The past six months has presented a number of interesting cases that affect the affordable and public housing industry. This Monologue supplements my case law review presented at HDLI's 2008 Spring Conference in April 2008.[1] Following are the cases that, in my judgment, are the most significant and/or interesting, presented in subject matter order. I was delighted to see a number of cases giving further guidance in the area of the administrative grievance process, since HDLI is launching a new training manual (and video) in this area in early 2009.

Administrative Grievance Proceedings

In this first section, I discuss recent decisions within this *Grievances* subject matter with respect to due process provided mentally disabled tenants/participants, insufficiencies in agency findings, defective termination notices, and other violations of appropriate hearing procedures.

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[1] For more comprehensive compilations of important cases affecting the affordable and public housing industry *each quarter*, consult HDLI's ***Authority*** publication. Contact HDLI to receive the ***Authority*** at hdli@hdli.org or (202) 289-3400.

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Grievances Involving Tenants With Mental Disabilities

Public housing and redevelopment agencies[2] should especially be careful in the manner in which they prosecute termination proceeding involving tenants with mental disabilities. Courts are overturning otherwise valid evictions and terminations involving mentally disabled tenants when housing authorities fail to provide enhanced due process during the grievance process.

Take, for example, ***Bush v. Mulligan*, No 2006-11608, 2008 N.Y. App. Div. LEXIS 4074, 2008 NY Slip Op 4346, 51 A.D.3d 663, 858 N.Y.S.2d 249 (NY Sup. Ct. May 6, 2008)**, involving a 69 year old Section 8 participant who failed to report her receipt of Social Security benefits to her PHA until her recertification interview six months later. Because her nondisclosure violated program rules, the PHA sent the participant and her landlord notice that it was terminating her benefits in 30 days for program fraud.

The participant requested a stay of the termination of her benefits, and an informal hearing was held. At the hearing, the participant testified that she had no recollection of having received Social Security benefits. While ordinarily one

2 Sometimes throughout this Review I refer to public housing agencies and/or redevelopment agencies as "authorities" or simply "PHAs."

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might be suspicious of the timing of this amnesia, it became clear to all who participated in the hearing that this participant truly was having difficulty comprehending the proceedings and memory lapses.

The hearing officer agreed to hold the determination of the participant's request in abeyance, pending the results of a medical report regarding her mental condition. Medical reports of three doctors that examined the participant indicated that she suffered from memory loss due to early vascular dementia and was mildly retarded, among other mental difficulties. One doctor opined that the participant was not capable of remembering to report non-periodic and unpredictable information and could no longer function autonomously. Despite the medical evidence to the contrary, the hearing officer found that the participant was neglectful and untruthful in relation to reporting complete and honest information regarding income change to the Section 8 office.

The participant sought judicial review, asserting that the hearing officer's determination was not supported by substantial evidence in the record since it failed to credit the uncontradicted medical evidence of her disability, and thus failed to reach the issue of whether her breaches of the disclosure rules were

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caused by her disability, and thus unintentional.

The court overturned the hearing officer's determination, finding that she erred in refusing to consider the participant's medical evidence. The court's sentiments are indicative of what we might expect to hear from other courts: *"The result of this disqualification is to leave this elderly, mentally-challenged individual homeless, a result not only contrary to law, but shocking to one's sense of fairness."*

The next case underscores the importance of allowing advocates for the mentally disabled to participate in the grievance process. In ***In re Chavis,*** **No. 2007-00687, 2008 N.Y. App. Div. LEXIS 5621, 2008 NY Slip Op 5694, 52 A.D.3d 708, 860 N.Y.S.2d 200 (Sup. Ct. N.Y. June 17, 2008),** a housing authority terminated a mentally disabled Section 8 participant's benefits because it believed that she intentionally failed to report that her ex-husband resided with her. The PHA granted the tenant an informal hearing. During the hearing, the participant's advocate was excluded from participating in the proceeding as an advocate because she was scheduled to be a potential witness on the dynamics of domestic violence. However, she ended up not testifying after all, due to a mix-up

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in notifying her as to when her testimony would be required. Nevertheless, the hearing officer agreed to consider the issue of domestic violence based on evidence from other sources in making his determination. The hearing officer affirmed the decision to terminate the participant's benefits, and she appealed.

The court found reversed the decision of the hearing officer, finding that he abused his discretion in excluding the advocate from participating in the proceeding. The court remanded the case so that the participant could properly be represented either by an assigned attorney or the advocate that she sought to have represent her at the original hearing.

Insufficiency of PHA Findings

For due process purposes, and in order to provide for meaningful review by a court, it is critical to provide the specific factual predicate for decisions that are adverse to the tenant. In this next case, a court scrutinizes the notice that a housing authority provided a Section 8 participant of its decision to disregard the decision of a hearing officer, and provides guidance as to the level of specificity that is required. In ***Jipson v. South Portland Hous. Auth., No. AP-07-60,*** **2008**

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Me. Super. LEXIS 101 (Me. Super. May 2, 2008), a housing authority sought to terminate the benefits of one of its Section 8 participants after her son was arrested for possession of a usable amount of marijuana. The participant requested, and received, an informal hearing, where the hearing officer upheld the PHA's decision to terminate the participant's benefits. The participant then requested, and received, a formal hearing.

This time, a different hearing officer overruled the first hearing officer and directed the PHA to reinstate the participant's Section 8 assistance. The PHA's director sent the participant a letter notifying her that he was disregarding the second hearing officer's decision and was terminating her voucher, stating:

> *I am in receipt of the information from both the informal and formal hearing officers regarding the termination of your participation in the Housing Choice Voucher Program because of drug-related activity by your son.*
>
> *I have reviewed this information and the information contained in our Section 8 Administrative Plan regarding this issue. As a result of this review, it is my decision to uphold the termination of your voucher.*
>
> *The obligations of the Housing Authority will terminate on January 31, 2008. Your landlord will be notified of this decision prior to January 1, 2008.*

The tenant then sought judicial review of the director's action,

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arguing that the PHA's decision to disregard the decision of the second hearing officer was arbitrary, capricious and in violation of her due process rights.

Even though neither party challenged the sufficiency of the director's finding the court raised the issue *sua sponte.* The court held that the director's findings were insufficient to permit meaningful judicial review by the court because the director's letter failed to set forth which specific law or rule the participant violated and the facts supporting the alleged violation that underlie his exercise of discretion. The court noted, for example, that there had been no finding that any of the son's transgressions had been imputed to the mother. The court remanded to the agency for findings that would permit meaningful judicial review.

Defective Notices

There were quite a few cases involving defective termination notices this time. The first case illustrates the importance of adhering to termination notice requirements to the "T." Courts may be forced to excuse a tenant's egregious

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conduct when the PHA has provided insufficient notice. In ***Rockville Centre Hous. Auth. v. Boggen,*** **No. SP 2018/08, 2008 N.Y. Misc. LEXIS 4534, 2008 NY Slip Op 51634U, 20 Misc. 3d 1126A, 240 N.Y.L.J. 28 (D.N.Y. (1st Dist. July 31, 2008)**, a public housing tenant asked for her PHA's permission to have a friend "stay" in her apartment for two weeks, which violated the PHA's guest policy permitting visits for a maximum of four consecutive days or thirteen days in any calendar year. The PHA informed the tenant of its guest policy and denied her request.

Two weeks later the PHA observed that the guest had remained in the unit longer than four days and notified the tenant that, if her guest did not immediately vacate, her lease would be terminated. The guest left the next day. Nonetheless, the PHA sent the tenant a 30 day notice termination notice which stated that her lease was being terminated in 30 days, but the fatal flaw was that it did not state the reasons therefor. The notice enclosed a copy of the grievance policy and stated that, if she cared to do so, she must file an appeal within 14 days.

The tenant had an informal hearing at which egregious conduct on the

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tenant's part was revealed: the guest stayed in the tenant's apartment for a period of two weeks, and during that time the tenant and her guest illegally obtained funds from the department of social services, payable to both of them, based upon the guest's misrepresentations that he was living at the tenant's apartment (the tenant as purported "sublandlord" kept half of the proceeds from the DSS check). The hearing officer upheld the termination of benefits.

When the tenant did not vacate the apartment, the housing authority sought to evict her advancing various alternative theories: that, as a result of the presence of the guest in the unit for a period greater than four consecutive days, the tenant: 1) had an unlawful occupant, 2) failed to report a change in household composition, 3) impermissibly assigned or sublet the apartment, and/or 4) impermissibly had a boarder or lodger.

The tenant moved to dismiss the petition, asserting that the court lacked subject matter jurisdiction until the tenant received a formal grievance hearing and, thus, exhausted her administrative appeals. The PHA cross-moved for summary judgment, arguing that a formal grievance hearing was not required under HUD rules because the tenant engaged in criminal activity by defrauding

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the DSS and depriving the PHA from having the opportunity to conduct a background check with respect to the guest.

The court indicated its displeasure with the tenant's conduct but nonetheless dismissed the eviction proceeding. The court found that the tenant's criminal activity could not serve as a basis for eviction because the PHA failed to comply with the notice provisions of the lease, which required that it set forth the specific basis for termination. Here, the notice did not state any reasons for the termination. Moreover, the court found that the tenant's violation was cured as required by the notice when the guest vacated the day following the tenant's receipt of the notice, so the notice was ineffective to terminate the lease. Notably, the court also noted that the PHA essentially had only "one bite of the apple" and refused to allow it to substitute another violation for grounds of eviction. Accordingly, the court dismissed the eviction proceeding.

Another unauthorized occupant case provides a good example of sufficient notice of the facts that support the termination, but was otherwise flawed. In ***Hous. Auth. Of the City of New Haven v. Soares, et al.,*** **No.** ***NHSP093937*****, 2008 Conn. Super. LEXIS 2351 (Conn. Super. Aug. 19, 2008)**, a housing authority

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served a 30 day notice on a tenant who had an unauthorized occupant staying in her unit. The notice specified violation of nine subsections of the "Section 6 - Tenants' Obligations" portion of her lease. The notice stated the reasons for termination of the lease as follows:

> *You are allegedly in violation of each of these provisions because you allowed individuals not named in the lease to reside in your apartment specifically Charles Glenn, a.k.a., Charlie Rock and Jane Doe. Charlie Rock was recently evicted from another HANH property. Further on October 5, 2007 Officer Young of the New Haven Police Department reported that Mr. Glenn sated (sic) he was renting from Ms. Soares and pays her $ 200 cash and $100 in food stamps each month. The apartment is in disarray and drug paraphernalia was on the floor . . . you are allegedly in violation of each of these provisions of your lease because you allowed individuals not named in your lease to reside in your apartment specifically and further these individuals made rent payments to you which was admitted to the New Haven Police Department. Further the apartment was in disarray with drug paraphernalia on the floor.*

The termination notice further notified the tenant of her right to an informal conference within fourteen days, and her right to an impartial informal hearing. The notice also gave the tenant the opportunity to cure the violations without penalty within fifteen days. Otherwise, the notice advised that the rental agreement would terminate in no less than thirty days.

After the guest did not leave, the housing authority initiated eviction

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proceedings. The tenant moved to dismiss on the grounds that the pre-termination notice was insufficient because it said that the tenant had fourteen days to contest the claim where the regulations require thirty days. The housing authority countered that the regulations only require fourteen days, and that the thirty days referred to the time in which the housing authority could terminate the lease - not the time for the tenant to access the grievance process.

The court noted that 24 CFR 966.54 et seq. describes the procedure for an informal settlement without a hearing. If the defendant is not satisfied with the outcome of that informal process, §966.55 requires the tenant to request, in writing, a hearing within a reasonable time after receiving the summary from the informal discussion. The issue in this case was what is a reasonable time in which to require a tenant to request a hearing?

