



**WSSFC 2023**

**Substantive Law Track – Session 4**

# **A Tenant Filed Bankruptcy: Now What?**

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## About the Presenters...

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### I. **Definitions/Overview of Basic Bankruptcy Concepts**

#### A. Chapters of Bankruptcy.

- i. **Chapter 7** - the most common type of bankruptcy, chapter 7 is a “liquidation” case in which a chapter 7 trustee is appointed to liquidate any non-exempt assets and pay claims. The vast majority of cases are “no-asset” cases meaning all assets are exempt or of de minimus value and nothing is paid out to creditors.
- ii. **Chapter 13** - a repayment plan bankruptcy for individuals (not entities) to reorganize their finances. The debtor will propose the terms of a plan, consistent with what the Bankruptcy Code allows, to cure arrearages, reinstate defaulted loans, modify terms of secured debts, and pay minimum amounts specified by the “Means Test” set forth in the Bankruptcy Code.
- iii. **Chapter 11** - typically a business reorganization or liquidation, but sometimes also used as a reorganization option for individuals with debt greater than the limits for Chapter 13. Subchapter V is the small business reorganization subchapter of Chapter 11.
- iv. **Chapter 12** - reorganization / liquidation bankruptcy chapter specific to farm and fishing operations.

B. Chapter 13 Plan. A Chapter 13 Plan may:

- i. provide for the curing or waiving of any default (**11 U.S.C. § 1322(b)(3)**)
- ii. subject to **§ 365**, provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor (**11 U.S.C. § 1322(b)(7)**)
- iii. But note - after a 5-day notice remains uncured, the tenancy is terminated, and thus there is not a tenancy in default to cure; it has already been terminated and there is no lease to assume. Notwithstanding, landlords may consent to the repayment of arrears and the reinstatement of the lease if it's provided for in the Plan.

C. Automatic Stay.

- i. Automatically upon filing of a Bankruptcy Petition, **11 U.S.C. § 362** provides for the “Automatic Stay” which prohibits any collection efforts outside of the bankruptcy context. In the landlord/tenant context, collection efforts includes providing termination notices and commencing or continuing eviction proceedings.
- ii. The automatic stay and its impact on landlord/tenant relations is discussed in greater detail below.

D. Assumption (or Rejection) of Lease. A lease will be deemed rejected unless the Trustee assumes it; election is made on the proposed Chapter 13 Plan.

- i. Under **11 U.S.C. § 365(d)(1)**, a Chapter 7 trustee has sixty (60) days to assume or reject a debtor’s unexpired lease. If not expressly assumed, it is deemed rejected. However, rejection, without more, does not terminate the lease or remove the lease from the bankruptcy estate.
- ii. The rejection of an unexpired lease (by the trustee or rejected in a filed Plan) is deemed to be a breach of the lease “immediately before the date of the filing of the petition.” **11 U.S.C. § 365(g)(1)**. If it was assumed and then later rejected, then the breach occurs (A) at the time of the rejection if the case was not converted from Ch. 7 to Ch. 13; or (B) if the case was converted from Ch. 7 to Ch. 13 (i) immediately before the conversion, if the lease was assumed prior to the conversion; or (ii) at the time of rejection if the lease was assumed after the conversion.
- iii. Rejection is not synonymous with termination. “Rejection's effect is to give rise to a remedy in the non-debtor party for breach of the rejected contract, typically a right to money damages assertable as a general unsecured claim in the bankruptcy case.

Rejection has absolutely no effect upon the contract's existence; the contract is not canceled, repudiated, rescinded, or in any fashion terminated.” Michael T. Andrew, Executory Contracts Revisited: A Reply to Professor Westbrook, 62 U. Colo. L.Rev. 1, 15 (1991). Lease termination, on the other hand, is a matter of state law.

E. Pre-Petition Debt - § 365(g).

- i. Unpaid rent arising before the filing of the petition is considered a pre-petition debt and landlords should file a proof of claim. The claim will be unsecured.
- ii. Unpaid rent arising after the filing of the petition may also be considered a pre-petition debt where the lease has not been assumed, and the debtor’s plan provides for a rejection of the lease, as under **11 U.S.C. § 365(g)** the breach is deemed to have occurred “immediately before the date of the filing of the petition.” In re Perry, 369 B.R. 402, 403 (E.D.Wis.Bk. 2007).

F. Post-Petition Debt.

- i. Any debt arising after the filing of the Bankruptcy Petition.
- ii. Where a tenant assumes a lease and then fails to pay rent, the landlord would have to file a claim for post-petition rent and/or seek relief from the Automatic Stay to pursue eviction and collection of the post-petition lease arrears. To pursue eviction only (possession of the premises), filing a claim may not be necessary, but relief from the stay will.
- iii. But is it an administrative claim entitled to priority? Some claims for post-petition debts may be filed as administrative expenses, and thus entitled to payment priority over unsecured and other creditors. For commercial properties, **11 U.S.C. § 503(b)(7)** provides a specific calculation. In the residential context, for a post-petition rent claim to qualify as an administrative expense under **11 U.S.C. § 503(b)** “it must arise from a post-petition transaction with the estate and include ‘the actual, necessary costs and expenses of preserving the estate.’” In re Perry, 369 B.R.402, 403 (E.D.Wis.Bk. 2007). As a result, unpaid post-petition rent will generally be considered an unsecured claim, and not entitled to priority. “The allowance of an administrative expense to a landlord of residential property seeking to collect rental arrears from a debtor appears to be rare.” Id., but see, In re Mandel, 319 B.R.743 (Bankr.S.D.Fla.2005) (finding debtor’s post-petition occupation of apartment conferred actual, concrete benefit to estate because

debtor was self-employed, using apartment in his business to generate income to pay creditors.).

G. Discharge.

- i. At the conclusion of Chapter 7 and Chapter 13 cases, the debtor may receive from the bankruptcy court an order of discharge. This order results in the debtor's pre-petition being discharged, or, stated another way, the debtor is no longer personally liable for the debts.
- ii. An order of discharge creates an injunction against actions by creditors to collect on pre-petition debts.
- iii. Do not violate the discharge injunction! Violation can result in severe sanctions.

H. Non-dischargeability.

- i. **11 U.S.C. § 523(a)** sets forth various types of debts that are deemed to be non-dischargeable as a matter of course. In general, non-dischargeability is not applicable in the context of a landlord/tenant relationship, but the following might apply in certain circumstances:
  1. **11 U.S.C. § 523(a)(2)**: for money, property, services, or an extension, renewal or refinancing of credit, to the extent obtained by [fraud].
  2. **11 U.S.C. § 523(a)(6)**: for willful and malicious injury by the debtor to another entity or to the property of another entity;
  3. Note that even if a debt is of the type mentioned above, an Adversary Proceeding (a separate lawsuit related to the bankruptcy case) is required to determine a debt under **§ 523(a)(2)** or **(6)** as non-dischargeable. See, § 523(c)(1)

I. Trustee / Debtor-in-Possession.

- i. A bankruptcy trustee is appointed to oversee cases in Chapter 7, 12, and 13, and has a varying role in the case depending on the chapter.
- ii. In Chapter 11 and 12 cases, unless removed for cause, the debtor remains as the Debtor-in-Possession and has many of the rights of a trustee, including rights concerning assumption and rejection of leases, and filing a plan of reorganization or liquidation, which will affect the creditor/debtor relationship.
- iii. In Chapter 13, the debtor remains in possession of their property, but their rights are not as extensive as those of a Chapter 11 / 12 Debtor-in-Possession. A Chapter 13 debtor proposes a plan that may assume or reject outstanding leases.

