof was sufficient to prove that there was an oral lease for one year. Also under the Arkansas Statute of Frauds, any lease agreement exceeding one year in duration which is assigned must be assigned in writing. '16-31-102.

A residential lease agreement may be recorded with the circuit clerk, provided it is "proved or acknowledged according to law." See A.C.A. '14-15-402.

D. Arkansas Statutes - Landlord and Tenant

(Note: This section discusses Arkansas statutes which for the most part do not belong to a particular comprehensive scheme. Discussion on the statutes addressing civil and criminal eviction, landlord liens and distraint, and security deposits is contained in separate individual sections of this chapter.)

1. Chapter 88, Rev. Stat. of 1837.

A.C.A. "18-16-103, 106, 107, 201-205, along with '18-41-101 comprise the original landlord and tenant chapter of our statutes. The reader can determine which of these statutes could be relevant to contemporary landlord/tenant relations.

Secs. 18-16-103, 204 and 205 address such matters as the duties upon executors, administrators and survivors of deceased persons in certain instances regarding the collection or payment of rent. These sections primarily address such duties and rights with regard to tenancies for life only.

Sec. 18-16-202 requires a tenant who receives a summons in an ejectment action, (where a third person seeks to recover the premises), to promptly notify the landlord.

Sec. 18-16-107 provides that if a tenant notifies the landlord of intention to vacate by a certain date and fails to deliver, the landlord may collect double rent during the holdover period. In view of the penal nature of this section, the Court of Appeals has construed the double rent provision as special damages which must be specifically pleaded by the landlord for a court to permit recovery. *Keathley v. Diversified Fastener & Tool Co.*, 2 Ark. App. 59, 616 S.W.2d 775 (1981).

Sec. 18-16-106 provides that when a tenant for life, for years, or any person having possession of land under such tenant willfully holds over after termination of the term and 30 days written notice, the person entitled to possession may recover double the yearly rent during the holdover period, notwithstanding any equitable defenses. Although the deadlines imposed by this section could subject a tenant to great inconvenience and would injure the tenant's business, this does not enable the tenant to escape the double rent penalty provision. *Driver v. Edrington*, 74 Ark. 12, 34 S.W. 783 (1905).

Sec. 18-16-203 allows a landlord to recover a reasonable sum for use and occupation of any lands and tenements held by any person under an agreement not made by deed. It provides that oral agreements setting rent may be used as evidence in a landlord's action to recover rent and allows the owner to recover the value for use of lands occupied without any special agreement for rent.

Sec. 18-16-201 establishes a cause of action against tenants in ejectment for property owners to recover possession of premises whenever the tenant is in arrears for a half a year's rent. If for no other reason than the half year waiting period, these provisions are seldom used and have not been cited in any appellate decisions since 1905. (Ejectment is an action where one person may dispossess another from land upon showing title to the land. There is a separate statutory proceeding for ejectment, found at A.C.A. "18-60-201, et seq. which is not as restrictive as the one cited above.)

Sec. 18-41-101, placed by the compiler in the Landlord Liens section of the Code provides that for a lien by the landlord upon the crop grown for a demised year. (See I.E., below).

2. Other landlord and tenant statutes.

Sec. 18-16-102 makes it unlawful for any tenant to sublet any lands or collect rent from a sub-tenant without having obtained from the landlord and delivered to the sub-tenant a written direction stating the amount of rent authorized to be collected from the sub-tenant. This section permits the landlord to collect a pro rata share of rent from the sub-tenant upon the tenant's failure to make payment, in accordance with the amount of land cultivated by the sub-tenant. Any tenant who tries to collect rent from a sub-tenant without having followed the provisions of this section is guilty of a misdemeanor.

With respect to tenants, '18-16-104 provides that any person who interferes with, entices away or induces a renter who has contracted with another person to leave the leased premises before expiration of the contract without the landlord's consent shall be subject to a fine ranging from \$25.00 to \$500.00 and shall also be liable to the landlord for any advances made by the landlord to the renter and for all other damages. This section also applies to laborers. Most of the cases which have been referred to in this section involve sharecroppers.

Recently enacted '18-16-105 provides that an owner of farmlands may elect not to renew an oral or written lease for the following calendar year by giving notice on or before June 30

that the lease will not be renewed the following year.

Sec. 20-27-608 makes it illegal for an owner to retaliate against a tenant who reports existence of lead based paint on the premises. (See VI, *infra*.)

Tender of rent with a check which is returned for insufficient funds subjects the tenant to criminal liability under the Arkansas hot check laws, under Act 69 of 1987.

E. Landlord Liens, Distraint and Distress

1. Arkansas common law provisions.

Distraint or distress refers to a common law right of the landlord to seize a tenant's personal property to secure payment of past due rent. Arkansas has long recognized that a landlord has no common law lien or right to distraint against a tenant's chattels found on the demised premises for any rent or arrearages. *Bennett v. Taylor*, 49 S.W.2d 608 (1932). In absence of a statute or contract authorizing it, a landlord may not dispose of a tenant's belongings for rent arrearages. *Id.*

2. Arkansas statutory provisions.

a. crop liens, U.C.C. and forcible entry & detainer.

A.C.A. '18-41-101 et seq. address landlord liens, but these liens may attach only to crops grown on the rented property when there are rent arrearages or when certain advances are made by landlords to tenants in connection with producing the crop.

