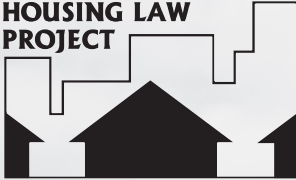


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Housing Law Bulletin

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Strategies for Enforcing HAMP Through the Courts —see page 136

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Cover: Weinberg Manor West is a Section 202 project originally built in 1982 in the Park Heights community of Baltimore, and rehabilitated by nonprofit Homes for America, Inc. The building has 108 apartments, all occupied by very low-income senior citizens aged 62 and older.

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Proposed State Legislation Would Safeguard Tenants' Rights in Foreclosure*

The Protecting Tenants at Foreclosure Act of 2009 (PTFA) provides national protections for tenants caught up in foreclosure.¹ The PTFA covers any foreclosure on a federally related mortgage loan² or on any dwelling or residential real property after May 20, 2009.³ Under the PTFA, a "bona fide tenant" is entitled to at least a 90-day notice before he or she is evicted and may stay in the residence until the end of the lease if more than 90 days remain in the lease term.⁴ While the PTFA is scheduled to expire at the end of 2012,⁵ two bills before Congress would make the PTFA's protections permanent. H.R. 4766 would simply remove the sunset date from the current law,⁶ while H.R. 3045 would remove the sunset date only from PTFA section 703, concerning Section 8 tenants.⁷

Since the PTFA's enactment, many state lawmakers have proposed legislation that mirrors the PTFA or that would add substantial protections for tenants, including requiring just cause for eviction, pre-foreclosure notices for tenants, and notices for prospective tenants. This article surveys pending state legislation addressing tenants' rights in foreclosure and is offered as a guide for jurisdictions that hope to augment the PTFA's protections.

Bills that Mirror the PTFA

Since the PTFA's enactment, at least one state has codified its protections in state law,⁸ and several states are considering whether to adopt them. Some bills would enact parts of the PTFA into state law, closely following the PTFA's example. For instance, the Minnesota legislature has passed a bill that would incorporate the PTFA's protections for tenants receiving Section 8 assistance into state law.⁹ In May, Maryland enacted legislation to permanently incorporate the PTFA's protections into state

*The author of this article is Katherine Joseph, a graduate research fellow at the UC Hastings Center for State and Local Government Law.

¹See NATIONAL LAW CENTER ON HOMELESSNESS AND POVERTY & NATIONAL LOW-INCOME HOUSING COALITION, WITHOUT JUST CAUSE: A FIFTY-STATE REVIEW OF THE (LACK OF) RIGHTS OF TENANTS IN FORECLOSURE, http://www.nlchp.org/content/pubs/Without_Just_Cause1.pdf.

²26 U.S.C. § 2602 (2010).

³Pub. L. No. 111-22, tit. VII, §§ 701-704, 123 Stat. 1632, 1660-62 (2009).

⁴*Id.*

⁵*Id.*

⁶Permanently Protecting Tenants at Foreclosure Act of 2010, H.R. 4766, 111th Cong., 2d Sess. (introduced Mar. 4, 2010).

⁷Section Eight Voucher Reform Act of 2009, H.R. 3045, 111th Cong., 1st Sess. (introduced June 25, 2009).

⁸See NHLP, *State and Local Measures Safeguard Tenants' Rights During Foreclosure*, 40 HOUS. L. BULL. 74, 87 (Mar. 2010).

⁹H.F. 2668, 86th Reg. Sess. (Minn., passed May 6, 2010).

law.¹⁰ In Maine, a recently enacted law provides for a 90-day pre-eviction notice and post-foreclosure survival of existing leases, with a sunset date that matches the PTFA.¹¹

Other bills incorporate elements of the PTFA while expanding upon its protections. State legislatures are considering bills that would enact the 90-day eviction notice into state law without a sunset date,¹² and provide at least a 60-day eviction notice once the PTFA expires.¹³

Many of the bills that have PTFA-like provisions also provide for tenant protections in ways the PTFA does not contemplate, while other bills contain protections that are far superior to the PTFA's. The following is a discussion of protections that extend beyond those provided in the PTFA.

Pre-Foreclosure Notice to Tenants

Tenants can be caught off guard by the foreclosure process.¹⁴ While the PTFA's 90-day notice requirement provides some protection, pre-foreclosure notice can be an important means of ensuring that tenants have a fair opportunity to prepare for a potential move. Several states and localities, including Maine,¹⁵ North Carolina,¹⁶ and Minneapolis, Minnesota,¹⁷ have already enacted laws that require landlords to provide tenants notice before a foreclosure sale takes place.¹⁸ Many more states are still in the process of considering bills that would require such notice.

Maryland

The Maryland legislature passed legislation altering the content of the pre-foreclosure notices required by existing law.¹⁹ Prior law requires two pre-foreclosure notices,

¹⁰2010 Md. Laws 587 (enacted May 20, 2010); 2010 Md. Laws 588 (enacted May 20, 2010) (provides for 90-day pre-eviction notice and survival of existing leases after foreclosure; also provides for manner of effectuating notice).

¹¹2010 Me. Laws 566 (enacted Mar. 29, 2010).

¹²H.B. 5410, Gen. Assem., 2010 Feb. Sess. (Conn., introduced Mar. 2, 2010). (providing for 90-day pre-eviction notice and post-foreclosure survival of existing leases with no sunset date).

¹³H.F. 2668, 86th Reg. Sess. (Minn., passed May 6, 2010) (providing for 90-day eviction notice until the PTFA's sunset date, and thereafter providing for at least a two-month notice).

¹⁴WITHOUT JUST CAUSE, *supra* note 1, at 7 (indicating that, as of February 2009, only 17 states required notice of foreclosure for tenants); Vicki Been & Allegra Glashauser, *Tenants: Innocent Victims of the Nation's Foreclosure Crisis*, 2 ALB. GOV'T L. REV. 1, 15 (2009), available at <http://www.albanygovernmentlawreview.org/articles/2/1/Glashausser.pdf>.

¹⁵ME. REV. STAT. ANN. tit. 14, § 6203-A (Westlaw Feb. 24, 2010) (requiring the mortgagees to provide tenants with notice of foreclosure sale if they know or should know of the tenancy, and at least 21 days prior to beginning an eviction proceeding).

¹⁶N.C. GEN. STAT. ANN. § 45-21.17(1) (Westlaw Feb. 5, 2010) (requiring the mailing and posting of notice 20 days in advance of foreclosure sale).

¹⁷MINNEAPOLIS, MINN. CODE OF ORDINANCES § 244.265 (2009) (enacted May 22, 2009) (requiring owners to notify tenants of foreclosure sale within seven days of owner's receipt of foreclosure notice).

¹⁸See the March issue of the *Bulletin* for a more complete list and discussion of pre-foreclosure notice laws already enacted in other states. NHLP, *supra* note 8, at 87.

¹⁹See MD. REAL PROPERTY CODE ANN. § 7-105.9 (effective May 19, 2009).

one at least 45 days before a foreclosure sale and another no more than 30 days before a foreclosure sale.²⁰ Under S.B. 654 and H.B. 711, the first notice would include language advising tenants of their right to stay on the property for 90 days following an eviction notice, of their right to stay until the end of the lease term (if longer than 90 days), and advising them to speak to an attorney.²¹ The second notice would include the first possible date at which a tenant could be evicted if he or she were to receive a proper 90-day notice.²²

Utah

Under the recently enacted H.B. 243, a trustee must notify tenants that the property is for sale at least 20 days before the sale is to occur by posting a notice on the primary door of each dwelling unit or in at least two conspicuous places on the property, or by mailing a notice to each occupant of the property to be sold.²³ When it was first introduced, the bill provided the trustee with only one option for delivering the notice, requiring the notice to be posted on the primary door of each dwelling unit of the property to be sold.²⁴

Required Notices and Educational Publications

Receiving an eviction notice may be confusing for tenants with limited experience with legal documents. In response, states can require the preparation of publications or informational notices that provide tenants with resources to help them understand their legal rights. Proposed legislation in California would require an informational "cover sheet" to be included with eviction notices delivered within one year of a foreclosure sale.²⁵ The cover sheet would include information on filing court papers, would notify tenants that they are most likely entitled to stay in their units for 90 days following receipt of the notice, and would provide tenants with contact information for nonprofit legal services organizations.²⁶

Continuation of Utilities and Other Services

If a landlord in default on his or her mortgage also stops paying utility bills, tenants may lose essential services. A new Maine law provides that if a landlord fails to pay for utility service that is in the landlord's name, the tenant may pay for the utility service and deduct the amount paid from the rent due to the landlord.²⁷

²⁰MD. REAL PROPERTY CODE ANN. § 7-105.9 (effective May 19, 2009).

²¹2010 Md. Laws 587 (enacted May 20, 2010); 2010 Md. Laws 588 (enacted May 20, 2010).

²²*Id.*

²³H.B. 243, 2010 Gen. Sess. (Utah, introduced Jan. 25, 2010; enacted Mar. 22, 2010).

²⁴H.B. 243, 2010 Gen. Sess. (Utah, introduced Jan. 25, 2010).

²⁵S.B. 1149, Reg. Sess. (Cal., introduced Feb. 18, 2010; passed Senate Apr. 22, 2010), http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_1101-1150/sb_1149_bill_20100218_introduced.pdf.

²⁶*Id.*

²⁷2010 Me. Laws 566 (enacted Mar. 29, 2010).

Disclosure of Foreclosure to Prospective Tenants

As the foreclosure crisis continues, tenants are at risk of moving into a residence only to face an eviction notice shortly thereafter.²⁸ These situations may occur where a landlord in default hopes that renting out the property will provide enough income to avoid foreclosure.²⁹ States are considering legislation that would protect prospective tenants by requiring notice of foreclosure.

Minnesota

Proposed legislation in Minnesota would require landlords to provide prospective tenants with written notice of foreclosure before entering into a lease or accepting any rent or security deposits.³⁰ Additionally, landlords would have to provide prospective tenants with notice of their right to continue to “receive utility services if the landlord defaults on utility payments during the foreclosure process.”³¹

Arizona

Under the recently enacted H.B. 2766, owners entering into rental agreements after a foreclosure has been initiated must provide written notice of the possible foreclosure.³² The notice must include the name, address and phone number of the court where the action is filed, and the foreclosure sale date, if known.³³

Just Cause for Eviction

Just cause for eviction laws can be powerful tools in alleviating the harmful effects of foreclosure on tenants. Generally, just cause laws operate by prohibiting evictions that are not based on a statutorily sanctioned cause, such as failure to pay rent or use of the property for an illegal purpose.³⁴ If foreclosure is not listed as a cause, foreclosure alone is not reason enough to evict. Even before the foreclosure crisis, some states and localities enacted laws to prevent evictions except for just cause.³⁵ Minnesota and

Massachusetts are currently considering joining the list of states that provide these protections for tenants, and San Francisco has recently enacted an ordinance to do so.

Minnesota

Minnesota House File 2604 would provide comprehensive protection for tenants by addressing the survival of leases after foreclosure.³⁶ H.F. 2604 would prohibit “holders”³⁷ from terminating a tenancy without cause. Holders would be required to “offer a fixed-term lease option to a tenant with a periodic lease in place at the time the tenant becomes a tenant of the holder.”³⁸ H.F. 2604 contains no exception for owner move-ins. Holders would be required to maintain the property as rental property, offer renewal leases and would be prohibited from raising rent.³⁹

As introduced, Minnesota Senate File 2242 was identical to Minnesota House File 2604 in requiring just cause for eviction.⁴⁰ However, the first engrossed version of S.F. 2242 would prohibit evictions without cause only until June 30, 2012.⁴¹ After that date, tenants residing in foreclosed properties would enjoy many of the protections provided for in Minnesota House File 2604. Their leases would survive foreclosure. New owners would be required to continue using the property as rental property and to offer fair market rent.⁴² However, S.F. 2242 has a limited exception for owner move-ins.⁴³ If a new owner intends to use the property as a primary residence within 60 days of purchase, he or she would be able to evict a tenant in order to do so, but would bear the burden of demonstrating intent to live in the property in question.⁴⁴

Massachusetts

Massachusetts is considering S.B. 2407, which would prevent foreclosing owners from evicting tenants without just cause.⁴⁵ Just cause would exclude nonpayment of rent and failure to abide by lease covenants unless the foreclosing owner posted and delivered to each tenant a written notice within 30 days of the foreclosure.⁴⁶ The notice would be required to state the address where rent can be paid and the names, addresses and telephone numbers of the foreclosing owner and its building manager.⁴⁷

²⁸See Kelly Noble, “Something Wicked This Way Comes”: Revising Rhode Island Law to Require Notice to Tenants in Foreclosure, 14 ROGER WILLIAMS U. L. REV. 328, 330 (2009); Been & Glashauser, *supra* note 13.

²⁹See Lynn Arditi, *Borrowing Trouble: Foreclosure Fallout*, PROVIDENCE J. BULL. (R.I.), Jan. 6, 2008 (Sunday Extra), at D1 (describing one family’s experience renting a property already in foreclosure and discussing the problem more generally).

³⁰H.F. 2604, 86th Sess. (Minn., introduced Feb. 4, 2010), <http://wdoc.house.leg.state.mn.us/leg/LS86/HF2604.0.pdf>.

³¹*Id.* See MINN. STAT. § 504B.215 (providing that a utility must post a notice before cutting off service and allow tenants to make payments even if the landlord does not; enacted 5/15/08).

³²H.B. 2766, 49th Legis., 2d Reg. Sess. (Ariz., enacted May 7, 2010).

³³*Id.*

³⁴See Been & Glashauser, *supra* note 13.

³⁵See, e.g., N.J. STAT. ANN. § 2A:18-61.1 (Westlaw Mar. 22, 2010); SEATTLE, WASH., MUN. CODE § 22.206.160(C) (2008). See generally Florence Roisman, *The Right to Remain: Common Law Protections for Security of Tenure: An Essay in Honor of John Otis Calmore*, 86 N.C.L. REV. 817, 834-35 (2008) (listing jurisdictions with good-cause-for-termination requirements).

³⁶H.F. 2604, 86th Reg. Sess. (Minn., introduced Feb. 4, 2010).

³⁷A holder is “a contract for deed vendor or a holder of the sheriff’s certificate of sale or any assignee of the contract for deed vendor or of the holder of the sheriff’s certificate of sale.” *Id.*

³⁸*Id.*

³⁹*Id.*

⁴⁰S.F. 2242, 86th Reg. Sess. (Minn., introduced Feb. 4, 2010).

⁴¹S.F. 2242, 86th Reg. Sess. (Minn., 1st engrossed version, Mar. 1, 2010).

⁴²*Id.* Unlike the introduced version, the first engrossed version of S.B. 2242 does not prohibit raising rent, but provides that new owners can only require fair market rent.

⁴³*Id.*

⁴⁴*Id.*

⁴⁵S.B. 2407, 186th Legis. Sess. (Mass., introduced as S.B. 1379 Jan. 20, 2009; passed by Senate as amended Apr. 29, 2010).

⁴⁶*Id.*

⁴⁷*Id.*

Violations would be punished by a fine of \$5,000. The bill provides an exception to allow eviction for other than just cause if the foreclosing owner executes a purchase and sale agreement with a bona fide third-party buyer.⁴⁸

Massachusetts legislators are also considering a bill that would enact just cause eviction protections in the City of Brockton.⁴⁹ The bill would provide a limited exception for owner move-ins. Just cause would exist to evict a tenant if a purchaser (other than a foreclosing owner) intends to occupy the property as a primary residence.⁵⁰ The sale agreement must require "the housing accommodation or some portion thereof to be conveyed vacant."⁵¹ H.B. 4277 would provide hefty penalties for violators (\$10,000 for each violation), and would expire on December 31, 2013.⁵²

San Francisco, California

San Francisco, California, requires good cause before tenants may be evicted from rent-controlled properties, and foreclosure is not good cause to evict.⁵³ The recently enacted Ordinance 60-10 extends this protection to cover non-rent controlled properties acquired through foreclosure or foreclosure alternatives such as short sale or deed in lieu of foreclosure during a pending foreclosure.⁵⁴

Security Deposits

Tenants who are evicted as a result of foreclosure can be vulnerable to loss of their security deposits if the post-foreclosure owner refuses to return them. The PTFA does not directly address the issue of security deposits, leaving room for states to engineer solutions. Several states have already enacted laws that protect tenants' security deposits in the event of a foreclosure.⁵⁵ Virginia recently passed an ordinance to protect tenants' security deposits, and Chicago, Illinois, is considering an ordinance to do so.