## II. A More In-Depth Discussion of the Automatic Stay.

### A. Overview of the Automatic Stay.

- i. Under U.S. Bankruptcy Code, the automatic stay is an automatic injunction that stops actions by creditors, with certain exceptions, to collect debts from a debtor who filed for relief under the bankruptcy code. Pursuant to Section 362 of the Bankruptcy Code, the stay begins at the moment when the debtor files a bankruptcy petition.
- ii. The Automatic stay ends:
  1. As to an act against property of the bankruptcy estate, when the property is no longer property of the bankruptcy estate;
  2. As to any other act, the earliest of the time the case is closed, the case is dismissed, the discharge is entered; and
  3. In general, upon a request for relief from stay and abandonment of property from the estate being granted.

### B. What landlord/tenant actions are stayed by the automatic stay? See 11 U.S.C. § 362(a).

- i. Beginning or continuing a lawsuit against the tenant to evict them from a residential tenancy - **11 USC § 362(a)(1)**;
  1. NOTE: *Ipso facto* clauses providing that the act of filing a bankruptcy case in and of itself constitutes a breach of the lease, are rarely enforceable in bankruptcy.
  2. These clauses are also likely meaningless in a residential lease and a state court would look to the bankruptcy court for how to proceed (i.e., would need to see an order granting relief from the stay)
- ii. Beginning or continuing a lawsuit against the tenant to collect money damages - **11 U.S.C. § 362(a)(1)**.

### C. What landlord/tenant actions are not stayed by the automatic stay? See 11 U.S.C. § 362(b).

- i. It does not prohibit the debtor from making voluntary payments on otherwise dischargeable debts.
- ii. **11 U.S.C. § 362(b)(1)** - Commencement or continuation of criminal proceedings. If a tenant has done something illegal that should be reported to the authorities, nothing prohibits such a report and the relevant authorities can commence and continue any relevant criminal proceedings.
- iii. **11 U.S.C. § 362(b)(22)** and **11 U.S.C. § 362(l)** - Landlords may evict a tenant from possession of a leased residential property post-petition, and without obtaining relief from the automatic

stay only if the landlord obtained a judgment for possession of the property prior to debtor/tenant's filing of the petition, unless a tenant files with the Petition and serves on the landlord a declaration that: (A) the debtor has a right under applicable nonbankruptcy law to cure the entire monetary default that gave rise to the judgment; (B) the debtor has deposited with the bankruptcy court clerk any rent that would come due in the thirty (30) days immediately following the filing of the Petition. The automatic stay will lift after 30 days to allow the eviction to continue unless the debtor/tenant further confirms the cure and reinstatement of the lease within the 30 days, as set forth in **11 U.S.C. § 362(m)**. If the landlord objects to the declaration, the Court will hold an expedited hearing to determine whether the eviction can continue or remains stayed.

1. NOTE: Wisconsin law does not allow a tenant to cure a default under a lease after the expiration of a 5-day notice (more on this below).
  2. NOTE: This section does not allow a landlord to commence or continue pursuing a pre-petition action for money damages, even if the local county allows the two actions to be brought in the same case. It only allows the landlord to obtain possession of the rental premises where the judgment was obtained pre-petition.
- iv. **11 U.S.C. § 362(b)(23)** - Landlords may file an eviction action and seek possession of a leased residential property post-petition for a breach of a residential lease “based on endangerment of such property or the illegal use of controlled substances on such property.” However, to do so, the landlord must file with the bankruptcy court and serve upon the debtor/tenant a sworn certification “that such an eviction action has been filed, or that the debtor, during the 30-day period preceding the date of the filing of the certification, has endangered property or illegally use or allowed to be used a controlled substance on the property.”
1. If the landlord files and serves the certification on the debtor, the landlord can proceed with the eviction after 15 days, provided the debtor/tenant does not file with the court and serve upon the landlord an objection. If an objection is filed and served, the court must hold a hearing within 10 days of the objection to determine if the landlord’s statement was untrue, or whether the situation has been remedied.



D. Keep an eye out for Repeat Filers.

- i. **11 U.S.C. § 362(c)(3) - 1 Dismissal Within Last Year.** If a tenant filed bankruptcy, it is dismissed and then the tenant files another bankruptcy within one year of the dismissal of the first case, there is a presumption that the second case was filed in bad faith, and the automatic stay will expire after only 30 days, unless the debtor obtains a court order continuing the stay.
- ii. **11 U.S.C. § 362(c)(4) - 2 or More Dismissals Within Last Year.** If a tenant filed two or more bankruptcies in the previous year, and then files a third bankruptcy, there is a presumption that the third case was filed in bad faith, and the automatic stay will not take effect at all upon the third filing.

E. Something for Commercial Landlords (ONLY). The Bankruptcy Code permits a landlord of nonresidential commercial space to take possession of the real property post-petition if the commercial lease had "terminated by the expiration of the stated term of the lease" before commencement of, or during the, bankruptcy case. - **11 U.S.C. § 362(b)(10)**

F. Your Tenant Defaults While in Bankruptcy, Now What? How to Get Relief from the Automatic Stay.

- i. **Practice Tip:** Unless the landlord really wants the tenant out of the property, the first call should be to the debtor's bankruptcy attorney (if they have one) to have them remind their client to pay the past-due rent. If the tenant is a *pro se* debtor, this can be more difficult.
- ii. To obtain relief from the automatic stay, you must file a motion with the bankruptcy court and obtain a signed order for relief.
- iii. The motion must describe the circumstances of the residential tenancy, the applicable terms of the lease, and the tenant's breach. These should be substantiated in an affidavit.
- iv. Abandonment. Even if a residential lease has been rejected by the trustee, it is not automatically terminated and remains part of the bankruptcy estate.
  1. **11 U.S.C. § 554.** Abandonment can occur in one of three ways: (1) the trustee can expressly abandon the lease by serving a notice of abandonment; (2) a landlord can seek to compel the trustee to abandon the lease under **11 U.S.C. § 554(a) & Fed.R.Bankr.P.6007(b)**; or (3) the lease is deemed abandoned if it is listed on the tenant's schedules, the trustee does not administer it, and the case closes, **11 U.S.C. § 554(d)**.

