

A GUIDE TO VIRGINIA RESIDENTIAL LANDLORD & TENANT LAW

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UNLAWFUL DETAINER ACTIONS UNDER VIRGINIA LAW

Landlords are in the business of maximizing the total number of occupants within a property's available living space. A high occupancy rate equates to a high cash inflow. Therefore, in general, eviction is not a welcome procedure as the eviction of a tenant results in a vacancy and a loss of expected revenue. Nonetheless, when a tenant is unwilling or unable to abide by the terms of a lease agreement, the tenant must be removed quickly and efficiently. Non-paying and problem tenants make property management difficult and frustrating. A protracted eviction process will result in lost potential revenue and lost opportunity costs. In those situations, a clean and quick eviction process is an important and helpful tool for landlords. During the course of an eviction, issues of outstanding rent, late fees, damages, and attorneys' fees will be sought and disputed by the respective parties. This outline will review how these issues are addressed under applicable Virginia law.

Please note that there are exceptions as to what properties are covered by the Virginia Residential Landlord and Tenant Act ("VRLTA").¹ However, with the reduction of the trigger number under Virginia Code Section 55-248.3:1(B), the majority of residential leases will now be covered by the VRLTA. Further, in recent legislative sessions, the General Assembly has begun placing multiple sections of the VRLTA into the Landlord and Tenant Act², which has significantly reduced the differences between the two Acts. Therefore, this outline will focus primarily on the eviction process for VRLTA properties. Although there are still remaining differences between the VRLTA and the Landlord and Tenant Act, the VRLTA is more comprehensive and more often relied upon and referred to in unlawful detainer actions than the Landlord and Tenant Act. Thus, the VRLTA will be the main focus and subject of this outline and CLE course. Differences between the two Acts will be noted along each step of the guide.

STEP ONE - Identify a Breach of the Lease

Property managers and landlords often articulate problems created by tenants, but they routinely fail to link the tenant's behavior with a particular lease provision or applicable statute. Property managers and landlords must be instructed to identify the

¹ Virginia Code Sections 55-248.2 through 55-248.40.

² Virginia Code Sections 55-217 through 55-248.

precise nature of the breach, and they have to be instructed to detail the underlying breach in the subject notice.

The following are common examples of instances whereby a tenant breaches a lease agreement or statutory provision:

- **Example 1:** *Failure to pay rent*
 - Although one would assume that landlords quickly address tenants who fail to pay monthly rent; however, landlords regularly fail to address this issue quickly. Landlord's often accept a partial payment and hope that the tenant's next payment will be for the full amount owed. Once a tenant starts to fall behind, non-payment usually follows, which becomes compounded with the imposition of late fees. Thus, landlords should adhere to a consistent policy of sending notices unless they receive the full rent amount.

- **Example 2:** *Breach of quiet enjoyment*
 - Well written leases contain a provision requiring that a tenant respect the quiet enjoyment of the leased premises and common areas. Situations often arise whereby tenants cause disturbances disrupting other tenants. Practitioners should encourage their landlord/property manager clients to document any such incidents. Thorough documentation will make success during the trial phase more likely. Landlords should send 21/30 material non-compliance notices following such a breach. The number of 21/30 notices to be sent prior to filling a Summons for Unlawful Detainer is usually dictated by the severity of the breach.

- **Example 3:** *Failure to abide by occupancy restrictions*
 - Most leases require the prospect to list individuals, who will be living on the premises. Many leases also require that only those individuals listed in the lease reside on the premises. On occasion, tenants will permit unauthorized friends and family to move into the leased premises. These situations are difficult for property managers and landlords to detect and to prove. Mail carriers may report to the staff when a given residence receives large amounts of mail to an unauthorized person within the leased premises. Property managers should also look for unregistered vehicles parked in the housing community lot.

- **Example 4:** *Failure to maintain utilities and services*
 - Tenants generally maintain the utilities as a necessity for sustainable living. In some cases, tenants may fail to maintain the proper utilities. Landlords and property managers should move quickly against such

tenants to avoid property damage, especially in extreme weather conditions.

Questions:

1) Can a landlord change the locks on the apartment and lock the tenant out following a breach of the lease?

Absolutely not. Virginia Code Sections 55-225.1 and 55-248.36 expressly prohibit the landlord from recovering possession except by lawful and permitted means. Consequently, Virginia law no longer recognizes the right of “self-help” in residential landlord and tenant situations. Self-help remedies are still available in non-residential tenancies. (See Va. Code § 55-225)

2) Can a landlord dispose of the tenant’s furniture following a breach of the lease and/or apparent abandonment?

Items of personal property left in the leased premises at the end of the tenancy are to be treated as abandoned property, which will require the landlord to comply with Virginia Code Section 55-248.38:1. In such a scenario, prior to disposing of any abandoned property, including furniture, the landlord must provide the former resident with the appropriate notice as set forth under the aforementioned code section. If possession was obtained by lawful Court order and by way of a writ of eviction, then the personal property may be disposed of in accordance with Virginia Code Section 55-248.38:2. Also please refer to Step Nine for additional information.

STEP TWO - Serve the Proper Notice

Under the VRLTA, notices are an integral part of a good landlord-tenant practice. Pursuant to Virginia Code Section 55-248.6, the VRLTA deems notice of a fact when a person:

- has actual knowledge of a fact, or
- has received verbal notice of the fact, or
- has reason to know that such a fact exists.

The VRLTA defines “Notice” as one:

- given in writing by either regular mail or hand delivery, with the sender retaining sufficient proof of having given such notice, which may be either a United States postal certificate of mailing or a certificate of service confirming such mailing prepared by sender; or
- if the rental agreement so provides, notice may be sent in electronic form. (See Virginia Code Section 55-248.6(B))

Notice is served on the landlord at his place of business where the lease agreement was made or at any place the landlord represents to be a place for receipt of communication. Notice is served on the tenant at his last known place of residence, which may be the dwelling unit. Notice received by an organization is effective for a particular transaction at the time it is brought to the attention of the person conducting the transaction, or from the time it would have been brought to his attention if the organization had exercised reasonable diligence.

No notice to quit or notice of termination of tenancy served on a public housing tenant is effective unless it contains on the first page, the name, address, and telephone number of the legal services program, if any, serving the jurisdiction in which the rental premises are located.

Notices must set forth the proper time periods permitting the tenant an opportunity to remedy his breach or a statutory time period within which to surrender possession of the premises, as required by the VRLTA. If the property is governed by HUD such as a Section 8 based property, the notices must also strictly comply with the applicable HUD regulations and guidelines.

Examples:

Example 1: 21/30 Material Non-Compliance Notice

Pursuant to Virginia Code Section 55-248.31, a 21/30 material non-compliance notice should be sent to tenants when they breach the lease in such a way that the breach could be remedied and cured.³

For example, assume a hypothetical situation whereby neighbors complain about a particular tenant's loud and disturbing behavior, to which the landlord may send this notice to indicate that the tenant has 21 days within which to remedy his breach of the lease for his failure to comply with the lease's quiet enjoyment provision. Should the landlord receive any further verifiable complaints within 21 days, the tenant must vacate the premises within 30 days from the date of the notice. On the other hand, if the tenant does not violate the quiet enjoyment provision, then he may remain on the premises through the duration of the lease term, provided there are no other breaches of the lease.

Example 2: Material Non-Compliance for Failure to Pay Rent

Pursuant to Virginia Code Section 55-248.31, this notice should be used when a tenant fails to pay rent. This notice provides the tenant with an additional five days within which to pay rent. Should the tenant fail to make payment for the amount due and owing (including late fees), the owner may proceed with a Court proceeding to obtain a money judgment, possession, and attorneys' fees and costs, if applicable.⁴

³ See a sample 21/30 Material Non-Compliance Notice attached as Appendix 1.

⁴ See a sample Material Non-Compliance Notice for Failure to Pay Rent attached as Appendix 2.

Example 3: Notice of Termination – Non-Remediable Violation

Pursuant to Virginia Code Section 55-248.31(C), this notice should be used in situations whereby the tenant breaches the lease in such a way that there is no remedy. This notice results in termination of the lease agreement. The tenant is permitted to remain on the property for no less than 30 days upon receipt of this notice. This notice is often utilized when the tenant takes part in criminal or illegal drug activity.⁵ If the non-remediable breach constitutes a criminal or willful act, which is not remediable and which poses a threat to health or safety, the landlord may give the tenant an immediate non-remediable breach of lease notice; commonly referred to as a 72 hour notice.

