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Eleventh Circuit Limits Section 8 Housing Subsidy Terminations and Defines and Applies "Burden of Persuasion"

In a case of first impression for any U.S. circuit court, the Eleventh Circuit made significant rulings in the case of *Basco v. Machin*, 514 F.3d 1177 (11th Cir. 2008), that should help Section 8 Housing Choice Voucher holders throughout the United States and its territories resist the termination of their vouchers. (The vouchers are officially called "Housing Choice Vouchers" but are colloquially called "Section 8" because Congress enacted the program as Section 8 of the U.S. Housing Act of 1937 (42 U.S.C. § 1437f).)

Factual Background: Housing Authority Mean-Spiritedness

A disturbingly large number of Section 8 public housing authorities give lists of addresses of their voucher holders' subsidized dwellings to criminal reporting companies and pay these companies to scan police reports for criminal activity at these addresses. These private reporting services then submit to the public housing authority reports of both criminal activity at the dwelling and criminal activity in which an alleged perpetrator is listed as living at the dwelling. This case note focuses on the latter scenario.

The mind-set of these public housing authorities is to send to the voucher holder automatically, without investigation, a "notice of intent to terminate" stating that the termination is based on "criminal activity at the dwelling, or "unauthorized resident," or both if the voucher holder does not list the alleged criminal perpetrator as a member of the voucher holder's dwelling.

These public housing authorities automatically send a "notice of intent to terminate" for "unauthorized resident" if a police report lists a witness' address as that of the subsidized dwelling and if the housing authority receives a report, even an anonymous report, of an unauthorized resident.

These public housing authorities, always advised by counsel, do recognize the right of a voucher holder to have an "informal hearing" pursuant to 24 C.F.R. § 982.555. However, these housing authorities traditionally view the purpose of such hearings as merely a chance for the voucher holder to rebut the most adverse implications of the police reports and other reports. In other words, these housing authorities think of themselves as "terminators," subject only to the veto power of hearing officers. Because hearing officers are not required to be trained in the law, many hearing officers have this same mind-set.

Worse, many of these public housing authorities incorporate into their administrative plans a "template" provision similar to the *Basco* public housing authority provision that states (emphasis added):

> Any person not included on the HUD [(U.S. Department of Housing and Urban Development)] 50058 [(a form that HUD uses to collect demographic and income information on tenants)] who has been in the unit more than 15 consecutive days without PHA [public housing authority] approval, or a total of 30 days in a 12[-]month period, will be considered to be living in the unit as an unauthorized household member.
>
> Absence of evidence of any other address will be considered verification that the visitor is a member of the household.
>
> Statements from neighbors and/or the landlord will be considered in making the determination.
>
> Use of the unit address as the visitor's current residence for any purpose that is not explicitly temporary shall be construed as permanent residence.
>
> *The burden of proof that the individual is a visitor rests on the family.* In the absence of such proof the individual will be considered an unauthorized member of the household and the PHA will terminate assistance since prior approval was not requested for the addition.

Many hearing officers around the country have interpreted template provisions such as this to mean that the "burden of persuasion" (sometimes called the "ultimate burden of proof") is on the voucher holder to disprove the allegation of unauthorized residence.

Consistent with this interpretation, these public housing authorities and hearing officers typically seem to view the term "informal hearing" in 24 C.F.R. § 982.555 as a "sword" available to the public housing authority to enable the termination without according the voucher holder real due process rights. By contrast, voucher holder advocates view the "informality" as a "shield" to protect the voucher holder—especially those who appear at the "informal hearing" without representation of counsel—from unjustified termination of a basic federal benefit.

Moreover, these public housing authorities and hearing officers believe that the "informality" of the proceeding allows them to accept fully the hearsay evidence in written reports, especially police reports, even where there is no direct testimony at the hearing as to a ground for termination. The effect on the voucher holders of this hearsay evidence reception at the hearings is exacerbated by federal statute and regulations not granting witness subpoena power to the voucher holders.

Legal Background: No Previous Judicial Standard

The underlying problem for advocates and voucher holders alike has been the absence of judicial precedent on these issues. Related to this absence is that the principle of *stare decisis* does not apply to decisions of U.S. district courts. No U.S. district court is required to follow the holding of any other U.S. district court. District court judges are even free to contradict their own previous opinion so long as they adhere to the principles of *res judicata* and collateral estoppel when the same parties are involved. Thus, although there are a number of well-reasoned district court opinions—the most widely known of which is *Edgecomb v. Housing Authority of Vernon*, 824 F.

