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630 Eye Street, NW
Washington, D.C. 20001;
ph: (202) 289-3400
e-mail: hdli@hdli.org
www.hdli.org

Editor:
Lisa Walker Scott, Esq.
Assistant Editor:
Timothy P. Coyle

Anti-Eviction Medicine?

The "Anti-Discrimination" Provision of the U.S. Bankruptcy Code

By Lisa Walker Scott

The case of *In re Valentin*, No. 03-25290T, 2004 Bankr. LEXIS 640 (Bankr. E.D. Pa. May 10, 2004), prompted me to wonder how many PHAs have invested the time and expense of pursuing eviction proceedings against a public housing tenant with a shoddy paying record only to have the tenant try to avoid eviction by invoking the so-called "anti-discrimination" provision of the Bankruptcy Code in an attempt to have the back rent discharged and the eviction stayed. I looked at the line of cases decided from the late 1970s through last May that involved the use of this tactic to try to invalidate otherwise lawful public housing evictions. The cases reach different conclusions. This article provides an overview of the underlying issues and highlights certain key decisions that can help you anticipate and respond to these issues.

The History of Section 525(a)

The "anti-discrimination" provision of the federal Bankruptcy Code, 11 U.S.C. Section 525(a) ("Section 525(a)"), was enacted to prevent discrimination against persons who become insolvent or seek bankruptcy protection, and was designed to ensure that debtors are not deprived of a "fresh start." As applicable to PHAs, Section 525(a) provides that a *governmental unit* may not discriminate against a person with respect to a license, permit, charter, franchise, or *other similar grant solely because of* that person becoming insolvent, or seeking or receiving bankruptcy protection. (Key terms in italics).

Section 525(a) evolved out of a 1971 bankruptcy case, *Perez v. Campbell*, 402 U.S. 637 (1971), where the U.S. Supreme Court struck down a state law that withheld driving privileges from debtors who failed to satisfy vehicle-related tort judgments after their judgments were discharged in bankruptcy, on the theory that the practice was contrary to the fresh start principles of the Bankruptcy Code. Congress took up the cause by enacting Section 525(a), and courts have extended Section 525(a)'s protections to a wide variety of contexts. However, the scope of Section 525(a)'s protections in the context of public housing remains unsettled today. Since the federal courts have espoused differing views, and the U.S. Supreme Court has not dealt with this issue in the public housing context directly, whether Section 525(a) bars an eviction proceeding against a public housing resident for nonpayment of rent depends upon in which circuit your agency finds itself.

Considerations

The issues related to this discussion can be complex. The analysis begins with the definition of "governmental unit."

1. PHA as a "Governmental Unit"

Section 525(a), as applicable to PHA eviction proceedings, requires that the alleged discriminatory action be undertaken by a "governmental unit." The definition of "governmental unit"

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Anti-Eviction Medicine Cont'd

under the Bankruptcy Code is expansive: "governmental unit" is defined as:

> United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government.

11 U.S.C. §101(27). Bankruptcy courts have construed this provision in the broadest sense to include entities that carry out some government function. Courts have either explicitly or implicitly determined that a PHA is a governmental unit under Section 525(a). [1] *See, e.g., Valentin*, *supra*, No. 03-25290T at 5 (for purposes of Section 525(a) a PHA is a governmental unit)*; Stoltz*, *supra,* 315 F.3d at 88 (same holding); *In re Robinson*, 169 B.R. 171, 176 (N.D. Ill. 1994), *aff'd,* 54 F.3d 316 (7th Cir. 1995)(same holding); *In re Szymecki,* 87 B.R. 14, 16 (Bankr. W.D. Pa. 1988) (same holding). Thus, the considerations that leave courts in a quandary concern *the viability of the public housing lease*, whether the eviction action is being taken *solely because* of the discharged debt, and the precise nature of the "*grant*" at stake.

2. The Viability of the Public Housing Lease.

Under the Bankruptcy Code, a trustee may assume or reject any executory contract or *unexpired lease* of the debtor. 11 U.S.C. §365(a). Generally, courts have not treated public housing residents differently than market rate tenants in determining when a lease is expired under Section 365(a). *See, e.g., In re Talley,* 69 Bankr. 219 (Bankr. M.D. Tenn. 1986); *In re Cunningham,* 159 Bankr. 230, 233 (N.D. Ill. 1993). Thus, if a public housing lease is not assumed or is deemed rejected, then the lease is deemed expired, does not become part of the bankruptcy estate, and cannot receive bankruptcy protection. A related consideration is whether the public housing lease still is viable. This often presents when, during eviction proceedings, a court has issued an order of possession in favor of the PHA prior to the tenant's filing of the bankruptcy petition. Some have argued that the lease effectively is terminated or expired once the order of possession issues. U.S. Supreme Court precedent is clear that state law controls in this area. *Nobleman v. American Savings Bank*, 508 U.S. 324 (2003) (property interests are created and defined by state law); *Butner v. United States,* 440 U.S. 48, 55 (1979)(same holding).

The general rule is that the lease ends when the tenant no longer is entitled to possession. In some states, a lease is not terminated until the eviction actually is *completed,* notwithstanding that an order of possession has been issued or even served. *See, e.g., Valentin*, *supra*, No. 03-25290T at 4 (under Pennsylvania law); *In re Couture,* 225 B.R. 58, 10-11 (Bankr. D. Vt. 1998)(under Vermont law). Accordingly, if the PHA is unable to complete the physical eviction prior to the date that the debtor files bankruptcy, then the lease will not have been terminated. On the other hand, if your state construes a lease as terminated when an order of possession issues or is served, or at some point before the actual eviction is completed, then you might successfully argue that the lease cannot be discharged. *See, e.g., Robinson*, *supra,* 54 F.3d at 322)(under Illinois law, lease terminated after judgment of possession entered, if not earlier). Note that a lease is not considered terminated until the tenant no longer has legal recourse to preserve the lease, such as under cure or anti-forfeiture laws. Hence, if under state law, a tenant can vacate the order of possession by paying the outstanding rent due, some courts have found that the lease remains "unexpired." *See, e.g., In re Stoltz, supra,* 315 F.2d at 115 (under Vermont law, tenant has right to redeem any time before execution of writ); *Talley, supra,* 69 Bankr. at 225)(same holding under Tennessee law)*; Marcano*, *supra,* 288 Bankr. at 338-39 (same

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Lisa Walker Scott, Esq.