Example 4: Notice of Termination – Repeat Violation

This notice should be served on tenants when the subject breach of the lease agreement is repeated in a similar or serial manner. For example, when a tenant violates a quiet enjoyment provision of a lease, the owners may send a 21/30 notice. Then the tenant may remedy the breach by not causing disruptions within the 21-day period. If, at some point afterward the tenant violates the quiet enjoyment provision of the lease agreement again, then this notice should be sent to the tenant to inform him of his repeated violation. The notice requests possession of the premises within a period no less than 30 days from the date of the notice.⁶

Questions:

1) What actions should a landlord's attorney take when the landlord has served the wrong notice and there is a pending unlawful detainer return date?

To properly posture a landlord's unlawful detainer action, the landlord must have served the tenant with the appropriate notice in accordance with Virginia Code Section 55-248.31. In the event the landlord served an incorrect notice, then the defendant is afforded an opportunity to have the case dismissed based on that error. Consequently, the landlord will be faced with one of two options. First, nonsuit the pending unlawful detainer action, properly serve the correct notice, and then re-file the unlawful detainer action. In the alternative, the case can be continued to a date far enough in advance to allow the landlord to serve the proper notice and to allow for that notice period to expire before then proceeding with setting the unlawful detainer action for a trial on the merits. The one problem with the second option is that you technically have a case pending prior to and during the time that the termination notice is pending, which procedurally is not the proper sequence. Thus, a nonsuit of the pending action would appear to be more appropriate.

⁵ See a sample Notice of Termination – Non-Remediable Violation attached as Appendix 3.

⁶ See a sample Notice of Termination – Repeat Violation Notice attached as Appendix 4.

STEP THREE - Identify and Compile the Proper Documentation

In preparation for the return date, the attorney should procure the following:

- a copy of the lease agreement;
- the relevant notice served following the breach and the attempted eviction,
- a copy of the account ledger indicating the amounts outstanding, if any;
- acceptance of rent with reservation notices, and if necessary an abstract of a prior summons for unlawful detainer action that was dismissed per the one right of redemption, (See Virginia Code Section 55-248.34:1); and
- affidavit per Virginia Code Section 8.01-126 - (See Step Six for further discussion).

If the notices served on the tenant by the landlord or property manager are not the proper notices, then the plaintiff's case is defective. The attorney should request a nonsuit to allow time for his client to correct the problems and to serve the proper notice. After the landlord or property manager serves the proper notice and after the termination period expires, the plaintiff's attorney should re-file the unlawful detainer action using the proper notice as its base. By taking these steps, the plaintiff's case will be properly positioned prior to the trial. (See also Question 1 in Step Two)

Depending on the jurisdiction, some General District Court judges prefer to hear the contested matter at the time of the return date, instead of setting the matter for a contested date. In those jurisdictions, it is necessary to prepare all the proper documentation needed to participate in the contested hearing at that time instead of on a separate and later court date, which will include securing the necessary witnesses to be present at the return date.

STEP FOUR - File the Unlawful Detainer

An unlawful detainer is filed pursuant to Virginia Code Sections 8.01-124 and 8.01-126.⁷ The forms are available on the Virginia Judicial System website.⁸ The proper pleading for an eviction is an unlawful detainer and NOT a warrant in debt.

The pleading must indicate the basis for filing the unlawful detainer action. If the basis for the unlawful detainer action is unpaid rent, then list all amounts due and owing, including, but not limited to, rent, past due rent charges, fees, and attorneys' fees. **Note:** The form was updated in July 2014 and now includes a box for "Plaintiff requests judgment for all amounts due as of the date of the hearing." You will want to always check that box as it will allow you to amend the amount of rent and other damages you may be seeking without necessarily filing a motion for leave to amend. (See Virginia Code Section 8.01-126 (C)(2)).

⁷ See a sample Unlawful Detainer attached as Appendix 5.

⁸ www.courts.state.va.us

If the basis for the unlawful detainer is a breach of the lease, then indicate how the lease was breached.

The plaintiff's attorney must affirm that the proper notices have been properly served on the tenants. The following information must be included on the unlawful detainer:

- Proper jurisdiction – the location of the leased premises;
- The address of the leased premises;
- Proper party names;
- Rent, past due rent, and fees allegedly owed by defendant to plaintiff; and
- If the lease or the VRLTA provides for attorneys' fees, then indicate it on the unlawful detainer.

Questions:

1) Should a landlord file an unlawful detainer action when it appears that the resident has abandoned the property?

If the landlord can establish that the resident has abandoned the property and has surrendered possession of it per Virginia Code Section 55-248.33, which may require the service of a seven (7) day abandonment notice, then the landlord does not need to file an unlawful detainer action because possession has already been re-established by the landlord. On the other hand, if the landlord is unable to determine whether or not the property has been abandoned and thus whether or not possession has been surrendered, then the landlord should file an unlawful detainer action and allow for the Court to determine who has the right of possession.

2) Does a landlord have to wait for the termination period to expire before filing an unlawful detainer?

Yes. Once the landlord serves the appropriate termination notice as set forth under Virginia Code Section 55-248.31, then the landlord must wait until that termination period expires before the landlord proceeds with an unlawful detainer action. The resident is not unlawfully detaining the unit while the notice remains in effect. Once the notice expires and the resident has refused to vacate and to surrender possession of the leased premises, then the landlord may argue and allege that the resident is unlawfully detaining the unit, which will permit the landlord to proceed with the filing of a summons for unlawful detainer seeking possession of the leased premises.

STEP FIVE - Prepare for Common Evidentiary Issues

Landlord and Tenant law is similar to other areas of contract law as the plaintiff must show the existence of a contract, a breach, and the damages proximately caused by the breach. The lease serves as proof of a contract with consideration. The ledger sheet establishes the monetary damages. Both of these elements are usually proven through the

property manager, who should, during the course of his or her testimony, identify and introduce into evidence a copy of the lease, the account ledger, and the appropriate notice(s). The property manager should also be able to testify regarding the authenticity of both documents. Most of the testimony during a landlord and tenant case revolves around establishing the breach.

The plaintiff must prove by a preponderance of the evidence that the breach referred to and identified in the notice is identical to the breach referred to on the face of the unlawful detainer summons. The notice and the unlawful detainer summons should list the same breach. Courts often strike evidence regarding the tenant's alleged behavior that plaintiff failed to include in the notice or in the unlawful detainer summons.

Prior to any Court appearance, the plaintiff's attorney should identify all potential evidence necessary to prove the tenant's breach of the lease. It is straightforward and easy to determine that the lease was breached for failure to pay rent on time. It can be more difficult to prove other breaches. To prove other types of breaches, it may be necessary to call witnesses, who observed or documented the breach. The property manager, neighbors, police and/or security guards often provide helpful testimony regarding the tenant's activity, which resulted in the breach of the lease agreement.

Due to the statutory requirements, it is necessary to introduce the notice into evidence and to prove that the notice was served properly, as required by Virginia Code Section 55-248.6, and that the notice was proper and addressed the specific breach that occurred in the case at bar in accordance with Section 55-248.31.

Questions:

1) How much can a landlord deduct from the tenant's security deposit for a carpet ruined by the tenant's pet?

Virginia Code Section 55-248.15:1, subparagraph A, will permit the landlord to make a deduction from the security deposit based on damages above reasonable wear and tear suffered as a result of the resident's noncompliance with Virginia Code Section 55-248.16. Therefore, if the carpet has been ruined by pet urine, excess traffic, or other such damage above reasonable wear and tear, the damage charges can be deducted from the security deposit. If the damage to the carpet can be repaired without replacement, then the landlord may deduct its actual costs incurred in making the repair. On the other hand, if the carpet has been ruined to the extent that it must be replaced, then the landlord may not deduct the actual replacement cost of the carpet. Rather, the landlord may only deduct from the security deposit the depreciated value of the carpet at the time of destruction. (Please also note that, as of January 1, 2015, the statutory requirement to accrue interest on security deposits was repealed.)

STEP SIX - Prepare for and Attend the Return Date

Many unlawful detainers result in default judgments, particularly in cases brought for non-payment of rent. Nevertheless, the plaintiff's attorney must present evidence to the Court, which consists of the:

1. account ledger;
2. 5-day notice;
3. lease agreement; and
4. affidavit per Virginia Code Section 8.01-126.