Virginia

Under the recently enacted H.B. 231, the holder of the landlord's interest in the dwelling unit at the time of termination of tenancy must return any security deposit and any accrued interest that is owed to the tenant.⁵⁶ This is required whether or not such security deposit is transferred with the landlord's interest by law or equity, and regardless of any contractual agreements between the original landlord and his successors in interest.⁵⁷

⁴⁸*Id.*

⁴⁹H.B. 4277, 186th Gen. Ct., 2010 Reg. Sess. (Mass., introduced Aug. 26, 2009).

⁵⁰*Id.*

⁵¹*Id.*

⁵²*Id.*

⁵³San Francisco, CA Admin. Code ch. 34, § 37.9 (2010).

⁵⁴San Francisco, CA Ordinance 60-10 (enacted Mar. 9, 2010).

⁵⁵The March issue of the *Bulletin* contains a fuller discussion of the laws already in effect. NHLP, *supra* note 8, at 90.

⁵⁶2010 Va. Acts 181 (enacted Mar. 29, 2010).

⁵⁷*Id.*

Chicago, Illinois

Under the ordinance, any person, including a lienholder, who follows a landlord in ownership or control of a dwelling unit becomes the "successor landlord."⁵⁸ The ordinance would require the successor landlord to notify tenants in writing that it is holding their security deposits within ten days of the date the property is transferred.⁵⁹ The former landlord would remain jointly and severally liable for the security deposit until it transfers the funds to the successor landlord. Failure to comply with the ordinance would subject the successor landlord to damages equal to twice the amount of the security deposit.⁶⁰

Record Sealing of Post-Foreclosure Evictions

Tenants who are evicted as a result of foreclosure can face terrible obstacles as they try to move on to other housing. Landlords often check a tenant's rental history as part of the application process and will frequently refuse to rent to anyone with an eviction record.⁶¹ Because tenants who face post-foreclosure evictions often receive little or no notice of the foreclosure, some states have decided that these tenants should not be denied future rental opportunities and are sealing the records of post-foreclosure evictions.⁶² New York and California could join these states by enacting bills that would protect tenants from being blacklisted as a result of foreclosure-based evictions.

California

Proposed legislation in California would mask a tenant's eviction record if the tenant was evicted as a result of foreclosure.⁶³ Existing law already provides an initial 60-day masking period after an eviction is filed, but this bill would keep the record of a post-foreclosure eviction masked after the initial 60-day period unless the landlord prevailed in the eviction action.

New York

Proposed legislation in New York would require the sealing of a tenant's eviction record if the tenant was evicted as a result of foreclosure.⁶⁴ The bill would provide for civil penalties ranging from \$1,000 to \$2,000 for anyone who discloses a tenant's record.⁶⁵

⁵⁸Chicago, Ill. Ordinance 2010-376 (introduced Feb. 10, 2010).

⁵⁹*Id.*

⁶⁰*Id.*

⁶¹Rudy Kleysteuber, *Tenant Screening Thirty Years Later: A Statutory Proposal to Protect Public Records*, 116 YALE L.J. 1344, 1363-64 (2007); Motoko Rich, *A Blacklist for Renters*, N.Y. TIMES, Apr. 8, 2004, at F1.

⁶²NHLP, *supra* note 8, at 91.

⁶³S.B. 1149, Reg. Sess. (Cal., passed Senate as amended Apr. 22, 2010), http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_1101-1150/sb_1149_bill_20100218_introduced.pdf.

⁶⁴S.B. 2954, 2009-2010 Reg. Sess. (N.Y. introduced Mar. 6, 2009); A.B. 4590, 2009-2010 Reg. Sess. (N.Y. introduced Feb. 5, 2009).

⁶⁵*Id.*

No Evictions by Financial Institutions

Lenders frequently end up owning the property they have foreclosed upon.⁶⁶ Such entities often act quickly to evict tenants, resulting in vacant properties that are vulnerable to vandalism and neglect.⁶⁷ To stabilize neighborhoods and to provide tenants with a measure of protection, Rhode Island is considering a bill to prevent banks from evicting tenants from foreclosed properties. H.B. 7045 would prohibit foreclosing financial institutions from evicting tenants until the foreclosed property is transferred to a non-financial institution.⁶⁸ To remain in their homes, tenants must continue to pay rent for the duration of their occupancy.⁶⁹ The financial institution is responsible for all utilities that had been paid by the pre-foreclosure owner.⁷⁰

Moratorium on Foreclosures

Minnesota House File 2604 would allow owners or renters of residential property to stop a foreclosure for up to two years if certain conditions are met.⁷¹ If tenants serve a notice of right to stay on the mortgage holder (or the holder of title if different from the mortgage holder), the court, and the sheriff, tenants would be able to remain in possession of their rental units for up to two years from the date of service of the notice.⁷² Additionally, tenants must “continue to reside on the foreclosed property,” must make “reasonable, affordable” monthly payments to the appropriate party, and must not do anything that would constitute a just cause for eviction.⁷³

The bill would also provide for a mechanism to dissolve the stay.⁷⁴ A stay could be dissolved if the tenant has failed to reside in the foreclosed property, has failed to pay rent or “other just cause exists.” Other just causes would include permitting a nuisance to exist on the property, failing to remedy a breach of lease after written notice from the owner, using the property for an illegal purpose and refusing the foreclosing owner reasonable access to the unit.⁷⁵ However, to dissolve a stay, the court must also find that dissolving the stay is in the “public interest.”⁷⁶ The owner must provide the tenant with 30 days’ written notice before applying for dissolution.⁷⁷

As introduced, Minnesota Senate File 2242 contained moratorium provisions identical to those in H.F. 2604.⁷⁸ However, the Health, Housing, and Family Security Committee amended S.F. 2242 to remove the protections for tenants from the bill’s moratorium provisions.⁷⁹

Conclusion

State legislatures have begun to respond to the impact of the foreclosure crisis on tenants with a variety of approaches. Most responses have focused on attempting to provide fair notice to tenants and prospective tenants, to provide tenants with informational resources designed to help them navigate the foreclosure process, and to limit the number of evictions resulting immediately from the foreclosure. Some states, such as Minnesota, are considering sweeping protections for tenants, while others are staying close to the PTFA’s protections. The National Housing Law Project will continue to track state and local legislative developments in the coming months.⁸⁰ ■

⁶⁶Been & Glashausser, *supra* note 13.

⁶⁷*Id.* at 15, 22, 25.

⁶⁸H.B. 7045, 2010 Leg. Sess., Gen. Assem. (R.I., introduced Jan. 7, 2010).

⁶⁹*Id.*

⁷⁰*Id.*

⁷¹H.F. 2604, 86th Sess. (Minn., introduced Feb. 4, 2010), <http://wdoc.house.leg.state.mn.us/leg/LS86/HF2604.0.pdf>.

⁷²*Id.*

⁷³*Id.*

⁷⁴*Id.*

⁷⁵*Id.*

⁷⁶*Id.*

⁷⁷*Id.*

⁷⁸S.F. 2242, 86th Reg. Sess. (Minn., introduced Feb. 4, 2010).

⁷⁹S.F. 2242, 86th Reg. Sess. (Minn., 1st engrossed version, Mar. 1, 2010).

⁸⁰As new laws are passed, they will be posted on NHLP’s website at <http://nhlp.org/node/1341>.

Home Affordable Modification Program Enforcement Through the Courts*

Program History and Structure

The Home Affordable Modification Program (HAMP), announced in March 2009 as part of President Obama's Making Home Affordable Initiative, was intended to modify 3 to 4 million mortgages by the end of 2012. As of March 2010, fewer than 230,000 final HAMP loan modifications were in place.¹ The program's failure to provide homeowners with sorely needed assistance has been well documented.² Increasingly, advocates have turned to the courts to interpret and apply the program's governing directives to revive its goal of providing "help for the hardest hit."³

This article discusses both defensive and affirmative litigation around the country. The increase in litigation seeking to enforce HAMP is a reflection of the program's disappointing performance, with both servicer compliance and government oversight halfhearted at best.⁴ Given the program's aspirations and its importance to our communities and our national economic wellbeing, it is alarming to consider that the cases discussed herein represent the last resort for most homeowners.

*The authors of this article are Rebekah Cook-Mack and Sarah Parady. Ms. Cook-Mack is a Skadden Fellow at South Brooklyn Legal Services, where she is a staff attorney in the Foreclosure Prevention Project (rebekahcm@sbls.org). Ms. Parady is a Skadden Fellow at Colorado Legal Services, where she works as staff attorney in the Consumer Law Unit (sparady@colegalserv.org). The authors administer a listserv dedicated to tracking and discussing HAMP-related litigation. The cases and pleadings cited in this article are available on the group's site. The authors encourage advocates to join the listserv and/or share pleadings and decisions. Please contact them via email.

¹See Making Home Affordable Program—Servicer Performance Report through March 2010 at 1, <http://www.makinghomeaffordable.gov/docs/Mar%20MHA%20Public%20041410%20TO%20CLEAR.PDF>.

²Government oversight panels agree that the program has been hobbled by constant revisions and a lack of meaningful enforcement mechanisms. See, e.g., Office of the Special Inspector General for the Troubled Asset Relief Program, Factors Affecting Implementation of the Home Affordable Modification Program 22-29 (Mar. 25, 2010) [hereinafter SIGTARP Report], http://www.sig tarp.gov/reports/audit/2010/Factors_Affecting_Implementation_of_the_Home_Affordable_Modification_Program.pdf (identifying "changing documentation requirements," "repeated changes and clarifications in net present value models," "[lack of] guidance on other HAMP implementation issues," "servicer capacity and training issues" and "issues related to HAMP marketing efforts" as the major causes of the program's slow start); Congressional Oversight Panel, An Assessment of Foreclosure Mitigation Efforts After Six Months at 111-12 (Oct. 9, 2009) [hereinafter "Warren Report"], <http://cop.senate.gov/documents/cop-100909-report.pdf> (recommending improvements to the transparency of the program and the accountability of participating servicers). Because of these handicaps or deeper structural reasons, there have been substantial delays in finalizing modifications. See SIGTARP Report at 8-14; Warren Report at 48-55. Even more troubling, recent congressional testimony supports the strong anecdotal sense among advocates that erroneous denials have been widespread. See Warren Report at 62.

³Making Home Affordable, <http://www.makinghomeaffordable.gov/>.

⁴See note 1, *supra*.

To understand the litigation currently underway around the country, a brief overview of the program's structure is in order.⁵ Homeowners may be eligible for a HAMP modification in one of two situations: if a Government Sponsored Entity (GSE)⁶ owns the mortgage, or if the mortgage servicer has signed a Servicer Participation Agreement (SPA) with Fannie Mae, acting as fiscal agent for the U.S. Department of the Treasury.⁷ By signing an SPA contract, servicers agree to evaluate all eligible homeowners for a modification pursuant to Treasury-issued HAMP directives, and to grant modifications to all eligible homeowners who pass a "net present value" test,⁸ in exchange for incentive payments from Treasury. Homeowners who qualify are to be offered a three-month "trial period" at the modified payment level and, if payments are made successfully, a permanent loan modification.

Because the foreclosure process differs by state, the arenas in which advocates raise HAMP compliance issues vary greatly. In some states, foreclosure is a judicial process; in others, it is carried out by a private sale without

⁵The HAMP program has been described in greater detail in past issues of the *Bulletin*. See Jane Bowman & Mark Ireland, *Home Affordable Modification Program: Help for Homeowners or Another Dead End?*, 39 Hous. L. Bull. 230, 230-31 (Sept. 2009); Holly E. Snow, *Hope for HAMP: One Step Back, But Two Steps Forward?*, 40 Hous. L. Bull. 12, 12-13 (Jan. 2010). Subsequent supplemental directives have changed some program terms. Most notably, starting on June 1, 2010, (1) oral offers of trial period plans based on verbal statements of homeowner financials are no longer permissible; (2) servicers may not deny program participation to homeowners in any stage of bankruptcy; (3) foreclosure actions (rather than merely foreclosure filings and sales) are frozen when homeowners are performing under trial period plans; and (4) clearer and stricter documentation requirements apply throughout the process, including as prerequisites to foreclosure. See Supplemental Directive 10-01, Home Affordable Modification Program – Program Update and Resolution of Active Trial Modifications (Jan. 28, 2010), https://www.hmpadmin.com/portal/docs/hamp_servicer/sd1001.pdf; Supplemental Directive 10-02, Home Affordable Modification Program – Borrower Outreach and Communication (Mar. 24, 2010), https://www.hmpadmin.com/portal/docs/hamp_servicer/sd1002.pdf.

⁶The GSEs are Federal Home Loan Mortgage Corporation (Freddie Mac) and Federal National Mortgage Association (Fannie Mae). Loans owned by these entities may be serviced by a wide variety of servicers who contract with them, including some who participate in HAMP independently and some who do not.

⁷Currently, 109 mortgage servicers, servicing roughly 89% of first-lien mortgages when combined with GSE-owned mortgages, have signed an SPA and agreed to participate in HAMP. Most of the largest mortgage servicers are program participants, with some exceptions, including HSBC/Beneficial and Suntrust. All program contracts may be viewed at http://financialstability.gov/impact/contracts_list.htm.

⁸The objective of this test is to determine whether foreclosure, or a modification under the terms of the program, will ultimately be more profitable to the investor that owns the mortgage debt. Several recent articles have chronicled the servicer's incentives to foreclose, given the great deal of discretion most servicers have under the pooling and servicing agreements setting forth their duties as servicers. For further discussion of this mismatched incentive structure, see Diane E. Thompson, *Why Servicers Foreclose When They Should Modify and Other Puzzles of Servicer Behavior*, Nat'l Consumer L. Ctr. (Oct. 2009), http://www.nclc.org/issues/mortgage_servicing/content/Servicer-Report1009.pdf.

court supervision.⁹ Additionally, many states and localities have implemented mediation programs designed to help facilitate non-foreclosure resolutions to mortgage default.¹⁰ As a result of this variety, advocates' approach and judicial response to HAMP enforcement have been wide ranging. (The most comprehensive response to date has occurred in South Carolina, where the state Supreme Court responded to an unusual ex parte motion filed by Fannie Mae by issuing an administrative order requiring an affidavit of HAMP applicability and compliance as a prerequisite to foreclosure.)¹¹ Finally, the program itself has changed a great deal since it was first launched.

HAMP Noncompliance as a Foreclosure Defense

Servicer failure to comply with HAMP has provided a successful defense to foreclosure in both judicial and non-judicial foreclosure states. These successes suggest strategies for advocates to postpone foreclosure where the HAMP directives have been violated, giving clients time to continue seeking a modification. HAMP violations may implicate traditional legal and equitable defenses such as waiver, estoppel and unclean hands. Courts may enforce HAMP without relying upon a specific state-law defense, instead relying loosely upon the equitable powers they retain in the foreclosure process.

Judicial Foreclosure States

The judicial foreclosure process presents a procedural opportunity to raise defenses and educate the court. Judges in these proceedings have shown a willingness to take noncompliance seriously and to employ their equitable powers in a commonsense fashion. In Iowa, for example, several judges have denied summary judgment to foreclosing lenders when borrowers had not been completely or correctly reviewed for a HAMP modification.¹² (Of course,

where summary judgment is denied, a lender must then prove HAMP compliance as a factual matter before the sale process can go ahead.) Although the Iowa orders treat the necessity of HAMP compliance as self-evident, the underlying pleadings reveal a wide variety of arguments and include causes of action that could be raised affirmatively (such as the third-party beneficiary theory discussed below) and pure defenses (such as unclean hands).¹³

An Ohio court similarly held that summary judgment must be denied because the homeowner's mortgage was GSE-owned and the borrower was "entitled to be evaluated under the HAMP eligibility criteria" and "ha[d] clearly not been evaluated, provided a loan modification plan, or provided a trial period".¹⁴ In Vermont, in the course of dismissing a foreclosure complaint for lack of standing, a judge held that upon refiled the action, "Plaintiff will be required to demonstrate its efforts to comply with its HAMP obligations."¹⁵ Remarkably, the defendant in the Vermont case had not raised HAMP noncompliance, but the judge did so sua sponte, relying upon the equitable nature of foreclosure proceedings. This result, in particular, underscores the importance of educating the court about HAMP and its requirements.

