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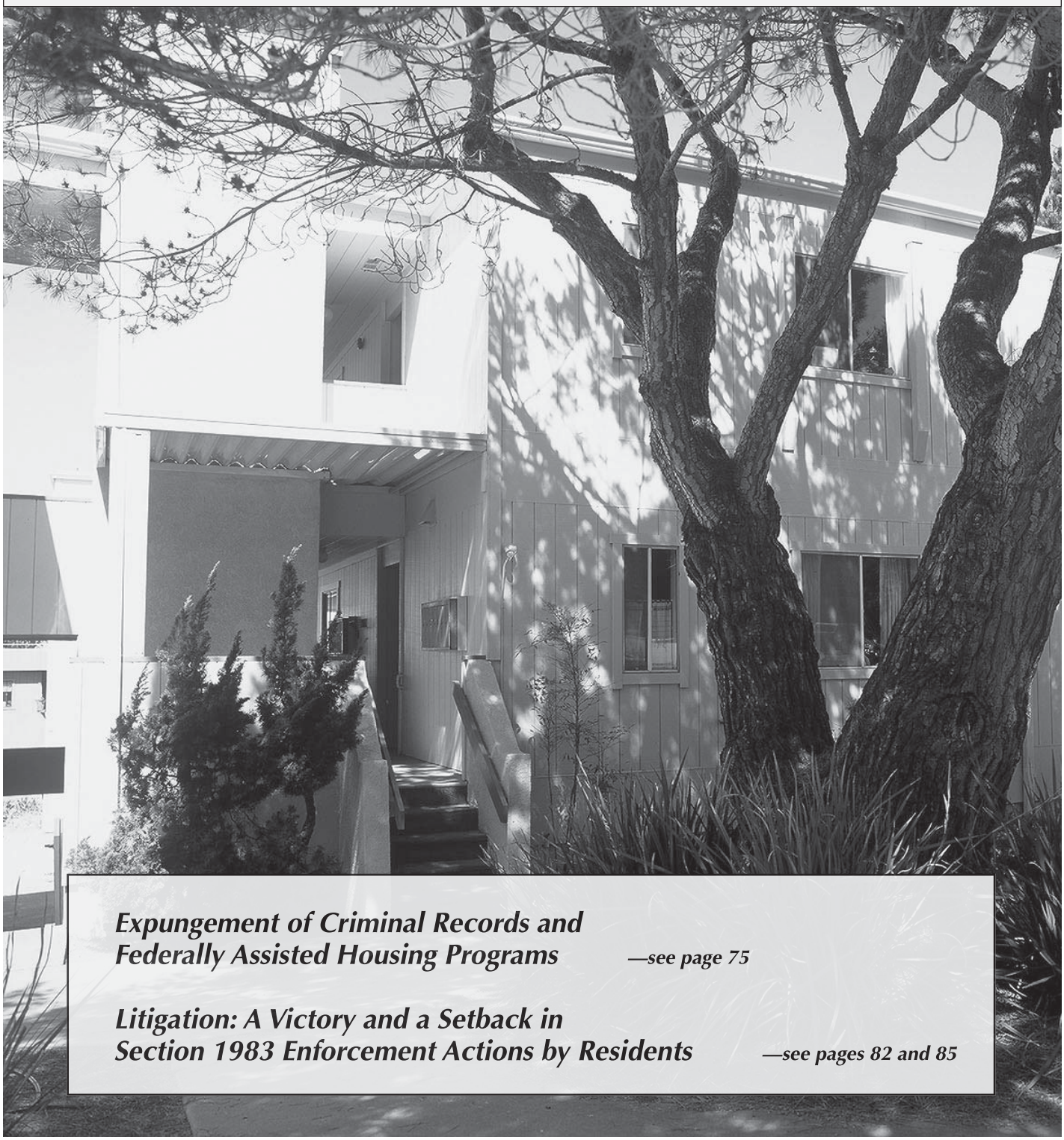

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Expungement of Criminal Records and Federally Assisted Housing Programs

By Devon Knowles*

Evidence of past interaction with the criminal justice system is a basis for denying needy individuals access to federal low-income housing benefits. Even where an arrest did not result in a subsequent conviction, it may preclude an individual or his family from receiving federal housing assistance. With four to five million Americans arrested every year, the implications of this policy are widespread and can be disastrous for a family trying to make ends meet.

Currently, one in five Americans has a criminal record.[1] Not surprisingly, minorities, who experience disproportionate contact with the criminal justice system, will bear the brunt of this exclusionary law. Annually, racial and ethnic minorities constitute two-thirds of all individuals transitioning from prison or jail to the community.[2] Specifically, African Americans, who make up 12% of the nation's population, constitute 27% of those arrested.[3] Many individuals reentering society and reunifying with their families will be denied federally assisted housing benefits on the basis of their criminal record. The inability to find housing can make successful reentry prohibitively difficult, forcing vulnerable individuals even further into the margins.

While there is a narrow category of crimes that permanently disqualify individuals from receiving housing benefits, in many instances a criminal record need not render an individual or family ineligible for federally assisted low-income housing. The extent to which a criminal record does affect an applicant's housing eligibility varies by program—for example, public housing, the Housing Choice Voucher Program, or Project Based Section 8 housing. Each program also provides different levels of discretion to the administrators in determining what types of criminal records can disqualify an applicant.

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*Devon Knowles is a student at Columbia Law School, Class of 2006.

[1]Employment Screening for Criminal Records: Attorney General's Recommendation to Congress, Comments of the National Employment Law Project to the U.S. Attorney General, Office of Legal Policy (OLP Docket No. 100) 2 (Aug. 5, 2005) (estimating 45 million adults with criminal records) *available at* http://www.nelp.org/docUploads/AGCommentsNELP.pdf.

[2]Human Rights Watch, No Second Chance: People with Criminal Records Denied Access to Public Housing 84 (2004) [hereinafter No Second Chance] (citing Joan Petersilia, When Prisoners Come Home: Parole and Prisoner Reentry 26 (2003)), *available at* http://hrw.org/reports/2004/usa1104/usa1104.pdf.

[3]*Id*.

This article discusses the remedy of expungement or sealing of criminal records as a means of removing barriers for qualifying for federally assisted housing programs. Primarily, expungement can prevent the housing administrator, owner or manager from learning about an individual's criminal history by preventing federal authorities from disclosure and relieving an applicant from the requirement of self-disclosure. Even where an expunged criminal history comes to the attention of a housing administrator, owner or manager, good arguments exist for excluding the criminal record as a basis for denial or for using it as a mitigating or changed circumstance.

Admissions and Evictions Based on Criminal History

In the typical situation, past criminal activity alone will be used as a basis to deny an application for federally assisted housing or to the voucher program, rather than to evict or terminate benefits. As noted below there are some situations in which prior criminal activity which is not compounded by current criminal activity may also be used to precipitate an eviction or termination of benefits.

The rules governing the various federally assisted low-income housing programs vary in how they deal with prior criminal activity in admissions, evictions and continued occupancy.[4] The following is a summary of the key provisions. However, for more detail please refer to *HUD Housing Programs: Tenants' Rights*, published by NHLP.

Admission or Initial Eligibility

Within all federally assisted housing programs, there are provisions allowing for screening applicants based on their criminal histories. The information may be obtained through the applicants themselves, background checks, or other sources. In some instances, PHAs and owners have no discretion as to whether to disqualify an individual based on criminal history. Rather, federal law requires public housing authorities (PHAs) and owners of federally assisted housing to bar admission or participation based on a narrow category of criminal acts. Individuals who have been convicted of sex offenses for which they are subject to lifetime registration requirements are ineligible for admission.[5] Individuals who have been convicted of production of methamphetamine on federally assisted housing premises are barred from receiving public housing, a voucher or project-based Section 8 assistance.[6] Similarly, PHAs and owners must exclude from admission or participation any applicant who has been evicted from a federal housing program within the last three years for a drug-related activity, absent rehabilitation or changed circumstances.[7] PHAs and owners are also required to establish standards to exclude any family with a household member who is currently engaged in illegal drug use or whose illegal drug use is reasonably believed to interfere with the rights of other tenants.

For individuals whose criminal records do not require exclusion, PHAs and owners have broad discretion to deny admission to federally assisted housing based upon past criminal activity. PHAs and owners may deny admission to federally assisted housing where it is reasonably believed that any member of the household is currently engaged in, or at some "reasonable" time prior to admission has engaged in, a wide variety of criminal activities.[8] What constitutes a "reasonable" time prior to admission and whether individuals previously denied based on criminal activity can be reconsidered where the evidence demonstrates the conduct no longer exists is to be determined by the PHA or owner.[9] This determination may include an assessment of whether there are extenuating circumstances such as the effect of the action on other household members and whether the applicant is sufficiently rehabilitated to be eligible given the criminal history.[10]

For applicants for public housing, the regulations provide that the decisions should be determined on an individualized basis, looking to the "time, nature, and extent of the applicant's conduct and the seriousness of the offense."[11]

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[4]See 24 C.F.R. § 5.10 (2005) for a definition of federally assisted housing. It includes public housing, Section 8, Sections 202, 811, 221(d)(3) and 236. Section 514 and 515 housing is listed in the definition of federally assisted housing, but then the provisions regarding the obligations of owners and rights of tenants regarding issues of criminal activity specifically exempt such housing, see 24 C.F.R. § 5.850. Also, the sections of the regulations regarding access to the federal criminal records database by a PHA are applicable to public housing, Section 8 including project-based, and the voucher program. See 24 C.F.R. § 5.902 (2005).

[5]NHLP, HUD Housing Programs: Tenants' Rights § 2.6.2.4 (3d ed. 2003) [hereinafter HUD Housing Programs].

[6]*Id*. § 2.6.2.2.; 24 C.F.R. § 982.553(a) (2005) (requiring PHAs to prohibit entry into the Housing Choice Voucher Program those persons who have been convicted of methamphetamine offenses on federally assisted housing premises and those who are required by any state to register as a lifetime sex offender); 24 C.F.R. § 5.854(b) (2005) (requiring Section 8 project based owners to prohibit entry of those who are required to register as lifetime sex offenders under any state program).

[7]HUD Housing Programs, *supra* note 5, § 2.6.2.1; 24 C.F.R. § 5.854 (2005) (providing exceptions to the general prohibition of this category of individuals). While this requirement applies to all members of the applying household, it may be overridden if the individual has successfully completed a rehabilitation program or the circumstances leading to the eviction no longer exist); *see also* 24 C.F.R. § 982.553(a) (2005) (requiring PHAs to take adverse action towards this category of individuals participating in the Housing Choice Voucher Program); The Legal Action Center, After Prison: Roadblocks to Reentry, A Report on State Legal Barriers Facing People with Criminal Records 16 (2004) [hereinafter After Prison], *available at* http://www.lac.org/lac/upload/lacreport/LAC_PrintReport.pdf.

[8]24 C.F.R. § 5.855 (2005).

[9]*Id*.

[10]After Prison, supra note 7, at 16 (citing forty-seven states that make individualized determinations based on an applicant's criminal history and three states implementing a flat ban on individuals with a "wide range of criminal records").

[11]24 C.F.R. § 960.203(d)) (2005).

In evaluating a particular criminal record, PHAs and owners should consider whether there exists any indication that an individual constitutes a threat to the health, safety, or enjoyment of the premises. Unfortunately, with little direction as to what constitutes a "risk" to the "health, safety, or enjoyment" of the premises, PHAs too frequently prohibit admission of individuals with any criminal record.[12]

Eviction or Termination of Subsidy

Criminal activity and a prior criminal record may be used not only to deny admission to federally assisted housing programs, but also as a basis for eviction or termination of benefits. Because criminal records are reviewed prior to admission, past criminal activity most typically is relied upon in eviction and termination proceedings when current criminal activity is suspected or at issue.[13] Prior criminal activity should not be grounds for an eviction if there is no current bad behavior or threat to the health, safety and quiet enjoyment of other tenants, staff or the property.[14]

There are at least two instances in which past criminal conduct may be the primary factor leading to termination and eviction without concomitant current criminal activity. One is where it is discovered that an individual has provided false information regarding a prior arrest or conviction during the eligibility screening process. Another situation is where the rules have changed and certain prior criminal activity is now grounds for eviction. In the former situation, the PHA or owner may seek eviction for fraud or intentional misrepresentation.[15] The tenant defenses to that action will depend upon the elements of fraud or intentional misrepresentation, which generally include a knowing misrepresentation (including omissions) made for the purposes of gaining an undue advantage.[16] In the situation where the policies of the PHA have changed, the tenant should not be threatened with eviction or termination of subsidy without proof of a current threat. However, in one instance, a tenant who was a registered sex offender but who had lived in the apartment for four years without incident was evicted because the new rule required the exclusion of registered sex offenders.[17] The court in that case held that under state law the landlord could impose a new rule so long as the rule was reasonable. The court found the new rule reasonable, despite the fact that, by definition, the tenant could not comply.