The court noted that the applicable statute states that a "reasonable" time shall be a) not to exceed thirty days if the health or safety of the other tenants is threatened, b) fourteen days in the case of nonpayment of rent and c) thirty days in any other case unless state or local law provides a shorter period. Section 1437d(k)(1)-(4).

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The court found that, since the housing authority made no claim that the health or safety of the other tenants was threatened or that the tenant failed to pay rent, the claims against the tenant fall under "any other case." The court noted that the housing authority gave the tenant fourteen days to request a hearing and fifteen days to cure the violations, which was short of the statutory thirty days to access the grievance process. Since no state or local law provided less time, the court held that the housing authority should have given the tenant thirty days to request a hearing. Accordingly, the court dismissed the complaint.

Impermissible Consideration of Evidence Outside of the Hearing

In ***Lyons v. Tuscarawas Metro. Hous. Author.*****, No. 2007AP080051, 2008 Ohio 3278 (Ohio. App. Jun 24, 2008),** a housing authority believed that a Section 8 participant was committing program fraud by allowing her boyfriend, an unlawful occupant, to live with her. Following investigations by the local police department and a fraud investigator the matter was referred to the prosecutor's office, but no action was taken. The housing authority sent the participant a 30-day letter notifying her that her benefits were being terminated. Upon her request, the participant received an informal hearing. At the hearing,

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the participant admitted that her child support award had increased and that her boyfriend helped with her expenses. She further admitted that when he was not working, her boyfriend lived with her, but then later changed her story to state that he only stayed with her from time to time and used her address because he could not receive mail at his mobile home. The hearing officer upheld the termination of her benefits, and the tenant sought judicial review.

The participant challenged the hearing process, arguing that she was not given access to exculpatory information that could have led to the discovery of further exculpatory evidence; namely: (1) the photos of her boyfriend's mobile home taken by the police; (2) proof that electrical service to his home was established by the electric company; (3) a document containing the information that the police used to determine that the boyfriend was *not* residing with the participant; (4) that the county prosecutor determined there was insufficient evidence to present the case to the grand jury; and (5) that the PHA had hired a fraud investigator. Most notably, there was evidence that, after the hearing, the hearing officer went on a friendly site visit and personally viewed the boyfriend's mobile home after the hearing.

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The court found that the hearing officer stepped outside her role as hearing officer, and improperly assumed the duties of investigator, by gathering evidence after the hearing to verify or refute the participant's statements. The court further noted that the hearing officer's letter informing the participant of her decision made it clear that she improperly based her decision on information she gathered after the hearing to corroborate, or discredit, the evidence presented at the hearing. Accordingly, the court found that the trial court erred in affirming the decision to terminate the participant's benefits.

Violation of Hearing Procedures

In *Diaz v. Donovan,* No. 404959/07, 2008 N.Y. Misc. LEXIS 4570, 240 N.Y.L.J. 10 (N.Y. Sup. Ct. Jun. 25, 2008), a Section 8 participant was arrested following a warranted search of his apartment. The participant was charged with an unspecified crime, but his case was dismissed and his record sealed. Three months later, the participant's record was unsealed for "the limited purpose of pursuing an eviction proceeding." The district attorney requested that the landlord evict the participant, and provided him with documents from the

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participant's unsealed record.

The landlord began eviction proceedings, at which point the participant became aware that his record had been unsealed. The participant filed a motion to show cause to reseal his record and to stay the eviction proceedings pending the court's decision, as well as stay any use of documents from the participant's record being used in civil proceedings against him. The court granted the stay, withdrew the order unsealing the participant's record, and resealed it.

In the meantime, the landlord had sent a letter to the state Section 8 administrator requesting the termination of the participant's Section 8 subsidy. The letter attached documents from the participant's criminal case. The administrator notified the participant that his Section 8 subsidy was retroactively terminated and did not respond to the participant's subsequent request for a hearing to contest the termination.

After the participant's Section 8 subsidy was terminated, the landlord sued the participant for nonpayment of the subsidized portion of his rent. The participant then sued the landlord and the administrator, seeking the reinstatement of his Section 8 subsidy, an order to compel the administrator to

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grant him a hearing to contest the termination of his Section 8 subsidy, and the dismissal of the landlord's nonpayment suit in housing court.

The court found in favor of the participant in all respects. First, the court held that the administrator had insufficient grounds under both HUD regulations and the administrator's administrative plan ("Plan") to terminate the participant's Section 8 subsidy, since the participant was only indicted on a charge that was subsequently dismissed. Further, the court found that the administrator failed to follow its procedures for terminating Section 8 subsidies, which require granting an informal hearing if timely requested.

Next, the court found that the landlord's nonpayment suit violated the administrator's Plan, which prohibited landlords participating in the Section 8 program from seeking to recoup section 8 subsidies from the tenant. Finally, the court ordered that the administrator retroactively reinstate the participant's Section 8 subsidy to the date of termination, that the administrator provide the participant a hearing to contest his termination from the Section 8 program.

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Insufficient Hearing Proceedings

In ***Ervin v. Hous. Auth. Birmingham Dist.*, No. 07-14219, 2008 U.S. App. Lexis 13138 (11th Cir. June 17, 2008),** the Eleventh Circuit addressed the limitations on the reliance upon hearsay evidence in termination proceedings. A housing authority terminated the Section 8 benefits of a participant after learning from the participant's landlord that the local police had notified the landlord that a search warrant had been served at the participant's residence, and that during the search, police found marijuana on the property. The participant requested, and was granted, an informal hearing on the termination decision.

After hearing testimony from a neighbor as to the drug activity, and from a housing authority staff person concerning the police department's letter (the actual letter was not presented as evidence), the hearing officer determined that the participant had violated program rules by allowing her unit to be used for drug-related activity and upheld the termination of the benefits.

The participant filed suit in federal district court, seeking declaratory and injunctive relief under 42 U.S.C. § 1983. She alleged the housing authority violated her procedural due process rights when it failed to comply with HUD

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administrative regulations applicable to Section 8 proceedings when the hearing officer relied solely on hearsay without adequate indicia of reliability, and improperly shifted the burden of proof to the tenant, rather than to the housing authority. The district court affirmed the housing authority's decision and again the participant appealed.

The appellate court vacated and remanded, finding that a housing authority has the burden of persuasion and must initially present sufficient evidence to establish a *prima facie* case. The court found that, since the housing authority's evidence supporting the adverse administrative decision consisted wholly of the police report, which was hearsay, it was insufficient. The court held that, although hearsay may constitute substantial evidence in administrative proceedings, the factors that assure the underlying reliability of the evidence, specifically whether the opposing party could have obtained the information contained in the hearsay before the hearing and could have subpoenaed the declarant, were not present.

The court further found that the participant did not have access to the police department letter at the time of the hearing. As such, the court ruled that

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the evidence capable of appellate review was unreliable. The court vacated and remanded the case to district court to reconsider the reliability and probative value of the evidence.

Defective Notice

In ***Corpus Christi Hous. Auth. V. Lara,* No. 13-07-00277-CV, 2008 Tex. App. LEXIS 5290 (Tex. App. Jul. 17, 2008)**, a housing authority terminated a tenant's lease after it received reports from the local police department that she and her children had committed criminal acts on PHA property involving harassment, intimidation, and physical violence toward a neighbor. The housing authority provided the tenant with a 3-day notice to vacate, which contained copies of the police reports. When the tenant refused to vacate, the PHA[3] sought a judgment for possession from a justice court, arguing that the tenant (1) did not abide by the admission and continued occupancy policy; (2) disturbed other residents' peaceful enjoyment of the premises; and (3) engaged in criminal activity that impaired the physical or social environment of the development.

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Following the court's award of judgment for the PHA, the tenant appealed the eviction to the county court, arguing that the housing authority's eviction action should be dismissed because her notice was defective under controlling federal regulations. Specifically, she argued the notice was defective under federal law because it failed to include two federally mandated statements: 1) specifying the judicial eviction procedure to be used, and 2) specifying whether the eviction is for a criminal activity or for drug-related criminal activity. The tenant further argued that the eviction violated state law because it was instituted before an effective lease termination.

The trial court agreed with the tenant and dismissed the eviction suit. The housing authority appealed, contending that its notice was adequate because, since the state had only one judicial eviction procedure, a generic notice was sufficient. Alternatively, the PHA argued that, even if the notice was inadequate, the action should not be dismissed because the statute's purpose was informational, rather than jurisdictional.

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3 The term "PHA" used herein refers to "public housing authority," "redevelopment agency," or other entity that manages or administers federal public housing or housing choice vouchers.

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The appellate court reversed and remanded. However, the court rejected the housing authority's argument that its notice was sufficient, finding that the regulation's use of the word "shall" with regard to specifying the judicial eviction procedure to be used mandates that PHA's notify tenants of the judicial eviction procedure to be used. However, the court agreed with the housing authority that the notice requirements contained in 24 CFR § 966.4(l)(3)(v)(B) and (C) are not jurisdictional, so the trial court should have abated the housing authority's action until it could provide the tenant with the technically proper notice.

DOMESTIC VIOLENCE

Upon information and belief, the following case is the first reported decision that has a substantive discussion about domestic violence in the housing agency context. Interesting, the case does not even mention the Violence Against Women Act ("VAWA")[4]. In ***Robinson v. Cincinnati Metro. Hous. Auth.*****, No.1:08-**

[4] Congress's latest reauthorization of VAWA in 2005 had significant changes relevant to landlords, in general, and to public housing evictions, in particular.

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CV-238, 2008 U.S. Dist. LEXIS 39523 (S.D. Ohio Apr. 29, 2008)[5] a public housing tenant lived in a scattered site single family public housing unit with her two children, but had to flee the unit to avoid abuse by her former boyfriend. The abusive incident occurred when the boyfriend came to the tenant's home, forced his way in and severely beat her, causing significant injuries to the tenant as well as property damage to the home. The tenant filed a police report and was granted an ex parte Civil Stalking and Sexually Oriented Offense Protection Order. The ex-boyfriend remains at large.

The tenant and her children stated that they were afraid to return to the residence because the ex-boyfriend, who lives half a block down the street, has threatened to come back and kill the tenant. They had been staying with friends and family; however, the tenant still paid rent and utilities for the unit.

As a result of the abuse and the threat to her life, the tenant asked her housing authority to transfer her to another unit or scattered site dwelling so that her ex-boyfriend would not be able to find her. The housing authority declined to transfer her because it’s admissions and continued occupancy policy ("ACOP")

[5] The housing authority’s counsel in this case, Jeffrey Mando, is speaking about the *Robinson* case and other VAWA issues at this conference.

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did not provide for transfers on the basis that a tenant has been a victim of domestic violence. The housing authority noted that the only exception for transfers based upon the tenant being a victim of a crime is for hate crimes under the federal hate crimes statute, or in cases of "extreme harassment." Other than denying her transfer request, the housing authority took no other adverse action against the tenant, and her subsidy remained in place.

Thus, the issue was whether the tenant was a victim of a federal hate crime or extreme harassment. The tenant argued that domestic violence would be included as "extreme harassment," which would warrant a mandatory transfer under the ACOP. She further argued that, since domestic violence affects women more than men, to deny the tenant a transfer, because it is based on domestic violence, is unconstitutional gender discrimination in violation the federal and state fair housing acts.

The housing authority's position was that "extreme harassment" does not include domestic violence and is meant to be part of the reference to the federal hate crimes statute so that mandatory transfers are only for extreme harassment based upon race, color, religion or national origin as per the hate crimes statute.

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The tenant sought a temporary restraining order and preliminary injunction to require the housing authority to approve her transfer, claiming that its transfer policy violated the Fair Housing Act because it discriminated against her on the basis of her gender. The housing authority responded that its ACOP transfer policy was gender neutral, as the same restrictions apply to transfer requests by men as by women. The PHA also argued that the legal authority that the tenant cited was inapplicable because each case involved domestic violence victims being evicted or denied other federal housing benefits, whereas here, the tenant has not been evicted or denied any other federal housing benefits following the domestic violence incident.

