Litigation Approaches to Challenging Subsidized Housing Denials Based on Applicants' Criminal Records

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In 2010 and 2011, staff attorneys at two of the Bay Area Legal Aid (BayLegal)[1] regional offices began seeing a pattern of clients whose applications for housing choice vouchers or public housing had been denied because of past criminal activity. The clients had three things in common—they had been on the waitlist for public housing or the Section 8 Housing Choice Voucher (HCV) program (hereinafter Section 8) for many years, they had a criminal record that was many years old, and they were otherwise qualified for subsidized housing.

Challenging these denials required different litigation approaches depending on where the criminal records provided to the public housing authority (PHA) originated. For clients denied by the Housing Authority of Contra Costa County (HACCC), BayLegal's consumer law program identified violations of California's Investigative Consumer Reporting Agencies Act (ICRAA)[2] in each of the five background checks. The remedy was a lawsuit against the private furnisher of these consumer reports.

In Alameda County, the Oakland Housing Authority (OHA) used its own police department, the Oakland Housing Authority Police Department (OHAPD), as part of the applicant screening process. OHAPD obtained criminal record information through the state criminal database, which the OHA police officers used to make determinations of eligibility for Section 8. When it became apparent that OHAPD was flouting not only the federal laws and regulations governing the application process, but also state law and OHA's Administrative Plan, BayLegal's housing unit sought to negotiate a change in policy and procedure. When those efforts failed, they filed a writ asking for judicial review on behalf of five petitioners to ensure enforcement of the due process rights of current and future applicants.

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[1]BayLegal is the largest provider of civil legal services in the Bay Area. BayLegal serves clients in the counties of Alameda, Contra Costa, Marin, Napa, San Francisco, Santa Clara, and San Mateo counties. BayLegal serves thousands of clients annually with issues related to, *inter alia*, housing, domestic violence prevention, public benefits, consumer rights, youth justice and health access.
[2]Cal. Civ. Code § 1786 *et seq.* (2013).

Background

In late 2010, the BayLegal office saw five clients in Contra Costa County with issues that arose from denial of applications for subsidized housing based on old criminal records. An applicant on SSI, many years sober, was denied housing due to an arrest from 2001 for which she was never convicted and a plea to a possession charge from 2000. Another client had spent countless hours working with a private attorney to have a 1998 conviction dismissed with a certificate of rehabilitation, only to find both the conviction and dismissal dates listed on his background check. Three additional clients had reports which contained arrest records for which they were never convicted or convictions over seven years old. Upon HACCC's denial of their applications, the five Contra Costa County clients obtained copies of background check reports containing criminal record information furnished by a private consumer reporting agency.

In early 2011, a number of Alameda County clients whose applications had been denied by OHA for failing the "initial criminal background screening" sought assistance from BayLegal. One of these clients had not been arrested or convicted of any crime in the past five years, but her application was flagged by OHAPD because of a $5,000 warrant for unpaid traffic tickets. Another client's application was initially denied because almost five years earlier she had been convicted of assault with a deadly weapon in a crime directly related to a long history of domestic abuse. The remaining three clients all had criminal convictions that were on average more than 15 years old.

As part of OHAPD's screening process, it pulled the complete criminal records of all applicants without regard for the five-year time limitation in OHA's Administrative Plan. They used these records to make the initial determination of eligibility. If an applicant contested the denial, she could request an informal meeting that was held at the OHAPD headquarters. This meeting was most often presided over by a uniformed and armed police officer. Despite requests, none of the applicants received copies of their criminal records either prior to or during the review meeting. If the hearing officer found the applicant ineligible following the meeting, a one-page form letter decision of denial was issued.

Consumer Law Approach

Summary of the Law

The ICRAA governs the behavior of investigative consumer reporting agencies (CRAs), defined as entities which produce and sell investigative consumer reports (ICRs).[3] Both the ICRAA and California Consumer Reporting Agencies Acts (CCRAA) protect the privacy rights of consumers and have provisions specific to the reporting of criminal record information that exceed the reach of the federal Fair Credit Reporting Act (FCRA).[4] The ICRAA contains a private cause of action, a $10,000 statutory penalty for a negligent violation of the law and a non-reciprocal attorney's fees provision, making it a powerful tool for consumer rights and housing attorneys to enforce the rights of applicants for housing or employment.[5] When a housing authority denies an applicant based on information that should not have been reported in an ICR, the enforcement mechanism is a civil lawsuit brought under the ICRAA against the investigative consumer reporting agency that issued the report.[6]