Procedural Rights[18]

In the admission or eligibility context, an applicant has a right to an informal hearing or review to object to the denial of admission or the denial of the voucher. In an eviction, the tenant has a right depending upon the type of federally assisted housing involved to meet with the owner or his or her representative or to a grievance hearing and/or a hearing in court. In the case of termination of the voucher, the participant has a right to an informal hearing prior to termination. In addition, a tenant or applicant has a right to a hearing before the PHA to contest action taken pursuant to the PHA accessing federally maintained criminal records, including the records obtained from a state or local government regarding lifetime sex offenders.[19]

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[12] *See* NO SECOND CHANCE , supra note 2, at 46, 54 (noting that PHAs often uniformly deny eligibility to anyone with even a minor record).

[13] Public housing leases must include a provision that allows landlords to evict tenants for any "criminal activity . . . engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control." 24 C.F.R. § 966.4(f) (12) (2005). A similar provision is required authorizing termination of a voucher tenancy based on drug-related criminal activity engaged in, on, or near the premises, and eviction for drug-related activity that interferes with the rights of other residents. *See e.g.* 24 C.F.R. § 982.310(c)(1) (2005). Thus, PHAs and owners have broad discretion to terminate assistance for individuals who are suspected of engaging in criminal conduct or of being complicit in the use of illegal drugs.

[14] *See, e.g.*, Wellston Hous. Auth. v. Murphy, 131 S.W.3d 378 (Mo. App. Ct. 2004) (tenant cannot be terminated based upon the criminal record of her guest that occurred prior to lease term).

[15] *See e.g.*, 24 C.F.R. § 982.552(c)(1)(iv) (2005).

[16] 37 AM. JUR. 2D *Fraud and Deceit* § 1 (2006).

[17] Archdiocesan Hous. Auth. v. Demmings, 108 Wash. App. 1035 (2001) (unpublished).

[18] For more discussion, see HUD HOUSING PROGRAMS: TENANTS' RIGHTS, ch. 13, and §§ 2.12, 14.3 and 14.4.2.

[19] 24 C.F.R. §§ 5.903(f) and 5.905(d) (2005). Also see discussion in the next section of this article regarding accessing information from the National Crime Information Center.

James Scruggs Joins NHLP to Lead D.C. Office

The National Housing Law Project pleased to announce that **James Scruggs** has recently joined our staff to assume the leadership of our District of Columbia office. James comes to us with many years of experience in assisting low-income clients with housing and consumer law issues, most recently serving as the managing attorney at the Fairfax office of Legal Services of Northern Virginia.

James is already settled into our D.C. office, where his work will focus primarily on our D.C. Public Housing Residents' Initiative and NHLP's RHS Homeowner Foreclosure Prevention Project, in addition to a variety of housing advocacy work. You may reach him at 202-347-8775 or by email at jscruggs@nhlp.org. Please join us in extending a warm welcome to James.

How Information Regarding Criminal Records Is Obtained

There are several sources from which PHAs and owners are able to obtain information about an applicant's criminal record. First, PHAs and owners may require applicants to disclose their criminal records in the application process. For example, the Housing Authority of Baltimore City application asks whether the applicant or any family member has been convicted of a violent or drug-related crime, is required to register as a sex offender or is currently on parole, probation, or home monitoring.[20] It also indicates that a criminal background check will be performed for all household members above the age of 14.[21]

The second major source of criminal history information is through the federal criminal database. Once an individual has been fingerprinted, his or her information is sent to the National Crime Information Center (NCIC), a federal database accessible to federal and state law enforcement agencies.[22] Therefore, after an arrest—even where the charges are dismissed or the defendant is acquitted—local law enforcement agencies send information and fingerprints to the national database where it can be accessed by any law enforcement agency in the country at the request of a PHA. Because PHAs are authorized or required to make assistance determinations based on criminal activity, they have been granted the statutory right to access an applicant's criminal history for screening or eviction purposes.[23] On the other hand, owners of project-based Section 8 housing have a right to request that a local PHA obtain the criminal records of adult members of households for evaluation for screening or eviction purposes.[24] The extent to which a PHA is authorized to access an individual's criminal record, and the limited purposes for which this information can be used, are outlined below:

- **Public Housing.** PHAs administering a public housing program are entitled to access criminal records for screening for eviction and lease enforcement purposes.[25] Under Department of Housing and Urban Development (HUD) guidelines, PHAs are required to check applicants' criminal histories to determine whether there is any criminal activity that would constitute a lease violation had that applicant lived in public housing.[26]
- **Housing Choice Voucher Program.** PHAs are entitled to access criminal records for screening applicants. However, because PHAs are only authorized to obtain the records on behalf of project-based landlords, PHAs may not use the information received from a law enforcement agency for lease enforcement or eviction purposes, as these functions are performed by the voucher landlords and those landlords do not have a statutory right to request or obtain the criminal records from NCIC.[27]
- **Project-Based Section 8 Housing.** PHAs have the authority to access NCIC criminal records at the request of owners of project-based Section 8 housing. The records may be used for screening, eviction, and lease enforcement purposes.[28]

Finally, PHAs or owners may gain knowledge of an individual's criminal record from outside sources. These include newspaper reports, police blotters, publicly available state lists of sex offenders, references given by the applicant, the applicant's prior landlords, or anonymously given information.

Expungement of Criminal Records

Although the definitions vary by state, "expungement" typically refers to the process of destroying or erasing all previously public records relating to a specific criminal incident. "Sealing" does not require destruction of the record, but does prevent it from being accessed by PHAs or private owners of federally assisted housing. Because the effect of both sealing and expungement are generally the same for housing purposes, for the remainder of this article the terms are used interchangeably.

As previously noted, criminal activity without a criminal conviction is sufficient grounds for PHAs or owners to take adverse action against an individual's housing application, making the existence of *any* criminal record problematic. It is for this reason that individuals may want to have their criminal records expunged or sealed. In many states, criminal records that have been expunged or sealed cannot legally or practically be used as grounds for denying federal housing benefits or taking other adverse action against recipients. Specifically, expungement may

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[20]Housing Authority of Baltimore City, Application for the Public Housing Program (Feb. 9, 2005), *available at* http://www.baltimorehousing.org/index/phousing/ph_app.pdf.

[21]*Id*.

[22]For more information about NCIC, see http://www.fas.org/irp/agency/doj/fbi/is/ncic.htm (updated April 8, 2003).

[23]42 U.S.C.A. § 1437d(q) (West 2003) (applies to public housing, the Housing Choice Voucher Program, Section 8 project-based assistance (at request of the owner) and the Section 8 Moderate Rehabilitation program).

[24]42 U.S.C.A. § 1437d(q)(1)(B) (West 2003) (note also that juvenile records may be released only if state or local law permits); 24 C.F.R. § 5.903(d) (2005).

[25]24 C.F.R. § 5.903(a) (2005).

[26]HUD, Public Housing Occupancy Guidebook 53 (2004), *available at* http://www.hud.gov/offices/pih/programs/ph/rhiip/phguidebook.cfm.

[27]42 U.S.C.A. § 1437d(g)(1)(B) (West 2003); 24 C.F.R. § 5.903(e)(ii)(B) (2005).

[28]24 C.F.R. § 5.903(e)(1)(ii)(B) (2005).

restore an individual's legal status and rights,[29] prevent PHAs and owners from accessing an individual's criminal record,[30] or authorize an individual to omit the expunged information in housing applications.[31]

While expungement can be an extremely useful remedy in overcoming the consequences associated with an individual's criminal record, it is a difficult process and has inherent limitations. First, it is difficult to determine what the process is and whether it is available. Authority to expunge, seal, or dismiss criminal records is derived from state statute and/or judicial authority. [32] Thus, the availability of relief and the effect on federal housing benefits will be different for each locality. It can also be difficult to determine the qualifications for expungement based upon the content of the individual's criminal record.

Second, each state typically defines classes of individuals who qualify for expungement, making it a remedy that is not available to all. There are five general distinctions that states typically use to establish categories of individuals eligible to petition for expungement. These are:

- **Case Disposition.** Generally, states have distinguished three classes of criminal records: (1) the individual was arrested, but the charges were never brought or were ultimately dropped, dismissed, or resolved in favor of the defendant; (2) the defendant pled guilty to or was convicted of an offense where the judgment was withheld or suspended on the condition of completing a program or term of probation; and (3) the defendant pled guilty to or was convicted of an offense where the judgment was imposed. Usually, expungement laws are more likely to provide relief for individuals in the first two categories. For example, under the Colorado Code, most individuals who were arrested or taken into police custody but were not ultimately charged of a crime can have their record sealed.[33]

- **Criminal Offense.** Many states allow expungement of criminal records for those who are convicted or plead guilty to commission of relatively minor offenses, particular those involving controlled substances. Pennsylvania provides one example of this type of classification, whereby most individuals charged under the Controlled Substances, Drug Device, and Cosmetic Act are entitled to expungement, thereby preventing PHAs and owners from accessing their criminal records. This exception may be particularly important in areas like New York State, where African Americans and Latinos make up 93% of those incarcerated for drug offenses.[34]

- **Age and Criminal History of Offender.** Some states have special expungement provisions that apply to offenses committed by juvenile offenders or individuals under the age of 21. Moreover, to qualify for expungement, regardless of age, individuals will frequently have to demonstrate that the record they seek to seal or expunge is their only criminal arrest or conviction. For example, in North Carolina, individuals under the age of 21 who have not previously been convicted and who plead or are found guilty of a violation of misdemeanor possession of alcohol may petition to have the record expunged after two years and are thereafter not required to report that information for any purpose including federal housing applications.[35]

- **Time Limitations.** Individuals will often be required to wait for a predetermined period of time after arrest or conviction before they are eligible to apply for expungement. How long an individual must wait depends on the state and on the type of offense committed. The waiting period may be an additional burden on applicants if the state waiting period for seeking expungement is longer than the period that the PHA or owner has established for considering prior criminal history relevant for the current admission. In the case of a proposed eviction for a criminal record that could be expunged, the state waiting period may be crucial because of the immediacy of the eviction action.

- **Prior Expungement.** Often, an individual is eligible to get only one offense expunged or sealed over his or her lifetime. As a result, anyone who has already availed themselves of this remedy in a state with a lifetime limit will be barred from expunging criminal records in that state again.

Third, the process of petitioning for and successfully obtaining an expungement order is difficult. It requires individuals to maneuver their way through a complicated legal process. It can be timely, expensive and difficult to

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[29] *E.g.*, IDAHO CODE § 19-2604 (2005).

[30] *E.g.*, GA. CODE ANN. § 35-3-37 (2004).

[31] *E.g.*, FLA. STAT. §§ 943.0585 and 943.0509 (2005).

[32] *See* 21A AM. JUR. 2d *Criminal Law* § 1309 (2004) (noting that in some jurisdictions courts gain their authority to expunge from statutes).

[33] COLO. REV. STAT. § 24-72-308 (2004).

[34] DRUG POLICY ALLIANCE, ROCKEFELLER DRUG LAWS, *at http://www.drugpolicy.org/library/factsheets/rockefeller_fact2.cfm*) (last visited Mar. 31, 2006) (compiled by the New York Legal Aid Society in 2002).