A "landlord's lien" is expressly excluded from Article 9 of the Arkansas version of the Uniform Commercial Code (UCC). '4-9-104(b). In interpreting the above provision contained in the original Arkansas version of the UCC, the U.S. District Court determined that a "landlord's lien" excluded by the UCC refers only to liens created by statute. In *re King Furniture City, Inc.*, 240 F. Supp. 453 (D.C. Ark. 1965). The court went on to find that a commercial lease agreement expressly providing the landlord with a lien on all property, chattels, or merchandise which might be placed in the leased premises created a contractual lien under Arkansas law, rather than a statutory lien. The contractual lien was enforceable pursuant to UCC Article 9 provisions which authorized the creation of liens by parties to a contract. The court further ruled, however, that the express contract lien in the King lease did not give the landlord the right to distress for rent under Arkansas law. Rather, it would only give the creditor a right to foreclose upon the lien.

A.C.A. '18-60-302 (forcible entry and detainer) provides that no person shall enter and hold any lands except where entry is given by law, and then only in a peaceable manner. In *Gorman v. Ratliff*, 289 Ark. 332, 712 S.W.2d 888 (1986), the Arkansas Supreme Court refused to allow a self-help lien enforcement and repossession of a tenant's goods by the landlord. The lease agreement between the parties in *Gorman* expressly authorized the landlord to enter the premises and store all of the tenant's personal property upon the tenant's non-payment of rent. The lease also expressly created a lien in favor of the landlord upon the tenant's personal property. In refusing to enforce these provisions, the court relied on the above mentioned provisions of '18-60-302. The court further ruled that the forcible entry and detainer statutes do not permit a self-help entry by a landlord onto the property occupied by another, and that the self-help provisions contained in the lease were thereby invalid.

b. Act 577 of 1987.

To add to the confusion on landlord lien law, there is an inconspicuous Section 2 to Act 577 of 1987, an Act purporting in its title to amend previously enacted law on the execution of a writ of possession, "and for other purposes."

Section 2 of the Act provides:

Upon the voluntary or involuntary termination of any lease agreement, all property left in and about the premises by the lessee shall be considered abandoned, and may be disposed of by the lessor as the lessor shall see fit without recourse by the lessee. All property placed on the premises by the tenant/lessee is hereby subjected to a lien in favor of the lessor for the payment of all sums agreed to be paid by the lessee.

This section raises many questions both as to the creation of these liens and to their

termination. Is abandonment to trigger the creation of the lien or is the lien created on all leases at the outset? What constitutes a voluntary termination under this Act? An involuntary one? If a tenant moves, can a lien follow the personal property? Does this section define abandonment, so that no affirmative act of giving up rights to the property is required?

How is the lien enforced? Article 9 of the U.C.C. still does not apply to statutory liens. See '4-9-104(b), *In re King Furniture City*, supra. Self-help enforcement still appears to be prohibited under the forcible entry detainer laws as interpreted in *Gorman v. Ratliff*; supra. However, lien enforcement may not matter if the tenant's property can be so quickly considered "abandoned" as that term is used in Act 577.

There is no requirement of notice to the tenant under this new Act that a lease will be considered to be involuntarily terminated by the landlord, thereby making the tenant's belongings abandoned property. This would appear to raise serious questions regarding the law's constitutionality.

II. EVICTIONS

A. Generally

"Eviction" has recently been defined as "interfering with the tenant's enjoyment of the premises". *Burdan v. Walton*, 268 Ark. 98, 689 S.W.2d 543, 545 (1985). For purposes of this chapter, the term is used in a more popular sense, a landlord's removal of a tenant by re-entry or by legal procedure. This section will first address negotiations generally, before moving on to specific procedures of criminal eviction, civil unlawful detainer, repossession without process and evictions from federally subsidized housing.

B. Negotiations

A tenant's advocate should always consider negotiating with the landlord to keep the tenant in the dwelling. Whether the landlord's concern is nonpayment or something else, if the tenant is a desirable one, it could be in the landlord's best interest to work with the tenant. The cost of eviction, clean up, advertising, and holding the rental property vacant while seeking a new tenant, can exceed the cost or risks involved in working with the current tenant. If the landlord perceives a particular tenant as desirable to any degree, it may not be worthwhile to search for a new tenant with an unknown background.

Before negotiating with the landlord, the tenant's advocate should obtain information about the tenant in order to determine desirable and undesirable factors as may be perceived by the landlord, in order to anticipate complaints and to persuasively argue why a settlement short of terminating the lease would be desirable.

A tenant's advocate should specifically obtain information about late payments and their frequency. If the termination is other than for nonpayment and the tenant has a good payment record, it could be effective to emphasize the payments since cash flow is always among the top considerations in the rent business.

Few clients who qualify for Legal Services have checking accounts, and they may not keep all of their receipts. It can be useful to ask the tenant how many times over a certain period they have made a late payment. Does the client understand when a payment is technically late? Is the lease clear on this point? What is the reason for the late payments? Perhaps the tenant has technically been paying late rent for some time under the terms of the lease, but there has been a waiver of those payments by the landlord. Did an emergency come up, causing the tenant to fall short on rent? Does the tenant have any other favorable rent history?

The above questions may not even have anything to do with the problem at hand, but they are always useful to know in advising the client and in negotiating with the landlord. (See Tenant Questionnaire at Form 4, *infra*.)

As well as finding out answers to the above questions, the tenant's advocate should always check the other side of the ledger to determine whether the tenant has claims against the landlord, before starting to negotiate.

When a tenant's advocate is negotiating a nonpayment case, it is certainly more persuasive to be able to tell the landlord that the back rent is on hand at the advocate's

office. Unfortunately, the tenant may not always have the past due rent when they first visit an attorney. If that is the case, the advocate should find out exactly where the money is coming from and when it will be received. Then, if appropriate, the advocate may discuss the particulars of when the rent will be paid with the landlord.

