

PHAs to Reimburse Nationwide Class of Enhanced Voucher Holders

As a result of the settlement of a nationwide class action challenging the failure of the Department of Housing and Urban Development to adjust voucher subsidies provided after certain mortgage prepayments during the late 1990s,¹ PHAs should now be taking steps to identify and reimburse affected class members. HUD has issued two notices advising public housing agencies (PHAs) of the settlement and their duties to identify tenants who should have received subsidy adjustments and provide them with lump-sum reimbursements or rent credits.²

Taylor had challenged as contrary to statute HUD's failure to adjust voucher payment standards for certain tenants residing in certain HUD-subsidized properties prepaid between Fiscal Years (FYs) 1997-1999.³ The affected tenants are those who (1) received so-called "preservation vouchers" to subsidize the new higher post-prepayment rents, but (2) were then denied additional subsidy increases to cover *subsequent* rent increases at the property, levied after one year from the prepayment that triggered their voucher eligibility.

Because of the 1999 statutory clarification, the only prepayment voucher tenants who were entitled to reimbursement are those with unadjusted voucher subsidies between FYs 1997-1999.⁴ The *Taylor* settlement does *not* affect (1) those tenants who received enhanced vouchers as a result of Section 8 opt-outs; or (2) tenants who moved

after receiving their "preservation voucher" but prior to such a subsequent rent increase (because their subsidy would have then become subject to ordinary voucher payment standard rules).

Implementing the Settlement

Pursuant to the settlement terms, HUD issued a second specific directive to all PHAs,⁵ requiring each PHA that issued preservation vouchers during the affected period to identify those class beneficiaries still receiving voucher assistance no later than each tenant's next annual recertification. Absent a narrow exception, the notice then directs the PHA to determine the appropriate reimbursement and make payment through either a lump sum or rent credits. Former preservation voucher tenants who subsequently moved who now seek a determination of eligibility would have to apply to the PHA that issued their preservation voucher for that determination. If eligible, the PHA must reimburse them through a lump sum payment.

Local housing advocates can help affected tenants by ensuring that HUD and PHAs follow the terms of the settlement. A Web site⁶ now provides most of the information needed by advocates and claimants. However, advocates will still have to determine whether tenants are entitled to reimbursements, by taking the following steps.

Step #1: Review the currently updated list of affected properties, to see if there are any local properties and tenants in your service area. In lieu of the cryptic list attached to HUD's first notice, Plaintiffs' counsel has developed and posted the current list of affected properties with more identifying information, such as address, city and state,⁷ to help identify affected properties in specified states or cities. Note that this list only identifies those properties that HUD has agreed are potentially affected—others may be subsequently identified. If the affected properties are not located within your service area but within that of someone you know, please contact them and pass along this information.

¹*Taylor v. Jackson*, No. 02-CV-1120AA (D. Ore. filed 2002).

²HUD Notice PIH 2005-10 (Mar. 23, 2005) and HUD Notice PIH 2005-24 (July 8, 2005), available at <http://www.nhlp.org/html/pres/casedocs.cfm?id=800030>.

³For more background on the case, see NHLP, *Settlement Reached in Enhanced Voucher Class Action*, 35 HOUS. L. BULL. 147, 163 (June 2005). Pleadings and settlement documents in the case are available (the latter without a password) from NHLP's Web site at <http://www.nhlp.org/html/pres/casedocs.cfm?id=800030>. One federal court had upheld such a claim on behalf of the tenants at one Minnesota property, *215 Alliance v. Cuomo*, 61 F. Supp. 2d 879 (D. Minn.1999). See NHLP, *Minnesota Section 8 Tenants Win Major Preservation Victory*, 29 HOUS. L. BULL. 161, 161 (1999). In 1999, Congress clarified the statute, Pub. L. No. 106-74, § 538(a), 113 Stat. 1122 (Oct. 20, 1999) (codified at 42 U.S.C. § 1437f(t)), while specifically contradicting HUD's interpretation. H.R. Rep. 106-286, 106th Cong., 1st Sess., at 22 (Aug. 3, 1999). HUD implemented this change only prospectively, HUD Notice PIH 2000-09 (Mar. 7, 2000), thus continuing the harm challenged in *Taylor*.

⁴Tenants who received a preservation voucher upon prepayment during the relevant period and remained in place should have had their assistance converted to an "enhanced voucher" at their first annual recertification following enactment of the enhanced voucher statute on October 20, 1999, thus terminating their harm.

