

# DECENT HOUSING IS A RIGHT

## HANDBOOK ON TENANTS' RIGHTS

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If you live in rental housing in West Virginia, the following are your rights under the law:

1. You have the right to live in decent housing at all times.
2. Your landlord is required to maintain your housing in a fit condition from the time you move in until the time you move out.
3. You have the right to complain about unfit housing conditions to your landlord or to the local government agencies, such as the building code inspector, fire marshal or health department.
4. Your landlord cannot evict you in retaliation for complaining about unfit housing conditions
5. You have the right to file a civil suit against your landlord to enforce your right to decent housing and to ask for money damages if your rights have been violated.
6. Although it is best to be represented by a lawyer, you have the right to file a suit on your own without a lawyer.
7. If you are a low-income person, you have the right to file a suit and to use all of the services of the court, even if you cannot afford to pay.
8. If you are not behind in your rent, your landlord must provide you with proper notice in advance before trying to evict you.
9. Even if you are behind in your rent, your landlord must go through the court in order to evict you.
10. It is unlawful for your landlord to lock you out, shut off your utilities, refuse to make repairs, or do other things to evict you without going through the court.
11. It is unlawful for your landlord to seize and impound your personal property as a way of collecting back rent.
12. It is unlawful for your landlord to enter your rental housing at any time whatsoever without consent, except for the purpose of making emergency repairs.

13. If your landlord files a suit to evict you in Magistrate Court, you have the right to remove your case from Magistrate Court to Circuit Court.
14. You have the right to file a counterclaim for money damages against your landlord if your rights have been violated
15. You have the right to have your case decided by a jury either in Magistrate Court or Circuit Court, but not both
16. If your case is decided in Magistrate Court, you have the right to appeal to Circuit Court within 20 days if you disagree with the decision
17. It is unlawful for the landlord to refuse to return your damage or security deposit without just cause.
18. If you have a written lease or rental agreement, or if you live in subsidized housing, you may have many other rights and protections.

## **Decent housing is a right: Handbook on tenants' rights**

### Introduction

If you live in rental housing in West Virginia, your landlord is required by law to maintain your housing in a fit and habitable condition from the time you first move in until the time you move out. This means that the landlord must make all necessary repairs in a timely manner while you reside in the housing. The landlord must also make sure that the condition of your housing meets all health, safety, fire and housing codes.

If your landlord fails to maintain your housing in a habitable condition, you have the right to take action to enforce the law. First, you have the right to complain to your landlord about the conditions without fear of being evicted in retaliation for making the complaint. You also have the right to complain to various agencies which enforce these laws, such as your local building code inspector, fire marshal or health department

If your landlord tries to evict you for making a complaint, or for any other reason, you have the right to contest the eviction in court. Your landlord cannot take the law into his or her own hands by locking you out or trying to evict you without first going through court procedures. Once you are in court, you also have the right to have your case decided by a jury either in Magistrate Court or Circuit Court, but not both.

The purpose of this handbook is to give you a brief explanation of your legal rights as a tenant to help you determine whether your rights have been violated and to help you enforce your rights under law. If you have a written lease, or if you live in subsidized housing, you may have additional rights beyond what all tenants have under West Virginia law.

If you believe that your rights as a tenant have been violated, it would be best to consult with a lawyer for further assistance in enforcing your rights. If you are unable to afford a lawyer, you may be eligible for representation from a legal services program which helps low-income people. To find out if you are eligible for assistance, you should contact the West Virginia Legal Services Plan, Inc. at 800-642-8279.

### **Landlords must provide proper written notice**

Under West Virginia law your landlord is required to provide you with proper written notice in advance before attempting to evict you. The amount of notice required varies

depending on whether or not there is a written lease. If there is a written lease or rental agreement, the landlord is required to provide at least the amount of notice stated in the lease.

Most tenants simply rent housing on a month-to-month basis without any written lease. In these cases, West Virginia law requires that landlords provide tenants with notice of eviction at least one full rental period in advance before the end of the preceding period. This means your landlord must notify you before your new monthly rental period begins in order to request that you leave by the end of the month.