The court agreed with the housing authority, ruling that the tenant was not being denied housing and had not been evicted, thus, the housing authority had not denied any housing benefit. The court further found that, with the exception of the hate crimes provision, the transfer policy was neutral on its face, and there was in the policy that provides for special, different or more restrictive consideration for victims of domestic violence. The court found that the tenant had not shown that the housing authority's interpretation and application of its

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policy was discriminatory. The court also found that an injunction would harm persons other than the tenant because to require a transfer in these cases would place a burden on the housing authority that it was not equipped to meet, and would interfere with its ability to provide public housing. However, the court did encourage housing agencies to consider, not only policies that would allow for domestic violence transfers, but also transfers for witnesses of crime for their protection from an alleged perpetrator.

EVICTION

***Linares v. HUD*, 548 F. Supp. 2d 21 (E.D.N.Y. May 5, 2008)**, is a continuation of a suit earlier this year where public housing tenants sued HUD to challenge its "no cause" eviction regulation, 24 C.F.R. § 247.10, which permitted HUD to evict tenants without cause, usually as part of a redevelopment plan. The court granted the tenants' motion for partial summary judgment, finding that the "no cause" eviction regulation violated the tenants' due process rights, and declaring the regulation facially unconstitutional.

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HUD has now moved for reconsideration< raising a number of arguments. First, HUD claimed that the case had become moot because some of the plaintiffs were no longer in the public housing program and because HUD voluntarily had ceased no-cause evictions at the sites at issue. The court held that HUD's mootness arguments failed because, although two of the tenants were no longer subject to the regulation since they had moved to non-HUD housing, the problem of the legality of no cause evictions under the regulation remained. The court further held that HUD's voluntary cessation of no cause evictions with respect to the HUD properties at issue did not limit the potential for no cause evictions to surface with respect to other HUD properties.

Next, HUD argued that the relief granted to the tenants exceeded that requested since they did not seek a declaration of the unconstitutionality of the "no cause" eviction regulation. The court found that, because the regulation impermissibly deprived and continued to deprive tenants of HUD-owned properties, their rights under the Due Process Clause, the tenants were entitled to a declaration that the regulation was facially unconstitutional pursuant to the court's power to grant relief under Fed. R. Civ. P. 54(c). Ultimately, the court

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denied HUD's motion for reconsideration and issued a permanent injunction against its enforcement of 24 C.F.R. § 247.10.

Criminal Activity - "One Strike"

In the following case, a New York civil court carved out certain eviction actions that are not preempted by the *HUD v. Rucker*[6] "innocent tenant" doctrine. *In* ***New York City Hous. Auth v. Lipscomb-Arroyo, et al.*****,2008 NY Slip Op 51085U, 19 Misc. 3d 1140A, 239 N.Y.L.J. 112 (N.Y. Civ. Ct. Jun. 2, 2008)**, a housing authority sought to evict a public housing resident because her boyfriend was living in her unit in an unauthorized manner and using it for alleged drug dealing activities. During the court of a narcotics investigation police officers entered the tenant's apartment with a search warrant and found the boyfriend present, along with crack cocaine inside of the boyfriend's jacket which was lying on a couch, a black 9 millimeter firearm with magazine which was found in the back of a closet on a high shelf in plain view, $2,033.00, most of which was found in a dresser drawer in a bedroom, four pieces of mail containing the boyfriend's

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name; the boyfriend's New York State Benefits Identification card, and the boyfriend's New York State Inmate identification card. Based on that evidence, the PHA sought to evict the tenant for having an unauthorized occupant in her apartment and allowing criminal drug activity in the unit.

At trial, the PHA's witness, a police detective, offered no testimony as to whether any evidence was uncovered that would demonstrate that the boyfriend was an unauthorized occupant. Except for the jacket containing the crack, none of the boyfriend's other clothing or personal items were found in the apartment. Likewise, neither of the photo IDs was introduced in evidence. Neither the four pieces of mail, nor any pictures thereof, were introduced as evidence in the trial. The detective also testified that no paraphernalia associated with the narcotics trade, including but not limited to, scales, measuring devices, vests, a safe or prerecorded drug-buy money, were found in the apartment. He further testified that the drugs found inside Mr. Jackson's coat were the only drugs found in the apartment.

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[6] *HUD v. Rucker, 535 U.S. 125 (2002)*, where the U.S. Supreme Court held that housing authority's have the discretion to evict an entire family for the criminal activity of any household member or tenant guest.

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In rendering its decision in favor of the tenant, among the issues that the court considered was one of the factors that courts use to determine when a leased premises is being used for illegal purposes, that is, whether the tenant knew or should have known about the illegal business and acquiesce regarding the activity. This is where *Rucker*[7] comes in.

The PHA argued that, in *Rucker*, the Supreme Court has enunciated that a standard of "strict liability" applies to criminal activity occurring in a public housing authority apartment. Under that standard a tenant can be subject to eviction for criminal activity that occurs, regardless of whether there is actual knowledge or acquiescence by the tenant.

The court distinguished the application of *Rucker* to this case, finding that *Rucker's* "strict liability" standard flows from the lease between the tenant and the public housing authority. Citing local precedent, it noted that eviction proceedings brought under the specific statutes in question were not based on PHA lease violations, but on the language and provisions of the statute. A distinguishing factor in this case is that, by local statute, the lease is void when illegal commercial activity is the basis for an eviction proceeding. The court thus

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7 *HUD v. Rucker*, 535 U.S. 125 (2002). *See* footnote 7, *supra.*

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stated that the standard developed by the local courts applicable to these local statutes is the “knew or should have known” standard.

The court also acknowledged that some local courts had even decided that the standard of "strict liability" announced in *Rucker* may apply to eviction proceedings brought under the local statute; however, it noted that those decisions still contain an analysis of the evidence based on the standard that the tenant knew or should have known of the illegal activity as part of the *prima facie* case.

Further, the court stated that the analysis of whether a tenant "knew or should have known" must be based on the record before the court and not from inferences or speculation. The court found that the detective who testified at the trial merely had assumed that the boyfriend was an occupant of the subject apartment because he was in the apartment at the time the search warrant was executed, and his jacket was on the couch.

The court pointed out that in this jurisdiction, the PHA has a choice to invoke the administrative process wherein the tenant is sent a notice setting forth charges and the facts underlying the charges, and a hearing may follow

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unless the PHA decided to settle the matter by stipulation. The court noted that, should a hearing take place, the standard for termination of the tenancy in a commercial drug breach of the lease matter is "strict liability". The court did point out that a hearing officer does have the discretion to look at all the facts and circumstances and decide whether or not "strict liability" should be applied.

The court also presented the PHA's other choice: it also may choose to bring an illegal commercial drug case to court, as it did in the instant matter; however, any illegal commercial drug "holdover" must be brought pursuant to local statute, which provides that the lease between the parties is void as a matter of law. The court stated that this remedy was enacted to allow landlords to bring tenants alleged to be involved in illegal commercial activity to court without having to first terminate the lease and/or go through an administrative process. This is a "Catch-22" for the PHA because, if a PHA chooses this venue, then the lease between the parties is void per statute, giving the tenant a right to demand a jury trial which ordinarily would be waived by the tenant in the PHA lease.

Additionally, the court found that the PHA failed to meet its *prima facie* burden to prove that the alleged use itself constituted an "illegal trade or

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business," noting that the PHA failed to offer any evidence that would tend to demonstrate any trade or business at was being conducted in the subject premises. The court pointed out that the boyfriend was arrested for possession of a gun, not on any drug charge, and that nobody else in the household was arrested for any drug charges.

Finally, the court found that the PHA also failed to show that the tenant knew or should have known about the illegal drug trade from her apartment. The court noted that the crack and money were not in plain view. It found that the only items in plain view were the pieces of mail and ID cards that may have belonged to the boyfriend. Evidence of the gun was determined to be inadmissible. The court found persuasive that no evidence of any paraphernalia commonly used in illegal drug trade was found during the search of the premises.

In ***Stevens v. Housing Auth. of S. Bend*, No. 3:08-CV-51, 2008 U.S. Dist. LEXIS 55935 (N.D. Ind. July 22, 2008),** a housing authority initiated eviction proceedings against a public housing tenant and her two sons for violating the housing authority's zero tolerance policy for criminal activity. The tenant asserted that the individuals involved in the criminal activity were not residents

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in her apartment, but rather, were outside parties over whom she had no control. The tenant sued the housing authority, claiming, *inter alia*, that the threatened eviction violated her due process and equal protection rights. The housing authority moved to dismiss the complaint under the authority of *Rucker*.

The court denied the motion to dismiss, rejecting the housing authority's claim that *Rucker, supra*, applied to Stevens' situation. The court held that, whereas the criminal actor in *HUD v. Rucker* was a resident and listed on the lease, the tenant here made a well-pleaded argument that the criminal actors in her case were outside parties who did not reside in her apartment and who were not under her control. While the court acknowledged that the police report cited in the housing authority's eviction notice suggested that the criminal suspects were the tenant's guests, the court nevertheless ruled that was not sufficient for a motion to dismiss, although it might be proper in a motion for summary judgment, depending upon the results uncovered in discovery.

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FAIR HOUSING

As usual, there are a number of important cases in the fair housing area. This area has seen a proliferation of suits against public housing and redevelopment agencies, as well as a rise of "Section 504" compliance audits from HUD. Disability discrimination and racial discrimination continue to be the two most prolific areas for claims, followed by familial status (families with children) discrimination. We are seeing a measurable increase in source of income discrimination suits, as well, this reporting period.

If your agency already has not considered it, now is a good time to consider engaging HDLI to provide *on-site* fair housing training for your staff, attorneys, and industry partners.[8] Be proactive to avoid being the next defendant in one of these suits!

Disability Discrimination

In the first case in this section a Minnesota appellate court held that a tenant's relapse into her crack cocaine addiction constituted "current use" of a

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controlled dangerous substance, which excluded her from protection under the disability provisions of the federal Fair Housing Act. In ***Pub. Hous. Agency of the City of St. Paul v. Ewig*, No. A07-1199, 2008 Minn. App. Unpub. LEXIS 595 (Minn. App. May 20, 2008)** a housing authority sought to evict a public housing tenant after learning that she smoked crack cocaine, and allowed guests to smoke crack cocaine, in her apartment. The PHA alleged that these actions constituted a serious violation of her lease which provided that she shall not allow her guests "to engage in any criminal activity, including drug-related criminal activity."

The tenant admitted at trial that she had done this on at least two occasions, but that her drug use was a disability, for which she was in recovery but unfortunately relapsed. She also claimed that, in addition to her drug disability, she has been diagnosed with minor depression and anxiety disorder.

The district court dismissed the action, finding that the tenant's cocaine addiction constituted a disability under the federal Fair Housing Act ("FHA"), and that the housing authority's decision not to forego eviction as a reasonable accommodation for the tenant's disability was discriminatory. The PHA appealed.

8 An HDLI fair housing training brochure is in the front of your conference materials.

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The appellate court reversed and remanded, noting that recovering drug addicts are considered disabled under the FHA; however, the "current, illegal use of . . . a controlled substance" is not covered. The tenant asserted that she is not excluded under this provision because her relapse does not constitute "current" illegal use of a controlled substance. Giving the FHA provisions their ordinary meaning, the court held that drug use that is "reasonably contemporaneous with the alleged incidents of discrimination" is excluded from protection under the FHA. The court found that the tenant's use of crack cocaine occurred two weeks before the PHA sought to evict her and was reasonably contemporaneous with the PHA's decision to evict her. With respect to her argument that she also had other disabilities, the court found that those diagnoses were not the cause of her eviction, since she was evicted for using illegal drugs and allowing others to use illegal drugs in her apartment. The court stated that the FHA prohibits discrimination "because of" a handicap, and that even if the tenant's minor depression and anxiety diagnoses were disabilities under the FHA, they were not the cause of her eviction. Accordingly, the court held that the tenant was not disabled under the FHA, and that to allow any other result excusing the tenant's

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illegal drug use would be an "absurd result."