Many landlords, especially in nonpayment cases, get upset that the tenant has retained an attorney. In such instances, it may help for the tenant's advocate to explain to the landlord that the tenant cares enough to see an attorney in order to try to straighten out the problem. Assurance that the tenant strongly hopes to continue renting in good standing is also useful. The advocate may discover that a breakdown in communications has occurred between client and landlord and renewed communication can sometime resolve the dispute.

C. Failure to Vacate - "Criminal Eviction"

1. generally.

A.C.A. '18-16-101, a/k/a the criminal eviction statute, a/k/a the failure to vacate statute, provides:

(a) Any person who shall rent any dwelling house, or other building or any land, situated in the State of Arkansas, and who shall refuse or fail to pay the rent therefor, when due, according to contract, shall at once forfeit all right to longer occupy said dwelling house or other building or land.

(b) If, after ten [10] days' notice in writing shall have been given by the landlord, his agent or attorney, to the tenant to vacate said dwelling house or other building or land, said tenant shall willfully refuse to vacate and surrender the possession of said premises to said landlord, his agent or attorney, said tenant shall be guilty of a misdemeanor and upon conviction thereof before any justice of the peace, or other court of competent jurisdiction, in the county where said premises are situated, shall be fined in any sum not less than one dollar [\$1.00], nor more than twenty-five dollars [\$25.00] for each offense. Each day the tenant shall willfully and unnecessarily hold the dwelling house or other building or land after the expiration of notice to vacate shall constitute a separate offense.

Since the penalty provisions of '18-16-101 do not set a term of imprisonment, the actual classification of this criminal offense should be as a violation and not a misdemeanor under the 1975 revised criminal code. A.C.A. '5-1-108.

Sec. 18-16-101, along with the civil unlawful detainer statutes discussed below, are the two primary means by which landlords dispossess tenants in Arkansas. An informal statewide survey conducted in preparation for this chapter in the summer of 1987 indicates that '18-16-101 is more frequently employed by private landlords than the civil. In some counties or municipalities, however, '18-16-101 criminal charges are rarely, if ever, brought against tenants (Washington County and Russellville, for example). As local practice and procedures appear to govern the handling of these charges, it is important that a tenant's advocate know the local prosecutor's or city attorney's attitudes and procedures regarding this statute as well as those of the municipal judge in order to formulate a defense strategy.

Sec. 18-16-101 does not empower a court to evict anyone. Nor is the fine required to relate to the amount of rent owed by the tenant. The statute appears only to give the court the power to find a tenant guilty and then a fine for each day the tenant stays in possession "willfully and unnecessarily."

An indigent defendant charged under '18-16-101 is not entitled to representation by a public defender, since there is no threat of imprisonment under the statute. See *Gideon v. Wainwright*, 372 U.S. 335 (1963).

Sec. 18-16-101 as a practical matter gives landlords an economic benefit by enabling the prosecutor commence the landlord's litigation in the name of the state, so the landlord does not incur any attorney fees or court costs. Once charges are filed, defendant tenants frequently move, so that no legal fees will have to be incurred for eviction at all and, depending upon the local practice, the landlord may never need to take time out for a court appearance if the tenant has moved.

In view of this potential economic aid to landlords, it is worth remembering that '18-16-101 charges may only be filed against tenants who have failed to pay rent. Some

landlords may try to file failure to vacate charges against tenants that they want to evict for reasons other than non-payment of rent. This can be risky business. The Arkansas Supreme Court affirmed an award of punitive damages for malicious prosecution where a landlord charged a tenant under '18-16-101 without probable cause. *Parker v. Brush*, 276 Ark. 437 S.W.2d 539 (1982).

One may wonder why some prosecutors spend significant amounts of time on failure to vacate cases. Certainly there are more serious crimes to prosecute than failure to vacate if the prosecutor's time is at a premium. Some prosecutors may justify handling these cases by saying it's their job to enforce all the laws. However, a civil unlawful detainer action provides a swift remedy for landlords, so if '18-16-101 charges are not brought by the prosecutor, the landlord is not left out in the cold. The tenant's attorney may wish to consider questioning the local prosecutor or city attorney as to the necessity of bringing such charges when civil remedies exist.

The statute is unique. In all other states, civil unlawful detainer is the exclusive remedy for landlords seeking to dispossess nonpaying tenants. However, attempts to challenge the statute as an improper exercise of police power have not succeeded. See *Munson v. Gilliam*, 543 F.2d 48 (8th Cir. 1976); *Poole v. State*, 244 Ark. 1222, 428 S.W.2d 628 (1968). In *Munson*, the court held that the statute addressed a legitimate concern to the legislature. The court drew an analogy between holding over and theft. In both *Poole* and *Munson*, the courts indicated that any defenses that could be raised in civil litigation arising out of a failure to vacate can also be presented as defenses to '18-16-101.

In *Williams v. City of Pine Bluff*, 284 Ark. 551, 683 S.W.2d 923 (1985), '18-16-101 was described as one of the "correct" statutes to be used against holdovers who have not paid their rent. In *Williams*, the court overturned the conviction of a rent delinquent holdover tenant who had been charged with Criminal Trespass, A.C.A. '5-39-203. (The court held that this criminal trespass statute did not apply in landlord/tenant situations in view of the more specific '18-16-101 together with the civil unlawful detainer laws).

2. failure to vacate and federally subsidized housing.

