STATE OF WISCONSIN
SUPREME COURT
Appeal No. 2013AP002207

Milwaukee City Housing Authority,

Plaintiff-Respondent-Petitioner,

v.

Felton Cobb,

Defendant-Appellant,

REVIEW OF A DECISION BY DISTRICT I OF THE WISCONSIN COURT OF APPEALS REVERSING THE MILWAUKEE COUNTY CIRCUIT COURT, THE HON. PEDRO COLON PRESIDING, CIRCUIT COURT CASE NO.: 13SC020628

RESPONSE BRIEF OF DEFENDANT-APPELLANT-RESPONDENT FELTON COBB

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STATEMENT OF THE ISSUE

Does 42 U.S.C. § 1437d(*l*)(6) pre-empt Wisconsin's statutory tenancy termination notice requirements?

The circuit court answered yes.

The court of appeals answered no.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

Felton Cobb is a sixty-two-year old disabled public housing tenant at Merrill Park, one of the Housing Authority of the City of Milwaukee's (HACM's) mid-rise complexes for the elderly and single disabled adults. **(**R. 18-9 & 10, Pet'r's App. 178.) He occupies his apartment pursuant to a lease for one year. (R. 6-8, Resp't's App. A-1.) Mr. Cobb disputed the facts and evidence at his eviction trial held in Milwaukee County's Circuit Court on August 20, 2013, the Honorable Pedro Colon presiding.

The allegations underlying this eviction stem from an incident on June 5, 2013, when Housing Authority of the City of Milwaukee (HACM) Public Safety Officer James Darrow smelled marijuana while on routine patrol at Merrill Park. (R. 6-3&4, Pet'r's App. 182-83.) Officer Darrow believed the

smell was coming from Mr. Cobb's apartment, so he knocked on Mr. Cobb's door. *Id.* Mr. Cobb opened the door slightly and answered Officer Darrow's questions. *Id.* Officer Darrow did not believe Mr. Cobb's explanations for the smell. *Id.* Mr. Cobb refused to allow Officer Darrow to search his apartment. *Id.* Officer Darrow did not observe Mr. Cobb using or possessing marijuana. (R. 17-39, L. 10-16, Pet'r's App. 153.) Thus, the entirety of the evidence against Mr. Cobb was Officer Darrow's belief that the smell of burnt marijuana intensified when Mr. Cobb opened his door.

Officer Darrow did not contact the police or engage in any further investigation. (R. 17-42, L. 20-25, Pet'r's App. 156.) Three weeks *after* the incident occurred, on June 26, 2013, HACM's attorney issued a 14-Day Notice to Tenant Terminating Tenancy which alleged that Mr. Cobb had engaged in drug related criminal activity. (R. 6-3&4, Pet'r's App. 182-83.) This eviction action followed.

At trial, HACM offered as evidence only Officer Darrow's testimony and his written report of the incident. (R. 17-29 – 17-43, Pet'r's App. 143-57.) Mr. Cobb then took the stand and testified that he had not engaged in drug related

criminal activity on the day alleged, and that his entire conversation with Officer Darrow lasted less than a minute. (R. 17-46-48, Pet'r's App. 160-62.) Judge Colon, however, determined that the evidence was sufficient to find that Mr. Cobb engaged in drug related criminal activity. (R. 17-51 -53, Pet'r's App. 165-67.)[1] Additionally, the circuit court held that because HACM alleged that Mr. Cobb engaged in criminal activity, a right-to-cure notice as provided in Wisconsin Statutes, section 704.17(2)(b) was not required because the Wisconsin statute was pre-empted by federal law. (R. 18-2-4, Pet'r's App. 171-73.) The circuit court entered a Judgment of Eviction and issued a Writ of Restitution, which it then stayed for thirty days pursuant to Wis. Stat. § 799.44(3). (R. 18-7-11, Pet'r's App. 176-80.) On October 1, 2013, Mr. Cobb timely filed the Notice of Appeal. (R. 15-1)

On May 28, 2014, the Court of Appeals of Wisconsin issued its decision, now published, reversing the circuit court and holding that HACM was required to include Wisconsin's statutory right to cure in Mr. Cobb's termination notice.

[1] Judge Colon made his findings applying the preponderance of the evidence standard. (R. 18-7, L. 13-23, Pet'r's App. 176.) After trial, Mr. Cobb argued that the appropriate evidentiary standard was clear, satisfactory and convincing evidence. (R. 9-1 – 18.) This issue was not addressed by the court of appeals and is not before this Court.

Milwaukee City Hous. Auth. v. Cobb, 2014 WI App 70, ¶ 1, 354 Wis. 2d 603, ¶ 1, 849 N.W.2d 920, ¶ 1 (Pet'r's App. 101.) The court of appeals held that Wisconsin's law did not conflict with federal law, so it was not pre-empted. *Id.* at ¶¶ 6 & 14 (Pet'r's App. 106 & 113.) Further, the court of appeals held that HACM had explicitly agreed to comply with section 704.17(2) in its lease with Mr. Cobb. *Id.* The court of appeals remanded the case to the circuit court to vacate the eviction judgment and the restitution order. *Id.* ¶ 1 (Pet'r's App. 101.)

On June 26, 2014, HACM filed a Petition for Review with the Supreme Court of Wisconsin, and on September 18, 2014, this Court granted that Petition. Mr. Cobb continues to reside at Merrill Park.