In the next case, a court considered whether fair housing law requires a landlord to waive, as a reasonable accommodation, its economic-related policies (such as for minimum income) because a disabled person's disability causes him/her not to be able to meet those policies (such as when a person cannot work because of their disability). In ***Bell v. Tower Mgt. Serv.*****, No. 07-CV-5305 (FLW), 2008 U.S. Dist. LEXIS 53514 (D. N. J. July 15, 2008)**, a disabled Section 8 participant requested that a prospective landlord waive its minimum income policy as a reasonable accommodation of her disability. She claimed that the reason she could not meet the minimum income policy was because her disability prevented her from working refused to waive the minimum income requirement. The landlord refused to do so. Accordingly, the participant moved into another apartment with a higher rent and thereafter sued the original landlord under the fair housing act for the difference in her share of the rents. The landlord moved to dismiss on the ground that the fair housing laws did not require the permitted economic accommodation.

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In deciding the landlord's motion, the court looked to decisions from several other circuits which had squarely considered this issue and have universally have held that no such accommodation is required. The Second Circuit has held that "it is fundamental that the law addresses the accommodation of handicaps, not the alleviation of economic disadvantages that may be correlated with having handicaps." [Citations omitted].

Similarly, the Third, Fourth and Sixth Circuits have held that the plaintiff in an FHAA reasonable accommodations case must "establish a nexus between the accommodations that he or she is requesting, and their necessity for providing handicapped individuals an equal opportunity to use and enjoy housing." [Citations omitted]. The Seventh Circuit has held that "the FHAA accommodations provision does not require "consideration of handicapped people's financial situation." [Citations omitted].

Persuaded by these holdings, the court held that, to mandate that a landlord provide a disabled tenant - but not non-disabled, impecunious persons - with an exemption to its minimum income policy would be to impermissibly elevate the rights of the handicapped poor over the rights of the non-

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handicapped poor. Without expressly adopting any of the rationales of the other circuits, the court went on to find that the fair housing act's reasonable accommodation requirement set forth in 42 U.S.C. § 3604(f)(3)(B), requires some causal nexus between a disabled plaintiff's disability and her need for an accommodation, and that this tenant here had failed to prove such a nexus.

In the next case involving disabilities discrimination a housing authority clearly bent over backwards in attempting to accommodate a disabled tenant. In ***Kalai v. State of Hawaii*, Civil No. 06-00433 JMS/LEK, 2008 U.S. Dist. LEXIS 64215 (D. Haw. Aug. 20, 2008)**, an elderly public housing resident who used a wheelchair lived in a unit that was not handicapped accessible. The tenant requested that the housing authority provide her wheelchair access, handle bars in the bathroom, and an accessible parking stall for her existing unit. She later asked for permission to install grab bars that she had purchased. The housing authority agreed to provide wheelchair access from the unit to the parking stall and to install the grab bars that she had purchased in both bathrooms, but it refused to modify its policies regarding post-construction alterations to its

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buildings to allow the tenant to install the grab bars herself. The housing authority later determined that it could not install a handicapped parking stall at the existing building because of its location and steep slope, and thus offered the tenant the option of moving to an accessible. The housing authority first offered the tenant a one bedroom unit that was wheelchair accessible and had grab bars, but the tenant rejected the unit. The tenant also rejected another accessible unit with grab bars and handicapped parking. The housing authority then offered the tenant a third unit, a studio unit which was not accessible but had some grab bars already installed, which she also denied. The tenant then identified a different one bedroom unit that she preferred, and the housing authority agreed to move her to that unit.

During the time that the housing authority was making offers to move her to accessible units and the tenant was refusing the offers, and while the parties' negotiations continued, the housing authority did not install the grab bars in the bathrooms of her current unit due to the fact of her impending move. Plaintiff eventually fell in the bathroom of her existing unit and was injured. She subsequently moved into her new unit, with grab bars fully installed. Later, she

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moved out of public housing altogether.

The tenant sued the housing authority, seeking injunctive relief and damages. She alleged that the housing authority violated the federal Fair Housing Act ("FHA") by not properly accommodating her disability and by refusing to give her permission to install the grab bars that she had purchased. She also claimed that the housing authority was negligent for failing to install the grab bars in her current unit. The housing authority moved for summary judgment on the grounds that the tenant's claim for damages was barred by the state's sovereign immunity, and that her request for injunctive relief was moot since she no longer resided in public housing.

With regard to the immunity defense, the court first held that Congress has not abrogated the housing authority's sovereign immunity, since the FHA contains no clear congressional statement unequivocally expressing an intent to abrogate sovereign immunity. The court rejected the tenant's argument that when the FHA is read together with the Rehabilitation Act and the Americans With Disabilities Act there is Congressional intent to abrogate states' Eleventh Amendment sovereign immunity under the FHA. The court

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distinguished Tennessee v. Lane, 541 U.S. 509 (2004), which had held that Congress validly abrogated sovereign immunity under Title II of the ADA, finding that that case involved the narrow issue of access to courts. The court stated that *Lane's* limited holding did not implicate the FHA and that there was no support for extending *Lane's* limited holding in the ADA context to the FHA, where the FHA itself contains no clear congressional intent to abrogate sovereign immunity.

The court held that the tenant's FHA claims seeking damages were barred by the Eleventh Amendment and awarded the housing authority summary judgment as to the claims for damages. Having dismissed the federal claims, the court declined to exercise its supplemental jurisdiction over the tenant's state law negligence claim. Finally, with regard to the mootness defense, the court found that since the tenant no longer resided in public housing, there was no longer a live issue upon which the court could issue prospective relief and granted summary judgment on that issue, as well.

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Racial Discrimination

***Ohio Civil Rights Comm'n v. Akron Metro. Hous. Auth.*, No. 2007-0254, 2008 Ohio LEXIS 1770 (Ohio July 8, 2008)** presented a case of first impression in Ohio. Public housing tenants were attempting to get Ohio courts to recognize a new cause of action -"hostile housing environment"- which would impose fair housing tort liability on landlords for racial harassment occurring at their developments between tenants, even where the landlord took no part in the harassment.[9] The housing authority took the position that Ohio should not recognize such a cause of action, and HDLI filed an *amicus* brief in support of the housing authority.[10]

In *Harper*, an African American public housing tenant and her family had a number of confrontations with members of a Caucasian family next door. The African American family claimed that their neighbors used racial slurs during some of these confrontations. The local civil rights commission filed a complaint alleging that housing authority had discriminated against the African American

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[9] Some other jurisdictions have recognized this cause of action.
10 This decision and HDLI's *amicus* brief are available on HDLI's website: www.hdli.org .

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family by failing to take action to stop the racial harassment against the family, despite notice of the harassment and allegedly of its racial nature.

The commission asserted that the housing authority had the power to terminate tenants who violated lease terms, including the provision against disturbing neighbors' peaceful enjoyment of their apartments. The commission further argued that the housing authority's actions created a "hostile housing environment" for this African American family, and that Ohio should recognize this new cause of action, in the same manner that it recognizes "hostile work environment" cases in the employment context.

The trial court granted summary judgment for the housing authority, rejecting the commission's contention that the housing environment was analogous to the employment environment. The intermediate appellate court reversed, holding that the trial court erred in not recognizing a cause of action for "hostile housing environment," finding that such a cause of action existed, although it was not based on the fair housing law, which only prohibits one party from discriminating against another in connection with access to housing. Instead, the appellate court found support for this cause of action in two types of

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cases: federal housing discrimination cases and Ohio workplace harassment cases. The housing authority appealed.

The state supreme court upheld the trial court's decision in favor of the housing authority, holding that a landlord is not liable under the Ohio fair housing act for racial harassment by one tenant against another when the landlord does not actively take part in the harassing behavior. The court further held that a landlord is not liable under the act for failing to take corrective action against another tenant whose racial harassment caused the hostile housing environment. The Ohio Supreme Court rejected the appellate court's support of a more expansive view and its reliance on the federal housing discrimination and Ohio workplace harassment cases.

The court distinguished the federal housing discrimination cases as differing substantially from the housing authority context. It noted that four of the six housing-discrimination cases involved direct harassment by the landlord or homeowners' association. A fifth case involved the children of a building manager, and the last case relied on a Virginia statute. The court also distinguished the Ohio workplace harassment cases because they were grounded

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in federal case law on negligence as derived from agency law, which had no counterpart in landlord-tenant law.

While the court acknowledged that a landlord has some control over its tenants through its power of eviction, it found this degree of control insufficient to hold a landlord liable for the tortious acts of one tenant against another.

Familial Status Discrimination

In ***Hunter v. Williamson*, Civil Action No: 07-7970 Section: J(3), 2008 U.S. Dist. LEXIS 48522 (E.D. La. June 25, 2008),** a Section 8 participant who was seeking to return to New Orleans following Hurricane Katrina signed a lease to rent a three-bedroom apartment , for which she paid an initial deposit. Before she occupied the apartment, the landlord learned that the participant planned to have her five children live with her and her husband. Citing the "three child limit" listed on his advertisements, the landlord refused to complete the rental and returned the participant's deposit check.

The participant sued the landlord, claiming that his advertising of apartments with limits on the numbers of children constituted a *per se* violation

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of the federal fair housing act ("FHA"), which prohibits discrimination based on familial status. The parties each moved for summary judgment.

The court granted the participant's motion for summary judgment, ruling that she had demonstrated the three conditions required by the FHA: the landlord had made a statement; the statement was in reference to the sale or rental of a dwelling; and the statement indicated a preference based on a protected class – here, familial status, which is having one or more children living in the household.

The court rejected the landlord's claim that the limit on children was necessary to comply with the parish ordinance on maximum occupancy, agreeing with the participant that a facially discriminatory child limit cannot be camouflaged as a local occupancy ordinance. The court stated that the occupancy requirements referred to limits on the number of people, not only on the number of children. Further, the court found that the landlord provided conflicting measurements of the apartment, with one measurement sufficiently large to enable Hunter and her family to comply with the parish code. Thus, the court found that the landlord had violated the FHA in refusing to rent to the participant

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due to the number of children after the participant had made a bona fide offer to rent the apartment.

Source of Income Discrimination

There were a number of interesting "source of income" discrimination cases reported this period. The first case addresses whether a landlord's refusal to accept a section 8 voucher constitutes "source of income" discrimination under an anti-discrimination statute -or put another way, whether a landlord can be forced to participate in the Section 8 program. This issue is becoming litigated more regularly as states and/or local jurisdictions are adding "source of income" as a protected class under their fair housing and antidiscrimination laws.[11]

In ***Kosoglyadov v. 3131 Brighton Seventh, LLC*, No. 2007-10431, 2008 N.Y. App. Div. LEXIS 6837, 2008 NY Slip Op 6965 (Sup. Ct. N.Y. Sept. 15, 2008)** a couple signed a lease for a rent-stabilized apartment which indicated the landlord would accept Section 8 rent subsidies, even though the couple did not yet have a Section 8 voucher. The owner was subject to the antidiscrimination

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provisions of the J-51 tax abatement law, having received a 20-year J-51 property tax abatement from the city. Sometime later, the tenants received a Section 8 voucher, at which time they requested that the landlord, through its management company, accept their Section 8 rent subsidy. The management company and landlord refused, arguing that they did not have to participate in the Section 8 program.

