

Sweetening the Pill of *Rucker*: Recent Decisions*

In *Department of Housing and Urban Development v. Rucker*,¹ the Supreme Court upheld the discretion of public housing agencies (PHAs) to terminate a public housing tenant's lease if a household member, guest or other person under the tenant's control engaged in certain types of criminal activity, regardless of the tenant's knowledge of the activity. After the *Rucker* decision, many housing advocates feared that "good tenants, innocent of any wrongdoing, would become the victims of the one-strike policy and lose their public housing with virtually no defense available in a court of law."² In practice, this has not always been the case.³ In several recent decisions, tenants' advocates and courts have deftly maneuvered around *Rucker*. This article updates advocates on such cases issued since August 2008. Recognition that federal law does not mandate eviction is a common theme in many of these cases.

Judge Criticizes *Rucker* as "Draconian"

Criticism of *Rucker* often centers on its strict liability approach. In *Minnesota Public Housing Authority v. Vann*,⁴ a public housing tenant was evicted for possession of a small amount of marijuana while one mile away from the premises. Noting his own discomfort with the harsh result of zero tolerance/strict liability policies, the judge reconsidered and vacated his prior order, describing such policies as "common instruments of totalitarian regimes" and "draconian."⁵

Under state law, the tenant's act was not considered criminal activity. Rather, it was a petty misdemeanor and thus not intended to carry with it the same harsh consequences⁶ as a "crime." In its first order, the court held that although the act was not "criminal" according to state law, it was nonetheless illegal under federal law because "drug-related criminal activity" refers to possession of "illegal" substances. In reconsidering its order, the court criticized the use of "criminal" and "illegal" in the same context in 42 U.S.C. § 1437d(l) as creating inconsistency and imprecision of language.⁷ Additionally, the court found that Congress' intent was that "each case will be judged on

its individual merits and will require the wise exercise of humane judgment by the PHA and the eviction court."⁸ The court held that the strict liability approach was therefore inappropriate as applied to the tenant's case.

Criminal Conduct that Is Neither Drug-Related Nor Violent

The one-strike policy approved by *Rucker* permits lease termination based on two broad categories of criminal activity: (1) criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants; and (2) any drug-related criminal activity on or off the premises. Advocates should ensure that PHAs do not engage in inappropriate and extralegal attempts to expand the scope of *Rucker* to include any criminal activity. In *Alexandria Redevelopment & Housing Authority v. Thaxton*,⁹ the PHA terminated the defendant's tenancy due to her son's alleged criminal conduct.¹⁰ However, the alleged criminal conduct was neither violent nor drug-related, and the conduct did not occur on PHA property. Accordingly, the court held that this alleged criminal activity was not grounds for immediate termination under federal law. The court therefore excluded from the proceedings all evidence of the son's alleged criminal activity.

Termination Is Discretionary, Not Mandatory

Advocates also should be aware of mistakes PHAs can make which exacerbate, rather than mitigate, the negative effects of *Rucker*. In *Yancey v. New York City Housing Authority*,¹¹ the PHA terminated the petitioner's tenancy for alleged drug-related criminal activity near the premises. The court held that the hearing officer was mistaken in ruling that despite mitigating circumstances, the only possible determination was that the tenancy must be terminated.¹² The court held that pursuant to *Rucker*, PHAs have discretion to terminate the lease of a tenant.¹³ *Rucker* and the PHA's management manual both conferred discretion on the PHA on the issue of termination.¹⁴ The court therefore remanded the case for reconsideration.

Standard of Review

Although PHAs have broad discretion to terminate on the basis of a one-strike policy, they are obligated not to abuse their discretion, and in eviction actions, courts are empowered to review the PHA's decision to terminate. In *Jersey City Housing Authority v. Ford*,¹⁵ the PHA had

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¹535 U.S. 125 (2002).

²NHLP, *One Strike Evictions: Post-Rucker Decisions*, 32 HOUS. L. BULL. 201, 201 (Sept. 2002).

³See *id.*; NHLP, *Post-Rucker Decisions: Three Years Later*, 35 HOUS. L. BULL. 249, 257 (Nov.-Dec. 2005); NHLP, *Post-Rucker Decisions: Six Years Later*, 38 HOUS. L. BULL. 187, 187 (Sept. 2008).

⁴No. 27-CV-HC-08-10954 (Minn. Dist. Ct. Sept. 23, 2009).

⁵*Id.* at 4.

⁶*Id.* at 3, 5, 6.

⁷*Id.* at 4, 5.

⁸*Id.* at 4, 6 (quoting S. REP. 101-316, at 171 (1990), as reprinted in 1990 U.S.C.A.N. 5763, 5941).

⁹No. CL08003662 (Va. Cir. Ct. May 18, 2009).

¹⁰The court's order refers generally to "alleged criminal conduct."

