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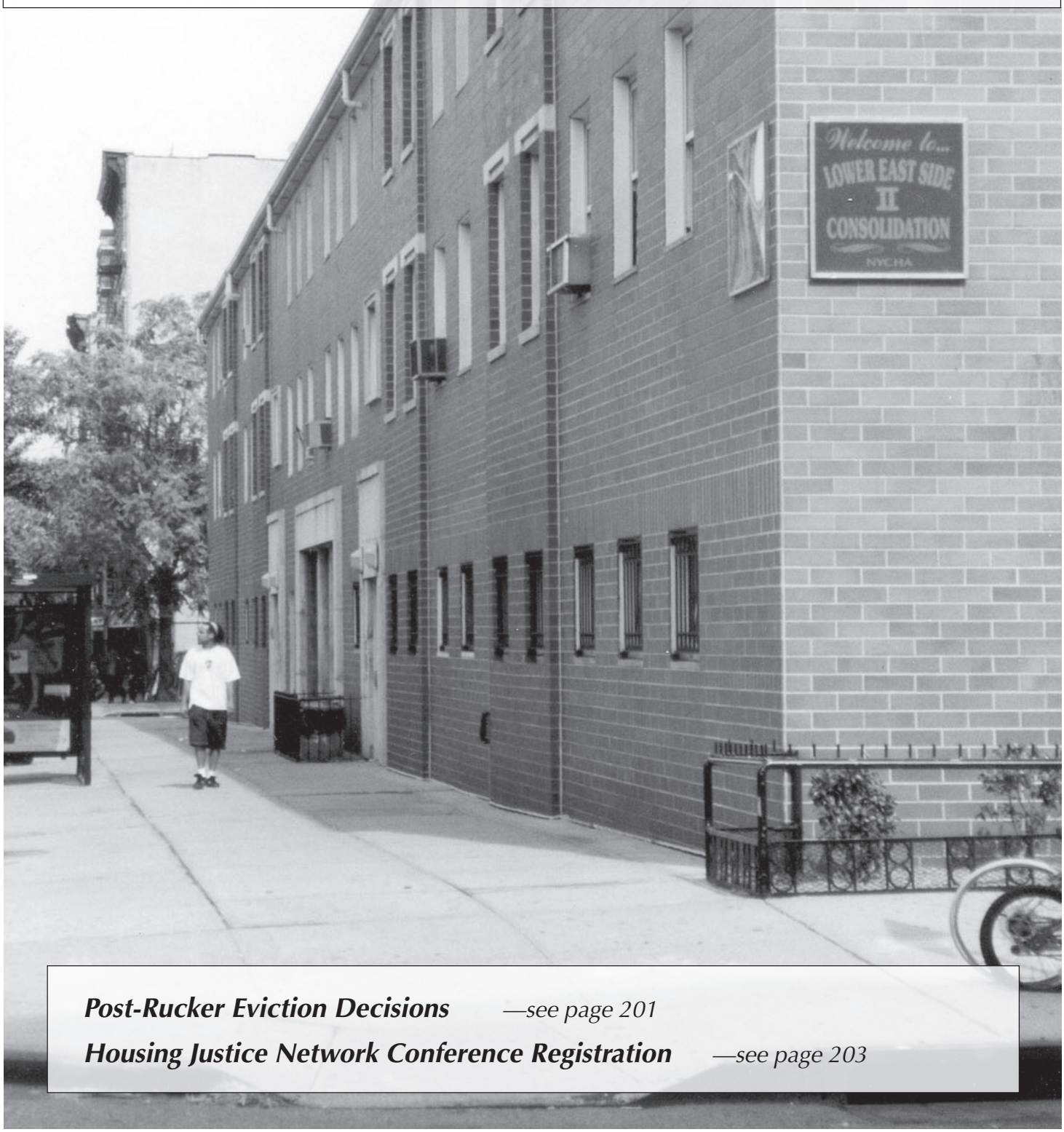