Restrictions on Reporting of Criminal Record Information

The ICRAA prohibits the reporting of criminal convictions that antedate the date of the report by seven years from the date of disposition, release, or parole and reports of arrests that did not result in a conviction.[7] Like the FCRA, the ICRAA imposes affirmative duties on CRAs to maintain reasonable procedures, to avoid reporting inaccurate information, and to assure maximum possible

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[3]An investigative CRA is "any person who, for monetary fees or dues, engages in whole or in part in the practice of collecting, assembling, evaluating, compiling, reporting, transmitting, transferring, or communicating information concerning consumers for the purposes of furnishing investigative consumer reports to third parties." Cal. Civ. Code § 1786.2(d) (2013). An investigative consumer report is "a consumer report in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through any means." *Id*. at § 1786.2(c).

[4]A single consumer report may contain multiple entries, some of which are actionable under the federal Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 *et seq*. (2013), the California Credit Reporting Agency Act (CCRAA), Cal. Civ. Code § 1785 *et seq*. (2013), and others actionable under the ICRAA. The FCRA places no time limit on reporting of criminal convictions and permits reporting of arrests for seven years. 15 U.S.C. § 1681c(a)(5). The ICRAA at Cal. Civ. Code § 1768.18(a)(7) imposes stricter restrictions on reporting of criminal record information. *See* n. 10 and associated text and n.14 and associated text, *infra*.

[5]"(1) Any actual damages sustained by the consumer as a result of the failure or, except in the case of class actions, ten thousand dollars ($10,000), whichever sum is greater. (2) In the case of any successful action to enforce any liability under this chapter, the costs of the action together with reasonable attorney's fees as determined by the court." Cal. Civ. Code § 1786.50(a) (2013).

[6]Due to preemption of particular causes of action within the ICRAA by the FCRA, there is no private cause of action against users of investigative consumer reports (ICRs), such as a PHA or private landlord. *See* 15 U.S.C. §§ 1681m (regulating the behavior of users of consumer reports, which limits enforcement to attorneys general and eliminates a private cause of action against users of ICRs) and 1681t(b)(1)(C) (regarding the explicit preemption of state law by § 1681m).

[7]"Records of arrest, indictment, information, misdemeanor complaint, or conviction of a crime that, from the **date of disposition, release, or parole**, antedate the report by more than seven years. These items of information shall no longer be reported if at any time it is learned that, in the case of a conviction, a full pardon has been granted or, in the case of an arrest, indictment, information, or misdemeanor complaint, **a conviction did not result**; except that records of arrest, indictment, information, or misdemeanor complaints may be reported pending pronouncement of judgment on the particular subject matter of those records." Cal. Civ. Code § 1786.18(7) (emphasis added).

accuracy.[8] However, the ICRAA goes further than the FCRA to ensure that public record information is accurately reported by requiring CRAs to verify the information it reports during the 30 days immediately prior to issuing a report.[9] The lawsuit filed by BayLegal on behalf of five plaintiffs alleged violations of explicit prohibitions on reporting of obsolete information and for violations of the affirmative duties imposed under the ICRAA.[10] These statutory violations also constitute unfair business practices under both the unlawful and unfair prongs of California's unfair competition law (UCL).[11] Accordingly, BayLegal sought injunctive relief under the UCL to halt continuing violations of the ICRAA. It was revealed during discovery that the defendant CRA is a provider of ICRs to public housing authorities throughout California. The requested injunction sought significant changes in the policies and procedures of the defendant CRA in order to bring it into compliance with the ICRAA.

The goal of the litigation was not to drive the defendant out of business, but to bring it into compliance with the law. An independent expert analyzed the defendant CRA's policies and procedures, including training policies and manuals. The case ultimately settled favorably for the plaintiffs. Plaintiffs negotiated changes in the CRA's policies and procedures and obtained a monetary settlement of six figures for damages, statutory penalties and attorney's fees. The defendant CRA remains in business using revised policies and procedures.