STANDARDS OF REVIEW

The pre-emptive effect of a federal law is a question of law determined de novo by this Court. *Miller Brewing Co. v. Dep't of Indus., Labor and Human Relations*, 210 Wis.2d 26, 33-34, 563 N.W.2d 460, 463 (Wis. 1997).

ARGUMENT

I. Wisconsin Statutes, section 704.17(2) is not pre-empted by federal law.

The Housing Authority of the City of Milwaukee (HACM) argues that a federal statute specifying the lease terms public housing agencies must include in their leases pre-empts Wisconsin's statutory tenancy termination notice requirements. HACM's argument is only "conflict" pre-emption. HACM claims Wisconsin's law stands as an obstacle to Congress's manifest intent to reduce crime in public housing.[2] *See* 42 U.S.C. § 1437d(*l*)(6) & Wis. Stat. § 704.17(2)(b). HACM has the burden of establishing pre-emption. *Miller Brewing Co. v. Dep't of Indus., Labor and Human Relations*, 210 Wis.2d 26, 33-34, 563 N.W.2d 460, 464 (Wis. 1997).

A. The federal policy is to defer to state tenancy termination notice procedures, including when implementing the so-called "one strike" provision required to be in public housing leases by 42 U.S.C. § 1437d(*l*).

HACM is unable to meet its burden and overcome the strong presumption against federal pre-emption of state law

[2] HACM does not argue that express pre-emption or field pre-emption applies. (Pet'r's Br. 8-9.) Accordingly, Cobb's response brief does not discuss the express pre-emption or field pre-emption cases which support the court of appeals decision on review.

for the three reasons: First, Congress and the Department of Housing and Urban Development (HUD) expressly stated their intent that federal requirements co-exist with state law procedures for terminating tenancies. This express deference to state tenancy termination methodology is unsurprising, given that state judicial proceedings and termination notice requirements have traditionally applied to evictions from housing regulated by federal law. Second, Wisconsin's statutory termination notice requirements compliment, rather than conflict with, federal law. Third, federal law requires HACM to state its tenancy termination procedures in its lease, and HACM's lease with Mr. Cobb provides that HACM will comply with Wisconsin Statutes, section 704.17(2)(b).

1. Federal regulations explicitly acknowledge the validity of parallel state and local tenancy termination and eviction procedures.

a. Wisconsin's tenancy termination scheme has different notice provisions and different cure opportunities for different grounds.

Wisconsin statutes specify the method for terminating tenancies for all tenants residential and commercial. The notice periods are different, depending on whether the tenancy is under a lease or not and depending on the alleged

breach that is grounds for termination. *See generally* Wis. Stat. §§ 704.16-704.19. The parties agree that, in this case, but for HACM's pre-emption argument, the applicable state statute is Wisconsin Statutes, section 704.17(2)(b) and that it requires a five-day-right-to-cure notice. If the claimed breach is not cured within five days, the eviction may proceed; if the alleged breach is cured, any notice of a second lease breach within a twelve month period (whether of the same clause or not) terminates the tenancy without any right to cure. Wis. Stat. § 704.17(2)(b).

In some circumstances, Wisconsin law permits termination of a tenancy without a right to cure. First, under section 704.17(2)(c), when the local police department has determined that a drug or gang nuisance exists in the unit or was caused by the tenant on the property, the tenancy may be terminated without an opportunity to cure. Wis. Stat. § 704.17(2)(c). Second, Wisconsin law also permits a five-day-no-right-to-cure notice if an offending tenant commits one or more acts that cause another tenant within the same complex to face an imminent threat of serious physical harm and the offending tenant is named in an injunction or criminal

complaint alleging domestic abuse, child abuse, stalking, or sexual assault. Wis. Stat. § 704.16(3).

This review of Wisconsin's various notice requirements for terminating tenancy in different circumstance permits a response to HACM's serious mischaracterization of Cobb's argument. (Pet'r's Br. 14.) Neither the reasoning expressed in Cobb's briefs to the court of appeals nor the court of appeals decision leads to a result that "absent a second offense within five days, the tenant decides whether he should stay or go." Nothing in Wisconsin's statutory right to cure requires a "second offense within five days." The statute clearly says that **even if** the tenant cures the alleged breach perfectly, the tenancy may be terminated upon a 14 day notice, without any right to cure, "if the tenant . . . breaches the same or any other covenant or condition of the tenant's lease." Wis. Stat. § 704.17(2)(c). More fundamentally, the tenant does not "decide whether he should stay or go." As with any dispute of alleged breach of contract, whether involving a commercial lease or a residential lease, or a contract for the sale of goods, the court system "decides whether" the evidence of any given case

establishes a breach of contract. The legislature's policy determination, however, is that even when that first breach is adjudicated to have occurred, tenants have a right to cure, and so long as there is not another breach of "the same or any other covenant or condition of the tenant's lease," the tenancy continues.

Similarly, HACM is wrong in its assertion that Cobb's (or the court of appeals') "rationale" prevents eviction by a tenant "who commits a sexual assault, or armed robbery of his neighbor, even a homicide" (Pet'r's Br. 14.) As discussed above, there are a number of circumstances in Wisconsin where tenancies may be terminated without a right to cure and with only five days' notice, including drug nuisances, gang nuisances, domestic abuse, child abuse, stalking, and sexual assault. Wis. Stat. §§ 704.17(2)(c), 704.16(3).

b. The federal policy is to defer to and to supplement state law notice procedures for terminating tenancy.