A Court may require rent escrow before the tenant can request a continuance, pursuant to Virginia Code Section 55-248.25:1. Under Virginia Code Section 55-248.25:1, where a landlord has filed an unlawful detainer action seeking possession of the premises and the tenant seeks to obtain a continuance of the action or to set it for a contested trial, the Court may, at that time, order the tenant to pay an amount equal to the rent due as of the initial Court date into the Court escrow account prior to granting the tenant's request for a continuance. If the tenant asserts a "good faith defense," and the Court agrees, the Court shall not require the rent to be escrowed. Also, if the landlord requests a continuance or to set the case for a contested trial, the Court shall not require the rent to be escrowed. (See Virginia Code Section 55-248.25:1(A))

If the Court finds that the tenant has not asserted a "good faith defense," the tenant will be required to pay an amount determined by the Court to be deposited into the Court escrow account for the case to be continued or to be set for a contested trial. In addition, the Court may grant a tenant a continuance of no more than one week to make the full payment to the Court of the ordered amount into the escrow account. If the tenant fails to pay the entire amount ordered, the Court shall, upon the motion of the landlord, enter judgment for the landlord for possession and for the amounts owed. The Court shall further order that, should the tenant fail to pay future rent due under the rental agreement into the Court escrow account, the Court shall, upon the motion of the landlord, enter judgment for the landlord for possession and for the outstanding amounts due and owing to the landlord. Upon motion of the landlord, the Court may disburse the monies held in the Court escrow account to the landlord for payment of his mortgage or other expenses relating to the dwelling unit.

Pursuant to Virginia Code Section 8.01-129, as amended, in any unlawful detainer action filed, if a judge grants the plaintiff a judgment for possession of the premises, upon request of the plaintiff, the judge shall further order that the writ issue immediately upon entry of judgment for possession. In such case, the clerk shall deliver the writ to the sheriff, who shall then, at least 72 hours prior to execution of such writ, serve notice of intent to execute the writ, including the date and time of the eviction. In no case, however, shall the sheriff evict the defendant from the dwelling unit prior to the expiration of the defendant's 10-day appeal period. If the defendant perfects an appeal, the sheriff shall return the writ to the clerk who issued it. Thus, the plaintiff or its counsel should request immediate possession at the return date.

Use of an Affidavit or Sworn Testimony for Default Judgment

In 2014, 2015 and 2017, the General Assembly amended Virginia Code Section 8.01-126 regarding what amounts the Court may award in the case of a default judgment. As briefly noted in Step Four, the unlawful detainer form now includes a box for “Plaintiff requests judgment for all amounts due as of the date of the hearing.” For a landlord to recover all amounts sought as of the date of the hearing, that box must be checked and the landlord, or landlord’s attorney, must provide to the Court at the hearing date an affidavit or sworn testimony that describes the amount of outstanding rent, late charges, attorney fees, and any other charges or damages due as of the date of the hearing. Also, if the lease or rental agreement so provides, the amount of the rent due shall include the entire month in which the hearing is held, and thus the rent shall not be prorated.

Bifurcated Unlawful Detainer Actions

Virginia Code Section 8.01-128 was amended in 2005, 2016 and 2017 to give the plaintiff the option of bifurcating the unlawful detainer trial on the issue of possession, and on the issue of final rent and damages. Virginia Code Section 8.01-128 provides in pertinent part as follows:

The plaintiff may, alternatively, receive a final, appealable judgment for possession of the property unlawfully entered or unlawfully detained and be issued a writ of possession, and continue the case for up to 120 days to establish final rent and damages. If the plaintiff elects to proceed under this section, the judge shall hear evidence as to the issue of possession on the initial court date and shall hear evidence on the final rent and damages at the hearing set on the continuance date, unless the plaintiff requests otherwise or the judge rules otherwise. Nothing in this section shall preclude a defendant who appears in court at the initial court date from contesting an unlawful detainer action as otherwise provided by law.

If under this section an appeal is taken as to possession, the entire case shall be considered appealed. The plaintiff shall, in the instance of a continuance taken under this section, mail to the defendant at the defendant's last known address at least 15 days prior to the continuance date a notice advising of (i) the continuance date; (ii) the amounts of final rent and damages; and (iii) that the plaintiff is seeking judgment for additional sums. A copy of such notice shall be filed with the court.

Unauthorized Practice of Law

Property managers will often attempt to litigate unlawful detainer cases without the assistance of an attorney. Property managers must be warned of the pitfalls of the unauthorized practice of law statute. Pursuant to Virginia Code Section 54.1-3904, any person who practices law without authorization or license shall be guilty of a Class 1

misdemeanor. A *pro se* litigant may represent his own interests in a court of law; however, a *pro se* litigant may not represent another entity or person. Thus, except in limited circumstances, a property manager may only represent his interests and not those of his apartment complex. Under Virginia Code Section 55-246.1, a property manager may attend a return date and request appropriate relief from the Court as set forth in the aforesaid code section. If the defendant/tenant appears at the return date and contests the pending action, then the property manager may request a continuance. Note that the property manager should obtain his attorneys' available dates or the appointed Court date may create scheduling problems for the attorney. Also, in a recent 2016 amendment to Virginia Code Section 8.01-375, in an unlawful detainer action filed in general district court, a managing agent, as defined under the VRLTA, is exempt from being excluded as a witness upon a motion by the Court or by any one of the parties to the action.

STEP SEVEN – The Contested Hearing

As noted in Step Five, the landlord must prove the breach. Plaintiff's attorney must put on evidence of the lease, notice, and ledger. Also, the landlord must utilize testimony from witnesses who observed the breach (for example, neighbors, police, or security guards). The evidence must prove that the breach occurred, a notice was served on the tenant/defendant, and the tenant/defendant failed to vacate the leased premises. Plaintiff must also prove the amount of rent and fees owed to the plaintiff.

For a tenant, the landlord's non-compliance may be used as a defense to an action for possession for nonpayment of rent, pursuant to Virginia Code Section 55-248.25. Virginia Code Section 55-248.25 addresses the landlord's non-compliance as a potential defense for tenants involved in actions for possession for nonpayment of rent. In cases where the landlord is pursuing an action for possession based on nonpayment of rent, the tenant may assert as a defense that there exists upon the leased premises a condition or conditions which "constitutes or will constitute, a fire hazard or a serious threat to the life, health or safety" or is a material breach of the lease and/or a provision of law. Prior to asserting this defense, however, there are certain requirements that the resident must satisfy as set forth in subsections (A)(1) and (A)(2) of Virginia Code Section 55-248.25. The landlord may respond by establishing that the conditions do not exist, or that they have been removed or remedied, or that the conditions were caused by the resident, or that the tenant has unreasonably refused entry to the landlord of the leased premises for the purpose of correcting the condition.

As set forth in Virginia Code Section 55-248.25, a General District Court may make findings of fact and enter an Order, including any one of the enumerated remedies that are contained in subsections (C)(1) through (C)(3). If the Court finds that the tenant raised this defense in bad faith or caused the violation or unreasonably refused entry to the landlord for the purpose of correcting the condition, the Court, in its discretion, may impose certain costs incurred by landlord, which could include court costs, costs of repair if caused by tenant, and reasonable attorneys' fees.

STEP EIGHT – Post-Judgment Issues

Appeals

The plaintiff's attorney must remember to post the bond on time if an appeal is to be perfected. It is important for the practitioner to remember the commonly overlooked point that unlawful detainer appeals require a bond to be posted, the writ tax and costs paid, and the appeal to be noted, all within ten days from the date of judgment. Many attorneys fail to pay the writ tax and costs and post the bond within the required ten day period. It is important to remember that in unlawful detainer cases, the rule of thumb is 10/10 and not 10/30.

Pursuant to Virginia Code Section 8.01-129, when the defendant appeals an unlawful detainer, he must give security for all rent which has accrued and which may accrue on the premises, but not for more than one year's rent, and also for all damages that have accrued or may accrue from the unlawful use and occupation of the premises for a period not exceeding three months. The amount of the bond will be set by the Court. Virginia Code Section 16.1-107 also provides that, in all civil cases, except trespass, ejectment, unlawful detainer against a former owner based upon a foreclosure against that owner, or any action involving recovering rents, no indigent person shall be required to post an appeal bond.

Once a matter has been appealed from General District Court to Circuit Court, execution on the order of possession is stayed. Therefore, it is often necessary to file subsequent unlawful detainer actions for nonpayment of rent or other such breaches that may occur during the months following the original case that has been appealed to Circuit Court. These successive unlawful detainer actions demonstrate the defendant's inability or unwillingness to cooperate further with the landlord.

Bankruptcy

The eviction process may be disrupted when a tenant files a petition for bankruptcy. Prior to April 2005, the automatic stay provisions of the Bankruptcy Code prohibited the continuation of any eviction or unlawful detainer proceedings against a tenant by a landlord of residential property, despite the landlord's procuring a judgment for possession of the leased premises prior to the commencement of the tenant's bankruptcy action. Under the old bankruptcy law, the automatic stay provision stalled eviction proceedings.