2. For abandonment to be ordered, the landlord must demonstrate that the residential lease is “burdensome to the estate or that [it] is of inconsequential value and benefit to the estate.” **11 U.S.C. § 554(a)**.
  - a. A debtor’s tenant rights under a residential lease are generally not burdensome to the estate, as there is nothing for the trustee to administer - the tenant just pays their rent to the landlord.
  - b. Generally residential real leases are not valuable to the bankruptcy estate. Trustees usually look to see if the asset for which abandonment is requested has value that they can monetize. Since tenants cannot sell their leasehold rights, it is almost always of inconsequential value and benefit to the estate.
    - i. **Question: What if the tenant runs a business out of their rented property?**
  - c. **Practice Tip:** You should also ask for the court to waive the 14-day stay under Fed.R.Bankr.P. 4001(a)(3) and 6004(h).
- v. The notice of motion must provide a 14-day objection period. If you are only seeking relief from the automatic stay, the notice of motion and motion must be provided to the debtor, U.S. Trustee, and the appointed bankruptcy trustee. If you are also seeking abandonment (which you should), it must be provided to all of the creditors listed on the creditor matrix.
- vi. If the debtor objects to the motion, the court will generally set an initial hearing in hopes the parties can work out the dispute. If the dispute is not settled, then an additional motion hearing or evidentiary hearing may be scheduled (depending on the nature of the dispute).
- vii. Once the landlord obtains a signed order for relief from the automatic stay and abandonment, they can use that to go to (or back to) state court and file or continue the eviction proceedings.
- viii. **NOTE:** It is highly unlikely that a bankruptcy court will grant relief from the automatic stay to pursue money damages against the tenant; however, if the landlord desires such relief, it would need to be included in the initial motion for relief from the automatic stay, or brought as part of a subsequent motion after the eviction is complete

### III. Relevant Wisconsin Law

- A. Lease is “an agreement, whether oral or written, for transfer of possession of real property, or both real and personal property, for a definite period of time. A lease is for a definite period of time if it has a fixed commencement date and a fixed expiration date or if the commencement and expiration can be ascertained by reference to some event, such as completion of a building.” **Wis. Stat. § 704.01(1)** (emphasis added)
- B. Premises is the property covered by the lease, including not only the realty and fixtures, but also any personal property furnished with the realty. **Wis. Stat. § 704.01(3)**
- C. Rental agreement is “an oral or written agreement between a landlord and tenant, for the rental or lease of a specific dwelling unit or premises, in which the landlord and tenant agree on the essential terms of the tenancy, such as rent. “Rental agreement” includes a lease. ‘Rental agreement’ does not include an agreement to enter into a rental agreement in the future.” **Wis. Stat. § 704.01(3m)**
- i. So, you could have a “rental agreement” without a “lease”
- D. Possession of Rental Premises by Tenant
- i. Tenant has the right to exclusive use and possession of the rental premises, unless in default, until the expiration or termination of the lease or tenancy. **Wis. Stat. § 704.05(2)**
  - ii. This right of possession is what must be properly terminated, whether there is a lease or not and whether the tenancy is for a specified term, is periodic, or is at-will.
- E. Termination of Tenancy.
- i. A tenancy may be terminated in one of three ways:
    1. Expiration date in lease
    2. Mutual agreement to terminate on a date other than expiration date in lease
    3. Service of notice under Chapter 704 (see Appendix B)
  - ii. Notices terminating tenancy. **Wis. Stat. § 704.17(1p)(a) & (2)(a)**
    1. 5-day with right to cure: most common for nonpayment
    2. 14-day without right to cure: can be issued in either case:
      - a. Month-to-month lease
      - b. Lease for a year or less

3. 28-day notice terminating a periodic tenancy or tenancy at will (no reason required, except in manufactured home communities). **Wis. Stat. § 704.19**
- iii. The termination is to the *tenancy*, not necessarily the lease. If the tenancy is terminated and the tenant remains in possession, the terms of the lease governing tenant's possession still apply, until the tenant vacates or is removed through eviction proceedings.
- F. **Holding Over**. If a tenant does not vacate the premises after the tenancy has been terminated, the tenant is holding over and the landlord may proceed to remove the tenant to regain possession of the premises. **Wis. Stat. § 704.23**
- G. **Chapter 799** (small claims) governs eviction proceedings. Eviction action is filed in circuit court in the county where the rental premises are located. While initially heard by a court commissioner, contested matters go before a judge in the vast majority of counties.
- H. Disposition of personal property following removal of tenant is governed by **Wis. Stat. § 704.05(5)**.

Appendix A

Selected Bankruptcy Code Sections

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## 11 U.S.C. § 101. Definitions

(5) The term “claim” means—

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

## 11 U.S.C. § 362. Automatic Stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title [11 USCS § 301, 302, or 303], or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 [15 USCS § 78eee(a)(3)], operates as a stay, applicable to all entities, of—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning a tax liability of a debtor that is a corporation for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title.

(b) The filing of a petition under section 301, 302, or 303 of this title [11 USCS § 301, 302, or 303], or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970 [15 USCS § 78eee(a)(3)], does not operate as a stay—

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

...

(10) under subsection (a) of this section, of any act by a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the stated term of the lease before the commencement of or during a case under this title to obtain possession of such property;

...

(22) subject to subsection (l), under subsection (a)(3), of the continuation of any eviction, unlawful detainer action, or similar proceeding by a lessor against a debtor involving residential property in which the debtor resides as a tenant under a lease or rental agreement and with respect to which the lessor has obtained before the date of the filing of the bankruptcy petition, a judgment for possession of such property against the debtor;

(23) subject to subsection (m), under subsection (a)(3), of an eviction action that seeks possession of the residential property in which the debtor resides as a tenant under a lease or rental agreement based on endangerment of such property or the illegal use of controlled substances on such property, but only if the lessor files with the court, and serves upon the debtor, a certification under penalty of perjury that such an eviction action has been filed, or that the debtor, during the 30-day period preceding the date of the filing of the certification, has endangered property or illegally used or allowed to be used a controlled substance on the property;

(c) Except as provided in subsections (d), (e), (f), and (h) of this section—

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate;

(2) the stay of any other act under subsection (a) of this section continues until the earliest of—

(A) the time the case is closed;

(B) the time the case is dismissed; or

(C) if the case is a case under chapter 7 of this title [11 USCS §§ 701 et seq.] concerning an individual or a case under chapter 9, 11, 12, or 13 of this title [11 USCS §§ 901 et seq., 1101 et seq., 1201 et seq., or 1301 et seq.], the time a discharge is granted or denied;

(3) if a single or joint case is filed by or against a debtor who is an individual in a case under chapter 7, 11, or 13 [11 USCS §§ 701 et seq., 1101 et seq., or 1301 et seq.], and if a single or joint case of the debtor was pending within the preceding 1-year period but was dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b) [11 USCS § 707(b)]—

(A) the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the later case;

(B) on the motion of a party in interest for continuation of the automatic stay and upon notice and a hearing, the court may extend the stay in particular cases as to any or all creditors (subject to such conditions or limitations as the court may then impose) after notice and a hearing completed before the expiration of the 30-day period only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed;

...

(4)

(A)

(i) if a single or joint case is filed by or against a debtor who is an individual under this title, and if 2 or more single or joint cases of the debtor were pending within the previous



year but were dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b) [11 USCS § 707(b)], the stay under subsection (a) shall not go into effect upon the filing of the later case; and

(ii) on request of a party in interest, the court shall promptly enter an order confirming that no stay is in effect;

(B) if, within 30 days after the filing of the later case, a party in interest requests the court may order the stay to take effect in the case as to any or all creditors (subject to such conditions or limitations as the court may impose), after notice and a hearing, only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed;

(C) a stay imposed under subparagraph (B) shall be effective on the date of the entry of the order allowing the stay to go into effect;

...

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

(2) with respect to a stay of an act against property under subsection (a) of this section, if—

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization;

(l)

(1) Except as otherwise provided in this subsection, subsection (b)(22) shall apply on the date that is 30 days after the date on which the bankruptcy petition is filed, if the debtor files with the petition and serves upon the lessor a certification under penalty of perjury that—

(A) under nonbankruptcy law applicable in the jurisdiction, there are circumstances under which the debtor would be permitted to cure the entire monetary default that gave rise to the judgment for possession, after that judgment for possession was entered; and

(B) the debtor (or an adult dependent of the debtor) has deposited with the clerk of the court, any rent that would become due during the 30-day period after the filing of the bankruptcy petition.