A Letter from the Executive Director and General Counsel

What a busy several months it has been for HDLI. HDLI's 2004 Spring CLE Conference held in the first week of May entitled "ALL ABOUT OPERATIONS" was a great success! According to the conference evaluations and in my own opinion, the speakers and materials were thorough, insightful and very helpful on all of the timely topics. If you were unable to attend the conference, our binder of written materials is available for purchase. We've enclosed an order form in this issue of the *Counsellor* that restates the individual seminar topics.

SAVE THE DATE FOR THE *HDLI FALL CONFERENCE*! HDLI's Fall CLE Conference will be held on October 12, 2004 at NAHRO's annual conference in Baltimore, Maryland. As usual, it will be a full-day of important and timely information. This is the 50th anniversary of the Supreme Court's *Brown v. Board of Education of Topeka, Kansas* decision, so we've decided to assemble this year's conference around the theme "The Legal Effect of the *Brown v. Board of Education* Decision on Public and Affordable Housing - 50 Years Later." We have developed a special format and are bringing to you a host of nationally-recognized expert speakers in the area of the interplay between school and housing reform, as well as counsel who have defended housing agencies in public housing reform cases. This will not be merely an academic discussion. We'll discuss how the *Brown* decision and its progeny has both helped and hindered desegregation in housing over the years and present well-reasoned suggestions to avoid the pitfalls that have plagued well-intentioned remedies. This will be *real life*, not theory. The discussions will be especially relevant for PHAs who have not yet become embroiled in litigation, as you continue to refine your housing and mobility policies and strategies.

EMPLOYMENT LAW TRAINING: HDLI's next in-depth Employment Law Training will take place on Monday, September 27, 2004 from 8:30 am – 4:30 pm at the Cornell Club in New York City. This training is for all of your agency supervisors, managers and staff, human resources staff, executive directors and other housing officials, and legal counsel. Unlike other training courses, this course is designed for the specialized world of PHAs, and is a must-have for PHAs wanting to avoid employment disputes and lawsuits. Premier employment lawyers at the national firm of Epstein Becker & Green LLC will train you to launch an offensive attack on the escalating numbers of employment-related lawsuits filed against public housing and redevelopment agencies. Come strengthen your staff's knowledge of important employment law issues. We've better refined the course from last year, and have added new topics, such as more emphasis on the ADA and FMLA, so attendees from last year's training will benefit this year, as well.

The course is designed to assist PHAs in handling daily personnel and employment-related issues and alert them to the outcomes of important and recent lawsuits filed against PHAs and other governmental. The training will focus on common issues and pitfalls related to the field of personnel and employment law including:

- Effective hiring, disciplinary, and termination practices
- Sexual harassment prevention and handling of complaints
- Navigating the Americans with Disabilities Act
- Applying The Family and Medical Leave Act
- Employee discipline in the public sector

A registration flyer is enclosed. We hope to see you and your staff members there.

Finally, this edition of *The Counsellor* contains a longer-than-usual feature article that I hope you will read and pass along to your colleagues. It focuses on the impact of the anti-discrimination provisions of the U.S. Bankruptcy Code upon tenant evictions for nonpayment of rent. Whether or not you have already had to deal with tenants seeking bankruptcy protection to avoid eviction, you'll want to hone up on the issues and concerns relating to this issue.

I hope the remainder of your summer and this fall are all that they can be.

CASE CORNER

Following are summaries of recent noteworthy cases

This month we begin a new format for Case Corner designed to more easily demonstrate the gist of the cited cases, along with the relevance to your practice. We welcome your feedback as to this new format.

TENANT RECORDS

***Williams v. New York City Housing Authority, et al.*, 02 Civ. 4473 (LMM) (RLE), 2004 U.S. Dist. LEXIS 9394, (S.D.N.Y. May 25, 2004)**

COURT: Southern District of New York.

BRIEF FACTS: A tenant sued a PHA for sexual discrimination and harassment, negligent hiring and retention, retaliation, intentional infliction of emotional distress, and battery under various federal, state, and local laws. She moved to compel responses to various discovery requests, and also sought a confidentiality order governing procedures for handling materials within her tenant file and shielding from disclosure those documents. The PHA objected to the discovery requests and to the confidentiality order, claiming that her request was premature since no document had been disclosed that was not already under seal.

KEY ISSUE: Whether a PHA can be required to enter into a confidentiality agreement when state law specifically does not protect a tenant file from public disclosure.

HOLDING/RATIONALE: Yes. Noting that state Law did not protect a tenant file from public disclosure when the Housing Authority is a party in a case, the court found that there may be materials in the file that merit confidential treatment. The court ordered the confidentiality agreement, finding no reason to wait until a specific document is put in issue in order to address possible concerns.

CASE RELEVANCE: Aside from the many good reasons that a PHA may not want to disclose public housing tenant files, this case demonstrates that a PHA may not be able to rely upon state law requiring disclosure of public housing tenant files.

SECTION 1983

***Johnson v. City of Detroit, et al.*, No. 03-CV-74440-DT, 2004 U.S. Dist. LEXIS 9616, (E.D Mich. May 24, 2004)**

COURT: Eastern District of Michigan.