The revised Bankruptcy Code allows a landlord to enforce pre-petition judgments for possession without first obtaining an order from the Bankruptcy Court modifying the automatic stay. Pursuant to 11 U.S.C. § 362(b)(22), the automatic stay does not apply to the continuation of eviction actions by a landlord involving residential leased property whereby:

1. the debtor resides in the property as a tenant, and

2. the landlord has obtained, before the bankruptcy, a judgment against the debtor/tenant for possession of the property.

In these cases, the landlord does not need to file a motion to obtain relief from automatic stay, and the landlord is free to continue pursuing its eviction rights and writ of possession.

Limitations on the 11 U.S.C. § 362(b)(22) relief:

- The provisions of 11 U.S.C. § 362(l) place conditions on the above referenced relief. The conditions set forth a procedure whereby the tenant may attempt to retain possession of the property.
- Under 11 U.S.C. § 362(l), the debtor is allowed to file and to serve, by no later than 30 days after the bankruptcy petition is filed, a certification under penalty of perjury. The automatic stay will apply for the first 30 days of the bankruptcy case if the debtor attests to the following:
 - Under applicable non-bankruptcy law (i.e. Virginia law, etc.), circumstances exist that permit the debtor to cure the entire monetary default giving rise to the judgment for possession (for example, the debtor has a right of redemption available pursuant to Virginia Code Section 55-248.34:1);
 - The debtor has deposited with the Bankruptcy Court Clerk any rent that would become due during the 30-day period after the petition is filed; and
 - Within 30 days after the case is filed, the debtor cures all monetary defaults giving rise to the unlawful detainer action.

The landlord may object to the debtor's certification. If the landlord contests the debtor certification, the Court must hold a hearing within 10-days to determine the truth of the challenged certifications. If the Court upholds the landlord's objection, the automatic stay is terminated, and the landlord will be entitled to proceed under Virginia law to complete the eviction process and to recover possession of the property. (See 11 U.S.C. § 362(l)(3)(B)).

Eviction processes initiated due to endangerment of property or illegal use of controlled substances on the leased premises are less susceptible to an automatic stay under bankruptcy law. Pursuant to 11 U.S.C. § 362(b)(23), the automatic stay will terminate 15 days after the landlord files a certification, if the landlord certifies under penalty of perjury that:

1. The landlord's unlawful detainer is based on the endangerment of the leased premises, or the illegal use of controlled substances on the leased premises; or
2. The tenant, during the 30-day period preceding the filing of the certification, has endangered the leased premises or illegally used a controlled substance on the leased premises.

The tenant may file and serve an objection to the landlord's certification within 15 days after the certification is filed challenging the truth of the landlord's certification. (See 11 U.S.C. § 362(m)). Then the automatic stay will prohibit further eviction actions until the Bankruptcy Court conducts a hearing on the objection within 10-days. At the hearing, the Court is required to determine whether "the situation giving rise to the lessor's certification . . . existed or has been remedied." (See 11 U.S.C. § 362(m)(2)(B)). If the tenant demonstrates to the Court that the situation giving rise to the landlord's unlawful detainer action did not exist, or has been remedied, then the stay will remain in effect. (See 11 U.S.C. § 362(m)(2)(C)). If the tenant does not prevail at this hearing, the landlord will be entitled to take further action to recover possession of the leased premises under Virginia law. (See 11 U.S.C. Section 362(m)(2)(D)).

STEP NINE - Obtain and Execute a Writ of Possession

Following the entry of judgment and the expiration of the 10 day period within which a defendant may appeal a judgment in plaintiff's favor, the plaintiff is permitted to file for and to obtain a writ of possession pursuant to Virginia Code Sections 8.01-471 and 8.01-293. A writ of possession may be issued up to one year following the date of judgment for possession, and the writ of possession must be returnable within 30 days from the date of issuing the writ. **Note:** Courts should only award "immediate" possession in the event of default judgments, for cases of nonpayment of rent, and for immediate non-remediable breaches of the lease.

The landlord or property manager will not be permitted to issue a writ if he has accepted rent payments without reservation. (See Virginia Code Sections 8.01-471 and 55-248.34:1). The request for a writ of possession must be filed with the clerk's office and the clerk must be provided with three copies of the writ of possession. As stated in Virginia Code Section 8.01-293, only the sheriff may execute the writ. The sheriff will travel to the leased premises and physically remove the tenant from the premises. This step actually results in the removal of the tenant and effectively closes the eviction process. **Note:** The sheriff will maintain the peace, but he or she will not remove the tenant's personal property or anything else that needs to be removed from the premises. If you anticipate having to remove any personal property belongings located in the unit, you then should be prepared to have those belonging removed pursuant to Virginia Code Section 55-248.38:2 as described below.

Personal Property Issues

As briefly noted in Step One, following the termination of the lease (not following the execution of a writ of possession), Virginia Code Section 55-248.38:1 describes how a landlord can handle the disposal of personal property items that were abandoned by the tenant in the premises or in any storage area provided by the landlord. The landlord must give the tenant notice by:

- 1) Providing a termination notice that includes a statement that any personal property left in the premises will be disposed of within the 24-hour period after termination of the lease;
- 2) Providing written notice pursuant to Section 55-248.33 that includes a statement that all personal property left in the premises will be disposed of within the 24-hour period after the seven-day notice period expires;
or
- 3) Providing separate written notice to tenant that all personal property left in the premises will be disposed of within 24 hours of the ten (10) day notice period expires.

It is important to note that the landlord must allow the tenant reasonable access to the property until the time in which the property is disposed. What that means in practice is that, once any statutory notice period has expired, the landlord should promptly dispose of the personal property. If the landlord waits and denies the tenant's request for reasonable access to the personal property even after the required wait period has expired, then the tenant is entitled to injunctive relief and other relief provided by law (typically damages for the value of the personal property being detained.)

Virginia Code Section 55-248-38:2 provides how a landlord may treat personal property remaining in the premises following a judgment for possession in an unlawful detainer action. The statute provides the landlord with two options:

- 1) execute the writ of possession and remove the personal property to the nearest public way for 24 hours after which the landlord must dispose of the property; or
- 2) execute the writ of possession and store the personal property in a storage area designated by the landlord (which can be the leased premises itself) for 24 hours and then dispose of it.

If the landlord chooses the storage area option, the tenant must be provided access, at reasonable times, to the personal property until the landlord disposes of it. If such reasonable access is denied, the tenant is entitled to injunctive relief and any other relief provided by law.

Pursuant to Virginia Code Section 55-248.38:3, upon the death of a tenant, who is the sole occupant of the dwelling unit, the lease is considered terminated and the landlord does not need to file an unlawful detainer action to obtain possession. The estate is liable for actual damages described in Virginia Code Section 55-248.35. It is important to immediately secure the leased premises. Pictures or an inventory may be useful should there be any allegations of missing or stolen property in the future. Once the leased premises have been secured and protected, then landlord should check with the Court to see if an executor or an administrator has been appointed to handle the probate. If no one has been appointed, the landlord must give at least 10 days' written notice to the emergency contact person identified in the lease or in any other related document, or if no such person is identified, then to the deceased tenant pursuant to Virginia Code Section 55-248.6. The notice must include a statement that all personal property items will be

treated as abandoned in accordance with Virginia Code Section 55-248.38:1 unless claimed within 10 days. After the notice requirement has been satisfied, the landlord can treat the remaining personal property as if it were abandoned and dispose of it according to Virginia Code 55-248.38:1.

STEP TEN - Acceptance of Rent During the Eviction Process

Although this step is not always utilized, it is critical for landlords to understand the rules regarding the acceptance of rent during the eviction process. Rules governing the acceptance of rent during the eviction process are found in Virginia Code Sections 55-225.47 & 55-248.34:1. If a landlord chooses to accept the tenant's rent following the issuance of a notice to the tenant that the lease is in breach and that the landlord intends to pursue legal action, the landlord must also give written notice to the tenant that the rent is and will be accepted with reservation. The notice may be included in the termination notice given by the landlord to the tenant, or in a separate written notice given by the landlord to the tenant. If so done, no further or subsequent notice of the landlord's acceptance of rent with reservation need be given by the landlord to the tenant, which includes the following of the Court's entry of judgment for possession but prior to the eviction. Thus, the notice need only be given once in order to secure the landlord's right to continue receiving and to accepting rent as well as to continue pursuing possession of the leased premises. (See 2018 amendments to Virginia Code Sections 55-225.47 & 55-248.34:1)

In Virginia, tenants are permitted to invoke a one right of redemption during a 12-month period. If the tenant pays all amounts owing, including rent, late fees, attorney's fees, and court costs, at or before the first return date of the unlawful detainer action, then the tenant must be permitted to remain in the leased premises. The tenant, however, may only invoke this right of redemption once within a 12-month period. If the tenant timely invokes the one right of redemption, then the landlord must dismiss the pending unlawful detainer action at that time. The landlord should retain proof of the tenant's exercise of the one right of redemption. This will afford the landlord proof that the tenant has already exercised his or her one right of redemption should the tenant fail to timely pay the rent required under the lease agreement within the next 12-month period.