[35] Individuals under the age of 18 who have not previously been convicted of a crime and who are convicted of a misdemeanor other than a traffic violation are also eligible to have their records expunged. N.C. GEN. STAT. § 15A-145 (2005) (noting that after expunction "[n]o person as to whom such order has been entered shall be held thereafter under any provision of any laws to be guilty of perjury or otherwise giving a false statement by reason of his failure to recite or acknowledge such arrest, or indictment, information, or trial, or response to any inquiry made of him for any purpose.").

navigate. Typically, individuals must petition for expungement in the court where the criminal case was handled. The process also usually requires collecting all the relevant information about the case such as date of arrest, statute violated, and date of conviction. An individual will have to contact the law enforcement agency responsible for handling the case or refer to court records. Next, an individual will usually have to fill out a court form, pay a filing fee and, at times, attend a hearing to explain why he or she is seeking expungement or demonstrate qualification for expunction under the state statute. If successful, the court will then order the record expunged. Also, the statutes vary in that individuals may or may not be responsible for forwarding the expungement order to local and federal law enforcement agencies. This is a critical step. It is essential that the expungement order is provided to the NCIC; otherwise, the criminal record will continue to remain available to PHAs and owners.

Allowing those whose records are expunged to overcome the default position of the PHA is justified in light of the inherent, extensive limitations on qualification for expungement.

Using Expungement to Eliminate Barriers to Federally Assisted Housing

In many cases, expungement will prevent the PHA or owner from learning that an applicant has a criminal record. Once a record has been expunged, absent error, it should be erased from the federal criminal database and therefore the PHA would not have access to it. In addition, many individuals who have their records expunged may legally omit information regarding their criminal history from their housing applications and other forms requesting information for housing.[36] Expungement laws may also be used to provide the basis for claiming mitigating or changed circumstances when the criminal record information is obtained from other sources.

For all federally assisted housing programs, PHAs and owners may consider mitigating circumstances in deciding whether to deny admission or terminate assistance to beneficiaries.[37] The fact that a record has been expunged should, in itself, be considered a mitigating or changed circumstance. The argument is that legislatures and the courts have decided that individuals who have gone through this process are entitled to be relieved of all the disabilities associated with a criminal record, and adverse action by a PHA or owner based on an expunged criminal record is such a disability. Further, because the NCIC, a federal database, is foreclosed from providing this information, it is reasonable to conclude that federally funded entities should also be barred from using the expunged information against the individual.

In addition, when evaluating a particular criminal record in the context of admission, PHAs and owners should make individualized determinations and specifically consider whether there exists any indication that an individual constitutes a threat to the health, safety, or enjoyment of other residents or a threat to the premises. In the context of expungement, an argument could be made that the PHA or owner may no longer rely upon that record, however obtained, and categorically exclude the tenant for having a prior criminal record.[38] In other words, if the record in itself would have been sufficient to exclude an applicant under the PHA's policy, where the record is expunged but the PHA still becomes aware of its existence, rather than excluding the individual categorically, the PHA should be required to consider whether the particular criminal history indicates the applicant would be a threat to the health, safety, or enjoyment of the premises.

Allowing those who have had their records expunged to overcome the default position of the PHA is justified in light of the inherent, extensive limitations on qualification for expungement. Specifically, because in many states only minor, distant past, and ultimately dismissed charges can be expunged, it is unlikely that such charges would support a finding that the applicant threatens the health, safety and enjoyment of other tenants or threatens the premises.[39] Moreover, as suggested above, because in the eyes of the law a criminal history that is expunged or sealed is treated as though it never existed in the first place, it is neither rational nor fair to exclude those who have had their records expunged, even if the PHA or owner subsequently becomes aware that the individual had a criminal history. Additionally, there is no rational basis for treating applicants with expunged records differently depending

[36]Many of the expunction statutes explicitly provide that individuals cannot be held liable for omitting the expunged information in the future (*see* Appendix A to this article, which is posted on the NHLP website). *See, e.g.* FLA. STAT. § 943.0585(b) (2005) ("a person who has been granted an expunction under this section, former s. 893.14, former s. 901.33, or former s. 943.058 may not be held under any provision of law of this state to commit perjury or to be otherwise liable for giving a false statement by reason of such person's failure to recite or acknowledge an expunged criminal history record.").

[37]*See e.g.*, 24 C.F.R. §§ 5.100 (definition of federally assisted housing), 5.850, 5.852 and 982.552(c)(2)(i) (2005).

[38]See HUD HOUSING PROGRAMS, *supra* note 5, § 2.6, for a discussion of categorical limitations.

[39]This argument in no way suggests that those who do not have their records expunged and who are routinely disqualified because of their criminal record are less deserving of housing benefits or are more likely to constitute a threat to the health, safety or enjoyment of the premises. Rather, it provides a reason that expungement can be used to identify individuals within the class of those who have a criminal history whose offenses are likely to be unsubstantiated, minor or in the distant past.

upon whether the PHA discovers the expunged criminal record or underlying criminal behavior. Finally, because states may vary in the rights conferred by expungement, the strength of this argument is proportional to the extent that expungement nullifies the criminal record.

A Survey of State Expungement Processes

The following are examples of state expungement requirements and procedures:[40]

Utah

Individuals in Utah are *entitled* to expungement if they were never charged with a crime or if the charges did not result in conviction. Thirty days must have passed since the arrest with no intervening arrests. Individuals may *apply* to have their record expunged if they have been convicted of no more than one felony or two class A or B misdemeanors (not all felonies are eligible for expungement). An individual must have been released from prison, probation, or parole for the requisite amount of time (the time requirement varies depending on the conviction), and must have paid all fines and restitution included in the sentence. To have their record expunged, individuals must petition the district court in which their case is maintained. This involves picking up the petition, filling it out and filing it with the court. Individuals must bring photo identification and a filing fee of $65 (the fee is waived for those entitled to an expungement). Additionally, the court may require that the individual appear at a hearing. A person may also petition to have the record expunged "in part" where all mention of his or her name is erased from the record, but the record itself remains.[41]

North Carolina

Individuals who were arrested and never charged, or who were charged with either a misdemeanor or a felony where a conviction did not result, may apply for expungement if they have no previous criminal charges or expungements. Individuals with a single conviction of possession of alcohol while under age 21 may also apply to have their records expunged after two years. In order to have a record expunged, a person must file a petition with the court in the county in which the person was charged. The forms are available on the state court website.[42] After ensuring that the individual has no prior convictions or expungements, the court signs an order of expungement, which is forwarded to state and federal agencies.[43]

New Jersey

Where an individual was arrested but was not charged, or the charges did not result in a conviction, the individual is eligible for expungement at any time. Completion of pretrial diversion programs are the same as arrests for expungement purposes. Individuals convicted of some indictable offenses are also eligible for expungement provided they have not been convicted of an indictable offense or more than two disorderly conducts in the past. Ten years must have passed between the completion of the sentence, including parole, probation, and all restitution. Individuals convicted of disorderly conduct can file for expungement after five years provided they have no indictable convictions or more than two disorderly conduct convictions in the past. In order to complete the petition, individuals will need information relating to their conviction or arrest, including date of arrest, offense and statute charged under, original indictment or complaint, the date of disposition (either conviction, dismissal, or acquittal), and the specific punishment or other disposition. This information can be obtained from the Criminal Case Management Office in the county where the arrest or conviction occurred, or at the local prosecutor's office or police department. The individual must then file the petition of expungement in the Superior Court in the county in which the arrest or conviction occurred, and be assigned a hearing date. The judge determines if the person is eligible for expunction and if granted the individual seeking the expungement must mail the court order to the appropriate authorities.[44]

Washington

Individuals who were never charged or whose charges did not result in a conviction can apply for expungement at any time. Those convicted of some misdemeanors may apply for a one-time expungement three years after the completion of their sentence provided that no criminal charges are currently pending. Individuals with felony convictions may also apply for expungement after successful completion of their sentence and the requisite waiting period (depending on offense). In order to apply for expungement, individuals should obtain information from the local, county, and state law enforcement officials, including date of arrest, law allegedly violated, and date of conviction or acquittal. Information about an individual's case and which law enforcement agency handled it may also be available at the Washington State Patrol Identification and Criminal History Section or the Administrative Office of Courts. Where no conviction was entered, an individual must petition the Washington State Patrol, which has

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[40]See Appendix A, posted on the NHLP website, which is a chart of the expungement laws by state.

[41]All information relating to the Utah process was obtained from http://www.utcourts.gov/howto/expunge/ (last modified Oct. 6, 2005).

[42]http://www.nccourts.org/Forms/FormSearchResults.asp.

[43]All information relating to the North Carolina process was obtained from http://www.ncsu.edu/stud_affairs/legal_services/legaldocs/ExpungeSheet.htm (last visited Dec. 29, 2005). It is unclear whether expungement covers only state files or whether the federal record will also be expunged.

[44]All information relating to the New Jersey process was obtained from http://www.lsnjlaw.org/english/crime/municipalcourt/clearingyourrecord.cfm (updated Dec. 1, 2003).

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. ■

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

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

[47]24 C.F.R. § 982.553(d) (2005).

[48]See 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

[1]In 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 panel[2] 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.

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

[3]479 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.

[8] 42 U.S.C.A. § 1437f(o)(2) (West 2003).

[9] 24 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.

[13] *See* 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. ■

[14]*See, 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).

Connecticut Supreme Court Rejects Challenge to the State's Segregated LIHTC Program

The Connecticut Supreme Court recently rejected the plea of Plaintiffs Adrienne Brown, a low-income resident, and an interest group for injunctive relief with regard to the Connecticut Housing Finance Authority's (CHFA) administration of the state's federal low-income housing tax credit program. *Asylum Hill Problem Solving Revitalization Assoc. v. King*, 2006 WL 305315 (Conn. Feb. 21, 2006). The court acknowledged the Plaintiffs' laudable goal of desegregating the tax credit program; however, the court was nevertheless unwilling to grant injunctive relief in light of the United States Supreme Court's narrowing interpretation of 42 U.S.C. § 1983.[1]

Background

Hartford, Connecticut is a fairly typical American city in terms of its racial and economic composition. In 2000, approximately 76.9% of Hartford County's residents were white and 9.3% of the County was living below the poverty level.[2] However, Asylum Hill, a neighborhood located within the city of Hartford, had a drastically different demographic. In 2001, approximately 47.3% of Asylum Hill's residents were at or below the federal poverty level and fewer than 5% of the students enrolled in the elementary school were white. Despite the apparent lack of economic or racial integration in Asylum Hill, CHFA, in August 2001, approved a reservation of tax credits for two buildings in the Asylum Hill neighborhood to provide low-income housing. This grant was in addition to a previous grant for another rental development located nearby in the same neighborhood.

Adrienne Brown is a low-income African-American resident of the Asylum Hills neighborhood in Hartford, and the revitalization association is an incorporated entity representing the interests of residents and institutions concerned with the quality of life and the future of that neighborhood. Collectively, Plaintiffs alleged violation of the state statute that required agencies to promote racial and economic integration and violation of federal statutes

[1]The Civil Rights Act, 42 U.S.C. § 1983, has long been the primary vehicle for challenging state or local governmental actions that violate federal laws that do not contain an explicit private right of action. In the past few years, and especially since *Gonzaga University v. Doe*, 536 U.S. 273 (2002), the Supreme Court has made it increasing difficult to sustain Section 1983 claims based on federal statutes and regulations. For an interesting discussion regarding the enforceability Section 1983 in the post-*Gonzaga* era, see Jane Perkins, *Using Section 1983 to Enforce Federal Laws*, 39 Clearinghouse Rev. 720 (2005).

[2]United States Census Bureau, Census 2000 (2000).

that required state agencies to comply with the Fair Housing Act.[3] Ultimately, Plaintiffs sought a ruling requiring CHFA to revise its tax credit allocation procedures in such a way as to minimize racial and economic segregation.

With respect to the Plaintiffs' state law claims, the trial court held that Section 8-37cc does not create a private right of action because the plaintiffs are not part of the class intended to benefit from the enactment and the legislative history does not indicate an intent to create a private right of action.[4] The trial court also rejected the Plaintiffs' federal claims, reasoning that an implied right of action does not arise from Section 3608(d) pursuant to the standard set forth in *Gonzaga*.[5] Plaintiffs appealed.

State Law Claim

Section 8-37cc(b) provides: "Each housing agency shall affirmatively promote fair housing choice and racial and economic integration in all programs administered or supervised by such housing agency."[6] Because the text of Section 8-37cc(b) does not expressly provide for a private right of action, the issue on appeal was whether an implied right of action should be inferred. Unfortunately, the court concluded no such authority existed.