The express federal policy is that state law provisions for terminating tenancies and federal law provisions for terminating tenancies co-exist. The most explicit statement of

the deference to state notice methods is 24 C.F.R. § 966.4(*l*)(3)(iii), which provides:

> A notice to vacate which is required by State or local law may be combined with, or run concurrently with, a notice of lease termination under paragraph (l)(3)(i) of this section.

The context explains the reference in § 966.4(*l*)(3)(iii) to federal notices being combined with or running concurrently with state notices. The title of § 966.4(*l*) is "Termination of tenancy and eviction." The title of § 966.4(*l*)(1) is "Procedures." It provides that "all procedures to terminate tenancy must be stated in the lease." The title of § 966.4(*l*)(2) is "Grounds." It limits the reasons a housing authority may terminate a public housing lease to serious or repeated violations of material lease terms, being over the income limit, and other good cause. The title of § 966.4(*l*)(3) is "Lease termination Notice." HACM concedes that it must give the notice terminating tenancy required by 24 C.F.R. § 966.4(*l*)(3)(i). (Pet'r's Br. 4-5.) HACM then simply ignores whether there is any relationship between the notices terminating tenancy required by federal law in § 966.4(*l*)(3)(i) and any notices required by state law. That is, however, the entire question of pre-emption. Do the federal tenancy

termination notice provisions supplant and replace state law tenancy termination notice provisions, or do federal law notice provisions co-exist with state law notice provisions?

Sub-section 966.4(l)(3)(iii) answers the question unequivocally: the federal notice provisions are minimal national standards that exist in addition to state law tenancy termination notice provisions. Sometimes the required federal notice provides more time and more protections than a given state law might. For example, 24 C.F.R. § 966.4(*l*)(3)(i)(A) gives 14 days' notice for non-payment of rent; Wisconsin state law allows only 5 days to cure by payment. *See* Wis. Stat. § 704.17(2)(a). Sometimes the federal notice period is longer and the public housing authority must provide a pre-eviction federal grievance hearing. See 24 C.F.R. § 966.4(*l*)(3)(iv) ["the tenancy shall not terminate (even if any notice to vacate under State or local law has expired) until the time for a tenant to request a grievance hearing has expired".] Sometimes federal law collapses its notice period down to a shorter state or local time period. *See* 24 C.F.R. §966.4(l)(3)(i)(C) ("30 days in any other case, except that if a State or local law allows a shorter notice period, such shorter

period shall apply"). The provision stating that a state termination notice may either be combined with or run concurrently with a required federal notice qualifies all of the preceding notice requirements, and it provides no exception for notices regarding drug-related criminal activity. 24 C.F.R. § 966.4(*l*)(3)(iii).

This peaceful co-existence of state and federal tenancy termination methods has been recognized in Wisconsin for more than 65 years. The court of appeals decision in this case cites at length the Supreme Court of Wisconsin's 1948 decision in *Meier v. Smith*, which considered the issue of federal pre-emption of a state tenancy termination notice requirement. *Milwaukee City Hous. Auth. v. Cobb*, 2014 WI App 70, ¶ 8, 354 Wis. 2d 603, ¶ 8, 849 N.W.2d 920, ¶ 8. In *Meier*, the Court upheld a state law requiring six months' notice prior to an eviction filing, although a relevant federal law required only "at least sixty days" notice. *Meier v. Smith*, 254 Wis. 70, 75, 35 N.W.2d 452, 455 (Wis. 1948). The *Meier* court noted that it was state law alone that provided the eviction remedy the landlord sought, not the federal act. *Id.* at 74. The *Meier* court declared, "[s]ince the state must create

the remedy, the state may impose such restrictions as it deems to be in the best interests of its citizens, provided such restrictions are equivalent to or in excess of," the minimum federal requirements. *Meier*, 254 Wis. at 74-75. The state law required at least sixty days' notice, so it was not in conflict with the federal law and was not pre-empted. *Id*.

The Court's *Meier* decision applies here. HACM seeks to obtain possession through Wisconsin's summary eviction proceedings, and the federal regulations require removal by state judicial eviction proceedings unless the law of the local jurisdiction permits administrative evictions. 24 C.F.R. § 966.4(*l*)(4). Like the state notice requirement at issue in *Meier*, Wisconsin's five-day notice required by section 704.17(2)(b) fits well within the federal minimum notice requirement, which is *any* reasonable length of time, but not more than 30 days. 42 U.S.C. § 1437d(*l*)(4)(A)(ii).

2. Wisconsin's tenancy termination procedures compliment rather than conflict with federal law.

Contrary to HACM's assertions, Wisconsin law allows HACM to act aggressively against gang and drug crimes in public housing. For example, when HACM suspects tenants

are engaging in drug crimes, a proper and aggressive first step for HACM employees to take is to report their suspicions to the police. If the police department finds that a drug nuisance exists in the unit, HACM may proceed to issue a five-day notice with no right to cure, followed by an eviction. Wis. Stat. §§ 704.17(2)(c) & 823.113. If the police department does not find a drug nuisance, but HACM still believes it has sufficient evidence to prove a breach of the lease, then HACM may issue a five-day-remedy-or-vacate notice. Wis. Stat. § 704.17(2)(b). A five-day-remedy-or-vacate notice *is* an appropriate, aggressive step toward removing gang and drug crime from public housing because it requires that the behavior cease or that the tenant vacate the unit within a mere five days. It informs the tenant that the tenant's behavior was noted, and that the behavior must stop if the tenant wishes to retain his housing. If the tenant does not cease the behavior within five days, HACM may immediately proceed with an eviction action. If the tenant ceases his behavior but is found to have breached the lease again within twelve months, HACM may issue a fourteen-day notice with no right to cure, followed by an eviction filing. Wis. Stat. § 704.17(2)(b).