(2) If, within the 30-day period after the filing of the bankruptcy petition, the debtor (or an adult dependent of the debtor) complies with paragraph (1) and files with the court and serves upon the lessor a further certification under penalty of perjury that the debtor (or an adult dependent of the debtor) has cured, under nonbankruptcy law applicable in the jurisdiction, the entire monetary default that gave rise to the judgment under which possession is sought by the lessor, subsection (b)(22) shall not apply, unless ordered to apply by the court under paragraph (3).

(3)

(A) If the lessor files an objection to any certification filed by the debtor under paragraph (1) or (2), and serves such objection upon the debtor, the court shall hold a hearing within 10 days after the filing and service of such objection to determine if the certification filed by the debtor under paragraph (1) or (2) is true.

(B) If the court upholds the objection of the lessor filed under subparagraph (A)—

(i) subsection (b)(22) shall apply immediately and relief from the stay provided under subsection (a)(3) shall not be required to enable the lessor to complete the process to recover full possession of the property; and

(ii) the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the court's order upholding the lessor's objection.

(4) If a debtor, in accordance with paragraph (5), indicates on the petition that there was a judgment for possession of the residential rental property in which the debtor resides and does not file a certification under paragraph (1) or (2)—

(A) subsection (b)(22) shall apply immediately upon failure to file such certification, and relief from the stay provided under subsection (a)(3) shall not be required to enable the lessor to complete the process to recover full possession of the property; and

(B) the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the docket indicating the absence of a filed certification and the applicability of the exception to the stay under subsection (b)(22).

(5)

(A) Where a judgment for possession of residential property in which the debtor resides as a tenant under a lease or rental agreement has been obtained by the lessor, the debtor shall so indicate on the bankruptcy petition and shall provide the name and address of the lessor that obtained that pre-petition judgment on the petition and on any certification filed under this subsection.

(B) The form of certification filed with the petition, as specified in this subsection, shall provide for the debtor to certify, and the debtor shall certify—

(i) whether a judgment for possession of residential rental housing in which the debtor resides has been obtained against the debtor before the date of the filing of the petition; and

(ii) whether the debtor is claiming under paragraph (1) that under nonbankruptcy law applicable in the jurisdiction, there are circumstances under which the debtor would be permitted to cure the entire monetary default that gave rise to the judgment for possession, after that judgment of possession was entered, and has made the appropriate deposit with the court.

(C) The standard forms (electronic and otherwise) used in a bankruptcy proceeding shall be amended to reflect the requirements of this subsection.

(D) The clerk of the court shall arrange for the prompt transmittal of the rent deposited in accordance with paragraph (1)(B) to the lessor.

(m)

(1) Except as otherwise provided in this subsection, subsection (b)(23) shall apply on the date that is 15 days after the date on which the lessor files and serves a certification described in subsection (b)(23).

(2)

(A) If the debtor files with the court an objection to the truth or legal sufficiency of the certification described in subsection (b)(23) and serves such objection upon the lessor, subsection (b)(23) shall not apply, unless ordered to apply by the court under this subsection.

(B) If the debtor files and serves the objection under subparagraph (A), the court shall hold a hearing within 10 days after the filing and service of such objection to determine if the situation giving rise to the lessor's certification under paragraph (1) existed or has been remedied.

(C) If the debtor can demonstrate to the satisfaction of the court that the situation giving rise to the lessor's certification under paragraph (1) did not exist or has been remedied, the stay provided under subsection (a)(3) shall remain in effect until the termination of the stay under this section.

(D) If the debtor cannot demonstrate to the satisfaction of the court that the situation giving rise to the lessor's certification under paragraph (1) did not exist or has been remedied—

(i) relief from the stay provided under subsection (a)(3) shall not be required to enable the lessor to proceed with the eviction; and

(ii) the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the court's order upholding the lessor's certification.

(3) If the debtor fails to file, within 15 days, an objection under paragraph (2)(A)—

(A) subsection (b)(23) shall apply immediately upon such failure and relief from the stay provided under subsection (a)(3) shall not be required to enable the lessor to complete the process to recover full possession of the property; and

(B) the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the docket indicating such failure.

## 11 U.S.C. § 365. Executory Contracts and Unexpired Leases

(a) Except as provided in sections 765 and 766 of this title [11 USCS §§ 765 and 766] and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

(b)

(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee—

(A) cures, or provides adequate assurance that the trustee will promptly cure, such default other than a default that is a breach of a provision relating to the satisfaction of any provision (other than a penalty rate or penalty provision) relating to a default arising from any failure to perform nonmonetary obligations under an unexpired lease of real property, if it is impossible for the trustee to cure such default by performing nonmonetary acts at and after the time of assumption, except that if such default arises from a failure to operate in accordance with a nonresidential real property lease, then such default shall be cured by performance at and after the time of assumption in accordance with such lease, and pecuniary losses resulting from such default shall be compensated in accordance with the provisions of this paragraph;

(B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and

(C) provides adequate assurance of future performance under such contract or lease.

(2) Paragraph (1) of this subsection does not apply to a default that is a breach of a provision relating to—

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title;

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement; or

(D) the satisfaction of any penalty rate or penalty provision relating to a default arising from any failure by the debtor to perform nonmonetary obligations under the executory contract or unexpired lease.

...

(c) The trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if—

(1)

(A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

(B) such party does not consent to such assumption or assignment; or

...

(3) such lease is of nonresidential real property and has been terminated under applicable nonbankruptcy law prior to the order for relief.

(d)

(1) In a case under chapter 7 of this title [11 USCS §§ 701 et seq.], if the trustee does not assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor within 60 days after the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such contract or lease is deemed rejected.

(2) In a case under chapter 9, 11, 12, or 13 of this title [11 USCS §§ 901 et seq., 1101 et seq., 1201 et seq., or 1301 et seq.], the trustee may assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor at any time before the confirmation of a plan but the court, on the request of any party to such contract or lease, may order the trustee to determine within a specified period of time whether to assume or reject such contract or lease.

(3) The trustee shall timely perform all the obligations of the debtor, except those specified in section 365(b)(2) [11 USCS § 365(b)(2)], arising from and after the order for relief under any unexpired lease of

nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title [11 USCS § 503(b)(1)]. The court may extend, for cause, the time for performance of any such obligation that arises within 60 days after the date of the order for relief, but the time for performance shall not be extended beyond such 60-day period. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f) of this section. Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

(4)

(A) Subject to subparagraph (B), an unexpired lease of nonresidential real property under which the debtor is the lessee shall be deemed rejected, and the trustee shall immediately surrender that nonresidential real property to the lessor, if the trustee does not assume or reject the unexpired lease by the earlier of—

(i) the date that is 120 days after the date of the order for relief; or

(ii) the date of the entry of an order confirming a plan.

(B)

(i) The court may extend the period determined under subparagraph (A), prior to the expiration of the 120-day period, for 90 days on the motion of the trustee or lessor for cause.

(ii) If the court grants an extension under clause (i), the court may grant a subsequent extension only upon prior written consent of the lessor in each instance.

...

