

a standard expungement form. After the expungement is ordered, the individual is responsible for transmitting the information to local and federal enforcement agencies. To expunge convictions, individuals must petition the court in which the judgment was entered. Forms are available at the Administrative Court Office. A hearing is required and an individual must provide the local prosecutor's office with notice and a copy of the petition.⁴⁵

Advocacy Tips

- **Know the law of the locality.** Each state will have its own rules regarding who is eligible to have records expunged, the process of expungement, and how successful expungement will affect future eligibility for a variety of rights and benefits including housing.
- **Try to stop the damage before it starts.** Expungement proceedings are difficult and time consuming. Therefore, if you are assisting someone whose criminal case is pending, determine if there is a statute under which the judgment can be withheld such that it will later be easier to expunge. Discuss with public defenders the ramifications of convictions on an individual's ability to obtain federally assisted housing.
- **Challenge action based on criminal conduct.** If your clients are denied housing or adverse action is taken against them, exercise the right to challenge the record. Emphasize that HUD regulations encourage case-by-case determinations made with compassion.⁴⁶ Also emphasize that the criminal conduct to be a grounds for denial, eviction or termination must relate to the tenant's suitability as tenant.
- **Check the facts.** Always check to make sure criminal history is accurate. Most states allow for expunction of false records. Moreover, PHAs are obligated to provide the tenant or applicant with a copy of the criminal record and a hearing if it is the basis for the adverse action.⁴⁷ In addition, a hearing is available to applicants for any assisted housing if rejected for any reason including for a prior criminal record.⁴⁸
- **Check if judicial relief can be granted.** Some state courts can expunge records of individuals who do not qualify under the statute (or if the state does not have a statute allowing for expungement), particularly upon a showing of great harm. ■

⁴⁵All information relating to the Washington process was obtained from <http://www.lawhelp.org/documents/2508019912EN.pdf?stateabbrev=WA/> (dated June 14, 2005).

⁴⁶See Letter from Mel Martinez, HUD (Apr. 16, 2002).

⁴⁷24 C.F.R. § 982.553(d) (2005).

⁴⁸See prior discussion regarding hearings.

Fifth Circuit Holds Voucher Utility Allowances Privately Enforceable

In an important case of first impression under the nation's largest affordable housing program—Housing Choice Vouchers—the United States Court of Appeals for the Fifth Circuit has ruled that tenants' legal rights to adequate utility allowances are judicially enforceable through Section 1983.¹ *Johnson v. Housing Authority of Jefferson Parish*, No. 04-31201, 2006 WL 533831 (5th Cir. March 6, 2006). The Fifth Circuit reversed the trial court, which had dismissed the tenants' complaint and refused to allow an amended complaint raising additional related claims to be filed. The case now returns to the trial court for further proceedings and possible settlement negotiations.

Background of the Case

The plaintiffs are forty-one tenants who leased privately owned units under the voucher program under the jurisdiction of the Jefferson Parish (Louisiana) Housing Authority. This public housing authority (PHA) had not adjusted allowances for nearly a decade, from 1995 to 2004, despite several utility rate increases of 10% or more. Neighboring PHAs had raised allowances for voucher tenants at least three times during the same period. Disparities became significant—Jefferson Parish's four-bedroom monthly allowance for gas and electric service was approximately \$69 per month, compared to nearby Kenner's \$115 and Orleans' \$124 for the same electric service provider. The actual utility costs paid by all of the plaintiffs greatly exceeded Jefferson's allowances.

The tenants filed suit in federal court in April 2004. Because the tenants were represented by a federal Legal Services Corporation grantee, the case had to be filed on behalf of individual named plaintiffs, rather than as the more appropriate and efficient class action on behalf of all the PHA's 2700 voucher recipients. Prior to a responsive pleading, plaintiffs filed an amended complaint to add more named plaintiffs. The complaint alleged that Jefferson had not provided the full amount of the housing assistance required by federal statute and regulations to private landlords on behalf of Housing Choice Voucher participants. Specifically, the suit claimed that Jefferson had violated the regulatory requirements of the Department of Housing and Urban Development (HUD) that allowances be based on current utility rates and be revised when utility rates increase by 10% or more from the rates supporting the prior allowance. In addition, according

¹In preparing this summary, NHLP gratefully acknowledges the assistance of Vicki Shabo, Student Law Clerk at the National Senior Citizens Law Center, University of North Carolina School of Law, Class of 2006.

to a second amended complaint, which the court denied leave to file, the PHA also violated two other regulatory requirements in failing to set allowances based on the typical cost of utilities and services paid by energy-conservative households occupying similar units locally, and by failing to use normal patterns of community consumption and current rates.

As a result, plaintiffs asserted that their rent burdens were higher than specified by Congress. Their complaint sought both retrospective and prospective relief for these violations.