The court analyzed the implied right of action issue in light of a three-part test that it previously established in *Napoletano v. CIGNA Healthcare of Connecticut*.[7] Under the *Napoletano* test, the court examined: (1) whether the plaintiffs were of the class for whose benefit the statute was enacted; (2) whether there was a legislative intent to create or deny such a benefit; and (3) whether a private right of action is consistent with the underlying purposes of the legislative scheme.[8] There is quite a bit of overlap among these three factors, and thus the ultimate question is "whether there is sufficient evidence that the legislature intended to authorize these plaintiffs to bring a private cause of action despite having failed expressly to provide for one."[9]

While the court acknowledged that the Plaintiffs may fall within the class of persons for whose benefit the statute was enacted, the court concluded that there was no indication, either explicit or implicit, that the Connecticut legislature intended to create a private right of action. Specifically, the court noted that the enforcement mechanism for Section 8-37cc(b) was apparently reserved to the legislative and executive branches through the use of strong reporting requirements that enabled legislative and executive oversight for compliance.[10] As such, "[t]o the extent that the legislature has chosen not to demand compliance with the reporting requirements and thereby has failed to monitor the defendant's efforts to promote integration, the plaintiffs' remedy is political, not judicial."[11]

Federal Law Claims

The Plaintiffs also alleged that CHFA's violation of the federal laws that govern fair housing and the tax credit program give rise to private rights that are enforceable pursuant to Section 1983, as interpreted by the United States Supreme Court in *Blessing v. Freestone*.[12] However, the court rejected Plaintiffs' argument and concluded that *Gonzaga* set forth a more stringent test that was controlling and that the Plaintiffs failed to meet that standard.

In *Gonzaga*, the United States Supreme Court addressed the *Blessing* factors as they pertained to a student's ability to sue a private university for damages under the Family Educational Rights and Privacy Act of 1974 pursuant to Section 1983. The *Gonzaga* Court stated that *Blessing* had inadvertently led plaintiffs to believe that Section 1983 conferred enforceable rights so long as the plaintiff fell within the general zone of interest that the statute was intended to protect. Consequently, the *Gonzaga* Court concluded, without necessarily overturning *Blessing*, that in order for a plaintiff to sustain a Section 1983 action it must be demonstrated that the federal statute unambiguously confers an individually enforceable right on the class of beneficiaries to which the plaintiff belongs.[13] In other words, the statute

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[3]Plaintiffs filed this action in three counts: (1) a violation of Connecticut's General Statutes § 8-37cc(b); (2) a violation of 42 U.S.C. § 3608(d) of the federal Fair Housing Act; and (3) violations of 42 U.S.C. § 3608(d) and 26 C.F.R. 1.42-9 enforceable through 42 U.S.C. § 1983.

[4]*Asylum Hill*, 2006 WL 305315 at *4.

[5]*Id*.

[6]C.S.G.A. § 8-37cc(b) (2006).

[7]*Napoletano v. CIGNA Healthcare of Connecticut*, 238 Conn. 216 (1996).

[8]*Asylum Hill*, 2006 WL 305315 at *5.

[9]*Asylum Hill*, 2006 WL 305315 at *5.

[10]The participating entities must submit to the housing agencies their affirmative marketing plans for recruitment of applicants from municipalities having a high concentration of minority populations. The housing agencies must periodically review these plans for compliance and require that the plans be revised. The agencies in turn must submit, annually, a report to the General Assembly that, *inter alia*, documents and analyzes their efforts to promote fair housing choice and racial and economic integration.

[11]*Asylum Hill*, 2006 WL 305315 at *8.

[12]42 U.S.C. § 1983 provides in relevant part: "Every person who, under color of any statute…subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress…." In *Blessing v. Freestone*, 520 U.S. 329 (1997), the Court set forth three factors for determining whether a statute creates a federal right. "First, Congress must have intended that the provision in question benefit the plaintiff…. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so 'vague and amorphous' that its enforcement would strain judicial competence…. Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms." *Blessing* at 340-341.

[13]*Gonzaga*, 536 U.S. at 283-284.

in question must contain explicit "right- or duty-creating language."[14] Thus, *Gonzaga* established the proposition that, when Congress fails to provide for a private right of action, it is assumed that no such right exists.[15]

In light of the *Gonzaga* decision, the Connecticut Supreme Court quickly rejected Plaintiffs' Section 1983 argument in *Asylum Hill*. The court concluded that the federal statutes in question were directed at executive departments and agencies regarding the administration of their programs and activities.[16] That language, the court held, cannot be unambiguously viewed as a directive to benefit the public generally with respect to a specific right, nor can it be viewed as a prohibition on certain acts against the public.[17] As such, the court concluded that the federal statutes in question do not confer an individually enforceable right to the Plaintiffs.

Conclusion

Many courts in the post-*Gonzaga* era have become increasingly unreceptive to Section 1983 and related claims, specifically in terms of their "right-creating language" analysis.[18] Meanwhile, Section 1983 remains one of the few weapons that is still available to advocates who seek to force states to provide federally mandated benefits to our nation's most disadvantaged populations. Consequently, in her recent article published in the *Clearinghouse Review*, Jane Perkins makes the following suggestions for advocates seeking to enforce federal laws via Section 1983:

- Rely on Congressional history and regulations to flesh out a federal statute that has a clear individual focus, and cite the specific section of the statute that is being enforced.[19]
- Attempt to enforce only those provisions that focus on the individual and contain right- or duty-creating language.[20]
- Clearly distinguish the language of the provision being enforced from the provisions at issue in *Gonzaga*.[21] ■

[14]*Gonzaga*, 536 U.S. at 284, n.3 (quoting *Cannon v. University of Chicago*, 441 U.S. 677, 690 n.13 (1979)).

[15]*Gonzaga*, 536 U.S. at 283-284.

[16]For example, 42 U.S.C. § 3608(d) states in relevant part: "All executive departments and agencies shall administer their programs and activities relating to housing and urban development…in a manner affirmatively to further the purposes of this subchapter…."

[17]*Asylum Hill,* 2006 WL 305315 at *10.

[18]*But see* Johnson v. Hous. Auth. of Jefferson Parish, 2006 WL 533831 (Mar. 6, 2006) (housing choice voucher utility allowance requirements privately enforceable via Section 1983).

[19]Perkins, *supra* note 1, at 732-733.

[20]Perkins, *supra* note 1, at 732.

[21]Perkins, *supra* note 1, at 733.

USDA and HUD Implement Rural Housing Voucher Demonstration Program

The Department of Agriculture (USDA)[1] and the Department of Housing and Urban Development (HUD) implemented the Rural Housing Demonstration Voucher Program on March 20, 2006.[2] The program is intended to prevent residents from losing their shelter subsidies when owners of Rural Development (RD) financed Rural Rental Housing[3] prepay their loans. Although long authorized, the voucher program was first funded on a demonstration basis this fiscal year after the Bush Administration proposed, in 2005, to lift the prepayment restrictions that prevent owners of Section 515 developments from prepaying their loans. Because the lifting of the prepayment restrictions would have displaced 50,000 or more households, the Administration proposed to protect the households through the issuance of rural vouchers. While Congress did not go along with the Administration's proposal to lift the prepayment restrictions in 2005, it did authorize a demonstration voucher program to protect those residents who are being displaced under prepayments currently authorized. The program announced by USDA and HUD implements this demonstration authorization.

Residents of Section 515 housing are not assured of their right to remain in their homes under the new Rural Housing Voucher Demonstration program. This is unlike the HUD enhanced voucher program, which effectively guarantees most residents of HUD Project-based Section 8 developments the right to remain in their homes when a HUD owner opts out of that program. Nonetheless, the rural voucher program is a welcome form of relief because some owners of Section 515 housing have been allowed to prepay their loans since 1987 and residents of prepaid developments have had few protections against displacement. As currently administered, the program grants rural rental housing residents only the right to gain priority admission to another Section 515 development or the right to receive a housing choice voucher if they can get themselves to the top of the local public housing authority (PHA) waiting list when the owner prepays the loan or the tenant's lease, which may extend beyond the prepayment date, expires.

[1]Officially, the notice announcing the rural voucher program was published by the United States Department of Agriculture. Technically, the department will be administering its national obligations under the program through the Rural Housing Service (RHS) and locally through Rural Development (RD).

[2]USDA Voucher Program, Notice, 53 Fed. Reg. 14,084 (Mar. 20, 2006) [hereinafter Notice].

[3]Rural Rental Housing is financed under Section 515 of the Housing Act of 1949. 42 U.S.C.A. § 1485 (West 2003).

The USDA-HUD notice advising the public of the program's implementation only sets out the broad parameters under which the rural voucher program will be operated. Many of the program's details are yet to be made public, presumably in notices or handbooks to be published in the near future by HUD or RD. This article will review the background of the rural voucher program, the USDA/HUD notice, various issues that are raised by the notice, and related issues.

Rural Housing Voucher Program

The Rural Housing Voucher program has been authorized under Section 542 of the Housing Act of 1949 since 1992.[4] The program has, however, not been functioning because Congress did not appropriate funds for the program until it passed the Fiscal Year 2006 Agricultural Appropriations Act,[5] which provided $16 million for a demonstration rural voucher program. The appropriations act limits the program authorized in Section 542 by specifying that vouchers are to be made available only to low-income residents of Section 515 housing whose loans have been prepaid after September 30, 2005. The value of the vouchers is to be set at the difference between the comparable market rent for the Section 515 unit (as determined by RD) and the tenant paid rent for such a unit. In addition, the appropriations act directs USDA to administer the program to the maximum extent feasible in a manner consistent with regulations and administrative guidance applicable to the HUD Housing Choice Voucher Program.

USDA-HUD Implementation Notice

In order to expedite implementation of the program—and because RD does not have the field capacity or experience to operate a national voucher program, particularly when funding for the program is very limited—the agency decided to delegate most of the program's administration to HUD, which will subcontract voucher administration to PHAs located in areas where the Section 515 prepayments occur. Consequently, the notice implementing the demonstration program was published jointly by USDA and HUD, which on March 1, 2005, entered into an Inter Agency Agreement whereby USDA delegated program administration to HUD.

Applicable Regulations

The USDA-HUD notice makes clear that vouchers administered under the demonstration program are tenant based vouchers generally subject to HUD's Housing Choice Voucher Program regulations, codified at 24 C.F.R. Part 982. It explicitly states that neither the HUD project-based voucher or homeownership voucher regulations are applicable to the program. Moreover, it also makes clear that certain general and specific sections of the 982 regulations are not applicable to the rural voucher program.[6]

Choice of Administering PHA

The Director of the Office of Public Housing in the HUD field offices will decide which PHA will be invited to administer the voucher program for a particular project whose owner has decided to prepay the Section 515 loan. If the invited PHA does not have the capacity or does not agree to administer the program, USDA will administer the program directly in that project.[7] Participating PHAs will receive administrative fees calculated by HUD for ongoing administration of the program and a one-time special fee of $250 per unit in recognition of the time sensitive nature of the actions that the PHA must undertake in order to promptly qualify households threatened with displacement under the program.[8]

Resident Eligibility

To qualify for a voucher, the resident household must be residing in the Section 515 unit on the date of the prepayment, which must have occurred after September 30, 2005.[9] The resident must be low-income, a determination that is made by USDA and not the administering PHA.[10] However, PHAs are authorized to screen potentially eligible households and to deny assistance on any grounds specified in 24 C.F.R. §§ 982.552 or 982.553.[11] If a PHA denies a household admission based solely on the household's owing a prior debt to the PHA or another PHA, the notice encourages, but does not require, the PHA to enter into a repayment agreement that allows the household to repay the debt over time.[12]

If the household, while living in the Section 515 development, was assisted under the HUD project-based Section 8 program, it is also eligible to receive assistance under the

[4] *See* 42 U.S.C.A. § 1490r (West 2003).

[5] The Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2006. Pub. L. No. 109-97 (2005).

[6] Notice, *supra* note 2, at 14086 (¶ II, 7).

[7] *Id.* (¶III).

[8] *Id.*

[9] *Id.* at 14,085 (¶ II, 1). Moreover, the voucher funds must be obligated to the household before October 1, 2006.