For example, if your rent is due on the first day of the month, say on April 1, and if your landlord wants you to move out by the end of April, then the landlord must provide you with a notice of eviction on or before the last day in March. If your landlord provides you with the notice of eviction after you have already paid rent for the new monthly rental period, then the landlord cannot properly require that you move out until the end of the next month.

Even though West Virginia law requires landlords to provide proper notice in advance before attempting to evict tenants, in some cases the landlords can file a suit in court to evict tenants without providing any notice. If you are behind in your rent, then the landlord may go directly to court and file a suit to evict you without giving a written notice in advance. In addition, if you have violated some other provision of the lease, (for example, by having a pet without the landlord's consent) the landlord can also file a suit to evict you without providing a written notice in advance.

It is important for all tenants to realize that the most important right of all is that a landlord cannot evict you without first going through court, even if a written notice in advance is not required. In other words, a landlord cannot legally change the lock on your door, shut off your utilities, or take any other action to force you out of your rental housing without first going to court and proving to a judge or jury that he or she has the right to have you evicted. Once in court, you have the right to contest the eviction suit. You may also have the right to file your own suit against the landlord ( called a counterclaim). Defending the eviction suit and filing a counterclaim against the landlord is discussed elsewhere in this handbook.

## **You have the right to live in decent housing**

Under West Virginia law, landlords are required to maintain your rental housing in a fit

and habitable condition from the time you move in until the time you move out. This means that the landlord must make all necessary repairs in a timely and adequate manner during the entire time you live there. The law (called a “statute”) which requires landlords to do this is found in West Virginia code s 37-6-30. A copy of this statute is included at the end of this handbook.

Specifically, the landlord must make sure that your rental housing is kept in a condition which measures up to all health, safety, fire and housing code standards at all times. This means the landlord, not you, must pay for all necessary repairs during the time you live there in order to make sure that the housing remains in proper condition as required by law. However, landlords may require tenants to pay for any damages they cause as a result of their own carelessness and neglect. For instance, if your child accidentally breaks a window, then you must pay the cost of this repair yourself.

It is unlawful for landlords to try to make tenants pay the cost of repairs. Even if you have signed a lease agreeing to pay the cost of repairs, this part of the lease would be unlawful and cannot be enforced in court. In some cases, landlords try to make tenants pay for repairs indirectly by increasing the rent to cover the cost of repairs. Rent increases to cover repairs are unlawful and can be challenged in court.

Even though you have the right to live in decent housing, many landlords violate this law. If this happens, there are steps you can take to enforce your rights.

### **How to enforce your right to live in decent housing**

There are many steps you can take to enforce your legal right to live in decent housing. It is important to make sure that your rent is paid in full. If your rent is not paid in full, the law excuses your landlord from making sure that your housing is kept in a decent condition.

The first and most important step you should take in enforcing your right to decent housing is to notify your landlord if there is a problem. The best way to notify your landlord is to send a certified letter, return receipt requested, listing all of your complaints and demanding that the problems be corrected within a reasonable time, usually within seven to ten days. Before mailing, always make a copy of the letter to keep for your records. If you need to go to court, you will use a copy of the letter as evidence. The law requires your landlord to correct the problems promptly and properly.

A responsible landlord will investigate your complaint after receiving your certified letter and will then make any necessary repairs in a prompt and proper manner. However, if your landlord fails to take action after receiving your letter, it may be necessary for you to enforce your rights by filing a civil suit against your landlord in court. At this point, it is best to consult with a lawyer to obtain further guidance on how to proceed. If you cannot afford to hire a lawyer, you may be eligible for help from a legal services program for low-income people. To find out if you are eligible for assistance, you should contact the West Virginia Legal Services Plan Inc. at 800-642-8279.

You have the right to file a civil suit against your landlord if necessary to enforce your right to decent housing. Although it is best to be represented by a lawyer, you have the right to file the suit without a lawyer. If you cannot afford to pay the filing fee or other court costs, you also have the right to file the suit without having to pay the filing fee or other court costs. You also have the right to have your case decided by a jury, either in Magistrate Court or Circuit Court, but not both.