BRIEF FACTS: Mother of child allegedly suffering from lead paint poisoning sued PHA and city under Section 1983 for alleged violations of the U.S. Housing Act and the Lead-Based Point Poisoning Prevention Act (Lead Paint Act) asserting, *inter alia,* an implied private right of action under the federal statutes and regulations.

KEY ISSUE #1: Whether Section 1437 or 1437f of the U.S. Housing Act confer a private right of action under Section 1983.

HOLDING/RATIONALE #1: No. Section 1437 is merely a Congressional policy declaration that does not confer enforceable rights. Likewise, Section 1437f merely confers the authority on HUD to issue housing quality standards for PHAs to follow.

KEY ISSUE #2: Whether the Lead Paint Act confers a private right of action under Section 1983.

HOLDING/RATIONALE #2: No. The provisions of the Lead Paint Act focus on regulating the Secretary of HUD, and not on the tenants as beneficiaries of express rights or entitlements. They do not contain the sort of rights-creating language that reveals Congressional intent to create a federal right for tenants to enforce the procedures mandated by the statute. A rule of thumb is that statutes focusing on the person regulated, rather than the individuals protected, create no implication of an intention to confer rights on a particular class of persons.

KEY ISSUE #3: Whether certain Section 8 housing quality regulations issued pursuant to the U.S. Housing Act and the Lead Paint Act confer a private right of action under Section 1983.

HOLDING/RATIONALE #3: No. As a preliminary matter, this district court set forth at great length its rationale for its lack of

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CASE CORNER CONT'D

agreement with Sixth Circuit precedent that holds that regulations, in themselves, can create enforceable rights, given the U.S. Supreme Court's decisions in *Alexander v. Sandoval* and *Gonzaga Univ. v. Doe*. Nonetheless, bound to follow its appellate court's precedent until it is overruled, the court analyzed whether certain regulations cited by the Plaintiffs created enforceable rights. Applying the U.S. Supreme Court's *Blessing v. Freestone* three-factor test, as modified by *Gonzaga Univ. v. Doe,* the court determined that the Section 8 housing quality regulations found at 24 C.F.R. §882.109, including those that implemented the Lead Paint Act, did not contain the sort of rights-creating language demonstrating intent to create new rights. Likewise, the court construed the ACC–related inspection and notice regulations found at 24 C.F.R §882.116 and 882.211 as not creating enforceable rights. The same was true for the basic eligibility requirements found in 24 C.F.R §882.209, and those found at 24 C.F.R §35.20, 35.24, and 35.5.

CASE RELEVANCE: In the area of lead paint liability, this court specifically looked at the housing quality and inspection-related statutory and regulatory provisions under the Housing Act and Lead Paint Act and found that they do not confer individual enforceable rights.

DEVELOPMENT

Walker v. HUD, No. 3:85-CV-1210-R, 2004 U.S. Dist. LEXIS 8792 (N.D. Tex. May 18, 2004)

COURT: Northern District of Texas.

BRIEF FACTS: This decision is part of long-standing reform public housing litigation in Dallas, Texas. The PHA sought court approval of certain sites for public housing development. One of the sites was located in a premier location in a predominantly white neighborhood, and PHA proposed to build 40 public housing units on that site. The site originally was chosen at the time that the PHA was employing a race-conscious selection policy. However, the PHA showed that it had conducted nonracial analyses of the suitability of various housing sites, and that this site was chosen according to HUD site selection standards. The PHA subsequently disbanded its race-conscious selection policy in favor of a race-neutral policy after the Fifth Circuit ordered it to do so in 2001. Certain homeowners sued the PHA and HUD to enjoin construction on the site, claiming that the site selection violated their equal protection rights.

KEY ISSUE: Whether the site selection, that originally was identified under a race-conscious selection policy, violated the homeowners' equal protection rights.

HOLDING/RATIONALE: No. Even if the construction of housing on site was found to produce a present racially disproportionate effect (which the court found was not so) racial discrimination was not a proximate or "but-for" factor in the PHA's decision to build housing on the site. The PHA's reason for choosing the site was that there was no better place in the city on which to build a 40-unit apartment complex.

CASE RELEVANCE: When non-racial site selection criteria are utilized to select a public housing site, the selection decision will be upheld notwithstanding the existence of a race-conscious selection policy.

REASONABLE ACCOMMODATION

Douglas v. Kriegsfeld Corporation, No. 02-CV-711, 2004 D.C. App. LEXIS 23, (D.C. App. May 13, 2004)

COURT: District of Columbia Court of Appeals.

BRIEF FACTS: A Section 8 landlord served one of its tenants with a thirty-day notice to "cure or quit" for her failure under her lease to maintain the apartment in a clean and sanitary condition. The apartment had a foul odor emanating into the rest of the building, the toilet was frequently filled with feces and urine, and garbage, rotting food, and dirty laundry were strewn about the apartment. The tenant was alleged to be suffering from a "mood disorder" that affected the tenant's ability to keep the apartment safe and sanitary, and she was an outpatient at a city-operated mental health/substance abuse clinic. Counsel for the tenant requested a stay of eviction and a reasonable accommodation under the Fair Housing Act on the basis of the tenant's mental disability, and stated that the adult services division of the local government was prepared to assist her with cleaning the apartment. The landlord never responded. At trial, the tenant sought to invoke a discrimination defense based on the PHA's failure to consider her requested reasonable accommodation. The court denied this defense, finding that it was "extremely vague" and was untimely raised. The court further found that the defense was barred under the "health and safety" exception of § 3604(f)(9), because the premises were a direct threat for the health and safety of others who live in the building. Third, the court found that the tenant had failed to establish that she had a mental disability, and that the disability caused her not to maintain her apartment in a clean and sanitary condition. The jury then heard an

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essentially defenseless case, found for the PHA, and the tenant subsequently was evicted. The tenant appealed from the trial court's ruling that barred her discrimination defense and from the court's order upon the jury verdict that resulted in her eviction.

