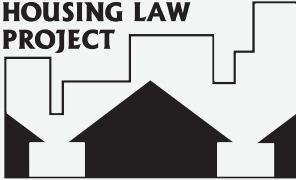


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**Cover:** Developed by nonprofit Citizens Housing Corp. and located in San Francisco, Mosaica consists of 151 units of mixed-use, affordable rental and ownership housing, including 93 units of low-income housing for families and 24 units for low-income seniors.

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## Foreclosure and Section 8 Tenancy: Federal Legislative Developments\*

The Protecting Tenants at Foreclosure Act (PTFA), part of the Helping Families Save Their Homes Act signed into law on May 20, 2009, is a much-needed expansion of the law governing the relationship between existing tenants and new owners of foreclosed rental properties.<sup>1</sup> In its simplest terms, the PTFA protects tenants by requiring that a successor in interest of a foreclosed-upon property abide by the terms and conditions of the existing lease and that all bona fide tenants receive a ninety-day notice to vacate.<sup>2</sup> This is the first time in more than sixty years that federal law has required notices for evictions from private rental units or required that a new owner take subject to existing leases.<sup>3</sup> This article responds to claims limiting the impact of the statute, with special attention to the PTFA's effects on Section 8 tenants. It provides an interpretation of the law that gives Section 8 tenants the maximum protection, in accordance with Congressional intent, by extending as long as possible the time to find replacement housing or negotiate continued occupancy beyond any ninety-day notice period.

Five major questions may arise from the interpretation of the PTFA and its effect on Section 8 tenancies:

- To which tenants do the statute's protections apply?
- Who may initiate eviction proceedings?
- When may a notice to vacate be served?
- Does the PTFA apply to properties foreclosed upon prior to the statute's date of enactment? and
- To what terms and conditions is the new owner subject?

\*The author of this article is Jake Gray, a J.D. candidate at the University of California, Berkeley, and a summer intern at the National Housing Law Project.

<sup>1</sup>Helping Families Save Their Homes Act, Pub. L. No. 111-22, §§ 701-04, 132 Stat. 1632, 1660-62 (2009) (§§ 701-704 are referred to as "the Protecting Tenants from Foreclosure Act" [hereinafter PTFA]).

<sup>2</sup>*Id.*; The White House Office of the Press Secretary, Reforms for American Homeowners and Consumers: President Obama Signs the Helping Families Save Their Homes Act and the Fraud Enforcement and Recovery Act, May 20, 2009, available at [http://www.whitehouse.gov/the\\_press\\_office/Reforms-for-American-Homeowners-and-Consumers-President-Obama-Signs-the-Helping-Families-Save-their-Homes-Act-and-the-Fraud-Enforcement-and-Recovery-Act/](http://www.whitehouse.gov/the_press_office/Reforms-for-American-Homeowners-and-Consumers-President-Obama-Signs-the-Helping-Families-Save-their-Homes-Act-and-the-Fraud-Enforcement-and-Recovery-Act/).

<sup>3</sup>See the provisions of the O.P.A. Rent Regulation for Housing (8 Fed. Reg. 7322-02 (June 2, 1943)) issued pursuant to the Emergency Price Control Act of 1942 as discussed in *Wrenn v. Sutton*, 65 Cal. App. 2d Supp. 823 (1944) and *Lester v. Isaac*, 63 Cal. App. 2d Supp. 851 (1944), which require a notice in compliance with the federal regulations to terminate a tenancy.

Answers to each question are available from the context of the PTFA and the statute's legislative history. These answers should serve as helpful tools for advocates using these new federal safeguards.<sup>4</sup>

### To Which Tenants Do the Statute's Protections Apply?

The first question to ask regarding statutory interpretation of the PTFA is to whom does it apply? The operative sections of the PTFA are Section 702, Effect of Foreclosure on Preexisting Tenancy, and Section 703, Effect of Foreclosure on Section 8 Tenancies.<sup>5</sup> The title and the text of Section 703 state that it only applies to Section 8 tenants. Section 8 tenants are also covered by Section 702, as evidenced by the text of the statute and the legislative history of the PTFA. That Section 702 encompasses all tenants is evidenced by the phrases "any dwelling or residential real property" in 702(a), "any bona fide tenant" in 702(a)(1) and 702(a)(2), and "any bona fide lease" in 702(a)(2)(A) (emphases added). Thus, as long as the tenant and lease are bona fide, Section 702 protects all residential tenants, including Section 8 tenants.

The legislative history of the PTFA reinforces the conclusion that Section 702 encompasses Section 8 tenants. The language of the PTFA is derived in large part from the American Recovery and Reinvestment Act (ARRA), which was enacted in February 2009.<sup>6</sup> The ARRA provisions relating to tenancy were intended to protect tenants from foreclosure in the limited circumstance of new owners acquiring foreclosed properties through the use of Neighborhood Stabilization Program funds made available under ARRA or under the Housing and Economic Recovery Act of 2008.<sup>7</sup> In ARRA, the ninety-day notice provision applied to bona fide tenancies and leases. To be bona fide, "the lease or tenancy requires the receipt of rent that is not substantially less than fair market rent for the property."<sup>8</sup> It could be argued that this clause left open the possibility that Section 8 tenants would not be considered bona fide tenants, and thus not be entitled to ninety days' notice because the amount that Section 8

tenants pay on their own is far below market value.<sup>9</sup> The first House version of the PTFA from March 2, 2009, contained this same language, as did prior Senate versions, including the one from May 5, 2009.<sup>10</sup> On May 19, the day before the enactment of the PTFA, the Senate bill was sent to the House and passed with several amendments, one being the addition of the clause "or the unit's rent is reduced or subsidized due to a Federal, State, or local subsidy."<sup>11</sup> This amendment demonstrates Congress' intent to ensure that Section 8 tenants receive the same protection from foreclosure as all other tenants, and therefore Section 703 is a supplement to, and not a replacement for, Section 702.

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*Section 8 tenants are also covered by Section 702, as evidenced by the text of the statute and the legislative history of the PTFA.*

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The statute protects bona fide tenants. A bona fide lease or tenancy is defined as one in which the tenant is not the child, spouse or parent of the mortgagor, the lease or tenancy was the result of an arm's length transaction, and the rent is not substantially less than the fair market, except for units whose rent is reduced by a federal, state or local subsidy.<sup>12</sup> Some have argued that the definition of bona fide tenant or lease is further restricted to one entered into before the notice of foreclosure. Those raising this argument seek to exclude from the protections of the PTFA all tenants whose possession was the result of an arm's length transaction but had the misfortune of entering into a lease after a notice of default was filed or the foreclosure had otherwise begun. This interpretation of

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<sup>9</sup>Whether the definition of "rent" is the tenant's rent or the HAP payments, or both, has been litigated in the context of a landlord's waiver of tenant breach by nonpayment of rent. See *Royal American Management, Inc. v. Godfrey*, 14 Fla. Supp. 2d 56 (1985) (Clearinghouse No. 44,416) (holding that acceptance of HUD rent subsidies constitutes acceptance of rent and a waiver of tenant's breach due to nonpayment); *Greenwich Gardens Assocs. V. Pitt*, 126 Misc. 2d 947 (N.Y. Dist. Ct. 1984); *Central Brooklyn Urban Dev. Corp. v. Copeland*, 471 N.Y.S. 2d 989 (N.Y.C. Civ. Ct. 1984); *Walton v. Holmes*, No. 86-1170-CC (Duval Cnty., Fla., Ct. July 1, 1986). Some courts have held that the definition of rent only includes the tenant's portion, which would make "rent" for Section 8 tenants well below market value. See e.g., *East Lake Management and Dev. Corp. v. Irvin*, 195 Ill. App. 3d 196 (1990) (holding that acceptance of HAP payments even after filing eviction suit does not waive termination of lease). The added provision in the PTFA renders irrelevant the definition of rent, at least in terms of whether or not a tenant or lease is bona fide.

<sup>10</sup>H.R. 1247, 111<sup>th</sup> Cong. (2009); S. 896, 111<sup>th</sup> Cong. (as passed by Senate, May 6, 2009).

<sup>11</sup>S. 896, 111<sup>th</sup> Cong. (engrossed amendment as agreed to by House, May 19, 2009); PTFA § 702(b)(3).

<sup>12</sup>PTFA § 702(b).

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<sup>4</sup>Protecting Tenants at Foreclosure: Notice of Responsibilities Placed on Immediate Successors in Interest Pursuant to Foreclosure of Residential Property, 74 Fed. Reg. 30,106 (June 24, 2009). HUD recently issued a notice in the Federal Register providing guidance for the implementation of the PTFA. The notice restates the statute in more accessible language and describes the major changes in the law but does little to address some of the PTFA's interpretive difficulties. The notice is consistent with the positions taken in this article.

<sup>5</sup>PTFA §§ 702-03.

<sup>6</sup>American Recovery and Reinvestment Act, Pub. L. No. 111-5, § 1201-04, 123 Stat. 115, 214-26 (2009) [hereinafter ARRA].

<sup>7</sup>*Id.* at 218-219 (Under the heading "Community Planning and Development: Community Development Fund").

<sup>8</sup>*Id.* at 219.

the statute is contrary to the purpose of the PTFA, which seeks to protect a broad range of tenants by encompassing all differing state law foreclosure procedures and to provide the broadest protection to those tenants by not usurping more favorable state laws. The operative language of the statute imposes obligations on successors in interest—those whose interest arise post foreclosure. There is no operative language regarding the rights of tenants or obligations of successors in interest pre-foreclosure. Thus, there is no evidence of legislative intent to carve out a group of tenants who are not protected by the statute.<sup>13</sup>

The application of the PTFA to project-based Section 8 tenants raises additional issues. Although Section 703 nominally applies to “Section 8 tenancies,” project-based Section 8 tenants are not covered by Section 703,<sup>14</sup> which applies only to Section 8 vouchers.<sup>15</sup> While project-based Section 8 tenants are not protected by Section 703, they receive the safeguards enjoyed by all other tenants under Section 702. Sections 702 and 703 both require owners of foreclosed properties to take title subject to preexisting leases between tenants and the entity being foreclosed upon.<sup>16</sup> Although, unlike Section 703, Section 702 does not expressly require new owners to take subject to both the lease and the Housing Assistance Payment (HAP) contract, the project-based Section 8 lease<sup>17</sup> is terminable only for specified good cause or when the HAP contract is terminated.<sup>18</sup> Thus, project-based Section 8 tenants may actually enjoy long-term tenancy protection under Section 702, so long as the HAP contract is not legally terminated.

Project-based HAP contracts are terminable only under their terms. Most project-based HAP contracts generally contain a provision that the HAP contract stays in effect and that payments will be made in the event of

a foreclosure, even a foreclosure by HUD.<sup>19</sup> Owners generally have no right to terminate a project-based HAP contract. For its part, HUD’s ability to terminate project-based HAP contracts is limited by the Schumer Amendment, which substantially restricts HUD’s ability to cancel contracts when foreclosing on properties with a formerly HUD-insured mortgage.<sup>20</sup> HUD’s authority to terminate contracts when foreclosing on non-HUD-insured properties, or outside of a foreclosure proceeding, is less clear, although certainly the specific terms of the actual HAP contract provide the analytical starting point. It would be ironic for HUD to seek a less-regulated position than PHAs, which are not free to terminate voucher HAP contracts under Section 703. Such behavior could be challenged as an abuse of discretion under the Administrative Procedure Act.<sup>21</sup>

### Who May Initiate Eviction Proceedings?

The PTFA by its terms is applicable to successors in interest of a foreclosed property, and not the owner being foreclosed upon. The PTFA states in the first section that, “any immediate successor in interest in such property pursuant to the foreclosure shall assume such interest subject to...the provision, by such successor in interest of a notice to vacate...”<sup>22</sup> The application of the PTFA solely to successors in interest is significant in that it helps to identify the point at which tenants may receive notice to vacate. Where exactly this notice falls along the foreclosure timeline is discussed below.

### When May Notice to Vacate Be Served?

The ninety-day notice to vacate may be served “at least 90 days before the effective date of such notice.”<sup>23</sup> The new owner’s interest is subject to “the rights of any bona fide tenant [with or without a lease], as of the date of such notice of foreclosure.”<sup>24</sup> The most reasonable interpretation of the phrase “such notice of foreclosure”

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<sup>13</sup>It could be further argued that such an interpretation of the statute would serve to nullify the element of the definition of a bona fide tenant that the transaction be at arm’s length. Tenants that would be excluded from protection of the PTFA, including those who entered into contracts in good faith and without knowledge of the foreclosure or with knowledge but assurances that renting the unit would prevent such foreclosure.

<sup>14</sup>For the purposes of this analysis, project-based Section 8 refers only to the programs administered by HUD’s Office of Multifamily Housing, which account for the vast majority of all project-based tenancies. Other project-based Section 8 programs administered by the Office of Public and Indian Housing and PHAs, such as moderate rehabilitation and project-based vouchers, have different form leases and contracts requiring separate analysis.

<sup>15</sup>Section 703 amends Section 8(o) of the United States Housing Act of 1937, 42 U.S.C. § 1437f(o), which is the section governing the voucher program.

<sup>16</sup>PTFA §§ 702(a), 703, amending Section 8(o)(7)(F) of the Act.

<sup>17</sup>HUD Form 90105-A, Model Lease for Subsidized Programs (Dec. 2007).

<sup>18</sup>*Id.*, ¶¶ 23 and 30.

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<sup>19</sup>Most initial project-based HAP contracts are based on an older HUD form and contain the same provision stating that the contract survives foreclosure. *See, e.g.*, HUD Form 52522-D, Part II of the Housing Assistance Payment Contract, 2.20(e)(2) (May 1995); HUD Form 52625-B, Part II of the Housing Assistance Payment Contract, 2.13(d) (Nov. 1975). Most of these initial project-based HAP contracts have expired and the projects are now governed by renewal contracts. Although the basic renewal contract renews all terms of the initial contract unless explicitly modified, there is no such explicit revision of the foreclosure provision. HUD Office of Multifamily Housing, Section 8 Renewal Policy: Guidance for the Renewal of Project-Based Section 8 Contracts, Attachment 11 (Nov. 5, 2007).

<sup>20</sup>Pub. L. No. 111-8, div. I, Title II, § 218, \_\_\_ Stat. \_\_\_ (March 10, 2009) (“Schumer Amendment” requiring HUD to maintain project-based assistance at foreclosure or disposition sale, absent specified exceptions, FY 09).

<sup>21</sup>5 U.S.C.A. § 706(2) (July 17, 2009).

<sup>22</sup>PTFA §§ 702(a), 702(a)(1).

<sup>23</sup>*Id.*

<sup>24</sup>PTFA §§ 702(a)(2), 702(a)(2)(A).

is that it is a notice that the foreclosure has in fact taken place—in other words, that the transaction is completed.<sup>25</sup> Because the purpose of the statute is to protect tenants and impose obligations on a successor in interest, a new owner (successor in interest) cannot issue a ninety-day notice to vacate until he or she has taken ownership of the rental property through the foreclosure sale of the property and the property rights of the owner prior to foreclosure are extinguished.<sup>26</sup> Any other interpretation would render the statute internally inconsistent and violate the common practice and logic that only the owner of a property or its agent may seek to evict. If the owner who is being foreclosed upon still has an interest in the property and the foreclosure is not complete, there is no successor in interest. Moreover, the foreclosing entity, which may become the successor in interest, cannot interfere with the owner's interest pre foreclosure.<sup>27</sup> Thus, any definition of "notice of foreclosure" that would make it applicable to a point on the foreclosure timeline prior to the transfer of ownership would be inappropriate and inconsistent with the purposes of the statute.

An additional consideration in calculating the point at which a successor in interest may give a tenant a ninety-day notice is the "right of redemption" period following a foreclosure sale. Redemption is available prior to a foreclosure sale, and in many states, "statutory redemption" exists whereby a party being foreclosed upon can reclaim the property after the foreclosure sale.<sup>28</sup> Redemption statutes differ markedly from jurisdiction to jurisdiction, with the period ranging anywhere from six months to two years.<sup>29</sup> Some allow for a redemption period in both judicial and power of sale foreclosures, while some provide for it in only one type of foreclosure.<sup>30</sup> In a number of states, the party being foreclosed upon has the right to retain possession of the property during the period of

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<sup>25</sup>The specifics of the foreclosure proceeding will necessarily differ based on the jurisdiction. Depending on whether the jurisdiction allows judicial or non-judicial foreclosure, or whether the state operates under a title theory or a deed theory of mortgages, can possibly alter the analysis. No matter the peculiarities of a particular jurisdiction, it is essential to emphasize that the party being foreclosed upon must lose *all* interest in the property and that the eviction proceedings should be delayed as long as possible in order to effectuate the purpose of the PTFA, which is to protect tenants.

<sup>26</sup>See 1 Grant S. Nelson & Dale A. Whitman, *Real Estate Finance Law* §§ 7.1-7.32 (5th ed. 2007) for an excellent discussion of the general principles of foreclosure and an exposition on variations among jurisdictions.

<sup>27</sup>This is an important distinction because it takes into consideration the differences in the nature of mortgages depending on whether the jurisdiction relies on a title theory or lien theory. In some title theory states, it might be possible for the foreclosing entity to take possession of the property prior to the finalization of the foreclosure. By placing the emphasis on "successor in interest," tenants are protected from lenders even in title theory states. Also, it is important to note that successor in interest refers to the interest in the property and not the interest in the mortgage.

<sup>28</sup>1 Nelson & Whitman, *Real Estate Finance Law*, § 8.4.