The U.S. Dept. of Housing and Urban Development (HUD) has determined that '18-16-101 charges may not be filed against tenants of either federally subsidized public housing projects or multi-family subsidized housing. HUD determined that this statute is not compatible with federal regulations governing lease termination in such housing. See II.F.1., *infra*.

3. handling of failure to vacate cases in municipal courts.

a. jurisdiction.

Do municipal courts have proper jurisdiction in failure to vacate cases? Ark. Const. Art. 7, '43 establishes corporation courts for towns and cities (i.e., municipal courts) and gives them concurrent jurisdiction with justice of the peace courts in civil and criminal matters. Ark. Const. Art. 7, '40 defines the jurisdiction of justice of the peace courts. It expressly provides that justice of the peace courts shall not have jurisdiction where a lien on land or title or possession thereto is involved. In *Lingo v. Myers*, 211 Ark. 638, 201 S.W.2d 745 (1947), the Arkansas Supreme Court struck down a newly enacted amendment to the unlawful detainer statute giving municipal and justice of the peace courts exclusive jurisdiction for unlawful detainer cases where the rent involved did not exceed \$200. The court found that the right of the respective parties to possession of rented premises is the very essence of an action for unlawful detainer. Therefore, the statute placing jurisdiction in unlawful detainer cases with the municipal and justice of the peace courts violated Art. 7, '40 of the Arkansas Constitution and was void.

A.C.A. '16-17-206 provides that municipal courts shall not have jurisdiction in civil cases where a lien on land or title or possession thereto is involved. However, Art. 7, '40 does not expressly exclude the same prohibition from applying to criminal, as well as civil cases. Since the criminal eviction statute expressly includes refusal to surrender possession of the rental premises as one of the elements of the crime, it may be open to question whether municipal courts have had any jurisdiction to hear these cases.

Jurisdiction to hear failure to vacate cases in municipal court does not appear to be affected by passage of Amendment 64 to the Arkansas Constitution. Amendment 64 expands civil jurisdiction of municipal courts but does not change jurisdiction in criminal actions.

b. procedure

Criminal eviction charges are typically brought in a municipal court in the county where the property is located. A tenant who wishes to assert a defense to these criminal charges has a difficult initial decision to make: If convicted the tenant faces a potentially burdensome fine of up to \$25 a day. (But see 6.B. below). The possibility of a severe fine is frequently coupled with local practices which discourage a tenant from contesting the charges. For example, a municipal judge may advise the tenant at plea and arraignment that the charges will be dismissed if the tenant will move immediately, but also warn the tenant of a possible large fine if the tenant has not moved by the time of trial upon a guilty verdict.

In some courts, the defendant must appear in within a short time following service of a citation, no bond being required. Plea and arraignment can be informal. Some courts may allow a "not guilty" plea to be made by telephone if the tenant has an attorney. If the tenant has moved before trial, some judges will dismiss the charges outright regardless of whether the tenant remained on the premises beyond the 10th day of the notice. Other judges may require a trial and upon a guilty verdict, impose a fine, plus restitution and costs, even if the tenant has moved. Still others may allow the prosecutor to voluntarily withdraw the charge if the tenant has moved, which achieves the practical effects of dismissal. See A.C.A. '16-85-302.

Occasionally, a large fine (number of days x \$25, plus costs) may be imposed upon the tenant if the tenant is found guilty and is still occupying the premises at the time of trial. The court may order the tenant to report back to court within a day or so for further consideration such as part or all of the fine and costs if the tenant has moved out by that time.

Some courts may attempt to use their powers of contempt to force a tenant to move, although '18-16-101 itself only gives the judge the power to impose a fine. This point was subject to a consent order in *Cotner v. Dishongh*, No. 82-2478 (Pulaski Co. Cir. Ct. July 27, 1982), with a finding that it exceeded the Little Rock Municipal Court's jurisdiction to order a defendant on a '18-16-101 charge to move or be subject to fine and incarceration for contempt.

4. bond requirement

Some municipal court judges have required tenants charged under the criminal eviction statute to post bonds. The necessity for doing this should be scrutinized by the tenant's attorney. Ark. R. Crim. P. 9.2(a) states that bail shall be set only after the court determines that "no other conditions will reasonably ensure the appearance of the defendant in court." If the tenant has not vacated, the tenant's advocate can argue that a bond will not be necessary since if the tenant does not appear in court, an alias warrant can immediately be served on the tenant at the address where the tenant is accused of committing the crime.

Inability to post a bond can create additional problems with some tenants, especially those living on fixed incomes. For example, an unmarried head of household charged with failure to vacate, unable to post bond and placed in jail, faces a risk of child neglect charges and temporary placement of her children with Social Services. Also, although the purpose of a bond is to guarantee the defendant's appearance in court, it is likely that most landlords would have no qualm if the tenant were to disappear altogether, as long as they've vacated the premises.

5. restitution to victim landlord.

Under '16-90-303, an order of restitution by the circuit judge is mandatory if a defendant pleads guilty to or is found guilty of a criminal offense. The amount awarded for restitution is in addition to any amounts imposed as part of the sentence. This section is applicable to municipal courts under '16-96-101, which provides that proceedings in circuit courts, so far as applicable, shall govern the proceedings of city courts, except as specifically otherwise provided.

The Arkansas Supreme has held that any judgment rendered by a municipal court as restitution pursuant to this section may not exceed the maximum jurisdictional limits governing civil actions in the municipal courts. *Townsend v. State*, 292 Ark. 157 (1987).