A Pending Federal Appeal May Impact the Efficacy of the ICRAA

Published case law addressing questions of the ICRAA and housing is sparse. The courts have addressed the issue of preemption and the question of unlawful detainers and coverage of the latter in the ICRAA and CCRAA.[12] Prior to 2007, lawsuits were brought to enforce ICRAA against investigative reporting agencies and landlords for use of statutorily barred unlawful detainer data.[13] In 2007, however, the California Fourth District Court of Appeal held in two companion cases, *Ortiz* and *Trujillo*, that both the ICRAA and CCRAA are unconstitutionally vague as applied to unlawful detainer entries in tenant screening reports.[14] The court held that "[r]easonable persons cannot readily determine whether unlawful detainer information constitutes 'character' information governed by the ICRAA or 'creditworthiness' information governed by the CCRAA," because it was unclear from the public record report whether a given unlawful detainer was for non-payment of rent or for something more reflective of an applicant's character.[15] As a practical result, the protections of the ICRAA and CCRAA are not applicable to the collection and dissemination of information regarding unlawful detainers.

At the time the BayLegal case was filed, there was no published case law on the issue of criminal background checks and the ICRAA. However, there is a pending appeal before the United States Ninth Circuit Court of Appeals seeking to uphold an extension of the holdings of *Ortiz* and *Trujillo* on reporting of criminal background checks in the ICRAA and finding Section 1786.18(7) unconstitutionally vague for the same reasons as the California Court of Appeal found for reporting unlawful detainers.[16] Although *Moran* is in federal court, the risk is great that should *Moran* be decided in favor of the defendant CRA, it would foreclose further litigation in this area of law. Moreover, such a ruling could allow landlords to deny housing to persons with criminal records more than seven years old and/or arrests that did not result in conviction in contravention of the intent of the California legislature.

The Writ Approach

In Alameda County, an evaluation of the notices and applicant review procedures used by the OHA to determine eligibility for the Section 8 Housing Choice Voucher Program revealed several areas of concern. This prompted the filing of a Writ of Mandate, on behalf of the five petitioners whose due process rights were violated, and a Writ of Administrative Mandamus, on behalf of the two clients who had informal reviews and were denied a housing choice voucher because of their criminal histories.[17]

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[8] *See* 15 U.S.C. § 1681e "(b) (2013). Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates; Cal. Civ. Code § 1786.20 (2013) "(b)Whenever an investigative consumer reporting agency prepares an investigative consumer report, it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates."

[9] Cal. Civ. Code § 1786.18(c) (2013).

[10] Under the FCRA, only reporting of a record of arrest over seven years old would have led to a violation. 15 U.S.C. § 1681c(a)(5). Here, the arrest-only records were within the FCRA reporting period but the case contained no federal causes of action, which allowed the matter to remain in state court.

[11] Cal. Bus. & Prof. Code § 17200 *et seq.* (2013).

[12] State statutes in effect as of September 30, 1996, relating to certain claims, including those arising from obsolescence periods for information contained in credit reports, are explicitly not preempted by the FCRA. 15 U.S.C. § 1681t(b)(1)(B) (2013); Credit Data of Arizona, Inc. v. State of Arizona, 602 F.2d 195 (9th Cir. 1979).

[13] These cases generally asserted violations of Cal. Civ. Code §§ 1786.18(a)(4) and 1786.20 (for failure to maintain reasonable procedures to avoid violations of §§ 1786.18 and 1786.12). *See, e.g.*, Cisneros v. U.D. Registry, Inc., 39 Cal. App. 4th 548 (1995).

[14] *See* Ortiz v. Lyon Management Group, Inc., 157 Cal. App. 4th 604 (2007); Trujillo v. First American Registry, Inc., 157 Cal. App. 4th 628 (2007).

[15] *Ortiz*, 157 Cal. App. 4th at 611.

[16] *See* Moran v. The Screening Pros, LLC, No. 2:12-CV-05808 2012 U.S. Dist. LEXIS 158598 (N.D. Cal. Sept. 28, 2012) (subsequent unpublished order on Motion to Reconsider reversed holding on FCRA in Defendant CRA's favor on November 20, 2012).

[17] In a writ of mandate proceeding, a petitioner asks a court, sitting in

Summary of the Law

Applicants who have been placed on a Section 8 waitlist are afforded certain due process rights upon denial of their application.[18] PHAs have an obligation to issue a prompt, written notification to the applicant of a decision to deny that contains "a brief statement of the reasons for the PHA decision."[19] Fundamental due process mandates that a notice of denial must state the factual circumstances that give rise to the denial in sufficient detail so as to inform the applicant of unfavorable evidence and to enable the preparation of a meaningful defense.[20] The PHA is also required to offer an informal review to the applicant whenever it has decided to deny the application.[21]

Under federal law, a PHA may deny admission to an applicant only for certain types of criminal activity.[22] HUD regulations call upon PHAs to establish a "reasonable time" period before the admission decision "during which an applicant must not have engaged in the [criminal] activities" that would give rise to a denial.[23] OHA's Administrative Plan, in addition to providing comprehensive guidance as to how the denial process should proceed, specified that it will look back no more than five years at an applicant's criminal record.