The tenants sued the landlord and management company ("Defendants") seeking, *inter alia*, a declaration that the Defendants were required to accept their Section 8 rent subsidy and enter into a Housing Assistance Payments ("HAP") contract with the housing authority. They asserted in their second cause of action that Defendants' refusal to accept their Section 8 rent subsidy because it derived from a federal program violated the anti-discrimination provision of the J-51 tax abatement law. The tenants moved for summary judgment on that claim, and the Defendants cross-moved, arguing that they were not required to accept the tenants' rent subsidy.

[11] Given QHWRA's elimination of the "take one take all" requirement for participation in the tenant-based Section 8 program, it also will be interesting to see the development of case law in jurisdictions that have not adopted the source of income protected class.

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The trial court granted the plaintiffs' motion for summary judgment as to their second cause of action and denied the defendants' cross motion, holding that the anti-discrimination provision of the J-51 tax abatement law required the defendants to accept the plaintiffs' rent subsidy. The court directed the defendants to retroactively credit the tenants' rent account in the amount they had paid that exceeded the tenants' Section 8 share of the rent, or $234 per month. The Defendants appealed.

The Supreme Court affirmed, but remanded for a new determination of the amount of the plaintiffs' rent subsidy. Curiously, while the decision states that the original lease between the parties provides that Section 8 subsidy "would be accepted," there was no claim, or discussion, of contractual liability.

The next case, ***Comm'n on Human Rights & Oppor. v. Shillingford Realty Corp.*, No. *CV074022802S*, 2008 Conn. Super. LEXIS 1293 (Conn. Super. May 30, 2008),** involved a different source of income: a DSS security deposit guaranty. A husband and wife wanted to rent an apartment from a landlord that required a security deposit. In lieu of cash, the couple tendered a ***security deposit***

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guarantee from the state department of social services which was intended to pay the landlord for any damages suffered by the landlord due to a tenant's failure to comply with the obligations of a lease ("DSS Guaranty"). Desiring cash, the landlord refused to accept the DSS Guaranty.

The couple sued the landlord, contending that the DSS Guaranty was a lawful source of income provided by the state to serve in lieu of a cash security deposit, and that the landlord's refusal to accept it constituted "source of income" discrimination under the state anti-discrimination law. "Lawful source of income" was defined under state law as income derived from, among other sources, "housing assistance." The landlord moved to strike the complaint.

The court determined that, if as alleged, the landlord refused to rent because of the offer of the DSS Guaranty for the security deposit, such a claim would be sufficient to state a cause of action. The court further noted that the legislative history of the state statute demonstrates that the legislature intended to prohibit landlords from denying rental opportunities to people whose source of income included federal or state housing assistance. Accordingly, the court denied the motion to strike.

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In Washington, D.C. -another jurisdiction with "source of income" as a protected class- an advocacy group established a Section 8 landlord's "source of income" discrimination through, *inter alia,* the use of testers. The landlord challenged, *inter alia*, the advocacy group's standing in the suit after discovering that the group's charter had been revoked during part of the period in question.

In ***Bourbeau v. The Jonathan Woodner Co.*, 549 F. Supp. 2d 78 (D. D.C. Apr. 17, 2008)**, a Section 8 participant and an advocacy organization sued a Section 8 owner claiming that it discriminated on the basis of the actual or perceived source of income of potential renters, and negligently supervised its employees with regard to that practice. The advocacy group used testers to see whether discrimination was occurring. The testers who claimed to be Section 8 voucher holders were turned away, as the participant had been. Testers who did not indicate they had vouchers were told that units were available. With this evidence in hand, the Plaintiffs sued the landlord, seeking declaratory relief, compensatory and punitive damages, and costs and fees.

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The landlord moved to dismiss the complaint, arguing that (1) the advocacy group lacked standing; (2) to whatever extent the state civil rights law compels landlords to participate in the Housing Choice Voucher Program ('HCVP") it is preempted by federal law; and (3) HCVP voucher payments were not protected "source[s] of income" under the civil rights law at the time that the alleged discrimination took place against the testers and the participant, because the statute was amended to include that source of income subsequently.

The landlord really did its homework with respect to its standing argument. It did not raise the typical organizational standing argument; rather, its argument was based on the fact that the advocacy group's articles of incorporation had been revoked for failure to comply with reporting and filing requirements during the period in question, which the group conceded. The landlord's argument was that, during this time, the group had no legal existence, was deemed to have been dissolved, and thus legally was incapable of suffering the requisite injury in fact.

The group explained that its filing issue resulted from a clerical error and that its status was quickly reinstated. It asserted that the reinstatement of its

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charter retroactively cured any actions that it took during the revocation period.

The court determined that the group could sue for injuries that occurred after its reinstatement, but not before. Citing local precedent, the court held that, during the period that its articles were revoked, the group could not claim injury for the diversion of its resources from its central mission, because it was not authorized to pursue that mission. The court also rejected the group's "cure" argument, refusing to allow the group to enjoy a "benefit" (namely, standing to sue) derived from acts taken during the period of revocation, namely, sending testers to the apartment complex and expending resources to counteract the landlord's allegedly discriminatory conduct.

The landlord also presented a preemption defense based upon the voluntary nature of the Section 8 voucher program, arguing the provision of the local civil rights act prohibiting discrimination on the basis of a voucher holder's status as a voucher holder cannot be read as actually prohibiting such discrimination, because to read the provision in that way would be to override federal law, which provides that landlords' participation in the Housing Choice Voucher Program is voluntary. Thus, the landlord argued that to allow the act to

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impose mandatory participation in the program by way of a prohibition on discrimination against voucher holders would contravene general principles of preemption. The court disagreed, finding that federal law did not preempt more expansive state law, and that the state law enhanced, rather than contravened, the federal law.

FRAUD

In a case of first impression in Tennessee, a criminal appeals court determined whether public housing tenants who committed program fraud by failing to report their income could be guilty under the state "theft of services" statute. In ***Tennessee v. Butler, et al.,*** **No. M2007-02718-CCA-R3-CO, 2008 Tenn. Crim. App. LEXIS 725** (Tenn. Crim. App. Sept. 10, 2008), three public housing tenants were charged with felonious "theft of services" from their housing authority when they underreported their income to obtain lower rent. Each tenant signed leases that obligated them to report any change in income to the housing authority so that rent could be adjusted accordingly. They also

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signed forms stating that their income was accurate and acknowledging that it was a violation of program rules to willfully make false statements for the purpose of obtaining rental assistance. The tenants failed to report both employment and child support income, owing the housing authority more than $1,000 in rent.

The tenants moved to dismiss the indictments, arguing that the theft of services statute did not apply to their actions because the provision of rental housing was not a "service" under the statute. The trial court agreed, concluding that occupancy of a residence pursuant to a lease term was not a “service” under the plain meaning of the statute.

The State appealed, arguing that receipt of public housing is both a "public service" and "an accommodation" within the "services" definition provided in the “theft of services” statute. It argued that public housing is a "public service," under state law and that the overriding statutory policy of housing authorities in Tennessee, and the very motivation for the existence of public housing, is to provide the public service of providing dwelling accommodations at the lower possible rates. The State also argued that public housing is an accommodation

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"elsewhere" within the purview of the definition of "services."

The tenants countered by pointing out that the enumerated public services in the statute are all forms of utilities, such as telephone, gas, electricity, steam, water and cable television. They argued that public housing would not be of the same kind or class, even if it could be considered a 'public service. The tenants further argued that the legislature did not include public housing within the definition of "services" and has not chosen to specifically criminalize such conduct elsewhere in the code.

The appellate court affirmed the dismissal of the indictments. Applying the rules of statutory construction it considered the plain language of the statute. Like the trial court, it agreed that the tenants did not receive a "service" within the purview of the theft of services statute because the public housing provided by housing authority did not constitute a "public service" under the "services" definition. The court also noted that, where general words follow special words which limit the scope of the statute, general words will be construed as applying to things of the same kind or class as those indicated by the preceding special words. In the theft of services statute the phrase "other public service" is

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preceded by an enumerated list of services, mostly utilities. Agreeing with the trial court, the court determined that the tenants did not receive a "public service" but rather if they paid their rent, the services be provided.

With regard to the accommodations argument, the court found that public housing is not equivalent to "accommodations in hotels, restaurants or elsewhere" because those accommodations are transitory and temporary in nature, and that occupancy of a dwelling pursuant to a lease term is not an accommodation within the scope of the theft of services statute. The court held that to conclude that this case fell under the meaning of the "services" definition would impermissibly extend the coverage of the statute.

Finally, the court pointed out that the legislature specifically had criminalized similar situations; such as TennCare fraud, communications theft, destruction or interference with utility lines, fixtures, or appliances, and unauthorized water connections; however, it had not yet seen fit to criminalize the tenant's behavior at issue.

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The following case addresses whether a housing authority can be liable for toxic lead paint conditions existing within a private Section 8 unit. In ***Williams v. New York City Hous.* Auth., 35004/06, 2008 N.Y. Misc. Lexis 3302 (N.Y. App. Div. June 10, 2008)**, a Section 8 participant moved into a private unit using her Section 8 voucher. The landlord and the real estate agent who facilitated the move executed a *Disclosure of Lead-Based Paint Hazards*. Prior to the participant moving into the premises, her housing authority inspected the unit and did not find any problems in the apartment. Specifically, the inspection report noted that the exterior surfaces outside and inside the rooms were free of cracking and peeling loose paint. Both the tenant and the landlord signed the inspection report.

Four months after moving in, the tenant informed the housing authority that her two-year-old son had been hospitalized for lead poisoning and that the health department had told her to vacate the premises. The health department later found lead violations in the apartment and issued a notice to abate.

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The participant subsequently sued the housing authority and the city, asserting that they were negligent in administering the Section 8 program because the infant was placed in a residence with lead and had a significant rise in his lead blood level causing medical problems. The participant further alleged that the housing authority breached a warranty of habitability, negligently inflicted emotional distress, is liable for loss of services, and violated several state and federal ordinances, rules, regulations and statutes, including the federal Lead Poisoning Prevention Act.

The housing authority moved for summary judgment to dismiss the complaint, alleging that it did not own the premises and that its only involvement in the case relates to its status as a public housing authority under the Section 8 program.

The court found in favor of the housing authority. Citing earlier case law, the court found that, in order to hold a municipality liable in the context of children poisoned by lead, the plaintiff must demonstrate a special relationship with the municipality. The court stated that a special relationship was only created if the municipality violated a statutory duty enacted for the benefit of a

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particular class of persons, when it voluntarily assumed a duty that generates justifiable reliance by the person who benefits from the duty, or when it assumed positive direction and control in the face of a known, blatant and dangerous safety violation.

The court ruled the Lead Poisoning Prevention Act did not afford a private right of action, and therefore the participant could not assert a special relationship based on a claimed violation of that statutory duty. The court also found that the housing authority acted within the scope of its statutory duties and did not reach beyond that duty. Therefore, the housing authority met its burden of showing entitlement to summary judgment as a matter of law. The court thus dismissed the complaint with prejudice.

PERSONAL INJURY

***Allston v. Hous. Auth. Of the City of New Haven*, No. CV075012207S, 2008 Conn. Super. LEXIS 1881 (Conn. Super. Jul 24, 2008**). In *Allston*, the public housing tenant was held to the strict requirements of a notice statute. The tenant allegedly fell and injured herself on housing authority property. Within

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days she notified an employee of the housing authority about the time and place of the fall and her injuries. The employee filled out a form that met some of the requirements of the local notice statute for personal injury claims involving housing authority property - - for instance, the document indicated that legal action was in the offing, it listed when and where the incident happened, and it was filled out within the six-month notification period required by the statute – - just about everything that was required by the notice statute. The plaintiff did not sign it or submit the form, but it was completed with information she provided.

However, in its motion for summary judgment the housing authority argued that the notice failed in one material respect; that is, it was not provided to the chairman or secretary of the housing authority as required by statute. Relying upon other precedent in the state, the plaintiff responded that when the right party ultimately receives actual notice of the claim anyway, "actual notice" should suffice, despite failure to notify the housing authority officials mentioned in the statute.