Supp. 312 (D. Conn. 1993) (Clearinghouse No. 49,093)—not one federal judge is required to follow any of these holdings.

Before *Basco*, my colleagues and I had achieved seven consecutive favorable results in hearsay cases brought in the Tampa Division of the Middle District of Florida, including one written opinion. However, the *Basco* trial court was free to rule to the contrary, and it did (see *Basco v. Machin*, No. 06-00260-CV-T-24MSS, 2007 U.S. Dist. LEXIS 8334 (M.D. Fla. Feb. 6, 2007), rehearing denied, 2007 U.S. Dist. LEXIS 18800 (M.D. Fla. Mar. 5, 2007)).

The Eleventh Circuit *Basco* Holdings

Although the Eleventh Circuit's opinion spoke decisively and authoritatively about many issues present in the appeal, a close reading of the opinion yields only the following two ultimate holdings:

- 24 C.F.R. § 982.555 and the public housing authority template administrative plan provisions are constitutional because, (a) consistent with *Goldberg v. Kelly*, 397 U.S. 254 (1970) (Clearinghouse No. 1799) (in which the federal benefit at issue was Aid to Families with Dependent Children), 24 C.F.R. § 982.555 puts the "burden of persuasion" on the housing authority in order for a hearing officer to uphold lawfully a housing authority–intended subsidy termination, and (b) the "burden of proof" stated in the public housing authority administrative plan template provision is merely a "burden of production" (sometimes called "burden of going forward with the evidence") that is needed only where the housing authority establishes a prima facie case at the hearing (*Basco*, 514 F.3d at 1182).
- The public housing authority did not meet its "burden of persuasion" by relying solely on a mere listing of a person's address in a police report as the same address as the subsidized dwelling. This evidence is legally insufficient to establish the requisite prima facie case that the alleged unauthorized person resided in the dwelling (*id.* at 1183). (In *Basco* there were actually two police reports; but the court treated them individually because one police report identified the person as "Emmanuel Jones" and the other police report identified the person as "Elonzel Jones" (*id.*).)

Basco's Necessary Predicate Holding

Practitioners who have faced adversity in federal courts to the bringing of Civil Rights Act suits to reinstate terminated Section 8 benefits should take comfort in the knowledge that the Eleventh Circuit could not have reached the above-listed holdings without first making the following significant predicate holding, paraphrased here as: *Goldberg v. Kelly* applies "with equal force" to Section 8 public housing assistance and therefore grants the voucher holder the right to Fourteenth Amendment due process to remedy wrongly terminated housing benefits (see *id.* n.7).

Basco's Dicta

Listed below are two significant subjects that the Eleventh Circuit addressed in an authoritative manner; they must be labeled *obiter dictum* because the court's pronouncements are not necessary to support the holdings listed above.

1. Use of Hearsay Evidence. The *Basco* court did not hold that a public housing authority could never justify a subsidy termination based solely on hearsay evidence. The court was not required to reach this question because, assuming that all the hearsay in *Basco* was both accurate and credible, the court held that there was no evidentiary premise that would justify an inference that the admitted facts would yield the legal conclusion that the person in question was a "resident" of Mr. and Mrs. Basco's household.

As my law school evidence professor, the late L. Ray Patterson, explained "proof" at the Vanderbilt School of Law, to reach a "proposed conclusion" (e.g., Elonzel Jones, not authorized to reside at the dwelling, did reside at the dwelling), the housing authority needed "propositions of fact" from which a reasonable "inference" could be drawn by using a legally correct "evidentiary premise." In *Basco* the public housing authority used as its only proposition of fact the listing of Jones in a police report as having the same address as the subsidized dwelling. The Eleventh Circuit held that, as a matter of law, it was unreasonable to infer that Jones resided at the dwelling because, in effect, the housing authority's evidentiary premise was false (see *id.* at 1183). As a matter of law, that a person whose address is listed in a police report as "x" actually resides at "x" is not "more probable than not" (Professor Patterson's term).

However, the court strongly stated that the hearsay testimony that the public housing authority used in *Basco* was suspect because Mr. and Mrs. Basco were denied the due process right of cross-examination; the termination hearing process does not afford the voucher holder the right to subpoena the persons who authored the police reports (see *id.* at 1182–83 (citing *Richardson v. Perales*, 402 U.S. 389, 402–6 (1971) (Clearinghouse No. 48,641), and *J.A.M. Builders Incorporated v. Herman*, 233 F.3d 1350, 1354 (11th Cir. 2000))).