<sup>29</sup>*Id.*

<sup>30</sup>*Id.*

redemption; in others, there is no such right.<sup>31</sup> It is also the case that in some instances of judicial foreclosure, the purchase is not entirely complete until the court confirms the sale agreement.<sup>32</sup> Although confirmation of sale will be granted in most instances, it can provide even more time before the successor in interest may serve a ninety-day notice.<sup>33</sup> Therefore, in some jurisdictions, the right to redemption period can significantly delay a foreclosing entity's ability to begin the eviction process because the party being foreclosed upon still has an interest in the property, especially in states where the party being foreclosed upon retains the right to possession.

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*In some jurisdictions, the right to redemption period can significantly delay a foreclosing entity's ability to begin the eviction process because the party being foreclosed upon still has an interest in the property.*

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Further, the completion of the foreclosure process through the termination of the previous owner's interests is not sufficient to begin the ninety-day notice period. The new owner must take affirmative action to begin this ninety-day period by serving the tenant with a "notice to vacate." The ninety-day notice cannot automatically begin at the time of sale, even in the situation where the property will become the primary residence of the new owner, because the PTFA states that "a successor in interest may terminate a lease effective on the date of sale."<sup>34</sup> This permissive language, along with the general procedural protections against eviction, proves the requirement that a successor in interest must take action to notify the tenant and thus commence the ninety-day period.<sup>35</sup>

Because the foreclosure process occurs in a number of phases and differs from state to state, others may try to argue that the phrase "notice of foreclosure" is ambiguous and could refer to various points along the foreclosure timeline such as notice of default, filing of a foreclosure in court, judicial determination of foreclosure, notice of a foreclosure sale, etc. However, the reasoning above shows that this phrase can only refer to the time at which the successor in interest, which may be the foreclosing entity, has full rights to the property and the owner prior to foreclosure has relinquished any and all property interests.

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<sup>31</sup>*Id.*

<sup>32</sup>*Id.* at § 7.17.

<sup>33</sup>*Id.*

<sup>34</sup>PTFA § 702(a)(2)(A) (emphasis added).

<sup>35</sup>The nature of the eviction action and its procedures will depend on the jurisdiction, and again, it is essential to pursue the latest date possible for the beginning of the ninety-day period to effectuate the purposes of the statute.

## Does the PTFA Apply to Properties Foreclosed upon Before the Statute's Date of Enactment?

Related to when a ninety-day notice may be sent to a tenant is the application of the PTFA to properties at different stages in the foreclosure process as of May 20, 2009. It is clear that the PTFA will apply to all tenants where the entire foreclosure proceedings occur after the date of the PTFA's enactment, May 20, 2009, until the sunset clause date of December 31, 2012.<sup>36</sup> However, where some step in the foreclosure process occurred before May 20, 2009, the applicability of the PTFA requires closer analysis.

Based on the analysis above and an understanding of the effective date of the "notice of foreclosure" as the time of completion of the sale and termination of all property rights of those being foreclosed upon, the statutory protections for tenants apply to all foreclosures pending as of May 20, 2009. Even if there were a notice of default, filing of foreclosure in court, advertising sale, or anything short of a transfer of ownership and a termination of the rights of the previous owner prior to this date, the successor in interest is bound by the restrictions of the PTFA.

Some may argue that tenants are not entitled to the protection of the PTFA in properties where the sale and transfer of ownership occurred before May 20, 2009.<sup>37</sup> However, the PTFA states, "[i]n the case of any foreclosure on a federally-related mortgage loan or on any dwelling or residential real property after the date of enactment of this title..."<sup>38</sup> As will be explained, the most reasonable argument is that "after the date of enactment" is only applicable to the second category, "any dwelling or residential real property," and that the protections of the statute were intended to apply to all federally-related mortgage loans, regardless of whether the foreclosure occurred before or after May 20.

The doctrine of last antecedent is a general principle of statutory interpretation, which states that a qualifying word or phrase applies only to the immediately preceding antecedent.<sup>39</sup> According to Sutherland, "the last antecedent is the last word, phrase, or clause that can be made an antecedent without impairing the meaning of the sentence. Thus a proviso usually is construed to apply to the

provision or clause immediately preceding it."<sup>40</sup> Here the proviso regarding the date of application of the PTFA should apply to the last antecedent, which in this case is "any dwelling or residential real property." Further, "[e]vidence that a qualifying phrase is supposed to apply to all antecedents instead of only to the immediately preceding one may be found in the fact that it is separated from the antecedents by a comma."<sup>41</sup> In Section 702(a) there is no comma separating the qualifying phrase, "after the date of enactment of this title," from either antecedent.

In addition to the doctrine of last antecedent, the rule of construction that requires that every word and phrase in a statute have meaning indicates that the PTFA is intended to apply to all federally related mortgage loans, regardless of the date of foreclosure. "It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute. A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant[.]"<sup>42</sup> Because most federally related mortgage loans are on a "dwelling or residential real property," if the qualifying clause "after the date of enactment of this title" were to apply to both antecedents, the phrase "dwelling or residential real property" would be superfluous and insignificant.

This interpretation of the effective date of the tenant protections is important because the definition of a federally related mortgage loan, taken from Section 3 of the Real Estate Settlement Procedures Act, is expansive and affords many tenants with the safeguards of the PTFA, regardless of the date of foreclosure.<sup>43</sup> The definition includes any loans directly from government agencies as well as those "made in whole or in part by any lender the deposits or accounts of which are insured by any agency of the Federal Government, or is made in whole or in part by any lender which is regulated by any agency of the Federal Government..."<sup>44</sup> Most mortgage loans would be included in this definition because a high percentage of lenders utilize the FDIC or are regulated by the government, and this broad protection is consistent with the purposes of the PTFA.<sup>45</sup>

<sup>36</sup>PTFA § 702(a), 704.

<sup>37</sup>Arguments against this could be made for the retroactive application of the statute or for the proposition that the PTFA is merely a clarification of existing law, and thus would not have retroactive effects, only retrospective application. Success on the basis of these statutory constructions is unlikely given the fact that legislative intent is a requisite element for any retrospective/retroactive argument and there is nothing in the record that would indicate such intent. For the landmark case on the statutory retroactivity, see *Landgraf v. USI Film Products*, 511 U.S. 244 (1994). For an exposition of a "clarification" of the law versus a "change" in the law, see *Piamba Cortes v. American Airlines, Inc.*, 177 F.3d 1272 (11th Cir. 1999).

<sup>38</sup>PTFA § 702(a) (emphasis added).

<sup>39</sup>2A Norman J. Singer & J. D. Shambie Singer, *Sutherland Statutory Construction* § 47:33 (7th ed. 2001).

<sup>40</sup>*Id.* (internal quotations omitted).

<sup>41</sup>*Id.*

<sup>42</sup>*Id.* § 46:6 (internal quotations omitted).

<sup>43</sup>Real Estate Settlement Procedures Act, 12 U.S.C.A. § 2602 (2009).

<sup>44</sup>12 U.S.C. § 2602(1)(B)(i).

<sup>45</sup>HUD's New England Regional Office has unequivocally confirmed this position in stating, "These changes are effective for all Section 8 tenants, even those living in units that have already been foreclosed." Protecting Section 8 Tenants at Foreclosure, New England PIH Advisory Letter 09-02, (June 15, 2009).

## To What Terms and Conditions Is the New Owner Subject?

A final question relates to the various obligations a successor in interest may have to the terms and conditions of a tenant's occupancy. The operation of the PTFA could differ depending on the length of term of the Section 8 lease.

Section 703 states that the successor in interest is subject to the lease between the Section 8 tenant and the landlord, as well as the HAP contract between the landlord and the PHA.<sup>46</sup> The new owner is required to allow the tenant to finish the lease term and obliged to follow the HAP terms, including the good cause requirement. The language in Section 703 states that where there is a foreclosure "during the term of the lease, vacating the property prior to sale shall not constitute other good cause," subject to the provision that a new owner can terminate the lease with a ninety-day notice if the unit will be the new owner's primary residence.<sup>47</sup>

Another important aspect of the PTFA is that its protections apply to all Section 8 leases. Before the PTFA was sent to the House on May 19, 2009, all prior versions of the bill stated that actions related to foreclosure would not constitute good cause "during the term of the initial lease."<sup>48</sup> Under the Section 8 Tenancy Addendum, the elimination of the word "initial" excludes the possibility of using foreclosure as "a business or economic reason for termination of the tenancy" in the case of tenants with extended or subsequent leases.<sup>49</sup> In accordance with the required Section 8 lease addendum, foreclosure should not be good cause under an initial lease term, because "other good cause for termination of tenancy must be something the family did or failed to do."<sup>50</sup> For subsequent lease terms, the good cause requirement for termination of a Section 8 lease is expanded to include business reasons, "such as sale of the property, renovation of the unit, the owner's desire to rent the unit for higher rent."<sup>51</sup> The PTFA excludes the possibility that foreclosure constitutes good cause during the term of any Section 8 lease.<sup>52</sup> This conclusion is supported by the fact that this language mirrors the ARRA language, except that ARRA states that it is good cause if property is "unmarketable while occupied." The failure to repeat this language in the PTFA strengthens the position that foreclosure may not be used to support a claim that there is good cause to evict.<sup>53</sup> The

elimination of the "unmarketable while occupied" provision and the deletion of the word "initial" both indicate Congress' intent that foreclosure should not constitute a legitimate "business or economic" reason for termination of any Section 8 tenancy.

The terms of Section 703 of the PTFA provide stability for Section 8 tenants by allowing them to maintain their tenancy under the terms of the lease despite foreclosure, with the exception of a successor in interest who intends to become a resident. Section 8 tenants have the security that they will not be evicted without good cause,<sup>54</sup> that their lease remains effective, and that the successor in interest is their bona fide landlord, responsible for each and every duty a landlord owes a tenant, either by law or by contract.

## Additional Tenant Protections

In addition to the PTFA, some tenants have additional protections. Both Sections 702 and 703 contain the provision that the PTFA "shall not affect any State or local law that provides longer time periods or other additional protections for tenants."<sup>55</sup> State and local regulations, especially in rent control and eviction control jurisdictions, should be examined to determine the relative levels of protection in comparison with the PTFA. The source of the funds used to acquire foreclosed properties may provide another avenue for tenant protection. Though not as expansive, similar protections are available under ARRA and HERA, both enacted before the PTFA, for a property acquired with funds made available through the Neighborhood Stabilization Program.<sup>56</sup> In addition, under EESA, federally controlled or owned lenders were required to maintain the tenancies of those current on their rent and to protect federal, state and local rental subsidies.<sup>57</sup> Some federally controlled lenders, like Fannie Mae, developed policies to protect tenants in response to litigation.<sup>58</sup> Additionally, specific lenders not controlled by the federal government may have enacted tenant protection policies, as

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<sup>54</sup>Project-based Section 8 tenants cannot be evicted except for good cause. For voucher tenants the statute provides for good cause only during the term of the lease and the term shall be for not less than one year, unless the PHA determines that a shorter term will improve housing opportunities for the tenant or is the local market practice. 42 U.S.C.A. § 1437f(0)(7). Despite the legislation, it may be that the tenant's lease requires termination for cause at the end of the term or of a month-to-month tenancy. Advocates should review the lease to determine whether there must be good cause to terminate a month-to-month voucher tenant. See *Wasatch Property Management v. Degrate*, 126 Cal. Rptr.2d 923, 928 (2002) (According to the California rules of Court, this case may not be cited; nevertheless the reasoning of the case can be used in other cases).

<sup>55</sup>PTFA §§ 702(a)(2)(B)(1), 703(2).

<sup>56</sup>ARRA 123 Stat. at 218-19.

<sup>57</sup>Emergency Economic Stabilization Act, 12 U.S.C.A. § 5219b (2009).

<sup>58</sup>Answer at 14-20, *Fed. Nat'l Mortgage Ass'n v. Barnes*, No. 095478 (New Haven Super. Ct. filed December 4, 2008).

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<sup>46</sup>PTFA § 703(2).

<sup>47</sup>PTFA § 703(1).

<sup>48</sup>H.R. 1247, 111<sup>th</sup> Cong. (2009); S. 896, 111<sup>th</sup> Cong. (as passed by Senate, May 6, 2009).

<sup>49</sup>HUD Form 52641-A, 8(d)(3)(c), (Jan. 2007).

<sup>50</sup>HUD Form 52641-A, 8(d)(1).

<sup>51</sup>HUD Form 52641-A, 8(d)(3)(c).

<sup>52</sup>PTFA § 703(1).

<sup>53</sup>ARRA 123 Stat. at 219.

did Freddie Mac and Fannie Mae.<sup>59</sup> Although not likely to be as protective as the PTFA, it is worthwhile to investigate a lender's policy to determine if additional protections are available to tenants of properties foreclosed upon both before and after May 20.

### Conclusion

The public policy underlying the PTFA is consistent with extending protections to the maximum number of tenants in units subject to foreclosures. According to the bill's sponsor, the statute was designed to protect "low- to moderate-income folks in America who do not get protections otherwise from being just booted out on the street, which is literally what has happened in the absence of this protection."<sup>60</sup> When accompanied by the purposes of Section 8 housing in general, this testimony illuminates the principle that the statute should be interpreted most favorably to tenants affected by the foreclosure crisis.

To summarize, the PTFA was intended to provide expansive and beneficial safeguards for all tenants in danger of losing their housing through the exclusive fault of the property's owner. In brief:

- Both Section 702 and Section 703 of the PTFA apply to Section 8 tenants.
- The operative language of the PTFA imposes obligations on successors in interest.
- A successor in interest can only give ninety-day notice at the completion of the foreclosure sale and termination of all property rights of the party being foreclosed upon.
- The PTFA applies to all federally related mortgages, regardless of whether the transaction was completed before May 20, 2009.
- A successor in interest becomes a landlord and is subject to all terms and conditions of any lease or Section 8 HAP contract related to the tenancy prior to foreclosure. ■

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<sup>59</sup>Kelly Evans, Fannie Mae to End Tenant Evictions in Foreclosures, *The Wall Street Journal*, December 15, 2008, available at <http://online.wsj.com/article/SB122929716434005201.html> (containing correspondence between legal services advocates and Fannie Mae confirming the policy); see Fannie Mae's National REO Rental Policy FAQs available at [http://www.fanniemae.com/newsreleases/2009/faq/FAQ\\_national\\_REO](http://www.fanniemae.com/newsreleases/2009/faq/FAQ_national_REO); Freddie Mac Extends Eviction Suspension Until March, Launches Rental Option for Foreclosed Borrowers, Tenants, News Release (Jan. 30, 2009).

<sup>60</sup>155 Cong. Rec. S5174 (daily ed. May 6, 2009) (statement of Sen. Kerry).

## Quiet Title Claim Denied Following Attempted Prepayment of RHS 515 Loan\*

The United States Court of Appeals for the Ninth Circuit has affirmed a federal district court decision restricting an owner of a Rural Housing Service (RHS) project from prepaying its loan through a quiet title action. In *Schroeder v. United States*,<sup>1</sup> the court held that the Emergency Low Income Housing Preservation Act of 1987 (ELIHPA)<sup>2</sup> applied to the Section 515 loan at issue, and limited the borrower's ability to prepay the loan.<sup>3</sup> Further, the court held that the district court's refusal to quiet title on an equitable basis was appropriate, as it prevented the borrower from avoiding the prepayment restrictions.<sup>4</sup>

### Background

Congress enacted ELIHPA in 1987 in an effort to preserve affordable rural housing, as borrowers were prepaying their RHS loans.<sup>5</sup> ELIHPA allows prepayments for RHS loans only if borrowers comply with several requirements intended to preserve low-income housing.<sup>6</sup> In 2002, the Supreme Court held that ELIHPA "repudiated" existing loan contracts and, as a result, affected property owners could claim damages against the government.<sup>7</sup> However, the Court did not hold that owners or the government could disregard the statute. Borrowers seeking to prepay RHS loans must still follow ELIHPA's procedures but may seek damages.<sup>8</sup> In *Schroeder*, the owner attempted to circumvent this process by bringing an action to quiet title in Oregon state court.

Alberta Schroeder owns a six-unit RHS Section 515 project in Heppner, Oregon. She purchased the property in 1984, three years before Congress enacted ELIHPA, from a company that constructed the property in 1975 using a forty-year loan from RHS (then the FmHA).<sup>9</sup>

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\*The author of this article is Adam Cowing, a J.D. candidate at the University of Michigan Law School and a summer intern at the National Housing Law Project.

<sup>1</sup> \_\_\_ F.3d \_\_\_, 2009 WL 1740751 (9th Cir. 2009).

<sup>2</sup>42 U.S.C.A. § 1472(c) (Westlaw July 15, 2009).

<sup>3</sup>*Id.* at \*5.

<sup>4</sup>*Id.* at \*6.

<sup>5</sup>*Id.* at \*1.

<sup>6</sup>Under ELIHPA, an owner seeking to prepay must give notice of his or her intent. The government must then make an offer providing incentive to remain in the program. If the owner still seeks to prepay after the incentive offer, he or she must offer to sell the property to a qualified nonprofit purchaser or public agency if the prepayment will have an adverse impact on minority housing opportunities. If the property is not sold within 180 days, then the owner may prepay the loan. *See* 42 U.S.C. § 1472 (c).

<sup>7</sup>*Franconia Assocs. v. United States*, 536 U.S. 129, 143 (2002).

<sup>8</sup>*Schroeder*, 2009 WL 1740751, at \*2.