KEY ISSUE #1: Whether a landlord's continued pursuit of a pending action for possession is a discriminatory act under the Fair Housing Act if, upon request of an accommodation, the landlord fails to make a good faith, reasonable effort at accommodation after learning of a tenant's mental impairment.

HOLDING/RATIONALE #1: Yes. The appellate court reversed the trial court's decision, finding that the tenant's request was not "extremely vague," and not made too late because the landlord's denial was deemed to occur during the entire period before eviction and a "reasonable accommodation" defense is available at trial before a judgment of possession has been entered if the other requirements of the defense are met. The court also found that the trial court had ruled prematurely that the "health and safety" exception of § 3604(f)(9) barred the tenant's defense because the landlord had not yet attempted an accommodation. The court found that the tenant established a prima facie case satisfying the four McDonnell-Douglas criteria for discrimination because there was competent evidence tending to show that the tenant had a mental impairment. The court found that before the landlord could invoke the "health and safety" exception, it should have been required to articulate a legitimate, nondiscriminatory reason for persisting with the eviction. The court laid out the steps one must take in assessing a request for reasonable accommodation: once a tenant requests a "reasonable accommodation" for a handicap, such as mental impairment, federal law obliges the landlord to "open a dialogue" with the tenant, eliciting more information as needed, to determine whether the requested accommodation is feasible and offers a reasonable possibility of curing the lease violation. The court remanded for a new trial where the tenant could invoke her discrimination defense. A lengthy dissent would have denied the tenant the defense.

CASE RELEVANCE: This case illustrates how thoroughly a tenant's request for accommodation should be explored - first by the landlord, then by the court - before it is denied.

BANKRUPTCY

In Re: Olga Valentin, No. 03-25290T, 2004 Bankr. LEXIS 640 (Bankr. E.D. Pa.. May 10, 2004)

COURT: Bankruptcy Court for the Eastern District of Pennsylvania.

BRIEF FACTS: A PHA sought to evict one of its tenants for failure to pay rent. The trial court entered judgment and possession to the PHA if the tenant did not pay the back rent. After the tenant defaulted on a payment plan, the PHA was granted an order of possession. Before the PHA could evict the tenant, the tenant filed for Chapter 7 bankruptcy protection. The PHA moved to lift the automatic stay. The tenant (debtor) contended that 11 U.S.C. § 525(a), which protects a debtor against discrimination by a governmental unit, prohibited the PHA from lifting the stay and pursuing the eviction.

KEY ISSUE #1: Whether Section 525(a) prohibits a public housing landlord from obtaining relief from an automatic stay to evict a tenant whose sole default is the non-payment of pre-petition rent.

HOLDING/RATIONALE: Not if the PHA does not attempt to preclude the debtor from future participation in public housing programs for which she was otherwise eligible. Finding that the PHA's eviction action would not preclude the debtor from future participation in housing programs, the court lifted the automatic stay to enable the PHA to continue with its state court eviction proceeding.

KEY ISSUE #2: Whether, by virtue of the "order of possession" the lease effectively had been "terminated" prior to the debtor's bankruptcy filing, such that the lease cannot become part of the bankruptcy estate and cannot receive bankruptcy protection.

HOLDING/RATIONALE #2: No. Under state (PA) law, a lease is not terminated until the eviction of the lessee is completed. Since, despite obtaining the order of possession, the PHA was unable to complete the eviction prior to Debtor's bankruptcy filing, so the lease was not terminated prior to the Debtor's bankruptcy filing.

KEY ISSUE #3: Whether a public housing lease is a protected grant within the meaning of Section 525(a).

HOLDING/RATIONALE #3: No. Courts have differed in their interpretation of exactly which aspects of public housing constitute an "other similar grant" under Section 525(a). How the public housing grant is ultimately defined affects the scope of Section 525(a) protection. Some courts have held that the term "other similar grant" encompasses public housing leases. Others have held that the government rent subsidy was the protected grant, or that both the lease and the rent subsidy were protected grants. In those instances in which the courts define the protected grant as the lease and/or the rent subsidy, Section 525(a) generally will shield a debtor from eviction, assuming that the eviction was "solely because of" one of the enumerated items in the statute. However,

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CASE CORNER CONT'D

other courts have held that the protected grant does not include the lease or the rent subsidy, and have limited the Section 525(a) protected grant in the public housing context to the future right to participate in public housing. In so finding, these courts find that the issue in Section 525(a) is not collection of discharged debt, ably dealt with in other sections, but refusal to deal with the debtor because of his bankruptcy and its consequences. While there is no prohibition on a private party's refusal to deal, there is such a prohibition when the party is a governmental entity and the dealings are in the nature of licenses, permits, charters, franchises or similar grants for due to the exclusivity of those benefits, their absence will impair the debtor's fresh start. The housing authority's role as a grantor is to provide the right to participate in public housing and within this duty, the housing authority will be constrained by Section 525(a). However, so long as the housing authority proceeded *in rem* against a premises and does not seek to collect dischargeable debt, its activities would not be prevented by Section 525(a). The court ultimately found that Section 525(a) does not prevent a PHA from obtaining relief from the automatic stay to continue prosecution of an eviction action against a debtor based upon the debtor's failure to pay pre-petition rent, so long as the PHA does not attempt to preclude the debtor from future participation in public housing programs for which he/she otherwise is eligible.