2. The Inherent Contradiction of a Police Report. One police report stated that Mr. Basco had made a written statement that the person in question "stayed" at the dwelling unit. However, no such written statement was attached to the police report. At the informal hearing, Mrs. Basco denied that Mr. Basco made, orally or in writing, any such statement; and the hearing officer denied her request to have Mr. Basco testify by telephone. The Eleventh Circuit stated, "[W]e are troubled by the PHA's failure to explain the absence from the police report of the actual statement" (*id.* n.8). However, in like manner to the address-listing analysis above, the court avoided reaching the question by holding that inferring that a person who was "staying" at an address was a "resident" there would be legally improper (see *id.*).

Basco's Implications

Three points are logical extensions of the Eleventh Circuit's two actual holdings listed above. Advocates for federal benefit recipients should urge these points in benefit termination proceedings.

1. Bringing the Termination in the First Place Was Illegal. One of the strongest points that advocates can make right now to stave off future assaults on their clients' vouchers is that bringing the termination in the first place was illegal. The Eleventh Circuit specifically mentioned public housing authority official Sherry Hanson by name as having sent the "notice of intent to terminate" grounded only on the documentary evidence that the court found per se legally insufficient at 514 F.3d. at 1183 (*id.* at 1179). Thus advocates should send to the public housing authorities in their jurisdictions written notices that the housing authorities' sending a "notice of intent to terminate" letter to any Section 8 voucher holder is illegal if all the evidence that the housing authority has is a name and address in a police report.

2. The Failure of the Housing Authority Director to Overturn the Hearing Decision Was Illegal. The Eleventh Circuit specifically identified Section 8 Program Director Gil Machin, one of the defendants, by name and stated that Mr. Machin declined two opportunities to correct the hearing decision that the court of appeals held to be invalid (*id.* at 1180). The clear implication is that the Section 8 program director is required to use the authority in 24 C.F.R. § 982.555(f) to reject any hearing decision in which a finding of "residency" is based solely on the listing of an address in a police report.

3. The Hearing Officer Was Wrong to Refuse to Allow Testimony by Telephone. For the same reasons listed in the dicta discussion above, the Eleventh Circuit did not need to decide whether the hearing officer's refusal of Mrs. Basco's request to have Mr. Basco testify by telephone to deny that he told a police officer that the unauthorized person "was staying" at the dwelling violated due process. However, the manner in which the court mentioned this fact implies that the hearing officer's having denied this request was unfair (see *id.* at 1180).

Stare Decisis Effect of *Basco* Holdings: The Doctrine of Precedent

I urge advocates to argue that, under the well-established principles of the "doctrine of precedent," the *Basco* holdings should be binding on all U.S. district courts because *Basco* is the only circuit court case on point as to the holdings set forth above (although I was unable to locate any U.S. circuit court decision that specifically endorses this statement).

The most recent thorough, yet concise, exposition of the doctrine of precedent is found in the *obiter dictum* of the Eighth Circuit opinion in *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000) (Clearinghouse No. 53,171) (unpublished opinions have the same effect as published ones). The *Anastasoff* opinion contains a wonderful discussion of the origin of the doctrine of precedent and why it was so important to the framers of our U.S. Constitution and our legal system.

Simply stated, in the United States our federal judicial system was firmly established on the principle of the declaratory theory of adjudication (*Anastasoff*, 223 F.3d at 901–2). In *Anastasoff* the Eighth Circuit stated, "As the Framers intended, the doctrine of precedent limits the 'judicial power' delegated to the courts in Article III" (*id.* at 903). Courts are not free to decide contrary to a prior decision of an appellate court that "declared" the law as to a particular issue (*id.*).

Thus I urge as a proposition of law that a district court in, for example, California, is required to follow the Eleventh Circuit's holdings in *Basco* until (if ever) another circuit court or the U.S. Supreme Court rules in a contrary manner. By their very nature, intermediate courts of appeals are a higher authority than trial courts.

This principle of law is well settled in Florida (see *Pardo v. State*, 596 So. 2d 665, 666–67 (Fla. 1992); *Stanfill v. State*, 384 So. 2d 141, 143 (Fla. 1980); *Special's Trading Company v. International Consumer Corporation*, 679 So. 2d 369, 369–70 (Fla. Dist. Ct. App. 1996)). The Florida Supreme Court's *ratio decidendi* is impeccable:

> [I]t is logical and necessary in order to preserve stability and predictability in the law that … trial courts be required to follow the holdings of higher courts—District Courts of Appeal [the intermediate courts of appeal in Florida]. The proper hierarchy of decisional holdings would demand that *in the event the only case on point on a district* [i.e., intermediate] *level is from a district other than the one in which the trial court is located, the trial court be required to follow that decision*. [*Pardo*, 596 So. 2d at 666 (emphasis added).]