<sup>9</sup>*Id.*

Schroeder assumed the loan and executed another promissory note, deed of trust, and loan agreement for a fifty-year RHS loan.<sup>10</sup> Thus, she became liable for two loans, due in 2015 and 2034 respectively.<sup>11</sup> Both promissory notes provided Schroeder an unconditional right to prepay, but the deed of trust for the loan due in 2034 required that Schroeder use the property for low-income housing for twenty years, until 2004.<sup>12</sup> The loan also included a provision further restricting the property's use to rental housing for low-income people, stating "so long as the loan obligations remain unsatisfied, the Borrower shall not use the house for any purpose other than as rental housing and related facilities for eligible occupants."<sup>13</sup>

In 2004, at the end of the restricted period, Schroeder requested permission to prepay the loans. RHS denied her request, pursuant to the ELIHPA prepayment restrictions, and made her an incentive offer to keep the development in the Section 515 program as affordable housing.<sup>14</sup> Schroeder rejected the offer and tendered payment of the balance of the loans to RHS, which in turn rejected the prepayment, based on ELIHPA.<sup>15</sup> Schroeder then commenced an action in Oregon state court to quiet title, seeking to compel the government to accept her payment of the loans.<sup>16</sup>

The government removed the case to federal court, where the parties filed cross motions for summary judgment.<sup>17</sup> A magistrate judge recommended that Schroeder be able to prepay and granted the quiet title action.<sup>18</sup> The district court rejected this recommendation and held that Schroeder was not entitled to quiet title, concluding that a court must act within the bounds of a statute.<sup>19</sup> Schroeder appealed.<sup>20</sup> The National Housing Law Project and the Oregon Law Center filed an amicus brief in support of the district court's decision.

## The Ninth Circuit's Decision

Schroeder claimed that ELIHPA did not apply to her loans because the final payment was not a prepayment, which triggers ELIHPA's requirements, and because ELIHPA did not create a new, enforceable restricted-use period.<sup>21</sup> She also argued that the district court abused its discretion by failing to grant the quiet title claim on

an equitable basis. The Ninth Circuit disagreed with each of these arguments, holding that ELIHPA applied to the loans<sup>22</sup> and that the district court did not abuse its discretion by declining to quiet title.<sup>23</sup>

### ELIHPA's Application to the Loans

The court held that ELIHPA's requirements applied to the loans because Schroeder's attempted payment constituted a prepayment. The court further held that the statute created a new restricted-use period. The court began by examining the prepayment issue, concluding that the parties intended for the promissory notes' due dates (2015 and 2034) to constitute the maturity dates. First, the court reasoned that at the time the loans were executed, the due dates were the only firm dates included in the loan.<sup>24</sup> The parties did not know with any certainty the exact date on which the principal would be satisfied "because the dates were subject to unpredictable factors."<sup>25</sup> Second, the court stated that Schroeder's interpretation, which essentially equated the payment dates with the maturity dates, would effectively render the loans' prepayment clause meaningless.<sup>26</sup> Under Schroeder's interpretation, "no final payment could constitute a prepayment, and the language permitting prepayments would essentially be a nullity."<sup>27</sup> Third, the court observed that under common law, a prepayment clause is distinct from the maturity date, and interpreting the notes as equating the maturity dates with the final payments under the prepayment clause violated this principle.<sup>28</sup> Because the loans' specified maturity dates were in 2015 and 2034, respectively, the court concluded that Schroeder's attempted payment amounted to a prepayment, and ELIHPA's requirements therefore applied.<sup>29</sup>

Next, the court considered whether ELIHPA created a new restricted-use period. The deed of trust executed in 1984 stated that the housing would be used for Section 515 housing during the following twenty-year period.<sup>30</sup> However, the loan agreement required the property to be used as low-income housing "so long as the loan obligation remains unsatisfied."<sup>31</sup> Under ELIHPA, a borrower

<sup>10</sup>*Id.*

<sup>11</sup>*Id.*

<sup>12</sup>*Id.*

<sup>13</sup>*Id.* Under the provision, "eligible occupants" were the elderly and low-income people.

<sup>14</sup>*Id.* at \*3.

<sup>15</sup>*Id.*

<sup>16</sup>*Id.*

<sup>17</sup>*Id.*

<sup>18</sup>*Id.*

<sup>19</sup>*Id.*

<sup>20</sup>*Id.* For more information on the district court's decision, see NHLP, *Owner Denied Right to Prepay RHS 515 Loan*, 37 HOUS. L. BULL. 183 (Oct. 2007).

<sup>21</sup>*Schroeder*, 2009 WL 1740751, at \*3-4.

<sup>22</sup>*Id.* at \*4.

<sup>23</sup>*Id.* at \*6.

<sup>24</sup>*Id.* at \*4.

<sup>25</sup>*Id.* According to the court, such factors included "the total rent received from tenants, which, in turn, determined the interest rate applied to the principal." *Id.*

<sup>26</sup>*Id.*

<sup>27</sup>*Id.*

<sup>28</sup>*Id.*

<sup>29</sup>*Id.* at \*5.

<sup>30</sup>The relevant provision stated, "The borrower and any successors in interest agree to use the housing for the purpose of housing people eligible for occupancy as provided in Section 515 of Title V of the Housing Act of 1949 and FmHA regulations then extant during this 20 year period beginning August 31, 1984. No person occupying the housing shall be required to vacate prior to the close of such 20 year period because of early repayment." *Id.*

<sup>31</sup>*Id.*

“may not repay the loans—and thus the ‘loan obligation [will] remain unsatisfied’—until either: (1) she completes the prepayment procedures outlined in ELIHPA; or (2) the loan period expires.”<sup>32</sup> Accordingly, the court concluded that Schroeder must continue to use the property for low-income housing until she completes ELIHPA’s procedural requirements or until 2034.<sup>33</sup>

### The District Court’s Decision Declining to Quiet Title

After deciding that ELIHPA’s requirements applied to the loans, the Ninth Circuit held that the district court did not abuse its discretion in declining to quiet title to Schroeder’s property on equitable grounds.<sup>34</sup> Because the suit involved a contract between Schroeder and the federal government, the court applied federal common law. For the purposes of deciding the merits of the quiet title action, the court assumed that a quiet title action was available.<sup>35</sup>

The court first established that equitable relief was “not appropriate where an adequate remedy exists at law.”<sup>36</sup> In this case, the court stated, an adequate remedy existed because Schroeder could seek damages for ELIHPA’s repudiation of the existing loan contract.<sup>37</sup> Additionally, the court found that Schroeder had not shown a need for equitable relief, agreeing with the district court’s conclusion that “the importance of preserving that which ELIHPA seeks to preserve”—i.e., low-income housing units—outweighs the burden to owners of complying with ELIHPA.<sup>38</sup>

### Conclusion

The *Schroeder* decision makes clear that an owner may not circumvent RHS prepayment restrictions through a quiet title action. Owners may seek prepayment through ELIHPA’s required procedures or bring claims for damages due to ELIHPA’s adverse effect on contracts in existence at the statute’s enactment. However, the court has ruled that prepayments that do not follow ELIHPA’s procedures will not be accepted, and quiet title actions will not allow owners to work around the law. While some may have believed that quiet title claims offered a way around prepayment requirements, *Schroeder*, which follows an earlier Ninth Circuit decision in *DBSI/TRI IV Ltd. Partnership v. United States*,<sup>39</sup> appears to have put this idea to rest in the Ninth Circuit. ■

<sup>32</sup>*Id.* (citing *Franconia Assocs. v. United States*, 536 U.S. 129, 143 (2002)).

<sup>33</sup>*Id.* at \*6.

<sup>34</sup>*Id.*

<sup>35</sup>*Id.*

<sup>36</sup>*Id.* (citing *Mort v. United States*, 86 F.3d 890, 892 (9th Cir. 1996)).

<sup>37</sup>*Id.* Under the Tucker Act, damages are available to compensate owners for contracts breached as a result of ELIHPA. *Id.* (quoting *DBSI/TRI*, 465 F.3d at 1041 n.8 (citing *Franconia Assocs. v. United States*, 536 U.S. 129 (2002))).

<sup>38</sup>*Id.* (quoting *Schroeder v. United States*, 2007 WL 3028432, at \*2 (D. Or. Oct. 17, 2007)).

<sup>39</sup>465 F.3d 1031 (9th Cir. 2006).

## United States Agrees that HUD Voucher Regulations Do Not Preempt Local Eviction Controls\*

On June 19, 2009, the United States filed an amicus brief supporting affirmance of a district court’s judgment holding that local eviction control laws are not preempted by federal regulations governing tenancy termination under the Housing Choice Voucher program.<sup>1</sup> In *Barrientos v. 1801-1825 Morton, LLC*, a landlord had sought to evict voucher tenants for reasons permissible under federal regulation but prohibited under the Los Angeles Rent Stabilization Ordinance (LARSO).<sup>2</sup> Though the appeal remains pending in the Ninth Circuit, the United States’ brief and subsequent Notice issued by the U.S. Department of Housing and Urban Development (HUD) provide strong support for the position that HUD regulations cannot be interpreted to give federally assisted tenants fewer protections than they would receive as unassisted tenants.

### Background

Morton Gardens is a sixty-six-unit apartment complex in the City of Los Angeles.<sup>3</sup> It was developed in 1971 through a federal mortgage-secured loan under Section 236 of the National Housing Act, and as such was subject to a use agreement requiring that the units be rented to low-income households and limiting the amount of rent that could be charged.<sup>4</sup> In 1998, Morton Gardens’ prior owner prepaid the Section 236 loan, extinguishing the use agreement.<sup>5</sup> As a result, tenants who lived in Morton Gardens at the time of prepayment became eligible to receive enhanced vouchers.<sup>6</sup> Enhanced vouchers resemble those issued under the tenant-based Housing Choice Voucher

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<sup>1</sup>Brief for the United States as *Amicus Curiae* Supporting Affirmance of the District Court’s Judgment, *Barrientos v. 1801-1825 Morton, LLC*, No. 07-56697 (9th Cir. Nov. 13, 2007) (hereinafter “Brief for the United States”). For a more detailed discussion of the decision issued at the district court level, see NHLP, *Local Eviction Controls and Enhanced Voucher Statute Protect Voucher Holders*, 37 HOUS. L. BULL. 180 (2007).

<sup>2</sup>Los Angeles Municipal Code § 151.01 *et seq.*

<sup>3</sup>Order re Plaintiff’s Motion for Summary Judgment, *Barrientos v. 1801-1825 Morton, LLC*, No. 06-6437, slip. op. at 3 (C.D. Cal. Sept. 11, 2007) (hereinafter, “Sept. 2007 order”).

<sup>4</sup>*Id.*

<sup>5</sup>*Id.*

<sup>6</sup>Pursuant to annual appropriations acts passed during the late 1990s and permanent legislation passed in 1999, enhanced vouchers become available to tenants residing in buildings when owners prepay their federally secured mortgages. Pub. L. No. 106-74, § 538, 113 Stat. 1047, 1122 (1999) (establishing Section 8(t) of the United States Housing Act, codified at 42 U.S.C. § 1437f(t)).

(HCV) program, with two important distinctions: the payment standards for enhanced vouchers can be higher to cover the new market rent,<sup>7</sup> and enhanced voucher holders have a federal statutory right to remain in their homes.<sup>8</sup> The plaintiffs in the present case are sixteen enhanced voucher holders and six HCV program participants, who moved into the property after the prepayment.<sup>9</sup>

In June 2006, the owner served on each voucher tenant a “Ninety Day Notice to Terminate Tenancy.”<sup>10</sup> The notice cited the reason for termination as “a business or economic reason, including but not limited to, the desire to opt-out of the Tenant Based Section 8 Program and or the desire to lease the unit at a higher rental rate.”<sup>11</sup> Pursuant to 42 U.S.C. § 1437f(o), during the lease term, an owner participating in the HCV program “shall not terminate the tenancy except for serious or repeated violation of the terms and conditions of the lease, for violation of applicable Federal, State, or local law, or for other good cause...”<sup>12</sup> HUD’s voucher regulations state that, after the initial lease term, “other good cause...may include...a business or economic reason for termination of the tenancy (such as sale of the property, renovation of the unit, or desire to lease the unit at a higher rental).”<sup>13</sup> Though the general provisions of Section 1437f(o) apply to enhanced voucher tenants as well, HUD has not issued regulations defining “other good cause” as it pertains to the enhanced voucher program.

The LARSO, which governs most rental housing in the City of Los Angeles including voucher units, does not recognize a landlord’s desire to raise the rent as a permissible ground for eviction.<sup>14</sup> The question therefore arose as to whether the owner could evict the tenants for reasons unrecognized by local law.<sup>15</sup> In the tenants’ view, the owner was attempting to transform this “minimum nationwide floor of protection against no-cause evictions ...into a preemptive ceiling that precludes Tenants from enjoying the benefits of the same LARSO eviction controls that their unassisted neighbors enjoy.”<sup>16</sup>

In September 2007, the federal district court granted a preliminary injunction allowing the tenants to remain in their apartments and entered summary judgment for the tenants on two grounds.<sup>17</sup> In granting summary judgment to the enhanced voucher tenants, the court found that applicable statutory provisions “unambiguously provide enhanced voucher tenants a right to remain in tenancy when the rent is raised.”<sup>18</sup> Therefore, HUD’s voucher regulations allowing for evictions based on the “desire to lease the unit at a higher rental” do not apply to enhanced voucher tenants.<sup>19</sup> Second, the court examined whether the LARSO’s eviction controls protected the six standard voucher tenants from eviction. Finding that an actual conflict exists between the LARSO and HUD’s regulation regarding whether an owner may evict based on the desire to raise rents,<sup>20</sup> the court then held that HUD exceeded its statutory authority by defining “other good cause” to include the desire to raise rent.<sup>21</sup> According to the court, the HUD regulations contradicted Congressional intent to “minimize disturbance of the private relationship under state law between the unit owner and the tenant”<sup>22</sup> and to leave local rent control laws in place.<sup>23</sup>

In ruling on a motion for reconsideration, the court further clarified what may constitute “good cause” for eviction, prompted by the owner’s attempt to rely on additional grounds—the desire to avoid the costs of Section 8 program requirements. While noting that this issue was not presented by the summary judgment record, the court nevertheless found that avoiding program compliance costs cannot constitute “good cause” for eviction.<sup>24</sup> The court reasoned that good cause “demands more than a bare desire to opt out of the program—whether for excessive costs or some other programmatic reason.”<sup>25</sup> More significantly, the court found that Congress intended Section 8 tenancies to mirror the unassisted rental market.<sup>26</sup> The court reasoned that “[l]imiting evictions to those defined in LARSO places assisted and unassisted tenants on equal footing” and therefore owners seeking to evict voucher holders based on “business or economic reasons” must be limited to the reasons enumerated in the LARSO.<sup>27</sup> Because the cost of program compliance is not a ground

<sup>7</sup>See generally NHLP, HUD HOUSING PROGRAMS: TENANTS’ RIGHTS § 15.4.2.4 (3d ed. 2004).

<sup>8</sup>See 42 U.S.C.A. § 1437f(t)(1)(B) (Westlaw June 29, 2009).

<sup>9</sup>The National Housing Law Project, the Legal Aid Foundation of Los Angeles, and Munger, Tolles & Olson LLP are counsel to tenant Plaintiffs-Appellees.

<sup>10</sup>Sept. 2007 order at 5.

<sup>11</sup>*Id.*

<sup>12</sup>42 U.S.C.A. § 1437f(o)(7)(C) (Westlaw June 29, 2009) (emphasis added).

<sup>13</sup>24 C.F.R. § 982.310(d)(1)(iv), (d)(2) (2009).

<sup>14</sup>Sept. 2007 order at 2-3.

<sup>15</sup>Similar questions were raised before the New York Court of Appeals in *Rosario v. Diagonal Realty, L.L.C.*, 872 N.E.2d 860 (N.Y. 2007). That case examined whether the 1998 Congressional amendments eliminating the endless lease requirement in the Section 8 program enabled owners to refuse to offer a renewal lease as required by local law. The court held that federal law does not preempt local rent and eviction protections. See also NHLP, *New York’s Highest Court Rules NYC Voucher Owners Must Offer Assisted Renewal Leases*, 37 HOUS. L. BULL. 158 (2007).

<sup>16</sup>Appellees’ Brief, *Barrientos v. 1801-1825 Morton, LLC*, No. 07-56697, 1 (9th Cir. Nov. 13, 2007).

<sup>17</sup>Sept. 2007 order at 44.

<sup>18</sup>*Id.* at 17 (analyzing the language and history of 42 U.S.C. § 1437f(t)).

<sup>19</sup>*Id.* at 19 (citing 24 C.F.R. § 982.310(d)(iv)).

<sup>20</sup>*Id.* at 22.

<sup>21</sup>*Id.* at 41.

<sup>22</sup>*Id.* at 37-38 (quoting S. Rep. No. 97-139 (1981), as reprinted in 1981 U.S.C.A.N. 396, 552).

<sup>23</sup>*Id.* at 39.

<sup>24</sup>Order re. Defendant’s Motion to Reconsider and Amend the Court’s September 12, 2007 Order, *Barrientos v. 1801-1825 Morton, LLC*, No. 06-6437, 18 (C.D. Cal. Oct. 24, 2007).

<sup>25</sup>*Id.*

<sup>26</sup>*Id.* at 14.