Plaintiff complied with the HAMP requirements"); *Waterfall Victoria Master Fund Ltd. v. Hansen*, No. EQCV007412 (Iowa Dist Ct. Benton County Mar. 31, 2010) (denying summary judgment because of "the existence of fact issues concerning . . . Plaintiff's efforts to determine whether Defendants Hansen are eligible for HAMP" and noting that an affidavit generally asserting HAMP compliance was insufficient to resolve factual dispute); *HSBC Bank, U.S.A. Nat'l Ass'n v. Garcia*, No. EQCV027408 (Iowa Dist. Ct. Buena Vista County Nov. 12, 2009) (denying summary judgment because "the Defendants contend their loan is subject to the Home Affordable Modification Program [and] that [Plaintiff] is contractually bound to the United States Treasury to fulfill all requirements of the . . . Program[, which] may also be an issue of fact for trial"); *Nat'l City Real Estate Servs., LLC v. Metzger*, No. EQCV065878 (Iowa Dist. Ct. Linn County Oct. 9, 2009) (denying summary judgment because "there appears to be a dispute regarding the level of negotiations the parties have had with respect to loan modification and whether Plaintiff has complied with TARP directives regarding loss mitigation").

¹³It is worth noting that in every one of these cases, the defendant raised multiple foreclosure defenses and summary judgment was denied until several factual issues, including but not limited to HAMP compliance, could be resolved. This may be coincidental, or may suggest additional willingness to inquire into HAMP compliance when there are other flaws underlying a foreclosure.

¹⁴*B.A.C. Home Loans Servicing, L.P. v. Bates*, No. CV2009 06 2801 (Ohio Ct. of Common Pleas Butler County Mar. 8, 2010). Note that, where the basis for HAMP review is GSE ownership of the mortgage, a third-party beneficiary to contract claim (discussed below) is unavailable. This is because provisions in the contracts between Fannie Mae and Freddie Mac and their servicers explicitly disclaim any intended beneficiaries, and both GSEs have implemented HAMP through amendments to those contracts. *See, e.g.,* Fannie Mae 2010 Single Family Selling Guide A2-1-01 ("No borrower or other third party is intended to be a legal beneficiary of the MSSC or the Selling Guide or Servicing Guide or to obtain any rights or entitlements through Fannie Mae's lender communications or contracts."). Thus, framing HAMP noncompliance as a defense is particularly important in cases involving foreclosure on a GSE-owned loan.

¹⁵*GMAC Mortgage, LLC v. Riley*, No. 500-09 Fc (Vermont Super. Ct. Franklin County Mar. 5, 2010).

⁹For a list of judicial and non-judicial foreclosure states, see John Rao and Geoff Walsh, *Foreclosing a Dream: State Laws Deprive Homeowners of Basic Protections*, Nat'l Consumer L. Ctr. (Feb. 2009), <http://www.nclc.org/issues/foreclosure/content/FORE-Report0209.pdf>.

¹⁰*See* Geoff Walsh, *State and Local Foreclosure Mediation Programs: Updates and New Developments*, Nat'l Consumer L. Ctr. (Jan. 2010), http://www.consumerlaw.org/issues/foreclosure_mediation/content/ReportS-UpdateJan10.pdf.

¹¹RE: Mortgage Foreclosures and the Home Affordable Modification Program (HMP), Admin Order No. 2009-05-22-01 (S.C. Sup. Ct.) (May 22, 2009), <http://www.judicial.state.sc.us/courtOrders/displayOrder.cfm?orderNo=2009-05-22-01>. Fannie Mae had sought an injunction only as to those mortgages owned by itself or Freddie Mac, but the court applied its resulting order to all mortgages.

¹²*See* U.S. Bank Nat'l Ass'n ND v. Peterman, No. EQCV067378 (Iowa Dist. Ct. Linn County Apr. 21, 2010) (denying summary judgment because "there is no information in the file regarding what steps Plaintiff took to determine Defendants' eligibility for the Making Home Affordable Program, and there is a genuine issue of material fact on this issue"); *Deutsche Bank Nat'l Trust Co. v. Kane*, No. EQCV067273 (Iowa Dist. Ct. Linn County Mar. 31, 2010) (denying summary judgment because plaintiff had "offered no information . . . showing what steps were taken, if any, to determine whether Mr. Kane is eligible for a loan modification" and thus, "there is a genuine issue of material fact as to whether

During Mediation

Another opportunity to raise HAMP noncompliance as a defense to foreclosure may arise in states—both judicial and non-judicial—that have instituted a mandatory pre-foreclosure mediation process.¹⁶ Some mediation statutes place a specific duty on lenders to negotiate in good faith with the borrower regarding a non-foreclosure resolution.¹⁷ Where such a requirement exists, HAMP noncompliance can be raised as evidence of bad faith negotiations in support of a motion to dismiss the foreclosure action or, at the least, prolong negotiations. Advocates in New York have obtained orders requiring proof of HAMP compliance before a case could be positively reported out of mediation and back into the foreclosure process.¹⁸ Indeed, the Kings' County Supreme Court rules now require a HAMP "status report" from plaintiff's counsel in all cases involving a HAMP participating servicer, including a "specific written justification with supporting details" if the homeowner is denied a HAMP modification.¹⁹

Non-Judicial Foreclosure States

In non-judicial foreclosure states without mediation programs, there may be no procedural opportunity for advocates to raise HAMP or other defenses. For advocates in those states, an affirmative suit may provide the only opportunity to prevent an improper foreclosure sale from going forward in violation of the HAMP directives.

In some non-judicial states, however, limited opportunities to raise noncompliance defenses prior to sale may exist. For example, in Colorado the foreclosure process includes a single hearing, limited by statute to the issue of whether the borrower has defaulted. If the court finds default has occurred, an order authorizing sale issues.²⁰ The Colorado Supreme Court has slightly expanded this hearing to allow homeowners to raise certain defenses to default.²¹ Advocates have successfully argued that a

servicer's participation in HAMP represents a waiver of the right to foreclose until HAMP directives have been complied with and/or that a borrower's request for a HAMP application and reliance thereon should result in estoppel. This argument has resulted in orders authorizing sale with the condition that HAMP must first be complied with.²²

It is fitting that courts sitting in equity have proven themselves unwilling partners in the processing of avoidable foreclosures. As judges across the country confront the rampant noncompliance with HAMP directives, this trend is likely to gain momentum.

Affirmative Litigation Seeking HAMP Compliance

Servicers' failure to comply with the HAMP supplemental directives, coupled with inadequate government oversight, has led to a range of affirmative lawsuits. These suits highlight many of the troubling aspects of the program. HAMP itself provides no private right of action, as it exists in contracts rather than in statute or regulation.²³ Suits premised on HAMP violations must therefore begin by identifying a cause of action allowing for suit.²⁴ Complaints filed thus far assert a wide variety of causes of action, including:

- breach of the SPA contract, which borrowers may enforce as intended third-party beneficiaries;
- breach of a contract—such as a signed Trial Period Plan—between the borrower and servicer;

¹⁶Some 26 states and localities currently have mediation programs in place. See Nat'l Consumer Law Ctr., Summary of Programs, http://www.consumerlaw.org/issues/foreclosure_mediation/content/SummaryOfPrograms.pdf.

¹⁷Jurisdictions with a good-faith requirement include Maine, the First Judicial District of New Mexico, New York, Oregon and Providence, Rhode Island. See *id.* Other mediation plans may not have specific good faith language, but may make evaluation for a modification a prerequisite of foreclosure, which would have much the same effect if meaningfully enforced.

¹⁸See, e.g., *Wells Fargo Bank, N.A. v. Lewis*, No. 130421/2009 (Richmond County N.Y. Sup. Ct. Feb. 25, 2010) (in N.Y. Civ. Prac. L. & R. § 3408 pre-foreclosure mediation proceeding, ordering Wells Fargo to "produce to [borrower] documentation of efforts it has taken, pursuant to HAMP, to remove any restrictions or impediments to modification"); *Wells Fargo Bank, N.A. v. Gonzalez*, No. 100982/2008 (Richmond County N.Y. Sup. Ct. May 6, 2009) (in a Settlement Conference held pursuant to N.Y. Civ. Prac. L. & R. § 3408, ordering Wells Fargo "to delineate reasons why [borrowers] do not qualify for HAMP").

¹⁹See *Kings County Sup. Ct. Civ. R G(6)*.

²⁰See *Colo. R. Civ. P. 120*.

²¹*Goodwin v. Dist. Ct. for the Sixteenth Jud. Dist.*, 779 P.2d 837, 843-44 (Colo. 1989).

²²See, e.g., *In re Application of U.S. Bank Nat'l Ass'n for an Order Authorizing Sale*, No. 2010CV-200944 (Colo. Dist. Ct. Arapahoe County Mar. 22, 2010). The court conditionally authorized the foreclosure sale but stated that "the sale is not to proceed until borrower has been evaluated for the HAMP and her eligibility determined." *Id.* The court cited Supplemental Directives 09-01, 09-08, and 10-01. See also *In re Application of Wells Fargo Finan. Colo., Inc. for an Order Authorizing Sale*, No. 2009CV10991 (Colo. Dist. Ct. Adams County Mar. 12, 2010). The court granted the motion authorizing sale but barred Wells Fargo from selling the property at a foreclosure sale unless the borrowers were determined to be ineligible for modification or other foreclosure alternative. Beyond referencing the supplemental directives themselves, these orders do not give a rationale for their conditional nature. Since no further order is needed before sale may proceed, these conditions may prove challenging to enforce—an inherent difficulty of an essentially non-judicial process. Enforcement options include motions for contempt of court should a sale proceed.

²³Section 101 of the Emergency Economic Stabilization Act of 2009, which created the Troubled Asset Relief Program, granted Treasury the authority to promulgate programs to prevent foreclosure. Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, § 101, 122 Stat. 3765 (Oct. 3, 2008). No part of the Act includes a private cause of action, and no other legislation governs HAMP.

²⁴One litigant in a very early case succeeded in persuading a judge to directly enforce HAMP without discussing what cause of action made this possible. *Deutsche Bank Nat'l Trust Co. v. Hass*, No. 2009-2627-AV, slip op. at 5-9 (Mich. Cir. Ct. Macomb County Sept. 30, 2009) (remanding for factual determination of whether Wells Fargo was the servicer of the foreclosed loan and, if so, set-aside of foreclosure sale was warranted due to breaches of Wells Fargo's HAMP Servicer Participation Agreement); see also *Snow*, *supra* note 5, at 13-14.

- breach of the contractual duty of good faith and fair dealing in either of these contracts or the original mortgage;
- a variety of other common law claims; and
- state statutory claims.²⁵

The Third-Party Beneficiary Hurdle

Of these possible causes of action, third-party beneficiary challenges pose the most fundamental challenge to the program. Success on a third-party beneficiary claim would have the effect of making both the SPA and the supplemental directives (which are imported as binding contract terms by § 1(A) of each SPA) fully enforceable. Third-party beneficiary claims are particularly important in the early stages of the HAMP review process, before a servicer has interacted extensively with the borrower, because at this stage, common law tort and contract claims are less likely to arise. Thus, advocates have attempted to certify class actions raising third-party beneficiary claims to assist borrowers early on in the HAMP process and to effect systemic change to improve the process for all.

Edwards v. Aurora Loan Servs. LLC,²⁶ currently before the U.S. District Court for the District of Columbia, challenges the HAMP review process and seeks both preliminary and permanent injunctions designed to address both the servicer's failure to follow the HAMP directives and Treasury's lack of enforcement thereof. The *Edwards* case, filed six months into the program's rollout,²⁷ represents the first wave of HAMP litigation based on servicer failure to review homeowners for HAMP eligibility. It relies primarily on a third-party beneficiary theory.²⁸ Plaintiffs contend that Aurora Loan Services failed even to consider them for HAMP modifications, including sending some

plaintiffs into foreclosure without HAMP analysis, thus violating the contractually required HAMP process at its earliest stages.²⁹

Defendants' motions for dismissal and summary judgment are currently pending before the court. Since *Edwards* was filed, three motions for summary judgment in HAMP third-party beneficiary cases have been decided in the U.S. District Court for the Southern District of California. One was denied³⁰ and two were granted.³¹ Outcomes in these cases depend largely³² on whether the court accepts that homeowners are "intended" beneficiaries of the SPA. Thus, advocates would be well advised to brief this claim with care, drawing on the considerable evidence in the public record that HAMP was created precisely to aid struggling homeowners. Plaintiffs' memorandum of law in opposition to dismissal in *Edwards*³³ provides an excellent template for this argument.

Near simultaneously with the *Edwards* filing, a similar class action was filed in Utah against multiple servicers, alleging that each had failed to offer trial period plans to qualified borrowers and had mistakenly rejected them or failed to process their applications.³⁴ The case has not proceeded past the complaint stage, perhaps indicating that negotiations are occurring.³⁵

²⁵Another possibility is to raise a due process challenge to the sufficiency of Treasury's implementing procedures (and/or to the procedures used by the servicers, on the theory that they are acting under color of federal law). However, because due process claims challenge the structure of the program rather than compliance with it, we do not review these claims here. A prior *Bulletin* article discussed *Williams v. Geithner*, which raised a due process challenge that was dismissed by a federal district court. *Bowman & Ireland*, *supra* note 5, at 231-33; *Snow*, *supra* note 5, at 12-13. Given the early stage at which *Williams* was sua sponte dismissed and the broad injunctive remedy it sought, it should not be read as a death knell for challenges based in due process. Indeed, another case seeking relief for an individual homeowner and asserting due process, among other claims, has since survived a motion to dismiss. *Huxtable v. Geithner*, No. 09cv1846, 2009 WL 5199333 (S.D. Cal. Dec. 23, 2009).

²⁶Compl., *Edwards v. Aurora Loan Servs., LLC*, No. 09cv2100 (D.D.C. filed Nov. 9, 2009).

²⁷This lawsuit was filed shortly after SD 09-08 was issued. This directive establishes (1) a requirement that servicers provide borrowers with denial letters giving the reason for the denial, and (2) a timeframe for borrowers to contest denials that are based in part upon borrower-provided information. See Supplemental Directive 09-08, Home Affordable Modification Program – Borrower Notices (Nov. 3, 2009), https://www.hmpadmin.com/portal/docs/hamp_servicer/sd0908.pdf.

²⁸Plaintiffs also assert due process violations not discussed herein. See note 25, *supra*.

²⁹The introductory summary of plaintiffs' claims states: "Aurora has (a) wrongfully denied Plaintiffs access to the benefits of HAMP by refusing to evaluate their non-GSE loans for modification, even when Plaintiffs approached Aurora with specific requests to be considered under HAMP; (b) instituted, failed to suspend, or threatened to institute foreclosure proceedings against certain Plaintiffs who asked to be considered under HAMP; and (c) offered Plaintiffs, in some instances, forbearance agreements that violate the HAMP program guidelines by not lowering Plaintiffs' monthly payments, requiring Plaintiffs to waive substantial legal rights, and not guaranteeing a modification even if the Plaintiff fully complies with the terms of the forbearance agreement." Compl., *supra* note 26, at 4-5.

³⁰*Reyes v. Saxon Mortgage Servs., Inc.*, 2009 WL 3738177 (S.D. Cal. Nov. 5, 2009) (denying defendant Saxon Mortgage Services' motion to dismiss plaintiffs' claim that Saxon had breached its HAMP SPA and finding that plaintiffs had alleged sufficient facts to support the third-party beneficiary claim).

³¹*Escobedo v. Countrywide Home Loans, Inc.*, 2009 WL 4981618 (S.D. Cal. Dec. 15, 2009) (dismissing plaintiff's claim premised on Bank of America/Countrywide's breach of its HAMP SPA because plaintiff could not prove that he was an intended beneficiary of that agreement); *Villa v. Wells Fargo Bank, N.A.* No. 10cv81, 2010 WL 935680 (S.D. Cal. Mar. 15, 2010) (same).

³²An alternate basis for the court's decision in *Escobedo* should be more easily refuted. The court accepted defendant Countrywide's argument that, because HAMP does not guarantee a modification to any particular borrower, borrowers are not intended beneficiaries under the SPA. Properly viewed, however, the benefit secured to borrowers by the SPAs is the opportunity to be *fairly evaluated* for the program—or, viewed differently, the program intends to benefit those borrowers who objectively qualify for a modification under its assorted criteria.

³³Plaintiffs' Memorandum of Law in Opposition to Defendants' Motions to Dismiss or in the Alternative for Summary Judgment, *Edwards v. Aurora Loan Servs.*, No. 09cv2100 (S.D. Cal. filed Mar. 5, 2010).

³⁴Class Action Complaint, *Reese v. Citi Mortgage*, No. 09cv1031 (D. Utah) (filed Nov. 18, 2009).

