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Legal Analysis of H.R. 1429, the "One Strike and You're Out! Act of 2003"

namer ed acted
Legislative Attorney
American Law Division

Summary

H.R. 1429 would create an exception for victims of domestic violence from current federal law and policy mandating zero tolerance for criminal activity in federally assisted housing. Under HUD's "One Strike Policy," tenants may be held strictly liable and evicted by public housing authorities for criminal behavior by "a tenant, any member of a tenant's household, a guest or another person under the tenant's control." Reportedly, the policy has been applied to evict public housing tenants who were victims of domestic violence at the hands of their own household members or guests. The bill rewrites federal no-fault eviction rules to avoid such application to domestic violence victims. In effect, it would erect an "innocent tenant defense" for victims of domestic or dating violence, where the target of the criminal act is either the tenant herself or an immediate family member. Persons guilty of physical acts of violence against family members or others – whether committed on the premises or elsewhere – would not enjoy immunity, but could be evicted by public housing authorities under current HUD rules. In addition, by placing "paramount importance" on the safety and "continued maintenance" of domestic violence victims, the bill could be interpreted to create a heightened duty of care on the part of public housing authorities towards the tenant in such circumstances.

In 1988, Congress amended the United States Housing Act of 1937 by enacting the Anti-Drug Abuse Act, which required public housing authorities (PHAs) to include clauses in all their leases allowing eviction of tenants for criminal or drug-related activities. Motivating the amendment were congressional concerns that "rampant drug-related or violent crime" was imposing a "reign of terror" on public housing tenants; that these conditions led to even more serious criminal activity and a deterioration of the public housing environment; and that the federal government had a duty to provide public housing that is "decent, safe, and free from illegal drugs."[1] Two years later, Congress revisited the problem of criminal and drug-related activity in public housing when it

[1] 42 U.S.C. § 11901.

enacted the Cranston-Gonzalez National Affordable Housing Act of 1990. It expanded the bases for eviction to include "any criminal activity that threatens the health, safety, or right to peaceful enjoyment."[2] The Cranston-Gonzales Act required more stringent language to appear in all public housing leases, providing that:

> [A]ny criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or near such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy.[3]

Congress further bolstered the Cranston-Gonzalez Act by enacting the Housing Opportunity Program Extension Act of 1996.[4] This amendment gave PHAs nationwide access to criminal background information screening for public housing applicants,[5] called for admissions procedures to screen out drug users and alcohol abusers likely to harm others,[6] and further broadened the scope of the lease provision by allowing the termination of tenancy for criminal activity "on or off" the premises instead of "on or near" the premises.[7] Thereafter, the President signed the Quality Housing and Work Responsibility Act of 1998. In part, the new law clarified that the U.S. Department of Housing and Urban Development (HUD) could issue due process determination for eviction proceedings based on "violent" as well as "drug-related" criminal activity, and that such activity could occur "on or off such [public housing] premises."[8]

HUD has interpreted the statute to authorize a "One Strike Policy," permitting eviction by PHAs whether or not the tenant knew, should have known, or tried to prevent the criminal activity.[9] Thus, tenants may be held strictly liable for criminal behavior by "a tenant, any member of a tenant's household, a guest or another person under the

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[2] 42 U.S.C. § 1437d (l)(6).

[3] P.L. 101-625, § 504, 104 Stat. 4181 (1990)(codified at 42 U.S.C. 1437d (l)(6)).

[4] P.L. 104-120, § 9(a)(1), 110 Stat. 834 (1996).

[5] 42 U.S.C. § 1437d(q).

[6] Id. at § 1437n(e).

[7] Id. at § 1437(d)(1)(6).

[8] Id. at § 1437d(k).

[9] See HUD v. Rucker, 535 U.S. 125 (2002). The statute was also relied upon by President Clinton when, in his 1996 State of the Union Address, he announced a "one strike and you're out policy" to govern evictions from public housing for alleged criminal activities. Several months later, President Clinton elaborated: "If you break the law, you no longer have a home in public housing, one strike and you're out. That should be the law everywhere in America." The President directed the HUD Secretary to "issue guidelines to public housing and law enforcement officials to spell out with unmistakable clarity how to enforce [the policy]." Remarks announcing the "One Strike and You're Out" Initiative in Public Housing," in 32 Weekly Comp. Pres. Doc. 582, 584 (April 1, 1996). HUD initially published the guidelines for the one-strike initiative in April of 1996. PIH 96-16. Though the initiative was presented as new policy, it relied on existing legislation and regulations. As President Clinton noted, "Believe it or not, the Federal law has actually authorized 'one strike' eviction since 1988."