<sup>27</sup>*Id.*

for eviction in the LARSO, the court found that it was also impermissible to evict the tenants on that basis.<sup>28</sup>

The owner appealed to the Ninth Circuit in November 2007.<sup>29</sup>

## Oral Argument

Before a panel consisting of Judges O’Scannlain, Rymer and Wardlaw of the Ninth Circuit, counsel presented oral argument on March 2, 2009.<sup>30</sup> The court spent a significant amount of time focusing on conflict preemption, attempting to determine whether the LARSO’s eviction controls can exist simultaneously with HUD’s “other good cause” eviction provisions.<sup>31</sup>

There are two types of conflict preemption. The first exists when it is not possible to comply with both federal and state or local requirements. The second, primarily involved in this appeal, concerns the so-called “frustration of purpose” doctrine. This test, as laid out by the Supreme Court, asks whether “the State has created ‘an obstacle to the accomplishment and execution of the full purposes and objectives’” of the federal statute or regulation.<sup>32</sup>

The owner argued that the LARSO stands in actual conflict with HUD regulations.<sup>33</sup> One judge responded that it seemed possible to comply with both HUD regulations and the LARSO by terminating the underlying lease only for reasons recognized by both the LARSO and federal law. When another judge inquired as to why municipalities should not be able to provide greater protections beyond the federal standard, the owner replied that doing so would destroy incentives for building owners to participate in the voucher program and that HUD intended this regulation to apply nationwide.<sup>34</sup> The judge then pointed out that the federal regulations did not expressly prohibit local laws protecting voucher tenants.<sup>35</sup> On rebuttal, the owner subsequently reiterated its position that the substantive grounds for lease termination are defined by federal law and that state and local law govern only the procedural grounds for a landlord to regain possession.<sup>36</sup>

During argument, tenants sought to clarify for the court that different regulations apply to enhanced voucher holders and standard voucher holders, and that both are subject to local protections such as the LARSO. Tenants emphasized that the regulatory “other good cause” definitions apply to the regular voucher program, but that

HUD has been silent on such detailed definitions under the enhanced voucher program.<sup>37</sup> And where HCV regulations apply to enhanced vouchers, those regulations must be interpreted in light of Congress’s subsequent creation of the enhanced voucher right to remain.<sup>38</sup> Analogizing to local rent controls, tenants argued that this right to remain would be taken away if landlords were allowed to raise rents beyond what local law allows.<sup>39</sup> The only rate restriction in the enhanced voucher program is that the rents must be “reasonable,” which in a rent control jurisdiction requires rents that are comparable to other rent-controlled units.<sup>40</sup>

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*The court spent a significant amount of time focusing on conflict preemption, attempting to determine whether the LARSO’s eviction controls can exist simultaneously with HUD’s “other good cause” eviction provisions.*

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Tenants then turned to the issue of conflict preemption, arguing that the purpose behind HUD’s “other good cause” regulation was to bring federal law more closely in line with state and local law.<sup>41</sup> The purpose was not, contrary to the owner’s position, to allow landlords to maximize rents.<sup>42</sup> Rather, HUD created the option of evicting based on desire to raise rents because it worried that owners would not join the voucher program if federal laws were more restrictive than local laws.<sup>43</sup> HUD was thus aiming to close the gap between local and federal law, which tenants argued the LARSO also does by applying its restrictions equally to assisted and unassisted housing.<sup>44</sup> Therefore, enforcement of the LARSO would be consistent, and not in conflict, with the purpose of HUD regulations. To support its argument that conflict preemption does not exist, tenants cited both case law<sup>45</sup> and HUD’s 1999 regulatory amendments stating that its regulations do not preempt state and local prohibitions on discrimination against tenants based on their status as Section 8 voucher holders.<sup>46</sup> Finally, tenants argued that the

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<sup>28</sup>*Id.* at 10.

<sup>29</sup>Appellees’ Brief, *supra* note 16.

<sup>30</sup>Audio recording: Oral Argument for *Barrientos v. 1801-1825 Morton LLC* (Mar. 2, 2009) (hereinafter “Oral Argument, Mar. 2, 2009”), [http://www.ca9.uscourts.gov/media/view\\_subpage.php?pk\\_id=0000002882](http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000002882).

<sup>31</sup>*Id.*

<sup>32</sup>*Fidelity Fed. Sav. and Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 156 (1982) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

<sup>33</sup>Oral Argument, Mar. 2, 2009.

<sup>34</sup>*Id.*

<sup>35</sup>*Id.*

<sup>36</sup>*Id.*

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<sup>37</sup>*Id.*

<sup>38</sup>*Id.* See also 42 U.S.C.A. § 1437f(t)(1)(B).

<sup>39</sup>Oral Argument, Mar. 2, 2009.

<sup>40</sup>42 U.S.C.A. § 1437f(o)(10)(C).

<sup>41</sup>*Id.*

<sup>42</sup>*Id.*

<sup>43</sup>Appellees’ Brief, *supra* note 16, at 22.

<sup>44</sup>Oral Argument, Mar. 2, 2009.

<sup>45</sup>See *Chevron USA, Inc. v. Hammond*, 726 F.2d 483, 488 (9th Cir. 1984) (stating, “if we are left with a doubt as to congressional purpose, we should be slow to find preemption”); *Kargman v. Sullivan*, 552 F.2d 2, 7 (1st Cir. 1977) (finding that the existence of local rent control rates lower than federal regulations permit “does not, of itself, present an impermissible actual conflict with federal law”).

<sup>46</sup>24 C.F.R. § 982.53(d).

permissive language of the regulations does not automatically result in preemption, as the HUD regulations state only that a landlord “may” evict for the enumerated reasons, but not that he “must” do so.<sup>47</sup> Because of their permissive nature, the regulatory eviction provisions do not automatically create direct conflict with local laws such as the LARSO; one would need to go further and find a policy conflict.<sup>48</sup> None can exist here where the policy is to bring laws governing assisted tenancies in line with those governing unassisted tenancies.<sup>49</sup>

At the conclusion of argument, the panel suggested that the views of the United States might be helpful in resolving the federal preemption question. Approximately six weeks later, the court solicited input from the United States regarding the “frustration of purpose” conflict preemption issue. In its letter to the Attorney General, the court inquired, “Do local eviction controls . . . pose an obstacle to the accomplishment and execution of the full purposes and objectives of HUD’s definition of ‘good cause’ to terminate assisted tenancies as including the desire to raise rents, set forth in 24 C.F.R. § 982.310(d)(iv)?”<sup>50</sup> The cities of Los Angeles, San Francisco and New York City, all of which have local eviction protections that could be impaired by an adverse preemption ruling, communicated their concerns to HUD Secretary Shaun Donovan, who directed HUD to file a brief clarifying that the federal regulations do not preempt local protections.

### United States Files Amicus Curiae Brief

On June 19, 2009, the United States filed the requested amicus curiae brief, agreeing with tenants and the district court that HUD regulations do not preempt the LARSO or other local eviction controls. In examining whether the frustration of purpose doctrine creates conflict preemption in this case, the United States reviewed the history behind HUD’s Section 8 voucher program regulations. It found that HUD did not originally intend to create “a comprehensive regulatory definition of good cause” but that HUD eventually did so to provide assurance to landlords considering Section 8 program participation.<sup>51</sup> Thus, HUD issued regulations that it hoped would make “minimal demands on the owner beyond the normal requirements of an unsubsidized tenancy.”<sup>52</sup> The resultant regulations

defining “other good cause” used the permissive “may,” which the Supreme Court has interpreted to mean “may or may not.”<sup>53</sup> The United States therefore argued that the LARSO’s prohibition on eviction for the reason in question does not conflict with HUD regulations, as regulations dictate that “an owner’s desire to raise the rent during the term of a lease ‘may’—or may *not*—constitute ‘good cause’ for termination of tenancy.”<sup>54</sup> As further support for its position, the United States pointed to other Section 8 regulations that expressly recognize local rent controls.<sup>55</sup>

Despite agreeing with the district court’s final judgment in favor of the tenants, the United States disagreed with that court’s reasoning on several points. The United States did not believe that either the language or intent of the “good cause” regulations conferred upon landlords a “right” to terminate a Section 8 tenancy for the permissibly defined reasons.<sup>56</sup> Based partially upon the purported existence of such a “right,” the district court had found HUD regulations stood in actual conflict with the LARSO.<sup>57</sup> The United States argued that the court erred in interpreting HUD regulations as granting owners a “right” to terminate, focusing again on their permissive language.<sup>58</sup> Under this reasoning, there could be no conflict between the regulations and the LARSO, and therefore HUD did not exceed its statutory authority in defining “good cause” and so the “good cause” regulation was still valid.<sup>59</sup>

The United States also argued that its interpretation of its own “ambiguous” regulation is entitled to weight,<sup>60</sup> citing the recent Supreme Court decision in *Wyeth v. Levine*.<sup>61</sup> There, the Court recognized that federal agencies “have a unique understanding of the statutes they administer and an attendant ability to make informed decisions” regarding how state or local law will impact the agency’s regulations.<sup>62</sup> The United States argued that its analysis was entitled to weight because it met the *Wyeth* test of being “thorough, consistent, and persuasive.”<sup>63</sup>

Although the question of the federal regulation’s applicability to enhanced voucher tenants was not directly raised by the court’s briefing request, the United States voiced its general agreement with the lower court’s analysis that the earlier regulation should not deny tenants the right to remain subsequently conferred by statute.<sup>64</sup>

<sup>47</sup>Oral Argument, Mar. 2, 2009; see also 24 C.F.R. § 982.310(d)(1)(iv).

<sup>48</sup>Oral Argument, Mar. 2, 2009 (citing *Sprietsma v. Mercury Marine*, 537 U.S. 51, 67 (2002) (finding no conflict preemption in the absence of an “authoritative” message of a federal policy)).

<sup>49</sup>Oral Argument, Mar. 2, 2009.

<sup>50</sup>Letter from Molly C. Dwyer, Clerk of Court, United States Court of Appeals for the Ninth Circuit, to the Honorable Eric H. Holder, Jr., Attorney General of the United States, U.S. Department of Justice (Apr. 17, 2009).

<sup>51</sup>Brief for the United States at 17 (citing 49 Fed. Reg. 12,215, 12,233 (Mar. 29, 1984)).

<sup>52</sup>*Id.* (citing 49 Fed. Reg. 12,233).

<sup>53</sup>*Id.* at 19 (citing *Rowland v. California Men’s Colony*, 506 U.S. 194, 201 (1993)).

<sup>54</sup>*Id.*

<sup>55</sup>*Id.* at 20-21 (citing 24 C.F.R. § 982.509).

<sup>56</sup>*Id.* at 24.

<sup>57</sup>Sept. 2007 order at 33.

<sup>58</sup>Brief for the United States at 24.

<sup>59</sup>*Id.* at 24-25.

<sup>60</sup>*Id.* at 27.

<sup>61</sup>129 S. Ct. 1187 (2009).

<sup>62</sup>*Id.* at 1201.

<sup>63</sup>Brief for the United States at 28 (citing *Wyeth*, 129 S. Ct. at 1201).

<sup>64</sup>*Id.* at 10, note 5.

## HUD Issues Notice on Lease Terminations in Housing Choice Voucher Program

Just days after joining *Barrientos* as amicus curiae, the federal government issued a HUD Notice clarifying how state and local eviction controls apply to voucher lease terminations.<sup>65</sup> The Notice reiterates the United States' position in *Barrientos* that the language of the regulations defining "other good cause" is permissive rather than mandatory.<sup>66</sup> The Notice specifically gives the example that the federal regulation permitting landlords to terminate voucher leases because of a desire to raise the rent does not preempt any local ordinances that might prohibit such lease termination.<sup>67</sup> "In summary," the Notice states, "nothing in 24 C.F.R. 982.310(d)(1) pre-empts any applicable State or local laws that restrict or prohibit the termination of tenancy. This applies to all Housing Choice Vouchers."<sup>68</sup> However, the Notice does nothing to clarify the meaning of "other good cause" in the enhanced voucher program in light of the subsequently enacted statutory right to remain.

### Conclusion

Although the decision in *Barrientos* remains pending, the United States' brief and HUD's new Notice have important implications. These actions provide critical assurance to Section 8 tenants nationwide that they will not be less protected than their unassisted neighbors solely by virtue of their participation in a federal housing program. The *Bulletin* will follow future developments in this case. ■

## Courts Find Private Right of Action Under the Servicemembers Civil Relief Act\*

With the advent of the foreclosure crisis and the apparent permanence of American military mobilization, the protections afforded by the Servicemembers Civil Relief Act (SCRA)<sup>1</sup> have become increasingly important to those on active duty in our Armed Forces. The Pentagon has estimated that 75% of servicemembers are renters, and thus may be at risk of losing their residences because of defaulting landlords.<sup>2</sup> Many servicemembers who own their homes are facing foreclosure, with one study indicating that foreclosures are four times more likely to occur in military towns.<sup>3</sup> The SCRA provides tenants and homeowners with defenses to adverse actions by creditors, mortgagees or landlords, but a major concern has been whether the judiciary will recognize a private right of action under the SCRA. Most recently, courts have held that a private right of action does exist and have provided servicemembers much-needed relief in the face of economic uncertainty.<sup>4</sup> This article delineates the protections of the SCRA, with specific attention to foreclosure, examines recent cases determining that the SCRA contains an implied private right of action, and discusses possible future developments related to the SCRA.

### Background

In December 2003, President Bush signed the SCRA, replacing the Soldiers' and Sailors' Civil Relief Act (SSCRA) of 1940.<sup>5</sup> The SCRA serves as a source of benefits and obligations for servicemembers related to consumer transactions, including homeowner and tenant rights, mining claims, installment contract limitations, life insurance protections and tax deferral procedures.

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<sup>1</sup>Servicemembers Civil Relief Act, 50 U.S.C.A. app. §§ 501-96 (Westlaw June 17, 2009) [hereinafter SCRA or the Act]; see also NHLP, *The Servicemembers Civil Relief Act of 2003*, 34 HOUS. L. BULL. 42 (2004).

<sup>2</sup>See Michael J. Carden, *Foreclosure Protection for Military: Law Gives Military Renters More Protection Against Foreclosures*, Army.com, June 11, 2009, <http://www.army.com/news/item/5322>.

<sup>3</sup>Kathleen M. Howley, *Foreclosures in Military Towns Surge at Four Times U.S. Rate*, Bloomberg.com, May 27, 2008, <http://www.bloomberg.com/apps/news?pid=20601109&refer=home&sid=awj2TMDLnwsU>. However, this study has been criticized. See e.g., Karen Jowers, *Are Service Members Perceived as a Higher Foreclosure Risk?*, Armytimes.com, [http://www.armytimes.com/money/financial\\_advice/military\\_foreclosures\\_061908w/](http://www.armytimes.com/money/financial_advice/military_foreclosures_061908w/).

<sup>4</sup>See, e.g., *Batie v. Subway Real Estate Corp.*, 2008 WL 5136636 (N.D. Tex. Mar. 12, 2008); *Hurley v. Deutsche Bank Trust Co. Americas*, 2009 WL 701006 (W.D. Mich. Mar. 13, 2009).

<sup>5</sup>Soldiers and Sailors Civil Relief Act, 50 U.S.C. § 512 (1940) (replaced by Servicemembers Civil Relief Act, 50 U.S.C.A. app. § 501 (2003)).

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<sup>65</sup>See State and Local Law Applicability to Lease Terminations in the Housing Choice Voucher (HCV) Program, PIH 2009-18 (June 22, 2009).

<sup>66</sup>*Id.*

<sup>67</sup>*Id.*

<sup>68</sup>*Id.*

The SCRA's stated purpose is to strengthen the national defense by easing the burden of consumer-related obligations on servicemembers "to enable such persons to devote their entire energy to the defense needs of the nation."<sup>6</sup> The SCRA attempts to accomplish this through the temporary suspension of judicial and administrative proceedings that may adversely affect the "civil rights" of members of the military on active duty.<sup>7</sup> The SCRA provides several general procedural protections. It requires that a lawyer be appointed for any action it covers,<sup>8</sup> including foreclosure and eviction actions. Further, courts must grant a stay of proceedings for a minimum of ninety days upon application by counsel, or on the court's own motion.<sup>9</sup>

In terms of evictions and foreclosures, the SCRA provides procedural protections for all active duty servicemembers. Without a court order, a landlord cannot evict a servicemember or his or her dependents<sup>10</sup> during a period of military service from premises used as a primary dwelling<sup>11</sup> where the monthly rent does not exceed \$2,932.31.<sup>12</sup> Further, courts must grant a ninety-day stay of an eviction proceeding upon the servicemember's request, unless justice and equity require a longer or shorter period.<sup>13</sup> The SCRA does not provide forgiveness of rent due.

If a mortgage, trust deed or security was entered into before service, there can be no forced sale, foreclosure or seizure of property during service without a court order.<sup>14</sup> If, after such a court order, a stay of foreclosure is requested and granted, a court may appoint three disinterested appraisers.<sup>15</sup> Based on their appraisal and absent undue hardship on the servicemember's dependents, the court may require that the servicemember's equity be returned as a condition of foreclosure or repossession.<sup>16</sup> In other words, the court may order that any downpayment

plus all subsequent payments made by the servicemember be returned to the servicemember in exchange for the return of the house.