³⁵Some non-class complaints have raised third-party beneficiary claims regarding a servicer's failure to analyze a borrower's HAMP

Direct Enforcement of Trial Period Plan Contracts

More recently, widespread servicer failure to convert trial period plans into permanent modifications has become a significant hurdle to the program's success. This has led to a second wave of HAMP enforcement litigation seeking to end the purgatory and cost of endless trial period plans. Advocates seeking conversion from a trial period to a final modification can sue for breach of contract without having to prevail on a third-party beneficiary claim. Their contract claims are premised on breaches of the trial period plan entered into by each individual borrower. Until recent program changes in supplemental directive 10-01, the trial period plan borrowers signed and returned to accept a three-month trial period contained specific provisions regarding when and how it would convert to a permanent modification.³⁶ Currently, however, trial periods are initiated by a brief announcement sent to the borrower and accepted via payment rather than signature. This announcement states only that "[a]fter all trial period payments are timely made and you have submitted all the required documents, your mortgage would then be permanently modified."³⁷ Given its lack of specificity, this language does less to support a breach of contract claim for failure to convert by a certain date, but does not totally remove such a claim from the arsenal.³⁸ Advocates have also augmented breach of trial period plan contract claims with breach of good faith and fair dealing and promissory estoppel claims.

In Massachusetts, consumer advocates recently filed class actions against a number of the largest HAMP servicers for failure to convert trial period plans into permanent modifications. In separate class actions, these advocates have sued BAC Home Loans Servicing, J.P. Morgan Chase, Wells Fargo, and IndyMac for their

comprehensive failure to convert trial period plans into permanent modifications.³⁹ Similar cases have been filed in Washington and California.⁴⁰ These class actions seek injunctive relief to forestall foreclosure, specific performance of defendant's contractual obligations (that is, offering final modifications), and injunctions to systemically change the way in which each servicer trains its staff and implements the program. While these suits do not require the court to reach the question of whether homeowners are intended third-party beneficiaries under SPAs, they do require the court to interpret the supplemental directives insofar as these are reflected in and referenced by the trial period plans. Accordingly, they present an opportunity to achieve systemic change in the program as well as protecting the rights of individual trial period participants.⁴¹

Additional Common Law and State Statutory Claims

As program documentation develops and homeowners who are further along in the HAMP process find their way to advocates, possibilities for affirmative litigation expand. Advocates have increasingly asserted a wide range of common law claims against loan servicers for failure to convert trial period plans into final modifications and other HAMP violations. These include breach of the contractual duty of good faith and fair dealing (arising from the SPA, a trial period plan, or the original mortgage), promissory estoppel, misrepresentation, negligence, fraud and infliction of emotional distress.⁴² In addition,

³⁹See *Compl., Durmic v. J.P. Morgan Chase Bank, NA*, No. 10cv10380 (D. Mass. filed Mar. 3, 2010); *Am. Compl., Johnson v. BAC Home Loans Servicing, LP*, No. 10cv10316 (D. Mass. filed Apr. 30, 2010); *Compl., Reyes v. IndyMac Mortgage Servs., FSB*, No. 10cv10389 (D. Mass. filed Mar. 4, 2010); *Compl., Bosque v. Wells Fargo Bank, N.A.*, No. 10cv10311 (D. Mass. filed Feb. 23, 2010).

⁴⁰*Compl., Bayramian v. Bank of America*, No. 10cv1458 (N.D. Cal. filed Apr. 6, 2010); *Compl., Kahlo v. Bank of Am.*, No. 10cv488 (W.D. Wash. filed Mar. 22, 2010).

⁴¹Of course, non-class suits have raised breaches of trial period plan contracts as well. See, e.g., *Compl., Begum v. J.P. Morgan Chase Bank, N.A.*, No. 10cv2014 (E.D.N.Y. filed May 4, 2010); *Compl., Kaczmarczyk v. Select Portfolio Servicing, Inc.*, No. 2010 CA 000937 CI (Fla. Cir. Ct. Osceola County filed Feb. 5, 2010); *Verified Compl., Rudan v. MetLife Bank, N.A.*, No. CV OC 1006520 (Idaho D. Ct. Ada County filed Apr. 6, 2010); *Compl., Akins v. Wells Fargo Bank, N.A.*, No. CI 201002723 (Ohio Ct. of Common Pleas Lucas County filed Mar. 15, 2010).

⁴²See, e.g., *Rudan*, No. CV OC 1006520 (raising, in addition to a breach of trial period plan claim and accompanying breach of good faith and fair dealing claim, claims of promissory estoppel and fraud); *Begum*, No. CV10-2014 (raising, in addition to breach of trial period plan contract claim, a claim of breach of the accompanying duty of good faith and fair dealing, alternate claims of promissory estoppel and breach of implied contract, and fraud and negligent misrepresentation claims); *Compl., Ponder v. Bank of Am., N.A.*, No. 10cv81 (S.D. Ohio filed Feb. 10, 2010) (where multiple homeowners were promised modifications at a Bank of America event and these did not materialize, raising claims of misrepresentation, promissory estoppel, breach of fiduciary duty, breach of the duty of good faith and fair dealing arising from the SPA, negligence, defamation in credit reporting and infliction of emotional distress); *Hausam*, No. 09cv1437 (raising, in addition to third-party beneficiary

application. *Compl., Hausam v. Homecomings Fin., LLC*, No. 09cv1437 (D. Or. filed Dec. 4, 2009); *Verified Compl., Willms v. LNV Corp.*, No. 09cv1925 (Colo. D. Ct. Adams County filed Oct. 27, 2009); *First Am. Compl., Romero v. Onewest Bank Group, LLC*, No. C 09-03122 (Cal. Super. Ct. Contra Costa County filed Feb. 1, 2010).

³⁶The last version of the model trial period plan drafted by Treasury, which servicers were not to modify except in respects not relevant here, provided, "If I comply with the requirements in Section 2 and my representations in Section 1 continue to be true in all material respects, the Lender will send me a Modification Agreement for my signature which will modify my Loan Documents as necessary to reflect this new payment amount and waive any unpaid late charges accrued to date." It also defined the "Modification Effective Date" as "the first day of the month following the month in which the last Trial Period Payment is due."

³⁷Trial Period Plan Notice – Stated Income, https://www.hmpadmin.com/portal/docs/hamp_borrower/hampstatedincome.doc, and Trial Period Plan Notice – Verified Income, https://www.hmpadmin.com/portal/docs/hamp_borrower/hampverifiedincome.doc; see also Supplemental Directive 10-01, Home Affordable Modification Program – Program Update and Resolution of Active Trial Modifications at 3 (Jan. 28, 2010).

³⁸Moreover, it is worth bearing in mind that if current statistics are any guide, it will be some time before the many borrowers already offered trial period plan contracts manage to obtain final modifications, leaving many of these old contracts available as grounds for suit.

some state laws, such as unfair and deceptive practices statutes, may apply.⁴³ Unlike third-party beneficiary theories, these claims are not structured to address the full range of HAMP violations. Rather, they rely on careful parsing of facts specific to the individual homeowner. Not surprisingly, these claims lend themselves to individual rather than class plaintiffs. In newer cases where a trial period was offered through a notice of trial period plan, these claims will take on increasing importance.

HAMP Compliance as a Basis for Rescission of Sale

Even after sale, homeowner claims that a servicer failed to properly follow the HAMP directives remain relevant. In these cases, the question becomes whether rescission of sale (rather than damages) is a possible remedy under state law. In many states, obtaining this remedy may be an uphill battle.⁴⁴ A related and highly state-specific issue is whether HAMP violations (or a simultaneous affirmative suit alleging such violations) provide a defense to post-foreclosure eviction proceedings. Advocates in New York have obtained stays of at least two evictions based on HAMP violations underlying the foreclosure sale.⁴⁵ Even if post-sale cases prove to be difficult to win in court, ser-

claim, claims of breach of implied and oral contracts arising from a HAMP offer made by phone, promissory and equitable estoppel, and breach of the duty of good faith and fair dealing arising from the oral contract); *Simpson v. Am. Home Servicing, Inc.*, No. 09-C-97 (N.D.W. Va. filed Dec. 16, 2009) (raising a claim of breach of the duty of good faith and fair dealing in the original mortgage); *Romero*, No. C 09-03122 (raising, in addition to third-party beneficiary claim, claims of breach of the duty of good faith and fair dealing in the original mortgage, negligence, and negligent and intentional infliction of emotional distress); *Akins*, No. CI 201002723 (raising, in addition to a breach of trial period plan claim and accompanying breach of good faith and fair dealing claim, a claim of promissory estoppel).

⁴³See, e.g., *Romero*, No. C 09-03122 (raising claims of violations of the California Finance Code, Fair Debt Collection Practices Act and Unfair Competition Law); *Kaczmarczyk*, No. 2010 CA 000937 CI (raising unfair or deceptive acts or practices claims); *Simpson*, No. 09-C-97 (raising violations of West Virginia statutes regarding illegal debt collection and illegal return of payments).

⁴⁴Hass, *supra* note 24, was a post-sale case. As noted above, in that case the judge was willing to rescind the foreclosure sale if the plaintiffs proved the violations they alleged. Of the pending complaints cited in note 41, *supra*, at least one—*Rudan*—was filed post-sale. A complaint filed in Colorado also requested rescission and damages after a homeowner was foreclosed after a successful HAMP trial period without being offered a final modification. Verified Compl., *Svejcar v. Fed. Nat'l Mortgage Ass'n*, No. 2010CV192 (Colo. Dist. Ct. Boulder County filed Feb. 21, 2010).

⁴⁵*Huntington Nat'l Bank v. Reed*, No. 9018/2009 (N.Y. Sup. Ct. Saratoga County) (staying eviction proceedings based on an order to show cause brought to vacate a foreclosure sale based on the meritorious defense that the homeowner had been attempting to obtain a HAMP modification at the time the sale was conducted); *Mortgage Electronic Registration Systems, Inc. v. Petrella*, No. 2008-0425 (N.Y. Sup. Ct. Tompkins County Feb. 3, 2010) (denying writ of removal in eviction proceeding “on the grounds that the plaintiff has failed to furnish proof of a ‘HAMP’ review or any analysis with regard to the defendant[s] eligibility for a loan modification”).

vicers may be willing to voluntarily rescind sales if the foreclosed homeowner is genuinely HAMP-eligible, and a suit may draw the servicer’s attention to this possibility.

Lessons from Existing Litigation

Given the dearth of meaningful oversight and enforcement of the HAMP program, litigation has offered a promising avenue for advocates to protect client homes and avoid irresponsible foreclosures. Favorable decisions in these cases have been more easily obtained where non-compliance was raised as a defense to foreclosure. Courts’ greater willingness to enforce HAMP in such cases is likely due to a combination of factors. First and foremost, the hurdle of finding an applicable cause of action is not present, since the party raising HAMP noncompliance is the defendant. Moreover, judges who routinely decide foreclosure cases are well versed in the responsibilities inherent in sitting as a court of equity.

An additional reason for the limited number of decisions in affirmative suits is unrelated to judicial receptiveness: affirmative litigation captures servicer attention and can motivate action where previous efforts to negotiate were met with inattention. Ultimately, this reality combined with the cost of delay suggests that for many clients, individual, fact-specific filings may present the best strategy for enforcing HAMP and gaining sorely needed relief from high monthly payments.

The Coming Wave of HAMP Litigation

As HAMP is modified, litigation strategies will change accordingly. The next wave of litigation will likely focus on the documentation requirements of recent supplemental directives (09-08, 10-01, and 10-02), which add a powerful resource for HAMP enforcement.⁴⁶

The new directives set forth requirements covering both documentation of the individual borrower’s HAMP process and documentation of internal HAMP policies and procedures, all of which must be on file with the loan servicer before foreclosure may proceed.⁴⁷ Of particular

⁴⁶In addition, the new directives provide that borrowers in active bankruptcy must be considered for HAMP, and will give rise to HAMP challenges in a new judicial context. In re *Roderick*, No. 09-22866-C-7 (Bankr. E.D. Cal. Mar. 8, 2010), gives a preview of the kind of issues that may arise. The bankruptcy court interpreted the Federal Rules of Bankruptcy Procedure to allow extension of the automatic stay and deferment of the discharge as long as the servicer and homeowner wished to continue negotiations regarding a modification. The court explained that it chose to do so to preserve the possibility of a reaffirmation of personal liability in a modification and forestall foreclosure.

⁴⁷See Supplemental Directive 10-02, Home Affordable Modification Program – Borrower Outreach and Communication 10 (Mar. 24, 2010), https://www.hmpadmin.com/portal/docs/hamp_servicer/sd1002.pdf. Prefacing a specific list of required documentation, the directive states that “Servicers are required to maintain appropriate documentary evidence of their HAMP-related activities, and to provide that documentary evidence upon request to Freddie Mac as the Compliance Agent for Treasury. . . . Servicers must maintain documentation in

relevance to future litigation, before proceeding with foreclosure, servicers must certify to their local foreclosure counsel that HAMP has been complied with.⁴⁸ This pre-foreclosure documentation requirement presents an opportunity for discovery requests and, potentially, Fair Debt Collection Practices Act claims against local “foreclosure mills.”

The new directives should also bolster the use of HAMP noncompliance as a defense to foreclosure. Under these directives, foreclosure actions must be frozen completely once a borrower enters a trial period plan. Once the court has halted sale pending proof of the outcome of the trial period, it can use the newly required documentation to measure compliance.

Undoubtedly, advocates will have to educate the judiciary to ensure that compliance with the new directives is meaningful. The trend is clear, however: HAMP noncompliance presents a meaningful defense to foreclosure for homeowners. By working together to build authority for reference and citation,⁴⁹ advocates can build judicial knowledge and create enforcement momentum, aiding homeowners well beyond those they are able to represent. ■

well-documented servicer system notes or in loan files for all HAMP activities addressed in this Supplemental Directive.”

⁴⁸“Servicers must develop and implement written procedures applicable to all loans that are potentially eligible for HAMP . . . that require the servicer to provide to the foreclosure attorney/trustee a written certification that (i) one of the five circumstances under the ‘Prohibition on Referral and Sale’ section of this Supplemental Directive exists, and (ii) all other available loss mitigation alternatives have been exhausted and a non-foreclosure outcome could not be reached. This certification must be provided no sooner than seven business days prior to the scheduled foreclosure sale date (the Deadline) or any extension thereof.” *Id.* at 7.

⁴⁹To help build this momentum, please email authors (see email addresses *supra* note 1) with any new pleadings or decisions.

NHLP Testifies on Public Housing One-for-One Replacement

At the request of the House Subcommittee on Housing and Community Opportunity, the National Housing Law Project (NHLP) presented testimony on a discussion draft of a bill titled “The Public Housing One-for-One Replacement and Tenant Protection Act.”¹ The discussion draft is focused on revising and improving Section 18, the public housing demolition and disposition provisions of the United States Housing Act. The discussion draft contains a number of principles that NHLP supports, including:

- One-for-one replacement of any units that are approved for demolition or disposition will be required.
- The replacement housing must be comparable to public housing and affordable to the lowest-income families.
- A sufficient number of units must be located in the original neighborhood for all who wish to remain in that community.
- Residents who are displaced must be allowed to return without rescreening.
- Any displacement and/or multiple involuntary relocations should be minimized.
- Residents will play an active and effective role in the development of any plan for demolition or disposition and implementation of the plan for the replacement housing.
- Residents will receive counseling and services for relocation and mobility.
- Plans for demolition or disposition must be consistent with a housing authority’s duty to affirmatively further fair housing, and residents have rights to enforce this duty.
- Stricter preconditions for demolition or dispossession will be imposed.

In addition, NHLP suggested that the discussion draft could be improved if the following provisions were added or changed:

1. The one-for-one replacement requirement must state that the replacement units must be *rental* units.

¹The testimony is available at NHLP’s homepage at www.nhlp.org. The testimony will be archived on the Public Housing Demolition and Disposition webpage at NHLP’s Attorney/Advocate Resource Center at <http://nhlp.org/resourcecenter?tid=38>.