Thus, Wisconsin's tenancy termination scheme is extremely aggressive, allowing public housing authorities (and any other landlords) to quickly stop lease violating behaviors and evict non-compliant tenants. Wisconsin's court of appeals rightfully described the 5-day right to cure as "minimal." *Milwaukee City Hous. Auth. v. Cobb*, 2014 WI App 70, ¶ 14, 354 Wis. 2d 603, ¶ 14, 849 N.W.2d 920, ¶ 14. Although it is minimal, Wisconsin's right-to-cure provision smartly ensures that lease-breaching behavior ceases, while reducing housing instability. If anything, Wisconsin's termination notice scheme is more aggressive than any scheme envisioned by Congress or HUD; federal law explicitly permits up to thirty days' notice for termination of tenancy, even when the allegation is criminal activity. 42 U.S.C. § 1437d(*l*)(4)(A); 24 C.F.R. § 966.4(*l*)(3)(i)(B). Therefore, Wisconsin's termination notice scheme is consistent with the federal objectives of providing safe, sanitary, and crime free public housing.

Despite Wisconsin's aggressive termination scheme, HACM's behavior in this case can only be described as lackadaisical, which underscores the false sense of urgency

and frustration that HACM is now attempting to portray. On June 5, 2013, HACM Public Safety Officer Darrow suspected Mr. Cobb of smoking marijuana in his unit. (R. 6-3&4, Pet'r's App. 182-83.) Officer Darrow did not call the police to report the alleged crime, and he did not talk to any neighboring tenants to investigate further.[3] (R. 17-42, L. 20-25, Pet'r's App. 156.) Three weeks later, on June 26, 3013, HACM decided to issue a notice terminating tenancy. (R. 6-3&4, Pet'r's App. 182-83.) An eviction was not filed until July 18, 2013, more than a month after the alleged breach. (R. 2-1.)

Under Wisconsin law, however, HACM *could* have resolved the problem on or before June 11, 2013, two weeks before HACM even issued a termination notice, by following one of two paths. HACM could have:

> -immediately called the police, and if the police found a drug nuisance within the unit, issued Mr. Cobb a five-day notice without a right to cure requiring him to be out on or before June 11, 2013. *See* Wis. Stat. § 704.17(2)(c), or

[3] By statute, HACM is evaluated based on its implementation of *effective* eviction and anticrime strategies and the extent to which HACM coordinates with local government officials and residents in the implementation of such strategies. 42 U.S.C. § 1437d(j)(1)(I) (emphasis added). Any effective eviction and anticrime strategy should include reporting suspected crimes to the police.

> -immediately issued Mr. Cobb a five-day notice requiring him to cease the behavior or vacate on or before June 11, 2013 or face eviction, and if he breached a term of the lease again within 12 months, issued Mr. Cobb a fourteen-day notice to vacate or face eviction with no right to cure. *See* Wis. Stat. § 704.17(2)(b).

Either of those strategies would have been more aggressive than HACM's. And, either of those strategies would have been compliant with both state and federal law, resulting in HACM's correct and appropriate implementation of Congress's intent in enacting 42 U.S.C. § 1437d(*l*)(6). Therefore, HACM's argument that section 704.17(2)(b) is an obstacle to congressional intent is proven wrong by the ease with which HACM could have complied with federal *and* state law in this case, while still reducing drug crime in public housing.

3. The federally required lease provision in this case is not different than any other federally required lease provision and does not evince Congressional intent to pre-empt state law.

Mr. Cobb does not dispute that 42 U.S.C. § 1437d(*l*)(6) has a general purpose to reduce or eliminate gang and drug crimes from public housing. It is, however, too great a leap to infer that Congress intended a required lease clause to trample

on state legislatures' traditional control of its courts' eviction procedures. Congress's lack of pre-emptive intent is evinced by the passive, permissive statutory language it chose, a review of the HUD implementing regulations and policy statements, and the contrast between this statutory language and other, clearly pre-emptive language within the same statute.

When interpreting a statute, Wisconsin courts assume that Congress's intent is expressed in the statutory language. *State ex rel. Kalal v. Cir. Ct. of Dane Cnty.*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, ¶ 44, 681 N.W.2d 110, ¶ 44.

a. No statutory language distinguishes the required drug use lease clause from any other clause breach of which might lead to lease termination.

Despite the rhetoric surrounding the passage of the Act, the ultimate statutory language that Congress chose in passing 42 U.S.C. § 1437d(*l*) was only to require that public housing authorities' leases include a provision that any drug-related criminal activity on or off the premises, engaged in by a 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. 42 U.S.C. § 1437d(*l*)(6). Congress

requires a number of lease provisions in public housing, breach of which can be the basis for terminating the tenancy. Non-payment of rent, serious or repeated violations of terms or conditions of the lease, other good cause, furnishing false information, or abusing alcohol are all federal statutory grounds for terminating a public housing tenancy which must be in all public housing leases. 42 U.S.C. §§ 1437d(*l*)(5)-(7).