Litigation Practice Tips

The success of the *Basco* appeal is directly related to the practice tips listed below in the order of their importance.

1. Always Request Oral Argument. All of the fifteen or so legal aid attorneys who attended the oral argument concluded that the panel would have ruled 3-to-0 against us without oral argument. Eight minutes into the argument, a question from one of the panel made us realize that the panel all thought we were trying to invalidate the administrative plan's presumption of "residence" from a person being present for fifteen consecutive days. After we clarified for the panel that we had never contested this presumption and that our clients denied that Elonzel Jones ever spent even one night at the dwelling, the facial expressions of two of the panel members changed.

The panel apparently had not read the actual administrative plan provisions but had relied instead on the public housing authority's brief's excerpts of the provisions, which counsel had bullet-pointed to (probably unintentionally) create the impression that we admitted that Jones spent some nights in the dwelling. Until appellee's counsel faced the panel, the panel did not realize that the only pieces of evidence that the housing authority used to terminate the subsidy were the two police reports. One of the judges held up a letter-sized piece of paper, waved it, and asked appellee's counsel, "That's it? A piece of paper? The housing counselor gets word of an incident, swings by the police station, picks up a report, and terminates a low-income family's housing subsidy?"

2. Be Active in Statewide Working Groups and Encourage Your State's Working Group to Appear as Amicus Curiae. The effectiveness of the participation of the Florida Legal Services Housing Umbrella Group as amicus curiae cannot be overstated. The amicus brief highlighted the statewide and national importance of the issues and presented the broader policy issues beyond the immediate facts of Mr. and Mrs. Bas-

co's situation. The Housing Umbrella Group's members, along with Connecticut Legal Services advocate Richard Tenenbaum (winning counsel in the *Edgecomb* district court case cited above), made extremely helpful suggestions in the preparation of our appellants' brief and reply brief. We had many conference calls and exchanged drafts of all briefs. Ours was a real team effort.

3. If the Trial Court Does Not Address All of Your Arguments and Authorities, File a Motion for Rehearing. The district court's order in *Basco* had not expressly addressed several important arguments that we knew we wanted to make before the Eleventh Circuit. I had bad memories from the *Crum v. Housing Authority of Tampa*, 841 F.2d 376 (11th Cir. 1988) (Clearinghouse No. 34,235), class action housing admissions appeal wherein the first question from the panel at oral argument was, "Why didn't you give [District] Judge Hodges a chance to consider this issue?"

In *Basco* the district court's subsequent order denying the rehearing motion resulted in clarified issues on appeal as well as the district court judge's acknowledgment that she disagreed with the *Edgecomb* holding and the similar holdings of the other district court cases that we cited in favor of our position (*Basco,* 2007 U.S. Dist. LEXIS 18800).

4. Plan and Execute a "Game Plan" for Your Oral Argument. Bay Area Legal Services is in Tampa, Florida. The oral argument was in Jacksonville, about 225 miles away. My cocounsel and I stayed in Jacksonville two nights before our oral argument. The day before our oral argument, we attended and observed all five of the oral arguments and familiarized ourselves with the courthouse. We observed the demeanor of the panel and how they reacted to counsel exceeding their allotted times.

We agreed that one of the amicus counsel would sit at the counsel table with us, even though the oral argument time was too limited to allow more than one person per side to argue. Having two helpers provide analysis during the appellee's presentation helped make our rebuttal presentation more effective.

The litigants themselves, Mr. and Mrs. Basco, drove to Jacksonville the night before and came to court in time to be present at the oral argument. The panel seemed noticeably pleased when I introduced cocounsel, amicus counsel, and especially Mr. and Mrs. Basco. We presented a united "face."

[**Editor's Note:** About five months after its *Basco* decision, the Eleventh circuit relied on *Basco* in its decision in *Ervin v. Housing Authority of the Birmingham District*, No. 07-14219, 2008 U.S. App. LEXIS 13138 (11th Cir. June 17, 2008) (unpublished) ("Put simply, the evidence capable of appellate review in the instant case has less reliability and probative value than the two unauthenticated police reports we considered in *Basco*.").

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