2. The location of the on-site replacement units should be expanded to include replacing units in the neighborhood and should anticipate that more than one-third of the residents may want to return to the former site or neighborhood.
3. The requirement that replacement units must be built within the jurisdiction of the public housing agency and in areas having a low concentration of poverty should be changed to provide that units built outside the original site should be provided in a manner that furthers economic and educational opportunities for residents.
4. Temporary relocation and multiple moves should be minimized or indeed prevented by making off-site replacement housing available prior to any relocation of residents.
5. Replacement units should maintain essential rights of applicants, including but not limited to:
 - a. Rents must be set at 30% of a family's adjusted income.
 - b. Public housing agencies (PHAs) must target at least 40% of new admissions to applicants with incomes at or below 30% of Area Median Income (AMI). If the housing is project-based vouchers, PHAs must target at least 75% of new admissions to applicants with incomes at or below 30% of AMI.
 - c. Victims of domestic violence cannot be discriminated against.
 - d. Applicants may designate an alternate contact person or entity who can speak to the PHA on their behalf.
 - e. Applicants who are denied housing must receive a review before a hearing officer who did not make the original determination and is not subordinate to the person who did.
6. The replacement units should have the same number of bedrooms as those slated for disposition and demolition, unless a market analysis shows a need for units with a greater number of bedrooms.
7. Mobility counseling must be available to displaced residents who wish to voluntarily move to low-poverty and non-racially concentrated neighborhoods throughout the metropolitan area. Mobility programs shall include:
 - a. one-on-one housing counseling, search assistance and post-move counseling;
 - b. active landlord recruitment incentives;
 - c. use of exception rents;

- d. community tours and comprehensive community introductions on local schools, shopping, transportation, religious and health resources;
- e. credit repair and other training/education sessions. ■

Improved Section 3 Enforcement by HUD at Work in St. Paul*

In 2009, as part of a plan to increase employment and training opportunities for low-income individuals, the Department of Housing and Urban Development (HUD) began to more aggressively enforce Section 3 reporting requirements under form HUD-60002.¹ The form requires recipients of HUD funds to report annually on their compliance with Section 3, but before this past year, HUD did little to ensure that recipients submitted the form.² HUD's enforcement campaign has led to an increase in the number of state and local agencies that complied with their Section 3 reporting requirements.³ To date, 75% of HUD-funded state and local agencies have submitted form HUD-60002.⁴ This is the highest response rate since HUD first made the reporting mandatory.⁵ Should a state or local agency fail to submit the annual report, HUD may investigate the non-compliance and eventually withhold federal funds.

HUD also illustrated its improved commitment to enforcing Section 3 by investigating claims that the city of Saint Paul had failed to maintain a written or unwritten Section 3 plan and failing to file form HUD-60002.⁶ Specifically, the May 2009 compliance review found that the city lacked defined procedures to notify Section 3 residents about related training and employment opportunities, to notify Section 3 business concerns about related contracting opportunities, and to notify potential contractors about Section 3 requirements. HUD also found that the city lacked procedures to incorporate the Section 3 clause into solicitations and contracts and to document

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¹Press Release, HUD, HUD Steps up Enforcement of Job Creation Efforts for State and Local Governments (Mar. 8, 2010).

²For an in-depth analysis of this issue and discussion of Section 3 generally, see NHLP, *Recent Developments Show Promise for Enforcing Section 3*, 39 HOUS. L. BULL. 275, 289 (Nov.-Dec. 2009).

³Press Release, *supra* note 1.

⁴*Id.*

⁵*Id.*; see also 24 C.F.R. § 135.90 (2010) (effective June 30, 1994).

⁶Voluntary Compliance Agreement, Section 3 of the Housing and Community Development Act, HUD-St. Paul, MN, at 4, Feb. 2, 2010.

actions taken to comply with Section 3 requirements.⁷ The penalties for lack of compliance can be steep. Here, HUD withheld \$18 million in Neighborhood Stabilization Program funds due to noncompliance.⁸

As a result of the findings, HUD and the city entered into a Voluntary Compliance Agreement that sets forth the steps that the city will take to address these deficiencies.⁹ The agreement is noteworthy as an example of measures HUD may take in the future for other cities or agencies found to be noncompliant with Section 3.

The Scope of the Agreement

The agreement applies to HUD community development assistance received by the city that is used for housing rehabilitation, housing construction and other public construction.¹⁰ Community development assistance includes Community Development Block Grant funds, HOME funds, Emergency Shelter Grant funds, Neighborhood Stabilization Program funds, and Housing for Persons with AIDS funds, among others.¹¹ The agreement applies to recipients of funds for a Section 3 project in which the amount of the assistance exceeds \$200,000.¹² In addition, the agreement applies to both contractors and sub-contractors working on Section 3 covered projects that receive over \$200,000 in community development assistance if the contract or sub-contract exceeds \$100,000.¹³

Specific Provisions of the Agreement

Under the agreement, the city must comply with all relevant regulations, as well as a number of other requirements which the city must meet at various intervals throughout the agreement's four-year term. Within 60 days of the effective date of the agreement, the city must:

- hire or appoint appropriate personnel to oversee compliance with the terms of the agreement and provide HUD the names of such personnel;
- establish policies and procedures to enforce Section 3 and seek HUD approval of such; and
- place \$650,000 into a fund for the various Section 3 initiatives detailed in the agreement for the first two years of the agreement's term.¹⁴

⁷*Id.*

⁸See Ann Pratt, *Faith Leaders Want St. Paul to Pay for Its Sins*, MINN-SPOKESMAN REP., Feb. 16, 2010, <http://www.spokesman-recorder.com/news/article/article.asp?NewsID=101378&sID=4&ItemSource=L>; see also Chris Havens, *St. Paul, HUD, Settle Over Hiring, Outreach*, STAR TRIB., Feb. 3, 2010, <http://www.startribune.com/local/stpaul/83504242.html?elr=KArksUUUoDEy3LGDiO7aiU>.

⁹Voluntary Compliance Agreement, *supra* note 6, at 5.

¹⁰*Id.* at 9.

¹¹*Id.*

¹²*Id.*; see also 24 C.F.R. § 135.3(a)(3)(ii)(A) (2009).

¹³Voluntary Compliance Agreement, *supra* note 6, at 9; see also 24 C.F.R. § 135.3(a)(3)(ii)(B) (2009).

¹⁴Voluntary Compliance Agreement, *supra* note 6, at 10.

What the Agreement Does Not Do

The Agreement does not release the city from any claims arising under the False Claims Act.¹⁵ However, the Agreement does not create any right in a third party to enforce any of its provisions, or to assert any claim against the city or HUD.¹⁶ In addition, the agreement does not provide any specific relief to Frederick Newell, a local business owner who filed two administrative complaints with HUD alleging that the city of St. Paul and its Housing and Redevelopment Authority (HRA) failed to comply with Section 3. These administrative complaints precipitated the HUD compliance review.¹⁷ The agreement specifically states that it "will and hereby does fully and finally resolve Mr. Newell's pending Section 3 administrative complaints against the City and the St. Paul HRA without further action."¹⁸ Unfortunately, HUD's failure to provide any relief to Mr. Newell may discourage other parties from filing complaints with HUD.

Provisions in Place to Aid the Agreement's Success

Quotas and Identification of Appropriate Parties

Within 60 days of the effective date of the agreement, the city must develop and seek HUD's approval on a written Section 3 plan addressing contracting, employment and training opportunities. The city must establish a mechanism to ensure to the extent feasible that at least 10% of the total amount of Section 3 contracts for building in connection with housing rehabilitation and construction or other public construction be awarded to Section 3 business concerns.¹⁹ Likewise, the city must establish a mechanism to ensure that at least 3% of all other Section 3 covered contracts be awarded to Section 3 business concerns.²⁰ To aid this endeavor, the agreement also requires the city to establish a process to certify Section 3 residents and business concerns.²¹

Monitoring and Compliance

Importantly, HUD has established some concrete provisions regarding how compliance with the agreement

¹⁵*Id.* at 5; 31 U.S.C. §§ 3729-3733 (2009).

¹⁶Voluntary Compliance Agreement, *supra* note 6, at 9.

¹⁷Letter from Barbara M. Knox, HUD Office of Fair Housing & Equal Opportunity, to Chris Coleman, Mayor of St. Paul 2 (Aug. 25, 2009); see also NHLP, *supra* note 2, for a discussion of the Section 3 monitoring and limited compliance review for the City of St. Paul and the determination of noncompliance.

¹⁸Voluntary Compliance Agreement, *supra* note 6, at 5. Mr. Newell, in a class action involving three companies owned partially by him, also brought suit against the City of Saint Paul, and likewise received no relief there as the Court ruled that the plaintiffs lacked standing. See *Nails Constr. Co. v. City of St. Paul*, 2007 WL 423187 (D. Minn. Feb. 6, 2007).

¹⁹Voluntary Compliance Agreement, *supra* note 6, at 11; see also 24 C.F.R. § 135.30(c)(1) (2009).

²⁰Voluntary Compliance Agreement, *supra* note 6, at 11; see also 24 C.F.R. § 135.30(c)(2) (2009).

²¹Voluntary Compliance Agreement, *supra* note 6, at 11-12.

will be assured and what penalties the city may incur for noncompliance. For example, the agreement states that HUD will monitor the city's implementation and will be given access to the city's premises, records and personnel for this purpose.²² In addition, should any acts or omissions by the city and its representatives violate the terms of the agreement, HUD may then seek specific performance and/or enforce the provisions of the agreement in federal court.²³ Also, should HUD determine after 24 months of the effective date of the agreement that the city is unwilling or unable to comply with the requirements of Section 3 and the agreement, HUD may require the city to employ the services of a consultant or contractor to perform these duties on the city's behalf.²⁴ Finally, the agreement stipulates that the city must not only submit the HUD-60002 form annually as required by law, but must also submit semi-annual reports to HUD detailing the activities it has undertaken pursuant to the Agreement.²⁵

Transparency

The agreement also provides for greater transparency in several ways. First, a copy of the agreement must be made available to any person for his/her review pursuant to the Freedom of Information Act or any other law.²⁶ Second, within 180 days of the execution of the agreement, the city must provide notice of upcoming contracting opportunities on its website, on the Contract Analysis Services bulletin board, and directly to the city's certified Section 3 business concerns.²⁷ In addition, the city must annually provide Section 3 training events for contractors, sub-contractors, grantees, sub-recipients and residents.²⁸

Conclusion

HUD's agreement with the city of Saint Paul takes important steps towards remedying the city's noncompliance with Section 3 and may serve as a watermark as to what future agreements with other cities could entail. The agreement takes significant steps to enhance transparency by increasing the reporting requirements in both frequency and depth. It also aims to create accountability by giving HUD access to the city's records, requiring the city to appoint an individual to oversee compliance, and allowing HUD to require the city to hire an outside contractor to aid the implementation of the agreement should HUD find compliance lacking. In the event that similar agreements are made with other cities, HUD could further increase transparency by making all reports that the cities provide to HUD available to the public and by announcing major steps that the cities take to correct

²²*Id.* at 10.

²³*Id.* at 17.

²⁴*Id.*

²⁵*Id.* at 16.

²⁶*Id.* at 9.

²⁷*Id.* at 13.

²⁸*Id.* at 12.

noncompliance.²⁹ In addition, HUD should post all compliance agreements and determinations of noncompliance on its website. Posting such agreements, assuming that they are favorable to the beneficiaries of Section 3, would help advocates secure local compliance with Section 3. ■

²⁹See NHLP, *supra* note 2, at 291.

Highway Funds Could Be Subject to Section 3 Requirements

The Department of Transportation (DOT) recently published a notice seeking comments on a proposal to create an experimental project which would allow states to use Community Development Block Grant (CDBG) funds with their Federal Highway Administration Funds.¹ This would trigger requirements under Section 3 of the Housing and Urban Development Act to provide geographic and income-based preferences in hiring and contracting. The proposal seeks to implement the federal government's efforts to coordinate DOT, Department of Housing and Urban Development (HUD) and Environmental Protection Agency (EPA) policies to create sustainable and livable communities.

The National Housing Law Project (NHLP) and the National Low Income Housing Coalition (NLIHC) submitted comments on the DOT notice.² The comments focused on the interface between HUD and DOT policies and practices, with an emphasis on the implications for the CDBG program and Section 3. NHLP and NLIHC generally supported the proposal, but asked that the CDBG program's primary objectives be preserved, including developing viable urban communities, providing decent housing and a suitable living environment, and expanding economic opportunities for persons of low and moderate. The comments also urged that the experimental project advance Section 3's purpose of creating employment and other economic opportunities for low- and very low-income individuals. ■

¹Livability Initiative under Special Experimental Project No. 14, 75 Fed. Reg. 15,767 (March 30, 2010).

²The comments, which were submitted May 14, 2010, are available on NHLP's homepage at <http://www.nhlp.org/>. They will be archived at NHLP's Attorney/Advocate Resource Center webpage on Section 3, <http://nhlp.org/resourcecenter?tid=115>.

RHS Makes Changes to Rural Voucher Program

For the fourth time in three years, the Rural Housing Service (RHS) has published a Notice changing provisions relating to its administration of the Rural Voucher Program, which is operated under authority provided in the annual Agricultural Appropriations Acts that have been passed since Fiscal Year 2006.¹ Unfortunately, the new Notice, which was published in the Federal Register on April 14, 2010,² continues, in several instances, not to conform either to Congress' intent on how the voucher program is supposed to run or to other laws controlling RHS' administration of its housing programs.

The RHS voucher program was first authorized in 2006 to protect subsidized residents of Section 515 Rural Rental Housing³ from displacement and loss of subsidies when owners of the housing prepay their loans and remove the developments from the rental program. The agricultural appropriations acts, which have authorized the program on an annual basis while permanent legislation is being considered,⁴ authorize RHS to operate a program that provides rental subsidies to residents of prepaid developments so that they can either remain in their current homes or move to alternative housing. The acts prescribe the level of subsidy that RHS is authorized to provide. They generally direct that RHS operate the program in conformance with the Department of Housing and Urban Development (HUD) Section 8 Enhanced Voucher Program,⁵ which is intended to protect residents of HUD-assisted rental housing whose owners elect to end their participation in the project-based Section 8 program.

The last time RHS altered the operation of its voucher program was in April 2009, when it distributed an unnumbered letter setting out the manner in which the agency was planning to operate the program.⁶ Presumably, that unnumbered letter is no longer effective since it had an expiration date of April 30, 2010.⁷

The Notice makes several important changes in the operations of the program. First, it eliminates the three-year timeframe, announced for the first time last year,

for receiving voucher assistance. Instead, continued eligibility for the voucher is dependent on annual congressional appropriations.⁸ This is consistent with the HUD Enhanced Voucher Program and eliminates a restriction that was not part of the voucher authorizing statutes.

Second, the Notice makes clear that voucher recipients have a right to appeal the level of assistance provided them under the voucher program in accordance with the United States Department of Agriculture's (USDA) administrative appeals process, which is set out in USDA regulations.⁹ This is the first time that RHS has openly acknowledged that voucher applicants have a right to appeal the RHS decision. While the Notice appears to limit the right to appeal to challenges regarding level of assistance, presumably voucher applicants can also appeal other eligibility decisions.

Third, the new Notice continues to differentiate the RHS voucher program from the HUD Enhanced Voucher Program by prohibiting income recertifications during the time that a household is receiving voucher assistance.¹⁰ This practice, which was first announced in last year's unnumbered letter, severely penalizes households whose income decreases due to loss of employment or death of a household member, or whose rent is increased by the landlord. The impact of this provision is particularly harsh on fixed-income, two-person elderly households whose rent payments may increase from 30% of household income to 60% of household income when one of the two persons leaves the household due to an illness or death. Effectively, the increased rent burden assures that the remaining household member will have to move from the dwelling due to RHS' unwillingness to recertify the household income.

Fourth, the Notice continues to require United States citizenship or permanent resident status as a condition of eligibility.¹¹ While this is consistent with the general requirements of Section 214 of the Housing and Community Development Act of 1980,¹² it omits two very significant provisions mandated by that section. Under Section 214, persons who are 62 years of age or older can simply submit a declaration establishing their residency status in the United States and are not required to actually proffer any documents to support that statement.¹³ The RHS Notice does not provide senior residents with this option and, therefore, violates Section 214. Moreover, Section 214 authorizes an appeals procedure under which persons whose resident status in the United States is deemed to make the person ineligible for assistance can appeal the

¹See, e.g., Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2010, Pub. L. 111-80 (Oct. 16, 2009).

²75 Fed. Reg. 19,353 (Apr. 14, 2010).

³42 U.S.C. § 1485 (2003).

⁴The most recent bill that would permanently authorize a rural voucher program to protect residents of prepaying projects against displacement is H.R. 4868, 111th Cong. (2010). The rural provisions are incorporated in Title VIII of that bill.

⁵42 U.S.C. § 1437f(t) (2003).