Additionally, federal law and regulations require that "[b]efore an adverse action is taken with regard to [Section 8] assistance under this title on the basis of a criminal record, the public housing agency shall provide the tenant or applicant with a copy of the criminal record."[24] As part of its applicant screening process, the PHA is authorized to receive the criminal conviction history of an applicant from a law enforcement agency.[25]

California state law also authorizes law enforcement to release selective criminal records information to the PHA for the purpose of Section 8 applicant screening.[26] Any information released or received under this state statute must "be consistent with Title 24 of the Code of Federal Regulations and the current regulations adopted by the housing authority using the information."[27] Accordingly, state law places additional restrictions on what information a PHA may use to make a determination of eligibility. For example, a PHA is barred from receiving certain criminal records, including arrests that do not result in conviction, juvenile records, information that does not relate to serious felonies, domestic violence violations, and enumerated alcohol or drug related crimes.[28] Finally, the state law requires the PHA to "review and evaluate [the criminal history information] in the context of other available information and…not evaluate the person's suitability as a prospective participant based solely on his or her past criminal history."[29]

The Flawed Application Denial Process

The experiences of the applicants seen by BayLegal staff demonstrated that OHA's informal review practices denied access to fair and impartial review. First, the denial notices lacked the required specificity to ensure the applicants had enough information to prepare an adequate defense. Second, the police records upon which the initial denial was based were never provided to the applicant either before or during the review meeting. Despite requests for copies of the criminal records,[30] OHA refused to provide them prior to the hearing. And in one case, OHA only offered to let the applicant review but not receive a copy of the records one hour before the review meeting.

Third, the hearing official was not familiar with or refused to apply the policies contained in the Administrative Plan. In one case, the OHA police officer who pre-

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equity, to direct an administrative body to do something. The writ of mandate, sometimes called the ordinary mandate, is a remedy in which a court orders the administrative agency, in this case the housing authority, to perform a duty "which the law specially enjoins" or "to compel the admission of a party to the use and enjoyment of a right to which the party is entitled." Cal. Code of Civ. Proc. § 1085 (2013). The writ of administrative mandamus is a statutory remedy which enables the petitioner to challenge an administrative decision "made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of the facts is vested in the inferior tribunal.…" Cal. Code of Civ. Proc. §§ 1094.5 and 1094.6 (2013).

[18]Ressler v. Pierce, 692 F.2d 1212 (9th Cir. 1982).

[19]24 C.F.R. § 982.554(a) (2012).

[20]McNair v. New York City Housing Authority, 613 F. Supp 910, 914 (S.D. NY 1985); *See also* Singleton v. Drew, 485 F. Supp 1020, 1024 (E.D. Wis. 1980) (the initial determination of ineligibility must set forth, with reasonable specificity, the reasons for denial of the application).

[21]24 C.F.R. § 982.554 (a) and (b) (2012).

[22]PHAs must establish policies for denying applicants who are currently engaging in illegal use of a drug, or whose "pattern of illegal drug use may threaten the health, safety, or right to peaceful enjoyment of the premises by other residents." 24 C.F.R. §§ 982.553 (a)(1)(ii)(A)-(C) and 982.553 (a)(2). The PHA is also permitted, but not required, to deny admission to an applicant if it determines that the applicant or any member of applicant's household "is or was, during a reasonable time preceding the date when the applicant household would otherwise be selected for admission, engaged in any drug-related or violent criminal activity or other criminal activity which would adversely affect the health, safety, or right to peaceful enjoyment of the premises by other residents." 42 U.S.C. § 13661 (2013); *Id*. at § 982.553 (a)(2)(ii)(A)(1-3)(2013).

[23]*Id*. at § 982.553 (a)(2)(ii)(B).

[24]42 U.S.C. § 1437d(q)(2) (2013); 24 C.F.R. §§ 982.553(d)(1) and 982.553(d)(3) (2012); *Id*. at § 5.903(f).