One-Strike Evictions: Post-Rucker Decisions

Since *HUD v. Rucker*[1] was decided early this spring, public housing tenants and their advocates have lamented the idea that tenants of public housing could be evicted for the criminal activity of others, whether the tenants themselves were involved in or knew of the activity. Newspaper coverage across the country has been virtually unanimous in its condemnation of the decision,[2] and some members of Congress acted quickly to attempt to moot the decision through legislation. Even HUD Secretary Mel Martinez and Assistant Secretary Michael Liu issued letters to public housing authorities instructing them to use their discretion judiciously in light of the decision.[3] In short, fair-minded people with knowledge of the complications of maintaining adequate housing for the poor feared that good tenants, innocent of any wrong-doing, would become the victims of the one-strike policy and lose their public housing with virtually no defense available in a court of law. And, of course, this is essentially what the decision means.[4] The practical applications of *Rucker*, however, are still just beginning to be established. In addition to the flurry of activity alluded to above, a number of courts have addressed one-strike evictions since the *Rucker* decision came down.[5] The results, while

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[1] ___U.S. ___, 122 S. Ct. 1230, 152 L. Ed. 2d 258 (2002).

[2] *See, e.g.,* Evelyn Nieves, *Drug Ruling Worries Some in Public Housing*, N.Y. Times, March 28, 2002; Mary Mitchell, *Poor Pay Heavy Price for Justices' Idealism*, Chicago Sun-Times, March 28, 2002; *Our Opinions: Supreme Court: Public Housing Evictions Trample on Rights of Poor*, The Atlanta Journal Constitution, April 1, 2002, Editorial, at A9; *Drug Law Ruling: Justices Wrongly Choose Eviction Over Innocence*, Detroit Free Press, April 4, 2002, Editorial, at 8A; *Sins of the Few*, The Blade (Toledo, OH), March 31, 2002, Pages of Opinion, at B4, all on file at the National Housing Law Project (NHLP). *But see*, Greg Jonsson, *Area Public Housing Officials Laud Court's Ruling*, St. Louis Post-Dispatch, March 26, 2002, on file at NHLP.

[3] *See* letter from Secretary Mel Martinez to Public Housing Directors, April 16, 2002, available online at www.nhlp.org/html/new/index.htm; letter from Assistant Secretary Michael Liu to Public Housing Directors, June 6, 2002, available online at www.nhlp.org/html/new/index.htm or *See also* Letter from Carole W. Wilson, HUD Associate General Counsel for Litigation to Charles J. Macellaro, Attorney, Re: PHA Evictions For Criminal Activity Proscribed by Lease Provision Mandated by Section 6(l)(6) of the U.S. Housing Act (August 15, 2002) (HUD legal opinion issued to the PHA for Yonkers, NY regarding *Rucker* and HUD regulations. In the opinion, HUD repeats its position that a PHA is not required to apply or consider the discretionary factors, but is free to do so if it wishes to do so. The opinion cites *Oakwood Plaza Apartments v. Smith*, *infra,* and essentially says the position taken by the court there is NOT HUD's position.) The opinion is also available at www.hud.gov/offices/pih.

[4] For a more thorough discussion of the *Rucker* decision itself, *see U.S. Supreme Court Finds No "Innocent Tenants" in Application of One-Strike Law,* 32 HOUS. L. BULL. 95 (April 2002).

[5] *See Housing Authority of Joliet v. Chapman*, 2002 WL 1033123 (Ill. App. 3 Dist., May 17, 2002) (unpublished opinion); *Oakwood Plaza Apartments v. Smith*, 800 A. 2d 265 (N.J. Super. Ct. App. Div., July 2, 2002); *Newport Housing Authority v. Reynolds*, Case No. ND2002-0290 (R.I. Super. Ct. - Newport) (on file at NHLP); *Maryland Park Apartments v. Robinson*, No. CX-02-4044 (Min., 2nd judicial dist., June 17, 2002); John Stevenson, *Judge Blocks Move to Evict Mother, Kids; Public Housing Trying to Keep Drugs out of Communities*, Durham (NC) Herald-Sun, May 5, 2002 (on file at NHLP).

predictably gloomy in one of the cases, actually show that there is a flicker of hope that some defendants may be able to raise a defense in court that goes beyond simply denying that the alleged criminal activity occurred. This article will discuss some of those post-*Rucker* one-strike cases and their ramifications.