⁶See NHLP, *Rural Housing Service Modifies Operation of Rural Voucher Program*, 39 HOUS. L. BULL. 133, 142 (June 2009).

⁷See, Unnumbered Letter from James C. Alsop, Acting Administrator Housing and Community Facilities Programs, to State Directors, Rural Development (Apr. 10, 2009).

⁸75 Fed. Reg. 19,353, 19,356, ¶ 7 (Apr.14, 2010).

⁹7 C.F.R. pt. 11 (2009).

¹⁰75 Fed. Reg. 19,355, ¶ 5. RHS maintains that it cannot recertify household income because the appropriations acts set the voucher subsidy level and the agency cannot deviate from that statutory provision.

¹¹*Id.* at 19,354, ¶ 1.

¹²Codified at 42 U.S.C. § 1436a (2003).

¹³§ 1436a(d)(1)(A).

determination to the Immigration and Customs Enforcement Division of the Department of Homeland Security.¹⁴ The RHS Notice makes no mention of this appeal process and, therefore, also violates Section 214.

The current administrator of RHS has previously been advised of the fact that its operation of the Rural Voucher program does not conform to the HUD Section 8 Enhanced Voucher Program, that it violates Section 214, and that other provisions of the program are onerous and contrary to the intent of Congress. For reasons that are not clear, the administration has chosen to ignore these violations of law and to continue to operate the program the same way it has for the past four years. Advocates who represent residents who are affected by these provisions are urged to challenge RHS' administration of the program. ■

California Court Rejects Section 8 Tenant's Source of Income Discrimination Claim*

An April 8, 2010, the California Court of Appeal issued a troubling decision for tenants' rights groups and housing law advocates. The Court held in *Sabi v. Sterling*¹ that the California Fair Employment and Housing Act's "source of income" discrimination provision does not protect tenants against discrimination based on their participation in the Section 8 Voucher program.² The court also held that under the California Disabled Persons Act (DPA), an accommodation is not necessary for an in-place tenant. This ruling puts California law at odds with that of other states.

Background and Procedural History

In light of the case's facts, advocates were hopeful that the court would settle the issue of discrimination against Section 8 tenants in a manner that would afford more protections to such tenants in California. Elisheba Sabi, the appellant, is an elderly, disabled widow who brought an action against her landlords, Donald T. Sterling and the Donald T. Sterling Corporation. Mr. Sterling owns many residential properties. He has been sued a number of times, including by the U.S. Department of Justice (DOJ), for other instances of housing discrimination.³

Ms. Sabi and her husband lived in the apartment for 17 years. Their children moved out in 2001, but remained on the original lease, dated 1988. The family applied for Section 8 tenant-based assistance in 1998, and Ms. Sabi and her husband received the voucher after five years on the waitlist. When her husband passed away and her Supplemental Security Income (SSI) alone was insufficient for her rent, she requested that her landlords accept her voucher so that she could independently afford her rent and continue to reside at her home. Ms. Sabi requested that her landlords accept her voucher as a reasonable accommodation for her disabilities. The landlords refused, despite requests from Ms. Sabi's children, the Legal Aid Foundation of Los Angeles, and the Housing Authority of the City of Santa Monica (SMHA).

*The author of this article is Jia Min Cheng, a graduate of the University of Oregon School of Law and a volunteer at the National Housing Law Project. Ms. Cheng is also a volunteer attorney in the Housing Division at Bay Area Legal Aid.

¹*Sabi v. Sterling*, No. B205279 (Cal. Ct. App. Apr. 8, 2010).

²See Katherine Lehe, *Courts Consider Landlord Defenses to Source of Income Laws*, 38 HOUS. L. BULL. 235, 239 (Nov. 2008).

³The DOJ's case, *United States v. Donald Sterling, et al.* (C.D. Cal.), led to the largest settlement in a housing discrimination claim for multifamily rental housing. More information is available at the DOJ website, <http://www.justice.gov/crt/housing/documents/casesummary.php>.

¹⁴§ 1436a(d)(5).

Ms. Sabi attempted to find other housing that would be suitable for her needs and even received extensions on her voucher from the SMHA to do so, but to no avail. When it became clear that moving would be detrimental to her health, Ms. Sabi brought an action against her landlords in the Superior Court of the County of Los Angeles, asserting claims of source-of-income discrimination under the California Fair Employment and Housing Act (FEHA) and disability discrimination under FEHA, California's Unruh Civil Rights Act and the DPA.

The trial court dismissed the claims for source of income discrimination and disability discrimination under the DPA as not actionable as a matter of law.⁴ Ms. Sabi appealed the decisions. She also argued on appeal that the trial court's refusal to instruct the jury to disregard the contractual obligation of her children to pay rent in determining whether the reasonable accommodation was necessary had a prejudicial effect and warranted a reversal on the FEHA disability discrimination claim.

On appeal, the court answered in the negative on two important questions: (1) whether the Legislature intended for FEHA to encompass Section 8 vouchers; and (2) whether the refusal to accept a Section 8 voucher from an existing tenant who is disabled and low income interferes with her "equal opportunity to use and enjoy" her home under the DPA.

Section 8 Vouchers and Source of Income Discrimination

Under FEHA,⁵ it is unlawful "[f]or the owner of any housing accommodation to discriminate against . . . any person because of the . . . source of income . . . of that person."⁶ "Source of income" is "lawful, verifiable income paid directly to a tenant or paid to a representative of a tenant."⁷ In 2004, an amendment was added to FEHA, stating that "[f]or the purposes of this section, a landlord is not considered a representative of a tenant."⁸

Ms. Sabi asserted that her landlords' refusal to accept her Section 8 voucher was source-of-income discrimination prohibited by FEHA.⁹ Ms. Sabi and amicus curiae argued that the Legislature intended for FEHA to encompass Section 8 vouchers.¹⁰ A liberal construction of FEHA's definition of "source of income" covers Section 8 vouchers.¹¹ Ms. Sabi argued that "'income' constitutes any benefit

received by a person that results in an increase in the aggregate amount of cash available to them"¹² and that Section 8 assistance payments are within this definition.

The court disagreed about the need to delve deeply into the legislative history of FEHA and interpret the language. Instead, it held that the language of the relevant section was unambiguous.¹³ The court focused on distinguishing the voucher, which cannot be "paid," from currency, which is "paid." In rejecting Ms. Sabi's argument that the housing subsidy funds are lawful verifiable income paid by HUD to the public housing agency (PHA) as the tenant's representative, the court simply stated that a transfer of federal funds to the PHA is not "anyone's income."¹⁴ Furthermore, the court rejected Ms. Sabi's contention that Section 8 vouchers are "paid" to the PHA, and that the PHA is a representative of the tenant. The court stated that the PHA "receives housing assistance funds from HUD" and does not receive vouchers but rather "issues a voucher to the tenant."¹⁵ Although the Court acknowledged that "[t]o some, sound social policy may call for an inclusion of Section 8 assistance payments in the tenant's source of income," it noted that "so far the Legislature does not think so."¹⁶

The court repeatedly characterized the landlords' actions as refusing to participate in the Section 8 program, rather than as Section 8 discrimination. It was not convinced that the legislative history of FEHA shows "that it was the intent of the Legislature to enact legislation that compelled landlords to accept Section 8 assistance payments from a PHA."¹⁷ Furthermore, the court noted that while the Legislature was aware of the problem of landlords refusing to participate in the Section 8 program, it did not address Section 8 vouchers specifically and instead prohibited "source of income" discrimination.¹⁸ Ms. Sabi cited a June 2, 2000, letter by the Legislative Counsel stating that "Section 8 assistance payments are included in the source of income."¹⁹ The Court rejected the opinions of the Legislative Counsel as neither binding nor persuasive. The Court stated that it was reluctant to conclude, based on "[s]tray comments in one, two or even three committee analyses amid dozens of studies and reports, especially when quoted out of context" that the "Legislature intended to prohibit 'Section 8 discrimination'."²⁰

Overall, the court's reasoning in rejecting the proposition that Section 8 vouchers are covered under the source of income discrimination provision of FEHA is somewhat

⁴Brief of Petitioner-Appellant at 4, 5, *Sabi v. Sterling*, No. B205279 (Cal. Ct. App. Apr. 8, 2010).

⁵CAL. GOV'T CODE § 12955 *et seq.* (2009).

⁶§ 12955(a).

⁷§ 12955(p).

⁸§ 12955(p)(1).

⁹Brief, *supra* note 4, at 21.

¹⁰*Id.* at 13; *see also* Brief of Appellant's Response to the Amicus Curiae Brief Filed by California Apartment Association, California Apartment Law Information Foundation, and Apartment Association of Orange County at 6-21, *Sabi v. Sterling*, No. B205279 (Cal. Ct. App. Apr. 8, 2010).

¹¹Brief, *supra* note 4, at 23, 24.

¹²*Id.* at 27.

¹³*Sabi*, *supra* note 1, slip op. at 10.

¹⁴*Id.*, slip op. at 16.

¹⁵*Id.*, slip op. at 15.

¹⁶*Id.*, slip op. at 20.

¹⁷*Id.*, slip op. at 10.

¹⁸*Id.*, slip op. at 20, 21; *but see* Brief, *supra* note 4, at 26 ("The statute does not list any representative examples of what constitutes 'income' for its purposes.").

¹⁹*Sabi*, *supra* note 1, slip op. at 25.

²⁰*Id.*, slip op. at 26.

convoluted. However, the court made clear that it did not believe that Section 8 vouchers constitute income for the purposes of this statute.

Section 8 Vouchers and Reasonable Accommodations

Under the DPA, “[i]ndividuals with disabilities shall be entitled to full and equal access, as other members of the general public, to all housing accommodations offered for rent, lease, or compensation in this state.”²¹ Additionally, “[a]ny person renting, leasing, or otherwise providing real property for compensation shall not refuse to make a reasonable accommodation in rules, policies, practices, or services, when those accommodations may be necessary to afford individuals with a disability equal opportunity to use and enjoy the premises.”²²

Ms. Sabi has mental and physical disabilities that have resulted in limited mobility. Her ailments and her age prevented her from working, and after her husband passed away, she depended on her SSI and financial help from her sons to cover living expenses. She requested that her landlords accept her Section 8 voucher as a reasonable accommodation for her disabilities because without Section 8 assistance payments, her SSI was insufficient for her to continue to reside at her dwelling. Prior to the suit, Ms. Sabi was able to remain in the unit because her children were still obligated to pay rent under the lease, even though they lived elsewhere. She brought the suit against her landlords so that she could live independently.

Ms. Sabi argued on appeal that the trial court’s change to the jury instructions was exploited by the landlords at closing arguments regarding her sons as a collateral source. The trial court omitted language instructing the jury to disregard the lease obligation of her sons to pay rent. On appeal, the landlords repeatedly argued that there was no FEHA violation in denying the reasonable accommodation because “Appellant’s children had an independent contractual obligation to Respondents to pay the rent.”²³

The court held that for there to be a claim under the DPA,²⁴ the rules, policies, practices or services in question must “actually impinge on the tenant’s use and enjoyment of the premises.”²⁵ The court found that since Ms. Sabi was able to remain in her home, there was no interference with her use and enjoyment.²⁶ Taken to its logical conclusion, this holding would prevent any in-place tenant who is not threatened with eviction from ever requesting an accommodation, despite a long line of cases stating otherwise.²⁷

The Court characterized the situation in a manner wholly different from Ms. Sabi’s characterization: “Appellant continued to live in the apartment she rented from respondents not because her sons were ‘obligated’ on the lease, but because she continued to meet her obligations under the lease.” Also “she had been living there for 17 years, i.e., she evidently managed to pay the rent for a considerable period of time.” Thus, instead of considering the reasonable accommodation request at the time it was made, the court looked to whether it was needed before Ms. Sabi’s circumstances changed. According to Ms. Sabi, she was only able to continue to meet her obligations under the lease because of the aid from her children.²⁸ It is unclear why the court disregarded the change in circumstances—her husband’s death and the resulting loss of her husband’s income—that made it impossible for her to pay her rent independently. Because the court’s reasoning conflicts with federal law regarding the analysis of whether an accommodation is necessary, it could prove problematic for tenants in California trial courts.

Conclusion

The court’s decision makes it increasingly clear that a legislative solution is needed to protect Section 8 voucher holders. The court, though purporting to be sympathetic to Ms. Sabi’s case, asserted that “questions of social policy are not for us to debate and they are certainly not for us to resolve. This is for the Legislature to do. We must confine ourselves to apply the law that the Legislature has enacted.”²⁹ With regard to the holdings regarding reasonable accommodation, advocates are seeking depublishation. The California Supreme Court is authorized under the state’s constitution and rules of court to depublish court of appeal cases. If the case is depublished, it cannot be cited or quoted. ■

²¹CAL. CIV. CODE § 54.1(b)(1) (2009).

²²§ 54.1(b)(3)(B).

²³Brief, *supra* note 4, at 18.

²⁴CAL. CIV. CODE § 54.1(b)(3)(B) (2009).

²⁵Sabi, *supra* note 1, slip op. at 28.

²⁶*Id.*, slip op. at 28.

²⁷*See, e.g.,* Bronk v. Ineichen, 54 F.3d 425, 429 (7th Cir. 1995) (holding that

in order to be necessary, a reasonable accommodation must “affirmatively enhance a disabled plaintiff’s quality of life by ameliorating the effects of the disability”); Auburn Woods I Homeowners Ass’n v. Fair Employment & Hous. Comm’n, 121 Cal. App. 4th 1578 (2004).

²⁸Brief, *supra* note 4, at 10.

²⁹Sabi, *supra* note 1, slip op. at 27.

California Supreme Court Rules on Residency Restrictions for Sex Offenders

On February 1, 2010, the California Supreme Court upheld the enforcement of residency restrictions against registered sex offenders on parole who committed the underlying sex offense before the restrictions became effective.¹ In *In re E.J.*, the court found that California Penal Code Section 3003.5(b) is not being applied retroactively, but prospectively, and does not violate the ex post facto clauses of the state and federal Constitutions.² The court remanded the balance of the petitioners' constitutional challenges for further review, leaving room for the lower courts to invalidate the residency restrictions as applied to the petitioners.³

Factual and Procedural History

On November 7, 2006, California voters passed Proposition 83, The Sexual Predator Punishment and Control Act: Jessica's Law. The initiative added subdivision (b) to Section 3003.5 of the Penal Code, which states that "[n]otwithstanding any other provision of law, it is unlawful for any person for whom registration is required pursuant to Section 290 to reside within 2000 feet of any public or private school, or park where children regularly gather."⁴ The residency restrictions became effective on November 8, 2006.

On August 17, 2007, the California Department of Corrections and Rehabilitation (CDCR) began to enforce Section 3003.5(b) as a parole condition.⁵ Registered sex offenders released from custody on or after November 8, 2006, regardless of the reason for their most recent stint in prison, became subject to the parole condition.⁶ CDCR gave parolees 45 days to locate compliant housing before being subject to revocation of parole and re-incarceration.⁷ According to CDCR policy, it would not arrest parolees who, unable to locate compliant housing, became transient.⁸

Four registered sex offenders on parole filed a unified petition for writ of habeas corpus, seeking to temporarily and permanently enjoin the enforcement of the statute. Each of the petitioners committed the underlying sex offense long before the passage of Proposition 83 and

became subject to Section 3003.5(b) after serving time for a parole violation.⁹ None of the petitioners could locate compliant housing within the 45 days allotted by CDCR.¹⁰

The petitioners claimed that the enforcement of Section 3003.5(b) against registered sex offenders convicted of the underlying sex offense before the residency restrictions became effective is retroactive and contravenes the ex post facto clauses of the federal and state Constitutions.¹¹ Moreover, the petitioners claimed that Section 3003.5(b) is an unreasonable, vague and overbroad parole condition that infringes on their federal and state constitutional rights, including their privacy rights, their right to interstate travel, their property rights, and their substantive due process rights under the federal Constitution.¹²

Retroactive Application

Insofar as Proposition 83 does not expressly state that the residency restrictions are to be applied retroactively, the petitioners claimed that the enforcement of Section 3003.5(b) is impermissible under Section 3 of the Penal Code, as the petitioners committed the underlying sex offense long before the passage of the initiative.¹³ Under Section 3, "[n]o part of [the Penal Code] is retroactive, unless expressly so declared."¹⁴

The California Supreme Court established the test for determining retroactivity in *People v. Grant*.¹⁵ A law is retroactive if it attaches new legal consequences to conduct that occurred before the law became effective.¹⁶ "Thus, the critical question for determining retroactivity usually is whether the last act or event necessary to trigger application of the statute occurred before or after the statute's effective date."¹⁷

Looking to several prior cases, the court found that Section 3003.5(b) does not operate retroactively, but prospectively.¹⁸ The court reasoned that the statute does not focus on the conduct that led to the underlying sex offense,

⁹*In re E.J.*, 223 P.3d at 36-38.