¹¹879 N.Y.S.2d 661 (N.Y. Sup. Ct. 2009).

¹²*Id.* at 745.

¹³*Id.* at 752.

¹⁴*Id.* at 753.

¹⁵No. A-5657-08T3 (N.J. App. Div. 2010).

terminated the tenancy of a tenant whose son, a household member, had pled guilty to drug-related criminal activity. The court cited its own prior case, *Oakwood Plaza Apartments v. Smith*,¹⁶ in its analysis. In *Oakwood*, the court had held that a trial court must determine whether the landlord “exercised its discretion in a manner consistent with federal statute.”¹⁷ In its exercise of judicial discretion, the trial court should take into account “the law and the particular circumstances of the case before the court”¹⁸ and examine whether there are good reasons for the reviewing court to defer to the PHA’s decision to terminate.¹⁹ The evidence presented at the trial was insufficient to demonstrate that the PHA properly exercised its discretion in terminating the tenancy.²⁰ Therefore, the court reversed the trial court decision for the PHA and remanded the case.

Consideration of Mitigating Factors

Many advocates regard *Rucker* as unfair because the penalty of eviction often is disproportionate to the act constituting the breach of lease. In *Vazquez v. New York City Housing Authority*,²¹ the PHA terminated the petitioner’s tenancy in part because she had pled guilty to unauthorized use of an ATM card. The court noted that termination was discretionary, and that probation was available in lieu of termination. The court also considered a number of mitigating factors,²² including the fact that the petitioner paid full restitution and complied with all conditions of her probation for the criminal act. In light of this information, the court found that termination of her tenancy would be “shocking to the judicial conscience and to one’s sense of fairness.”²³ Accordingly, the court remanded the case for imposition of a lesser penalty.

Reasonable Accommodation for Mental Disability

In cases involving tenants with mental disabilities and criminal activity, there is often interplay between the law on reasonable accommodation and *Rucker*. In *Boston*

Housing Authority v. Bridgewater,²⁴ the PHA terminated the tenancy of a public housing resident for causing serious physical harm to another resident. The terminated resident asked for a reasonable accommodation for his mental disabilities, citing his disabilities as the cause of the violence. The PHA declined to grant the reasonable accommodation, stating that it was “not interested in preserving this tenancy” and was “not interested in any sort of mediation [because] of the severity of the crime.”²⁵

The Massachusetts Supreme Judicial Court held that the PHA failed to follow the Fair Housing Amendments Act,²⁶ Department of Housing and Urban Development regulations,²⁷ and the PHA’s own policies. The court found that where a disabled tenant has requested a reasonable accommodation, a PHA is required to “make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures will mitigate the risk.”²⁸ The court stated that PHAs cannot summarily conclude that no accommodation will sufficiently reduce the risk of harm in order to avoid their obligations to accommodate tenants with disabilities.²⁹

Preemption Issues

In some jurisdictions, state law, so long as it is not preempted by federal law, may provide tools for combating one-strike evictions. In *Housing Authority of Covington v. Turner*,³⁰ a public housing tenant who received a 14-day notice of eviction after drugs and drug paraphernalia were found in her apartment attempted to remedy the breach of lease pursuant to a state law provision. The tenant had no prior knowledge of the drugs, which were found in the room where her nephew, a regular guest, kept his belongings. After receipt of the notice, the tenant excluded her nephew from the premises. The lease contained a provision stating that evictions for criminal activity would be governed by the Uniform Residential Landlord and Tenant Act (URLTA) as adopted by the state, which provided a right to remedy the breach.³¹

¹⁶352 N.J. Super. 467, 474 (App. Div. 2002).

¹⁷*Jersey City*, *supra* note 15, slip op. at 17 (quoting *Oakwood*, 352 N.J. Super. at 474, 475).

¹⁸*Id.* at 19 (quoting *Higgins v. Polk*, 14 N.J. 490, 493 (1954)).

¹⁹*Id.* at 19 (citing *Flagg v. Essex County Prosecutor*, 171 N.J. 561, 571 (2002)).

²⁰*Id.* at 19, 20.

²¹871 N.Y.S.2d 10 (N.Y. App. Div. 2008).

²²The court also considered the petitioner’s lack of a prior criminal record and the unlikelihood that she would engage in further criminal conduct. Additionally, the court noted that the petitioner and her uncle both resided at the public housing unit, that the petitioner took care of her uncle and that both suffered from disabilities. The court further noted that the petitioner suffered from depression and stress, which may in part have been caused by her son’s deployment to Iraq. Finally, the court noted that the petitioner had a strong family support system. *Id.* at 11, 12.

²³*Id.* at 12.

²⁴898 N.E.2d 848 (Mass. 2009).

²⁵*Id.* at 852.