The court sided with the housing authority, holding that the court's prior

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decision upon which the tenant relied was wrongly decided. The court agreed that notice to the wrong housing authority employee could not be adequate notice under the statute since any particular employee does not have the responsibility to handle claims or take the necessary steps to protect the government agency's position which is the purpose of notice in the first place. Accordingly, the court granted the housing authority's motion for summary judgment.

In ***Cavanaugh v. Howell, et al.*, No. *CV085018064*, 2008 Conn. Super. LEXIS 993 (Super. Ct. Conn. May 1, 2008),** a trial court in Connecticut considered whether, in a personal injury suit, a public housing tenant could individually sue the housing authority's director and facilities manager without suing the housing authority, and whether statutory notice rules applied to such a suit. The incident at issue occurred when the tenant was w0alking into her apartment building through a rear exterior door and the door closed too fast, forcibly striking her foot, and causing her to fall to the ground and sustain personal injury. The tenant sued the director and the facilities manager, but not the housing authority. [Reading between the lines, this may have been the case

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because the tenant failed to comply with municipal notice requirements.] The defendants moved to strike the entire complaint claiming that the tenant was required to give notice to, and sue, the housing authority because employees of the authority and the authority are a single entity. Defendants further argued that not bringing the action against the housing authority was insufficient to make out a cause of action for personal injury under state law because she failed to give timely notice of her claim.

The first issue the court considered was whether the tenant was required to give notice to the housing authority of her claim against the employees within six months of the incident, as required by the state personal injury statute. The court determined that the state statute was limited in that it requires the plaintiff to provide a housing authority with notice of an action 'to recover damages *from such authority*'" (emphasis added). The court found that only the liability of the municipality, but not that of the municipal *employee*, is dependent upon the giving of proper statutory notice. Thus, when a housing authority is not a named party, the notice requirement is not applicable.

The other issue that the court considered was whether the tenant could

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bring suit directly against the individual employees without suing the housing authority. The court reviewed operative indemnification provisions of state law which provided that a housing authority had to indemnify its commissioners and employees "from financial loss and expense, including legal fees and costs, if any, arising out of any claim, demand, suit or judgment by reason of alleged negligence, or for alleged infringement of any person's civil rights, on the part of such commissioner of such employee while acting in the discharge of his duties.". The court reasoned that there would be no need for such indemnification if the employees could not be held individually liable here.

The Defendants tried to persuade the court that another local case involving a municipality was on point - it held that employees of a municipality and the municipality were a single unified entity requiring negligence actions to be brought against the municipality. However, the court did not agree that the cases were analogous, finding [erroneously, I believe] that municipalities and housing authorities, and statutes governing each, are different and distinct. Accordingly, the court denied the PHA's motion to strike.

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PRIMARY RESIDENCE

Sometimes landlords must deal with the difficult circumstance of having to recover the unit of a mentally disabled tenant who, because of his disability, prefers to live on the street, rather than in his public housing unit. In the following rent stabilization case, an emotionally and legally divided Supreme Court of New York held that the laws of rent stabilization do not allow for the indefinite retention of the right to rent-a stabilized unit by a tenant who does not actually reside in the premises and has no intent to return to reside there at any point in the future, and that this also is true in cases where the tenant's inability to reside in the unit is caused by mental illness. The dissent was sharply critical of the majority's holding and did not mince words.

In ***TOA Construction Co. v. Tsitsires,*** **2008 N.Y. App. Div. LEXIS 6473, 2008 NY Slip Op 6179, 54 A.D.3d 109, 861 N.Y.S.2d 335 (Sup. Ct. N.Y. July 8, 2008)**[12], a 59-year old tenant who was a tenant in a single-room occupancy (SRO) unit for some 30 years suffered from mental disabilities that, *inter alia*,

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caused him to prefer living as a "homeless" person on the streets, rather than in his apartment. There was medical evidence that either substance abuse or claustrophobia caused the tenant to do this. The tenant kept his personal possessions in the apartment, and had his mail delivered there, but notwithstanding his testimony to the contrary, he rarely went there. The tenant claimed that, during the period in question he spent seven or eight months out of each year in his apartment, the amount of time varying with the season. The landlord's 1000 hours of video surveillance belied this position, revealing that during a three month period the tenant entered the building to his apartment only twice. Once more, the evidence showed that the tenant did not even have a key to his apartment, which he had given to his long-time girlfriend so that she could use the apartment for showering and storage.

There also was evidence that the building was deteriorating, and may have been uninhabitable, due to landlord neglect. In an unusual move , the trial court actually personally inspected respondent's room and found it to be virtually uninhabitable There was evidence that the tenant applied for public housing that

12 Rarely have I seen the type of "in-fighting" between the majority and dissent as reflected in this decision. Both use unusually strong language in criticism of the other.

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would accommodate his disability, stated on the application that he was homeless, but failed to take necessary steps to accept an offer of a public housing unit.

The landlord sought to evict the tenant under statute that permitted eviction of rent stabilized tenants when they have unexplained absences a minimum of 183 days per year. The tenant made a technical argument that the landlord had to prove, not only that the tenant did not reside in the apartment, but also that he had an alternative *primary* residence. Because it was clear that the tenant had no other residence and lived as a homeless person, he argued that that there was no proof of another primary residence. Finding for the landlord, the trial court disagreed, stating that establishing that the tenant has an alternative primary residence is merely one way for the landlord to meet its evidentiary burden; it is not the only way. The tenant appealed.

The intermediate appellate court reversed and remanded for a new trial, finding that the tenant's extended absence from the subject premises was excusable and that he had not established any new residence or abandoned his tenancy. The factual findings supporting the court's finding are not clear in the

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reported decision. The landlord appealed.

The state supreme court reversed the appellate court, holding that the essence of a “nonprimary residence” claim is that the tenant lacks an "ongoing, substantial, physical nexus with the controlled premises for actual living purposes." The court held that the Rent Stabilization Code does not require proof that the tenant maintain an alternative primary residence; rather, a *prima facie* showing of nonprimary residence can successfully be made simply by proof that a rent-paying tenant was absent from the apartment and kept no belongings there during the relevant period, without the introduction of any information about where the tenant had gone. Indeed, the court rejected the notion that one’s alternative primary residence could be a park bench.

With regard to the issue of excusable absence, the court distinguished the facts of the cases relied upon by the intermediate appellate court, finding that those cases involved absences due to professional obligations or health. In each of those cases, the tenant fully intended to return to and reside in the apartment as soon as practicable. The court further found that, in this case, there was no credible evidence indicating that this tenant would ever return to and reside in

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the apartment, or even that he has any intent to do so, as there was no credible evidence in the record that he could be cured of his need or compulsion to stay out of the apartment. The court specifically rejected the tenant's argument that phone service at the apartment indicated his presence in the unit, finding that it was the girlfriend that used the phone at the apartment. The court stated that there was no evidence that the girlfriend had any succession rights.

Likewise, the court was not persuaded that newspaper articles submitted after the trial were relevant to the time period in question. Indeed the court noted that "[h]owever sympathetic respondent's plight, the concept of rent-stabilized tenancy is warped beyond recognition if a tenant who is permanently absent from the apartment, using it only as showering facilities for his companion and as storage space and mail drop for himself, without any indication that he will ever be able to reside there again, may nevertheless be entitled to be treated as a rent-stabilized tenant who has not abandoned the apartment."

Finally, the court addressed the tenant's claim that the landlord allowed the premises to become uninhabitable with the intent of emptying the SRO building of all tenants. The court found that the landlord's conduct, however unlawful,

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had no impact on the tenant's abandonment of the apartment as his residence, as it was the tenant's mental illness that was the cause. The court held that, had the tenant successfully demonstrated that his absence from the apartment was due to its uninhabitable condition, and that he would return and reside there if it were made habitable, then landlord's conduct would have been relevant to the question whether respondent's absence from the premises should be considered "excusable." The court referred to the tenant's failure to accept the offered public housing unit as further credence to the conclusion that his mental illness was the substantial impediment to his maintaining his residence in the apartment, finding that had he been motivated by the need for a clean and habitable apartment, rather than impelled by his mental illness, he would have done what was necessary to take the offered apartment.

The dissent was sharply critical of the majority decision and did not mince words, finding in a lengthy dissent that the majority, "'in the guise of protecting "those landlords who can establish that they are acting in good faith to return underutilized housing to the market,' is in reality facilitating a notorious slumlord's 20-year effort to empty its building of all tenants by evicting

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respondent tenant from his rent stabilized apartment in the landmarked Windermere on the dubious ground that he has abandoned the only home he has had for the past 35 years to take up residence in the City's streets and parks . . ." In addition to making its own judgment with regard to the adequacy and credibility of much of the trial evidence, the dissent took issue with the fact that the trial court relied upon the tenant's deposition testimony to impeach his trial testimony, where his deposition testimony had not been entered into evidence. Accordingly, the dissent argued that the majority should not have given the trial court's decision deference. Next the dissent argued that the majority erred in concluding that the tenant had used his apartment solely for storage, pointing out that he and his girlfriend kept all of their furniture, appliances and personal belongings in "their" apartment throughout "their" tenancy. The dissent further asserted that the majority failed to address the most obvious factor relevant to this case, i.e., whether the tenant's alleged absence from his apartment was for more than 183 days a year. The dissent pointed out that the trial court did a tally of the time that the tenant spent away from his apartment during the entire two-year period and found that the absence to be somewhere between four to a little

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less than six months. Thus, the dissent argued, that there was no evidence that the absence ever exceeded the 183-day period of unexplained absence permitted under the statute. The dissent also focused on the landlord's culpability, believing that the tenant did not spend long periods of time at his apartment because of its uninhabitability. It cited the tenant's testimony that he spent time away because during the summer because there was insufficient wiring to have air conditioning and that he did so during the winter at times when the heat was out of order – testimony discredited by the trial court.

RELOCATION

In ***Veal v. City of Dublin*, Civil Action No C 07-05794 MHP, 2008 U.S. Dist. LEXIS 41174 (N.D. Cal. May 22, 2008),** after several housing authorities ventured to demolish existing units at a public housing development, four residents filed suit alleging that the PHAs had pressured them to relocate before a comprehensive relocation plan had been developed, before HUD had approved the relocation plan, and before the residents had received adequate notification of their rights to relocation assistance and comparable housing in violation of

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federal and state law. The PHAs moved to dismiss the residents' federal claim, arguing that federal housing law does not create individually enforceable rights that the residents can assert.

The district court denied the PHAs' motion, holding that federal housing law creates individual rights enforceable against a public housing authority to receive notice and relocation assistance before displacement, demolition, or disposition can occur. The court employed the Supreme Court's three-prong *Blessing* test, which assesses: (1) whether the statutory language is sufficiently "rights-creating;" (2) whether the rights conferred are neither vague nor amorphous; and (3) whether the section is couched in mandatory, not precatory terms.

The court reasoned that the federal housing statute satisfied all three prongs because: (1) it focused on the benefitted class, the public housing project residents who could be displaced, and articulated specific and detailed entitlements, such as offering of comparable housing, payment of actual and reasonable relocation expenses and necessary counseling; (2) the services and benefits that displaced residents are entitled to receive, such as demolition

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notification and relocation assistance, are specific and judicially enforceable; and (3) the mandatory nature of the statute is indicated by its repeated and consistent use of the term "will" in regard to the public housing authority's obligations corresponding with tenants rights. Additionally, the court asserted that, since the *Blessing* test was satisfied, the PHAs had the burden to show that Congress intended to foreclose the given remedy, which could not do. Ultimately, the court held that 42 U.S.C. Section 1437p(a)(4) gives rise to rights enforceable by individual tenants under 42 U.S.C. Section 1983, and that those rights include the right to receive notification that a public housing project will be demolished, the right to be told that HUD has approved the PHA's application, and the right to receive an offer of comparable housing, payment of actual and reasonable relocation expenses, and necessary counseling.