CASE RELEVANCE: Section 525(a) of the Bankruptcy Code, otherwise known as the anti-discrimination provision, *inter alia,* does not permit a governmental unit, such as a PHA, from denying, refusing to renew, or otherwise discriminating against a debtor "solely because" the debtor is or has been a debtor, has been insolvent before the commencement of the bankruptcy case, or during the case, before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in bankruptcy. The issue of the scope of Section 525(a)'s protection in the context of public housing remains unsettled, with different jurisdictions deciding the issue differently. Courts have struggled with the question of whether eviction is being sought by a public housing authority "solely because" a debtor failed to pay a dischargeable debt (i.e., pre-petition rent). Assuming that the only basis of default is the non payment of pre-petition rent (such as is the case here), some courts have held that an eviction would not be "solely because" a debtor failed to pay a pre-petition debt because the public housing authority sought to recover the premises rather than collect the pre-petition rent. Other courts have broadly have interpreted the term "solely because," requiring that the failure to pay a debt play a significant role in the government's action. In other words, if the failure to pay had any part to do with the government's decision to evict, it was deemed to be the sole cause. This decision that provides some comfort to PHAs seeking to evict tenants with poor payment histories. It supports the PHA's decision to continue with eviction so long as it does not attempt to preclude the debtor from reapplication to public housing programs for which he/she otherwise is eligible.

ADMINISTRATIVE PROCEDURES ACT

Hunter v. Underwood, et al., 362 F.3d 468 (8th Cir. April *1, 2004)*

COURT: Eighth Circuit.

BRIEF FACTS: A PHA in Iowa sought to terminate a tenant's lease for a number of serious lease violations, including not reporting gambling income, permitting an authorized boarder to live on the premises, and permitting illegal drug activity. The PHA's termination decision was ratified after a grievance hearing. After a number of tenant appeals and decisions between various state and federal courts, the case made its way to the Eighth Circuit. In addition to raising various jurisdictional and procedural issues, the tenant's appeal sought federal court review of the PHA's termination action.

KEY ISSUE #1: Whether under 42 U.S.C. Section 1437 (Section 1437) and its implementing regulations a housing authority is an "agency" such that a federal court has jurisdiction under the Administrative Procedures Act (APA) to review the PHA's actions.

HOLDING/RATIONALE #1: No. Under the APA, "agency" is defined as "each authority of the Government of the United States." The PHA at issue is a state agency created under state law. Nothing in QHWRA or its implementing regulations grants federal agency status to a PHA or grants federal courts the jurisdiction to review PHA actions. Specifically, Section 1437 and 24 CFR §966, while speaking to provisions regarding leases and grievance procedures, do not confer any federal court jurisdiction.

KEY ISSUE #2: Whether 42 U.S.C. Section 1983 (Section 1983) creates a separate enforceable federal right to any particular state law eviction procedure.

HOLDING/RATIONALE #2: No, since the Housing Act does not specifically incorporate the state's eviction procedures as a federally guaranteed right.

KEY ISSUE #3: Whether federal lease termination regulations require a PHA to follow state due process requirements that are more substantial than the federal ones, and whether a Section 1983 claim lies for a PHA's failure to follow state law.

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AUGUST 2004 MEDITATIONS

(A.K.A. STRESS NEUTRALIZERS)

O.K., RIGHT NOW . . . stop multi-tasking (e.g., typing, writing, eating, and talking on the phone while you're reading this), take a deep soothing breath, exhale, read the following and take heed . . .

HONESTY

How refreshing when we can be honest, even humorously honest, about ourselves. Often, we are so busy protecting ourselves that we don't dare risk letting others know that we aren't perfect. Of course, usually we are the only ones fooled by our masquerade, but we make ourselves believe that others are fooled, too. When we can be honest with ourselves, we usually know very clearly what we need and what is destructive to us. The trick is, can we listen to ourselves? Are we capable of following our own good advice? Can we let ourselves see our foibles and laugh about them? After all, no one knows us as well as we know ourselves. So, naturally, we are the persons who are most capable of seeing ourselves clearly. Are we courageous enough to let ourselves see ourselves and be honest about what we see?

ADVICE IS DIFFICULT, EVEN WHEN IT COMES FROM OURSELVES. EVEN IF WE CAN'T PUT OUR ADVICE INTO ACTION, WE DON'T NEED TO BEAT OURSELVES UP ABOUT IT.

INTERRUPTIONS

How we hate interruptions, especially when we are working on something important. In fact, when we are working on something important everything is an interruption. Indeed, as Tillie Olsen says, distraction, interruption, and the spasmodic seem to be our lot sometimes. How difficult it is to mesh the process of our life and the process of our work. Yet, how sweet it is when that happens. One of the reasons that meditation, continuity, and constant toil have not been possible is because we have not believed that we deserve the time for ourselves to do our own work. The workaholic who is into her workaholicism is out of touch with her work.

WHEN I TRUST MY PROCESS, I TRUST THE PROCESS OF MY WORK.

WISDOM

It is time to listen - to listen to myself and to listen to the ancient wisdom that is all around me. We are such masters of practical wisdom and we live in a world that is dying for a lack of practicality. What good is the best invention in the world if it doesn't work? What good are the best ideas in the world if we cannot use them? If we are indeed the guardians of wisdom, it behooves us to share that wisdom.

"THE RITES OF ANCIENT RIPENING MAKE MY FLESH PLUME."

- MERIDE LE SUEUR

**The foregoing is adapted from Anne Wilson Schaef's *Meditations for Women Who Do Too Much*, Harper& Row, 1990.

Anti-Eviction Medicine Cont'd

holding under New York law); *In re Ross,* 142 Bankr. 1013 (S.D. Fla. 1992)(under Florida law, lease terminated at time that no anti-forfeiture laws can revive the lease).