tenant's control."[10] For evictions based on the acts of tenants' household members and guests, allowing access to the premises establishes the tenant's responsibility, and the state of tenant's knowledge, if any, is not an issue. But for "other persons" degree of contact with the tenant or family members determines whether sufficient "legal control" exists to hold the tenant responsible for that person's criminal conduct. For example, the tenant's legal control over "commercial visitors" – solicitors, delivery persons, etc – or other nonguest invitees on the premises only sporadically or for brief periods "necessarily would be limited by the brevity of the visit and would not extend to activity off public housing premises."[11] In addition to terminating a tenancy, the HUD regulations allow PHAs discretion to continue tenancies, provided that any culpable household member is excluded,[12] and to consider rehabilitation when deciding whether or not to terminate a tenancy.[13]

Application of the federal zero tolerance statute and regulations, and corollary provisions in the laws of several states, have been the subject of various legal challenges.[14] In the leading case, *HUD v. Rucker*, the U.S. Supreme Court held that § 1437d(l)(6) of the federal law was unambiguous and permitted eviction of tenants for the actions of third parties regardless of their knowledge of drug or criminal activity. It further affirmed that "control" meant only "that the tenant ha[d] permitted access to the premises," and that the statute "entrusted" the local PHAs to make the decision whether to evict the tenant for a violation. A controversy that has emerged in *Rucker*'s wake concerns reports of public housing tenants who have been evicted after complaining of domestic violence perpetrated upon them by their own household members or guests.[15]

H.R. 1429 appears intended to rewrite federal no-fault eviction rules to avoid such application to domestic violence victims. Thus, the bill would amend the public housing and § 8 rental assistance programs by addition of the following proviso:

> except that such criminal activity, engaged in by a member of a tenant's household or any guest or other person under the tenant's control, shall not be cause for termination of tenancy of the tenant if the tenant or immediate member of the tenant's family is a victim of domestic violence or dating violence and, as a result, could not control or prevent the criminal activity relating to domestic violence or dating violence; and except that nothing in this paragraph shall be construed to limit the authority of a public housing agency to evict individuals who engage in criminal acts of physical violence against family members or others, and in all cases, a public housing agency shall consider the safety, security and continued maintenance of victims of domestic violence to be of paramount importance.

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[10] 24 C.F.R. § 966.4(l)(5)(i)(B) (2003).

[11] 66 Fed. Reg. 28,782 (2001).

[12] Id. at § 966.4(l)(5)(vii)(C).

[13] Id. at § 966.4(l)(5)(vii)(D).

[14] See RS21199, "No-fault Eviction of Public Housing Tenants for Illegal Drug Use: A Legal Analysis of Department of Housing and Urban Development v. Rucker." (CRS 4-15-2002).

[15] See Lapidus, L.M, " Doubly Victimized: Housing Discrimination Against Victims of Domestic Violence," 11 Am. U.J. Gender Soc. Pol'y & L 377 (2003).

In effect, the bill would erect an "innocent tenant defense" – rejected by the *Rucker* Court - for victims of domestic or dating violence, where the target of the criminal act is either the tenant herself or an immediate family member. Persons guilty of physical acts of violence against family members or others – whether committed on the premises or elsewhere – would not enjoy immunity, but could be evicted by public housing authorities under current HUD rules. In addition, by placing "paramount importance" on the safety and "continued maintenance" of domestic violence victims, the bill could be interpreted to create a heightened duty of care on the part of PHAs towards the tenant in such circumstances. The bill is largely silent on what specific measures, if any, might be required. The annual reporting requirement imposed by § 4 of the bill relative to the numbers of evictions for domestic or dating violence may provide one example. However, in the absence of further legislative guidance, the precise contours of any such duty, or any obligations it may imply, would remain a matter for judicial determination.

Finally, note that other possible remedies for domestic violence victims may exist under current federal law. The Court did not address the potential for gender discrimination in PHA eviction policies in *Rucker*. But the Fair Housing Act[16] may provide an avenue for challenging the eviction of domestic violence victims for the violent act of their abusers. Because women are disproportionately the victims of domestic violence, it could be argued, application of the current One Strike policy has a disparate impact on women. Disparate impact claims arise where a group protected by the Fair Housing Act is adversely affected disproportionately by a facially neutral policy. In the past, the theory has been invoked by racial minorities or the disabled when denied housing access as a consequence of policies not overtly discriminatory on their face.[17] In a case settled by consent decree in November of 2001, claims of gender discrimination under the Fair Housing Act were predicated on the eviction of a low-income housing tenant as the result of a domestic violence incident.[18]

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[16] 42 U.S.C. §§ 3601 et seq.

[17] See Village of Arlington Heights v. Metropolitan Housing Development Corporation ,429 U.S. 252 (1977).

[18] U.S. v. C.B.M. Group, Inc., Consent Decree 01-857 PA (D. Or. 11-05-2001), at [http://archive.aclu.org/court/alveraconsentdecree.pdf]. HUD brought an action in federal district court on behalf of Ms Alvera, who intervened as of right pursuant to 42 U.S.C. § 3612(o)(2).