The Cases

Rucker affirms the proposition that public housing authorities, under a statutorily required lease clause,[6] may evict an entire public housing household if any member of that household, or any guest, or any other person under a household member's control, engages in drug-related or certain other criminal activity, regardless of whether other members of the household were involved in or knew of the criminal activity, and regardless of where that activity took place.[7] Thus, the policy could, in theory, be applied to evict a tenant whose guest leaves her apartment and, unbeknownst to her, engages in drug-related criminal activity miles away and days later. The only defense such a tenant would seem to have would be that the criminal activity did not actually take place. Evidence that she had no knowledge of her guest's proclivity towards drugs or that she kicked him out of her unit when she learned of such proclivity, for example, would be irrelevant in an eviction proceeding. Advocates fear that the decision will lead to even more evictions of such "innocent" tenants. And that does seem to be the likely result.

Housing Authority of Joliet v. Chapman

This feared result was obtained in *Housing Authority of Joliet v. Chapman*,[8] an unpublished Illinois opinion and perhaps the least-surprising post-*Rucker* ruling regarding one-strike evictions in public housing. The *Chapman* decision is a straightforward application of the one-strike decision, acknowledging the Supreme Court's upholding of HUD's interpretation of its statutory authority. Ms. Chapman's 19-year-old son, a resident of the unit, was arrested for possession of three bags of marijuana and the Housing Authority of Joliet filed an action to terminate Ms. Chapman's tenancy in public housing.[9] The trial court determined that Ms. Chapman had no knowledge of her son's activities and dismissed the housing authority's complaint. The appellate court read *Rucker* and reversed the trial court decision stating that, "because knowledge of the criminal activity was not a prerequisite to eviction, eviction clearly could occur regardless of [Ms. Chapman's] lack of knowledge." Perhaps the point was brought home most clearly by the brief concurring opinion of Justice McDade, who stated:

> I realize that the United States Supreme Court's unanimous opinion in [*Rucker*] compels the decision which we announce today and with which I reluctantly concur. I write separately to express my dismay with the Supreme Court's interpretation of the legislation at issue. It is impossible for me to reconcile fundamental principles of fairness and due process with a finding that wholly innocent persons can be punished for the criminal activity of others of which they had no knowledge and over which they had no control.[10]

Thus, Ms. Chapman, who was found after a trial to have no knowledge or control over the criminal activities of her adult son, lost her home.

Oakwood Plaza Apartments v. Smith

While the *Chapman* decision is basically what advocates expected after *Rucker*, the case of *Oakwood Plaza Apartments v. Smith*[11] raises the specter of even worse results, while at the same time offering a glimmer of hope. The context of *Oakwood Plaza* was not public housing, but a project-based Section 8 development. The landlord filed an eviction action against a tenant, Andrea Smith, after she was arrested for drug-related criminal activity. Ms. Smith vacated the unit prior to the completion of the eviction action, and Tamara Feaster took legal custody of the tenant's children and moved into the unit with the children. Ms. Feaster intervened in the suit as a real party in interest. The lower court, recognizing a judicially created "innocent lessee exception" in New Jersey law, dismissed the case against Ms. Feaster. The appellate court, however, noted that the decision had been entered prior to the *Rucker* decision. Citing the similarity of provisions in Section 8 law with those in Public Housing regarding eviction for drug-related criminal activity, the court concluded that "because of the virtual identity of language in statutory provisions governing drug-related activity as a basis for eviction in public and Section 8 housing, there is no doubt that the reasoning of *Rucker* is applicable to this Section 8 case."[12]

The court noted that HUD had acknowledged and encouraged housing authorities' discretion to decide when eviction was necessary for criminal activity of tenants, household members, etc., through the letters to the public housing authorities.[13] The court ascertained that "*Rucker* does not mandate eviction; it permits it after suitable weighing of positive and negative factors such as those enumerated in federal regulations and HUD's June 6 letter."[14] Thus, the court concluded that the "federal statutory framework therefore does not permit a Section 8 landlord to act in an arbitrary or capricious fashion."[15] Since there was no administrative procedure available to challenge a Section 8 eviction, the court placed the responsibility of deciding whether the landlord had properly exercised his discretion within the trial court's

[6] 42 U.S.C. § 1437d(l)(6).

[7] *Rucker*, *supra* note 1.

[8] *Chapman, supra* note 5.

[9] *Id.* at *1.

[10] *Id.* at *2 (McDade, J., dissenting).