Another related scenario is when a Chapter 7 trustee rejects the public housing lease, or his/her actions are deemed to reject the lease. Here, some have argued that the trustee's "rejection" of the lease is tantamount to a "termination" of the lease. At least one court has rejected this view, on the basis that "rejection" is a bankruptcy concept that simply determines whether the estate will administer the lease as an asset, and has no impact on a contract's existence. *See Valentin*, *supra*, No. 03-25290T at 4; *Couture*, *supra,* 225 B.R. at 64-65.

3. "S*olely because"* of the discharged debt

Another consideration is whether the eviction is being sought by the PHA "solely because" its tenant failed to pay the dischargeable debt - *i.e.*, the pre-petition rent. Some PHAs have attempted to distinguish between the tenant's *breach* of the payment provisions of the lease and the tenant's *failure to pay* pre-petition rent as the reason for the eviction, arguing that this distinction is of consequence. Courts have found that argument unpersuasive, considering it an "illusory distinction." *See Stotz, supra,* 315 F.3d at 91; *In re Bacon,* 212 B.R. 66, 75 (Bankr. E.D. Pa 1997); *In re Day*, 208 B.R. 358, 364 (Bankr. E.D. Pa. 1997). Note that where the tenant breaches another duty under the lease other than that to pay pre-petition rent, Section 525(a) would not bar the eviction. *See, e.g., In re Smith*, 259 B.R. 901 (Bankr. App. 8th Cir. 2001)(Section 525(a) did not prevent creditor from terminating debtor's public housing benefits for failing to report income). Still, other courts have found the eviction not to be "solely because" of the nonpayment of rent when the landlord seeks possession of the premises or has some "other reason" to support its decision to evict than to collect past due rent. *See e.g., In re Collins,* 199 B.R. 561, 566 (Bankr. W.D. Pa. 1996); *In re James*, 198 B.R. 885, 888 (Bankr. W.D. Pa. 1996); *In re Robinson*, 169 B.R. 171, 176 (Bankr. N.D. Ill. 1994), *aff'd*, 54 F.3d 316 (7th Cir. 1995). Nonetheless, other courts broadly have interpreted the term "solely because," merely requiring that the failure to pay have a significant part to do with the government's decision to evict. *See, e.g., In re Curry*, 148 B.R. 966, 971-972 (S.D. Fl. 1992); *In re Sudler*, 71 B.R. 780, 786-87 (Bankr. E.D. Pa. 1987).

In *FCC v. NextWave Pers. Communs., Inc.*, 537 U.S. 293 (2003), the U. S. Supreme Court shed light on the meaning of the term "solely because" under Section 525(a). This case involving the FCC's cancellation of a broadband personal communications license was outside of the public housing realm; however, the Court's explanation of the phrase "solely because" is relevant. The Court held that in order for a governmental unit's action to be "solely because," the failure to pay must alone be the proximate cause of the cancellation, irrespective the PHA's other potential motives for the action. *Id.* at 302. The *Valentin* court put this holding in the context of public housing, stating that if the PHA proffered several compelling reasons to evict a debtor, in addition to the failure to pay pre-petition rent, these reasons would be irrelevant so long as the event that caused the PHA to evict the debtor was the tenant's failure to pay the pre-petition rent. *Valentin, supra*, No. 03-25290T at 12. The *Valentin* court found that since the PHA would not have evicted the debtor had the pre-petition rent been paid, the PHA was seeking to evict "solely because" the debtor failed to pay the pre-petition rent.

4. The Nature of the "Grant"

Perhaps the most controversial consideration is the nature of the "other similar grant" in the public housing context. Usually, neither a "license," "permit," "charter," nor "franchise" (*i.e.,* the grants or benefits specifically enumerated in Section 525(a)) is the basis for an eviction in public housing cases. Usually, the tenant has violated some term of the public housing lease, many times the payment obligation. However, a residential lease is not one of the enumerated grants in Section 525(a), so one must resort to the "other similar grant" catch-all phrase within the statute. The phrase "other similar grant" is not defined in the Bankruptcy Code, and the precise nature of the "other similar grant" in the public housing context is unsettled.

While courts have been consistent in finding that "public housing" generally is an interest protected by Section 525(a), they have disagreed in their interpretation of exactly which aspects of public housing constitute the "other similar grant" contained in Section 525(a). How the public housing grant ultimately is defined affects the scope of Section 525(a) protection.

a. The Public Housing Lease And/or Rent Subsidy is the Grant

Some courts have held that the term "other similar grant" encompasses public housing leases. *Stoltz, supra,* 315 F.3d at 90-91; *Szymecki*, *supra,* 87 B.R. at 16. Another court has held that the government rent subsidy is the protected grant. *Curry, supra,* 148 B.R. at 972. Still another court has held that both the lease and the rent subsidy are protected grants. *Day, supra,* 208 B.R. at 367. The lease and the rent subsidy may be thought to constitute the debtor's *present* right to participate in the public housing program. In those instances in which the

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courts define the protected grant as the lease and/or the rent subsidy, Section 525(a) generally will shield a debtor from eviction, assuming that the eviction was "solely because of" one of the enumerated items in the statute.

b. The Future Right to Participate in the Public Housing Program is the Grant

In *In re Bacon*, *supra*, the Bankruptcy Court for the Eastern District of Pennsylvania determined in 1997 that the "other similar grant" with regard to public housing benefits is neither the lease nor the rent subsidy, but the tenant's *future right to participate* in the PHA's public housing program. 212 Bankr. at 75-76. In doing so, the court specifically declined to include the public housing lease, itself, within the grant. The court bifurcated the two roles of the PHA as grantor and as creditor. The court noted that a PHA's role as a grantor is to provide the right to participate in public housing, and within this duty the PHA is constrained by Section 525(a). However, the court held that the PHA is not so constrained in its creditor role, so long as the debtor-creditor relationship is not being used to deprive the debtor of his or her future right to participate in the public housing program. The court ultimately permitted an eviction that did not seek to collect pre-petition rent and permitted the debtor the right to reapply to the program. *See also In re Hobbs*, 221 B.R. 892, 896 (Bankr. M.D. Fla. 1997)(court defined the grant as the future right to participate in the public housing program).

