

# Public Housing Alert

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## **The North Carolina Supreme Court Recently Removed the Unconscionability (or 'Unfairness') Defense to Eviction. But, With One Catch...**

Technical notice requirements, grievance procedures, and other aspects of federal law and regulation make evictions by public housing authorities ("PHAs") uniquely complex. Since 1967, North Carolina law imposed an additional obstacle, requiring a PHA to prove that eviction is not "unconscionable" (meaning "excessive," "unreasonable," or "unfair").

Traditionally, "unconscionability" was perhaps the most frequently used and least predictable defense to eviction. Residents and their attorneys raised "unconscionability" to request a second chance, to explain the circumstances of the lease violation, or to assert an inability to obtain housing outside of the PHA.

However, in its recent decision in [ECRHA v. Lofton](#), the North Carolina Supreme Court removed the "unconscionability" requirement from eviction cases in North Carolina. As described below, the [Lofton](#) decision upholds a PHA's authority to evict for lease violations, even for "innocent tenants" and confirms that courts will no longer second-guess a PHA's decision to evict by reviewing the "fairness" of that decision or its impact on the tenant's household. Most significantly, the holding in [Lofton](#) removes the most unpredictable obstacle to a PHA's right to evict and enforce its rules in North Carolina.

But the benefits of [Lofton](#) come with one catch: because a PHA is not *required* to evict in response to a lease violation, the PHA must show the court that the PHA actually considered the facts and used judgment when making the choice that eviction was in the best interest of its community, rather than following a hard-and-fast rule to evict in response to each lease violation. This article provides guidance as to how to comply with this requirement.

### **What Happened in Ms. Lofton's Apartment?**

In [Lofton](#), the tenant, Ms. Lofton, signed a lease with a PHA. The lease contained the federally mandated provision that any drug-related criminal activity by the tenant's guests or persons under her control shall constitute grounds to terminate her tenancy. This provision made Ms. Lofton personally responsible for the actions of those persons she allowed into her housing unit.

Ms. Lofton frequently used a babysitter to watch her children while she worked the night shift. One evening, the babysitter came to Ms. Lofton's apartment to allow Ms. Lofton to sleep before her shift. While Ms. Lofton slept, police entered the apartment and arrested the babysitter for outstanding child support warrants.

During the arrest, the police found four individually portioned bags of marijuana in the babysitter's pocket. Ms. Lofton consented to a search of her apartment and police also discovered in plain sight a "marijuana blunt" in the making, marijuana on the kitchen counter, plastic bags with the ends ripped off, and 14 more bags of marijuana on the kitchen counter. The babysitter was charged with felony drug crimes. Ms. Lofton was not charged.

Because drug-related criminal activity had occurred in Ms. Lofton's apartment by a person under her control, the PHA issued a lease termination notice to Ms. Lofton pursuant to the federally mandated breach provision. After Ms. Lofton failed to vacate, the PHA filed a complaint in summary ejection.

### **The Trial Court and the Court of Appeals Rely on Unconscionability**

At trial, Ms. Lofton admitted that a lease violation occurred. She also acknowledged that, pursuant to the United States Supreme Court's 2002 decision in Dept. of Housing and Urban Dev. v. Rucker, which struck the "innocent tenant defense," her contention that she was unaware of, and did not actually participate in, the drug-related criminal activity would not prevent her lease from being terminated. Nonetheless, Ms. Lofton argued at trial that although she admittedly violated her lease, the PHA was required to first consider facts that made the eviction unfair before it could proceed with the eviction.

The trial court agreed and denied eviction. The trial judge concluded that the PHA was required to prove that it had considered certain "mitigating factors" before it could evict, and that because the PHA had not done so, it had acted as though it had no choice but to evict in response to the lease violation.

The PHA, disagreeing with the trial court's reasoning, appealed to the North Carolina Court of Appeals. The Court of Appeals likewise denied eviction. Although it found that a lease violation occurred, the Court of Appeals concluded that the PHA *should not have* decided to evict Ms. Lofton because the eviction was "unconscionable." Specifically, the Court of Appeals believed that it was "unreasonable" or "unfair" to evict Ms. Lofton because she did not participate in the drug crime, she had not previously violated her lease, she had three young children who would be affected by eviction, and she had insufficient income to find housing outside of the PHA.

The PHA was concerned about the ruling by the Court of Appeals because it second-guessed the fairness of the PHA's decision to evict. The PHA also was particularly concerned that the ruling by the Court of Appeals meant that a PHA could not evict for drug-related criminal activity if the tenant was not involved (despite the holding in Rucker that such factor is irrelevant), if the tenant has children (as many PHA residents do), or if the tenant has low income (as most PHA residents do). Simply put, the decision of the Court of Appeals significantly expanded the "unconscionability" issue in PHA evictions and thus the PHA appealed the decision to the North Carolina Supreme Court.