When the restitution to victims statute is used in conjunction with a failure to

vacate case, the tenant's advocate will note the practical result that the prosecutor, still acting on behalf of the state and without any retainer agreement, has now become the landlord's collection attorney.

6. defenses to failure to vacate

a. willfulness issue.

In upholding the constitutionality of '18-16-101, the court in Poole called attention to the requirement that there must be a willful refusal to vacate by the tenant and a necessary criminal intent to deprive the owner of the property. *Poole v. State*, 244 Ark. 1222, 428 S.W.2d 628. What does it take for a holdover for non-payment to be willful? Failure to pay rent to a landlord can occur when the tenant has the money but feels justified for one reason or another in not paying the landlord. It can also occur when the tenant wants to pay but simply does not have the money. In either case, it is debatable whether the non-payment is willful. Other fact situations can be imagined which hinge upon a tenant's good faith and whether the holding over has been committed willfully.

b. separate charge issue.

A tenant who is found guilty of failure to vacate may be charged with an extremely high fine representing \$25 dollars multiplied by the number of days between the expiration on the 10 day notice and the trial date. The threat of such a fine is of particular concern to a tenant offering a good faith defense. The tenant who retains possession while waiting for the trial date could face an additional separate \$25 fine for each day that they await the call to trial. However, it would appear that for a tenant to be liable for any more than a single \$25 fine, the citation, summons or information served upon the tenant must list a separate charge for every day that the tenant is alleged to have committed the offense, to comply with due process notice requirements. See Rules 5.3(iv), 6.2(iv), 7.2(v) and 21, Ark. R. Crim. P. If this analysis is correct, it is submitted that tenants charged with failure to vacate are frequently threatened in court with fines that exceed the true maximum penalty, since citations typically contain only one count of '18-16-101 violation (maximum fine \$25, plus costs). Prosecutors can correct this by amending or issuing new warrants. However, a prosecutor may decide it is not worth his or her time to do so. Amendment may also result in undesirable delays, from a landlord's viewpoint.

c. other defenses.

Since Poole permits a tenant to present any defense that would otherwise be available in a civil action, other defenses discussed at II.D.3.c., infra., may be consulted.

D. Unlawful Detainer, A.C.A. "18-60-301, et seq.

1. generally.

Unlawful detainer, (U.D.), a/k/a summary eviction proceedings, a/k/a summary possession statutes, is the civil remedy available to landlords which enables them to regain possession of their rental property from tenants who are wrongfully holding over, whatever the reason. Virtually every state has enacted such a procedure, although notice requirements and other particulars under such laws vary. The Arkansas U.D. statutes are found at A.C.A. "18-60--301 through 312. This chapter of the code also addresses forcible entry and detainer (F.E.D.) which, although similar in procedure, is a different cause of action.

The Arkansas U.D. statutes were revised in 1981. Although the 1981 Act actually repealed the former U.D. and F.E.D. statutes, most of the language in the new act tracks that of the former. The revisions were limited primarily to certain notice and surety provisions.

The U.D. statutes are structured to afford the landlord a quick means of regaining possession of rental premises by using a two part, or bifurcated hearing process. The first hearing is the summary proceeding. The sole issue is which party shall have possession of the premises pending a final hearing on the merits. The tenant's right to present defenses at the first hearing can be limited. The U.S. Supreme Court has held that this procedure is permissible where there are other safeguards of due process to the tenant, such as a requirement that security or bond be placed by the landlord out of which the tenant may collect damages, if at a later hearing the tenant's defenses are meritorious. *Lindsey v. Normet*, 405 U.S. 56 (1972).

A.C.A. '18-60-304 defines unlawful detainer. The phrasing of this section parallels the old unlawful detainer law and is rather obscure for a law passed in 1981. With respect to tenants, it appears to provide that if a tenant intentionally holds over on rental property without right beyond the term of the lease, or if the landlord is otherwise entitled to possession, the tenant must vacate within three days after service of a notice to quit or the tenant will be guilty of unlawful detainer. "Guilty" in this sense appears to mean civilly liable.

2. procedure for unlawful detainer.

a. notice to quit.

The Arkansas Supreme Court has construed the three day notice requirement under the old Ark. Stat. Ann. '34-1503 (1962 Repl.), (which was later repealed but which reads exactly the same as the current A.C.A. '18-60-304), to mean that the day the written notice is received by the tenant is counted as one of the three days. *Whitner v. Thompson*, 188 Ark. 240, 65 S.W.2d 28 (1933).

Notices to quit are frequently served by sheriff's deputies. In fact, the recently amended statute designating fees which shall be charged by sheriffs now sets a \$15.00 fee for service of a Notice to Vacate. A.C.A. '21-6-307. However, '18-16-304 only allows service of the notice to quit to be made by the landlord or the landlord's agent. It may be questioned whether a public official can be the landlord's agent, especially since a notice to vacate is not the same as service of process.

b. complaint.

A U.D. complaint is filed in circuit court. '18-60-307. This section also provides that the complaint must:

- (1) be signed by the person making the complaint, their agent or attorney;
- (2) specify the "lands, tenements and other possessions" allegedly being unlawfully detained;
- (3) specify the person committing the unlawful detainer;
- (4) specify the date when the unlawful detainer was committed;
- (5) by affidavit state that the plaintiff is lawfully entitled to the possession of the lands, tenements and other possessions set out in the complaint, and that the defendant unlawfully detains the same after lawful demand therefor has been made.

c. special notice attached to complaint.

