Servicemembers May Terminate Leases on Premises and Motor Vehicles

A servicemember may terminate a pre-service lease of occupied premises if called to active service during the term of the lease. A servicemember may also terminate a lease of occupied premises entered into during service if a permanent change of station (PCS) order is issued or a deployment of more than 90 days is ordered.[22] The same right is extended to leases for motor vehicles intended to be used for personal or business purposes where the servicemember is issued a PCS or subject to a deployment order of 180 days or more.[23]

Lien Enforcement Suspended During Military Service

Liens for storage, repair or cleaning cannot be enforced during or within 90 days of the termination of military service.[24]

Dependents May Also Claim Protection Under SCRA if Materially Affected

The protections regarding rent, installment contracts, mortgages, liens, assignment and leases accorded servicemembers under the Act[25] apply to "dependents"—which is defined to include spouses[26]—of servicemembers if it is proven that the dependent's ability to comply with obligations is materially affected by the servicemember's military service.[27] Thus, for example, if a servicemember's dependent child purchased an automobile, the child could be protected. This section does not require the servicemember to be a signatory to any agreement made by a dependent.

Conclusion

The SCRA's reach is quite broad. For example, in addition to what is described here, it also prohibits termination of life insurance policies despite unpaid premiums and suspends some personal income and property taxes for the period of active service. The Act should prove to be a flexible and useful tool to protect servicemembers and their families from financial hardship. ■

[22] *Id*. at § 305(b)(1).

[23] *Id*. at § 305(b)(2).

[24] *Id*. at § 307(a).

[25] *Id*. at § 300-8.

[26] *See* note 11, *supra*.

[27] Pub. L. No. 108-189, § 308, 117 Stat. 2835, 2851 (2003).

California Court Upholds State Preservation Law in Preemption Challenge

Ruling in the wake of two recent and unfavorable decisions by federal appellate courts, a California state court in Sacramento has rejected an owner's claim that federal law expressly preempts a state law requiring specified notice prior to an assisted housing project owner's withdrawal from federal subsidy programs. *College Gardens Preservation Committee v. Eugene Burger Management Corp.*, No. 03 AS02608, slip op. (Cal. Super. Ct. Nov. 19, 2003). Because the owner had never participated in the long-dormant federal preservation program established by the Low-Income Housing Preservation and Resident Homeownership Act (LIHPRHA), 12 U.S.C. §§ 4101 *et seq.*, the court logically concluded that Congress did not intend LIHPRHA's preemption provision, 12 U.S.C. § 4122, to displace state or local requirements. The decision is especially notable because the court disagreed with or distinguished the reasoning of two federal appellate panels on a question of federal law. It thus supports the authority of many state and local governments to regulate those HUD[1]-subsidized mortgage prepayments currently occurring outside of LIHPRHA, as well as other federal assisted housing conversions.

After the owner of a 100-unit Section 236 property gave notice under federal law to prepay its HUD-subsidized mortgage, tenants sued in state court to enjoin the transaction on the basis that the owner had failed to comply with California's separate notice law, CAL. GOV'T CODE §§ 65863.10 and 65863.**1**. That law requires owners to provide several notices to tenants, local governments and interested prospective preservation purchasers during the year prior to the proposed prepayment or subsidy termination.

After briefing and argument, on May 23, 2003, the court preliminarily enjoined the prepayment, rejecting arguments that the state law was preempted expressly or impliedly by federal law.[2] Specifically, the court concluded that the state notice laws are not expressly preempted by LIHPRHA because they do not "restrict or inhibit" prepayment of the HUD-subsidized mortgage and because they are laws of "general applicability" specifically exempted from LIHPRHA's preemption clause.[3] In this the court was aided by several federal trial court rulings that had ruled similarly on preemption challenges to state and local laws.[4]

[1] "HUD" refers to the United States Department of Housing and Urban Development.

[2] LIHPRHA's preemption provision provides in part: "No State or political subdivision of a State may establish, continue in effect, or enforce any law or regulation that (1) restricts or inhibits the prepayment of any mortgage . . . on eligible low income housing ...." 12 U.S.C.A. § 4122(a) (West 2001).

[3] 12 U.S.C.A. § 4122(b) (West 2001).

[4] Kenneth Arms Tenant Ass'n v. Martinez, 2001 U.S. Dist. LEXIS 11470 (E.D. Ca. July 3, 2001); Topa Equities v. City of Los Angeles, No. CV 00-10455 (C.D. Cal. April 8, 2002); Forest Park II v. Hadley, 203 F. Supp 2d. 1071 (D. Minn. 2002) (subsequently reversed).

A few months later, one of those federal decisions, *Forest Park*, was reversed by the Eighth Circuit.[5] Shortly thereafter, although reaching the right result in another case where an owner had resisted application of a local rent control law's base rent provisions, the Ninth Circuit failed adequately to distance itself from the Eighth Circuit's flawed reasoning.[6]

Because both federal decisions can be read to support the argument that LIHPRHA's preemption provision applies to properties that never participated in LIHPRHA, the owner in *College Gardens* moved to reconsider and dissolve the prior preliminary injunction, asserting that the governing law had changed. The tenants countered that the federal decisions are not binding on the state court, and that the state court should independently evaluate them for their persuasiveness.[7] After first issuing a tentative ruling in the tenants' favor to uphold the injunction,[8] the court held argument and then requested additional briefing on the central question of whether the owner's deed of trust (mortgage) was ever subject to a plan or assistance under LIHPRHA, and, if not, whether LIHPRHA's preemption provision applies to that deed of trust.