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Nonpayment of Rent As a "Serious Violation" of the Lease.

In the following case, a trial court in Maine considered a number of important due process issues; namely, whether a trial *de novo* is required, and whether only *one instance* of a failure to pay rent is a "serious violation" of the lease. **In *Landry v. Maine State Hous. Auth.*, No. 07-AP-076, 2008 Me. Super. LEXIS 175 (ME Super. June 25, 2008)**, a hearing officer set aside a housing authority's decision to terminate a participant's participation in the Section 8 program on the basis that it was not supported by a preponderance of the evidence in the record. The hearing officer concluded that the nonpayment of rent for only one month was not a "serious violation" of the lease permitting termination of benefits, because there was no evidence that Petitioner had previously failed to pay rent. The PHA disagreed with the hearing officer's reasoning and notified the participant that it did not consider the decision of the hearing officer to be binding because "it was contrary to HUD regulations or requirements or otherwise contrary to federal and state law". The tenant then

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initiated this action seeking review of the PHA's decision.

The first issue that the court considered was whether a participant is entitled to a trial *de novo*, or whether the hearing officer must give deference to the findings and conclusions of the PHA. While the participant argued that he was entitled to a *de novo* hearing before the hearing officer, the PHA countered that the hearing officer only can disturb the agency's initial determination if it abused its discretion. The court agreed that *de novo* review was warranted in order to satisfy the participant's due process rights.

Next, the court considered whether the failure to pay rent for a single month was a "serious violation" of the lease justifying termination of the tenant's benefits. The court answered this question in the positive, holding that one incident of nonpayment of rent is a "serious violation" under the HUD regulations. The court pointed out that nonpayment of rent is the only potential lease violation that is specifically identified as a "serious violation" in the governing HUD regulation, 24 C.F.R. § 982.310(a)(1). The court went on to find that, given that nonpayment of rent is plainly a "serious violation" under the regulations, given that the landlord terminated the tenancy for nonpayment of

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rent, and given that the PHA *must* terminate the participant's participation in the Section 8 Program when a tenancy is terminated for a "serious violation" of the lease, the hearing officer erred when she concluded that Petitioner's nonpayment of rent was not a "serious violation". Accordingly, the court held that the hearing officer's decision was "contrary to HUD regulations or requirements or otherwise contrary to federal and state law" and overturned it.

Rent Abatement

In the following case, a federal district court in New Jersey gives some direction for what leaky ceilings over a protracted period can cost a landlord in rent abatement. In ***Baldwin Merrick Assoc. v. Relles, et al.,*** **No. 2332/08, 2008 N.Y. Misc. LEXIS 3929, 2008 NY Slip Op 51331U, 20 Misc. 3d 1112A, 240 N.Y.L.J. 11 (D.N.Y. July 2, 2008),** a Section 8 participant became delinquent in her rent, which was $1,700/month, of which the tenant was responsible for $294. She and her landlord entered into an arrearages agreement where the tenant agreed to pay $ 5,832 by a date certain. When the tenant did not pay, she was dropped from the Section 8 program for failure to pay her rent. Nevertheless, she

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continued to live in the unit without paying rent. The landlord brought a summary action seeking possession and $ 24,523 in unpaid rent ($5,823 in arrears plus $ 1,700 per month in rent for July 2007 through June 2008).

However, the landlord had some issues, as well. The Town cited it for a number of deficiencies, including unsanitary and unsafe conditions in the apartment, the presence of mice, roaches, mold and leaks inside of the apartment, as well as garbage piled up outside of the apartment which attracted the vermin.

The Court determined that the amount of arrears at the time of filing was $3,234. With respect to other rent, the court found that the tenant was responsible for the full amount of use and occupancy accruing in the period after she was terminated from the Section 8 program, or $1,700 per month. Accordingly,

The court next turned to the tenant's abatement argument based upon the landlord's breach of the implied warranty of habitability, which requires landlords to keep their properties in a safe, habitable and usable fashion. The court stated that the proper measure for an abatement is the difference between the fair market value of the premises as warranted and the value of the premises

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during the period of the breach. The court noted that the tenant was unable to offers any evidence, other than her own testimony, of the mice, roaches or mold which she alleged was prevalent in the apartment. Accordingly, the court was only willing to abate with respect to the ceiling leaks, which were evidenced by the citation letters from the town as well as the tenant's own pictures and testimony. The court came up with an abatement figure of 15%, which was in the middle of the range of rent abatements awarded for water infiltration and the resulting damage. Thus, in sum the court awarded the landlord a final judgment of possession, a warrant of eviction with 30-day stay, and a money judgment in the amount of $ 16,503.60,which consisted of $3234.00 in arrears plus $16,182 in rent, with a 15% abatement of the total amount owed.

Holdover's Responsibility for Post-Termination Rent

In ***Douglas v. Nole, et al.,*** **No. SP001635, 2008 N.Y. Misc. LEXIS 41592008 NY Slip Op 51394U, 20 Misc. 3d 1119A, 240 N.Y.L.J. 16 (D.N.Y. (1st Dist. July 15, 2008),** a federal district court in New Jersey considered what rent a holdover Section 8 tenant owes after she is terminated from the program for her

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own wrongdoing. In this case, the tenant was terminated for fraud for allowing her daughter and two grandchildren to reside with her at the same time that they already were using their own HUD voucher in another city. The period in question was a two month period during which the landlord argued that the tenant was responsible to pay the tenant's portion in the amount of $846, as well as HUD'S portion of the rent in the amount of $2,794, plus legal fees listed as "additional rent" in the amount of $475.

The court held that, since there was no agreement stipulated between the parties transferring any responsibility upon the tenant to pay the HUD subsidy portion of the rent, she only could be held liable for her portion of the rent agreed to in the lease and not the delinquent amount owed by HUD for its share of the rent.

However, the tenant was not completely off the hook. The court found that the tenant was responsible for paying the "fair use and occupancy" value of the premise after the time that she was terminated from the Section 8 program. Unfortunately, however, the landlord did not claim fair use and occupancy in the nonpayment proceeding, so the court was unable to award it. Thus, the court

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ordered that the landlord could commence a holdover proceeding against the tenant for violating the Section 8 lease and collect use and occupancy for the period after termination of the Section 8 lease.

SECTION 8

Section 8 Rent Adjustments

The following two cases that came out this reporting period are the latest in a series of cases over the past decade challenging Congressional action beginning in 1989, and HUD Notice 95-12 (1995), both of which amended the Housing Act of 1937 to change the manner in which Section 8 rent increases are effected.

A little background. Prior to 1989 HUD's Housing Assistance Payments Contract ("HAP Contract") provided that, where warranted, HUD automatically would increase contract rents using annual adjustment factors ("AAFs"). After Congress maintained serious concerns that Section 8 rents were too high, and higher than comparable assisted units in the open market, Congress passed

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legislation changing the way that rent increases would be awarded in ways that were onerous and/or unfair to landlords.[13] In essence, these changes shifted the onus from HUD, to the landlords, to compile the data to support the rent increases through so-called "comparability studies."

There were stiff penalties if a landlord did not timely provide the comparability studies – s(he) would not get the rent increases. HUD then promulgated regulations to effectuate these changes. This started a firestorm of litigation against the federal government by Section 8 landlords and housing authorities. Ultimately, the new processes were struck down,[14] and landlords began suing the government to recover rent increases lost during the period of the changes.

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[13] For a detailed chronology of the changes in which Section 8 rent increases were calculated, *see* Cuyahoga Metro. Hous. Auth. v. United States, 57 Fed. Cl. 751, 759-60 (2003).

[14] There are a line of decisions which determined that the congressional alteration, beginning in 1989, of the way in which rent increases were to be determined, and HUD's implementing Notice 95-12, constituted a breach of existing HAP Contracts. *See* Park Props. Assocs., L.P. v. United States, 82 Fed. Cl. 162, 167, 169 & n.7 (2008); Park Props. Assocs., L.P. v. United States, 74 Fed. Cl. 264, 273-76 (2006); Statesman II Apts., Inc. v. United States, 71 Fed. Cl. 662, 665 (2006); Statesman II Apts., Inc. v. United States, 66 Fed. Cl. 608, 610-11 (2005); Cuyahoga Metro. Hous. Auth. v. United States, 57 Fed. Cl. 751, 759-60 (2003).

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In the first of the latest cases on this subject, ***Park Prop. Assoc. v. U.S.*, 82 Fed. Cl. 162 (Ct. Cl. May 23, 2008),** Section 8 owners filed suits against the federal government alleging that it breached the HAP Contract by failing to provide the automatic annual rent increases using the AAFs. The landlords sought contract damages of $2.75 million against the government. Both parties moved for summary judgment. Finding in favor of the landlords, the court held that the government had repudiated the HAP contracts when Congress amended the Housing Act to require that owners provide HUD with rent comparability studies in order to receive an annual rent adjustment and in issuing Notice 1995-12 (1995), which imposed additional requirements not envisioned by the HAP Contracts or any amendments thereto.

Liability having been established, a second round of cross-motions for partial summary judgment was the subject of this case, focusing on the application of the "overall limitation" provision in the HAP contracts on the calculation of expectancy damages. This provision provided that the AAFs were subject to an overall limitation designed to prevent adjustments from producing material differences between the rents for comparable assisted and unassisted

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units.

The government argued that the "overall limitation" clause should be read as an absolute limitation on the rents recoverable here, designed to ensure that there was no material difference between those rents and market rents for similar units. The landlords countered that the clause was not self-executing - - that is, it required HUD to take affirmative steps to invoke the clause by determining that there was a material difference between the rents adjusted under the inflation adjustment clause and those being paid on comparable unassisted housing - - but had to be invoked by HUD to prevent the annual rent increases based on the AAAFs from automatically occurring. The landlords further argued that since that invocation did not occur here, the "overall limitation" clause was ineffective in limiting damages now.

In considering the parties' positions, the court also took notice of the foreseeability prong of determining expectation damages. On this count, the government argued that the court should consider what would have happened had it not breached the HAP contracts, while the landlords asserted that HUD did not invoke the clause. But, the court also considered a third possibility: whether

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the possibility that the repudiation of the original overall limitation clause waived or eliminated the limitation altogether. The court went into a lengthy analysis of conditions precedent and subsequent, and the law of prevention. It noted that the original overall limitation was not self-effectuating; rather, the limitation places on HUD and only on HUD, the burden of coming forward to show that a particular adjustment would violate the limitation. The court ultimately found that the government could not repudiate the rent adjustment provisions in the HAP contracts via legislation that significantly modified them in its favor and then, later, seek to cap its damages via a limitation that, for all intents and purposes, effectuates the breaching modification. The court stated that, to hold otherwise would be to reward the government for its repudiation in a way that the law simply does not permit. Instead, the court held that, having repudiated the overall limitation provision in the original HAP contracts, the government could not rely upon that clause in limiting its damages. Accordingly, the court partially granted the landlords motion for partial summary judgment and denied the government's cross-motion for partial summary judgment.

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A few months later in ***Pennsauken Senior Urb. Renew. Assoc., LLC v. U.S.,* Nos. 07-174C, 07-*646C,* 2008 U.S. Claims LEXIS 262 (Ct. Cl. Sept. 18, 2008),** the Court of Claims considered the impact of the applicable statute of limitations on the landlords' claims. In that case, a Section 8 owner and a housing authority filed a similar suit against the government on September 4, 2007. They also alleged that the government breached the HAP Contract by failing to provide the AAFs.