## 2008 Amendments to the SCRA

Title II of the Housing and Economic Recovery Act of 2008 (HERA), entitled Mortgage Foreclosure Protections for Servicemembers,<sup>17</sup> amends Section 533 of the SCRA by extending its foreclosure protections from ninety days to nine months following the end of the servicemember's period of military service.<sup>18</sup> Specifically, if a foreclosure action covered by the SCRA is filed during, or within nine months after, a servicemember's period of military service, a court can stay the proceedings or adjust the servicemember's obligations.<sup>19</sup> Similarly, a sale, foreclosure or seizure of property for breach of an obligation is void if it occurs during, or within nine months after, a servicemember's period of service, subject to court order and approval of sale or foreclosure.<sup>20</sup> Additionally, HERA made explicit that mortgages are to be treated as obligations subject to a 6% interest cap for debts incurred prior to military service.<sup>21</sup> Upon receiving a written request for relief and a copy of the servicemember's military orders, lenders must reduce the interest rate on mortgages incurred by the servicemember, or a servicemember and spouse jointly, to no more than 6% per year. This interest cap applies during, and for one year after, active duty. Interest in excess of 6% that would otherwise be incurred is forgiven.<sup>22</sup>

## A Private Right of Action Under the SCRA

While the SCRA's protections are significant, their enforceability has been questioned because the statute does not specifically provide for a private right of action. Two recent cases, discussed in detail below, have addressed this issue.

### **Batie v. Subway Real Estate Corp.**<sup>23</sup>

In a case from the Northern District of Texas, the Subway Real Estate Corporation evicted servicemember Leon Batie from two commercial premises while deployed in Afghanistan.<sup>24</sup> Subway terminated the leases for non-payment of rent and obtained a default judgment and a writ of possession.<sup>25</sup> Batie claimed that his procedural rights under the SCRA were violated because he was not

<sup>6</sup>SCRA § 502(1).

<sup>7</sup>§ 502(2). Coverage under the Act extends to all active duty servicemembers in the armed forces beginning upon induction and terminating upon discharge or death. This includes National Guard members called to active duty for more than thirty consecutive days under 32 U.S.C. § 502(f) in response to a national emergency declared by the President and supported by federal funds. § 511(1).

<sup>8</sup>§ 521(b)(2).

<sup>9</sup>§ 521(d).

<sup>10</sup>§ 531(a)(1)(A)(i). The term "dependent" means a servicemember's spouse, or child (as defined in 38 U.S.C. § 101(4)) or an individual for whom the servicemember provided more than half the individual's support for 180 days immediately preceding the application for protection under this Act. § 511(4).

<sup>11</sup>§ 531(a)(1)-(a)(1)(a).

<sup>12</sup>§ 531(a)(2)-(3). The Act requires annual recalculation of the rent ceiling based on the Bureau of Labor Statistics' determination of the housing component of the Consumer Price Index. This recalculation must be published by the Department of Defense every year in the Federal Register. The 2009 rent ceiling is \$2932.31, up from \$2400 in 2003 when the SCRA was enacted. 74 Fed. Reg. 8068-01(Feb. 23, 2009).

<sup>13</sup>§ 531(b)(1)(A). If a stay is granted, the court may grant the landlord "such relief as equity may require." § 531(b).

<sup>14</sup>§ 533(c).

<sup>15</sup>§ 534(a).

<sup>16</sup>§ 534(b).

<sup>17</sup>Housing and Economic Recovery Act (HERA), Pub. L. No. 110-289, div. B, tit. II, § 2201-2203, 122 Stat. 2654, 2848-50 (2008) (codified at 10 U.S.C.A. § 922 note; 50 app. U.S.C.A. §§ 527, 533).

<sup>18</sup>§ 2203.

<sup>19</sup>HERA § 2203(a)(1); SCRA § 533(b).

<sup>20</sup>HERA § 2203(a)(2); SCRA § 533(c).

<sup>21</sup>HERA § 2203(b); SCRA § 527(a)(1)(A).

<sup>22</sup>SCRA § 527(a)(1)(A).

<sup>23</sup>2008 WL 413627 (N.D. Tex. Feb. 15, 2008) [hereinafter *Batie I*]; 2008 WL 5136636 (N.D. Tex. Mar. 12, 2008) [hereinafter *Batie II*].

<sup>24</sup>*Batie I*, 2008 WL 413627, at \*1.

<sup>25</sup>*Id.*

properly served, he was not appointed an attorney, Subway did not notify the court of his deployment, and the eviction proceedings were not stayed.<sup>26</sup> The district court granted Subway's motion to dismiss on the grounds that Batie did not properly exhaust his state remedies<sup>27</sup> and the SCRA did not contain a private right of action.<sup>28</sup>

A month later, the district court granted Batie's motion to reconsider and vacated its opinion in its entirety.<sup>29</sup> In a brief opinion containing little analysis, the court found that Subway failed to cite controlling authority for the conclusion that neither the SCRA nor its predecessor, the SSCRA, creates a private right of action.<sup>30</sup> Batie's motion to reconsider<sup>31</sup> relied on two federal district court cases, *Marin v. Anderson*<sup>32</sup> and *Moll v. Ford Consumer Finance Company*,<sup>33</sup> which were the centerpiece of a recent opinion also holding that the SCRA contains a private right of action.

### Hurley v. Deutsche Bank Trust Co. Americas<sup>34</sup>

Decided in March 2009, *Hurley* sets forth a detailed framework that relies heavily on prior case law to support the conclusion that the SCRA provides a private right of action. Sergeant James B. Hurley, a member of the Michigan National Guard, was called to active duty for training and subsequently failed to make his mortgage payments.<sup>35</sup> After completing his training, on September 11, 2004, Hurley was ordered to active duty in support of Operation Iraqi Freedom for eighteen months.<sup>36</sup> On October 14, 2004, Deutsche Bank held a sheriff's sale of Hurley's property and began eviction proceedings on May 3, 2005.<sup>37</sup> A default judgment was entered against Hurley, and his family was ordered to vacate the property.<sup>38</sup> Hurley filed suit against Deutsche Bank for violations of the SCRA.<sup>39</sup> As in *Batie I*, the court in *Hurley* initially granted summary judgment for the bank on the basis that no private right of action exists for a violation of the SCRA.<sup>40</sup>

After the *Batie* court granted a motion to reconsider and vacated its earlier opinion,<sup>41</sup> Hurley filed a motion for interlocutory appeal, and the district court granted this motion in part. The court held that "the statutory and

legislative history strongly support the conclusion that Congress must have intended to provide a means of enforcing the special rights it created in favor of servicemembers, otherwise, rights granted by the SCRA would essentially be illusory."<sup>42</sup> The court relied heavily on three past district court cases in determining that the SCRA contains an implied private right of action. Two of these cases, *Moll v. Ford Consumer Finance Company*<sup>43</sup> and *Marin v. Armstrong*,<sup>44</sup> were decided based on various sections of the SSCRA, while a third, *Linscott v. Vector Aerospace*,<sup>45</sup> was decided under the SCRA.

In *Moll*, a class of reservists who served during the Persian Gulf War filed suit against Ford Consumer Finance Corporation for failing to lower interest rates for servicemembers below 6% in violation of Section 526 of the SSCRA.<sup>46</sup> The corporation argued that the SSCRA was intended to provide servicemembers with defenses to claims brought by creditors during active duty only.<sup>47</sup> The court disagreed and held that the SSCRA provided an implied private right of action based on the Supreme Court's decision in *Cort v. Ash*.<sup>48</sup> Based on the SSCRA's legislative history, the second and most important of the *Cort* factors, the court found that Congress must have intended to create a private right under Section 526, "because otherwise the relief would [be] of no value at all."<sup>49</sup>

*Marin* extended *Moll's* reasoning by determining that sections 518 and 531 of the SSCRA provide a private right of action.<sup>50</sup> Section 531 of the SSCRA requires creditors to cease debt collection activities after being notified of a servicemember's inability to make payments "except in a court of competent jurisdiction."<sup>51</sup> Section 518 prohibits the dissemination of adverse credit information relating to a servicemember's attempt to enforce other portions of the SSCRA against the creditor.<sup>52</sup> Despite these provisions, a reservist was harassed by a lender after failing to make auto loan payments due to illness caused by military service.<sup>53</sup> The lender sought to dismiss the reservist's SSCRA action, arguing that the statute provided defensive relief

<sup>26</sup>*Id.*

<sup>27</sup>*Id.* at \*4.

<sup>28</sup>*Id.* at \*7.

<sup>29</sup>*Batie II*, 2008 WL 5136636, at \*1.

<sup>30</sup>*Id.*

<sup>31</sup>Pl.'s Mot. for Reconsideration, *Batie v. Subway Real Estate Corp.*, No. 3:07-CV-1415-M (N.D. Tex. 2008).

<sup>32</sup>1998 WL 1765716 (N.D. Tex. Sept 21, 1998).

<sup>33</sup>1998 WL 142411 (N.D. Ill. Mar. 23, 1998).

<sup>34</sup>*Hurley v. Deutsche Bank Trust Co. Americas*, 2008 WL 4539478 (W.D. Mich. Sept. 30, 2008) (hereinafter *Hurley I*); *Hurley v. Deutsche Bank Trust Co. Americas*, 2009 WL 701006 (W.D. Mich. Mar. 13, 2009) (hereinafter *Hurley II*).

<sup>35</sup>*Hurley I*, 2008 WL 4539478, at \*1-2.

<sup>36</sup>*Id.* at \*2.

<sup>37</sup>*Id.*

<sup>38</sup>*Id.*

<sup>39</sup>*Id.* at \*1.

<sup>40</sup>*Id.* at \*6.

<sup>41</sup>*Batie II*, 2008 WL 5136636, at \*1.

<sup>42</sup>*Id.* at \*4

<sup>43</sup>1998 WL 142411 (N.D. Ill. Mar. 23, 1998).

<sup>44</sup>1998 WL 1765716 (N.D. Tex. Sept. 21, 1998).

<sup>45</sup>2006 WL 240529 (D. Or. Jan. 31, 2006).

<sup>46</sup>*Moll*, 1998 WL 142411, at \*1. Section 526 of the SSCRA is now codified as Section 527 of the SCRA at 50 U.S.C. App. § 527.

<sup>47</sup>*Moll*, 1998 WL 142411, at \*2.

<sup>48</sup>*Id.* at \*3-5 (citing 422 U.S. 66 (1975)). In *Cort*, the Supreme Court held that four factors should be considered in determining whether a federal statute contains an implied right of action: (1) whether the plaintiff is a member of the class for whose benefit the statute was enacted; (2) whether there is any indication that Congress intended to create or deny such a remedy; (3) whether an implied remedy is consistent with the underlying purpose(s) of the statute; and (4) whether the cause of action is one traditionally relegated to state law.

<sup>49</sup>*Moll*, 1998 WL 142411, at \*4 (quoting 88 Cong. Rec. 5366 (1942)).

<sup>50</sup>*Marin*, 1998 WL 1765716, at \*3-4.

<sup>51</sup>SSCRA § 531.

<sup>52</sup>*Id.* at \*4.

<sup>53</sup>*Id.* at \*1.

only.<sup>54</sup> The court rejected this argument and held that sections 518 and 531 of the SSCRA contain an implied private right of action.<sup>55</sup> The court found that the SCCRA gave servicemembers a benefit not enjoyed by the general public, and that Congress must have intended to confer a private right of action because otherwise, “[c]reditors and insurers could simply ignore the provisions of the section without repercussions.”<sup>56</sup>

*Linscott* applied the reasoning of *Marin* and *Moll* to the SCRA.<sup>57</sup> A reservist sued a creditor for violation of Section 537 of the SCRA, which prohibits enforcement of liens during military service unless through a court order.<sup>58</sup> The creditor argued that Section 537 only prohibited it from proceeding without a court order and no damages remedy was intended.<sup>59</sup> The court disagreed, holding that a private right of action must exist because “[t]here is no indication that in enacting and renewing the [SCRA], Congress intended to create rights without remedies.”<sup>60</sup>

Following the reasoning of *Moll*, *Marin* and *Linscott*, the court in *Hurley* found that there is a private right of action under sections 533(c), 526(b) and 531 of the SCRA.<sup>61</sup> The court relied heavily on the fact that these provisions confer benefits to servicemembers as a unique class of individuals.<sup>62</sup> Section 533(c) prohibits a sale, foreclosure or seizure of property for failure to make payments during active duty and for a period thereafter unless conducted pursuant to a court order.<sup>63</sup> Noting that this provision was similar to those at issue in *Marin* and *Linscott*, the court held that *Hurley* was entitled to a private right of action to obtain relief against Deutsche Bank for its nonjudicial foreclosure of his home.<sup>64</sup> The court held the same with regard to Section 526, which tolls the right of redemption period during military service.<sup>65</sup> Section 531 prohibits eviction without a court order, and the court found that Deutsche Bank’s actions in evicting Sgt. *Hurley*’s family provided the basis for a private right of action for violation of the SCRA.<sup>66</sup>

*Batie* and *Hurley* offer support for advocates seeking to bring actions on behalf of servicemembers to enforce the SCRA. These recent cases serve as an important

reminder that the SCRA should be interpreted “with an eye friendly to those who dropped their affairs to answer their country’s call.”<sup>67</sup>

## Recent Developments

On June 4, 2009, Congressman Brad Miller (D-NC) introduced House Bill 2696, titled the Servicemembers’ Rights Protection Act.<sup>68</sup> The bill would delineate specific civil penalties for SCRA violations, permit a court to issue a restraining order or injunction, and authorize monetary damages for servicemembers, including consequential and punitive damages.<sup>69</sup> This bill would also authorize anyone protected by the SCRA to “commence an action in any appropriate United States District Court or in a State court of competent jurisdiction to enforce any requirement imposed or protection afforded by any provision of [the SCRA].”<sup>70</sup> This provision would essentially codify the holdings of *Batie* and *Hurley* by explicitly providing a private right of action under the SCRA.<sup>71</sup> The bill has been referred to the House Committee on Veterans Affairs.

## Other Helpful Resources for Servicemembers<sup>72</sup>

In addition to the SCRA, there are other regulatory and statutory provisions that may prove useful to advocates representing servicemembers impacted by foreclosure. In 2007, the Department of Defense amended the Joint Federal Travel Regulations (JFTR) in response to the increasing number of servicemembers facing displacement because their landlords defaulted on mortgages.<sup>73</sup> The amendment to the JFTR provides reimbursement for short distance moving expenses if a servicemember’s rental property is foreclosed upon.<sup>74</sup> This amendment does not apply to servicemembers who own their homes and encourages exhaustion of remedies under the SCRA and state law.<sup>75</sup> Nor does it provide eviction protections for servicemembers living in foreclosed rental properties, although these servicemembers may certainly assert the protections of the recently enacted Protecting Tenants at Foreclosure Act.<sup>76</sup> In any case, requesting assistance based on the JFTR can be a helpful tool for advocates seeking to ease a servicemember’s relocation costs. ■

<sup>54</sup>*Marin*, 1998 WL 1765716, at \*3.

<sup>55</sup>*Id.*

<sup>56</sup>*Id.*

<sup>57</sup>*Linscott*, 2006 WL 240529.

<sup>58</sup>SCRA § 537.

<sup>59</sup>*Linscott*, 2006 WL 240529, at \*5.

<sup>60</sup>*Id.* at \*7.

<sup>61</sup>*Hurley II*, 2009 WL 701006, at \*4.

<sup>62</sup>*Id.* The court declined to find a private right of action under Section 521(h), which extends to bona fide purchasers regardless of their military status, illustrating the importance of establishing that the right at issue is not available to the public at large.

<sup>63</sup>The time period applicable in *Hurley* was ninety days, which, as mentioned above, has been temporarily expanded to nine months. HERA § 2203.

<sup>64</sup>*Hurley II*, 2009 WL 701006, at \*4.

<sup>65</sup>*Id.*

<sup>66</sup>*Id.*

<sup>67</sup>See *LeMaistre v. Leffers*, 333 U.S. 1, 6 (1948).

<sup>68</sup>H.R. 2696, 111th Cong. (2009).

<sup>69</sup>H.R. 2696 § 801(b)(1)-(2).

<sup>70</sup>§ 802.

<sup>71</sup>§ 802.

<sup>72</sup>Members of the Armed Forces who own their homes and are transitioning to veteran status or who are already veterans may qualify for assistance from the Department of Veterans Affairs if they are at risk of foreclosure. For more information, see [www.homeloans.va.gov](http://www.homeloans.va.gov).

<sup>73</sup>JFTR par. U5355, 2007 WL 1763155 (D.O.D. Trav. Reg.) (current through Jan. 2009).

<sup>74</sup>*Id.*

<sup>75</sup>*Id.*

<sup>76</sup>Protecting Tenants at Foreclosure Act, Pub. L. No. 111-22, §§ 701-04, 132 Stat. 1632, 1660-62 (2009); see also NHLP, *Obama Signs Law Protecting Renters in Foreclosed Properties*, 39 HOUS. L. BULL. 133 (2009).

# Seventh Circuit Rules that City Can Take HUD-Subsidized Property Over Objection of HUD, Owners and Tenants

On April 9, 2009, the United States Court of Appeals for the Seventh Circuit ruled that Joliet, Illinois could condemn a multifamily federally insured low-income housing complex over the objections of the United States Department of Housing and Urban Development (HUD), the owners and the tenants. In *City of Joliet, Illinois vs. New West, L.P., et al.*,<sup>1</sup> the court found no impermissible conflict between the National Housing Act (NHA)<sup>2</sup> and the Multifamily Assisted Housing Reform and Affordability Act of 1997 (MAHRAA),<sup>3</sup> as they embody the national policy goal of providing decent, safe and sanitary housing for low-income families, and the authority of the City of Joliet to condemn the 356 apartments of Evergreen Terrace I and II, which were insured and subsidized under the Section 221 and Section 8 programs.