The Second Circuit is one of only two federal appellate courts that have analyzed the scope of Section 525(a) protection over evictions based on the nonpayment of rent.[2] In *Stoltz*, *supra*, a 2002 post-*Bacon* decision arising out of Vermont, the Second Circuit declined to adopt *Bacon's* narrow construction that the "other similar grant" is only the future right to participate, and held that the "other similar grant" includes the public housing lease. Relying upon definitions found in Blacks Law and Webster's dictionaries, the court held that a lease is a "grant," and further deducted that a public housing lease is a grant "similar" to a "license, permit, charter, or franchise" because it is a property interest not obtainable from the private sector and essential to a debtor's "fresh start." The court further found that a debtor-tenant's future right to participate in public housing programs – on a space available basis – would be of little or no practical value after an eviction. The court found that a "debtor-tenant's 'entire economic status is dependent on his or her current public housing lease, which is his or her 'single most significant material possession.'"

The chief judge of the Second Circuit dissented, however. He opined that Section 525(a) does not apply to residential leases on the basis that a "similar grant" is a grant relating to authorization to engage income-generating conduct, and thus did not extend Section 525(a) protection to residential leases. He noted that leases specifically are referred to elsewhere in the Bankruptcy Code, and that they specifically were not listed among Section 525(a)'s enumerated interests. Finally, he acknowledged the public housing policy implications, including the need for PHAs to receive prompt payment of rent to sustain their programs.

Notably, HUD, through the United States, submitted an *amicus curiae* brief in the *Stoltz* case. HUD argued that Section 525(a) should be construed narrowly to avoid undermining the important housing statutes that permit the eviction of public housing tenants for nonpayment of rent. However, the Second Circuit in rejecting this premise noted that Section 525(a) specifically exempted three federal statutes from its scope, and that neither statute was a housing statute.

Other courts have adopted the *Bacon* holding. Most recently, in May 2004, the U.S. Bankruptcy Court for the Eastern District of Pennsylvania in *Valentin* declined to follow the lead of the Second Circuit in *Stoltz*, notwithstanding that this bankruptcy court lies within the Second Circuit. In *Valentin*, a housing authority (PHA) sought to evict one of its public housing tenants for failure to pay nearly $800 in back rent. The trial court entered judgment in favor of the PHA, and ordered possession to the PHA in the event that the tenant did not pay the back rent by the time of the scheduled eviction. The parties then entered into a payment plan. After the tenant defaulted on the plan, the trial court granted the PHA an order of possession. However, before the PHA could evict the tenant, the tenant filed for Chapter 7 bankruptcy protection and continued to make subsequent rent payment to the PHA.

After the PHA moved to life the stay the debtor contended that Section 525(a) prohibited the PHA from lifting the stay and pursuing the eviction. Armed with the prior decisions of the other jurisdictions that went both ways, the *Valentin* court determined that a public housing landlord should be treated no differently than any other creditor under the Bankruptcy Code. It adopted the *Bacon* court's holding, finding that Section 525(a) does not impact the PHA's right to enforce its *in rem* rights to the premises under the lease as long as the PHA does not preclude the debtor from future participation in public housing programs. The court permitted the eviction to proceed; however, the court did order that if there was not a public housing waiting list, the Valentin family should be permitted to stay in their unit while their new public housing application was being processed.

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Enter the Dispute Concerning the Application of Section 365(b) of the Bankruptcy Code

The executory contracts and unexpired leases section of the Bankruptcy Code, 11 U.S.C. §365, requires a debtor to cure pre-petition defaults as a precondition of assuming an executory contract/lease into the bankruptcy estate. What happens when a tenant seeks to retain her unexpired public housing lease after having her debt discharged but does not cure the related pre-petition payment default? This results in a conflict between Sections 525(a) and 365 of the Bankruptcy Code that has divided the bankruptcy and district courts that have considered this situation. The question is whether Section 525(a) prohibits a PHA from evicting a tenant who has not cured the rent default, even though section 365 of the Bankruptcy Code requires a debtor or bankruptcy trustee to cure defaults in order to assume an unexpired lease. Although several courts have endeavored to resolve the conflict between the Code sections, there is no unanimity in their holdings.

Based on the basic principle that a specific statute controls over a general provision, some courts have determined that either Section 525(a) or 365(b) is the more specific provision, and have held that the more specific provision trumps the more general one. *See Curry, supra,* 148 B.R. at 972 (holding that Section 525(a) is the more specific); *In re Adams*, 94 B.R. 838 (Bankr. E.D. Pa. 1989)(same holding); *Collins*, *supra,* 199 B.R. at 567 (holding that Section 365(b) is the more specific); *James*, *supra,* 198 B.R. at 890 (same holding); *Caldwell*, *supra,* 174 B.R. at 654 (same holding). Note that the lower courts in *Stoltz* had differing views as to which provision was the more specific; however, the Second Circuit found that since Section 525(a) applied to landlords that are also governmental units, while Section 365(b) generally applied to all landlords, Section 525(a) was the more specific provision. *Stoltz, supra*, 315 F.3d at 93.

The dissenting judge in *Stoltz*, the Chief

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SHAKESPEARE'S REVENGE

"The first thing we do, let's kill all the lawyers."

-- William Shakespeare

Did you ever want to one-up somebody who told you a bad lawyer joke? Here's the ammunition . . .