[10] *Id.*

[11] PHAs must deny a voucher if at least one household member is not a citizen or a legally admitted resident. It may also deny a voucher to a household member who has engaged in drug or criminal activity and alcohol abuse that would threaten other residents. 24 C.F.R. § 982.552(b) (2005). It may deny a voucher if, among other reasons, a member of the household has been evicted from federally assisted housing in the past five years, if a PHA has ever terminated voucher assistance to the household, or if the family has ever committed fraud, bribery or other criminal activity in connection with a federal housing program. *Id.* § 982.552 (c).

[12] Notice, *supra* note 2, at 14,085 (¶ II, 1).

HUD enhanced voucher program when the owner opts out of the project-based program either before or after the prepayment. The household, not the landlord, the PHA, or USDA, chooses the program under which it will be assisted.[13] If the family residing in the Section 515 development is already receiving assistance under the enhanced voucher program or under the regular voucher program, it also has the choice of converting to the USDA voucher.[14] Once a choice is made, however, the household does not have the option of switching forms of assistance.

Residents who are denied a voucher because USDA determines that they are not low income are entitled to appeal the decision under USDA's appeals process.

Appeal Rights

Residents who are denied a voucher because USDA determines that they are not low income are entitled to appeal the decision under USDA's appeals process.[15] They are also entitled to appeal the decision through the USDA appeals process if they disagree with the amount of subsidy that they receive under the voucher. A family that is denied assistance by the PHA must be provided informal review under the PHA's review process that is set out in HUD regulations.[16]

Right to Remain in the Section 515 Unit

The USDA-HUD notice does not address whether a household has a right to remain in the unit that it occupied on the prepayment date or whether the landlord has an obligation to accept a resident who wants to remain in the unit provided that the household is prepared to pay the new rent for the unit. In a number of instances, the notice clearly contemplates that the household may remain or that it may move to other housing if it chooses to do so.[17] It does not, however, establish a right to remain. Thus, any household's ability to remain in its home is dependent on RD setting a comparable market rent figure that is equal to the rent level that the owner plans to charge for the unit, upon the owner's willingness to participate in the rural voucher program, and upon the owner's willingness to continue to rent to the particular household.

Portability

A household that so chooses may use the voucher to relocate to housing outside the jurisdiction of the administering PHA, and the provisions of 24 C.F.R. § 925.355 do not apply to a household choosing to so relocate.[18] If the PHA in the remote jurisdiction is unwilling to administer the voucher, USDA will administer the voucher directly.

Voucher Search Period

For households that seek to move from the Section 515 development, the initial voucher search period must be sixty days.[19] PHAs may grant extensions for the search period of up to an additional sixty days and must do so in the case of a household that requests a reasonable accommodation for a household member who has a disability.[20]

Inspection for Housing Quality Standards

PHAs must inspect the unit that the voucher holder chooses to lease to ensure that the unit meets the Housing Choice Voucher Program's housing quality standards (HQS) specified in 24 C.F.R. § 982.401. The PHA may not approve payments under the voucher for any period of time prior to the date that the PHA physically inspected the unit and determined that it meets the HQS.[21]

HAP Contract, Lease Commencement, and Lease Term

While PHAs are encouraged to enter into the Housing Assistance Payment (HAP) contract before the lease is executed between the owner and the resident, a PHA may enter into a HAP contract as late as sixty calendar days after the beginning of the lease term. In that case, the PHA may make retroactive payments to the beginning of the lease term. Any HAP contract entered into more than sixty days after the lease term has commenced is void and the PHA may not make payments under that contract to an owner. In such a case, the PHA must re-approve the unit and the family and the owner must enter into a new lease agreement for the unit. In the case of a household that remains in place after a prepayment, the HAP contract may not become effective before the prepayment date. HAP contracts are effective for one year.[22]

[13] *Id.*

[14] The notice has a provision that states that a PHA may not use HUD's regular voucher funding to assist families applying to USDA's voucher program. *Id.* (¶ II). The exact meaning of that statement is not clear inasmuch as HUD and USDA cannot categorically disqualify anyone from participating in the Section 8 Housing Choice Voucher Program particularly when a household may want to use a voucher to relocate to other housing and the level of subsidy available under that program is greater than the subsidy under the USDA program (this may be the case when the resident was not receiving a Rental Assistance subsidy when residing in the Section 515 development and, as a consequence, was paying a very high percentage of income for shelter).

[15] Notice, *supra* note 2, at 14,085 (¶ II 1).

[16] *Id.*

[17] *See, e.g., id.* at 14,086 (¶ II 5).

[18] Notice, *supra* note 2, at 14,086 (¶ II 5).

[19] *Id.*

[20] *Id.*

[21] *Id.* at 14,085 (¶ II 3).

[22] *Id.* (¶¶ II 2 and 4).

Leases

The notice does not prescribe any leases that must be entered into between owners and residents, although a HUD Tenancy Addendum is prescribed. However, the length of the initial lease term, twelve months, is prescribed by the notice.[23]

Subsidy Level

The subsidy that any household is entitled to is the difference between comparable market rent for the family's former Section 515 unit and the tenant contribution on the date of prepayment.[24] The determination of what constitutes the comparable market rent for the unit will be made by RD. The tenant contribution is determined based on the household's last income certification and the subsidy that was available to the household as of the prepayment date. Thus, if the household was not assisted under the RHS rental assistance program, the household rent remains at the family contribution level even though the household may have been paying in excess of 30% of income for shelter on the prepayment date.

Analysis

While the Rural Housing Voucher program implemented by USDA and HUD is clearly a welcome alternative for residents who are threatened with displacement due to owners prepaying their RHS loans, the notice published by USDA and HUD is incomplete and the voucher program outlined is fraught with unanswered questions and pitfalls that provide residents with no assurances that they may remain in their homes or be provided with adequate or timely forms of assistance. Moreover, the outlined program has many problems and issues that have long been associated with the HUD enhanced voucher program and introduces new ones by virtue of the fact that three agencies (USDA, HUD and a local PHA) are responsible for the program's administration.

If the Rural Voucher program is truly intended to protect residents of Section 515 housing against displacement, all residents of prepayment properties must automatically be deemed eligible for the program, must be given adequate notice of the prepayment and the options that they have to remain in their homes or to relocate to other housing, and must be granted adequate time to exercise those options. It must also guarantee residents a right to remain in their homes, provide sufficient and timely subsidies that would enable them to do so, and must provide the residents on-going security of tenure. The USDA voucher program fails to meet these standards in most respects.

Inadequate Notice to Residents

The USDA-HUD notice fails to include any information about how residents of Section 515 developments are to be informed of their right to receive voucher assistance, how they are advised and counseled of their options on how to remain in their homes, negotiate the terms of a new lease, choose among different assistance programs, relocate to other RHS housing, or relocate to other housing with a voucher. There is no indication as to how and when residents will find out whether the voucher that they are offered will cover the rent that their landlord plans to charge and how and when they should negotiate a new lease that will allow them to remain in their homes and to have part of their rent covered by the voucher.

While there are suggestions in the notice that RHS may provide some of that information to residents, the form and content of the notices are not specified and are not likely to be published in the *Federal Register* or to be available for public review and comment prior to their use in the field. This is unfortunate, because not only are RHS and HUD tenant notices typically complicated, they are rarely drafted in plain English let alone in other languages that residents may be more familiar with. Importantly, it is not clear whether the notices will advise residents of the fact that the vouchers that they will be receiving are issued under a demonstration program and are only good for one year unless Congress appropriates additional funding for the program.

Time Lines Unclear

Significantly, the notice sets no time lines for when anyone other than residents must act to ensure that residents continue to receive timely assistance. There is no provision that states when residents will be advised of the prepayment time line, who will negotiate with the owner with respect to whether the owner will accept the RD-established comparable rents, when the PHA must conduct the HQS inspection,[25] when and whether the PHA will enter into a HAP contract with the owner, and when RD and HUD will transfer funds to the PHA to actually pay the landlord. In short, no agency is required under the USDA-HUD notice to take any actions within a specified time frame or to bear the consequences of any failure to act promptly. In cases where residents seek to remain in their homes, they may be forced to negotiate leases with the owner without knowing if they will receive a rural rental voucher and without negotiating lease terms to ensure that they do not pay the full market rent when the voucher is approved or that they can get out of the lease if the voucher is not approved.

[23]*Id*. (¶ II 2).

[24]*Id*. (¶ II 4).

[25]The HUD Housing Choice Voucher Program regulations do specify that a PHA that administers less that 1250 budgeted units must conduct the HQS inspection within fifteen days. A PHA with a greater number of units must conduct the inspection within a reasonable period of time, generally considered to be fifteen days. 24 C.F.R. § 982.305 (2005).

Residence on Prepayment Date

A major and critical issue under this new program is the requirement that the resident must reside in the RHS development on the prepayment date in order to qualify for a voucher. It erroneously assumes that all residents want to and will be able to stay in their homes after their landlord prepays the RHS loan. While that may be the case in many prepayment situations, it will not always be the case. Given options, some residents may choose voluntarily to relocate to other housing or to other communities while other residents may be forced to relocate when the comparable market rent for their home is set below what the owner is planning to charge for rent, when the owner chooses for other reasons not to participate in the voucher program, or when the development or unit does not meet HQS.

In these cases, the requirement that residents remain in their units until the prepayment date simply does not make sense and will either force residents to pay unaffordable rents until they can relocate to other housing or require them to try to locate and secure approval to lease a new unit on short notice. In cases where the residents of an entire development are forced to relocate, this requirement may create sudden and drastic imbalances of supply and demand in local rental housing markets that may make it impossible for residents to remain in their communities.

What RHS should have done is to make all residents eligible for rural vouchers at least as of the date that RHS approves the prepayment and either preclude owners from prepaying their loans for a term of six months from the date of approval or require them, if necessary, to extend the residents' leases at their current terms for at least six months. This would allow residents to transition from the housing in a more timely manner that is also more sensitive to the housing market.

Re-Screening by PHAs

It is also troubling that the PHAs are given independent discretion under the program to screen residents for eligibility and to use their own criteria to decide whether to accept or reject an applicant. The rural voucher program was funded by Congress to protect residents of Section 515 housing who are threatened with displacement when landlords prepay their Section 515 loans. The residents eligible for the voucher program have already been screened by their landlords, have been found eligible for assistance under the Section 515 program, and are likely to have received some form of rental subsidy while residing in the Section 515 development. There is no reason why these residents should be re-screened by PHAs and denied the right to participate in the voucher program because the PHA decides that they should not be permitted to participate in the program.

This is particularly true if the residents remain in their homes. Such residents continue to live in the exact same unit in which they have lived before and they continue to have the same landlord that admitted them to the development. The only change that occurs is the agent through which the federal government distributes the subsidy on the resident's behalf. Simply because that agent changes, the agent should not be given authority to screen and reject the resident for grounds that the landlord either did not consider or considered and rejected. In many situations, the reason for the rejection may be a debt that the resident is alleged to owe to the administering PHA. If a PHA was unwilling or unable to collect the debt from its previous residents, the federal government should not facilitate attempts at collection by authorizing PHAs to make repayment a condition of receiving a federal benefit. In some cases, amounts sought by PHAs may no longer be collectable under state law because of a statute of limitation or because the debt may have been discharged through a bankruptcy.

In some cases, the requirement that residents remain in their units until the prepayment date simply does not make sense.

Inadequate Provisions for Subsidy Adjustments

Also disturbing is the fact that the rental subsidy that a household receives under the voucher can never exceed the difference between the comparable market value of the unit and the tenants' share of the rent as of the day of prepayment. Thus, for example, a household that was receiving some rental assistance while residing in the Section 515 development cannot have the amount of subsidy changed when the household income decreases, or the household size increases, even though that household could have had its subsidy increased under the Rental Assistance program had the landlord not prepaid. Similarly, a household that was not receiving rental assistance in a Section 515 development and was paying in excess of 30% of income for shelter while residing in the Section 515 development will continue to pay in excess of 30% of income under the rural voucher program.

The rural voucher program does not appear to incorporate a provision, such as that in the HUD enhanced voucher program, that allows participating households to have their subsidies increased if they experience a significant decrease in income.[26] Thus, it is likely that many households that qualify for the rural voucher program will be burdened with greater housing costs because RD has provided them with no mechanism by which their subsidy

[26]Section 8 Tenant-Based Assistance (Enhanced and Regular Housing Choice Vouchers), PIH 2001-41, ¶ II C (3) (Nov. 14, 2001).

can be increased when their incomes decrease for reasons beyond their control. The notice is not explicit but it appears to contemplate increases in subsidy, but not decreases.