Questions:

1) Can a landlord accept partial rent and still have the tenant evicted from the unit?

Pursuant to Virginia Code Section 55-248.34:1, the landlord may accept rent or partial rent with reservation and still seek possession of the leased premises. To avoid a waiver by accepting rent or partial rent, the landlord must strictly comply with the requirements set forth under Virginia Code Sections 55-225.47 and 55-248.34:1.

DAMAGES

The VRLTA allows the landlord to claim the following damages if the lease agreement is terminated:

1. Possession;
2. Rent;
3. Late Fees;
4. Costs
5. Reasonable attorneys' fees;
6. Actual damages of the breach.

Possession

How to obtain possession is discussed in detail in the preceding sections of this outline.

Rent

Most people think of rent as simply the required monthly payment the tenant makes as specified under the lease. However, the VRLTA defines rent as “all money, other than a security deposit, owed or paid to the landlord under the rental agreement, including prepaid rent paid more than one month in advance of the rent due date,” which broadens rent to include other fees and damages incurred under the lease. (See Virginia Code Sections 55-248.4 and 55-248.32.)

While rent may seem a straightforward category of damages, there are some issues to keep in mind. First of all, as briefly noted in the Eviction guide, the July 2014 unlawful detainer form includes a box that indicates that the plaintiff will seek rent owed as of the date of the hearing. It is important to check that box so that you can easily amend the amount of rent you are seeking (in lieu of more complicated motions for leave to amend). However, there will always be additional rent after the first contested hearing, so how can you recover that additional rent? There are two options a plaintiff can pursue.

Before 2005, after a plaintiff has successfully completed the unlawful detainer action, he or she would have to file a warrant in debt for any rent and damages not recovered under unlawful detainer action. Currently, the main appeal to this method is that the landlord has time to fully assess all of his damages and document his claim accordingly. Additionally, certain landlords as a business model have an organizational separation between unlawful detainers and collecting outstanding debts, for example retaining collection agencies for the latter. The downside to that approach is that it involves separate litigation with additional costs and extra efforts (such as finding and serving the tenant for whom you may not have any contact information).

As briefly noted Step Six, since 2005, Virginia Code Section 8.01-128 has allowed a plaintiff to bifurcate the unlawful detainer action as to possession and damages.

This allows a landlord to capture more damages in a single unlawful detainer action. The hearing on damages must be held within 120 days of the hearing on possession. However, the 120-day period should capture the significant majority, if not all, of a landlord's damages. Before the damages hearing, the landlord will have possession of the premises and will be able to fully assess any damage above normal wear and tear. Furthermore, if the landlord is able to re-rent the leased premises during that time period then that turnover period, in which no rent was received, can be claimed as outstanding rent. If the premises are still not re-rented, then at least the landlord can claim the entire 120-day window. Keep in mind, however, that the landlord must make a good-faith effort to mitigate the damages, which would include standard business efforts to re-rent the premises.

Late Fees

Virginia Code Section 55-248.7 specifically authorizes a landlord to charge a fee for a tenant's late payments, although it does not specify an amount. Courts will normally view late fees as a matter of contract law and will strictly construe the statutory language, allowing for reasonable "late charges contracted for in a written rental agreement." However, Courts will weigh the reasonableness of assessed late fees. Generally, Courts will approve a late fee of up to 10% of the monthly rent.

Costs

While "costs" may sound like a broad category of damages, it only applies to the cost of filing and service of process by the local sheriff. Typically, the cost of filing an unlawful detainer action ranges from \$50-\$70; whereas the cost for service of process by a sheriff is currently \$12. Therefore, the "costs" area of recovery is quite limited.

Reasonable Attorneys' Fees

Similar to late fees, the VRLTA includes various sections that allow the landlord recovery of attorneys' fees with no other guidance except that they must be "reasonable." In smaller, more "run of the mill" unlawful detainer actions, Courts will generally approve attorneys' fees as a reasonable percentage (usually 25%-33%) of the judgment awarded. However, in larger, more complex litigation, Courts may require proof of actual attorney fees incurred. **Note:** A landlord cannot include or add charges for attorneys' fees without actually retaining and having an attorney present at the hearing.

Actual Damages

Rent and late fees are the most straightforward actual damages in that the amounts are specified in the lease agreement. However, the Landlord can recover for other damages actually incurred. Most commonly, such damages will be repairs to the premises for damages incurred above normal wear and tear. As noted in Step Five, if a particular item in the leased premises is damaged and requires repair, then the landlord can recover the actual cost of repair. If the item must be replaced, however, then the

landlord can only charge the actual value of the item being replaced, accounting for depreciation. Unpaid utilities are also a common component of actual damages that a landlord may need to recover. Regardless of the nature of the damages, the landlord should be prepared to provide receipts and testimony to the Court, detailing the damages and explaining with specificity how it was incurred. **Note:** The VRLTA does not provide for punitive damages.

Remedy by Repair

It is helpful to note that pursuant to Virginia Code Section 55-248.32, if the tenant violates a provision of Virginia Code Section 55-248.16 (detailing tenant's duties to maintain premises) or a provision of the lease agreement materially affecting health and safety that can be remedied by repair, replacement, or cleaning, the landlord shall send a written notice to the tenant specifying the breach and stating that the landlord will enter the dwelling unit and will perform the work in a workmanlike manner and will submit an itemized bill to the tenant for the actual and reasonable cost of the repair, which shall be due as rent on the next rent due date, or if the rental agreement has terminated, for immediate payment. This section specifically authorizes the landlord to "engage a third party" to perform such repairs. In the event of an emergency, the landlord may enter the premises and repair the damage following the same procedures.

CHALLENGES TO TITLE IN UNLAWFUL DETAINER ACTIONS

Another recent issue that has been raised by the Virginia Supreme Court is the ability of General District Courts to consider challenges to a plaintiff's title to property in an unlawful detainer action. In *Parrish v. Fannie Mae*, the Supreme Court held that, while a General District Court lacks subject matter jurisdiction to hear title challenges to real property, the court may nonetheless consider whether such a challenge is legally sufficient to justify a dismissal without prejudice on jurisdictional grounds. *See Parrish v. Fannie Mae*, 292 Va. 44, 787 S.E.2d 116 (2016)(a copy of which is attached hereto). This holding now raises the question as to what evidence a General District Court may consider in making such a determination.

Overview of the *Parrish* case

In *Parrish*, the plaintiff, Fannie Mae, received a deed of trust to the defendants' real property, and it thereafter sought to take possession of the defendants' property pursuant to an unlawful detainer action in general district court. *Id.* at 48, 787 S.E.2d at 119. The defendants responded to the unlawful detainer action by arguing that the underlying foreclosure action was invalid due to plaintiff's failure to comply with a condition precedent inherent in the deed of trust. *See id.* The General District Court nonetheless awarded possession to Fannie Mae, and the defendants filed an appeal to the Circuit Court. *Id.*

In the Circuit Court, Fannie Mae argued that the Court should not consider any defenses relating to the validity of the underlying foreclosure action due to the fact that

the General District Court lacked subject matter jurisdiction to hear a title challenge in an unlawful detainer action. *Id.* In essence, Fannie Mae’s argument was premised on the Circuit Court’s jurisdiction being “derivative of the general district court’s subject matter jurisdiction...” *Id.* at 48, 787 S.E.2d at 119-20. The Circuit Court agreed with Fannie Mae, and it granted Fannie Mae an order of possession. Subsequently, the Virginia Supreme Court awarded the defendants an appeal. *See id.* at 48, 787 S.E.2d at 120.

In assessing this case, the Virginia Supreme Court noted that “[g]eneral district courts have subject matter jurisdiction over unlawful detainer cases. What they lack is subject matter jurisdiction to try title.” *Id.* at 53, 787 S.E.2d at 122, n.6. “[C]ourts not of record have no subject matter jurisdiction to try title to real property.” *Id.* at 49, 787 S.E.2d at 120. This, however, placed the Court in what it characterized as a “conundrum” due to the fact that unlawful detainer actions can hinge on the outcome of a title question. *Id.* at 50, 787 S.E.2d at 120-21.