A lawyer finds out he has an inoperable brain tumor. It's so large, they have to do a brain transplant. His doctor gives him a choice of available brains. There's a jar of rocket scientist brains for $10 an ounce, a jar of regular scientist brains for $15 an ounce, and a jar of lawyer brains for the sum of $800 an ounce. The outraged lawyer says, "This is a rip off! How come the lawyer brains are so damned expensive?" The doctor replies, "Do you know how many lawyers it takes to get an ounce of brains?"

(This isn't a lawyer joke, but it's funny)
The Los Angeles Police Department (LAPD), the FBI, and the CIA are all trying to prove that they are the best at apprehending criminals. The President decides to give them a test. He releases a rabbit into a forest and each of them has to catch it.

The CIA goes in. They place animal informants throughout the forest. They question all plant and mineral witnesses. After three months of extensive investigations they conclude that rabbits do not exist.

The FBI goes in. After two weeks with no leads they burn the forest, killing everything in it, including the rabbit, and they make no apologies. The rabbit had it coming.

The LAPD goes in. They come out two hours later with a badly beaten bear. The bear is yelling: "Okay! Okay! I'm a rabbit! I'm a rabbit!"

An old man was on his death bed. He wanted badly to take all his money with him. He called his priest, his doctor and his lawyer to his bedside. "Here's $30,000 cash to be held by each of you. I trust you to put this in my coffin when I die so I can take all my money with me." At the funeral, each man put an envelope in the coffin. Riding away in a limousine, the priest suddenly broke into tears and confessed that he had only put $20,000 into the envelope because he needed $10,000 for a new baptistery. "Well, since we're confiding in each other," said the doctor, "I only put $10,000 in the envelope because we needed a new machine at the hospital which cost $20,000." The lawyer was aghast. "I'm ashamed of both of you," he exclaimed. "I want it known that when I put my envelope in that coffin, it held my personal check for the full $30,000."

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Judge, pointed out that not including residential leases within the scope of Section 525(a) eliminates any conflict with Section 365. He also noted that finding that Section 525(a) trumps Section 365 removes any incentive for bankrupt public housing tenants to have to assume their lease and cure pre-petition debts as required by Section 365. *Id.* at 97. Moreover, the bankruptcy court in *Collins, supra* found that extending the protective provisions of Section 525(a) would unintentionally result in excusing debtors from the cure provisions of Section 365 and would result in a "windfall" for the debtor. 199 B.R. at 567. It concluded that Section 525(a) effected the housing authority only in so far as it would be required post-eviction to provide an identical housing subsidy to the debtor should a unit become available in the future. *Id.*

Conclusion

Much debate and a good amount of PHA and judicial resources has been spent over many years on this subject. Perhaps I see things too simplistically, but the resolution of this issue seems so easy: the focus of Section 525(a) is "anti discrimination," and if a PHA is not discriminating against debtors in the manner in which it carries out evictions against its tenants for nonpayment of rent, then why should Section 525(a) be invoked at all? If during the eviction process the PHA treats bankrupts in the same manner that it would treat non-bankrupts who violate the payment provisions of the lease, where is the discrimination? The Seventh Circuit agrees in its 1995 decision in *Robinson, supra*, where it summarily dismissed the tenant's Section 525(a) claim in four sentences. The Court held that the PHA could not have discriminated against the tenant because of her bankruptcy status since the tenant did not file for bankruptcy protection until after the PHA began the eviction process. *Robinson, supra*, 54 F.3d at 324. The Seventh Circuit got it back in 1995. And perhaps a Florida bankruptcy court said it best:

> If Section 525(a) prevented a public housing authority from evicting a debtor whom [sic] failed to pay prepetition rent then the 'fresh start' which Section 525(a) was designed to provide debtors would be turned into an impermissible 'head start.'

In re Hobbs, 221 B.R. 892, 894 (M.D. Fla. 1997).

It seems that without the U.S. Supreme Court's intervention PHAs will continue to have their rights to pursue evictions in this realm decided by the whim of their particular federal circuit. PHAs still are challenged to convincingly convey to the trial and appellate courts what we all know so well - that, in these times of a clear housing crisis, the rights of so many needy low-income public housing applicants who pay rent that will support the public housing program, and not the rights of a minority of public housing tenants who want their rent obligations discharged, should dominate in the process.

[1] Note that Section 525(a) protection does not apply to Section 8 leases. Courts have determined that a private Section 8 landlord is not considered a "governmental unit." *See, e.g., In re Valentin*, *supra*, No. 03-25290T at 9*; In re Stoltz*, 315 F.3d 80, 90, n.5 (2nd Cir. 2002*); In re Lutz*, 82 Bankr. 699 (M.D. Pa. 1988). *But see In re Marcano,* 288 B.R. 324, 335 (Bankr. S.D.N.Y. 2003), where the court held that a tenant's association was a "governmental unit" under Section 525(a), but a nonprofit homeless organization was not.

[2] *See also Robinson v. Chicago Housing Authority, infra.*

CASE CORNER CONT'D

HOLDING/RATIONALE #3: No. The federally mandated notice and grievance procedures set forth in 42 U.S.C. §1437d and 24 C.F.R. §966 are sufficient to satisfy any due process concerns regardless of any additional notice that might be provided by state law. An alleged violation of additional state law procedures does not state a constitutional due process claim under §1983.

CASE RELEVANCE: This post-QHWRA decision makes clear that PHA actions still are not subject to federal court review. It also makes clear that, where state law eviction procedures are more substantial or onerous than federal ones, Section 1983 is not an available mechanism to mandate compliance with state law procedures.

***** For a more comprehensive discussion of recent cases of interest to public housing authorities and redevelopment agencies, please consult HDLI's quarterly publication, The Authority. For more information contact Timothy Coyle of HDLI at 202-289-3400 or tcoyle@hdli.org.***