In order to file your own civil suit, you should contact the magistrate on duty in your local Magistrate Court. The magistrate will provide you with a form on which you may make a brief written statement of your complaint. On this form, you should state that your landlord has violated West Virginia law by failing to maintain your rental housing in a fit and habitable condition. You should describe all of the conditions in your housing which you believe are in violation of the law. You should also state that you notified the landlord of your complaint and that he or she has failed to take any adequate action to correct the condition.

On the complaint form there is also a place where you may state what you are asking the court to do about your problem. In this section of the form, you should state that you are asking the court to order the landlord to correct all of the problems immediately. You should also state that you are asking the court to award you money damages to compensate you for having to live in the unfit conditions. You may ask for two types of money damages: (1) you may ask for a refund of all or part of your rent because of the landlord's failure to maintain the housing in decent condition, and (2) you may also ask the court to award you damages for "annoyance and inconvenience." You may ask for any amount of money you feel is fair to make up for the annoyance and inconvenience which you have suffered. However, the total damages that you can be awarded in Magistrate Court are \$5,000.00. There is no limit on the amount of damages you may ask for in Circuit Court.

Whenever you file a civil suit in Magistrate Court, you also have other important rights.

First, if you cannot afford to pay the filing fee or the fees for the sheriff to serve your complaint on the landlord, you have the right to file your suit without payment of these fees. In order to file your suit without payment of fees or costs, you must ask to fill out a financial questionnaire called an “Affidavit of Indigency.” Once you fill out the Affidavit, you will be allowed to file your suit without payment of fees and costs so long as you meet the guidelines under the law. You also have the right to have your case decided by a jury if you request one. However, if you choose to have a jury trial in Magistrate Court, you cannot also have another jury trial later in Circuit Court if your case is appealed. If your Affidavit of Indigency is approved, then you cannot be required to pay the cost of having your case heard by a jury, even if you lose.

After a decision is made in your case, whether by a magistrate or a jury, both you and your landlord have the right to appeal the decision to Circuit Court within 20 days if you disagree with it. If your case is appealed, you will be given a new trial in Circuit Court. As in Magistrate Court, you cannot be made to pay the court costs or jury fees, even if you lose your case.

In order to be successful in your civil suit, you must present proof, called “evidence,” of the conditions in your housing and you must also prove that the conditions violate the law. There are many ways that you can present evidence of the conditions. The most common form of evidence is simply your own testimony and the testimony of other persons who have seen the conditions. It is also possible to present written documents or other records, such as photographs or a videotape, as evidence of the conditions in your rental housing.

You have the right to require persons to testify as witnesses in your case by having a subpoena served upon them. In the subpoena, you may also require that the witness bring certain documents or records with them to be presented as evidence to the court. If you have filed an affidavit of indigence with the court, the sheriff must serve your subpoenas without charging you a fee.

In most communities, there are agencies which will come to inspect the conditions in your housing and make written reports. You may be able to obtain an inspection of your rental housing by calling your local health department, fire marshal, or building code inspector. If you reside in the city of Huntington, you may contact the city building inspector at 304-696-5512 or the city fire marshal at 304-696-5960. Your complaint will be taken at first over the telephone and then your housing will be inspected shortly thereafter. After your housing is inspected, a written report will be prepared and provided to you and your landlord. If the inspector finds that the conditions in your rental housing violate the law,

your landlord will be provided with a notice requesting that the conditions be corrected within a certain period, usually thirty days. If the conditions still are not corrected, the agency may take further legal action on its own to force the landlord to correct the conditions. If you file a suit in court against your landlord, you may subpoena the inspector to court to testify about the conditions in your housing.

Many tenants try to enforce their legal right to live in decent housing by withholding their rent from landlords. Unfortunately, tenants in West Virginia do not have the legal right to withhold rent. For this reason, if you decide to withhold rent, it is likely that your landlord will file a suit to evict you for nonpayment of rent. If this happens, your landlord will probably be successful in evicting you, even though the landlord may have violated the law by failing to provide you with decent rental housing.