Moreover, the USDA-HUD notice does not contemplate what will happen to the voucher at the end of the first year. There is no guarantee that Congress will renew funding for the program at the end of the first year, but RD appears to assume that it will. The HUD enhanced voucher program is also funded for only one year. However, HUD provides for automatic lease renewals and rent and subsidy adjustments under its enhanced voucher program subject to annual appropriations. USDA does not appear to have even considered comparable provisions.

It is appalling to see how strictly the agency proposes to treat Section 515 households, nearly 60% of which are headed by an elderly person or a person with a disability.

Applicability to Prepayments Prior to March 2006

The notice also does not make clear whether and how the rural voucher program will be extended to residents of Section 515 housing whose owners prepaid their loans between October 1, 2005, and the March 20, 2006, notice. It appears that many of them may not be eligible for assistance, at least not retroactively, because the notice precludes a PHA from providing assistance on behalf of a resident before it conducted its HQS inspection. Because PHAs are not likely to have conducted such inspections for any development subject to an earlier prepayment, the residents of those developments will not be eligible for assistance unless somehow their leases continue to protect them past the prepayment date. Moreover, the notice does not state whether RHS will try to locate any residents of Section 515 developments prepaid since October 1, 2005, who have relocated to other housing or whether it will offer such residents vouchers to assist them in paying their current shelter costs.

No Requirement that Landlord Accept Vouchers

The fact that prepaying owners are not required to accept vouchers is also disturbing. In essence, it allows prepaying owners to pick and choose among residents to whom they want to continue to rent. Thus, for example, if an owner believes that certain units in a development are more marketable than others, the owner can simply refuse to continue the leases of the current residents and market the units to higher-income households at higher rents. Thus, voucher recipients would be allowed to stay in less-marketable units, while more attractive units will be marketed to the general public. Clearly, such a system will encourage prepayments as it allows owners to manipulate the voucher program to their advantage by minimizing the risk of conversion. Similarly, an owner can choose not to continue to lease to a resident who has placed any obligations on the owner, such as maintaining the property.

Effect of Administrative Delays on Residents

It is also very troubling that the new voucher program does not address the issue of delays in the execution of HAP contracts, approval of leases and the making of payments to landlords—all of which would be caused by RD, HUD or a PHA. The entire risk of untimely processing of the vouchers appears to fall on residents, who have had nothing to do with an owner's choice to prepay and have no control over any part of the voucher approval process. Thus, when delays occur in the process, the Section 515 household will either face eviction or the burden of paying the full market rent because RD, HUD or the PHA did not act in a timely manner.

Conclusion

The new rural voucher demonstration program is a precursor to an expanded voucher program the Administration expects to implement when Congress adopts legislation[27] that relieves owners of the prepayment restrictions that were placed on Section 515 developments by the Housing and Community Development Amendments of 1987 and 1992. It is appalling to see how strictly the agency proposes to treat the more than 50,000 households, nearly 60% of which are headed by an elderly person or a person with a disability, that will be affected by the flood of prepayments expected to occur if and when restrictions are lifted. Our government should treat the innocent low-income residents of these developments better than USDA and HUD are planning to treat them under their March notice. ■

[27]On March 29, 2006, Rep. Geoff Davis (R-KY) introduced H.R. 5039, which proposes to lift the restrictions on Section 515 prepayments. See *Legislation Authorizing Prepayment of Section 515 Loans Introduced* in this issue.

Legislation Authorizing Prepayment of Section 515 Loans Introduced

On March 29, 2006, Congressman Geoff Davis (R-KY) introduced the "Saving America's Rural Housing Act of 2006"[1] that authorizes a program for revitalizing the inventory of Rural Development's (RD)[2] Rural Rental Housing loans, also known as Section 515 loans. It also lifts the prepayment restrictions that were placed on Section 515 owners by the Emergency Low Income Housing Preservation Act of 1987 (ELIHPA),[3] and authorizes a voucher program to ostensibly protect residents who will be displaced by the prepayments.

Unfortunately, unlike previous bills that proposed to lift prepayment restrictions from the Section 515 inventory, the new legislation does not condition the right to prepay on the availability of vouchers for affected residents. Moreover, the proposed voucher program does not adequately protect residents who will be threatened with displacement as a result of the prepayments. Consequently, the bill poses a serious threat to more than 50,000 households that are likely to be displaced if the bill is enacted into law.

Background

ELIHPA places restrictions on the prepayment of all Rural Development rental housing developments if the prepayment affects minority housing opportunities or displaces residents from the communities in which they are living. If the prepayment affects minority housing opportunities, owners are required to offer the developments for sale to a nonprofit or public agency for a term of six months, and can only prepay their loans if they do not receive a bona-fide purchase offer. When residents would be displaced by the prepayment, ELIHPA requires the owners to extend the residents' right to remain in their homes indefinitely.[4]

Owners of Section 515 housing have opposed the prepayment restrictions since their imposition in 1987 and their direct judicial challenge of the statute has generally been unsuccessful.[5] However, in 2003 they succeeded in having the United States Court of Claims declare the restrictions a compensable regulatory taking[6] and thereby opened the door to hundreds if not thousands of damage actions that ultimately could cost the federal government hundreds of millions of dollars.

The Administration, which has been concerned with the physical quality of the Section 515 housing stock and its capacity to maintain it in good condition, perceived the damage actions as jeopardizing its ability to revitalize the Section 515 housing stock particularly when it was also generally concerned with limiting overall federal discretionary spending and, particularly, spending for continuing the Section 515 program. In 2003, it commissioned a study to assess the need and cost of revitalizing the Section 515 stock. The results of that study were released after the election in November of 2004.[7] Generally, the study concluded that the Section 515 stock was in adequate condition but that it needed revitalization that could not be carried out with funds already set aside in project reserves. Consequently, it called for the infusion of new funding to undertake a major revitalization of the stock.

Surprisingly, the study also came to the policy conclusion that the revitalization could not be undertaken at the same time as funds were being drawn for the preservation of that portion of the stock that could be prepaid and converted to moderate and above moderate uses. Because the study estimated that only 10% of the stock (approximately 50,000 units) is likely to be prepaid if prepayment restrictions were lifted, it concluded that it would be cost effective to lift the prepayment restrictions, protect residents with the issuance of vouchers, and to commence a revitalization program for the remaining 90% of the stock that would not be prepaid. Curiously, the study also recommended the imposition of minimum rents for the Section 515 and rural voucher programs. The newly proposed legislation represents the Administration's efforts to implement the study's recommendations, although in several instances it deviates from those recommendations.

Lifting of Prepayment Restrictions

The bill would repeal the prepayment restrictions imposed by ELIHPA with respect to all Section 515 developments that were financed prior to December 15, 1989.[8]

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[1]H.R. 5039, 109th Cong. (2006).

[2]These loans were made by the Farmers Home Administration (FmHA), which has since been reorganized into the Rural Housing Service (RHS). Because RHS programs are administered in the field by the Rural Development division of the Department of Agriculture, all references in this article to the administering agency will be to RD.

[3]The ELIHPA provisions applicable to RD are codified at 7 U.S.C. § 1472(c).

[4]*See* 42 U.S.C.A. § 1472(c) (West, WESTLAW through P.L. 109-211 (excluding P.L. 109-171, P.L. 109-177, P.L. 109-178) approved March 24, 2006).

[5]*See, e.g.*, Charleston Hous. Auth. v. USDA, 419 F.3d 729 (8th Cir. 2005). *But see* DBSI/TRI Ltd. P'ship v. United States, No. 98-1325-JE (D. Or. Dec. 19, 2003).

[6]*See e.g.* Franconia Assocs. v. United States, 2004 W.L. 1941215 (Fed. Cl., Aug. 30, 2004). *See* NHLP, *Claims Court Rules USDA Liable for Damages in ELIHPA Prepayment Case*, 34 Hous. L. Bull. 175, 193 (2004).

[7]Kevin J. Blake, et. al., Rural Rental Housing—Comprehensive Property Assessment and Portfolio Analysis, Final Study Report (2004). See NHLP, *Long-Awaited Rural Rental Housing Report Released*, 35 Hous. Law Bull. 1, 11 (2005).

[8]H.R. 5039, 109th Cong., § 3(c) (2006).

However, it would impose new prepayment restrictions on developments financed after December 21, 1979, if the twenty-year use restrictions originally placed on these developments have not expired, or if the owner has had other use restrictions placed on the developments by virtue of accepting ELIHPA authorized incentives to remain in the program. As to those projects, the bill would prohibit loan prepayment until the expiration of the existing use restrictions.[9] In essence, the bill would prevent owners who financed their Section 515 developments between 1986 and 1989 from prepaying their loans until after their twenty-year use restrictions expired, which, at the latest, would occur on December 15, 2009. It would prevent owners who sought to prepay their loans in the last nineteen years from prepaying their loans if they accepted incentives from RD to remain in the program and operate the housing as affordable housing. The bill would not repeal use restrictions placed on all Section 515 developments financed since December 15, 1989, which vary, depending on the term of the loan, from thirty to fifty years.

Interestingly, the legislation would not repeal the prepayment restrictions placed on farm labor housing financed under Section 514 of the Housing Act of 1949.[10] It is not clear why it would not repeal these restrictions. In part, this may be due to the fact that RD has sidestepped the enforcement of prepayment restrictions with respect to Section 514 loans made to farmers by simply concluding, whenever a farmer borrower sought to prepay a loan for a development on the farmer's land, that the housing is no longer needed. It may also be due to the fact that Section 514 owners have not initiated litigation against the agency and are not likely to do so as most privately owned farm labor housing developments are relatively small and litigation is likely to be too expensive in relation to their potential recovery.

Within ninety days of the passage of the legislation, RD would be required to adopt a prepayment plan that outlines the manner in which the Secretary will handle prepayment requests, administer vouchers, and facilitate the maintenance or transfer of Section 515 developments as affordable housing.[11] At the same time, however, the bill would preclude RD from delaying the acceptance of any prepayment request that has been filed with the agency. Once enacted, the bill effectively would lift immediately all prepayment restrictions that exist with respect to any Section 515 development that was financed prior to December 15, 1989, that is no longer subject to any use restrictions.

Owners, would not, however, immediately be able to prepay their loans because the bill would require that they provide residents with a ninety-day notice of intent to prepay. The notice would be required to simply advise residents of the date that the owner intends to prepay the Section 515 loan, the availability of vouchers and what residents must do to secure them, and the name, number, and electronic address of the owner's representative should the residents seek to contact the owner. If the prepayment will be made in connection with a transfer of the development to another owner, the notice must provide the date of the transfer and provide the residents with contact information about the transferee. The bill would authorize the Secretary to impose other notice requirements; however, it is not clear what those may be. Once an owner has provided residents with a notice of intent to prepay, the owner would be required to notify RD of the fact that such a notice has been given to the residents.[12]

In essence, the bill would prevent owners who financed their Section 515 developments between 1986 and 1989 from prepaying their loans until after their twenty-year use restrictions expired.

Curiously, once the owner has provided residents with a notice of intent to prepay, the owner would be precluded from transferring the development for a term of seventy-five days to any purchaser who would not continue to maintain the property as affordable housing for an additional twenty years.[13] It would not, however, preclude such an owner from negotiating a non-preservation sale that will take place at the expiration of the seventy-five-day period. Nor would it preclude an owner from entering into a non-preservation sales transaction prior to notifying the residents and RD of the intent to prepay, provided the transfer does not take place until the seventy-five days have expired.

In order to notify potential purchasers of an owner's intent to prepay a Section 515 loan, the bill would require RD to establish and maintain a database of potential buyers.[14]

The bill would authorize RD to give funding priorities for the construction of new Section 515 developments in areas where there is a need for new housing by virtue of the prepayment of existing loans.[15]

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[9] *Id.*

[10] 42 U.S.C.A. § 1484 (West, WESTLAW through P.L. 109-211 (excluding P.L. 109-171, P.L. 109-177, P.L. 109-178) approved March 24, 2006).

[11] H.R. 5039, 109th Cong., § 3(c) (2006).

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.* § 3(b).

Tenant Protections Vouchers

The bill would create a new voucher program ostensibly to protect residents from displacement; however, it does not include a right to remain in the prepaid development or, for that matter, the right to receive a voucher.