(g) Except as provided in subsections (h)(2) and (i)(2) of this section, the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease—

(1) if such contract or lease has not been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title [11 USCS §§ 901 et seq., 1101 et seq., 1201 et seq., or 1301 et seq.], immediately before the date of the filing of the petition; or

(2) if such contract or lease has been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title [11 USCS §§ 901 et seq., 1101 et seq., 1201 et seq., or 1301 et seq.]—

(A) if before such rejection the case has not been converted under section 1112, 1208, or 1307 of this title [11 USCS § 1112, 1208, or 1307], at the time of such rejection; or

(B) if before such rejection the case has been converted under section 1112, 1208, or 1307 of this title [11 USCS § 1112, 1208, or 1307]—

(i) immediately before the date of such conversion, if such contract or lease was assumed before such conversion; or

(ii) at the time of such rejection, if such contract or lease was assumed after such conversion.

(h)

(1)

(A) If the trustee rejects an unexpired lease of real property under which the debtor is the lessor and—

(i) if the rejection by the trustee amounts to such a breach as would entitle the lessee to treat such lease as terminated by virtue of its terms, applicable nonbankruptcy law, or any agreement made by the lessee, then the lessee under such lease may treat such lease as terminated by the rejection; or

(ii) if the term of such lease has commenced, the lessee may retain its rights under such lease (including rights such as those relating to the amount and timing of payment of rent and other amounts payable by the lessee and any right of use, possession, quiet enjoyment, subletting, assignment, or hypothecation) that are in or appurtenant to the real property for the balance of the term of such lease and for any renewal or extension of such rights to the extent that such rights are enforceable under applicable nonbankruptcy law.

(B) If the lessee retains its rights under subparagraph (A)(ii), the lessee may offset against the rent reserved under such lease for the balance of the term after the date of the rejection of such lease



and for the term of any renewal or extension of such lease, the value of any damage caused by the nonperformance after the date of such rejection, of any obligation of the debtor under such lease, but the lessee shall not have any other right against the estate or the debtor on account of any damage occurring after such date caused by such nonperformance.

(C) The rejection of a lease of real property in a shopping center with respect to which the lessee elects to retain its rights under subparagraph (A)(ii) does not affect the enforceability under applicable nonbankruptcy law of any provision in the lease pertaining to radius, location, use, exclusivity, or tenant mix or balance.

(D) In this paragraph, “lessee” includes any successor, assign, or mortgagee permitted under the terms of such lease.

...

## **11 U.S.C. § 502. Allowance of Claims or Interests**

(g)

(1) A claim arising from the rejection, under section 365 of this title [11 USCS § 365] or under a plan under chapter 9, 11, 12, or 13 of this title [11 USCS §§ 901 et seq., 1101 et seq., 1201 et seq., or 1301 et seq.], of an executory contract or unexpired lease of the debtor that has not been assumed shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(2) A claim for damages calculated in accordance with section 562 [11 USCS § 562] shall be allowed under subsection (a), (b), or (c), or disallowed under subsection (d) or (e), as if such claim had arisen before the date of the filing of the petition.

## **11 U.S.C. § 503. Allowance of Administrative Expenses**

(b) After notice and a hearing, there shall be allowed, administrative expenses, other than claims allowed under section 502(f) of this title [11 USCS § 502(f)], including—

(1)

(A) the actual, necessary costs and expenses of preserving the estate ...

(7) with respect to a nonresidential real property lease previously assumed under section 365 [11 USCS § 365], and subsequently rejected, a sum equal to all monetary obligations due, excluding those arising from or relating to a failure to operate or a penalty provision, for the period of 2 years following the later of the rejection date or the date of actual turnover of the premises, without reduction or setoff for any reason whatsoever except for sums actually received or to be received from an entity other than the debtor, and the claim for remaining sums due for the balance of the term of the lease shall be a claim under section 502(b)(6) [11 USCS § 502(b)(6)];

### **11 U.S.C. § 523. Exceptions to Discharge**

(a) A discharge under section 727, 1141, 1192, 1228(a), 1228(b), or 1328(b) of this title [11 USCS § 727, 1141, 1192, 1228(a), 1228(b), or 1328(b)] does not discharge an individual debtor from any debt—

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

(B) use of a statement in writing—

(i) that is materially false;

(ii) respecting the debtor's or an insider's financial condition;

(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and

(iv) that the debtor caused to be made or published with intent to deceive;

...

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity;

(c)

(1) Except as provided in subsection (a)(3)(B) of this section, the debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), or (6) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), or (6), as the case may be, of subsection (a) of this section.

(d) If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.

#### **11 U.S.C. § 541. Property of the Estate**

(a) The commencement of a case under section 301, 302, or 303 of this title [11 USCS § 301, 302, or 303] creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case. (a)(1)

...

(b) Property of the estate does not include—

...

(2) any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease before the commencement of the case under this title, and ceases to include any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease during the case;

#### **11 U.S.C. § 554. Abandonment of Property of the Estate**

(a) After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.

(b) On request of a party in interest and after notice and a hearing, the court may order the trustee to abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.

(c) Unless the court orders otherwise, any property scheduled under section 521(a)(1) of this title [11 USCS § 521(a)(1)] not otherwise administered at the time of the closing of a case is abandoned to the debtor and administered for purposes of section 350 of this title [11 USCS § 350].

(d) Unless the court orders otherwise, property of the estate that is not abandoned under this section and that is not administered in the case remains property of the estate.

### **11 U.S.C. § 1322. Contents of plan**

(b) Subject to subsections (a) and (c) of this section, the plan may—

(3) provide for the curing or waiving of any default;

...

(7) subject to section 365 of this title [11 USCS § 365], provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected under such section;

### **Fed. R. Bankr. P 4001. Relief from Automatic Stay; Prohibiting or Conditioning the Use, Sale, or Lease of Property; Use of Cash Collateral; Obtaining Credit; Agreements**

(a) Relief from stay; prohibiting or conditioning the use, sale, or lease of property.

...

(3) Stay of order. An order granting a motion for relief from an automatic stay made in accordance with Rule 4001(a)(1) is stayed until the expiration of 14 days after the entry of the order, unless the court orders otherwise.

### **Fed. R. Bankr. P 6004. Use, Sale, or Lease of Property**

(h) Stay of order authorizing use, sale, or lease of property. An order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise.

**Fed. R. Bankr. P 6007. Abandonment or Disposition of Property**

(b) Motion by party in interest. A party in interest may file and serve a motion requiring the trustee or debtor in possession to abandon property of the estate. Unless otherwise directed by the court, the party filing the motion shall serve the motion and any notice of the motion on the trustee or debtor in possession, the United States trustee, all creditors, indenture trustees, and committees elected pursuant to § 705 or appointed pursuant to § 1102 of the Code. A party in interest may file and serve an objection within 14 days of service, or within the time fixed by the court. If a timely objection is made, the court shall set a hearing on notice to the United States trustee and to other entities as the court may direct. If the court grants the motion, the order effects the trustee's or debtor in possession's abandonment without further notice, unless otherwise directed by the court.

## Appendix B

### Selected Wisconsin Landlord-Tenant Statute Sections

**704.01 Definitions.** In this chapter, unless the context indicates otherwise:

(1) "Lease" means an agreement, whether oral or written, for transfer of possession of real property, or both real and personal property, for a definite period of time. A lease is for a definite period of time if it has a fixed commencement date and a fixed expiration date or if the commencement and expiration can be ascertained by reference to some event, such as completion of a building. A lease is included within this chapter even though it may also be treated as a conveyance under ch. [706](#). An agreement for transfer of possession of only personal property is not a lease.