After the complaint is properly filed, the clerk must then attach a notice to the complaint which is entitled "Notice of Intention to Issue Writ of Possession." Basically, this advises the tenant to file written objections with the clerk within five days of service (excluding Sundays and Holidays) if that tenant wishes to contest the plaintiff's petition, and that upon failure to do so, the tenant may be directed to surrender possession of the property to the sheriff upon the issuance of a "Writ of Possession." '18-16-307(a).

It follows that if the tenant is served with a complaint with the clerk's notice attached and the tenant fails to file objections with the clerk in five days, a Writ of Possession may be issued directing the sheriff to the tenant without a hearing. It would appear in such an instance, that the tenant would still have 20 days following service to file an answer and, despite being dispossessed, have an opportunity to defend the action at a final hearing on the merits. Ark. R. Civ. P. 12(a).

d. summary hearing for writ of possession.

If a tenant files a timely objection to the landlord's claim for a writ of possession of the premises, the landlord may set a hearing on the issue of possession to the property. The landlord shall provide notice thereof to the tenant or tenant's attorney. '34-1507(c).

The landlord's burden at this hearing is to present evidence sufficient to make a prima facie case of entitlement to possession of the property. The tenant may present

evidence to rebut this prima facie case. '18-16-307(d).

e. obtaining a writ of possession and the matter of "adequate security".

If the court determines that the plaintiff is likely to succeed on the merits at the summary hearing, the court may order the clerk to issue a writ of possession to the landlord. If this is done, the landlord must post "adequate security" as determined by the court. '34-1507(d). A writ of possession may also issue upon the failure of the tenant to object after being properly served with a U.D. complaint.

Sec. 18-60-310, as recently amended by Act 577 of 1987, states the manner by which the sheriff may execute the writ of possession, including by seizure of the property and belongings of the tenant and placing those items in a public warehouse or other reasonable storage under the landlord's control until a final determination by the court has been made. Act 577 further provides that if the tenant's property is stored and at the final hearing the court rules for the landlord, the property and belongings so stored may be sold to satisfy storage costs and any monetary judgment for the landlord.

Sec. 18-16-310, as amended, appears inconsistent with '18-16-1507(e). Under the latter provision, a defendant seeking to retain possession of the property shall have 5 days from the issuance of the writ to post security. Sec. 18-16-310, however, requires forthwith execution of the writ by the sheriff.

If the tenant who has filed objections wishes to remain in possession of the premises pending a trial at a later date, the tenant must also post "adequate security" as determined by the court within five days of the issuance of the writ of possession. '18-16-307(e). This requirement of security is one of the new features of the revised unlawful detainer act, but the Act does not define "adequate security." Under the former '34-1507 (1962 Repl.), the landlord was required to post a surety bond in an amount equivalent to two years rent on the property to secure the writ of possession, and under the former '34-1510 (1962 Repl.), the tenant was required to do the same in order to retain possession pending a trial on the merits. These provisions had been subject to attack on the grounds that the size of this bond created an undue hardship upon tenants who wished to retain possession of the premises and violated due process.

The tenant's advocate may wish to consider alternative approaches with regard to "adequate security." If a writ of possession is issued and the tenant has not been given the opportunity to fully develop the defenses which otherwise might be raised at trial, the advocate may wish to proffer this evidence and argue that the court should require a substantial security to be placed by the landlord with the court's registry in order to secure damages for the tenant. (This may also create financial leverage against the landlord, depending on who the landlord is).

If there is no serious question that the landlord could cover the cost of a judgment for the tenant, the tenant's attorney could offer to waive the posting of a bond by the landlord as a good faith gesture, probably conditioned on a similar gesture by the landlord's attorney. The landlord's attorney may contend that the tenant should post substantial security with the court, perhaps making arguments about the money that the landlord stands to lose, but also because of the financial leverage this creates against the tenant. There appears to be nothing in '18-60-307 that would preclude adequate security from the tenant as being payment of the monthly rent as it accrues. This would seem to be a fair solution particularly where the grounds for eviction are non-payment of rent or some other grounds not related to substantial damage to the premises or other matters which could increase the potential damages to the landlord.

f. trial on the merits.

A.C.A. "18-60-309 and 311 cover the matters that may be brought before the court at a trial. Presumably, this is the trial on the merits and not the writ of possession hearing above. These statutes do not dwell on burdens of proof or trial procedures at the final hearing. It may be useful to consult Lindsey v. Normet, cited earlier, the U.S. Supreme Court decision which upheld the use of U.D. proceedings.

Sec. 18-60-309 provides that the trial can be held before a court or jury. It further provides that if the landlord prevails against a residential tenant, the landlord shall be entitled to receive an amount equal to rental value for the time that the defendant unlawfully detained the property and for judgment awarding recovery of the property if the premises have

not already been delivered to the landlord, plus costs.

Sec. 18-60-309 also provides that if the verdict is for the tenant that the judgment may include costs plus any damages that may be assessed in the tenant's favor, and also a writ of restitution restoring the property to the tenant, if the tenant had earlier been dispossessed. Sec. 18-60-311 provides that the tenant who has been dispossessed prior to the trial may present evidence showing the damages sustained and the court may render judgment against the plaintiff and against any surety posted as security plus costs. In a case decided prior to the new U.D. act, the Arkansas Supreme Court denied relief for mental anguish suffered by a tenant who ultimately prevailed at the final hearing stage, but who lost possession of farm property due to inability to post adequate bond during the pendency of the action. *Brickey v. Lacy*, 245 Ark. 860, 435 S.W.2d 443 (1968).