Subject to appropriations, the bill would authorize the Secretary to issue vouchers to residents who live in a Section 515 development on the date of prepayment. The voucher could be used in that development or elsewhere. It could also be used to purchase a home subject to the limitations established for the Section 8 homeownership program.[16]

While voucher holders could use the vouchers in their prepaid development, they would not be assured of the right to remain. The bill would prohibit owners from discriminating against voucher holders by virtue of their being voucher holders[17] but would not preclude the landlord from discriminating against the voucher holder on any other grounds not prohibited by the Fair Housing Act. Thus, if an owner does not want to continue to rent the unit to a particular family, the voucher holder would not have any right to remain in his or her home.

Moreover, the fact that the bill would require a household to reside in the development on the date of prepayment is also problematic. If, for example, the household does not want to continue to reside in the development after prepayment, or if the landlord does not intend to continue to rent the unit to the occupying household, the bill would not provide the household with the flexibility of moving prior to the prepayment date. If the household's lease expires on or about the prepayment date, the requirement that it remain in the dwelling until the prepayment date could prevent the household from using the voucher to lease another development as of the prepayment date and may force the resident to pay market rent until a voucher is approved.

The bill is also silent on whether prepaying owners are obligated to honor existing leases until their expiration. This is particularly critical for households who are receiving subsidies such as Interest Credit or Rental Assistance. Even under the current prepayment restrictions, where RD has made it clear that an owner must continue to honor the lease and rent the unit to the household at the subsidized rent, owners have sought to increase the rent immediately upon the prepayment, contending that they are authorized to do so by virtue of the fact that the subsidy has been terminated.

The amount of subsidy that would be made available to eligible households under the bill is the difference between (1) the lesser of (a) the rent charged for the unit after the prepayment or (b) the rent charged for a comparable unit in the prepaid project's market area, and (2) the lesser of (a) the rent paid by the household in the prepaid development on the date of prepayment or (b) an amount equal to 30% of the resident's adjusted family income. If the development is in a tight rental market, the Secretary would be permitted to increase the value of the voucher in conformity with the Enhanced Voucher program of the Department of Housing and Urban Development (HUD).[18]

The limitation of the voucher subsidy to the market area in which the development is located could dramatically restrict a voucher holder's portability or capacity to purchase a home.

It is not clear from the bill who would determine the comparable market area rents or how they would be determined. More importantly, the limitation of the voucher subsidy to the market area in which the development is located could dramatically restrict a voucher holder's portability or capacity to purchase a home. This is so because the rents in a particular market may be depressed and the amount of assistance that voucher holders are eligible for may not allow them to move to communities where the rents are not depressed without requiring them to pay substantially in excess of 30% of income for shelter.

The bill is totally silent on whether RD would be required to increase voucher subsidies as rents increase over time and whether residents would be able to seek rent recertification when household income is reduced.

Generally, the bill would require the Secretary of Agriculture to administer the vouchers in accordance with the HUD Section 8 voucher program, recently renamed the Housing Choice Voucher Program.[19] This could disqualify some Section 515 residents from receiving vouchers because HUD has allowed public housing authorities to apply their own eligibility requirements to the issuance of vouchers and RD has chosen to endorse that requirement when it recently implemented its voucher demonstration program.[20]

Unfortunately, and most critically, the bill would not condition the owners' right to prepay their loans on the availability of vouchers. As a consequence, it is quite possible that Congress will adopt the legislation repealing the current prepayment restrictions without, or at least before, appropriating funding for the voucher program. If that occurs, residents of Section 515 housing, most of whom are either elderly or persons with disabilities, will be displaced without any protections.

[16] *Id.* § 3(c).

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *See* USDA Voucher Program, 71 Fed. Reg. 14,084 (Mar. 20, 2006) (¶ II 1 (Family Eligibility)).

Revitalization

The bill authorizes RD to revitalize and preserve the Section 515 stock through a series of financial incentives that are provided to owners who are willing to remain in the Section 515 program for at least an additional twenty years.[21] Since the program is wholly voluntary, owners whose properties are located in appreciated markets would not be likely to enter into these agreements. Moreover, it is likely that a significant number of owners with developments in more marginal markets would not enter into these agreements because they are likely to believe that the market in their area will improve, providing them with an opportunity to prepay their loans and convert the housing to other uses prior to the expiration of an additional twenty years.

The financial incentives that RD, or an administrative agency acting on behalf or RD, would be authorized to extend to owners willing to revitalize their developments include:

- reduction in or the elimination of the interest rate charged on the Section 515 loan;
- partial or full deferral of the mortgage payments;
- loan forgiveness;
- subordination of the loan to other sources of financing;
- reamortization of the loan over an extended term;
- an outright grant;
- payment of the costs of developing a revitalization plan;
- facilitation of opportunities to secure third-party equity financing; and
- additional reduced interest Section 515 direct or Section 538 guaranteed loans without regard to the value of the project.

In order to be considered for these incentives, RD and the owner would be required to complete a long-term viability plan that includes a twenty-year comprehensive needs assessment and a financial plan that shows that the owner can operate and maintain the development for the benefit of low-income households in a financially sound manner over the next twenty years. The financial plan must assume all the incentives that the owner will receive through the restructuring, and must show that the owner will be able to make the repairs and other improvements called for in the comprehensive needs assessment. It would also be required to ensure that the owner has a long-term rate of return on investment that is comparable to the return secured by commercial multi-family housing projects. In calculating that rate of return, an owner who secures financing under the Low Income Housing Tax Credit program would be entitled to include in its investment any investment proceeds made by limited partners under the program that are used to cover hard construction costs. Ultimately, any revitalization plan and incentives that are offered owners must be the least costly to the government.

Owners would be given a right to review and comment on any revitalization and restructuring offer made by RD. Residents would not be provided any right to review or comment on the revitalization plans for their homes. Moreover, the bill would not protect them from displacement during the revitalization process or grant them a right to return to the development if they are displaced.

The bill would authorize RD to decline to provide assistance to an owner seeking to revitalize a development if the owner has not managed or maintained the development to RD standards, defaulted on the RD loan, or the owner has been suspended or debarred from further participation in federal programs. RD could also decline to provide assistance if an agreement cannot be reached with the owner in a reasonable time or for other good cause.

When RD and the owner agree to a revitalization plan, they would be required to enter into a long-term use agreement that obligates the owner to maintain use restrictions on the development for a term of twenty years or the balance of the original Section 515 loan term, whichever is longer. The use agreement would also bind the owner into a shared value agreement that obligates the owner to pay RD, at the end of the use agreement term, the lesser of (1) the sum of (a) loan write offs or write downs, and interest subsidies provided as part of the revitalization plan, (b) any outstanding loan principal and interest, and (c) any non-loan funds provided by RD for the revitalization; or (2) 75% of the appraised value of the project.

Any revitalization plan agreed to by RD and an owner could also provide for the sale of the development to a tenant-based condominium or cooperative. Unfortunately, the bill would not authorize special funding or priority under the Section 515 program funding for these entities to purchase the developments.

The long-term use agreement could be terminated by the owner at any time that any incentives that were promised to the owner under the use agreement become unavailable for reasons beyond the owner's control. The bill does not take into consideration whether the terminated incentives are material or whether there is another way of offsetting the losses caused by the termination of the incentives.

Once a revitalization plan has been entered into, rents in the revitalized development could be raised on an

[21] H.R. 5039, 109th Cong., § 3(a) (2006).

annual basis based on the standards incorporated into the agreement. The bill would require RD to establish those standards by regulations, which must include provisions that conform the rents to affordable rents in the area in which the development is located.

Several provisions in the bill make it likely that the rents in revitalized developments would increase in the short as well as in the long term. For example, the provision that authorizes owners to receive a commercial rate of return on their investment, which includes the investments made by limited partners in the Low Income Housing Tax Credit, would likely substantially increase rents in most developments.

Similarly, the provision authorizing annual rent increases based on local economic factors would cause rents to increase because owners would be entitled to rent increases based on the total cost of operating a development even when a major portion of those costs, principal and interest payments, are stable. Fortunately, the maximum rent provisions included in the bill should protect residents from displacement due to increased rents.

Minimum and Maximum Rents

The bill would authorize RD to establish a minimum rent in revitalized developments that does not exceed $25 per month.[22] It would also grant RD discretion to make exceptions to the minimum rent requirement to accommodate hardships, provided the exceptions follow the hardship exceptions codified for the HUD housing programs.

The bill would also establish maximum rents in revitalized developments and provides that they may not exceed 30% of household income.

Conclusion

The Saving America's Rural Housing Act of 2006 is a profound disappointment. It proposes to overturn twenty years of federal policy of preserving the RD rural rental housing stock and protecting its residents against displacement. Significantly, it would do so without ensuring that residents have a right to remain in their homes or communities.

Indeed, the act may become a nightmare for residents of RD financed Rural Rental Housing if it is enacted without appropriations for a voucher or revitalization program. It would displace more than 50,000 rural households and would fail to revitalize over 300,000 units of rental housing in need of rehabilitation. While the revitalization provisions of the bill are needed and welcome, the prepayment and voucher sections of the bill are not. If they are enacted, they must be strengthened to protect the interests of the residents who reside in the housing and of the communities that are served. ■

[22] *Id.* § 3(a).

Recent Cases

The following are brief summaries of recently reported federal and state cases that should be of interest to housing advocates. Copies of the opinions can be obtained from a number of sources including the cited reporter, Westlaw,[1] Lexis,[2] or, in some instances, the court's Web site.[3] Copies of the cases are *not available from NHLP.*

Eviction — Generally; Fair Debt Collection Practices Act

Hodges v. Feinstein, Raiss, Kelin & Booker, LLC, 2005 WL 3832632 (N.J. Super. Ct. App. Div. Mar. 8, 2006). Citing, *inter alia*, *Henitz v. Jenkins*, 514 U.S. 291 (1995), the Appellate Division of the Superior Court of New Jersey concluded that a law firm that regularly represents landlords in summary dispossess actions is subject to the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692o.

Eviction — Generally; Incompetent Parties — Guardians

Vill. Apts. of Cherry Hill v. Novack, 2006 WL 552501 (N.J. Super. Ct. App. Div. Mar. 8, 2006). In a summary dispossess action against a mentally disabled and incompetent tenant, the Appellate Division of the Superior Court of New Jersey concluded that the trial court lacked personal jurisdiction over the tenant in the absence of the tenant's guardian. The appellate division further concluded that representation by an attorney was not an adequate substitute for the presence of the guardian.

Eviction — Housing Choice Voucher Program

Goff v. Brown, 2006 WL 779904 (Iowa Ct. App. Mar. 29, 2006) (final publication decision pending). In this appeal in a forcible entry and detainer action, the Court of Appeals of Iowa concluded, *inter alia*, that a form Housing Choice Voucher lease was an actual lease agreement and not "merely a contract with HUD or the local PHA that contemplates a further lease between the landlord and tenant." The court also held that a voucher tenant's refusal to sign a separate "month-to-month" lease in addition to the form voucher lease did not constitute good cause for termination of tenancy under the voucher program.

[1] http://www.westlaw.com.

[2] http://www.lexis.com.

[3] For a list of courts that are accessible through the World Wide Web, see http://www.uscourts.gov/links.html (federal courts) and http://www.ncsc.dni.us/COURT/SITES/courts.htm#state (for state courts). See also http://www.courts.net.

Fair Housing — Disparate Impact; Housing Choice Voucher Program

Graoch Assocs. # 33 Ltd. P'ship v. Louisville & Jefferson County Metro Human Relations Comm'n, 2006 WL 753054 (W.D. Ky. Mar. 21, 2006). Recognizing a special exception set forth in *Salute v. Stratford Greens Garden Apartments*, 136 F.3d 293 (2d Cir. 1998), the United States District Court for the Western District of Kentucky held that a landlord's decision to withdraw from the Housing Choice Voucher program "is *not* sufficient to subject it to a claim of disparate impact discrimination."

Federal Courts — Private Right of Action; Housing Choice Voucher Program — Termination

Lowery v. Dist. of Columbia Hous. Auth., 2006 WL 666840 (D.D.C. Mar. 14, 2006). Deciding a motion to dismiss for lack of subject matter jurisdiction in this 42 U.S.C. § 1983 action, the United States District Court for the District of Columbia concluded that a Housing Choice Voucher program participant whose voucher has expired is entitled, under 42 U.S.C. § 1437d(k)(1), to a reasonably expeditious hearing where a housing authority decides to terminate the participant's voucher assistance.