“Because a court always has jurisdiction to determine whether it has subject matter jurisdiction, the court has the authority to explore the allegations to determine whether, if proven, they are sufficient to state a bona fide claim that the foreclosure sale and trustee’s deed could be set aside in equity.” *Id.* at 52, 787 S.E.2d at 122 (internal citation and quotation omitted). Thus, the Court held that “[i]f the general district court satisfies itself that the allegations are insufficient, it retains subject matter jurisdiction and may adjudicate the case on the merits. However, if the court determines that the allegations are sufficient, it lacks subject matter jurisdiction over the case and it must be dismissed without prejudice.” *Id.* at 53, 787 S.E.2d at 122.

Ultimately, the Court found that the defendants raised a bona fide question of title in the unlawful detainer proceeding, thereby divesting the General District Court of subject matter jurisdiction to try the unlawful detainer case before it. Likewise, since the Circuit Court’s jurisdiction on appeal was derived from and limited to the jurisdiction of the General District Court, the Circuit Court likewise lacked subject matter jurisdiction while exercising its de novo appeal. Thus, the Circuit Court was limited to dismissing the proceeding without prejudice. Therefore, the foreclosure purchaser was enabled to pursue its choice of available remedies in the Circuit Court under that Court’s original jurisdiction. *Id.* at 54, 787 S.E.2d at 123.

Application of *Parrish* to General District Court Proceedings

Though *Parrish* makes it clear to courts not of record that they are not required to dismiss unlawful detainer actions immediately upon a defendant’s challenge to a plaintiff’s title, the case nonetheless leaves an open question as to precisely how the General District Courts should handle such a challenge.

What procedures should a General District Court follow when evaluating a title challenge pursuant to *Parrish*?

While *Parrish* does not identify the exact procedures a General District Court should follow in hearing a title challenge in an unlawful detainer action, there is language in this decision that should give courts some guidance. Ultimately, General District Courts should consider only such evidence as is necessary to decide whether the defendant's response to the plaintiff's claim introduces a legally sufficient title challenge.

This approach is evidenced by the Supreme Court's underlying characterization of a defendant's title challenge. In essence, the Supreme Court suggests that a General District Court only has jurisdiction to consider such a challenge insofar as it is necessary to determine whether the court has subject matter jurisdiction. See *Parrish*, 292 Va. at 52, 787 S.E.2d at 122 (indicating that "a court always has jurisdiction to determine whether it has subject matter jurisdiction...") (quoting *Morrison v. Bestler*, 239 Va. 166, 170, 387 S.E.2d 753, 755 (1990)). The implication here is that a General District Court is in no way meant to consider the merits of the title challenge, but rather they are only to consider the legal sufficiency of the challenge itself.

Indeed, the Virginia Supreme Court states that "the allegations must be sufficient to survive a demurrer had the homeowner filed a complaint in circuit court seeking such relief." *Id.*; cf. *Filak v. George*, 267 Va. 612, 617, 594 S.E.2d 610, 613 (2004) ("a demurrer admits the truth of all facts alleged in a [complaint] but does not admit the correctness of the pleader's conclusions of law"). This language suggests that General District Courts should generally evaluate a title challenge in an unlawful detainer action in the same manner as they would in evaluating a demurrer to a complaint. In other words, the General District Court should treat the case as if the moving party was demurring to the allegations set forth in a pleading, and in so doing the court should only consider the four corners of the parties' respective pleadings.

This concept is somewhat confusing given that a party's claim or challenge made in a General District Court proceeding is not always set forth in a formal amplified pleading filed with the Court. Accordingly, it may be wise for a General District Court to order pleadings to be filed in a scenario where a defendant challenges the plaintiff's title to the disputed property.

What factors should a General District Court consider when evaluating a title challenge pursuant to *Parrish*

Another issue raised by the *Parrish* decision is a determination of what factors the court is to consider in evaluating whether the defendant's argument is sufficient to state a claim. Fortunately, the *Parrish* court provides a relatively clear answer to this question in a footnote, when it states:

The Homeowner's allegations must (1) identify with specificity the precise requirements in the deed of trust that he or she asserts constitute conditions precedent to the foreclosure, (2) allege facts indicating that the trustee failed to substantially comply with them so that the power to

foreclose did not accrue and (3) allege that the foreclosure purchaser knew or should have known of the defect.

Id. at 53, 878 S.E.2d at 122, n. 5.

Thus, a court should look to a defendant's argument with respect to whether it introduces each of these elements, understanding and recognizing that a "general allegation that the trustee breached the deed of trust is not sufficient." *Id.* Where it does not, the court should find that the defense was not properly raised, and accordingly, the court should recognize its subject matter jurisdiction and move forward in deciding the plaintiff's unlawful detainer case. Alternatively, if these allegations are raised and are sufficiently set forth, the court should find that it lacks subject matter jurisdiction and dismiss the case without prejudice.

Are there situations where a General District Court can hear evidence in a title challenge?

One final consideration is whether there are circumstances in which the General District Court may look beyond the four corners of the pleadings. Given that the *Parrish* Court did not expressly say that a General District Court may only treat such a title challenge like a demurrer, the Virginia Supreme Court has arguably left some room for a General District Court to consider and to entertain evidence beyond the pleadings when a title challenge is raised.

Ultimately, any evidence heard by a General District Court in the context of a title challenge during an unlawful detainer action should be heard exclusively for the sole purpose of determining whether the title challenge is legally sufficient. Just as a trial court is not to evaluate the merits of a plaintiff's complaint when ruling on a demurrer but rather only to evaluate the legal sufficiency of it, General District Courts should likewise be cautious so as not to evaluate the merits of a title challenge in an unlawful detainer action.

In most cases, a court will likely be able to determine whether a title challenge is adequate by merely listening to the defendant's argument and/or reviewing the defendant's pleadings. Nonetheless, situations could arise where evidence needs to be heard in order to make such a determination. The most obvious example is where an unrepresented defendant suggests that there is a title problem, but the defendant has limited knowledge of the law with respect to title issues. In such a case, the Court may ask to see certain mortgage or title documents solely for the purpose of understanding the defendant's argument. Moreover, the court in such a situation may also wish to advise the defendant of the complex nature of this argument and to encourage the defendant to obtain counsel.

Summary of Title Challenge Procedures and Considerations

Based on the above discussion, where a defendant in an unlawful detainer action alleges that the plaintiff lacks adequate title to the disputed property, a Court should consider the following:

STEP 1—Is the defendant’s argument clear?

- If the defendant understands the argument in full and presents it to the court in a coherent fashion, the court may be able to make an immediate decision as to whether the argument is legally sufficient.
- If the defendant’s argument is ambiguous, the court may wish to order pleadings to obtain a clear and amplified statement of the defendant’s position.
- If the defendant is unrepresented and does not seem to fully understand the implications of the argument, the court should consider advising the defendant to obtain counsel. The court may further ask for certain documentation so as to help with understanding the nature of the defendant’s arguments. However, the court should **not** consider evidence to evaluate the merits of the defendant’s challenges.

STEP 2—Is the defendant’s argument legally sufficient?

- The underlying question is whether the title challenge has been sufficiently raised such that the court can determine whether or not it has subject matter jurisdiction.
- The court should **NOT** evaluate the merits of the defendant’s challenge.
- The court should consider whether the defendant’s challenge satisfies the following elements:
 1. Does the defendant’s claim identify with specificity the precise requirements in the deed of trust or other mortgage document that he or she asserts constitutes conditions precedent to the foreclosure?
 2. Does the defendant allege sufficient facts indicating that the trustee failed to substantially comply with these conditions such that the power to foreclose did not accrue?
 3. Does the defendant allege that the foreclosure purchaser knew or should have known of the defect?

STEP 3—Does the defendant’s argument justify dismissal?

- If the court determines that the defendant’s argument does not raise a legally sufficient title challenge, the court should then find that it has subject matter jurisdiction and proceed forward in deciding the merits of the unlawful detainer action.⁹

⁹ It is important to note again that the court should never consider the merits of the title dispute. If the court has determined that the defendant has not introduced a legally sufficient claim, the court should then disregard this argument entirely in the context of the plaintiff’s claim. This is because the court lacks

- If the court determines that the defendant’s argument does raise a legally sufficient title challenge, the court should then dismiss the case without prejudice on the basis that the court lacks subject matter jurisdiction.

Examples

1. If the defendant alleges the trustee failed to properly advertise the sale, may the court receive evidence of the newspaper’s certificate of publication?

A district court should generally not receive evidence of the newspaper’s certificate of publication. This evidence would likely be pertinent only to deciding the merits of the defendant’s argument.