(2) "Periodic tenant" means a tenant who holds possession without a valid lease and pays rent on a periodic basis. It includes a tenant from day-to-day, week-to-week, month-to-month, year-to-year or other recurring interval of time, the period being determined by the intent of the parties under the circumstances, with the interval between rent-paying dates normally evidencing that intent.

(3) "Premises" mean the property covered by the lease, including not only the realty and fixtures, but also any personal property furnished with the realty.

(3m) "Rental agreement" means an oral or written agreement between a landlord and tenant, for the rental or lease of a specific dwelling unit or premises, in which the landlord and tenant agree on the essential terms of the tenancy, such as rent. "Rental agreement" includes a lease. "Rental agreement" does not include an agreement to enter into a rental agreement in the future.

(4) "Tenancy" includes a tenancy under a lease, a periodic tenancy or a tenancy at will.

(5) "Tenant at will" means any tenant holding with the permission of the tenant's landlord without a valid lease and under circumstances not involving periodic payment of rent; but a person holding possession of real property under a contract of purchase or an employment contract is not a tenant under this chapter.

\*\*\*\*\*

**704.05 Rights and duties of landlord and tenant in absence of written agreement to contrary.**

(1) When section applicable. So far as applicable, this section governs the rights and duties of the landlord and tenant in the absence of any inconsistent provision in writing signed by both the landlord and the tenant. Except as otherwise provided in this section, this section applies to any tenancy.

(2) Possession of tenant and access by landlord. Until the expiration date specified in the lease, or the termination of a periodic tenancy or tenancy at will, and so long as the tenant is not in default, the tenant has the right to exclusive possession of the premises, except as hereafter provided. The landlord may upon advance notice and at reasonable times inspect the premises, make repairs and show the premises to prospective tenants or purchasers; and if the tenant is absent from the premises and the landlord reasonably believes that entry is necessary to preserve or protect the premises, the landlord may enter without notice and with such force as appears necessary.

(3) Use of premises, additions or alterations by tenant. The tenant can make no physical changes in the nature of the premises, including decorating, removing, altering or adding to the structures thereon, without prior consent of the landlord. The tenant cannot use the premises for any unlawful purpose nor in such manner as to interfere unreasonably with use by another occupant of the same building or group of buildings.

(4) Tenant's fixtures. At the termination of the tenancy, the tenant may remove any fixtures installed by the tenant if the tenant either restores the premises to their condition prior to the installation or pays to the landlord the cost of such restoration. Where such fixtures were installed to replace similar fixtures which were part of the premises at the time of the commencement of the tenancy, and the original fixtures cannot be restored the tenant may remove fixtures installed by the tenant only if the tenant replaces them with fixtures at least comparable in condition and value to the original fixtures. The tenant's right to remove fixtures is not lost by an extension or renewal of a lease without reservation of such right to remove. This subsection applies to any fixtures added by the tenant for convenience as well as those added for purposes of trade, agriculture or business; but this subsection does not govern the rights of parties other than the landlord and tenant.

(5) Disposition of personalty left by tenant.

(a) *At the landlord's discretion.*

1. If a tenant removes from or is evicted from the premises and leaves personal property, the landlord may presume, in the absence of a written agreement between the landlord and the tenant to the contrary, that the tenant has abandoned the personal property and may, subject to par. (am) and s. 799.45 (3m), dispose of the

abandoned personal property in any manner that the landlord, in its sole discretion, determines is appropriate.

2. If the landlord disposes of the property by private or public sale, the landlord may send the proceeds of the sale minus any costs of sale and any storage charges if the landlord has first stored the personalty to the department of administration for deposit in the appropriation under s. [20.505 \(7\) \(h\)](#).

**(am) Exception for medical items.** If the personal property that the tenant leaves behind is prescription medication or prescription medical equipment, the landlord shall hold the property for 7 days from the date on which the landlord discovers the property. After that time, the landlord may dispose of the property in the manner that the landlord determines is appropriate, but shall promptly return the property to the tenant if the landlord receives a request for its return before the landlord disposes of it.

**(b) Notice required if property is a manufactured or mobile home or a vehicle.**

1. In this paragraph:

a. "Manufactured home" has the meaning given in s. [101.91 \(2\)](#).

b. "Mobile home" has the meaning given in s. [101.91 \(10\)](#), but does not include a recreational vehicle, as defined in s. [340.01 \(48r\)](#).

c. "Titled vehicle" means a vehicle, as defined in s. [340.01 \(74\)](#), for which a certificate of title has been issued by any agency of this state or another state.

2. If the tenant removes from or is evicted from the premises and leaves behind personal property that is a manufactured home, mobile home, or titled vehicle, before disposing of the abandoned property the landlord shall give notice of the landlord's intent to dispose of the property by sale or other appropriate means to all of the following:

a. The tenant, personally or by regular or certified mail addressed to the tenant's last-known address.

b. Any secured party of which the landlord has actual notice, personally or by regular or certified mail addressed to the secured party's last-known address.

**(bf) Notice that landlord will not store property.** If the landlord does not intend to store personal property left behind by a tenant, except as provided in par. [\(am\)](#), the landlord shall provide written notice to a tenant, when the tenant enters into or renews a rental agreement, that the landlord will not store any items of personal property that the tenant leaves behind when the tenant removes from, or if the tenant is evicted from, the premises, except as provided in par. [\(am\)](#).



Notwithstanding pars. [\(a\)](#), [\(am\)](#), and [\(b\)](#), if the landlord has not provided to a tenant the notice required under this paragraph, the landlord shall comply with s. [704.05](#), 2009 stats., with respect to any personal property left behind by the tenant when the tenant removes from the premises, or if the tenant is evicted from the premises and the landlord notifies the sheriff under s. [799.45 \(3m\)](#).

**(c) *Rights of 3rd persons.*** The landlord's power to dispose as provided by this subsection applies to any property left on the premises by the tenant, whether owned by the tenant or by others. The power to dispose under this subsection applies notwithstanding any rights of others existing under any claim of ownership or security interest, but is subject to s. [321.62](#). The tenant or any secured party has the right to redeem the property at any time before the landlord has disposed of it or entered into a contract for its disposition by payment of any expenses that the landlord has incurred with respect to the disposition of the property.

**(cm) *Inapplicability to self-storage facilities.*** This subsection does not apply to a lessee of a self-storage unit or space within a self-storage facility under s. [704.90](#).

\*\*\*\*\*

#### **704.17 Notice terminating tenancies for failure to pay rent or other breach by tenant.**

**(1g) Definition.** In this section, “rent” includes any rent that is past due and any late fees owed for rent that is past due.

**(1p) Month-to-month and week-to-week tenancies.**

**(a)** If a month-to-month tenant or a week-to-week tenant fails to pay rent when due, the tenant's tenancy is terminated if the landlord gives the tenant notice requiring the tenant to pay rent or vacate on or before a date at least 5 days after the giving of the notice and if the tenant fails to pay accordingly. A month-to-month tenancy is terminated if the landlord, while the tenant is in default in payment of rent, gives the tenant notice requiring the tenant to vacate on or before a date at least 14 days after the giving of the notice.