Sec. 18-60-308 provides the title to the premises in question shall not be adjudicated. This provision distinguishes an unlawful detainer action from an action in ejectment where the person claiming possession must show evidence of title to prevail.

3. U.D. defenses.

a. Procedural issues.

Procedurally, the same defects that may occur in other types of cases, i.e. lack of venue, improper parties, improper service, pleading deficiencies and the like. Although '18-60-307 requires the defendant tenant to file objections within five days, it would appear that certain procedural defects may still be responded to by motion, in lieu of objections, and then the time in which to file the objections upon an unfavorable ruling on the motion would commence at the time the ruling on the merits is made. See Ark. R. Civ. P., Rule 12. One relatively common procedural defense that arises in unlawful detainers is that the clerk fails to stamp or attach the requisite notice on the copy of the summons that is served upon the tenant. Since the U.D. procedure is dependent upon service of such a motion, the cause of action then becomes subject to a motion to dismiss pursuant to Ark. R. Civ. P. 12(b)(4) and (5).

b. procedural tactic: transfer to equity.

It is accepted doctrine that equity abhors a forfeiture. In the event that there are equitable defenses to unlawful detainer charges, the tenant's advocate should consider petitioning the court for transfer to equity. See A.C.A. '16-57-104.

The first portion of '18-16-101, (failure to vacate) allows anyone who fails to pay their rent when due, according to contract, shall at once forfeit all right to occupy those premises. See, *LaFarque v. LaFarque*, 210 Ark. 97, 194 S.W.2d 438 (1946).

Notwithstanding the harsh forfeiture language in this first portion of '18-16-101, the Arkansas Supreme Court has held that there should be no forfeiture for nonpayment where a lease contains no expressed provision for such. *Smith v. Glover*, 135 Ark. 531, 205 S.W. 891 (1918).

In *Pierce v. Kennedy*, 205 Ark. 419, 168 S.W.2d 1115 (1943), the landlord filed a U.D. action in circuit court alleging failure to pay rent. The lease agreement provided that failure to make prompt payment of rent made all unpaid rent due and that the tenant forfeited all rights to the property. The tenant claimed that while the monthly rent was due by the first, it was in fact paid after the first but before the end of the month. The case was transferred to equity due to a pending mortgage foreclosure where the tenant had the option to purchase. (Mortgage foreclosure cases are tried in chancery court). The Arkansas Supreme Court denied the forfeiture, and stated:

"The Court of Equity even in the absence of fraud, accident or mistake, may relieve against a forfeiture by the breach of a covenant to pay rent . . ."

In *Pardue v. Bryant*, 219 Ark. 727, 244 S.W.2d 135 (1951), a circuit court U.D. action was filed against a tenant who paid the two days after the due date. The tenant's wife's funeral occurred on the due date. The matter was transferred to equity and became an action to cancel the lease. The Arkansas Supreme Court held that a court of equity has the power to relieve against forfeiture for nonpayment because rent is the primary object of the parties and the forfeiture is merely an incident intended to secure its payment.

In addition, there are several Arkansas cases which refuse to allow forfeiture for various types of breaches of a lease by tenants in cancellation suits, which apparently began in chancery court. *Salley v. Michael*, 151 Ark. 172, 235 S.W. 785 (1920); *Meers v. Tommy's Men's Store, Inc.*, 230 Ark. 49, 320 S.W.2d 770 (1959).

For illustration, a tenant's advocate might consider transferring a U.D. case to equity in the following situations:

(1) An unwed mother of two children who has just turned 19 and recently began renting an apartment in a housing project failed to pay her rent on time shortly after the lease agreement began and the housing authority sought to terminate her lease. Furthermore, she is functionally illiterate. If the tenant can tender the back rent in court and demonstrate that she did not realize the significance of having to pay the rent by the due date, and that this is the first time that she has been out on her own renting property, it can be argued that equity should disallow a forfeiture and give her another opportunity to comply with the lease provisions.

(2) An elderly couple with no assets living from month to month whose Social Security check, the sole source of income, arrives late, is lost in the mail or is stolen. As a result, they do not have the money on the due date or immediately thereafter to pay the rent, but they do have it following the service of an eviction notice in commencement of U.D. proceedings. A court of equity might deny forfeiture in such an instance.

c. substantive defenses.

Substantive defenses available in U.D. cases depend on the particular facts. Some of the substantive issues which may arise are listed below. A tactical problem for the tenant's advocate in raising these defenses may revolve around the question of whether they should be developed at the initial summary hearing or later during the trial on the merits.

'18-60-307(d) permits a tenant to present evidence in rebuttal to the plaintiff's prima facie case of entitlement to possession of the property at the initial summary hearing.

It is not clear that the tenant is prevented from raising defenses at the initial hearing, at least as long as those defenses can be considered rebuttal against the landlord's proof. In most cases, especially those involving low-income tenants, the initial hearing may be the critical point in a U.D. suit. If the landlord prevails at that point, the many tenants who cannot post security to retain possession will not have the financial ability or the desire to pursue the matter months later at a trial on the merits. It is often desirable for the tenant to present as many defenses as possible at the initial hearing. Some strategic reasons might exist for withholding the defenses until a later hearing, but in view of the prospects of being dispossessed these reasons should be weighed carefully.

Another problem is that courts that deal with them are accustomed to the initial hearing being short and swift. This initial hearing is not a trial and it is not expected that a significant number of witnesses will be present to testify. But the statute does not disallow having numerous witnesses at the hearing. Depending upon the scheduling procedure of the particular circuit judge trying the case, the initial hearing may be set early in the morning, prior to an all day jury trial or under other similar circumstances where the court does not expect to spend a lot of time hearing it. This may call for some tactical discretion on the part of the attorney wishing to present numerous witnesses and raise numerous issues in defense of an unlawful detainer case, but again, there does not appear to be anything in the statutes to preclude this.