The Plaintiffs alleged that, from HAP Contract anniversary years 1996 through 2006, HUD failed to grant any rent increases, and they sought damages for the period September 4, 2001 and September 4, 2007 – - the Plaintiffs narrowed their claim to only include periods outside of the applicable six year limitations period under the Tucker Act. What the parties were fighting over was that portion of the Plaintiffs' 2001 claim for adjustments during the latter part of the 2001 anniversary year because it relates back to an anniversary date that falls outside the six year statute of limitations. HUD moved to dismiss those claims.

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The parties offered differing interpretations of Section 2.7(b)(1) of the HAP Contract and 24 C.F.R. Part 888. In its motion to dismiss, the government contended that the specific reference to the anniversary date in the rent-adjustment provision of the HAP Contract indicates that an adjustment of the contract rent can only take place on that date (March 17), and thus any claim based on HUD's alleged failure to make the annual contract rent adjustment could not accrue on any other date during the anniversary year besides the anniversary date itself and there could be no adjustment made unless made on March 17th.

Since the Plaintiffs did not file their complaint until September 4th, the government's position was that the Plaintiffs had no cognizable right to damages for any of the 2001 anniversary year (which extends from March 16, 2001 to March 15, 2002). Accordingly, the government argued, the March 16, 2001 anniversary date was outside the six-year statute of limitations. Further, the government sought to preclude the Plaintiffs from calculating damages for subsequent years based upon "the consequential effects of the alleged improper failure of HUD to adjust contract rents in 2001."

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The Plaintiffs' position was that Section 2.7(b) of the HAP Contract must be construed in accord with 24 C.F.R. § 888.203(b), which is incorporated into that contractual provision and which "broadly applies to any month." Acknowledging that the HAP Contract states that rent adjustment will take place on the anniversary date of the Contract, the Plaintiffs argued that, since the same contractual sentence provides that contractual rents are to be adjusted in accordance with 24 C.F.R. 888, 24 C.F.R. § 888.203 lacks any indication that the month in which rent adjustment occurs can only be the month in which the anniversary date falls . The Plaintiffs asserted that the reference in 24 CFR §888.203(b) to an "adjusted monthly amount," suggests that the contract requires the AAF calculation to be performed on a monthly rather than a yearly basis.

The court agreed with the Plaintiffs, looking to HUD's interpretation of its own regulation to guide resolution of the contractual and regulatory ambiguity, the court found that Notice 95-12 specifies the dates on which contract rents can be adjusted and describes the consequences when a building owner fails timely to file a request for a rent adjustment. It found that the Notice specifies that if an

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owner fails to request an adjustment before the anniversary date, HUD will still permit the rent adjustment to take place after the submission of the necessary information, so long as the information is submitted before the next anniversary date. Thus, the court found that the Notice served as a strong indication that the "monthly amount" of a contract rent can be adjusted at times of the contract anniversary year other than on the anniversary date itself.

Accordingly, the court found that the Plaintiffs could claim rent adjustments for a portion of a particular anniversary year after the anniversary date of that year since HUD contemplated mid-year adjustments to contractual rents under HAP Contracts. The court denied the government's motion to dismiss and directed the parties to file a joint status report setting out a proposed plan and schedule for future proceedings to reach a resolution of the consolidated cases.

Damages For Wrongful Termination

In the next case, a federal court in North Carolina considered whether a housing authority that wrongfully terminated a Section 8 participant's benefits was liable for the full amount of benefits not paid over the course of the time

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between termination and reinstatement of benefits. In ***Evans v. Hous. Auth. of the City of Raleigh,*** **No. 5:04-CV-291-FL, 2008 U.S. Dist. Lexis 48950 (D. E.D.N.C. June 24, 2008)**, a housing authority terminated a participant's Section 8 assistance for reasons not set forth in the court's decision. The participant requested, and received, an informal hearing at which the housing authority upheld the termination.

The participant sought judicial review while continuing to live in the apartment without paying rent. Under a belief held by both the participant and the landlord that the participant's benefits had been wrongfully terminated and that the housing authority eventually would be forced to refund the participant' the value of the terminated benefits, the landlord allowed the participant to stay in the unit and pay only her portion of the rent, $35.00/month.

The court found that the informal hearing failed to comport with constitutional due process requirements and applicable housing regulations and ordered the housing authority to reinstate the participant's benefits. The court deferred consideration of compensatory damages for the loss of benefits, including costs and attorney fees, until a later date. Thereafter, a magistrate

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recommended that compensatory damages be: $303.31 to cover the participant's moving expenses as a result of her illegal termination, court costs of $1,881.29 and attorneys' fees in the amount of $28,295.00.

The participant appealed the amount of compensatory damages, arguing that the housing authority also owed her the amount of benefits not paid over the course of the time between termination and reinstatement of her benefits, approximately $34,595.65.

The appellate court rejected the participant' argument, awarding her only nominal damages in the amount of $1, original court costs and attorneys fees. The court reasoned that any reliance held by the landlord or the participant concerning a future court award was misplaced. The court found that the housing authority could not be held liable for costs associated with the verbal agreement for rent between the participant and the landlord.

The court further found that the participant' attempt to reinstate the lease agreement after the housing authority terminated her benefits was in error since the HAP contract clearly stated that the lease would automatically terminate if the housing authority terminated the benefits. The court deemed the hold-over

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theory promoted by the participant, which addresses the extension of a contract term fully satisfied was not supported by law. Therefore, the court held that neither the landlord nor the participant could claim those compensatory damages from the housing authority. Under the same theory, the court determined that the participant could not recover moving expenses, finding that, even though the termination of benefits was illegal, the participant moved at her own convenience, not due to the illegal termination or the insistence of the landlord. In the absence of actual damages, the court ruled that nominal damages were the appropriate award, along with attorneys' fees and court costs.

Personal Liability For Owners of Unsafe Properties

In ***Alli, et al. v. U.S.*****, 83 Fed. Cl. 250 (Ct. Cl. Aug. 26, 2008)** the federal Court of Claims laid out the various actions that HUD can take against "slumlords," including piercing the corporate veil and holding them individually liable for damages flowing from their deficient properties. This case involved owners of various housing developments that, for long periods of time, ignored critical necessary repairs to the units. HUD held mortgages on some of the

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properties. I could not describe the conditions of the properties better than the judge in this case:

> Picture again these unpleasant images. A bathroom with an umbrella hanging upside-down to catch water leaking through a gaping hole in the ceiling. Other erstwhile bathrooms with exposed and deteriorating floor boards; buckled, molded and mildewed tiling, some with empty holes where plumbing once existed. Kitchens with broken and missing counters, cabinetry with no doors (some dangling from the walls), roach-infested and rusted refrigerators, and other nonfunctional appliances. Plastered walls and tiled ceilings in dimly-lit hallways, so dilapidated, water-damaged and partially-collapsed as to appear cave-like. Outside doors left off their hinges, cracked masonry, and roofs and flashing no longer impermeable, all exposing residents to the elements. A basement filled with feces and vermin, the latter an army so plentiful that those who enter unprotected immediately become infested. And, at least on one January day, elderly and little children huddled in coats and blankets [*88] around open ovens trying to keep warm in sub-freezing temperatures. Scenes from a dystopian novel about a post apocalyptic world? No, we now know that these graphic pictures are of the dwellings at issue in this case.

At various points, HUD determined that each of the properties at issue did not meet the decent, safe and sanitary standards due to numerous deficiencies that were repeatedly found during its inspections. On more than a dozen occasions, one of the landlords responded to HUD inspection reports by assuring that the deficiencies identified in the three properties at issue had been remedied

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when, in fact, he knew that they had not been. After the deficiencies remained unresolved after several re-inspections, HUD eventually suspended payments under the HAP contracts and then terminated them. The landlords sued HUD, asserting that HUD breached the HAP contracts by suspending and then terminating them. They also claimed an alleged breach of one of their HUD mortgages and breach of the HAP contract relating to HUD's alleged failure to authorize the transfer of one of the properties. The landlords sought damages of $ 675,000 for HUD's disapproval of the proposed sale , as well as other unspecified damages.

HUD filed a counterclaim, seeking $110,096.45, $79,675, and $90,646.40 for the cost to HUD of relocating families from the various properties to safe housing. It also sought $18,128.80 in foreclosures costs, and $ 1,112,173.45 for the cost of providing basic services, security, and repairs while acting as mortgagee-in-possession. For each counterclaim, HUD sought joint and several liability against each individual, and with respect to one property it sought to pierce the corporate veil of the landlords' corporation through which it did business and hold the individuals personally liable for the damages.

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Both parties moved for summary judgment. The court granted both in part. However, the main issues were: (1) whether HUD breached the HAP contracts and regulatory agreements; (2) whether the landlords breached the HAP contracts and regulatory agreements; and (3) whether the landlords personally are liable for any damages owed with respect to the breach associated with a property which was purchased by the corporation through which the landlords operated.

The court easily found that the landlords breached their HAP Contracts by failing to maintain the properties in a safe, decent and sanitary state. The harder question was whether the landlords should be personally liable for the breaches. The court found that the landlords were the sole owners of the thinly capitalized corporation which they purportedly hired to manage their properties and which purportedly owned one of the properties. The court found that the corporation was a mere instrumentality that the landlords relied upon when it served their purposes and ignored when it did not, commingling their funds with those of the corporation. For those reasons, the court held that it was appropriate to pierce the corporate veil and hold the landlords individually liable.

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Not surprisingly, the court found that HUD was justified in the actions that it took and did not breach the HAP Contracts. It further directed the parties to prepare for a trial on damages. Something tells me we will see an appeal . . .

TRESPASS AND BARRING

The following case involving a trespass and barring list upholds a housing authority's trespass and barring policy, but underscores the importance of developing policies that address how a person will be placed on, and removed from, the list, as well as the importance of having a procedure to challenge placement on the list. In ***New Jersey In re X.B.*****, 952 A.2d 521 (N.J. Super. Ct. App. Div. 2008),** a police department created a list of individuals banned from housing authority property in cooperation with the local housing authority, The police department used information from various sources, such as criminal convictions and findings of delinquency for drug or violence-related offenses. The list was not available to the public, nor was there a procedure to challenge or remove a name from the list.

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The police placed X.B., a juvenile, on the list because he was arrested for assault and subsequently found delinquent for weapon possession. Following the department's practice of notifying individuals on the list in person, the police personally notified both X.B. and his mother that he was banned from PHA property and that he would be arrested if found on PHA property.

When police saw X.B. crossing PHA property, they went to X.B.'s home to inform his mother. Upon arrival, X.B. was present and began cursing at the officers. An officer arrested X.B., who flailed his arms to resist the handcuffs, striking the officer in the chest with his elbow. The officers charged X.B. with resisting arrest, aggravated assault, and defiant trespass.

The trial court found X.B. delinquent, and rejected X.B.'s challenge to the constitutionality of the defiant trespass statute. X.B. appealed on both the merits and the constitutionality of the defiant trespass statute. The appellate court affirmed, finding that the evidence presented at the trial sufficed to surpass the "reasonable doubt" requirement. The court rejected X.B.'s assertion that the list was an unconstitutional discriminatory enforcement of an otherwise impartial law, since X.B. failed to demonstrate that the police discriminated on the basis of

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race, religion, or other arbitrary classification.

The court found that the police had placed X.B. on the list because of his adjudication of delinquency for weapon possession, a reasonable basis for banning him from PHA property in order to protect residents. The court also rejected X.B.'s claim that the lack of a procedure to remove a name from the list rendered the enforcement of the statute unconstitutional, since X.B. had not attempted to remove his name from the list.

Finally, the court ruled that X.B. failed to assert a legitimate reason for being on PHA property. While affirming the constitutionality of the list, in order to avoid future constitutional challenges the court cautioned public entities who maintained bar lists to consider adopting regulations regarding one's placement on and removal from the list and establishing a procedure whereby one could challenge placement on the list.

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