Although Congress requires lease terms, it does not require immediate termination and eviction for **any** of them. Rather, Congress specifies the minimum number of days' notice that must be provided for various breaches. 42 U.S.C. § 1437d(*l*)(4). As discussed above, those notice provisions co-exist with state law termination procedures. Sometimes the federal method is longer, sometimes shorter, and sometimes the federal provision collapses to a shorter state law period.

Additionally, Congress left the decision of *whether* to terminate a tenancy for drug-related criminal activity up to each individual housing authority. As the Court of Appeals noted, Congress did not mandate that every incident of alleged drug activity result in eviction. Instead, the

implementing regulations permit the housing authority to consider all mitigating circumstances relevant to a particular case when drug-related criminal activity is alleged and to use their discretion to determine whether to issue a termination notice. 24 C.F.R. § 966.4(*l*)(5)(vii)(B). Leaving the decision of whether to issue a termination notice up to each individual housing authority in each individual case hardly evinces a manifest Congressional intent to take the extreme step of impliedly pre-empting state law.

b. **HUD's *post-Rucker* guidance demonstrates that the "one-strike" metaphor does not imply a federal policy of immediate tenancy termination or pre-emption.**

Years after Congress enacted the statutory requirement, the United States Supreme Court decided *Department of Housing and Urban Development v. Rucker*. 535 U.S. 125, 122 S. Ct. 1230, 152 L.Ed. 2d 258 (2002). That decision held that the plain language of 42 U.S.C. § 1437d(*l*) permits the eviction of innocent tenants whose family members or guests committed crimes. *Id.* at 127-28. *Rucker* is not a pre-emption case. There was no question that

the state law procedures for terminating the tenancy were followed.

The federal department charged with enforcing the statute responded to the *Rucker* decision with a guidance letter interpreting the act: then HUD Secretary Mel Martinez sent a letter to housing authorities, advising, "[e]viction should be the last option explored, after all others have been exhausted." (R. 6-18.) The language in this letter starkly contrasts with HACM's claim that Wisconsin's minimal five-day right to cure is an impenetrable obstacle to Congressional intent. Even *post-Rucker*, HUD does not view a right to cure an alleged breach as an "impenetrable obstacle" to Congressional intent.

Secretary Martinez's *post-Rucker* guidance, that eviction is **not** mandatory, is in line with HUD's interpretation that state law eviction procedures are in addition to the federal minimums. While expressly interpreting 42 U.S.C. § 1437d(*l*)(6), HUD clearly stated that state law eviction procedures apply to its so-called "One-Strike" policy:

> State or local law governing eviction procedures may give tenants procedural rights **in addition** to those provided by federal law. Tenants may rely on those state or local laws so long as they have not been pre-empted by federal law.

("One Strike policy" guidance, R. 10-19, emphasis added.) It would be absurd to interpret HUD's regulations as pre-empting state law, when HUD explicitly acknowledges the existence of state termination procedures and says that they still apply.

Finally, HACM's reliance on the Supplementary Information provided in the proposed federal regulation implementing the so-called "One Strike" policy rests on a reed too thin to support its argument. (Pet'r's Br. 17-19.) HACM's brief quotes repeated "one strike" references as if they are more than a metaphor, but HACM leaves for the last sentence of a footnote, that all of the "One Strike" references were removed "from the title of the Final Rule." (Pet'r's' Br. 17, n2.)

HUD's final rule is a far more powerful rebuke of HACM's argument than just deleting the One Strike metaphor from the title. HUD demonstrates that its rule does not in any way pre-empt or modify any state law on terminating tenancy and evicting tenants from public housing.

The most explicit statement of the lack of pre-emption is at the end of the final rule publication:

> *Executive order 13132, Federalism*
>
> This final rule does not impose substantial direct compliance costs on State and local governments or pre-empt State law within the meaning of Executive Order 13132.

Screening and Eviction for Drug Abuse and Other Criminal Activity, (Final Rule), 66 Fed. Reg. 28,776, 28791 (Resp't's App. A-26.) Thus, HUD's Supplementary Information promulgating its *final* rule implementing the so-called "One Strike" policy removes any reference to the "one-strike" metaphor, does not explicitly pre-empt state law, and specifically states that the rule does not pre-empt state law.

4. In its lease with Mr. Cobb, HACM agreed to comply with Wisconsin Statutes, section 704.17(2), except as to the number of days' notice it would provide for specific breaches.

Federal law requires HACM to state in its public housing leases the procedures it will use to terminate tenancies. 24 C.F.R. § 966.4(*l*)(1). HACM's lease with Mr. Cobb specifically states that it will give termination notices:

> in accordance with a lease for one year per Section 704.17(2) of the Wisconsin Statutes, except the HACM shall give written notice of termination of the Lease as of:

1. Fourteen (14) days in the case of failure to pay rent;
2. A reasonable time commensurate with the exigencies of the situation (not to exceed 30 days) in the case of criminal activity on or off the development grounds;
3. Thirty (30) days in all other cases:
4. A notice to vacate pursuant to state law may run concurrently with a notice of lease termination.

(R. 6-14, Resp't's App. A-7, Dwelling Lease, p. 7, § 9.C.)

Thus, HACM has explicitly agreed to comply with the provisions of section 704.17(2), except as to the number of days' notice it will give depending on the breach.