**You do not have the right to withhold your rent to force the landlord to obey the law.**

In some states, tenants have the legal right to withhold their rent in order to pressure their landlords to make needed repairs. In West Virginia, however, tenants do not have the legal right to withhold their rent as a way of pressuring landlords to obey the law. The statute (West Virginia code s 37-6-30) which requires landlords to make sure that rental housing is maintained in a fit and habitable condition at all times excuses landlords from the duty to make repairs when the tenants are behind in their rent. For this reason, even if your landlord has failed to make necessary repairs, it is likely that your landlord will file a suit to evict you for nonpayment of rent if you decide to withhold your rent.

It is easy to understand why you would not want to continue paying rent after your landlord has refused to make serious repairs over a long period of time. In some cases, withholding of rent may succeed in pressuring the landlord to make repairs. However, withholding of rent is risky, since it may also result in your eviction. If you have already found a new place to live because of your landlord's refusal to obey the law, then it may be helpful to withhold your current rent to apply toward the cost of your new rental housing. However, if your goal is to remain in your rental housing and to enforce your legal rights to decent housing, you should continue to pay your rent and take some of the other actions suggested in this handbook to enforce your right to decent housing.

**You have the right to live in decent rental housing under the implied warranty of habitability.**

As stated elsewhere in this handbook, there is a specific law, called a statute, which

requires landlords to maintain your rental housing in a fit and habitable condition from the time you move in until the time you move out. This statute, West Virginia code s37-6-30, is included at the end of this handbook. The West Virginia Supreme Court of Appeals has also held in the case *Teller v. McCoy* that tenants have the right to live in decent housing because of the “implied warranty of habitability.” When you purchase an automobile or other consumer goods, they are usually covered by a “warranty” which protects you if the goods are defective. The implied warranty of habitability is a similar warranty which protects your right to have decent rental housing. This warranty requires landlords to maintain the rental housing in a fit and habitable condition at all times, regardless of whether or not there is a written lease between the landlord and tenant. For example, the implied warranty of habitability means that your rental housing must have adequate heat and hot water at all times. It is impossible to list all of the things covered by the implied warranty of habitability, but it covers most things necessary in providing safe and sanitary rental housing. Many of the things covered are listed in the statute, West Virginia code s37-6-30, included at the end of this handbook.

**You have the right to defend yourself in court if the landlord files a suit to evict you.**

As stated elsewhere in this handbook, your landlord may file a suit in court to evict you for nonpayment of rent, or for other reasons. As also stated, your landlord must go through court to evict you, and your landlord cannot lock you out, shut off your utilities or do other things to try to evict you without going through court. If your landlord does file a suit to evict you, you have the right to contest the suit in various ways.

In West Virginia, there is a procedure which enables the landlord to file an eviction suit by filling out a simple form. In most cases, the tenant will only have a few days’ notice of the court hearing after receiving the papers. If an eviction suit is served upon you, you should contact a lawyer immediately for assistance. If you cannot afford a lawyer, you may be eligible for assistance from a legal aid program which serves low-income people. To find out if you are eligible for assistance through a legal aid program, call the West Virginia Legal Services Plan, Inc. at 800-642-8279.

If your landlord files an eviction suit against you, it is very important for you to file a written answer to the suit and to appear in court. If you fail to answer the suit or to appear in court, your landlord will be given a court order, called a judgment for possession, which will require you to vacate the rental housing immediately. There are many reasons why your landlord may not have the right to evict you from your rental housing. If your landlord fails to provide you with a proper written notice of eviction before filing the suit,

this could be one reason why the landlord's suit should be dismissed. If you can show that your landlord has filed the suit to evict you in retaliation because you made a complaint about unfit housing conditions, this may also be a reason for the landlord's eviction suit to be dismissed. In addition, if you can show that your landlord has failed to maintain your rental housing in a fit and habitable condition, this can be a defense to the eviction suit.