After defendants filed a motion to dismiss, without oral argument or hearing, the district court granted the defendants' motion and dismissed the case in October 2004. The district court held that voucher participants have no right under Section 1983 to enforce the federal statute requiring local PHA administrators to pay monthly rental assistance that includes a utility allowance calculated under HUD's rules. Consequently, the court also denied leave to file the second amended complaint revising the regulatory basis for their claims, updating factual allegations, and adding two more plaintiffs. Because of its ruling, the court did not rule upon defendants' additional contention that some plaintiffs lacked standing because they had purportedly suffered no injury from the alleged violations because their gross rents already met or exceeded the local payment standard, and thus they would not benefit from an increased utility allowance.

Analysis of the Decision

The Fifth Circuit's three-judge panel² held unanimously that Housing Choice Voucher participants may sue under 42 U.S.C. § 1983 to challenge a PHA's failure to follow the statute and its implementing regulations governing utility allowances. Judge Wiener's opinion holds that the Supreme Court's 1987 pre-*Gonzaga* decision in *Wright v. Roanoke*,³ which found a Section 1983 claim for public housing tenants to challenge utility allowances under the rent limitation provisions of the Act and its implementing regulations, is still good law and controls the resolution of plaintiff voucher tenants' claims here.

The court began its analysis by noting the "increasingly restrictive" standards developed by the Supreme Court over the past two decades for determining when laws will be interpreted to create private rights of action, either under Section 1983 or directly as an implied right. In both cases, at least for this court, the statute must unambiguously create a privately enforceable substantive right. Under *Blessing*,⁴ the key element is Congressional

intent, discerned through a three-part inquiry: (1) intent to benefit the plaintiff; (2) a right sufficiently specific to be within judicial competence to enforce; and (3) couched in mandatory language. "[I]n the end, very few statutes are held to confer rights enforceable under § 1983.... We recognize at the outset, therefore, that the result we reach in this case is a rarity..., but we are nevertheless convinced that its resolution is controlled by ... *Wright*...."⁵

The Fifth Circuit held unanimously that Section 8 voucher participants may sue under 42 U.S.C. § 1983 to challenge a PHA's failure to follow the statute governing utility allowances.

In finding that the voucher statute, Section 1437f(o)(2), creates enforceable rights, the Fifth Circuit stated that *Wright's* analysis "indeed constitutes an indispensable element of the current [Supreme Court] methodology," because "*Gonzaga* expressly relied on *Wright*, pointing to it as a paradigmatic example of an appropriate case for finding the presence of a private right of action under Section 1983 and leaving no doubt that *Wright* survives as good law."⁶ In *Wright*, the Court had found that the statute imposed a mandatory rent limitation for tenants and fully authorized HUD's interpretive public housing utility allowance regulations, and thus were fully enforceable through Section 1983, since there was no indication of comprehensive alternative enforcement mechanisms.

The PHA had endeavored to distinguish *Wright*, arguing primarily that the public housing program involved different provisions of the act and that the structure of the voucher program, which permits tenants to choose to pay more than 30% of adjusted income, does not limit every tenant's rent contribution to the statutory amount. In the voucher program, any excess housing costs above the "payment standard," which is established by the PHA within statutory limits, are borne by the tenant. The court recognized that such excess payments result from tenant choices to rent higher-priced housing, and provide no legal support for compelling that result through a PHA's backdoor lowballing of utility allowances. In vainly attempting to distinguish *Wright*, the PHA had also pointed to the fact that the statutory voucher assistance payment flows from the PHA to the owner as evidence that Congress did not intend to vest rights directly in tenants.

²The panel was Judge Wiener (appointed by the elder President Bush), Judge Reavley (Carter) and Davis (Reagan),

³479 U.S. 418 (1987).

⁴*Blessing v. Freestone*, 520 U.S. 329 (1997).

⁵*Johnson v. Hous. Auth. of Jefferson Parish*, 2006 WL 533831, at *8-9 (5th Cir. March 6, 2006).

⁶*Id.* at *9.

The court found the PHA's attempt "unconvincing... a classic distinction without a difference," which "in no way compels the conclusion that ...[the voucher statute] does not create a federal right that can be enforced through Section 1983."⁷ Of significance to the court was the identical harmful effect of an inadequate allowance in both cases—tenants are forced to pay more than Congress intended.

The lack of any other statutory remedy for tenants only reinforced the court's conclusion that private enforcement via Section 1983 should remain available.