## Background

Evergreen Terrace I and II were acquired by HUD through foreclosure in the 1980s and sold to New West, L.P., and New Bluff, L.P., the current owners. In order to enable rehabilitation of the properties, HUD insured a mortgage under § 221 of the NHA, and provided a project-based Section 8 contract to keep the rents affordable. In 2006, because the Section 8 rents were above-market, after nearly five years of evaluation of physical conditions, assessment of local affordable housing needs and discussions with the city, HUD restructured the Section 8 contract rents and financing under MAHRAA's Mark to Market program and entered into new Section 8 contracts and thirty-year Use Agreements with the owners.

Meanwhile, on October 7, 2005, Joliet filed a state court eminent domain condemnation case seeking to acquire and raze the buildings. The city considered the buildings to be blight and proposed developing a park on the land. The city erroneously named Governmental National Mortgage Association (GNMA) as a defendant, along with mortgagor New West. GNMA removed the case to federal district court, where GNMA was dismissed and HUD was joined. The owner, New West, filed claims seeking injunctive relief and damages under 42 U.S.C. § 1983, which the District Court dismissed. On the first appeal, the Seventh Circuit rejected the city's challenge to the

owner's standing and recognized that the owner could affirmatively pursue its preemption claims under § 1983.<sup>4</sup> It also directed the District Court to address the condemnation proceeding prior to the § 1983 action, because its disposition might resolve some of the other issues.<sup>5</sup>

After remand, on January 31, 2008, six named Evergreen Terrace Tenants were granted leave to intervene in the District Court. Just prior to intervention, the tenants had filed a separate federal action challenging the city's actions under the Fair Housing Act and Equal Protection,<sup>6</sup> which remains pending.

On June 19, 2008, the District Court certified to the Seventh Circuit several contested orders for interlocutory appeal: (1) granting Joliet's motion for judgment on the pleadings with respect to the Supremacy Clause; (2) denying New West's and HUD's motions for reconsideration of that judgment; and (3) denying New West's and HUD's summary judgment motions based upon the Supremacy Clause, the Contract Clause, the Property Clause and the doctrine of Intergovernmental Immunity. These motions raised novel questions concerning the interrelationship of federal and local law with respect to the operation of federal affordable housing programs. In accepting the case, the Circuit "directed the parties to address the question how New West could give away a governmental power [eminent domain] that it never possessed."<sup>7</sup>

## Arguments of the Parties

On this appeal, the tenants and the owner raised similar issues. They argued that the Supremacy Clause prohibits a state from regulating the federal government by eliminating a major federal investment, that the taking would violate the Property Clause by interfering with HUD's insuring of the mortgages and its regulatory engagement in the operation of the property. They also contended that interference with the agreements between HUD and the owners would violate the Contracts Clause, and that the Intergovernmental Immunity doctrine, a corollary to the Supremacy Clause, bars the taking.<sup>8</sup>

The tenants and the owner asserted that the Supremacy Clause bars the taking because the purposes of Section 221 of the NHA<sup>9</sup> and the MAHRAA<sup>10</sup>—to engage private owners in the creation and preservation of decent, safe and affordable housing *and* the supporting regulatory scheme furthering that purpose—would be impermissibly

<sup>4</sup>New West, L.P. v. Joliet, 491 F.3d 717 (7<sup>th</sup> Cir. 2007).

<sup>5</sup>*Id.*

<sup>6</sup>*Davis, et. al. v. City of Joliet*, No. 07 C 7214 (N.D. Ill. filed Dec. 21, 2007).

<sup>7</sup>Decision at 6.

<sup>8</sup>New West asserted a Fair Housing Act claim (42 U.S.C. §§ 3601-3619) early in the litigation, but did not pursue it past the first appeal to the Seventh Circuit.

<sup>9</sup>12 U.S.C. § 1715l.

<sup>10</sup>42 U.S.C. § 1437f.

<sup>1</sup>City of Joliet, Illinois vs. New West, L.P., and New Bluff, L.P., U.S. Dep't of Hous. and Urban Devel. and Evergreen Terrace Tenants, Nos. 08-3032 & 08-3033 (7<sup>th</sup> Cir. April 9, 2009) (hereinafter "Decision").

<sup>2</sup>12 U.S.C. § 1715l.

<sup>3</sup>42 U.S.C. § 1437f.

frustrated.<sup>11</sup> They argued that the power of eminent domain is not absolute and that only HUD has the authority to terminate use agreements designed to further Congressional intent. Since the city's condemnation would constitute an obstacle to the federal preservation purpose, it should be preempted.

They argued that the condemnation would violate the Property Clause because HUD's Section 221 mortgage insurance, as well as the control HUD exercises over the operation and maintenance of the property through the various agreements, constitutes a property interest of the federal government that would be contravened by the taking.

Under the Contracts Clause, the tenants and the owner asserted that the taking would impermissibly terminate use agreements, regulatory agreements, project-based Section 8 contracts, and the thirty-year affordability commitment between HUD and the owners, resulting in the elimination of low-income housing established in furtherance of the federal policy.

Lastly, the tenants and the owner argued that the doctrine of Intergovernmental Immunity precludes the City of Joliet from regulating the federal government, and therefore from interfering with the operation of Evergreen Terrace, because Congress has not clearly and unambiguously authorized additional state or local government regulation of these federal housing programs in this fashion. The prescriptive regulation imposed by the federally required contracts for Evergreen Terrace mandates federal immunity.

The tenants and the owner pursued these federal claims in the context of the motive for the city's condemnation action. They contested the city's claim that Evergreen Terrace must be demolished because it is blighted, since the city was aware of the multi-million dollar renovation agreement between HUD and the owners. Furthermore, they noted the lack of alternative housing for the residents, contested the city's finding of public nuisance and rebuffed the city's vague assertions of its own interest in maintaining affordable housing. They found no facts to support the city's suggestion that it would build replacement housing, and contended instead that this condemnation is part and parcel of Joliet's plan to rid itself of affordable multifamily housing for low-income families, primarily people of color.

For its part, HUD argued that the city's exercise of eminent domain would frustrate Congress's purpose and objectives in both the NHA and MAHRAA, and that in such a conflict federal law preempts state or local government action under the Supremacy Clause. HUD maintained that the elaborate and pervasive body of government regulations and the provision of refinancing and rehabilitation provided through the federal programs

demonstrate that federal government concurrence is required for any condemnation. HUD asserted its right to withhold approval if it determined that the condemnation would thwart the underlying federal statutory purpose. HUD agreed with the tenants and the owner that the private ownership of Evergreen Terrace does not insulate the city's proposed taking from the preemptive force of federal housing laws.

The City of Joliet maintained that the condemnation had predated the preservation agreements between the owners and HUD and that the mortgages in effect at the time the condemnation was filed anticipated the possibility of foreclosure. Joliet argued that HUD's position as insurer of the mortgage, but not the mortgagee, did not give HUD any justiciable interest in the property. Joliet also contended that the NHA and MAHRAA were fiscal incentive programs, that the owners' voluntary participation therein did not divest the city of its sovereign authority to rid itself of a blight, that the regulatory agreements between the owners and HUD did not confer any property interest on HUD, thus rendering the Property Clause inapplicable, and that the federal agreements were not contracts within the meaning of the Contract Clause. Joliet further contended that intergovernmental immunity did not apply because the federal interest did not, by virtue of voluntary entry into regulatory agreements, inure to the privately owned property in question.

### Decision of the Seventh Circuit

The Circuit panel opined that all parties "acknowledge that neither [the NHA nor MAHRAA] has any clause preempting state law."<sup>12</sup> It noted that even HUD agreed that "the contracts do not affect state or local powers."<sup>13</sup> "The question at hand," stated the Court, "is whether a state or local law can be preempted by the 'findings' and 'purposes' clauses of a federal statute, even though the state or local law does not conflict with any rule of law established in the federal statute."<sup>14</sup> It answered the question by ruling that the federal policy advancing affordable housing is unenforceable in the absence of specific statutory language or "preemptive regulation with the force of law."<sup>15</sup>

The Court held that Evergreen Terrace is privately owned and that Joliet is taking not HUD's property, but HUD's security interest in another's property. Since the conditions placed upon the private owners to maintain Evergreen Terrace as affordable housing are conditions of the mortgages, they survive only as long as the mortgages.<sup>16</sup> It analogizes HUD's interest to a tax lien which would be properly resolved if the taxing authority were

<sup>12</sup>Decision at 3.

<sup>13</sup>*Id.* at 7.

<sup>14</sup>*Id.* at 7-8.

<sup>15</sup>*Id.* at 8, 12-14.

<sup>16</sup>*Id.* at 9.

<sup>11</sup>Brief for Intervening Defendants-Appellants Evergreen Terrace Tenants (Sept. 22, 2008).

paid at sale or by a bankruptcy court,<sup>17</sup> stating that full payment of HUD's interest can be accomplished by the application of condemnation proceeds.<sup>18</sup>

The Court found that neither the acceptance by the owners of Section 8 subsidies nor whatever fair housing claims there may be were of such substance as to preclude the exercise of eminent domain by Joliet. "Congress may well have the power to prevent state or local governments from condemning low-income housing, [but] it has not declared that it has exercised that power."<sup>19</sup>

The Court concluded by encouraging the district court to "bring [the proceedings] to a speedy conclusion."<sup>20</sup>

## Discussion

The Evergreen Terrace dispute raises significant and recurring issues of preemption and federalism for federal housing programs. Was the court correct in refusing to find conflict preemption? To what extent must Congress express the policy and purpose of legislation as mandate rather than admonition? How much federal control, interest or ownership is necessary to preclude local action? Does the degree to which the local action thwarts the federal policy and purpose affect the enforceability of the state or local law? Is a resulting total elimination of federally supported housing in a particular jurisdiction sufficient to trigger judicial protection? Does the execution of long-term use agreements between HUD and owners constitute a case-specific equivalent of regulations as an expression of federal policy for purposes of intergovernmental immunity or preemption?

## Current Status

In the last week of May, the tenants, owners and HUD filed petitions for rehearing *en banc*. The Housing Preservation Project, the National Housing Law Project, and the Chicago Rehab Network filed a joint motion for leave to participate as *amicus curiae* in support of appellants in seeking rehearing. Their brief argues that a long line of cases, beginning with *McCulloch v. Maryland* in 1819, is applicable to exactly the type of frustration of federal interests presented by the Joliet condemnation and forbids the states from impeding the operations of the federal government in supporting affordable housing. ■

*Editor's note: In mid-July, the Seventh Circuit denied the petition for rehearing.*

<sup>17</sup>*Id.* at 17.

<sup>18</sup>*Id.* and 24 C.F.R. § 248.101 (Prepayment).

<sup>19</sup>Decision at 11.

<sup>20</sup>*Id.*

# Federal One-Strike Law Does Not Preempt PHA from Granting Tenants the Right to Cure Lease Violations\*

In *Housing Authority of Covington v. Turner*,<sup>1</sup> the Kentucky Court of Appeals recently added to the series of cases interpreting the reach of the federal "one-strike" law after the Supreme Court's decision in *Department of Housing and Urban Development v. Rucker*.<sup>2</sup> The Court of Appeals, the state's intermediate court, held that the federal "one-strike" law for public housing did not preempt a lease provision allowing a tenant to remedy a breach of lease following drug-related criminal activity by a guest. After examining the reach of preemption in one-strike cases and the discretion afforded local housing authorities, the court concluded that there was no overriding conflict between the provision and the federal statute.

## Background

Clarissa Turner is a resident of the Jacob Price Development in Covington, Kentucky, located across the river from Cincinnati, Ohio. The Housing Authority of Covington operates Jacob Price and receives assistance from the federal government.<sup>3</sup> In 2007, Turner received a fourteen-day notice of eviction after the Authority found cocaine and drug paraphernalia in her apartment. The drugs belonged to Turner's nephew, who visited the apartment every other weekend.<sup>4</sup> Turner was at work when the apartment was searched and had no knowledge of the drugs, which were found in a room where her nephew kept his belongings.<sup>5</sup> In fact, she did not learn that her nephew had been arrested until she received the eviction notice.<sup>6</sup> She then told her nephew to stay away from her apartment and he did not return.<sup>7</sup>

The lease between Turner and the Authority contained two relevant provisions. One provision used language from the federal one-strike law for public housing, passed by Congress in 1996,<sup>8</sup> which provides that:

\*The author of this article is Adam Cowing, a J.D. candidate at the University of Michigan Law School and a summer intern at the National Housing Law Project.

<sup>1</sup> \_\_\_ S.W.3d \_\_\_, 2009 WL 1491330 (Ky. Ct. App. 2009).

<sup>2</sup>535 U.S. 125 (2002).

<sup>3</sup>*Id.* at \*1.

<sup>4</sup>*Id.*

<sup>5</sup>*Id.*

<sup>6</sup>*Id.*

<sup>7</sup>*Id.*

<sup>8</sup>The federal one-strike statute, 42 U.S.C. § 1437d(l)(6), amended the Anti-Drug Abuse Act of 1988.

Each public housing agency shall utilize leases which ... provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of the tenancy...."<sup>9</sup>

The provision obligates tenants to assure that guests not engage in any drug-related activity. The second relevant provision of the lease stated that "Evictions for Criminal Activity or Drug Related Criminal Activity will be governed by the URLTA as adopted by the State of Kentucky and the City of Covington and will not be governed by the grievance procedure of the authority."<sup>10</sup> The Uniform Residential Landlord and Tenant Act (URLTA) allows a tenant to remedy a breach of a lease before the lease is terminated.<sup>11</sup>

After a hearing, the district court held that Turner had sufficiently remedied the breach when she prohibited her nephew from returning to the apartment.<sup>12</sup> The circuit court affirmed.<sup>13</sup> The specific issue raised was whether the right to remedy a breach of a lease, pursuant to the relevant URLTA provision, was preempted by the federal one-strike law, which provides a basis for housing authorities to evict based on one criminal activity, but does not mandate it. The housing authority claimed the URLTA provision was preempted by the language taken from the federal statute. This led to an examination of the reach of preemption in so-called "one-strike" cases.

### The Court's Decision

The Court began its analysis with a review of *Department of Housing and Urban Development v. Rucker*,<sup>14</sup> the pivotal Supreme Court case considering the application of the one-strike law in eviction proceedings. In *Rucker*, the Court upheld Department of Housing and Urban Development (HUD) regulations requiring that public housing leases include terms that allow local housing authorities to evict a tenant "when a member of the household or a guest engages in drug-related activity, regardless of whether the tenant knew, or should have known, of the drug-related activity."<sup>15</sup> This authorizes a strict liability standard for eviction when a tenant or guest engages in any drug-related criminal activity. However, the court

also made clear that eviction is in no way mandatory and the actual decision to evict remains under the sole discretion of the local housing authority.<sup>16</sup>

After discussing *Rucker*, the court's opinion moved to an examination of the doctrine of preemption.<sup>17</sup> The court reviewed federal law's primacy over state law under the Supremacy Clause of the Constitution, but noted that there is a presumption against the preemption of state law.<sup>18</sup> As articulated by the court, the essential inquiry in this case is "whether the state and federal law can coexist and be applied without conflict."<sup>19</sup>

The court quickly concluded that the federal law did not prevent a housing authority from affording tenants the right to remedy a breach because the Supreme Court made clear in *Rucker* that the decision to evict was left to the discretion of local authorities.<sup>20</sup> The housing authority in this case exercised this discretion by including the URLTA provision in the tenant's lease, granting the right to remedy a breach. In reaching this conclusion, the court noted that in *Rucker*, the Supreme Court "expressly left discretion to the states and local authorities when it stated that the local authorities are in the best position to consider 'the extent to which the leaseholder has...taken all reasonable steps to prevent or mitigate the offending action.'"<sup>21</sup> By putting the URLTA provision into the lease, the housing authority had exercised its discretion. As a result, the court did not perceive any irreconcilable conflict between the statutes and held that the federal law does not restrict local authorities' discretion to decide when to evict.<sup>22</sup>

The court also concluded that the right to remedy a drug-related breach of a lease did not defeat the purpose of the federal statute.<sup>23</sup> In explaining why a right to remedy may advance the goal of discouraging drug use in public housing, the court quoted the circuit court's opinion, which reasoned that a tenant served with an eviction notice "has clear knowledge of the provision, and having been given the opportunity to remedy may be among the most likely of tenants to prevent the situation from recurring, thereby furthering the purposes of and objectives of the law."<sup>24</sup> Further, the court again cited the Supreme Court and HUD, which have both advised that the right to evict innocent tenants who unknowingly invite guests

<sup>9</sup>*Id.* (quoting 42 U.S.C. § 1437d(l)(6)).

<sup>10</sup>*Id.*

<sup>11</sup>*Id.* at \*2 (citing KRS 383.660(1)).

<sup>12</sup>*Id.* at \*1.

<sup>13</sup>*Id.*

<sup>14</sup>535 U.S. 125 (2002).

<sup>15</sup>*Id.* at 136.

<sup>16</sup>*Id.* at 133-34 ("The statute does not *require* the eviction of any tenant who violated the lease provision. Instead, it entrusts that decision to the local public housing authorities...").

<sup>17</sup>*Turner*, 2009 WL 1491330, at \*3.

<sup>18</sup>*Id.* at \*3-\*4.

<sup>19</sup>*Id.* at \*4.

<sup>20</sup>*Id.*

<sup>21</sup>*Id.* (quoting *Rucker*, 535 U.S. at 134).

<sup>22</sup>*Id.*

<sup>23</sup>*Id.*

<sup>24</sup>*Id.* (quoting the opinion of the Kenton Circuit Court).

participating in illegal drug activity into their homes, while authorized by the federal statute, should “be exercised with compassion.”<sup>25</sup>

Lastly, because the lease itself explicitly stated that evictions for drug-related activity would be governed by the URLTA, the court explained that it did not decide whether the URLTA provision applied to drug-related criminal activity generally.<sup>26</sup> Absent inclusion of the lease provision by a local public housing authority, the URLTA’s applicability to drug-related evictions would present a more problematic issue of federal preemption.