If your landlord files an eviction suit against you, you may also file your own suit against the landlord, called a "counterclaim." In your counterclaim, you may sue the landlord for money damages as a result of his or her failure to maintain your rental housing in a fit and habitable condition at all times. The amount of money damages you sue for will depend upon the seriousness of the landlord's violations. For instance, the landlord's failure to provide adequate heat and hot water would be a serious violation. Faulty wiring and other fire and safety hazards would also be considered serious violations. If your rental housing is infested with roaches or rodents, this would be a serious violation. You may also ask the court to issue an Order, called an Injunction, requiring the landlord to make all necessary repairs.

In your counterclaim, you may ask the court to require your landlord to refund all or part of your rent as a result of the unlawful conditions in your housing. You may also ask to be awarded money damages for "annoyance and inconvenience" as a result of the unlawful housing conditions. If your case is in Magistrate Court, you may only ask for damages up to the amount of \$5,000.00. However, if your suit is in Circuit Court, there is no limit on the amount of money damages you may ask for.

If your landlord has filed the eviction suit against you in Magistrate Court, you have the right to remove the suit to Circuit Court if you request it. In order to remove your suit to Circuit Court, you must fill out a paper in Magistrate Court stating that you want your suit removed to Circuit Court. In order to remove your suit, a Circuit Court filing fee must be paid. However, if you cannot afford to pay the cost of the filing fee, you may fill out a financial questionnaire, called an "Affidavit of Indigence," also called a Pauper's Affidavit, which covers all court costs and fees, including the jury fee if you choose to have a trial by jury.

## **You have the right to privacy and to the peaceful and quiet enjoyment of your rental housing.**

Many landlords believe they can enter your rental housing any time whatsoever, without your consent merely because they own the property. This is not true.

Under West Virginia law, landlords may not enter your rental housing without your consent, except to make emergency repairs. During the time that you occupy the rental housing as a tenant, you have the same right to privacy and to the peaceful and quiet enjoyment of the housing as you would if you owned the property. This right continues up until the time you move out of the housing.

If your landlord violates this right by entering your housing without your permission, or by harassing you in other ways, you have the right to sue your landlord for trespass or for an invasion of your right to privacy. If your landlord sues you for eviction, you may include these violations of your rights in your counterclaim against the landlord.

**It is unlawful for landlords to refuse to return your damage or security deposit without just cause.**

It is a common practice for landlords to require tenants to pay a damage or security deposit when they first move into the rental property. The amount of the deposit is usually equal to one month's rent. The deposit acts as insurance for landlords to cover damages caused by tenants to the rental property. After the tenant moves out, the landlord conducts an inspection of the rental property to see if any damage has been done. If so, the landlord is allowed to deduct from the security deposit the reasonable costs for making the repairs, but the landlord must then return the balance of the deposit to the tenant. Unfortunately, landlords often refuse to return deposits even when the housing is not damaged.

Although many states have special laws to protect tenants' rights to have their damage deposits returned, West Virginia does not. For this reason, when landlords wrongfully refuse to return damage deposits in West Virginia, tenants must file a civil suit against their landlords to recover their damage deposits.

In order to increase your chance of success in recovering damage deposits, you must make sure that the rental property is left in a clean and sanitary condition at the time they move out. It is advisable to have a responsible adult, preferably someone who is not a family member, inspect the rental unit, both inside and outside, at the time you move out. This person can be used as a witness later in court if necessary. It is also advisable to take photographs or a videotape of the conditions of the rental property for use in court later if necessary.

After moving out, it is best to send a simple letter to the landlord requesting that the damage deposit be returned. If the landlord fails to return the damage deposit, then you

may file a civil suit against the landlord in Magistrate Court. The suit can be filed either in the county where the landlord resides, or in the county where the rental property is located. If you are a low-income person, you can be excused from having to pay filing fees or other court costs by filling out a financial questionnaire called an “affidavit of indigence.” You must ask to fill out an affidavit of indigence because court officials will not always offer this information.

When a trial is scheduled on your suit for recovery of damage deposit, be sure that all persons who can testify about the conditions of the apartment are present to testify in person. Written statements or affidavits cannot be used in court. You must also bring to court all photographs, videotapes or any other documentary evidence you have to show the condition of the apartment.