In its brief, HACM underlines the exception for notices issued because of alleged criminal activity. But, there is nothing in the contractual language regarding notices for criminal activity that says that HACM will ignore the section 704.12(2) right to cure in those cases. Other than providing a different number of days, there is nothing that differentiates that provision from the provisions regarding non-payment of rent or other cases. HACM does not claim that its lease permits it to ignore the cure provision in section 704.17(2)(a) for failure to pay rent or in section 704.17(2)(b) for "all other cases." Further, HACM's lease specifically provides (as federal law requires) that state law notices to vacate will be

provided, but may run concurrently with a federally required notice of lease termination. (R. 6-14, Resp't's App. A-7, Dwelling Lease, p. 7, § 9.C.4.)

The Court of Appeals found this lease language unambiguously required HACM to comply with section 704.17(2)(b) by providing Mr. Cobb a right-to-cure notice. *Milwaukee City Hous. Auth. v. Cobb*, 2014 WI App 70, ¶ 11, 354 Wis. 2d 603, ¶ 11, 849 N.W.2d 920, ¶ 11. A lease is a contract. *Town of Menominee v. Skubitz*, 53 Wis.2d 430, 435, 192 N.W.2d 887, 889 (Wis. 1972). The lease should be equally enforceable against HACM *and* Mr. Cobb. Further, the lease is a form contract drafted by HACM, and if this Court finds ambiguity in its terms, the ambiguity should be resolved against the drafter. *Wis. Label Corp. v. Northbrook Prop. & Cas. Ins. Co.*, 2000 WI 26, ¶ 24, 233 Wis.2d 314, ¶ 24, 607 N.W.2d 276, ¶ 24. HACM should not be permitted to avoid federal law's explicit requirement that HACM state its procedures for terminating tenancy in its lease by arguing that Congress implicitly intended something else. *See* 24 C.F.R. § 966.4(*l*)(1).

B. HACM's pre-emption cases are easily distinguished from the present case.

1. HACM's United States Supreme Court pre-emption cases are inapposite because they all involve statutes in which the federal policy was uniformity.

HACM's string citation (Pet'r's Br. 9) of federal conflict pre-emption cases does not advance its argument because, unlike the federal policies in the cases that HACM cites, the federal policy with respect to state eviction procedures is explicitly to preserve them and blend the federal minimum procedures into peaceful co-existence with state law. The more analogous case law supports Mr. Cobb's position. It is worthwhile to take a closer look at the cases HACM cites.

In *Geier v. American Honda Motor Company, Inc.*, the federal policy was uniform safety standards for automobile manufacturers. 529 U.S. 861, 871, 120 S.Ct. 1913, 1920, 146 L.Ed. 2d 914 (2000). When the uniform federal standard did not require an airbag, a District of Columbia tort claim against Honda for failing to install an airbag conflicted with the federal policy of uniformity. *Id.* The federal policy was uniformity. Similarly, in *Barnett Bank of Marion County v.*

Nelson, state law forbade national banks from selling insurance in small towns while federal law permitted national banks to sell insurance in small towns. 517 U.S. 25, 31, 116 S.Ct. 1103, 1108, 134 L.Ed. 2d 237 (1996). A uniform federal authority to sell insurance was impossible without pre-emption. *Crosby v. National Foreign Trade Council,* 530 U.S. 363, 367, 120 S.Ct. 2288, 2291, 147 L.Ed. 2d 35 (2000), involves the uniquely federal sphere of foreign relations. The Supreme Court noted Congress' intent to vest control of economic sanctions in the President, to limit the range of economic sanctions against Burma, and to authorize the President to speak for the United States in developing a strategy to improve human rights in Burma. 530 U.S. at 374, 377, 380. Similarly, in *Hines v. Davidowitz,* state legislation affected immigration and international relations, matters uniquely within federal exclusive control. 312 U.S. 52, 67-68, 61 S.Ct. 399, 404, 85 L. Ed. 581(1941). In *Rice v. Santa Fe Elevator Corporation,* the Warehouse Act's "special and peculiar history" included an amendment, changing the federal act from one that was at one time explicitly subservient to state law to an act specifying that the power,

jurisdiction, and authority of the Secretary with respect to warehouseman licensing would be exclusive. 331 U.S. 218, 232, 67 S.Ct. 1146, 1153, 91 L.Ed. 1447 (1947).

The common thread of these cases is that they involve a clearly identified Congressional expression of a national interest in uniformity, with which any state law deviation would conflict. In the present case, however, the federal policy is the federalism opposite of uniformity. Congress intended deference to and co-existence with local tenant termination notice provisions. For example, a notice to terminate for criminal activity can be for *any* reasonable length of time, but not more than 30 days. 42 U.S.C. § 1437d(*l*)(4)(A)(ii). A notice terminating tenancy for any other reason, except non-payment of rent, must be 30 days or more *unless* a State or local law provides for a shorter period of time. 42 U.S.C. § 1437d(*l*)(4)(C) (emphasis added). Congress fully anticipated and explicitly provided, not for federal uniformity, but for variability among the states regarding public housing tenancy termination notices.