### The Reach of Preemption in Federal One-Strike Cases, Post-*Rucker*

The *Turner* decision adds to the myriad of cases examining the reach of preemption in federal one-strike cases. Because the federal statute provides a basis but not a mandate for eviction, state and local laws have been found to be preempted where they remove the discretion of housing authorities to make the eviction decision, as the Supreme Court has interpreted the law to vest this authority with local housing authorities. However, as *Turner* demonstrates, where a local housing authority uses its discretion to allow a right to remedy a breach of lease, there should be no federal preemption.<sup>27</sup>

The *Turner* decision may be contrasted with cases where state laws remove discretion from local housing authorities. For example, in *Boston Housing Authority v. Garcia*,<sup>28</sup> the Supreme Court of Massachusetts held that the federal one-strike law preempted a state law protecting innocent tenants from eviction. The Massachusetts court found that the law impermissibly allowed the state to override the use of discretion by local housing authorities.<sup>29</sup>

It might be argued that *Turner* is similar to *Garcia* in that the State of Kentucky authorizes cities to adopt the

URLTA<sup>30</sup> and the City of Covington has adopted the Act.<sup>31</sup> As a result, it is unclear whether the URLTA, as adopted, applies to drug-related evictions from federal housing, which might create a conflict with the federal statute. However, because the housing authority chose to include the URLTA provision in the lease, the court had no need to address this issue.<sup>32</sup>

### Conclusion

Under *Rucker*, housing authorities maintain the discretion to evict in situations where tenants’ guests are involved in drug-related criminal activity. This discretion is not preempted when a housing authority uses lease terms which effectively limit its ability to evict tenants in the future. The Kentucky court in *Turner* reached this conclusion, ruling that a right to remedy a breach of lease, granted by the housing authority, is not preempted by the federal one-strike law. This ruling represents yet another way of avoiding the unfair consequences that result from a strict application of the one-strike law. ■

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<sup>25</sup>*Id.* Earlier in the opinion, the court quotes a letter issued immediately after the *Rucker* decision from Mel Martinez, then HUD Secretary, to all public housing authorities, in which he “urged all to be guided by compassion and common sense” in the context of the decision to evict. *Id.* at \*2.

<sup>26</sup>*Id.* at \*5.

<sup>27</sup>In *Rucker*, the Court asserted that local housing authorities were best positioned to make these eviction decisions. *Rucker*, 535 U.S. at 133-34 (the statute “entrusts [the] decision to the local public housing authorities, who are in the best position to take account of, among other things, the degree to which the housing project suffers from ‘rampant drug-related or violent crime’ 42 U.S.C. § 11901(2) (1994 ed. and Supp. V), ‘the seriousness of the offending action,’ 66 Fed. Reg. at 28,803, and ‘the extent to which the leaseholder has ... taken all reasonable steps to prevent or mitigate the offending action,’ *ibid.*”).

<sup>28</sup>871 N.E.2d 1073 (Mass. 2007).

<sup>29</sup>*Id.* at 1078. For more information on the *Garcia* decision, see NHLP, *Post-Rucker Decisions: Six Years Later*, 38 HOUS. L. BULL. 187 (Sep. 2008); NHLP, *Massachusetts Court Finds State Innocent Tenants Protections Preempted*, 37 HOUS. L. BULL. 205 (Nov.-Dec. 2007).

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<sup>30</sup>KY. REV. STAT. ANN. § 383.500 (Westlaw July 15, 2009) (“The General Assembly hereby authorizes cities, counties and urban-county governments to enact the provisions of the Uniform Residential Landlord and Tenant Act as set forth in KRS 383.505 to 383.705”).

<sup>31</sup>COVINGTON, KY., CODE OF ORDINANCES tit XV, ch. 153 (1985).

<sup>32</sup>*Turner*, 2009 WL 1491330, at \*5.

## Recent Cases

The following are brief summaries of recently reported federal and state cases that should be of interest to housing advocates. Copies of the opinions can be obtained from a number of sources including the cited reporter, Westlaw,<sup>1</sup> Lexis,<sup>2</sup> or, in some instances, the court's website.<sup>3</sup> Copies of the cases are *not* available from NHLP.

### Public Housing: Housing Authority May Not Charge Rent Above Unit's Fair Market Value

*Northampton Hous. Auth. v. Kahle*, \_\_ N.E.2d \_\_, 2009 WL 1842521 (Mass. App. Ct. 2009). The court vacated a lower court decision to grant summary judgment in favor of a housing authority seeking to charge a tenant rent in excess of fair market value. In 2005, the tenant began receiving veterans' compensation retroactive to 1998. He had begun residing in the development in 1996. The housing authority sought to count the compensation toward the tenant's rent, which state law set at 30% of income, thereby raising the rental amount above market value. The authority also wished to collect a lump-sum retroactive rent payment. In vacating the decision, the court relied on state law providing that "no housing authority shall manage and operate any such project for profit." Further, the veteran's statutory right of continuous occupancy would be rendered useless if rents exceeded fair market value. Regarding retroactive payment, the court found the housing authority entitled to such payment and ordered that it be awarded based on the fair market value of the unit during the respective time periods covered by each retroactive payment. The court ordered that the tenant's future rent payments be computed at fair market value.

### Public Housing: Invited Guest Cannot Be Convicted for Trespassing Despite Existing Trespass Notice

*Commonwealth v. Nelson*, \_\_ N.E.2d \_\_, 2009 WL 1929316 (Mass. App. Ct. 2009). The court reversed the criminal trespass conviction of a visitor who was arrested in the hall of a Boston Housing Authority (BHA) property on his way to visit a tenant, at the tenant's invitation. The visitor had previously been arrested at the development and had received a BHA notice stating that if he returned to BHA property, he would be arrested and prosecuted. In reversing the conviction, the court found that landlords—whether public or

private—grant tenants an easement through the common spaces to access their units. Unlike easements in commercial properties, this easement includes the license to admit persons of the tenant's choosing. As an invited guest, the visitor therefore had the right to pass through the hall despite the existing trespass notice. The court found further support for this right in the BHA police department's trespass policy and in the BHA lease. The court also noted the lack of evidence that the visitor had lingered or loitered in the hall.

### Housing Choice Voucher Program: Housing Authority Entitled to Recover All Payments Made While Was Owner in Breach of Housing Assistance Payments Contract

*Thirty LLC v. Omaha Hous. Auth.*, \_\_N.W.2d\_\_, 2009 WL 1763128 (Neb. Ct. App. June 23, 2009). A housing choice voucher owner executed a lease with a tenant in accordance with the Housing Assistance Payments (HAP) contract. In violation of the HAP contract, the owner entered into a side agreement requiring the tenant to pay an extra \$103 per month. The tenant fell behind on the side payments, and the owner filed an eviction action. Litigation followed in which the tenant sued for the return of the side payments, and the court found that the owner breached the lease and the HAP contract. The court found that the agreement requiring the side payments constituted a material breach of the HAP contract, and that the Omaha Housing Authority (OHA) was entitled to recovery of overpayments. The parties disagreed over the definition of the term overpayments in the HAP contract, with the owner claiming that overpayments referred only to the additional \$103 paid by the tenant. OHA argued that overpayments referred to every housing assistance payment the owner received while in breach of the HAP contract. The court agreed, holding that the owner was in breach of the HAP contract from the time it entered into the side agreement, making the owner ineligible to receive housing assistance payments from the beginning of the HAP contract. Accordingly, OHA was entitled to recovery of all housing assistance payments. The court further held that OHA could recover the payments by offsetting amounts owed to the owner under other HAP contracts. However, OHA was not entitled to offset overpayments by withholding payments under its HAP contracts with one of the owner's partners.

### Housing Choice Voucher Program: Tenant Entitled to Damages for Owner's Collection of Illegal Side Payments

*Ray v. Thirty LLC*, 2009 WL 1819288 (Neb. Ct. App. June 23, 2009) (unreported). In this companion case to *Thirty LLC v. Omaha Hous. Auth.*, \_\_N.W.2d\_\_, 2009 WL 1763128 (Neb.

<sup>1</sup><http://www.westlaw.com>.

<sup>2</sup><http://www.lexis.com>.

<sup>3</sup>For a list of courts that are accessible online, see <http://www.uscourts.gov/links.html> (federal courts) and <http://www.ncsc.dni.us/COURT/SITES/courts.htm#state> (for state courts). See also <http://www.courts.net>.

Ct. App. June 23, 2009), discussed above, the voucher tenant brought claims against the owner for breach of contract, unlawful ouster, and failure to return the security deposit. When the tenant fell behind on payments due under an illegal side agreement, she was evicted for non-payment of rent. The trial court held that the owner violated the Housing Assistance Payments contract and the lease by charging more than that authorized by the contract. The trial court also held that this breach led to an unlawful ouster and granted the tenant damages, attorney's fees, and return of the security deposit pursuant to Nebraska law. The appellate court upheld the trial court's determinations, except that it increased the attorney's fees award and reversed the trial court's holding that the management company used by the owner was also liable for damages. While the management company was an agent of the owner, it was not subject to the contract between the owner and the tenant and was performing duties limited to the agreement between itself and the owner.

### **Section 515 Program: Government's Burden in Establishing Need for Temporary Receiver Is Minimal**

*United States v. Falls Ct. Props. Co.*, 2009 WL 1924771 (N.D.N.Y. July 1, 2009) (slip op.). The court granted the federal government's motion for appointment of a temporary receiver for a complex with a fifty-year mortgage loan provided by the Rural Housing Service in 1978. The mortgage terms allowed the government, in the event of a default, to accelerate the loan and have a receiver appointed for the property. In 2001, based on the owner's alleged mismanagement, the government sought to exercise this option. The court gave some credence to the owner's argument that receivership was improper because the property was in good physical condition, the owner had a store of funds to make the required payments, and receivership appointment would create an unnecessary expense. Further, the mortgage did not define what it meant for the owner to be in "default." Nevertheless, because a lender whose mortgage includes a covenant for temporary receivership has a minimal burden when seeking this relief, and because the court did not find that competing equities clearly reflected no useful purpose for such an appointment, the court granted the motion.

### **Fair Housing Act: Tenant and Sublessee Entitled to Damages from Race-Based Discrimination**

*Ho v. Donovan*, \_\_\_ F.3d \_\_\_, 2009 WL 1751490 (7th Cir. 2009). An African-American woman attempted to sublet a condo unit from a tenant. One of the condo's other occupants, acting as the landlord's rental agent, refused to permit the sublet because of the sublessee's race and barricaded the door when the woman attempted to move

in. The tenant and sublessee filed a complaint with HUD for violations of the Fair Housing Act (FHA). At the hearing, the agent appeared *pro se* and the landlord failed to show. The administrative law judge entered judgment awarding compensatory damages for mental distress and financial injury, prospective relief, and the maximum civil penalty for a first-time FHA violation. The court rejected the landlord's attempt to use the FHA exemption defense, finding that the condo was not a single-family dwelling because it housed three unrelated persons, the other occupant acted as the landlord's rental agent, and the landlord forfeited the affirmative defense by failing to file an answer or appear at trial. Further, because the admitted facts showed liability, establishment of a prima facie case based on live hearing testimony was not needed. The court also denied the agent's due process claims, as she had left her hearing notices unopened and walked out of the hearing itself.

### **Fair Housing Act: Temporary Restraining Order Granted to Tenant Seeking Extra Keys as a Reasonable Accommodation**

*Stross v. Gables Condo. Ass'n*, 2009 WL 1770129 (W.D. Wash. June 18, 2009). When a condominium association decided to change the locks on the building's front door, a resident with severe multiple sclerosis requested extra keys for her caregivers. The condominium board refused to provide the keys or allow installation of an outdoor key box unless the resident's family signed an agreement regarding the resident's caregivers, which her father refused to do. The resident sought a temporary restraining order enjoining the condominium from changing the locks without providing the extra keys. The order was granted. Using the traditional test for obtaining a preliminary injunction, the court concluded that a reasonable accommodation claim was likely to succeed. The court found that the resident's handicap was within the scope of the Fair Housing Act; the association was aware of the handicap; an accommodation was necessary to allow full use of the dwelling and was therefore reasonable; and the association had refused to make an accommodation. Furthermore, in balancing the hardships, the court found the association would suffer little harm if enjoined from changing the locks without providing extra keys. However, the resident was likely to suffer immediate and irreparable harm from being deprived of the ability to live in her home.

### **Preservation of Affordable Housing: No Statutory Authorization Required for Prepayment of Mortgage Subsidized by State Program**

*Johnson v. N.Y. State Urban Dev. Corp.*, \_\_\_ N.Y.S.2d \_\_\_, 2009 WL 1740816 (N.Y. Sup. Ct. 2009). Tenants sought to

enjoin an owner from prepaying a mortgage and removing a building from the supervision of the state's Division of Housing and Community Renewal (DHCR) under the Mitchell-Lama program, which subsidizes affordable housing. The tenants also sought to set aside DHCR's issuance of a "certificate of no-objection" allowing prepayment. According to the tenants, the owner was required to procure the consent of the state comptroller because the state's Urban Development Corporation (UDC), also a defendant, held the mortgage. The tenants also argued that since the mortgage did not specifically authorize prepayment, the owner could not prepay without statutory authorization. The court granted cross motions to dismiss by the owner and DHCR. The court held that the comptroller had no authorization to deny the prepayment because the UDC was distinct from the state, and further held that no statutory authorization was required for prepayment because DHCR had consented. The court also held that DHCR had complied with state requirements for prepayment, and DHCR had a rational basis for issuing the certificate.

### **Limited English Proficiency: California Law Regarding Translation of Loan Documents Not Preempted by Federal Law**

*Reyes v. Premier Home Funding, Inc.*, 2009 WL 1704574 (N.D. Cal. June 17, 2009). While refinancing his home loan, a borrower spoke with a lender's representative in Spanish. Although the borrower did not speak or write English, the representative had him sign loan documents printed entirely in English. The representative told the borrower that the loan documents included terms that had been promised earlier, though they were actually less favorable. The borrower alleged violations of California Civil Code Section 1632, which requires that if a contract is negotiated in a non-English language, the borrower must receive a written translation of the contract in the language used in the negotiation. Defendant Wachovia filed a motion to dismiss, asserting that Section 1632 was preempted by the federal Homeowners' Loan Act (HOLA). The court rejected this argument, finding that Section 1632 was not preempted because it did not require specific disclosures also required by HOLA. Although the statute required translation of loan documents, it applied to all businesses, not just lenders. Under federal regulations, general statutes which affect lending only incidentally are exempt from HOLA preemption. The court also held that Section 1632 was applicable to the loan. Although Section 1632 excludes loans secured by real property, there is an exception for loans used for personal, family or household purposes. Further, while the statute exempts "supervised financial organizations" from translation requirements, the court found that Wachovia was not such an organization.

### **Post-Foreclosure Occupancy: Order Confirming Foreclosure Sale Sufficient to Confer Possession Upon Purchaser**

*Chase Manhattan Bank v. Robert-Surzano*, 2009 WL 1871467 (D.V.I. June 22, 2009). Chase filed a foreclosure action, and default judgment was entered against the mortgagee. After purchasing the property at a marshal's sale, Chase received a court order confirming the foreclosure sale and stating that it was entitled to possession of the premises. Chase then filed a petition for writ of assistance for possession of the property. The trial court held that Chase was not entitled to a writ of assistance because the court order confirming the foreclosure sale was not an order granting possession. The trial court held that an order specifically commanding delivery of possession of property bought at a foreclosure sale was a prerequisite to the issuance of a writ of assistance to gain possession from the mortgagor. The appellate court reversed, holding that requiring a specific decree ordering delivery of possession after a foreclosure sale would result in an inappropriate two-tiered litigation process and would run afoul of territorial law establishing the right of possession of property at a foreclosure sale. The court held that the order confirming the foreclosure sale was the only adjudication necessary for the writ of assistance. Additionally, the court held that Chase was not required to demand the property from the occupant before petitioning for a writ of assistance.

### **Utilities: State Law Required Landlord to Disclose Formula for Determining Charges**

*Am. Mgmt. Consultant, LLC v. Carter*, \_\_\_ N.E.2d \_\_\_, 2009 WL 1706889 (Ill. App. Ct. 2009). A landlord filed an action against a tenant for past-due rent and utilities. The tenant appealed the trial court's judgment for the landlord on the grounds that the landlord misled her on how utility charges would be billed. She claimed that the landlord's flat charge system violated the lease, which stated that the tenant would be responsible only for utility charges attributed to the tenant's apartment. The appellate court reversed the judgment for the landlord. The court held that while rent may include compensation for utilities, the landlord violated the state's Utility Disclosure Act by failing to disclose the formula used to determine the tenant's proportionate share of the utilities. The tenant also argued that the landlord was required to comply with the federal Fair Debt Collection Practices Act (FDCPA). Though past-due rent is not explicitly included in the FDCPA's definition of debt, the court found that collection efforts may involve abusive practices and other concerns addressed by the statute. Therefore, the court held that the FDCPA applies to past-due rent. The court further held that the landlord's notices seeking payment of the late fees violated the FDCPA since they did not inform the tenant of procedures required if a debt was disputed. ■

# Recent Housing-Related Regulations and Notices

The following are significant affordable housing-related regulations and notices that the Department of Housing and Urban Development (HUD), the Department of Agriculture (USDA's Rural Housing Service/Rural Development (RD)), Federal Housing Finance Agency, Federal Emergency Management Agency (FEMA) and the Department of Veterans Affairs issued in July of 2009. For the most part, the summaries are taken directly from the summary of the regulation in the Federal Register or each notice's introductory paragraphs.