⁵HUD, Notice PIH 2005-24 (July 8, 2005), available at <http://www.nhlp.org/html/pres/casedocs.cfm?id=800030>.

⁶<http://www.hud-enhanced-vouchers.org>. Some of the legal documents may still not be posted there, but may be obtained from NHLP's Web site at <http://www.nhlp.org/html/pres/casedocs.cfm?id=800030>.

⁷The list is posted both on NHLP's Web site at <http://www.nhlp.org/html/pres/casedocs.cfm?id=800030> and at www.hud-enhanced-vouchers.org. The Excel file can be sorted in various ways. Note that for approximately 100 properties, there is not yet any further identifying information beyond what HUD first provided (e.g., no address, city or state), so advocates should scroll through those at the end to see if they recognize either the property name or PHA involved.

Based on HUD data on terminated mortgages, Plaintiffs' counsel initially estimated that tenants in 620 properties containing almost 60,000 units were possibly affected by HUD's no-adjustment policy. HUD, however, has so far identified only approximately 430 properties as having housed tenants receiving preservation vouchers,⁸ with far fewer vouchers than units having actually been made available. Plaintiffs' counsel is currently reviewing with HUD the apparent discrepancy of approximately 190 properties with about 16,000 units, as well as the shortfall of at least 26,000 vouchers issued, even in just a partial subset of the properties already acknowledged as covered by HUD. Once the correct number and identity of affected properties and vouchers is determined, it is still necessary to determine at the local level how many of those properties and tenants experienced a subsequent rent increase and a resulting improper subsidy determination.

Step #2: Determine whether there was an unsubsidized rent increase. In order to establish tenant eligibility for reimbursements at these prepaid properties, there must have also been a second rent increase that was not covered by increased voucher subsidy payments. This second rent increase will probably have to be established by making an inquiry of the tenants, PHA and/or project management. PHAs should know whether this happened because voucher owners must notify the PHA of rent increases,⁹ although their records may be hard to find unless affected tenants remain on their voucher program. The resident manager of a development may also have this information.

Step #3: Calculate the reimbursements due to eligible tenants. This should involve straightforward arithmetic—adding up the amount of rent increase(s) levied by the owner that were not covered by increases in the voucher subsidy and multiplying them by the number of months that they were effective.

Step #4: Address any PHA resistance to making the payments. Under Notice 2005-24, a PHA may only make payments or credits to the extent that it has sufficient budget authority available under its Annual Contributions Contract, and cannot

make any payments or adjustments if they would "jeopardize continued assistance for other current voucher participants."¹⁰ Payments can be delayed until funds become available. Although this exception should thus be limited to those rare situations where making payments would require a current voucher family to be terminated,¹¹ some PHAs may nevertheless be reluctant to pay if they have been recently experiencing funding shortfalls.

Tenants, advocates or PHAs with questions or problems should contact Plaintiff's counsel, Micky Ryan of the Oregon Law Center, at (800) 898-5594 x147, or via e-mail at enhancedvouchers@yahoo.com. ■

¹⁰See HUD Notice PIH 2005-24, at 6-7.

¹¹*Id.* Even if a PHA has no immediately available funding to pay reimbursements (counting reserves), the draft directive's language ("reserves resulting from turnover") suggests that funds freed up upon voucher turnover must be used for this purpose. For information on each PHA's current funding levels, see the Center on Budget and Policy Priorities Web site at <http://www.cbpp.org>, or the January 21, 2005, letter sent by HUD to each PHA. Information about reserves must be obtained locally from each PHA.

Post-Rucker Decisions: Three Years Later

There have been several reported court and hearing officer decisions regarding evictions from assisted housing and terminations of vouchers which applied to or have been impacted by the *Department of Housing and Urban Development v. Rucker* decision.¹ Several of these decisions have already been summarized in previous issues of the *Housing Law Bulletin*;² this article provides advocates with an overview and update of more recent decisions.

These decisions do not fit into any neat pattern. One court found that the criminal activity of the guest must be current to justify an eviction. Another reviewed the decision of a public housing agency (PHA) and found

⁸HUD's list is included as Attachment A to Notice PIH 2005-24 (July 8, 2005).

⁹See 24 C.F.R. § 982.308(g)(4) (2005).

¹Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125 (2000).

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