In the Sixth Judicial District of Arkansas, law clerks frequently hear initial U.D. hearings sitting as masters. A.C.A. '16-13-217 permits law clerks to serve as master in districts having populations greater than 240,000 and to conduct pre-judgment hearings. These law clerks might have more time than the sitting judge would have to permit development of issues at the initial proceeding.

While it is not a defense per se, see VI, *infra.*, concerning possible relief for tenants through Chapter 13.

Substantive defenses which may typically be raised may include the following:

1. Waiver - Landlord accepted past-due rent after service of Notice to Vacate. But see, *Best, Inc. v. Rimmel Playgrounds Park Assn.*, 192 Ark. 843, 96 S.W.2d 452 (1936).

2. Estoppel/waiver - Landlord waived late payment for this month by habitually accepting late payments in the past, thereby modifying terms of lease through course of conduct. *Duncan v. Malcomb*, 234 Ark. 146, 351 S.W.2d 419 (1961).

3. Breach is not substantial enough to allow for termination of contract.

4. Unpaid rent was used to make repairs (See Sec. V.).

5. Prohibited retaliatory action (See Sec. VI.).

6. Breached condition is rooted in unconscionable lease provision.

E. Self-Help Evictions

The Arkansas supreme Court has ruled in *Gorman v. Ratliff*, 712 S.W.2d 888 (1986) that a landlord may not use self-help to evict holdover tenants, and further, that a lease agreement that permits such self-help eviction will not be enforced. The court relied on A.C.A. '18-60-302 in the forcible entry and detainer statutes and allowed the tenant to maintain a tort action against the landlord who committed the self-help eviction. The Arkansas Supreme Court has ruled that while unlawful detainer is an action in contract, forcible entry and detainer is a tort action. *Cline v. Smith*, 205 Ark. 936, 167 S.W.2d 872 (1943). Thus, while a tenant who ultimately prevailed after losing possession in an unlawful detainer action was denied a claim for mental anguish, on finding that the landlord was guilty only of breach of contract, *Brickey v. Lacy*, 435 S.W.2d 443 (1969), there would appear to be no such limitation to damages in a tortious forcible entry and detainer. [Also see Sec. I.E. on Liens, Distress and Distrain].

An annotation at 6 ALR 3d 177 (1966) provides a helpful framework for analyzing self-help theories, issues, and remedies.

F. Evictions from Federally Subsidized Housing

1. generally.

Numerous federally subsidized rental housing programs operate in Arkansas. One of the most well known programs is the Section 8 program where individual homeowners rent their property to low-income families, with a portion of the rent coming from the family and the remainder being paid through subsidy often from a public housing authority (PHA). "Housing projects," operated by local PHAs which charge rent to low-income families in accordance with their income, are also well known. There are several other programs, including HUD programs for the elderly and handicapped. There are numerous privately developed multi-family apartment complexes which were built with low interest financing through HUD with the stipulations that the housing be made available to low or moderate to low income families. Farmers Home Administration (FmHA) programs also provide rent subsidies to low-income families in rural areas and in portions of the state, to migrant families.

A person or family whose financial situation allows them to qualify for a federal rent subsidy may lose more than just the premises alone if they are evicted. They also may lose the availability of a financial subsidy which enables them to live in decent, safe housing. The prospect of such a significant loss to a person or family living on this margin provides the basis for a pre-termination administrative reviews which are required in some form under virtually all subsidized programs.

These programs vary in design and purpose, but they receive their subsidies from the federal government. The amount, form, and directness of these subsidies to tenants varies. Each of these programs is governed by regulations which can be found in the Code of Federal Regulations (CFR). However, the regulations are not uniform to all subsidized programs.

If the advocate knows or suspects that federal rent subsidies are involved and the apartment complex has an identifiable name, they can call the Little Rock HUD office currently at (479) 378-5931, and inquire through the area counsel's office as to the exact nature of the housing program. Also, the advocate can check with FmHA, at (479) 378-6281 to determine whether the complex is subsidized under one of these FmHA programs. Once the type of program is identified, the appropriate CFR regulations can be consulted. In addition to these regulations, many of the programs, especially those under HUD, use management handbooks which contain guidelines established by HUD. These further delineate the responsibilities of management and of tenants. The manuals may be obtained through HUD in Little Rock. Also,

there may be local PHA regulations which, when not inconsistent with HUD rules and regulations or federal law, may further delineate duties of management and of tenants.

Every set of regulations provides specific procedures which be followed by a landlord seeking to evict a tenant. At a minimum, there must be "good cause" to terminate a tenant's lease. Each set of regulations requires that certain forms of notice be sent to tenants in the event that termination of their tenancies is being sought. For examples of different regulatory schemes, see 24 C.F.R. Part 247 (1987) (236, 221(d)(3) and (5) programs, rent supplement, Section 101 housing, Section 202 housing, and Section 8 HUD held mortgages); 24 C.F.R. Part 880 (1987) (Section 8 new construction); 24 CFR Part 881 (1987) (Section 8, substantial rehabilitation); 24 C.F.R Part 882 (1987) (Section 8 existing housing); 24 C.F.R. Part 883 (1987) (Section 8 - -state housing agencies); 24 C.F.R. Part 884 (1987) (Section 8 new construction set-aside for 515 rural rental housing); and 24 C.F.R. Part 886