### **The North Carolina Supreme Court Removes Unconscionability, But Requires a Showing of Exercise of Discretion**

On appeal, the North Carolina Supreme Court rejected the analysis of the Court of Appeals and held that "unconscionability" was irrelevant in all eviction actions. Specifically, the Supreme Court stated that "the equitable defense of unconscionability is not a consideration in summary ejection proceedings." In support of its conclusion, the Supreme Court first noted that, under federal law and regulation, it is a PHA (not a court) who is vested with the discretion to decide whether to evict because a PHA is in the best position to determine what is best for its community. Accordingly, where a lease violation occurs, and a PHA decides to evict, "the court is not to second-guess or replace" that decision by conducting its own fairness assessment or

by considering the impact on the tenant's household.

Although the Supreme Court rejected the "unconscionability" analysis for evictions and held that courts should no longer assess the fairness of a decision to evict, it did impose one burden on PHAs. It held that a PHA is required to show that its eviction decision was made after some deliberation, and with the knowledge that eviction is not *required*. Based on the trial court's finding that the PHA in Lofton did not explain the basis for its decision to evict, the Supreme Court concluded that the PHA did not make the required showing of an exercise of discretion and for that reason affirmed the judgment of the Court of Appeals denying eviction.

The Lofton case involved drug-related criminal activity, but the decision removes the "unconscionability" analysis from *all* eviction actions based on any lease violation. With regard to the drug-related criminal activity at issue in Lofton, the Supreme Court focused on the right of other residents to live in a safe community free from drugs and crime. In that way, the Court recognized that eviction decisions are often made not simply to punish the violator, but to protect the rights of other residents and to maintain order in communities. Similar analysis and reasoning also apply to a PHA's need to uniformly enforce rules about housekeeping, timely rent payments, or other issues.

### **Suggestions for Showing the Exercise of Discretion in Eviction Decisions**

At first glance, the Lofton decision may seem contradictory, holding that courts should not consider *whether* an eviction is fair, but then requiring that a PHA must explain why an eviction *is* fair. Despite this contradictory appearance, the holding is actually that once a PSA exercises judgment and discretion in determining whether an eviction is appropriate, the court cannot second-guess it. The Lofton decision merely cautions PHAs that they may not have a hard-and-fast rule to evict in every case and that they must provide enough information to show the court that the decision was not thoughtless.

PHA housing managers and executive directors do not make spiteful or thoughtless eviction decisions. Rather, they most frequently decide to evict out of concern for protection of their communities, uniform enforcement of rules, the rights of other residents, and to deter similar behavior by other residents (i.e. by informing other residents of the consequences for noncompliance, rather than setting a precedent of lenience or tolerance in response to lease violations).

Even though PHA housing managers and executive directors usually weigh the pros and cons of eviction, it is more difficult to describe those considerations in court. But now, after Lofton, a PHA must be prepared to explain in court the process taken to reach the eviction decision. With some advance preparation however, a PHA can meet its burden to explain why eviction serves the best interest of the community.

### **The following recommendations are suggested to help PHAs comply with the requirements in Lofton:**

- In advance of any eviction hearing, prepare to explain to the court that the PSA affirmatively considered whether eviction should be the remedy and why it concluded eviction is in the best interest of the community, including the specific consideration of the factors listed below. Be ready to explain it to the magistrate or judge. Do not wait to be asked for this information.
- Modify or terminate any policy which might imply that the PHA should *always* evict in response to a lease violation or in response to a certain type of lease violation.
- Consider adopting a written policy (or modifying any existing policy) which states:
  - The PHA's understanding that, while it has the authority to evict in response to lease violations, it is not *required* to do so;
  - Any decision to evict will be made only after considering and weighing a list of factors, which

may include:

- The nature of the lease violation;
- Whether the lease violation is due to the tenant's own conduct or decision-making;
- The tenant's history of lease violations or prior warnings;
- The impact of eviction upon the tenant and the tenant's household;
- The tenant's means and ability to obtain or afford alternative housing;
- The need to uniformly enforce the PHA's rule and its lease provisions;
- The deterrent effect which eviction may have in the community; and,
- The negative impact, if any, of nonenforcement of the lease or PHA rules.

Such a written policy will serve as a guideline to assist a housing manager in explaining the PHA's decision to evict in court, as required by Lofton.

Lofton makes clear that it is not "wrong" to decide to evict a resident even if the eviction will have a significant effect on the resident's household (as all evictions will) and if the resident does not have significant financial resources to find alternative housing (as is the case for most PHA residents). But the PHA must show that it did actually think about whether the benefits of lease enforcement, uniform application of rules, and deterrence justified eviction.

Additionally, PHAs should consider voluntarily affording the resident a grievance opportunity even where one is not required by federal law and regulation (such as for criminal activity). A voluntary grievance opportunity can be used to show the court that the PHA listened to and considered the tenant's side of the story before making a final decision to evict.

## **Conclusion**

The Lofton decision has significant benefits for PHAs. It correctly leaves the determination of whether an eviction is fair to a PHA and directs courts not to undertake their own "unconscionability" or "fairness" analysis. It does, however, call on PHAs to explain their thought process when considering eviction. With preparation, PHAs can be ready to comply with the requirements of Lofton and remove some uncertainty from the eviction process.

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