[11] *Oakwood Plaza*, *supra* note 5.

[12] *Id.* at 473.

[13] *See supra* note 3.

[14] *Oakwood Plaza*, *supra* note 5 at 474.

[15] *Id.*

jurisdiction. Since the lower court had dismissed the action without regard to whether the landlord considered a number of relevant factors and there was no evidence that the housing authority had considered these factors, the court remanded the case for the trial court to consider, for example, whether Ms. Smith had completely removed herself from the unit, whether she would be incarcerated, and whether she would be permitted to visit her children in the unit.[16]

The application of the Rucker *reasoning to Section 8 tenancies greatly broadens the scope of the ruling and clearly puts even more innocent tenants at risk of eviction.*

Oakwood Plaza is both troubling and encouraging. The application of the *Rucker* reasoning to Section 8 tenancies greatly broadens the scope of the ruling and clearly puts even more innocent tenants at risk of eviction. But the language that essentially reinstates the court's role in deciding the fairness of the eviction could significantly expand the options for tenant attorneys faced with one-strike evictions. As the court noted, there is no administrative procedure for challenging Section 8 evictions. Public housing one-strike evictions also bypass the administrative hearing, bringing the case directly to the landlord/tenant court. If other courts follow the New Jersey court's interpretation of *Rucker*, a one-strike trial becomes much more than merely deciding whether the criminal activity took place. Advocates can argue that the housing authority has not properly exercised its discretion because it did not consider all the factors in the case. At the very least, an advocate could argue that the housing authority has acted arbitrarily and capriciously. While this argument may not result in many innocent tenants being able to retain their units, it at least opens a crack for a judge to consider the entire picture.[17]

Durham Housing Authority v. Kersey

In North Carolina, a trial judge found another way to inject some fairness into a one-strike eviction case. In *Durham Housing Authority v. Kersey*, the judge used a stricter definition of "guest" than the housing authority attempted to apply, and refused to evict a public housing tenant. Ms. Kersey braided people's hair to earn extra money. Late one night an unidentified man, whom Ms. Kersey did not know, knocked on her door and asked to have his hair braided. Ms. Kersey declined because it was too late in the evening, asking him to return at some other time. After leaving the unit, the man became involved in a drug transaction with an undercover police officer. Due to this incident, the housing authority proceeded with an eviction action against Ms. Kersey. A magistrate held in favor of the tenant, holding that the man was not a guest. On appeal to the District Court, Judge Marcia Morey also ruled that the man wanting the braids was not a guest or visitor of Ms. Kersey, nor was he under Ms. Kersey's control. "There was nothing to link this unknown man to this apartment," the judge concluded.[18] Thus, the housing authority could not evict Ms. Kersey for the man's criminal actions. In making the ruling, the judge also questioned where the disabled Kersey and her three children would go.

[16] *Id.* at 475-6.

[17] Note that HUD has issued a legal opinion essentially stating that the court's opinion in this case is not HUD's position. *See* note 3 *supra*.

[18] *See* Stevenson, *supra* note 5.

NHLP Web Site: Housing Preservation Information Updated

The "Housing Preservation" page of the NHLP Web site is being updated regularly. Documents are being added to the "Cases" section as they become available. This includes demand letters, complaints, motions for temporary restraining orders and preliminary injunctions, briefs in support of dispositive motions, discovery materials, and court orders.

The housing preservation page contains an outline of topics of interest to advocates working on the loss of HUD multifamily housing. It includes (1) Prepayments of HUD-subsidized mortgages, (2) Opt-Outs - Owner Nonrenewal of Expiring Project-Based Section 8 Contracts, (3) Enhanced Vouchers and (4) State and Local Initiatives. The outline for each of these areas includes a description of the issue and then links to relevant statutes, regulations, HUD handbooks and other administrative materials, other relevant Web sites, cases and *Housing Law Bulletin* articles. These outlines, which are routinely updated and expanded, are structured as a reference for advocates working on preservation issues, with direct links to source materials, often in original format using Adobe Acrobat PDF files.

The preservation section of the Web site also contains "A Guide to Challenging Conversions of Federally Assisted Housing in California." It discusses many issues that are equally applicable to other states and localities.