The Wisconsin statutes, including section 704.17(2)(b), fit well into this policy of deference to state

law. A Wisconsin termination notice may be issued for breach of "any covenant or condition of the tenant's lease," so it does not impermissibly limit the grounds for which a notice terminating tenancy may be issued Any federally required lease covenant or condition may be the source of the alleged breach. Further, a notice pursuant to 704.17(2)(b) can terminate the tenancy in as little as five days, well within the federal 30-day limit of 42 U.S.C. § 1437d(*l*)(4)(A)(ii). The state law cure provision is entirely consistent with HUD's directive that "[e]viction should be the last option explored, after all others have been exhausted." (R. 6-18.) Thus, HACM's inability to cite any precedential pre-emption case that is analogous to this situation is unsurprising given the strong presumption against pre-emption, and the explicit statutory and regulatory language incorporating state tenancy termination and eviction procedures into federal public housing law. *See* 42 U.S.C. § 1437d(*l*)(4)(C); 24 C.F.R. § 966.4(*l*)(3)(iii).

2. The public housing cases on which HACM relies do not address tenancy termination or eviction procedures, which Congress and HUD specifically left to the states.

HACM's reliance on the United State Supreme Court decision in *Department of Housing and Urban Development v. Rucker* is misplaced because *Rucker* is not a pre-emption case at all. See, *Milwaukee City Hous. Auth. v. Cobb*, 2014 WI App 70, ¶ 12, 354 Wis. 2d 603, ¶ 12, 849 N.W.2d 920, ¶ 12. There is nothing in *Rucker* that suggests that the local housing authority failed to follow the state's tenancy termination procedures. Indeed, the tenants sued to establish that the federal statute should be interpreted to permit the eviction of the tenant who violated the lease clause, but not the innocent tenants who had not. 535 U.S. at 129-30. The United States Supreme Court was simply interpreting the plain language of 42 U.S.C. § 1437d(*l*) and found that it permitted the eviction of innocent tenants whose family members or guests committed the crime. 535 U.S. at 130-32. *Rucker* is not a pre-emption case, and HACM misstates its holding when HACM claims the United States Supreme Court placed greater importance on effectuating the intent of

Congress than on state statutory rights. (Pet'r's Br. 25). *Rucker* did not even consider whether a state's procedures for terminating a tenancy applied.

For the same reason, HACM's heavy reliance on *Boston Housing Authority v. Garcia* is misplaced. *Garcia* was the direct result of *Rucker,* but at least *Garcia* mentions pre-emption. 449 Mass. 727, 729, 871 N.E.2d 1073, 1075 (Mass. 2007). In *Garcia*, the state's statutory "innocent tenant defense" impermissibly limited the housing authority's discretion to evict an innocent tenant whose guest engaged in criminal activity. 871 N.W.2d at 1075. Given *Rucker's* interpretation of the federal statutory language, the state's "innocent tenant defense" directly conflicted with the federal law which the United States Supreme Court had just construed as forbidding the "innocent tenant" defense. The Massachusetts court held that the state's "innocent tenant defense" was pre-empted. *Id*. In *Garcia,* the court was determining permissible grounds for termination of tenancy, not the validity of the state's termination notices and eviction procedures, which the federal government left up to the states.

HACM's reliance on the *Garcia* case is similar to Smith's reliance on a New York pre-emption case in *Meier v. Smith*, 254 Wis. 70, 79, 35 N.W.2d 452, 456 (Wis. 1948). Smith tried to compare Wisconsin's six month notice requirement, significantly longer that the 60 federal notice requirement, with a New York law that prohibited eviction for purposes of withdrawing leased housing accommodations from the rental market. *Id.* In holding that Wisconsin's procedures for terminating tenancies were not pre-empted by the shorter federal notice period, the Supreme Court of Wisconsin distinguished the pre-emptive result in New York, where the federal Housing and Rent Act of 1948 specifically permitted evictions for the reason prohibited by the New York law. *Id.* Comparably, the Massachusetts law in *Garcia* prohibiting eviction of an innocent tenant directly conflicted with 42 U.S.C. § 1437d(*l*)(6), which explicitly permits the eviction of an innocent tenant. When it came to the different notice procedures for terminating tenancy, the Wisconsin Supreme Court held in Meier that Wisconsin's termination notice requirements did not conflict with the shorter federal time period and was, therefore, not pre-empted.

The Tennessee case HACM cites is somewhat of a pre-emption case, although it was not about termination notices or the right to cure. Instead, the Tennessee court determined that its statutory waiver defense was "trumped" by Congress's intent to provide housing that is "crime-free" for all tenants. *Ross v. Broadway Towers, Inc.*, 228 S.W.3d 113, 122 (2006). Tennessee's waiver defense provided that a landlord could not evict based on a default if the landlord had accepted rent for a subsequent month with full knowledge of the default. *Id.* at 121-22. Without doing any kind of specific pre-emption analysis, the Tennessee court unreasonably held that Tennessee's waiver defense was pre-empted because, otherwise, the landlord would be waiving the rights of other tenants to insist on the enforcement of the federal regulations. *Id.* at 122. Tennessee was clearly willing to overlook any and all procedural and substantive mistakes by the landlord to ensure that this particular defendant was evicted. *See Id.* at 120 (permitting eviction for a crime a live-in aid committed and was convicted of prior to moving in, instead of requiring the landlord to notice and prove a violation of the current lease), at 121 (allowing a notice terminating tenancy that did

not really include the required specificity to enable a tenant to prepare a defense), *Id.* (stretching to find that the trial court relied solely on the allegations in the notice terminating tenancy to find grounds for eviction). The court's faulty decision regarding pre-emption vests in other tenants the "right" to demand that certain tenants be evicted and finds that it would be a violation of that "right" to require the landlord to follow the law. *Id.* at 122.