Copies of the cited documents may be secured from various sources, including (1) the Government Printing Office's website,<sup>1</sup> (2) bound volumes of the Federal Register, (3) HUD Clips,<sup>2</sup> (4) HUD,<sup>3</sup> and (5) USDA's Rural Development website.<sup>4</sup> Citations are included with each document to help you secure copies.

## HUD Interim Rule

### **74 Fed. Reg. 36,383-36,390 (July 22, 2009) Section 108 Community Development Loan Guarantee Program: Participation of States as Borrowers Pursuant to Section 222 of the Omnibus Appropriations Act, 2009; Interim Rule**

*Summary:* This interim rule implements Section 222 in Division I of the Omnibus Appropriations Act, 2009, which authorizes HUD to provide community development loan guarantees, under Section 108 of the Housing and Community Development Act of 1974, to states borrowing on behalf of local governments in no entitlement areas (governments that do not receive annual Community Development Block Grants from HUD).

*Effective Date:* August 21, 2009.

*Comment Due Date:* September 21, 2009.

## HUD Federal Register Notices

### **74 Fed. Reg. 31,463-31,464 (July 1, 2009) Section 8 Contract Renewal Policy—Guidance for the Renewal of Project-Based Section 8 Contracts**

*Summary:* HUD has submitted to the Office of Management and Budget (OMB) for review an information collection requirement about which it is soliciting public comments. The information to be collected will include

the renewal of Section 8 contracts and its processes, the notification of owners of Project-based Section 8 units in advance of contract renewal due dates, the establishment of comparable market rents, and the funding of Section 8 on an annual basis.

*Comments Due Date:* July 31, 2009.

### **74 Fed. Reg. 32,178-32,179 (July 7, 2009) Notice of Proposed Information Collection: Comment Request; Request for Occupied Conveyance**

*Summary:* HUD is submitting to OMB for review an information collection requirement about which it is soliciting public comments. The information collected relates to form HUD-9539 which enables HUD to determine whether various persons qualify to remain as a tenant in occupancy. This information will also provide the basis for facilitating the management and administration of the property disposition program. Respondents are occupants of the property, former mortgagors and tenants.

*Comments Due Date:* September 8, 2009.

### **74 Fed. Reg. 32,179 (July 7, 2009) Notice of Proposed Information Collection: Comment Request; Application for the Transfer of Physical Assets**

*Summary:* HUD is submitting to the OMB for review an information collection requirement about which it is soliciting public comments. The information collected relates to applications for the transfer of Physical Assets. This information will be used to ensure that HUD multifamily housing properties are not placed in physical, financial or managerial jeopardy during a transfer of physical assets.

*Comments Due Date:* September 8, 2009.

### **74 Fed. Reg. 33,455-33,456 (July 13, 2009) Notice of Proposed Information Collection for Public Comment on the Participation Agreement, Baseline Survey, Tracking Survey and Key Informant Interview Guide for the Homeless Family Interventions Study**

*Summary:* HUD will submit to the OMB for review an information collection requirement about which it is soliciting public comments. The information collected relates to the Participation Agreement, the Baseline and Tracking Survey Instruments, and the Key Informant Interview Guide, which are all of the instruments necessary to put the Homeless Family Interventions Study into place. These instruments establish the research foundation on which HUD will undertake the research. They will permit the research team a set of baseline characteristics and conditions for both an experimental and a control group with which later characteristics and conditions for those same participants can be compared. A subsequent Federal Register Notice will include the follow-on survey which will permit HUD to report on the effects of various housing and services interventions on homeless families over time.

*Comments Due Date:* September 11, 2009.

<sup>1</sup>[http://www.access.gpo.gov/su\\_docs](http://www.access.gpo.gov/su_docs).

<sup>2</sup><http://www.hudclips.org/cgi/index.cgi>.

<sup>3</sup>To order notices and handbooks from HUD, call (800) 767-7468 or fax (202) 708-2313.

<sup>4</sup><http://www.rdinit.usda.gov/regis>.

**74 Fed. Reg. 34,029 (July 14, 2009)**

**Notice of Availability: Notice of Funding Availability (NOFA) for HUD's Fiscal Year (FY) 2009 HOPE VI Revitalization Grants Program**

*Summary:* HUD announces the availability on its website of the applicant information, submission deadlines, funding criteria and other requirements for HUD's HOPE VI Revitalization Program NOFA for FY 2009. Approximately \$113 million is made available through this NOFA. The notice providing information regarding the application process, funding criteria and eligibility requirements is available on the Grants.gov website at [https://apply07.grants.gov/apply/forms\\_apps\\_idx.html](https://apply07.grants.gov/apply/forms_apps_idx.html).

*Dated:* July 2, 2009.

**74 Fed. Reg. 36,244 (July 22, 2009)**

**Notice of Proposed Information Collection for Public Comment: Annual Performance Report and Annual Homeless Assessment Report**

*Summary:* HUD will submit to the OMB for review an information collection requirement about which it is soliciting public comments. The information collected relates to the Annual Performance Report and Annual Homeless Assessment Report. This information will enable HUD to assess the performance of individual projects and to determine project compliance with funding requirements. This information assists HUD in understanding homeless clients and service needs at the local level. HUD also uses this information to provide information on overall program performance and outcomes to HUD staff, other federal agencies, the Congress, and the Office of Management and Budget.

*Comments Due Date:* September 21, 2009.

**74 Fed. Reg. 36,244-36,245 (July 22, 2009)**

**Pre-Foreclosure Sales Program**

*Summary:* HUD has submitted to the OMB for review an information collection requirement about which it is soliciting public comments. The information collected relates to the Pre-Foreclosure Sales Program. The respondents are lenders, counselors and homeowners who are attempting to sell properties prior to foreclosure. The information collection is a record of the process from the borrower's application to participate in the program and the lender's approval, to HUD's review and approval of the specifics of the sale. Homeowners participating in the program must also receive housing counseling and the confirmation that the counseling has been performed must be documented.

*Comments Due Date:* August 21, 2009.

**74 Fed. Reg. 36,245-36,246 (July 22, 2009)**

**Budget-Based Rent Increase**

*Summary:* HUD has submitted to the OMB for review an information collection requirement about which it is soliciting public comments. The information collected

relates to the form HUD uses to review Budget-Based Rent Increases. Owners of certain cooperative and subsidized rental projects are required to submit a Budget Worksheet when requesting rent increases. HUD Field Offices review and evaluate the amount and reasonableness of the requested increase.

*Comments Due Date:* August 21, 2009.

**74 Fed. Reg. 33,6735-36,736 (July 24, 2009)**

**Notice of Proposed Information Collection for Public Comment: Homelessness Prevention and Rapid Re-Housing Program (HPRP) Quarterly and Annual Performance Reporting**

*Summary:* HUD will submit to the OMB for review an information collection requirement about which it is soliciting public comments. The information collected relates to the Homelessness Prevention and Rapid Re-Housing Program (HPRP). This information collection, as required by the American Reinvestment and Recovery Act of 2009, will enable HUD to monitor grantees that receive funding through HPRP as well as report aggregate data to HUD staff, other federal agencies, the Congress, the OMB and the public.

*Comments Due Date:* September 22, 2009.

**74 Fed. Reg. 37,237-37,238 (July 28, 2009)**

**Notice of Certification and Funding of State and Local Fair Housing Enforcement Agencies Under the Fair Housing Assistance Program; Request for Comments**

*Summary:* Through the Fair Housing Assistance Program (FHAP), HUD provides funding to State and local fair housing agencies that enforce laws that HUD has deemed substantially equivalent to the Fair Housing Act. The department's FHAP regulations provide that the Assistant Secretary for Fair Housing and Equal Opportunity may publish, on an annual basis, a notice that identifies all agencies that received interim certification during the prior calendar year, and to solicit public comment on the state or local fair housing laws of the interim agencies, including the performance of agencies in enforcing such laws. This publication is being issued in accordance with this regulatory provision.

*Comment Due Date:* August 27, 2009.

**74 Fed. Reg. 37,238-37,2401 (July 28, 2009)**

**Housing and Economic Recovery Act of 2008: Pilot Program for Automated Process for Borrowers Without Sufficient Credit History; Solicitation of Comments on Program Design**

*Summary:* The Housing and Economic Recovery Act of 2008 requires that HUD carry out a pilot program to establish, and make available to mortgagees, an automated process for providing alternative credit rating information, which might include rent, utilities and insurance payment histories, etc., for mortgagors and prospective mortgagors who have insufficient credit histories

for determining their credit worthiness. With this Notice, HUD commences the process for development of the mandated pilot program and solicits public comment and suggestions for a practicable design of the pilot program that is consistent with statutory goals, program requirements and fair lending standards, and includes comment on how the pilot program might align with existing Federal Housing Administration policy regarding nontraditional credit verification.

*Comment Due Date:* September 28, 2009.

**74 Fed. Reg. 37,725 (July 29, 2009)**  
**Notice of Submission of Proposed Information Collection to OMB; Standardized Form for Collecting Information Regarding Race and Ethnic Data**

*Summary:* HUD will submit to the OMB for review an information collection requirement about which it is soliciting public comments. The information collected relates to the Standardized Form for Collecting Information Regarding Race and Ethnic Data. HUD's standardized form for the Collection of Race and Ethnic Data complies with OMB's revised standards for Federal Agencies issued, October 30, 1997. These standards apply to HUD Program Office and Partners that collect, maintain and report Federal Data on race and ethnicity for program administrative reporting.

*Comments Due Date:* September 28, 2009.

**74 Fed. Reg. 37,726 (July 29, 2009)**  
**Notice of Availability: Notice of Funding Availability (NOFA) for HUD's Fiscal Year (FY) 2009 Fair Housing Initiatives Program (FHIP)**

*Summary:* HUD announces the availability on its website of the application information, submission deadlines, funding criteria, and other requirements for the FY 2009 Fair Housing Initiatives Program. The NOFA makes approximately \$26.3 million available to investigate allegations of housing discrimination and to educate the public and the housing industry about their rights and responsibilities under the Fair Housing Act. The Notice providing information regarding the application process, funding criteria and eligibility requirements is available on the Grants.gov website at [https://apply07.grants.gov/apply/forms/\\_apps\\_idx.html](https://apply07.grants.gov/apply/forms/_apps_idx.html).

*Dated:* July 1, 2009.

**74 Fed. Reg. 37,726-37,727 (July 29, 2009)**  
**Notice of Availability: Notice of Funding Availability (NOFA) for HUD's Fiscal Year (FY) 2009 Resident Opportunity and Self-Sufficiency (ROSS)—Service Coordinators Program**

*Summary:* HUD announces the availability on its website of the applicant information, submission deadlines, funding criteria and other requirements for HUD's Resident Opportunity and Self-Sufficiency (ROSS)—Ser-

vice Coordinators Program NOFA for FY 2009. Approximately \$28 million is made available through this NOFA. The notice providing information regarding the application process, funding criteria and eligibility requirements is available on the Grants.gov website at [http://apply07.grants.gov/apply/forms\\_app\\_idx.html](http://apply07.grants.gov/apply/forms_app_idx.html).

*Dated:* June 30, 2009.

## HUD Notices

**Notice H 09-07 (July 27, 2009)**  
**Fiscal Year 2009 Social Security's One-Time Economic Recovery Payments Excluded from Income**

*Summary:* This Notice provides for the exclusion of Social Security's One-Time Economic Recovery Payments received by applicants for assisted housing and by tenants participating in HUD's rental assistance programs from all purposes of determining eligibility and rent. The American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, requires this exclusion and the payments are an exclusion under 24 CFR 5.609(c)(9) of HUD's regulation.

**Notice: H 09-06 (July 1, 2009) Guidelines for Assumption, Subordination, or Assignment of Mark-to-Market (M2M) Program Loans in Transfer of Physical Assets (TPA) and Refinance Transactions**

*Summary:* These Guidelines amend and restate HUD's draft Guidance dated June 2006, titled "Draft Policy for Assumption and Subordination of Mark-to-Market ("M2M") Notes in Transfer of Physical Assets ("TPA") Transactions." The Guidelines outlined in this Notice apply to any Request to assume, subordinate, and/or assign a loan evidenced by a Note (defined below), and to waive the due-on-sale or refinance clause contained therein. This Guidance also applies to Requests to assume and/or subordinate loans originated under M2M's predecessor program, the Portfolio Reengineering Demonstration Program. The Guidelines contained in this Notice are effective immediately for all such transactions.

**Notice: PIH-2009- 21 (HA) (July 17, 2009)**  
**Non-Smoking Policies in Public Housing**

*Summary:* This notice strongly encourages public housing authorities (PHAs) to implement non-smoking policies in some or all of their public housing units. According to the American Lung Association, cigarette smoking is the number one cause of preventable disease in the United States. Because Environmental Tobacco Smoke can migrate between units in multifamily housing, causing respiratory illness, heart disease, cancer and other adverse health effects in neighboring families, the department is encouraging PHAs to adopt non-smoking policies.

**Notice: PIH-2009- 22 (HA) (July 21, 2009)**  
**Subject: Over Subsidization in the Housing Choice Voucher Program**

*Summary:* The purpose of this Notice is to extend and revise Notice PIH 2008-20. Specifically, the last paragraph under 1.A. in regard to occasional, intermittent, multiple or rotating care givers has been modified and section 1.C. has been added in regard to reasonable accommodation issues.

**Notice: PIH-2009- 25 (HA) (July 30, 2009)**  
**Energy Investment Guidance Under American Recovery and Reinvestment Act**

*Summary:* This Notice serves to provide energy investment guidance to public housing agencies regarding the American Recovery and Reinvestment Act of 2009. Additional information on Recovery Act Capital Fund activities can be obtained at: [www.hud.gov/offices/pih/programs/ph/capfund/ocir.cfm](http://www.hud.gov/offices/pih/programs/ph/capfund/ocir.cfm).

**74 Fed. Reg. 38214-28215 (July 31, 2009)**  
**Federal Property Suitable as Facilities To Assist the Homeless**

*Summary:* This Notice identifies unutilized, underutilized, excess and surplus federal property reviewed by HUD for suitability for possible use to assist the homeless.

*Dated:* July 23, 2009.

**Federal Housing Finance Agency Interim Final Regulations**

**74 Fed. Reg. 31,602-31,618 (July 2, 2009)**  
**Prior Approval for Enterprise Products**

*Summary:* The Federal Housing Finance Agency (FHFA) is promulgating and seeking comment on an interim final regulation to implement Section 1321 of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, as amended by Section 1123 of the Housing and Economic Recovery Act of 2008. The regulation establishes a process for the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) (collectively, the Enterprises) to obtain prior approval from the FHFA Director for a new product and provide prior notice to the Director of a new activity. Specifically, the interim final regulation implements Section 1321 and is designed to ensure that the FHFA Director has the opportunity to determine prior to an Enterprise commencing a new activity whether the new activity is a new product, and if it is a new product, to determine whether the new product is authorized by the Enterprise's charter, is in the public interest, and is consistent with the safety and soundness of the Enterprise or the mortgage finance or financial system. FHFA invites public comment on all aspects of the regulation.

*Effective Date:* July 2, 2009.

*Comment Date:* August 31, 2009.

**74 Fed. Reg. 38190-38191 (July 31, 2009)**  
**ACTION: 30-day notice of submission of information collection for approval from the Office of Management and Budget.**

*Summary:* In accordance with the requirements of the Paperwork Reduction Act of 1995, the Federal Housing Finance Agency (FHFA) is submitting the information collection known as "Federal Home Loan Bank Acquired Member Assets, Core Mission Activities, Investments and Advances" to the Office of Management and Budget for review and approval of a three-year extension of the control number 2590-0008, which is due to expire on August 31, 2009.

*Dates:* Interested persons may submit comments on or before August 31, 2009.

**74 Fed. Reg. 33,907-33,911 (July 14, 2009)**  
**Privacy Act Implementation**

*Summary:* The Federal Housing Finance Agency (FHFA) is issuing a final regulation to provide the procedures and guidelines under which it will implement the Privacy Act of 1974, as amended. The regulation provides the policies and procedures whereby individuals may obtain notification of whether an FHFA system of records contains information about the individual and, if so, how to access or amend a record under the Privacy Act. Upon adoption of this regulation the Privacy Act regulations of the Federal Housing Finance Board and the Office of Federal Housing Enterprise Oversight, will be removed.

*Effective Date:* July 14, 2009.

**Rural Housing Service Unnumbered Letters**

**July 14, 2009**  
**Results of the 2009 Multi-Family Housing Annual Fair Housing Occupancy Report**  
**Notice: H 09-06 (July 1, 2009)**

*Summary:* This report presents the 2009 Rural Development Multi-Family Housing Annual Occupancy Report, including both Rural Rental Housing Section 515 and Farm Labor Housing Section 514 demographics. These results are based on April 2009 data from the RD Multi-Family Information System. ■

# NATIONAL HOUSING LAW PROJECT | PUBLICATION ORDER FORM



PUBLICATION	UNIT PRICE	QTY.	TOTAL PRICE
<b>Combined Set: HUD Housing Programs: Tenants' Rights (3d ed. 2004) and 2006-2007 Supplement</b>	\$ 415	<input type="checkbox"/>	<input type="text"/>
HUD Housing Programs: Tenants' Rights 2006-2007 Supplement	\$ 130	<input type="checkbox"/>	<input type="text"/>
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