¹⁰*Id.*

¹¹*Id.* at 34.

¹²*Id.* at 38.

¹³*Id.* at 34.

¹⁴Cal. Penal Code § 3 (Westlaw Mar. 29, 2010).

¹⁵*In re E.J.*, 223 P.3d at 40 (citing *People v. Grant*, 20 Cal. 4th 150,157 (1999)).

¹⁶*Id.*

¹⁷*Id.*

¹⁸*Id.* at 41-43. The court found three cases instructive: *Grant*, 20 Cal. 4th 150, 157 (1999) (upholding a conviction for "continuous sexual abuse of a child" for a course of conduct that began before and ended after the statute became effective); *Bourquez v. Super. Ct.*, 156 Cal. App. 4th 1275 (2007) (upholding the application of the portion of Proposition 83 that permitted the extension of the civil commitment terms of individuals deemed sexually violent predators to petitions pending at the time Proposition 83 became effective); *People v. Mills*, 6 Cal. App. 4th 1278 (1992) (upholding a conviction for being a felon in possession of a firearm where the underlying felony occurred before the legislature amended the possession statute to include the type of firearm carried by the defendant).

¹*In re E.J.*, 223 P.3d 31 (Cal. 2010).

²*Id.* at 34.

³*Id.* at 35.

⁴Cal. Penal Code § 3003.5(b) (Westlaw Mar. 29, 2010). Section 290 imposes on individuals convicted of certain sex offenses a lifetime requirement to register with local law enforcement.

⁵*In re E.J.*, 223 P.3d at 36.

⁶*Id.* at 36.

⁷*Id.* at 36.

⁸Petition for Writ of Habeas Corpus, Memorandum of Points and Authorities at 5, *In re E.J.*, 223 P.3d 31 (Cal. 2010) (No. S157631).

but on the conduct of registered sex offenders after release on parole.¹⁹ The pivotal “last act or event” that must occur before Section 3003.5(b) comes into play is the securing of housing after release from custody.²⁰ Because the petitioners obtained noncompliant housing after November 8, 2006, the court concluded that the residency restrictions are not being applied retroactively.²¹

In addition, the court turned to “familiar considerations of fair notice, reasonable reliance, and settled expectations” for guidance.²² The court maintained that the petitioners knew, or should have known, of the need to abide by the residency restrictions, as Proposition 83 became effective before the petitioners’ release dates.²³ The dissent countered that the petitioners could not have known of the parole condition at the time of release.²⁴ The plain language of Proposition 83 does not indicate who is subject to the residency restrictions. In fact, it took CDCR eight months after the passage of the initiative to determine how to enforce Section 3003.5(b).²⁵ The petitioners could not have known of the need to follow the residency restrictions until after CDCR gave them 45 days to locate compliant housing. Consequently, the dissent reasoned, the implication that the petitioners intentionally entered noncompliant housing is inaccurate.²⁶

Ex Post Facto

In a closely related argument, the petitioners claimed that as applied to parolees who became registered sex offenders before November 8, 2006, Section 3003.5(b) is an unconstitutional ex post facto law, as it “makes more burdensome the punishment for a crime, after its commission.”²⁷ The court noted that to violate the ex post facto clause, a law must be retrospective, or apply to events that occurred before its enactment, and it must disadvantage the individuals affected by it.²⁸ Thus, finding that a law is being applied retroactively is a threshold requirement for finding that it is an unconstitutional ex post facto law.²⁹ Given its conclusion that Section 3003.5(b) is not being applied retroactively, the court rejected the petitioners’

ex post facto argument.³⁰ The court acknowledged that the petitioners are subject to Section 3003.5(b) by virtue of their status as registered sex offenders, a status obtained before the passage of Section 3003.5(b). But, because the violation of Section 3003.5(b)—securing noncompliant housing—occurred after the statute became effective, the residency restrictions do not additionally punish the petitioners for their original sex offense convictions.³¹

Unreasonable Parole Condition

The decision, however, did not foreclose the possibility of relief for the petitioners.³² The petitioners claimed that Section 3003.5(b) is an unreasonable, vague and overbroad parole condition that infringes on a number of state and federal constitutional rights, including their privacy rights, their right to interstate travel, their property rights and their substantive due process rights under the federal Constitution.³³ The court noted that the claims “present considerably more complex ‘as applied’ challenges” to the enforcement of Section 3003.5(b) and found the factual record insufficient to permit the resolution of the challenges.³⁴ The petitioners did not present sufficient evidence on the amount of compliant housing available in the cities and counties where the petitioners live.³⁵ In addition, the court found unsettled the matter of whether CDCR is obligated to help the petitioners locate compliant housing.³⁶ As a result, the court remanded the claims to the trial courts in the counties where the petitioners are on parole to establish the necessary facts.³⁷ The court indicated that the pertinent facts would include each petitioner’s current parole status, the precise location of each petitioner’s current residence and its proximity to the nearest school or park where children regularly gather, the amount of compliant housing available in each petitioner’s respective city or county, an assessment of how Section 3003.5(b) is being applied in each petitioner’s city or county, and a complete record of the protocol CDCR is following to enforce Section 3003.5(b).³⁸

¹⁹*In re E.J.*, 223 P.3d at 41-43.

²⁰*Id.* at 41 (citing *Grant*, 20 Cal. 4th at 157-158).

²¹*Id.* The dissent disagreed, finding the pivotal date to be the date the petitioners became registered sex offenders. The petitioners are subject to the residency restrictions by virtue of their status as registered sex offenders, and the petitioners acquired their status at the time of their convictions.

²²*Id.* at 40.

²³*Id.* at 43.

²⁴*Id.* at 52. (Moreno, J. dissenting).

²⁵*Id.*

²⁶*Id.*

²⁷*Id.* at 44 (citing *Collins v. Youngblood*, 497 U.S. 37, 42 (1990)).

²⁸*Id.* at 44-45 (citing *Weaver v. Graham*, 450 U.S. 24, 28-29 (1981)). There is no significant difference between the federal and state ex post facto clauses. *Tapia v. Super. Ct.*, 807 P.2d 434 (Cal. 1991).

²⁹*In re E.J.*, 223 P.3d at 42 (citing *Mills*, 6 Cal. App. 4th at 1279).

³⁰*Id.* at 44-45.

³¹*Id.*

³²*Id.* at 45-47.

³³*Id.* at 45.

³⁴*Id.*

³⁵*Id.* at 46. The court found that the maps submitted by the petitioners that purported to show the lack of compliant housing across the state “contain no dates reflecting when they were prepared, no street names or addresses, no indication of where these petitioners are residing in relation to the maps, no indication of the locations of any ‘schools or parks where children regularly gather,’ and no legend adequately explaining how the maps were prepared.”

³⁶*Id.* at 47. In footnote 9, the court noted that parolees remain in the constructive custody of CDCR and are not formally discharged from custody until the expiration of the parole term. CDCR is obligated by statute to “assist parolees in the transition between imprisonment and discharge.” (citing Cal. Penal Code §§ 3000 subd.(a)(1), 3074).

³⁷*Id.*

³⁸*Id.*

The dissent underlined the need for the trial courts to consider the petitioners' right to intrastate travel, noting that Section 3003.5(b) cannot be upheld unless it is reasonably necessary to further a legitimate government interest.³⁹ The dissent pointed to *In re White*, in which the Court of Appeal struck down a probation condition that barred individuals convicted of prostitution from certain areas of the city of Fresno as a violation of the right to intrastate travel.⁴⁰ Similarly, in *People v. Smith*, the Court of Appeal struck down a probation condition that prohibited registered sex offenders from leaving the county, holding that the parole condition bears "no reasonable relation to the crime."⁴¹ The dissent implied that the application of Section 3003.5(b) to individuals whose sex offense did not involve children may not reasonably relate to the goal of the statute—to keep children safe.⁴²

Conclusion

There is no credible evidence that residency restrictions protect children from sex crimes.⁴³ To the contrary, studies show that residency restrictions have no impact on recidivism rates.⁴⁴ In fact, experts suggest that such laws decrease public safety by forcing registered sex offenders into homelessness.⁴⁵ As sex offenders become financially, physically and emotionally unstable, the risk of recidivism may increase.⁴⁶ The decision in *In re E.J.* leaves room for the lower courts to invalidate Section 3003.5(b) as applied to parolees in particular jurisdictions. Such a decision would both improve public safety and provide a measure of relief to registered sex offenders, who, even without the residency restrictions, struggle to access and remain in housing. ■

³⁹*Id.* at 55 (Moreno, J. dissenting).

⁴⁰*Id.* (citing *In re White*, 97 Cal. App. 3d 141 (1979)).

⁴¹*Id.* (citing *People v. Smith*, 152 Cal. App. 4th 1245, 1252 (2007)).

⁴²*Id.* at 56.

⁴³HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE US, 7 (2007), available at <http://www.hrw.org/en/reports/2007/09/11/no-easy-answers>.

⁴⁴NIKI DELSON ET AL., CALIFORNIA COALITION ON SEXUAL OFFENDING, POSITION PAPER ON SEX OFFENDER RESIDENCE RESTRICTIONS 8 (2008).

⁴⁵*Id.* at 9. The number of transient registered sex offenders in California grew 34% between July 2006 and April 2008.

⁴⁶*Id.* at 10.

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,¹ Lexis,² or, in some instances, the court's website.³ Copies of the cases are *not* available from NHLP.

Public Housing: Noise Ordinance Violation Sufficient to Evict

Hous. & Redev. Auth. of St. Cloud v. Tesfaye, 2010 WL 1753271 (Minn. Ct. App. May 4, 2010) (unreported). A public housing tenant violated a city noise ordinance by creating a late night disturbance that could be heard more than 50 feet down the hallway from his unit. The ordinance required that such a violation be listed as a material breach and grounds for eviction in any lease agreement, and it imposed sanctions on landlords who rented to repeated violators. The housing authority commenced an eviction action based on the noise citation. After an informal hearing and a formal administrative hearing affirmed that the noise violation was a sufficient breach of the lease for eviction, the tenant sought *de novo* review. The trial court determined that the tenant's violation of the city noise ordinance supported his eviction from public housing. On appeal, the tenant argued that the noise violation was not a serious breach of the lease and that any lesser standard violated just cause requirements for eviction from public housing. The court found no error in the lower court's determination that the noise violation was both a material and serious violation of the lease. The court refused to review the hearing officer's decisions because its scope of review extended no further than the lower court's *de novo* determinations.

Public Housing: Reasonable Accommodation Request

United States v. Hiialeah Hous. Auth., 2010 WL 1540046, slip op. (S.D. Fla. Apr. 19, 2010). The United States sued Hiialeah Housing Authority (HHA) for violating the Fair Housing Act (FHA) when it failed to provide an accommodation to a disabled public housing tenant. HHA had offered the tenant a substitute unit rather than proceed with a for-cause termination over loud quarrels with the neighbors.

¹<http://www.westlaw.com>.

²<http://www.lexis.com>.

³For 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>.

The tenant initially accepted, but upon viewing the unit he wrote to say he could not move because he had disabilities preventing him climbing stairs to the bathroom. HHA did not respond other than to reinstate the termination. In defending HHA's eviction suit, the tenant argued that HHA had failed to reasonably accommodate his disability. During court-ordered mediation, the tenant provided some medical documentation of a back condition, but HHA requested further documentation before they would put the tenant on a waiting list for an accessible unit. The tenant then agreed to voluntarily vacate his original unit. He complained to the Department of Housing and Urban Development (HUD), whose investigation resulted in the United States' FHA suit. The court granted summary judgment to HHA, finding that based on the inadequate medical documentation the tenant provided, the United States could not show HHA knew or should have known the tenant was disabled, or that HHA knew the requested accommodation was necessary. The court further stated that no denial of accommodation occurred because HHA had instead requested further medical documentation, and the tenant opted to remain in his original unit until voluntarily vacating.

Public Housing: Marijuana Possession and Reasonable Accommodation

Moore v. New York City Hous. Auth., 2010 WL 1542524, slip op. (N.Y. Sup. Ct. Apr. 19, 2010). A public housing tenant moved to vacate the termination of her tenancy by the New York City Housing Authority (NYCHA) for marijuana possession. The tenant stated that she suffered from epilepsy and used the marijuana to avoid having seizures. She argued that termination of her tenancy constituted a failure to provide a reasonable accommodation for her disability. The court found that the tenant failed to establish that she had a qualifying disability because she did not present any evidence that she had epilepsy. Further, the court found that the legality of the use of marijuana is a matter for the legislature, and that NYCHA was not required to provide the tenant with an accommodation that allowed her to engage in illegal activities. The court also noted that an individual with a disability does not include an individual who is currently engaging in the illegal use of drugs when a public housing authority acts on the basis of such use. The court therefore upheld the tenant's termination.

Public Housing: Administrative Proceedings After Judicial Eviction Proceedings

Grillasca v. New York City Hous. Auth., 2010 WL 1491806, slip op. (S.D.N.Y. Apr. 7, 2010). A public housing tenant brought suit to enjoin the New York City Housing Authority

(NYCHA) from holding an administrative proceeding to terminate her public housing tenancy. NYCHA had previously sought to evict the tenant under the state's "Bawdy House Law" after she pleaded guilty to cocaine possession. The action was dismissed because NYCHA failed to meet the standard applicable to Bawdy House Law proceedings, which require a showing that the apartment had been used habitually for an illegal trade and that the tenant knew or should have known of the illegal trade. The tenant argued that the proposed administrative proceeding violated federal law because it would be based on the same misconduct that was at issue in the earlier judicial eviction proceeding. The court found that the tenant raised sufficiently serious questions going to the merits of her claim to make them a fair ground for litigation. The court noted that 24 C.F.R. § 966.4 requires a public housing agency pursuing a judicial eviction action to inform a tenant that she will not have an administrative hearing. The court noted that "[i]t is difficult to understand how this provision would serve the interests of tenants if PHAs, having tried and failed to use a judicial eviction option, still had the ability to evict them through an administrative mechanism." However, the court rejected the tenant's argument that NYCHA was barred from pursuing the administrative proceeding by the doctrine of res judicata. The court noted that NYCHA's claims based on breach of NYCHA rules and regulations could not have been brought in the earlier eviction proceeding, and that a different legal standard would apply to the administrative proceeding. Additionally, the court found that the tenant failed to demonstrate irreparable harm due to the availability of an alternative adequate legal remedy. The court found that even if a hearing officer determined that the tenant should be evicted, she could move to stay any holdover proceedings in the state Supreme Court. As a result, the court denied the tenant's preliminary injunction motion.

Housing Choice Voucher Program: Challenge to Informal Hearing Process

Wilson v. Seattle Hous. Auth., 2010 WL 1633323, slip op. (W.D. Wash. Apr. 22, 2010). The plaintiffs sued the Seattle Housing Authority (SHA) and the Department of Housing and Urban Development (HUD) on behalf of a class of all persons terminated from Section 8 housing in the previous six years, all disabled Section 8 tenants terminated in the past six years, and all similarly situated individuals who may be terminated in the future. The plaintiffs alleged that SHA's informal hearing process, which followed HUD's regulations and was approved by HUD, violated the Constitution and discriminated against tenants with disabilities. HUD moved to dismiss their claims against it, arguing that the plaintiffs lacked standing and had failed to state a claim. The court refused

to dismiss for lack of standing because there was a dispute as to whether HUD regulations caused defects in the SHA hearing process, and notice pleading did not require the complaint to specify exactly how the plaintiffs were injured. The court dismissed the plaintiffs' claims under the Rehabilitation Act and the United States Housing Act, ruling that no private right of action existed to enforce these laws. It dismissed the Americans with Disabilities Act claim as inapplicable against a federal agency. With regard to the remaining claims, the court held that, in general, the plaintiffs did not fail to state a claim because they adequately pleaded that the HUD regulations and the approval of SHA administrative procedures injured them. The court found the pleadings stated a claim for relief under the Fair Housing Act and were also sufficient in their assertion that HUD had violated due process under the Fifth Amendment by not allowing for a more rigorous hearing process. It allowed the plaintiffs' claim under the Administrative Procedure Act because their remedy against SHA alone might be inadequate if the procedural defects were caused by HUD regulations.