Federal Courts — Private Right of Action; Housing Choice Voucher Program — Utility Allowances

Johnson v. Hous, Auth. of Jefferson Parish, 2006 WL 533831 (5th Cir. Mar. 6, 2006). See *Fifth Circuit Holds Voucher Utility Allowances Privately Enforceable* in this issue.

Federal Courts — *Rooker-Feldman* Doctrine

Bolden v. City of Topeka, Kansas, 2006 WL 701151 (10th Cir. Mar. 21, 2006). In a lengthy and detailed decision explaining the distinctions between the *Rooker-Feldman* doctrine, res judicata and claim preclusion, the Tenth Circuit concluded that the *Rooker-Feldman* doctrine did not bar a federal court suit for racial discrimination and retaliation where the contractor had previously brought a state court suit to enjoin the city's demolition of real property purchased by the contractor in a foreclosure sale. ■

Recent Housing-Related Regulations and Notices

The following are significant affordable housing-related regulations and notices that the Department of Housing and Urban Development (HUD) and the Department of Agriculture's (USDA) Rural Housing Service (RHS) issued in March of 2006. For the most part, the summaries are taken directly from the summary of the regulation in the *Federal Register* or each notice's introductory paragraphs.

Copies of the cited documents may be secured from various sources, including (1) the Government Printing Office's Web site on the World Wide Web,[1] (2) bound volumes of the *Federal Register*, (3) HUD Clips,[2] (4) HUD,[3] and (5) USDA's Rural Development Web page.[4] Citations are included with each document to help you secure copies.

HUD Federal Register Final Rule

71 Fed. Reg. 14,328 (Mar. 21, 2006)
Conversion of Developments From Public Housing Stock; Methodology for Comparing Costs of Public Housing and Tenant-Based Assistance

Summary: This final rule provides the cost methodology that public housing agencies (PHAs) are required to use under HUD's regulations governing required and voluntary conversion of public housing developments to tenant-based assistance. Both programs require PHAs, before undertaking any conversion activity, to compare the cost of providing tenant-based assistance with the cost of continuing to operate the development as public housing.

Effective Date: April 20, 2006.

HUD Federal Register Proposed Rules

71 Fed. Reg. 13,222 (Mar. 14, 2006)
Implementation of Mark-to-Market Program Revisions

Summary: Based on statutory changes and HUD's technical operational experience in administering the program, this proposed rule would implement a number of changes to the Mark-to-Market (M2M) program, HUD's mortgage restructuring program for FHA-insured projects with project-based Section 8 assistance, to facilitate processing. Unlike the M2M proposed and final rules addressing renewal of expiring Section 8 project-based assistance contracts that HUD published on January 12, 2006, this rule

[1]http://www.access.gpo.gov/su_docs.

[2]http://www.hudclips.org/cgi/index.cgi.

[3]To order notices and handbooks from HUD, call (800) 767-7468 or fax (202) 708-2313.

[4]http://www.rdinit.usda.gov/regs.

addresses a range of administrative and programmatic issues other than the project-based assistance contracts.

Comment Due Date: May 15, 2006.

71 Fed. Reg. 16,004 (Mar. 29, 2006)
Indian Housing Block Grant Program; Notice of Proposed Negotiated Rulemaking Committee Membership

Summary: HUD announces its list of proposed members for its Indian Housing Block Grant Negotiated Rulemaking Committee (Committee), and requests public comments on the proposed membership. The Committee will provide advice and recommendations on developing a proposed rule for effectuating changes to the Indian Housing Block Grant Program in response to statutory amendments to the Native American Housing Assistance and Self-Determination Act of 1996. This document follows publication of a February 22, 2005, notice that advised the public of HUD's intent to establish the Committee and solicited nominations for Committee membership.

Comment Due Date: April 28, 2006.

HUD Federal Register Notices

71 Fed. Reg. 11,712 (Mar. 8, 2006)
Fiscal Year 2006 SuperNOFA for HUD's Discretionary Programs

Summary: On January 20, 2006, HUD published its Notice of Fiscal Year 2006 Notice of Funding Availability Policy Requirements and General Section to the SuperNOFA. In that publication, HUD announced it was publishing the General Section of the FY 2006 SuperNOFA in advance of the individual NOFAs in order to give prospective applicants sufficient time to begin preparing their applications, and to register early with Grants.gov to facilitate their application submission process. This publication contains the thirty-nine funding opportunities that constitute HUD's FY 2006 SuperNOFA.

Dates: Various.

71 Fed. Reg. 14,236 (Mar. 21, 2006)
Housing Counseling Program; Announcement of Funding Awards for Fiscal Year 2005

Summary: In accordance with Section 102(a)(4)(C) of the Department of Housing and Urban Development Reform Act of 1989 (42 U.S.C 3545), this announcement notifies the public of funding decisions made by the Department in a Super Notice of Funding Availability (NOFA) competition for funding of HUD-approved counseling agencies to provide counseling services. Appendix A contains the names and addresses of the agencies competitively selected for funding and the award amounts. Intermediaries are listed first and subsequent awards are grouped by their respective HUD Homeownership Center. Additionally, this announcement lists the noncompetitive housing counseling awards made by the Department.

HUD PIH Notices

Notice PIH 2006-13 (HA) (Mar. 8, 2006)
Non-Discrimination and Accessibility for Persons with Disabilities

Summary: The purpose of this notice is to remind recipients of federal funds of their obligation to comply with pertinent laws and implementing regulations which mandate non-discrimination and accessibility in federally funded housing and non-housing programs for persons with disabilities. Additionally, this notice provides information on key compliance elements of the relevant regulations and examples and resources to enhance recipients' compliance efforts.

Expires: March 31, 2007.

Notice PIH 2006-14 (HA) (Mar. 22, 2006)
Operating Fund Program Final Rule: Transition Funding and Guidance on Demonstration of Successful Conversion to Asset Management to Discontinue the Reduction of Operating Subsidy

Summary: This notice provides information for public housing agencies (PHAs) regarding the calculation of transition funding under the Operating Fund Program final rule. It also provides instructions to PHAs that wish to submit documentation of successful conversion to asset management in order to discontinue their reduction in operating subsidy under the Operating Fund Program final rule, commonly referred to as the "stop-loss" provision. HUD will issue expanded requirements for the subsequent deadline dates for stop-loss.

Expires: March 31, 2007.

RHS Federal Register Proposed Rule

71 Fed. Reg. 11,167 (Mar. 6, 2006)
Direct Single Family Housing Loans and Grants, 7 C.F.R. Part 3550

Summary: The Rural Housing Service is proposing homeownership education requirements. The lack of homeownership education is a well-known barrier to successful homeownership for many families. The intended effect of this action is to assure that first-time homeowners financed under the Section 502 Direct program are well prepared for homeownership by assuring that they receive homeownership education.

Comments Due: May 5, 2006.

RHS Federal Register Notice

71 Fed. Reg. 14,084 (Mar. 20, 2006)
USDA Voucher Program

Summary: The United States Department of Agriculture (USDA) is establishing a demonstration USDA Voucher Program, as authorized under Section 542 of the

Housing Act of 1949 (without regard to Section 542(b)), to be administered by the United States Department of Housing and Urban Development (HUD), pursuant to an Inter Agency Agreement (IAA) between the two departments, executed on March 1, 2006. This notice informs the public that USDA, acting under the IAA with HUD, shall make up to $16 million available for this purpose, as appropriated under the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2006. The notice also sets forth the policies and procedures for use of these vouchers.

Effective Date: March 20, 2006.

RHS Administrative Notices

AN No. 4149 (1980-D) (Mar. 10, 2006)
Eligibility of Non-U.S. Citizens for Single Family Housing Guaranteed Loan Program Assistance

Summary: This administrative notice furnishes guidance concerning what documentation non-U.S. citizens must supply in order to be considered for a loan note guarantee under the Single Family Housing Guaranteed Loan Program. In the near future, Agency personnel will be able to access the Systematic Alien Verification for Entitlements (SAVE) database maintained by the Citizenship and Immigration Service. In most cases, use of SAVE will eliminate the need to obtain the documentation described in this administrative notice. SAVE will also provide same-day responses concerning the immigration status of non-U.S. citizens. Instructions on how to use SAVE will be issued within the next 180 days.

Expiration Date: March 31, 2007.

AN No. 4150 (1980-D) (Mar. 10, 2006)
Single Family Housing Guaranteed Loan Program Foreclosure Sale Bids

Summary: This administrative notice provides guidance on foreclosure sale bids for security property on which there is a Single Family Guaranteed Rural Housing loan guarantee.

Expiration Date: March 31, 2007.

AN No. 4162 (1980-D) (Mar. 29, 2006)
Single Family Housing Guaranteed Loan Program Approved Lender Underwriting Guidelines

Summary: This administrative notice reiterates the agency's methodology for evaluating "payment shock." The outcome of this administrative notice is to provide underwriting guidance to Single Family Housing Guaranteed Loan Program lenders. It is the agency's expectation that lenders will act responsibly when originating and underwriting loans under RD Instruction 1980-D.

Expiration Date: March 31, 2007.

AN No. 4165 (1980-D) (Apr. 5, 2006)
Single Family Housing Guaranteed Loan Program Loss Mitigation Comprehensive Policy Clarification

Summary: Rural Development encourages lenders to exercise loss mitigation techniques to the fullest extent possible when servicing defaulted loans under the Single Family Housing Guaranteed Loan Program. This Administrative Notice clarifies the policies concerning loss mitigation actions. The attached Loss Mitigation Guide describes loss mitigation options, identifies circumstances for their use, and discusses situations in which each option may be appropriate. Lenders that service Section 502 Guaranteed Loans should use this guide to give guidance to borrowers when considering loss mitigation alternatives. Agency staff that give guidance to lenders should refer to this guide when considering the appropriateness of a lender's loss mitigation options.

Expiration Date: April 30, 2007.

RHS Unnumbered Letters

Fiscal Year 2005 Management Control Review of the Section 504 Loan and Grant Program
(Mar. 10, 2006)

Summary: The purpose of this memorandum is to address the concerns raised as a result of the FY 2005 Management Control Review for the Section 504 Loan and Grant Program. (Attachment 1). The Management Control Review Nationwide Compilation Report for FY 2005 was issued September 22, 2005. The Section 504 Loan and Grant Programs were reviewed in four states during FY 2005 as part of the management control review process. Also, case files were received and reviewed in six additional states.

Results of the 2006 Multi-Family Housing Annual Fair Housing Occupancy Report
(Mar. 22, 2006)

Summary: These results are based on January 2006 data from the RHS Multi-Family Information System. This report presents data from the past three years, and compares information from year 2004 to year 2006. Highlights of this year's data include: The total number of rental properties has decreased by 1.3% since last year; the number of rental units has decreased by less than 0.4%. The current population consists of: White, Non-Hispanic households: 69.7%, Black Non-Hispanic households: 17.5%; Hispanic households: 9.2%; Multi-racial households: 1.2%; American Indian/Alaskan Native households: 1.5%; Asian, Pacific Islander households: 0.8%. Very low-income households represent 93.86% of all households and low-income households represent 5.1% of the total. These statistics reflect a slight decrease in very-low income households and a small increase in low-income households. Average household incomes are up to $10,036 from $9,665 (a 3.84%

increase); the average income of Rental Assistance households is up to $7,961 from $7,601 (a 4.74% increase); Female-headed households continue to represent the majority of households (72.4%). There was a slight increase in the percentage of elderly/disabled households vs. non-elderly; and, within the elderly/disabled population, there was a 3.2% increase in the percentage of disabled households.

Expiration Date: March 31, 2007.

Preservation Proposals for Equity Funding (Mar. 27, 2006)

Summary: The purpose of this Unnumbered Letter is to announce the availability of up to $4.3 million of the Section 515 reserve that is made available to fund innovative approaches to preserve rental housing. One example of an innovative approach is providing an equity loan at the time of transfer to a nonrofit or public body in exchange for a restrictive-use agreement that assures that the project will remain as affordable housing for its remaining useful life. This unnumbered letter announces that proposals to use funds should be submitted to the Office of Rental Housing Preservation by May 10, 2006. ■

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