It is usually best to file the suit on your own without a lawyer since the amount of most damage deposits is less than \$500.00. If your suit is successful, the court will order your landlord to pay your court cost, in addition to your damage deposit. If either side disagrees with the Magistrate Court’s decision, it can be appealed to Circuit Court within 20 days and new trial will be held.

## **Conclusion**

As you can see, tenants in West Virginia have the legal right to live in safe and decent rental housing as well as many other important rights. If your landlord fails to maintain your rental housing in a safe and decent condition, or violates your other important rights, you may take some of the steps outlined in this handbook to try to enforce your legal rights. It is always best to consult with a lawyer before trying to take legal action against your landlord. If you cannot afford to hire a lawyer, you may be eligible for assistance at a legal aid program for low-income persons. To find out if you are eligible for such assistance, you should contact the West Virginia Legal Services Plan, Inc. at 800-642-8279.

*This pamphlet was prepared by West Virginia Legal Services Plan, a private nonprofit organization, which provides free legal assistance to low-income people.*

*Understanding and using the law is a complex process and this handout is only meant to be a general guide. If you have additional questions, you probably should discuss them with an attorney. If you are low-income, you may qualify for free help from a West Virginia Legal Services Plan.*

## **Appendix: Relevant sections of the West Virginia statute.**

### **S 37-6-5 Notice to Terminate Tenancy.**

A tenancy from year to year may be terminated by either party giving notice in writing to the other, at least three months prior to the end of any year, of his intention to terminate the same. A periodic tenancy, in which the period is less than one year, may be terminated by like notice, or by notice for one full period before the end of any period. When such notice is to the tenant, it may be served upon him, or upon anyone holding under him the leased premises, or any part thereof. When it is by the tenant, it may be served upon anyone who at the time owns the premises in whole or in part, or the agent of such owner, or according to the common law. This section shall not apply where, by special agreement, some other period of notice is fixed, or no notice is to be given; nor shall notice be necessary from or to a tenant whose term is to end at a certain time (code 1849, c. 138, s 5; code 1860, c. 138, s 5; codes 1868, c. 93, s 5; code 1923, c. 93, s 5)

### **S 37-6-30 Landlord to Deliver Premises in Fit and Habitable Condition; Duty to Maintain Premises.**

With respect to residential property:

A. A landlord shall:

1. At the commencement of a tenancy, deliver the dwelling unit and surrounding premises in a fit and habitable condition, and shall thereafter maintain the leased property in such condition; and
2. Maintain the leased property in a condition that meets requirements of applicable health, safety, fire and housing codes, unless the failure to meet those requirements is the fault of the tenant, a member of his family or other person on the premises with his consent; and
3. In multiple housing units, keep clean, safe and in repair all common areas of the premises remaining under his control that are maintained for the use and benefit of his tenants; and
4. Make all repairs necessary to keep the premises in a fit and habitable condition, unless said repairs were necessitated primarily by a lack of reasonable care by the tenant, a member of his family or other person on the

premises with his consent; and

5. Maintain in good and safe working order and condition all electrical, plumbing, sanitary, heating, ventilating, air-conditioning and other facilities and appliances, including elevators, supplied or required to be supplied by him by written or oral agreement or by law; and
6. In multiple housing units, provide and maintain appropriate conveniences for the removal of ashes, garbage, rubbish and other waste incidental to the occupancy of the dwelling unit: and
7. With respect to dwelling units supplied by direct public utility connections, supply running waster and reasonable amounts of hot water at all times, and reasonable heat between the first day of October and the last day of April, except where the dwelling unit is so constructed that running water, heat or hot water is generated by an installation within the exclusive control of the tenant.

B. If a landlord's duty under the rental agreement exceeds a duty imposed by this section, that portion of the rental agreement imposing a greater duty shall control.

C. None of the provisions of this section shall be deemed to require the landlord to make repairs when the tenant is in arrears in payment of rent.

D. For the purposes of this section, the term "multiple housing unit" shall mean a dwelling which contains a room or group of rooms located within a building or structure forming more than one habitable unit for occupants for living, sleeping, eating and cooking. (1978, c. 60.)