Key to the court's three-prong *Blessing* analysis was the legal framework of the program, where the regulations interpret clear but incomplete statutory language. The crucial laws involved here derive from the voucher statute itself, which mandates assistance for participating families renting units set at "the amount by which the rent (including the amount allowed for tenant-paid utilities) exceeds ... 30 percent of the monthly adjusted income of the family," capped at the PHA-established payment standard set within statutory limits.⁸ In turn, HUD regulations require that the PHA establish the "amount allowed for tenant-paid utilities" based "on the typical cost of utilities and services paid by energy-conservative households that occupy housing of similar size and type in the same locality ... us[ing] normal patterns of consumption for the community as a whole and current utility rates."⁹ The rules further require that the PHA "review its schedule of utility allowances each year, and must revise its allowance for a utility category if there has been a change of 10 percent or more in the utility rate since the last time the utility allowance schedule was revised."¹⁰

On the first part of the test—the intention to benefit the plaintiff-tenants—the court stated that the "statutory language could not be clearer" in establishing the amount of assistance for the family, rejecting the PHA's characterization of tenants as indirect beneficiaries as a "distortion" and "absurd."¹¹ The court thus refused to accept the contention that an enforceable statute must make tenants the subject of any rights-creating language. In fact, the court characterized the PHA's argument as "exactly backwards," since the voucher statute's explicit mention

of utilities demonstrates a basis for private enforcement actually superior to that in *Wright*, where the statute was silent on utilities.¹²

On the second part of the test—whether enforcement was within judicial competence—the court found the rules governing establishment and adjustment of allowances enforceable, even though the calculation was not an "exact science," whereas the 10% adjustment requirement left no discretion whatsoever. Again, *Wright* determined the outcome here.

On *Blessing*'s third part—whether the duties are mandatory—the court dismissed the PHA's argument that its only duty was to HUD, and that the regulatory duties could not be mandatory because HUD could waive them. The court simply pointed out that no such waiver had been sought or obtained.

Finally, as in *Wright*, the court had no trouble finding a lack of any comprehensive remedial scheme demonstrating Congressional intent to preclude private enforcement. The possibility of HUD oversight, administrative remedies and funding consequences for wayward PHAs provided no indication of Congress' intent to vest exclusive enforcement power in HUD. The lack of any other statutory remedy for tenants only reinforced the court's conclusion that private enforcement via Section 1983 should remain available.

The Significance of *Johnson*

On utility allowance claims, the decision obviously helps demonstrate continued judicial receptivity to private enforcement, which could extend beyond Section 1983 claims against PHAs for violations under the public housing and voucher programs to encompass private rights of action against private owners under the project-based Section 8, Rural Housing Services Rental Assistance, and Low-Income Housing Tax Credit programs—all of which require specific utility allowances for tenant-paid utilities. Private enforcement may become an important vehicle to encourage statutory and regulatory compliance in the face of rising utility costs and lax administrative oversight.¹³

For claims concerning enforcement of other laws, the decision shows how regulations can still be enforced after *Alexander v. Sandoval*, 532 U.S. 275 (2001), as long as they are implementing rights established in a statute, despite the "increasingly restrictive" enforceability doctrine developed by the Supreme Court. *Johnson* strongly supports the principle that *Gonzaga* did not overrule or otherwise marginalize major pre-existing precedents such as *Blessing* and *Wright v. Roanoke*. It is reasoning that may prove

⁷*Id.* at *12.

⁸42 U.S.C.A. § 1437f(o)(2) (West 2003).

⁹24 C.F.R. § 982.517(b)(1) (2005).

¹⁰*Id.* § 982.517(c)(1).

¹¹*Johnson*, 2006 WL 533831, at *15-16.

¹²*Id.* at *17-18.

¹³See NHLP, *Utility Allowance Adjustments: How Housing Advocates Can Proactively Address Skyrocketing Energy Costs*, 35 HOUS. L. BULL. 249 (2005); NHLP, *Shifting Affordable Housing Cost Burdens to Tenants: A Historical Perspective*, 35 HOUS. L. BULL. 1, 8 (2005).

useful in demonstrating that other federal laws create “enforceable” statutory rights post-*Gonzaga*. The court’s application of the *Blessing* test—observing that it derived from *Wright*—without considering whether *Gonzaga* modified it and without emphasizing the need for “right- or duty-creating language,” may prove useful elsewhere, as may its characterization of *Gonzaga* as “approving of the analysis and outcome in *Wright*.”

Finally, *Johnson* may prove important for supporting private enforcement of similar Spending Clause statutes, in the face of claims that the typical remedy of withholding federal funds should preclude private enforcement.¹⁴

The plaintiffs were represented by Charles Delbaum and Laura Tuggle of New Orleans Legal Assistance Corporation, joined for the Fifth Circuit argument by Pro Bono counsel Reagan Simpson of King & Spaulding in Houston. Amici AARP and the Texas Tenants Union were represented by several members of the Housing Justice Network, including NHLP. ■

¹⁴See, e.g., Lauren Saunders, National Senior Citizens Law Center, Are There Five Votes to Overrule *Thiboutot*?: The Threat to Enforcement of Federal Medicaid, Housing, Child Welfare, and Other Safety Net Programs (2006) (on file with NHLP).