Instead, the court should consider 1) whether the defendant has identified the precise requirements that the trustee was to abide by with respect to publication; 2) whether the defendant alleged sufficient facts suggesting that the trustee substantially failed to comply with these publication requirements; and 3) whether the foreclosure purchaser knew or should have known of the trustee’s failure to comply with the advertising requirements.

2. If the defendant alleges that a trustee’s report of the foreclosure was not filed with and approved by the Commissioner of Accounts, may the Court receive evidence of the Commissioner’s approval of the report?

A General District Court should generally not receive evidence of a Commissioner’s Approval of a Report of Foreclosure as this also may be relevant only to determining the merits the defendant’s title challenge. Instead, the court should again only focus on the above three (3) stated criteria and what facts, if any, have been alleged that would satisfy them.

3. If the defendant alleges lack of notice of the sale, may the court receive evidence of a certified return receipt of mailing of the notice of sale to the defendant?

As with the other above examples, this evidence would also be relevant only to determining the merits of the defendant’s title claim. Though this evidence would arguably be dispositive in disproving the defendant’s argument, the district court’s role is limited only to a determination of whether the claim is properly raised and not whether the claim has merit. If a claim is sufficiently raised, the court lacks subject matter jurisdiction to evaluate the merits and must dismiss the case without prejudice.

subject matter jurisdiction to hear the title claim and may only proceed on the merits of the plaintiff’s claim in the event that the defendant’s title challenge is determined to be legally insufficient.

Appendix 1

CONVENTIONAL
MATERIAL NONCOMPLIANCE NOTICE
SPECIFYING BREACH(ES)
TO BE REMEDIED WITHIN 21 DAYS

To: _____ Date: _____

_____ (the "Premises")

TAKE NOTICE that according to the applicable provisions and terms of your Lease or Rental Agreement, and Chapter 55 of the Code of Virginia (1950), as amended, Section 55-248.2, *et seq.*, the Virginia Residential Landlord and Tenant Act (the "Act"), you are required to:

Your failure to comply with these aforementioned lease provisions and terms and/or with the above referenced statutory requirements constitutes a material noncompliance with same.

Pursuant to Section 55-248.31 of the Code of Virginia (1950), as amended, the appropriate section of the Act, Management hereby requires and demands possession of the Premises and gives you notice of its intention to terminate the Lease or Rental Agreement on _____, if you do not do the following on or before _____:

If your above referenced noncompliance has been timely remedied, you must immediately notify the office to indicate and to confirm that you have timely complied and remedied what has been requested of you herein by Management. At that time, we will confirm your representation of timely compliance and remedy, and we will try to answer any additional questions that you may have regarding this matter. Your failure to timely

comply and to remedy what Management has requested of you in this Notice will result in a termination of your Lease or Rental Agreement and in Management pursuing all rights and remedies afforded it under the Lease or Rental Agreement and/or under applicable Virginia law, which may include the filing of a legal action seeking possession of the Premises, any monetary damages due and owing, including any outstanding rent, fees or costs, and any other such relief that may be afforded.

Pursuant to Section 55-248.34:1 of the Code of Virginia (1950), as amend, all rental payments made by you during the pendency of this material noncompliance notice will be accepted with reservation and will not affect any legal proceedings instituted.

Please note that any items of personal property left in the Premises will be disposed of within the twenty-four (24) hour period after termination as set forth herein.

Your prompt attention to this matter is both necessary and appreciated.

I hereby do certify that a true and exact copy of this Notice was mailed, first class, postage prepaid, and hand-delivered to (name and address of the Defendant/Tenant[s]) on this ____ day of _____, 2016.

By: _____
Authorized Representative

cc: _____

Appendix 2

MATERIAL NONCOMPLIANCE NOTICE
FOR FAILURE TO PAY RENT

To: _____ Date: _____

_____ (the "Premises")

TAKE NOTICE that according to the terms of your Lease or Rental Agreement, the monthly rent is due and payable on the first day of each month. If you fail to timely pay the monthly rent, the policy of Management and of the Landlord is to assess a late penalty as indicated below for monthly rent received after the fifth (5th) day of the month and not to accept any personal checks for rent received after the fifth (5th) day of the month. In addition, any rental payments received after legal action has been initiated will be accepted with reservation, will be applied to any delinquent and outstanding amounts due, and, to the extent permitted by applicable Virginia law, such acceptance of said outstanding payments may not affect any legal action instituted against you to recover any outstanding delinquent rent, damages, costs, fees, and/or possession of the Premises. Any such payments must be made by cashier's check, certified check, or money order. No cash will be accepted.

Our records indicate that you are delinquent in your monthly rental payments, plus late charges, damages, costs, fees, and/or other such financial assessments, by virtue of nonpayment of the monthly rental payments, or by presentation of a worthless check for the amount of the monthly rental payment, which was either returned for insufficient funds or account closed.

Rent from _____ to _____	\$ _____
_____	\$ _____
Other _____	\$ _____
_____	\$ _____
_____	\$ _____

Total Due \$ _____

Consequently, Management and/or Landlord hereby require and demand possession of the Premises and hereby serve you with this Notice of their intention to terminate your Lease or Rental Agreement unless you pay the above total amount in full within five (5) days after the date of this Notice. If necessary, upon termination of your Lease or Rental Agreement, Management and/or Landlord will proceed by due process of law to recover a judgment against you in the above total amount, plus any additional damages, costs, fees, including reasonable attorney's fees, incurred, and to recover legal possession of the Premises by lawful order and writ of eviction, if necessary.

Please note that any items of personal property left in the Premises will be disposed of within the twenty-four (24) hour period after termination as set forth herein.

I hereby do certify that a true and exact copy of this Notice was hand-delivered and/or mailed, first class, postage prepaid, to (name and address of the Defendant/Tenant[s]) on this ____ day of _____, 2016.

By: _____
Authorized Representative

cc: _____

Appendix 3

NOTICE OF TERMINATION
Nonremediable Violation

To: _____ Date: _____

_____ (the "Premises")

TAKE NOTICE that according to the applicable provisions of the Virginia Residential Landlord and Tenant Act, Section 55-248.2, *et seq.*, of the 1950 Code of Virginia, as amended, and/or of the applicable provisions of Federal and/or of State law, and /or the applicable provisions of your Lease or Rental Agreement, dated _____, and any subsequent amendments thereto, by and between _____, Landlord, and _____, Tenant[s], your Lease or Rental Agreement is hereby terminated, and Landlord hereby requires and demands possession of the Premises. Failure to vacate the Premises on or before _____, 2016, will result in legal action for possession of the Premises, any damages for holding over, and a request for attorney's fees and court costs incurred. In accordance with Section 55-248.34:1 of the Code of Virginia, as amended, during the period between the dates of this Notice of Termination and the effective date of this termination, all rental payments made by you will be accepted with reservation and will not affect the termination of the tenancy as provided herein.

The termination of your Lease or Rental Agreement is necessitated by the fact that you have committed a non-remediable violation of the applicable provisions of the Virginia Residential Landlord and Tenant Act, and/or of the applicable provisions of Federal and/or State law, and/or of the applicable provisions of your Lease or Rental Agreement, in that you:

Please contact the Rental Office during normal business hours as posted to advise the Manager of the date that you will vacate the Premises and to make arrangements for the checkout inspection, if you desire to be present. Your prompt attention to this matter is both necessary and appreciated.

Please note that any items of personal property left in the Premises will be disposed of within the twenty-four (24) hour period after termination as set forth herein.

I hereby do certify that a true and exact copy of this Notice was mailed, first class, postage prepaid, and/or hand delivered to (name and address of the Defendant/Tenant(s)) on this ____ day of _____, 2016.

By: _____
Authorized Representative

cc: _____

Appendix 4

NOTICE OF TERMINATION
(Repeat Violation)

To: _____

Date: _____

(the "Premises")

TAKE NOTICE that according to the terms and conditions of your Lease or Rental Agreement, dated _____, 20__, and any subsequent amendments thereto, by and between _____, Landlord, and _____, Tenant[s], your Lease or Rental Agreement is hereby terminated, and Landlord hereby requires and demands possession of the Premises. Failure to vacate the Premises on or before _____, 2016 will result in legal action for possession of the Premises, any damages for holding over, and a request for any other related damages, costs and/or fees incurred by Landlord, including but not limited to any attorney's fees and court costs. Please note that all rental payments made by you from this day forward will be accepted with reservation in accordance with Virginia Code Section 55-248.34:1, as amended, and it will not affect the termination of the tenancy as provided herein.