In its final ruling, the court first noted that it did not need to follow the various federal court decisions and was free to apply its own analysis and interpretation of the federal laws at issue. It then proceeded directly to the heart of the matter. After considering all of the cases and other arguments, it found that because the property, although nominally eligible to do so, did not participate in LIHPRHA while that program was functional, LIHPRHA's express preemption provision did not invalidate state law.[9] Although LIHPRHA was not repealed, Congress suspended processing of LIHPRHA plans in the late 1990s and withdrew funding for any new properties. The court reasoned,

> Although LIHPRHA continues to apply to properties participating prior to 1996, in effect the heart of LIHPRHA has been eviscerated....It does not follow that its preemption provision should be applied to [non-participating properties prepaying under other non-LIHPRHA authority][10] . . . . The presumption is against preemption unless it can be shown that it is the clear and manifest purpose of Congress to preempt state authority. [citing case]. If Congress had intended... to preempt state notice requirements, it could have included a preemption provision in the [subsequent] act. It did not do so. The fact LIHPRHA was not repealed does not compel the conclusion that its preemption provision apply [sic] to mortgages governed by HOPE.[11]

Although this decision represents an important victory for tenants and state and local authority, other pending cases in state and federal courts in Rhode Island and Maryland demonstrate that the preemption issue will remain hotly disputed in those jurisdictions that have enacted preservation law[12] until Congress settles the matter. Congress must clarify that state and local authority to enact such laws remains intact, in the absence of mandatory preservation policies for this large component of the federal low-income housing stock. After all, it is state and local governments and agencies and tenants and others in need who must wrestle with the impacts of these proposed conversions, and allocate scarce resources to address them. States and local governments must be free to develop responsive policies tailored to local conditions. ■

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[5]Forest Park II v. Hadley, 336 F.3d 724 (8th Cir. 2003) (ruling that Minnesota's notice and tenant impact statements are expressly and impliedly preempted, as applied to prepayments of HUD-subsidized mortgages). *See also* NHLP, *Federal Court Issues Stunning Preemption Decision*, 33 HOUS. L. BULL. 365, 378 (Aug. 2003).

[6]Topa Equities, Ltd. v. City of Los Angeles, 342 F.3d 1065 (9th Cir. 2003) (holding that although LIHPRHA's express preemption provision remained "extant," local rent law's base rent-setting provision did not restrict or inhibit prepayment and was exempted as a law of general applicability).

[7]The tenants also argued that the original federal prepayment notice had expired, and the owner could not prepay under federal law until they served a new notice between 150 and 270 days prior to the date of prepayment. The tenants also claimed that since the owner issued a new one-year state notice after the injunction was issued, it could not prepay until after that notice expired in mid-2004. The court instead chose to rely on the tenant's primary argument—that the state law was not preempted.

[8]This ruling, terming *Forest Park* unpersuasive, had again found that the state notice laws did not "restrict or inhibit" prepayment because it was possible to comply with both state and federal laws, and that the state laws were exempted as "laws of general applicability." *College Gardens*, slip op. at 1-2.

[9]The court also reversed its earlier finding that the state preservation notice law was exempt from LIHPRHA as a law of general applicability, *College Gardens*, slip op. at 2, but that was of no consequence in view of its ruling that LIHPRHA was altogether inapplicable.

[10]Here the court mentioned the Housing Opportunity Program Extension Act of 1996 (HOPE), which first created authority for owners to prepay outside of LIHPRHA, but the College Gardens owner actually sought to prepay under the subsequently enacted but similar provisions of Pub. L. No. 105-276, § 219, 112 Stat. 2461, 2487 (1998), which still governs these prepayments. Courts have sometimes referred to all of these non-LIHPRHA prepayment authorities as "HOPE."

[11]*College Gardens*, slip op. at 3.

[12]Numerous state and local governments passed laws to address the threatened conversion of existing federally subsidized properties to market-rate use, by protecting tenants or seeking to preserve the threatened properties. These jurisdictions include the states of Minnesota, Maryland, Rhode Island, Maine, Illinois, California, Connecticut, Texas and Washington, and the cities of San Francisco, Los Angeles, Denver, Portland, Seattle, Stamford (CT) and the District of Columbia. *See* www.nhlp.org/html/pres/state/index.htm. For more background on these state and local laws, see NHLP, *Preserving Federally Assisted Housing at the State and Local Level: A Legislative Tool Kit*, 29 HOUS. L. BULL. 183, 183 (Oct. 1999) (survey of state and local preservation initiatives), and NHLP, *Rights of First Refusal in Preservation Properties: Worth a Second Look*, 32 HOUS. L. BULL. 1, 1 (Jan. 2002) (reviewing state notice laws attempting to support transfers to preservation purchasers). Most of these laws require notices of various lengths to tenants and state and local governments about the owner's intentions; some establish rights of first refusal for specified preservation purchasers in the event of sale, or rights of such purchasers to make offers in the event the owner is converting but not selling; still others seek to extend existing rent control systems to cover rents at properties once federal regulation terminates.