### **Article 3a: Remedies for wrongful occupation of residential rental property**

#### **S 55-3a-1 Petition for Summary Relief for Wrongful Occupation of Residential Rental Property.**

- A. A person desiring to remove a tenant from residential rental property may apply for such relief to the Magistrate Court or the Circuit Court of the county in which such property is legated, by verified petition, setting forth the following:

1. That he is the owner or agent of the owner and as such has a right to recover possession of the property;
2. A brief description of the property sufficient to identify it;
3. That the tenant is wrongfully occupying such property in that the tenant is in arrears in the payment of rent, has breached a warrant or a lease-hold covenant, or has deliberately or negligently damaged the property or knowingly permitted another person to do so, and describing such arrearage, breach, or act of omission; and
4. A prayer for possession of the property

B. Previous to the filing of the petition the person shall request from the court the time and place at which the petitioner shall be heard. The court shall fix a time for such hearing, which time shall not be less than five nor more than ten judicial days following such request.

C. Immediately upon being apprized of the time and place for hearing the petitioner shall cause a notice of the same to be served upon the tenant in accordance with the provisions of Rule 4 of the West Virginia Rules of Civil Procedure or by certified mail, return receipt requested. Such notice shall inform the tenant that any defense to the petition must be submitted in writing to the petitioner within five days of the receipt by the tenant of the notice, and in no case later than the fifth day next preceding the date of hearing. Upon receipt of the return of service or the return receipt as the case may be, evidencing service upon the tenant, the petitioner shall file with the court his petition and such proof of service. (1983, c. 3.)

### **S 55-3a-2 Defenses Available**

In a proceeding under the provisions of this article, a tenant against whom a petition has been brought may assert any and all defenses which might be raised in an action for ejectment or an action for unlawful dealer. (1983, c. 3.)

### **S. 55-3a-3 Proceedings in Court; Final Order.**

- A. If at the time of the hearing there has been no appearance, answer or



other responsive pleading filed by the tenant, the court shall make and enter an order granting immediate possession of the property to the petitioner.

- B. In the case of a petition alleging arrearage in rent, if the tenant shall file an answer raising the defense of breach by the landlord of a material covenant upon which the duty to pay rent depends, the court shall proceed to a hearing on such issues.
- C. In the case of a petition alleging a breach by the tenant or damage to the property, if the defendant shall file an answer raising defenses to the claim or claims set forth in the petition the court shall proceed to a hearing on such issues.
- D. Continuances of the hearing provided for in this section shall be for cause only and the judge or magistrate shall not grant a continuance to either party as a matter of right. If a continuance is granted upon request by a tenant, the tenant shall be required to pay into court any periodic rent becoming due during the period of such continuance.
- E. At the conclusion of a hearing held under the provisions of subsection (b) or (c) of this section if the court shall find that the tenant is in wrongful occupation of the rental property the court shall make and enter an order granting immediate possession of the property to the petitioner. In the case of a proceeding under subsection (a) of this section the court may also make a written finding and include in its order such relief on the issue of arrearage in the payment of rent as the evidence may require. Any moneys paid into the court by the tenant in accordance with the provisions of this section may be ordered to be disbursed to the parties as may be appropriate under the finding of the court.
- F. Taking into consideration such factors as the nature of the property (i.e., furnished or unfurnished) the possibility of relative harm to the parties and other material facts deemed relevant by the court in considering the time in which the tenant might reasonably be expected to vacate the premises, the court shall in its order specify the time by which the tenant must remove himself from the property. The order shall further provide that if the tenant still wrongfully occupies the property beyond such

time the Sheriff shall forthwith remove him, taking such precautions as are necessary to guard against damage to the property of the landlord and the tenant.

Absent an issue of title, retaliation, or breach of warranty, and in the event of an appeal wherein the tenant prevails, if the term of the lease has expired the relief ordered by the appellant court shall be for monetary damages only and shall not restore the tenant to possession. During the pendency of any such appeal no tenant shall be entitled to remain in possession of the leasehold if the period of the tenancy has otherwise expires. (1983, c. 3.)