The termination of your Lease or Rental Agreement is necessitated by the following repeated violations of your Lease or Rental Agreement, the Rules and Regulations, the Virginia Residential Landlord and Tenant Act, and/or other applicable state and/or federal law and regulations. To date, you have previously received legal notices from Landlord stating that:

Despite these prior legal notices, on or about _____, 2016, you again committed a similar breach and/or similar breaches of a like nature in that you did the following:

Due to your aforementioned continued and repeated violation(s) as cited herein, your Lease or Rental Agreement shall be terminated in accordance with applicable state and/or federal law.

Please contact the Rental Office during the normal business hours as posted to advise the Manager of the date that you will vacate the Premises and to make arrangements for the checkout inspection of the Premises if you desire to be present. Your prompt attention to this matter is both necessary and appreciated.

Please note that any items of personal property left in the Premises will be disposed of within the twenty-four (24) hour period after termination as set forth herein.

I hereby do certify that a true and exact copy of this Notice was mailed, first class, postage prepaid, and hand-delivered to (name and address of the Defendant/Tenant[s]) on this ____ day of _____, 2016.

By: _____
Authorized Representative

cc: _____

Appendix 5

**SUMMONS FOR UNLAWFUL DETAINER
(CIVIL CLAIM FOR EVICTION)**

VA. CODE § 8.01-126
Commonwealth of Virginia
General District Court

CITY OR COUNTY

STREET ADDRESS OF COURT

TO ANY AUTHORIZED OFFICER: Summon the Defendant(s) as provided below;
TO THE DEFENDANT(S): You are commanded to appear before this Court on

to answer this civil claim.

RETURN DATE AND TIME

DATE ISSUED

CLERK DEPUTY CLERK MAGISTRATE

CLAIM AND AFFIDAVIT: That Defendant(s) unlawfully detains and withholds from Plaintiff(s):

ADDRESS/DESCRIPTION OF DETAINED PROPERTY

and that the Defendant should be removed from possession based on the following:

Unpaid rent and further that rent is due and owing and damages have been incurred as follows:
\$ rent due for and \$ late fee
RENT PERIOD

and \$ damages for with interest
RATE(S) AND BEGINNING DATE(S)

and \$ costs and \$ civil recovery and \$ attorney's fees.

Plaintiff requests judgment for all amounts due as of the date of the hearing.
 This summons is filed to terminate a tenancy pursuant to the Virginia Residential Landlord and Tenant Act, § 55-248.2 et seq. of the Code of Virginia.

All required notices have been given.

PLAINTIFF PLAINTIFF'S ATTORNEY PLAINTIFF'S AGENT

Subscribed and sworn to before me this day of 20

My commission expires:
NOTARY REGISTRATION NO.
 CLERK DEPUTY CLERK MAGISTRATE NOTARY PUBLIC
 City County of

CASE DISPOSITION

JUDGMENT that Plaintiff(s) recover against named DEFENDANT(S).
 possession of the premises described above pursuant to § 8.01-128.
 A hearing shall be held on to establish final rent and damages.

DATE AND TIME

Immediate writ of possession authorized pursuant to Virginia Code
 § 8.01-129 based upon a judgment of default for a trustee's deed following foreclosure
 the nonpayment of rent immediate non-remediable termination.
 § 55-243(C) or § 55-248.34:1(D).

DEFENDANT(S) PRESENT? YES NO

DATE

JUDGE

Rent, in the sum of \$ and \$ late fee
and \$ damages with interest and
RATE(S) AND BEGINNING DATE(S)

\$ costs and \$ civil recovery and \$ attorney's fees.

HOMESTEAD EXEMPTION WAIVED? YES NO CANNOT BE DEMANDED

JUDGMENT FOR NAMED DEFENDANT(S)
 NON-SUIT DISMISSED DEFENDANT(S) PRESENT? YES NO

DATE

JUDGE

FORM DC-121 FRONT 07/14

CASE NO.

PLAINTIFF(S) NAME(S) (LAST, FIRST, MIDDLE)

V.

TELEPHONE NUMBER

DEFENDANT(S) NAME(S) (LAST, FIRST, MIDDLE)

TELEPHONE NUMBER

TO DEFENDANT: You are not required to appear, however, if you fail to appear, judgment may be entered against you. See the additional notice on the reverse about requesting a change of trial location and your right to prevent this unlawful detainer action through payment of amounts owed.

To dispute this case, you must appear on the return date to try this case

To dispute this case, you must appear on the return date for the judge to set another date for trial.

If you fail to appear and a default judgment is entered against you, a writ of possession may be issued immediately for possession of the premises.

Bill of Particulars ordered
DATE

Grounds of Defense ordered
DATE

ATTORNEY FOR PLAINTIFF(S)

TELEPHONE NUMBER

ATTORNEY FOR DEFENDANT(S)

TELEPHONE NUMBER

DISABILITY ACCOMMODATIONS for loss of vision, hearing, mobility, etc. Contact the court ahead of time.

HEARING DATE AND TIME

Redemption tender presented; continued to:

HEARING DATE AND TIME

Defendant must pay:

\$
RENT OWED
into the court to be held in escrow by

DATE
and any rents coming due prior to the next hearing date must also be paid into the court.

JUDGE'S INITIALS

MONEY JUDGMENT PAID OR SATISFIED PURSUANT TO ATTACHED NOTICE OF SATISFACTION

DATE

CLERK

To the Defendant(s):

- (1) The preferred location for an Unlawful Detainer action is the city or county where the property is located. If the plaintiff has filed this case in a city or county other than where the property you rent is located, you may object to the location. The court may transfer the case to the preferred location, if the court agrees with you. The court may award costs and attorney's fees to you if the court agrees with your objection. To object to the location of the suit, you must do the following:
- Prepare a written request which contains (a) this court's name, (b) the case number and the "return date" as shown on the other side of this form in the left column under the words "TO THE DEFENDANT(S)," (c) Plaintiff(s) name(s) and your name(s), (d) "I move to object to venue of this case in this court because" and state the reasons for your objection and also state in which city or county the case should be tried, and (e) your signature and mailing address.
 - File the written request in the clerk's office before the trial date (use the mail at your own risk) or give it to the judge when your case is called on the return date. Also send or deliver a copy to the plaintiff.
 - If you mail your written request to the court, the clerk will notify you of the judge's decision.
- (2) If you pay the landlord or his attorney or pay into court all (i) rent due and owing as of the court date as contracted for in the rental agreement, (ii) other charges and fees as contracted for in the rental agreement, (iii) late charges contracted for in the rental agreement, (iv) reasonable attorney fees as contracted for in the rental agreement or as provided by law, and (v) costs of the proceeding as provided by law, this unlawful detainer action will be dismissed pursuant to Virginia Code § 55-243 or 55-248.34:1. You may exercise this right only once every 12 months that you continue to live in the same place, regardless of the term of the rental agreement or any renewal term.
- (3) You may tell your landlord that you want another person to receive a copy of this summons, and the landlord shall send a copy to that person. However, the person you identify will not, by receiving a copy of the summons, become a party to the case or be able to challenge the landlord's actions on your behalf. Virginia Code § 55-248.9:1

I certify that I mailed a copy of this document to the defendants named therein at the address show therein on

DATE [] PLAINTIFF [] PLAINTIFF'S ATTORNEY [] PLAINTIFF'S AGENT

Fl. Fa. issued on

Interrogatories issued on

Garnishment issued on

RETURNS: Each defendant was served according to law, as indicated below, unless not found.

Name	
Address	
<input type="checkbox"/> Personal Service	Tel. No.
<input type="checkbox"/> Being unable to make personal service, a copy was delivered in the following manner:	
<input type="checkbox"/> Delivered to family member (not temporary sojourner or guest) age 16 or older usual place of abode of party named above after giving information of its purport. List name, age of recipient, and relation of recipient to party named above.	
<input type="checkbox"/> Posted on front door or such other door as appears to be the main entrance of usual place of abode, address listed above. (Other authorized recipient not found.)	
<input type="checkbox"/> Served on the Secretary of the Commonwealth	
<input type="checkbox"/> Not found	SERVING OFFICER
..... for	
DATE	
Name	
Address	
<input type="checkbox"/> Personal Service	Tel. No.
<input type="checkbox"/> Being unable to make personal service, a copy was delivered in the following manner:	
<input type="checkbox"/> Delivered to family member (not temporary sojourner or guest) age 16 or older at usual place of abode of party named above after giving information of its purport. List name, age of recipient, and relation of recipient to party named above.	
<input type="checkbox"/> Posted on front door or such other door as appears to be the main entrance of usual place of abode, address listed above. (Other authorized recipient not found.)	
<input type="checkbox"/> Served on the Secretary of the Commonwealth	
<input type="checkbox"/> Not found	SERVING OFFICER
..... for	
DATE	