**(b)** If a month-to-month tenant commits waste or a material violation of s. [704.07 \(3\)](#) or breaches any covenant or condition of the tenant's agreement, other than for payment of rent, the tenancy can be terminated if any of the following applies:

1. The landlord gives the tenant a notice that requires the tenant to either remedy the default or vacate the premises no later than a date at least 5 days after the

giving of the notice, and the tenant fails to comply with the notice. A tenant is considered to be complying with the notice if promptly upon receipt of the notice the tenant takes reasonable steps to remedy the default and proceeds with reasonable diligence, or if damages are adequate protection for the landlord and the tenant makes a bona fide and reasonable offer to pay the landlord all damages for the tenant's breach. If, within one year from receiving a notice under this subdivision, the tenant again commits waste or breaches the same or any other covenant or condition of the tenant's rental agreement, other than for payment of rent, the tenant's tenancy is terminated if the landlord gives the tenant notice to vacate on or before a date at least 14 days after the giving of the notice.

**2.** The landlord gives the tenant notice requiring the tenant to vacate on or before a date at least 14 days after the giving of the notice.

**(c)** A property owner may terminate the tenancy of a week-to-week or month-to-month tenant if the property owner receives written notice from a law enforcement agency, as defined in s. [165.83 \(1\) \(b\)](#), or from the office of the district attorney, that a nuisance under s. [823.113 \(1\)](#) or [\(1m\) \(b\)](#) exists in that tenant's rental unit or was caused by that tenant on the property owner's property and if the property owner gives the tenant written notice requiring the tenant to vacate on or before a date at least 5 days after the giving of the notice. The notice shall state the basis for its issuance and the right of the tenant to contest the termination of tenancy in an eviction action under ch. [799](#). If the tenant contests the termination of tenancy, the tenancy may not be terminated without proof by the property owner by the greater preponderance of the credible evidence of the allegation in the notice from the law enforcement agency or the office of the district attorney that a nuisance under s. [823.113 \(1\)](#) or [\(1m\) \(b\)](#) exists in that tenant's rental unit or was caused by that tenant.

**(2)** Tenancies under a lease for one year or less, and year-to-year tenancies.

**(a)** If a tenant under a lease for a term of one year or less, or a year-to-year tenant, fails to pay any installment of rent when due, the tenant's tenancy is terminated if the landlord gives the tenant notice requiring the tenant to pay rent or vacate on or before a date at least 5 days after the giving of the notice and if the tenant fails to pay accordingly. If a tenant has been given such a notice and has paid the rent on or before the specified date, or been permitted by the landlord to remain in possession contrary to such notice, and if within one year of any prior default in payment of rent for which notice was given the tenant fails to pay a subsequent installment of rent on time, the tenant's tenancy is terminated if the landlord, while the tenant is in default in payment of rent, gives the tenant notice to vacate on or before a date at least 14 days after the giving of the notice.

**(b)** If a tenant under a lease for a term of one year or less, or a year-to-year tenant, commits waste or a material violation of s. [704.07 \(3\)](#) or breaches any covenant or

condition of the tenant's lease, other than for payment of rent, the tenant's tenancy is terminated if the landlord gives the tenant a notice requiring the tenant to remedy the default or vacate the premises on or before a date at least 5 days after the giving of the notice, and if the tenant fails to comply with such notice. A tenant is deemed to be complying with the notice if promptly upon receipt of such notice the tenant takes reasonable steps to remedy the default and proceeds with reasonable diligence, or if damages are adequate protection for the landlord and the tenant makes a bona fide and reasonable offer to pay the landlord all damages for the tenant's breach. If within one year from the giving of any such notice, the tenant again commits waste or breaches the same or any other covenant or condition of the tenant's lease, other than for payment of rent, the tenant's tenancy is terminated if the landlord gives the tenant notice to vacate on or before a date at least 14 days after the giving of the notice.

**(c)** A property owner may terminate the tenancy of a tenant who is under a lease for a term of one year or less or who is a year-to-year tenant if the property owner receives written notice from a law enforcement agency, as defined in s. [165.83 \(1\) \(b\)](#), or from the office of the district attorney, that a nuisance under s. [823.113 \(1\)](#) or [\(1m\) \(b\)](#) exists in that tenant's rental unit or was caused by that tenant on the property owner's property and if the property owner gives the tenant written notice requiring the tenant to vacate on or before a date at least 5 days after the giving of the notice. The notice shall state the basis for its issuance and the right of the tenant to contest the termination of tenancy in an eviction action under ch. [799](#). If the tenant contests the termination of tenancy, the tenancy may not be terminated without proof by the property owner by the greater preponderance of the credible evidence of the allegation in the notice from the law enforcement agency or the office of the district attorney that a nuisance under s. [823.113 \(1\)](#) or [\(1m\) \(b\)](#) exists in that tenant's rental unit or was caused by that tenant.

**(d)** This subsection does not apply to week-to-week or month-to-month tenants.

**(3)** Lease for more than one year.

**(a)** If a tenant under a lease for more than one year fails to pay rent when due, or commits waste, or breaches any other covenant or condition of the tenant's lease, the tenancy is terminated if the landlord gives the tenant notice requiring the tenant to pay the rent, repair the waste, or otherwise comply with the lease on or before a date at least 30 days after the giving of the notice, and if the tenant fails to comply with the notice. A tenant is deemed to be complying with the notice if promptly upon receipt of the notice the tenant takes reasonable steps to remedy the default and proceeds with reasonable diligence, or if damages are adequate protection for the landlord and the tenant makes a bona fide and reasonable offer to pay the landlord all damages for the tenant's breach; but in case of failure to pay rent, all rent due must be paid on or before the date specified in the notice.

**(b)** A property owner may terminate the tenancy of a tenant who is under a lease for a term of more than one year if the property owner receives written notice from a law enforcement agency, as defined in s. [165.83 \(1\) \(b\)](#), or from the office of the district attorney, that a nuisance under s. [823.113 \(1\)](#) or [\(1m\) \(b\)](#) exists in that tenant's rental unit or was caused by that tenant on the property owner's property and if the property owner gives the tenant written notice to vacate on or before a date at least 5 days after the giving of the notice. The notice shall state the basis for its issuance and the right of the tenant to contest the termination of tenancy in an eviction action under ch. [799](#). If the tenant contests the termination of tenancy, the tenancy may not be terminated without proof by the property owner by the greater preponderance of the credible evidence of the allegation in the notice from the law enforcement agency or the office of the district attorney that a nuisance under s. [823.113 \(1\)](#) or [\(1m\) \(b\)](#) exists in that tenant's rental unit or was caused by that tenant.

**(3m)** Criminal activity.

**(a)** In this subsection:

1. "Controlled substance" has the meaning given in s. [961.01 \(4\)](#).

2. "Drug-related criminal activity" means criminal activity that involves the manufacture or distribution of a controlled substance. "Drug-related criminal activity" does not include the manufacture, possession, or use of a controlled substance that is prescribed by a physician for the use of a disabled person, as defined in s. [100.264 \(1\) \(a\)](#), and that is manufactured by, used by, or in the possession of the disabled person or in the possession of the disabled person's personal care worker or other caregiver.