²⁶42 U.S.C. §§ 3601 *et seq.* (2000). The court distinguished the case from two cases relied on by the PHA, including *Rucker*, because those cases involved illegal drug activity, which is excluded from the Fair Housing Amendments Act’s definition of handicap. Specifically, 42 U.S.C. § 3602(h) provides that “[the term ‘handicap’] does not include current, illegal use of or addiction to a controlled substance.” *Bridgewater*, 898 N.E.2d at 860, 861 n.26.

²⁷24 C.F.R. § 9.

²⁸*Bridgewater*, 898 N.E.2d at 854 (citing 24 C.F.R. § 9.131(c)).

²⁹*Id.* at 853, 856.

³⁰295 S.W.3d 123 (Ky. Ct. App. 2009).

³¹*Id.* at 125.

The court held that federal law did not preempt the URLTA because federal law does not prohibit affording a public housing tenant the right to remedy a breach, there was no irreconcilable conflict between federal law and the URLTA, and application of the URLTA did not defeat the objectives of federal law.³² The Supreme Court “expressly left discretion to the states and local authorities when it stated that the local authorities are in the best position to consider ‘the extent to which the leaseholder has...taken all reasonable steps to prevent or mitigate the offending action[.]’ ”³³

However, the concurring opinion disagreed on the preemption issue, reasoning that 42 U.S.C. § 1437d(l)(6) does not include any provisions which mandate that a tenant be allowed to cure the breach. Therefore, the concurrence stated that “a state statute allowing a remedy is contrary to the clear language of the federal statute.”³⁴ Nonetheless, the concurring opinion shared the majority’s conclusion that the PHA should have weighed policy considerations, such as whether the development suffered from “rampant drug-related or violent crime,” before deciding to evict.³⁵

Cases that Strictly Apply *Rucker*

Although the aforementioned cases demonstrate willingness by some courts to narrowly construe *Rucker*, such cases appear to be outnumbered by those in which courts strictly apply *Rucker*. Two cases, both involving the Housing Authority of South Bend, Indiana, demonstrate the tendency of courts to apply *Rucker* expansively.

In *Stevens v. Housing Authority of South Bend*,³⁶ the plaintiff-tenant was evicted due to the violent criminal activity of a “person under the tenant’s control.” The tenant brought an action in federal court challenging her eviction on due process grounds. The court rejected her due process argument, reading in *Rucker* an additional determination from the Supreme Court that “a tenant can be evicted for the conduct of a household member or guest regardless of whether the tenant could realistically control the conduct of that household member or guest.”³⁷ The court interpreted “control” simply to mean that the tenant permitted the criminal actor to enter the premises.³⁸ The court also noted that while a PHA *may* consider mitigating circumstances, it can choose not to.³⁹

In *Bishop v. Housing Authority of South Bend*,⁴⁰ a tenant was evicted due to the criminal activity of her son, whom she claimed no longer resided at the unit. The lease contained a provision stating that persons listed on the lease

remained “members of the household and residents” until the resident provided the PHA written notice that such persons were no longer members of the household or residents. The tenant’s son had committed armed robbery near the premises, and the tenant claimed that her son had not lived in the unit for several months prior to the robbery. However, because the tenant had not provided written notice to this effect to the PHA, the court upheld the eviction because her son was still considered a resident under the terms of the lease.

Conclusion

There is no consistent explanation for why some tenants have been able to overcome the hurdle presented by *Rucker* while others have not. Even in the most sympathetic circumstances, like in the two cases from South Bend cited above, some courts have strictly applied *Rucker* and upheld terminations. Three of the most important strategies for advocates to keep in mind are: (1) ensure that PHAs do not abuse their discretion by improperly expanding the scope of *Rucker*; (2) argue mitigating circumstances; and (3) remind PHAs that *Rucker*, the Department of Housing and Urban Development⁴¹ and the regulations give PHAs discretion in determining whether to evict and do not mandate eviction. ■

³²*Id.* at 127.

³³*Id.* at 127 (quoting *Rucker*, 535 U.S. at 134).

³⁴*Id.* at 128 (Moore, J., concurring).

³⁵*Id.* at 129, 130 (Moore, J., concurring).

³⁶720 F. Supp. 2d 1013 (N.D. Ind. 2010).

³⁷*Id.* at 1032 (citing *Rucker*, 535 U.S. at 131).

³⁸*Id.* at 1032-33 (citing *Rucker*, 535 U.S. at 126).

³⁹*Id.*

⁴⁰920 N.E.2d 772 (Ind. Ct. App. 2010).

⁴¹See Letter from HUD Secretary Mel Martinez to Public Housing Directors (Apr. 16, 2002) (on file with NHLP); Letter from HUD Assistant Secretary Michael Liu to Public Housing Directors (June 6, 2002) (on file with NHLP).