Housing Choice Voucher Program: Due Process in Benefit Termination

Ross v. Houston Hous. Auth., 2010 WL 1741357, slip op. (S.D. Tex. Apr. 29, 2010). A Section 8 voucher participant received a notice of proposed termination based on a charge of theft by check. The participant requested an informal hearing, which was scheduled twice but never occurred. By the scheduled date of the second hearing, the hearing officer determined the participant was not in fact barred by her criminal record, but the participant and the housing authority did not communicate on this matter. The participant sued the housing authority for violating her due process rights under 42 U.S.C. § 1983 and the Supremacy Clause of the Constitution, seeking reimbursement for underpayment of benefits plus actual damages. The court denied her request for summary judgment and instead granted it to the housing authority, ruling that the participant had provided no evidence of any housing authority policy that caused a violation of her due process rights in the program, and without this her claim could not prevail. The court rejected her Supremacy Clause claim because she did not assert any conflict in the voucher program between state and federal law.

Housing Choice Voucher Program: Voucher Expiration Due to Landlord Delay

Miller v. Mulligan, ___ N.Y.S.2d ___, 2010 WL 1796799 (N.Y. App. Div. 2010). A Section 8 applicant lost her voucher when 180 days passed before the voucher attached to a rental unit. Although she had located a unit and signed

several documents with her prospective landlord, the landlord did not comply with agency requests that it submit a signed copy of the lease. The applicant sued the Division of Housing and Community Development seeking to annul its determination that her voucher had expired. She argued that the agency's unreasonable processing delays caused her voucher termination and challenged its decision not to extend the voucher term beyond 180 days as well as its failure to do more to compel the landlord to submit the signed lease. The Supreme Court dismissed her case for failure to state a claim. On appeal, the court affirmed, holding that the 180-day maximum is fixed by federal regulation and that the tenant failed to state a claim that the voucher termination violated lawful procedure, was caused by an error of law, or was arbitrary or capricious.

Housing Choice Voucher Program: No Private Right to Enforce Portability

Koroma v. Richmond Redev. & Hous. Auth., 2010 WL 1704745, slip op. (E.D. Va. Apr. 27, 2010). A Section 8 program participant sought to port his voucher across state lines. He found a rental in the receiving jurisdiction, but the initial public housing authority would not accept billing. Consequently Richmond Redevelopment and Housing Authority (RRHA), the receiving PHA, refused to execute a housing assistance program (HAP) contract. The participant sued RRHA, seeking to enforce the Housing Act. The court determined that there is no private right of action to enforce voucher portability, because the relevant statutes do not use mandatory terms and do not focus on Section 8 families as a benefited class, but simply guide HUD's administration. The participant next argued that his voucher had been terminated without due process under the 14th Amendment. The court responded that no right of hearing was triggered because RRHA had not terminated his voucher and could not even be said to have refused to process the participant's port, since it was not required to absorb a voucher in the absence of sufficient funds. Finally, the participant argued that, because RRHA originally stated it intended to absorb the voucher, it should be estopped under federal common law from later refusing to do so. The court rejected this argument, holding that there was no affirmative misconduct by RRHA and that promissory estoppel is generally unavailable against the government. Finding no grounds for relief, the court granted RRHA's motion to dismiss.

Housing Choice Voucher Program: Mold Injuries as State-Created Danger

McKinney v. Phila. Hous. Auth., 2010 WL 1644282, slip op. (E.D. Pa. Apr. 20, 2010). A family of Section 8 tenants

experienced damp conditions and mold in their unit. The children developed asthma, and one child suffered a coma and permanent brain damage caused by an asthma attack. The family sued their landlords for negligence and also brought claims against the public housing agency (PHA) for violating their Fifth and 14th Amendment rights and the United States Housing Act. On the defendants' motions for summary judgment, the court allowed the tenants' negligence claim to proceed, holding that the housing assistance contract created a landlord duty to repair leaks. The court granted partial summary judgment to the PHA on the Housing Act claims, ruling that the tenants lacked a private right of action to enforce the Housing Act provisions dealing with quality inspection and controls. It also held that the individual PHA defendants had qualified immunity because they were unable to understand that their conduct violated the tenants' rights. The court allowed the tenants to proceed to trial on their Fifth and 14th Amendment claims asserting the state-created danger doctrine, finding that the PHA's approval of the unit, payments to the landlord, and obstruction of the family's attempt to move out constituted affirmative acts and that the PHA's evident knowledge that mold constituted a health risk might shock the jury's conscience.

Project-Based Section 8: Managing Agent's Standing to Bring Eviction Action

Metro. Realty Group v. McSwain, 2010 WL 1740753, slip op. (N.Y. Civ. Ct. Apr. 30, 2010). The court dismissed a summary process against a Section 8 tenant because the plaintiff, the property owner's managing agent, lacked standing. Although the agent's name was listed on the lease and the owner had granted authority to contract on its behalf, the court held that these did not transmit a property interest from owner to agent and thus privity of estate did not exist between the agent and the tenant. Since the owner's previous attempt to bring suit against this tenant had also been dismissed for lack of standing, the court clarified that under HUD regulations the owner is the proper party to enforce rights under a lease, but since the owner's name did not appear on the lease, in any subsequent action the pleading must allege that the owner entered the lease through its managing agent.

Protecting Tenants at Foreclosure Act: Section 8 Tenancy Not Bona Fide

Deutsche Bank Nat'l Trust Co. v. Tulloch, __N.Y.S.2d__, 2010 WL 1796818 (N.Y. Dist. Ct. 2010). A tenant attached his Section 8 voucher to a unit subsequent to a judgment of foreclosure but prior to the actual sale. The mortgagee, Deutsche Bank, then purchased the home at the foreclosure sale. At the end of the lease term, the bank issued a

10-day notice to quit and then sued to evict. The tenant argued that the bank took ownership subject to his lease with the former owner and that he was protected by § 703 of the Protecting Tenants at Foreclosure Act (PTFA). The court ruled that he was not a bona fide tenant protected under the PTFA, because he had never tendered a rent payment to the bank and was therefore paying substantially less than market rate rent. Furthermore, at the time the lease was entered, a *lis pendens* on the property provided notice of foreclosure. Because the lease term had expired, the tenant was also not protected by the just cause requirements for terminating a Section 8 tenancy. Finally, the court rejected the tenant's state law breach of habitability claim, holding that no landlord-tenant relationship existed since rent was never tendered to the bank.

Fair Housing Act: Reasonable Accommodation for Special Use Permit

Alamar Ranch, LLC v. County of Boise, 2010 WL 1727844, slip op. (D. Idaho Apr. 27, 2010). The plaintiffs, who sought to build a residential school for children with substance abuse issues and other disabilities, sued the County of Boise for violating the Fair Housing Act (FHA) when it conditioned their special use permit on a 24-bed occupancy restriction and costly construction requirements. On cross-motions for summary judgment, the court found that the conditions impeded the plaintiffs' development plan and caused injury sufficient to support standing. The court found that a material issue of fact remained as to the number of proposed residents who would have a disability and whether a reasonable accommodation had been requested. It further found that issues of fact existed on the matter of disparate treatment and interference with an activity protected by the FHA. Finding that the situation was not extreme and that public policy disfavors punitive damages against a municipality, the court granted summary judgment to the county on that issue alone.

Fair Housing Act: Single-Family Zoning Limiting Number of Unrelated Persons

El Sereno v. City of Garland, 2010 WL 1741334, slip op. (N.D. Tex. Apr. 29, 2010). The owner of three single-family houses in Garland, Texas, sought summary judgment that the city's zoning ordinance violated the Fair Housing Act (FHA). The ordinance restricted occupancy of the houses to a single family, defined as one or more people, not more than four of whom are unrelated by blood, marriage or adoption. The court denied summary judgment on the basis that the owner had not shown the FHA protects tenants from discrimination on that basis. The court pointed out that the familial status protected under the FHA extends only to persons who are pregnant or who

are parents or other caretakers of a person under 18. The court then raised the city's entitlement to summary judgment sua sponte, granting the owner further opportunity to oppose with supporting evidence.

Fair Housing Act: Discrimination in Provision of Homeowner's Insurance Prohibited

Ojo v. Farmers Group, Inc., 600 F.3d 1205 (9th Cir. 2010) (en banc) (per curiam). African-American homeowners who were issued or applied for homeowner's insurance filed a class action against Farmers Group, claiming disparate impact discrimination in violation of the Fair Housing Act (FHA) based on increased premiums due to an allegedly discriminatory credit-scoring system. The district court dismissed the claim as preempted by the Texas Insurance Code under the reverse-preemption standard set forth in the McCarran-Ferguson Act (MFA). A panel of the Ninth Circuit Court of Appeals reversed and remanded, and rehearing en banc was subsequently granted. As a matter of first impression, the en banc court held that the FHA prohibits racial discrimination in both the denial and pricing of homeowner's insurance. The court noted that HUD has issued regulations explicitly stating that the FHA prohibits discrimination in the provision of homeowner's insurance and found that the terms of the FHA could reasonably bear this construction. According to the court, "the denial of homeowner's insurance can make housing unavailable." The court then held that the FHA could be reverse-preempted by the MFA. The court noted that the FHA does not specifically relate to insurance, and that the Texas Insurance Code was enacted for the purpose of insurance regulation. However, an outstanding question remained as to whether the application of the FHA to the instant case might invalidate, impair, or supersede the provisions of the Texas code that authorize insurance companies to use credit scoring in setting insurance rates. Because this question of Texas law was unsettled, the court certified the question to the Supreme Court of Texas and stayed further proceedings in the case.

When the city's appeals were exhausted, the court lifted its stay. The developer amended its federal complaint seeking damages for a temporary regulatory taking, violation of equal protection and due process under the federal and California constitutions, and contract violations. It filed the same claims in state court. The court dismissed the federal takings claim as unripe because the state court had not yet rendered a final decision on the matter. The court stayed the developer's other claims, finding that the following factors supported abstention: land-use planning is a sensitive area of social policy, the state court might render the federal claims moot by deciding to award damages, and the outcome in state court remained in doubt. ■

Takings: Concurrent State and Federal Suits

Palmer/Sixth Street Props., L.P. v. City of Los Angeles, 2010 WL 1658963 (C.D. Cal. Apr. 22, 2010) (unreported). A developer wanted to build a 350-unit mixed-use project on the site of a demolished affordable housing complex in Los Angeles. The city approved a permit on the condition that the developers replace the affordable units or pay an "in lieu" fee of \$5.7 million. The developer sued in federal district court, which stayed proceedings pending resolution of the developer's concurrent state court suit. The state court granted mandamus, ruling that the affordable housing requirements were preempted by other state housing law.

Recent Housing-Related Regulations and Notices

The following are significant affordable housing-related regulations and notices recently issued by the Department of Housing and Urban Development (HUD), the Department of Agriculture (USDA's Rural Housing Service/Rural Development (RD)), Federal Housing Finance Agency (FHFA), Federal Emergency Management Agency (FEMA) and the Department of Veterans Affairs. 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,¹ (2) bound volumes of the Federal Register, (3) HUD Clips,² (4) HUD,³ and (5) USDA's Rural Development website.⁴ Citations are included with each document to help you secure copies.

HUD Interim/Final Rules

Fed. Reg. 20,269-20,271 (Apr. 19, 2010) **Regulatory Reporting Requirements for the Indian Community Development Block Grant Program**

Summary: This final rule revises the reporting requirements for the Indian Community Development Block Grants program to require submission of the report on the hiring of minority business enterprises each October rather than twice a year.

Effective Date: May 19, 2010.

HUD Proposed Rules

Fed. Reg. 20,541-20,546 (Apr. 20, 2010) **Homeless Emergency Assistance and Rapid Transition to Housing: Defining "Homeless"**

Summary: This rule commences HUD's regulatory implementation of the Homeless Emergency Assistance and Rapid Transition to Housing Act of 2009 (HEARTH Act), enacted into law on May 20, 2009. The HEARTH Act defines the terms "homeless," "homeless individual," "homeless person," and "homeless individual with a disability," but these definitions contain terms that require further elaboration. HUD is initiating the rulemaking process with this proposed rule, which solely addresses the definition of these terms.

Comment Due Date: June 21, 2010.

¹http://www.access.gpo.gov/su_docs.

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

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

⁴<http://www.rdinit.usda.gov/regs>.

HUD Federal Register Notices

Fed. Reg. 25,284-25,285 (May 7, 2010) **Tracking the Use of CDBG Homeowners and Small Landlords Disaster Assistance Grants**

Summary: This study will evaluate the role of supplemental Community Development Block Grant disaster recovery funding in housing recovery in the three states most affected by hurricanes Katrina and Rita (Louisiana, Mississippi and Texas) and identify the most important factors affecting property owners' willingness to rebuild or repair their storm-damaged properties.

Dated: April 30, 2010.

Rural Housing Service Federal Register Notices

Fed. Reg. 22,095-22,100 (Apr. 27, 2010) **Notice of Funds Availability for the Section 533 Housing Preservation Grants for Fiscal Year 2010**

Summary: The Rural Housing Service (RHS) is soliciting competitive applications under its Housing Preservation Grant (HPG) program. The HPG program provides funds to assist very low- and low-income homeowners in repairing and rehabilitating their homes in rural areas and assists rental property owners and cooperative housing complexes in repairing and rehabilitating their units for low- and very low-income persons.

Dated: April 16, 2010.

Fed. Reg. 19,353-19,356 (Apr. 14, 2010) **Notice of Funding Availability: Rural Development Voucher Program**

For a full discussion of this Notice, see page 146 of the *Bulletin*.

Fed. Reg. 19,348-19,353 (Apr. 14, 2010) **Notice of Funding Availability (NOFA): Section 515 Rural Rental Housing Program for New Construction in Fiscal Year 2010**

Summary: This NOFA announces the timeframe to submit applications for Section 515 Rural Rental Housing (RRH) new construction loan funds, including applications for the nonprofit set-aside for eligible nonprofit entities, set-aside for Rural Economic Area Partnership (REAP), and the set-aside for the most Underserved Counties and Colonias (Cranston-Gonzalez National Affordable Housing Act). For fiscal year 2010, the Agency will provide scoring points to those proposals that have a goal of reaching a net zero energy consumption level during future project operations.

Dated: April 5, 2010.

HUD Notices

Notice PIH 2010-18 (HA) (May 10, 2010) Revision to HUD Notice PIH 2009-51 PHA Determinations of Rent Reasonableness in the Housing Choice Voucher (HCV) Program – Comparable Unassisted Units in the Premises

Summary: This Notice revises and supersedes certain guidance put forth in HUD Notice PIH 2009-51, regarding rent reasonableness requirements in the Housing Choice Voucher program.

Notice PIH 2010-16 (HA) (May 6, 2010) Voucher Management System Enhancements and Reporting Requirements

Summary: This Notice announces that four new data reporting fields are being added to the existing Voucher Management System (VMS). The system is currently used by public housing agencies (PHAs) to report their monthly leasing and expense information in connection with the Housing Choice Voucher program.

The new VMS fields are designed to provide greater effectiveness in monitoring the PHAs' financial data. The reporting enhancements will provide a more complete picture of resources available to PHAs. The reporting enhancements will improve the ability of PHAs to assist the maximum amount of individuals and families while staying within their budget.

Notice PIH 2010-15 (HA) (May 6, 2010) U.S. Department of Housing and Urban Development (HUD) Privacy Protection Guidance for Third Parties

Summary: This Notice informs all public housing agencies (PHAs) about their responsibilities for safeguarding personally identifiable information required by HUD and preventing potential breaches of this sensitive data. HUD is committed to protecting the privacy of individuals' information stored electronically or in paper form, in accordance with federal privacy laws, guidance and best practices. HUD expects its third-party business partners, including PHAs, who collect, use, maintain or disseminate HUD information to protect the privacy of that information in accordance with applicable law.

Notice PIH 2010-14 (HA) (Apr. 28, 2010) HUD Funding for Non-Presidentially Declared Natural Disasters

Summary: This Notice provides guidance to public housing agencies regarding the implications of the repeal of Section 9(k) of the Housing Act of 1937 on presidentially and non-presidentially declared natural disasters.

Notice PIH-2010-13 (HA) (Apr. 19, 2010) Reinstatement and Extension of Notice PIH 2008-12 (HA), Enhanced Voucher Requirements for Over-Housed Families

Summary: This Notice reinstates and extends Notice PIH 2008-12, which expired February 28, 2009. Procedures contained within PIH Notice 2008-12 remain in effect for federal fiscal year 2009 and 2010 until superseded by subsequent HUD directive or guidance. ■



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