**(b)**

1. Notwithstanding subs. [\(1p\) \(b\)](#), [\(2\) \(b\)](#), and [\(3\) \(a\)](#), and except as provided in par. [\(c\)](#), a landlord may, upon notice to the tenant, terminate the tenancy of a tenant, without giving the tenant an opportunity to remedy the default, if the tenant, a member of the tenant's household, or a guest or other invitee of the tenant or of a member of the tenant's household engages in any criminal activity that threatens the health or safety of, or right to peaceful enjoyment of the premises by, other tenants; engages in any criminal activity that threatens the health or safety of, or right to peaceful enjoyment of their residences by, persons residing in the immediate vicinity of the premises; engages in any criminal activity that threatens the health or safety of the landlord or an agent or employee of the landlord; or engages in any drug-related criminal activity on or near the premises. The notice shall require the tenant to vacate on or before a date at least 5 days after the giving of the notice. The notice shall state the basis for its issuance; include a description of the criminal activity or drug-related criminal activity, the date on which the

activity took place, and the identity or description of the individuals engaging in the activity; advise the tenant that he or she may seek the assistance of legal counsel, a volunteer legal clinic, or a tenant resource center; and state that the tenant has the right to contest the allegations in the notice before a court commissioner or judge if an eviction action is filed. If the tenant contests the termination of tenancy, the tenancy may not be terminated without proof by the landlord by the greater preponderance of the credible evidence of the allegation in the notice.

**2.** To terminate a tenancy under this subsection, it is not necessary that the individual committing the criminal activity or drug-related criminal activity has been arrested for or convicted of the criminal activity or drug-related criminal activity.

**(c)** Paragraph [\(b\)](#) does not apply to a tenant who is the victim, as defined in s. [950.02 \(4\)](#), of the criminal activity.

**(4)** Form of notice and manner of giving. Notice must be in writing and given as specified in s. [704.21](#). If so given, the tenant is not entitled to possession or occupancy of the premises after the date of termination specified in the notice.

**(4m)** Effect of incorrect amount in notice. A notice for failure to pay rent or any other amount due under the rental agreement that includes an incorrect statement of the amount due is valid unless any of the following applies:

**(a)** The landlord's statement of the amount due is intentionally incorrect.

**(b)** The tenant paid or tendered payment of the amount the tenant believes to be due.

**(5)** Contrary provision in the lease.

**(a)** Except as provided in par. [\(b\)](#), provisions in the lease or rental agreement for termination contrary to this section are invalid except in leases for more than one year.

**(b)** Provisions in any lease or rental agreement for termination contrary to sub. [\(3m\)](#) are invalid.

**History:** [1981 c. 286](#); [1993 a. 139, 486](#); [1995 a. 267](#); [2005 a. 281](#); [2011 a. 143](#); [2015 a. 176](#); [2017 a. 317](#), ss. [43](#) to [45](#), [54](#).

Only a limited number of defenses may be raised in an eviction action, including defenses as to the landlord's title to the premises and whether the eviction was in retaliation for the tenant's reporting housing violations, but not including violations of federal antitrust and state franchise laws — as well as public policy defenses. *Clark Oil & Refining Corp. v. Leistikow*, [69 Wis. 2d 226](#), [230 N.W.2d 736](#) (1975).

Absent notice of termination, the violation of the terms of a lease that required landlord permission for long-term guests did not result in the tenants losing their rights to possession of the property. Consequently the tenants' guests were on the premises with the legal possessor's permission and were not trespassers. *Johnson v. Blackburn*, [220 Wis. 2d 260](#), [582 N.W.2d 488](#) (Ct. App. 1998), [97-1414](#).

Federal law, 42 USC 1437d (l) (6), preempts the right-to-remedy provision of sub. (2) (b) when a public housing tenant is evicted for engaging in "drug-related criminal activity" within the meaning of 42 USC 1437d (l). A right to cure past illegal drug activity is counter to Congress' goal of providing drug-free public housing and is in conflict with Congress' method of achieving that goal by allowing eviction of tenants who engage in drug-related criminal activity. *Milwaukee City Housing Authority v. Cobb*, [2015 WI 27](#), [361 Wis. 2d 359](#), [860 N.W.2d 267](#), [13-2207](#).

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**704.19 Notice necessary to terminate periodic tenancies and tenancies at will.**

**(1)** Scope of section. The following types of tenancies, however created, are subject to this section:

**(a)** A periodic tenancy, whether a tenancy from year-to-year, from month-to-month, or for any other periodic basis according to which rent is regularly payable; and

**(b)** A tenancy at will.

**(2)** Requirement of notice.

**(a)** A periodic tenancy or a tenancy at will can be terminated by either the landlord or the tenant only by giving to the other party written notice complying with this section, unless any of the following conditions is met:

1. The parties have agreed expressly upon another method of termination and the parties' agreement is established by clear and convincing proof.

2. Termination has been effected by a surrender of the premises.

3. Subsection [\(6\)](#) applies.

**(b)**

**1.** A periodic tenancy can be terminated by notice under this section only at the end of a rental period. In the case of a tenancy from year-to-year the end of the rental period is the end of the rental year even though rent is payable on a more frequent basis.

**2.** Notwithstanding subd. [1.](#), nothing in this section prevents termination of a tenancy before the end of a rental period because of an imminent threat of serious physical harm, as provided in s. [704.16](#), or for criminal activity or drug-related criminal activity, nonpayment of rent, or breach of any other condition of the tenancy, as provided in s. [704.17](#).

**(3)** Length of notice. At least 28 days' notice must be given except in the following cases: If rent is payable on a basis less than monthly, notice at least equal to the rent-paying period is sufficient; all agricultural tenancies from year-to-year require at least 90 days' notice.

**(4)** Contents of notice. Notice must be in writing, formal or informal, and substantially inform the other party to the landlord-tenant relation of the intent to terminate the tenancy and the date of termination. A notice is not invalid because of errors in the notice which do not mislead, including omission of the name of one of several landlords or tenants.

**(5)** Effect of inaccurate termination date in notice. If a notice provides that a periodic tenancy is to terminate on the first day of a succeeding rental period rather than the last day of a rental period, and the notice was given in sufficient time to terminate the tenancy at the end of the rental period, the notice is valid; if the notice was given by the tenant, the landlord may require the tenant to remove on the last day of the rental period, but if the notice was given by the landlord the tenant may remove on the last day specified in the notice. If a notice specified any other inaccurate termination date, because it does not allow the length of time required under sub. [\(3\)](#) or because it does not correspond to the end of a rental period in the case of a periodic tenancy, the notice is valid but not effective until the first date which could have been properly specified in such notice subsequent to the date specified in the notice, but the party to whom the notice is given may elect to treat the date specified in the notice as the legally effective date. If a notice by a tenant fails to specify any termination date, the notice is valid but not effective until the first date which could have been properly specified in such notice as of the date the notice is given.

**(6)** Tenant moving out without notice. If any periodic tenant vacates the premises without notice to the landlord and fails to pay rent when due for any period, such tenancy is terminated as of the first date on which it would have terminated had the landlord been given proper notice on the day the landlord learns of the removal.

**(7)** When notice given. Notice is given on the day specified below, which is counted as the first day of the notice period:

**(a)** The day of giving or leaving under s. [704.21 \(1\) \(a\)](#) and [\(2\) \(a\)](#) and [\(b\)](#).

**(b)** The day of leaving or affixing a copy or the date of mailing, whichever is later, under s. [704.21 \(1\) \(b\)](#) and [\(c\)](#).

**(c)** The 2nd day after the day of mailing if the mail is addressed to a point within the state, and the 5th day after the day of mailing in all other cases, under s. [704.21 \(1\) \(d\)](#) and [\(2\) \(c\)](#).

**(d)** The day of service under s. [704.21 \(1\) \(e\)](#) and [\(2\) \(d\)](#).

**(e)** The day of actual receipt by the other party under s. [704.21 \(5\)](#).

**(8)** Effect of notice. If a notice is given as required by this section, the tenant is not entitled to possession or occupancy of the premises after the date of termination as specified in the notice.