So visit the preservation page of the National Housing Law Project's website at **www.nhlp.org/html/pres/index.htm**.

The case illustrates yet another area where there may be some play in defending a one-strike eviction case. Since there is no statutory or regulatory definition of "guest" in applying 42 U.S.C. § 1437d(l)(6), attorneys and judges who believe that they should have some role in deciding whether an innocent tenant is evicted for the actions of others can define the word in a way that brings more fairness to the proceedings. This has the potential to eliminate the extreme examples of tenants being evicted for the actions of pizza delivery men or solicitors. It does not, however, eliminate the possibility of tenants being evicted for the unknown actions of their household members.

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Additional Recent Cases

Also encouraging are a pair of recent rulings by trial level judges holding that federal law on one-strike eviction does not preempt state protections. In late August, a Rhode Island superior court judge granted a defendant tenant's motion to dismiss an eviction action filed against her because of her boyfriend's drug-related activity.[19] The tenant was not arrested, nor was she home when her boyfriend sold marijuana from her apartment while babysitting for her. The housing authority acknowledged that the tenant was not home and did not know or condone the criminal activity. Nonetheless it attempted to evict her, alleging that she was in violation of a Rhode Island statute that provides, "tenant shall refrain from using any part of the premises for the manufacture, sale or delivery of a controlled substance or from possessing on the premises with the intent to manufacture, sell or deliver" such a substance.[20]

In dismissing the case against the tenant, the judge concluded that the above-cited statute addresses only drug-related activity of the "tenant," rather than that of third parties. The judge specifically acknowledged that federal law would permit eviction of the tenant merely because she allowed her boyfriend into her unit, but ruled that Rhode Island law requires that the tenant do more in order to be subject to eviction. The court specifically held that *Rucker* and 42 U.S.C. § 1437d(l)(6) did not preempt state law.[21]

Similarly, a Ramsey County, Minnesota judge held, in a subsidized project-based context, that a tenant could not be evicted for the actions of her boyfriend, who entered her unit and overdosed on a controlled substance.[22] Finding that the tenant did not know or have reason to know of the drug-related criminal activity and that federal laws did not preempt state law, the judge did not permit eviction of the tenant. Instead, he concluded that a Minnesota statute[23] requiring knowledge or reason to know on the part of the tenant held sway. Both of these cases illustrate the importance and viability of arguing that state law governs the actual eviction proceedings and the significance of working within the state legislature to establish better laws to protect innocent tenants.

Conclusion

To date, the legislative efforts to undo some of the damage of *Rucker* and 42 U.S.C. § 1437d(l)(6) have failed. While an amendment to H.R. 3995, Marge Roukema's (R-NJ) omnibus housing bill that was recently passed by the House Finance Committee, would protect victims of domestic violence in one-strike eviction scenarios,[24] an amendment that would generally protect innocent tenants is not likely to be offered due to a perceived lack of support in Congress. Perhaps if the composition of Congress changes over the next few months, and if a well-organized campaign is mounted, opponents to the one-strike policy as currently interpreted can effect some change in the law. Until that time, however, the fate of many public housing and Section 8 tenants is largely in the hands of the public housing authorities and, unfortunately to a lesser extent, the courts. The limited number of post-*Rucker* decisions have shown a mix ranging from rote application of the ruling to creative ways to bring more justice to the proceedings, whether through a stringent definition of the word "guest" or by applying unpreempted state law.

Secretary Martinez stated in his letter that the one-strike law "should be applied responsibly"[25] and that "applying it rigidly could generate more harm than good."[26] Housing advocates should remind housing authorities and the courts of the Secretary's instructions when suggesting methods for avoiding the harsh injustice that strict application of the doctrine can cause. ■

[19]*See Newport Housing Authority v. Reynolds, supra* note 5.

[20]RIGL § 34-18-24(9).

[21]*See Newport Housing Authority v. Reynolds, supra* note 5.

[22]Maryland Park Apartments v. Robinson, *supra* note 5.

[23]Minn. Stat. 504B.171.

[24]For a detailed discussion of H.R. 3995 and the domestic violence amendment, *see State Courts Revisit Public Housing Trespass Policies,* 32 HOUS. L. BULL. 169 (August 2002).

[25]Martinez letter, *supra* note 3.

[26]*Id.*