[25]24 C.F.R. § 5.903(a) and (e). Federal regulations authorize law enforcement agencies to release criminal conviction records to the PHA upon submission of a signed consent form. *Id*. at § 5.903(b) and (c).

[26]Cal. Penal Code § 11105.03 (2013).

[27]*Id*. at § 11105.03(h).

[28]*Id*. at § 11105.03(b)(1)-(4)

[29]*Id*. at § 11105.03(d).

[30]The regulations governing the Section 8 Program also require the PHA to furnish the applicant with complete copies of all criminal records that form the basis for the proposed denial. The PHA must provide the applicant a copy of these criminal records, at no cost, so as to allow the applicant "an opportunity to dispute the accuracy and relevance of that record…in accordance with Section 982.554." 24 C.F.R. §§ 982.553(d)(1) and 982.553(d)(3) (2013).

sided over the informal review attended by a BayLegal attorney displayed a troubling lack of familiarity with OHA's Administrative Plan. He refused to share copies of the police records he was referring to during the meeting even though he indicated that he was looking back at least 10 years. It was only after an objection was made that he acknowledged that the look back period was indeed only five years according to the Administrative Plan. During another review meeting, an applicant testified about how her five-year-old criminal conviction would not have happened but for a long history of domestic violence. The officer completely discounted this testimony of severe abuse and even failed to consider OHA's own policies that require a consideration of all mitigating circumstances, including if and how domestic violence contributed to the criminal record in question.[31]

Finally, it was not clear from any of the written decisions issued following the review meetings if the officer adequately evaluated "whether the facts presented prove the grounds for the denial of assistance."[32] Instead, what the applicants received was a form letter which included irrelevant and arbitrary information that bore no relationship to the testimony and evidence presented at the applicant's review meeting. It was impossible to tell from these decision letters what evidence or information the hearing officer considered. This lack of clarity coupled with the vague and ambiguous denial notice and the refusal to provide the criminal records before the hearing made it impossible for the applicant to get a fair hearing.

Negotiations and Settlement Terms

Within a few months of the writ asking for judicial review of the denials and the procedural flaws in OHA's review process being filed, the parties began settlement negotiations. An early victory in the case came when OHA gave each of the five petitioners an HCV. Over the course of the next year, the parties worked together to revise the policies and procedures for application review.

First, the template for the denial notices was rewritten to adequately explain the grounds for the applicant's denial, including the date and nature of the alleged criminal convictions at issue. The notices now apprise the applicant of the right to an informal review, how to get a copy of the criminal records relied upon by OHA before the informal review, the right to counsel, and the application of both Violence Against Women Act (VAWA) and fair housing laws to the proceedings.

Second, the settlement implemented a clear process for the provision of any criminal records the OHA had obtained from OHAPD in making its initial criminal background screening. Instead of providing the entire criminal record to the staff charged with overseeing the informal review, the OHAPD now provides only a copy of the record that is directly within the statutory and policy guidelines. All information that does not conform to the requirements of Cal. Penal Code § 11105.03 and the federal statute is redacted and the records provided to OHA cover a look back of a maximum of five years. In addition to the existing Administrative Plan language, OHA developed additional written guidance and training so that all staff involved in the criminal background screening would be informed of the federal and state statutes and regulations that govern the handling and dissemination of criminal records.

Third, it is also clear that the OHAPD officers may no longer act as the informal review officers. Finally, in order to allow for monitoring of the settlement implementation, OHA agreed to provide BayLegal with the staff contact information and an organizational chart in the event that any subsequent issues or concern arise in the application review process.

Conclusion

The re-entry population is among those most likely to be homeless[33] and to be denied admission to federally assisted housing. California law and HUD regulations require that persons who have been arrested but not convicted and/or who have old criminal records will not continue to suffer the stigma of or be penalized for contact with the criminal justice system. Two very different, but equally powerful, California statutory provisions require consumer reporting agencies and public housing authorities alike to treat applicants with old criminal records or with arrest records only with an approach that respects the concept of rehabilitation and levels the playing field in applications for subsidized housing. ■

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[31]One of the purposes of the Violence Against Women Act is to enable PHAs to "respond appropriately to domestic violence." 42 U.S.C. § 1404e-1 (2013).

[32]24 C.F.R. § 982.554(b)(3) (2013).

[33]*See, e.g.*, Caterina Gouvis Roman And Jeremy Travis, *Taking Stock: Housing, Homelessness, And Prisoner Reentry*, Urban Institute, March 8, 2004.