Although HACM urges this Court to vest Wisconsin's public housing tenants with similar rights, the Tennessee court's reasoning is contrary to the permissive, as opposed to mandatory, statutory language chosen by Congress and HUD. *See* 42 U.S.C. § 1437d(*l*)(6), 24 C.F.R. § 966.4(*l*)(5)(vii)(B). It is also contradictory to HACM's assertion, supported by the regulations, that the *landlord* has the discretion to consider mitigating circumstances and to decide whether to issue a termination notice. (Pet'r's Br. 21-22.); 24 C.F.R. § 966.4(*l*)(5)(vii)(B). Taken to its logical conclusion, Tennessee's reasoning would eliminate any procedural or notice requirements, along with landlord discretion, if they impeded other tenants' "rights" to be in crime-free housing.

Clearly, Congress and HUD did not intend that result. *See, e.g.* HUD "One Strike" policy guidance (providing that state and local tenant protections apply) (R. 10-19.)

In a footnote, HACM also cites without explanation a case from Connecticut and a case from Iowa. In HACM's Connecticut case, the court applied and interpreted a Connecticut statute; it did not do a pre-emption analysis. *Hous. Auth. of City of Norwalk v. Brown*, 129 Conn. App. 313, 317, 19 A.3d 252, 255 (2011). The Connecticut court held that the tenant had not cured under the state's cure statute because the statute only permitted tenants to cure by repair or payment. 19 A.3d. at 256. Thus, under state law the breach could not be cured. *Id.* at 259. The Connecticut tenant did not challenge the housing authority's compliance with federal or state termination notice requirements.

The Iowa case cited by HACM also did not do an implied conflict pre-emption analysis. The tenant argued that both federal law and the lease explicitly required "good cause" before it could be terminated. *Horizon Homes of Davenport v. Nunn*, 684 N.W.2d 221, 224 (Iowa 2004). The Iowa court simply found that the plain language of the

relevant federal statutes and regulations required good cause to terminate a federally subsidized tenancy. 684 N.W.2d at 225-26. The court also noted that subsidized housing tenants have significant procedural due process rights prior to the termination of their tenancies. *Id.* at 225. Nothing in *Horizon Homes* supports HACM's position.

3. Only one state and the District of Columbia have considered whether their right-to-cure provisions were pre-empted by 42 U.S.C. § 1437d(*l*)(6).

Although HACM asserts that multiple jurisdictions have considered the legal question before this Court, (Pet'r's Br. 27), in fact, only Kentucky and the District of Columbia have considered the question of whether a state statute's right-to-cure lease termination notice provision is pre-empted by 42 U.S.C. § 1437(*l*)(6). The two courts came to different conclusions.

The Kentucky Court of Appeals decision is the better reasoned and involves a cure statute similar to Wisconsin's. In *Housing Authority of Covington v. Turner*, 295 S.W.3d 123, 127 (Ky. Ct. App. 2009), the statutory tenancy termination notice procedure includes the right to cure the

first alleged breach. Like HACM, the Covington housing authority had incorporated the right-to-cure statute into its lease. *Id.* at 124. The Kentucky state statute, Kentucky Revised Statutes, section 383.660(1) reads, in pertinent part, as follows:

> . . . if there is a material noncompliance by the tenant with the rental agreement or a material noncompliance with KRS 383.605or 383.610, the landlord may deliver a written notice to the tenant specifying the acts and omissions constituting the breach and that the rental agreement will terminate upon a date not less than fourteen (14) days after receipt of the notice. If the breach is not remedied in fifteen (15) days, the rental agreement shall terminate as provided in the notice subject to the following. If the breach is remediable by repairs or the payment of damages or otherwise and the tenant adequately remedies the breach before the date specified in the notice, the rental agreement shall not terminate. If substantially the same act or omission which constituted a prior noncompliance of which notice was given recurs within six (6) months, the landlord may terminate the rental agreement upon at least fourteen (14) days' written notice specifying the breach and the date of termination of the rental agreement.

KRS § 383.660(1). Kentucky permits 15 days to cure; Wisconsin only 5. In both states, a successful cure permits the tenancy to continue. In both states a subsequent breach can result in termination of the tenancy without a right to cure. In Kentucky, the subsequent breach must be within six months and be for the same act or omission. In Wisconsin, the alleged subsequent breach can be of any covenant or condition within

the next year. *Compare* KRS § 383.660(1) *and* Wis. Stat. § 704.17(2)(b).

The Housing Authority of Covington made exactly the same argument HACM makes here and relied on *Rucker*. 295 S.W.3d at 127. The Kentucky Court of Appeals noted that *Rucker* does not require eviction for a lease violation, even the drug use provision. *Id.* Thus, the legislature's determination that a cure should be allowed does not conflict with the Congressional purpose. *Id*. Further, the Kentucky court then adopted the Kentucky trial court's reasoning, observing that a state law cure provision may well further discouraging drug use in public housing:

> In its well-reasoned opinion, the circuit court applied judicial common sense and concluded the right to remedy may further the objective of discouraging illegal drug use on public housing premises. We quote: '[R]ather than the provision of an opportunity to remedy being an obstacle to the purposes and objectives of the Anti-Drug Activity law, a tenant who has been served with notice of the intent to evict has clear knowledge of the provision, and having been given the opportunity to remedy may be among the most likely of tenants to prevent the situation from recurring, thereby furthering the purpose of and objectives of the law.

Id. Notice of a suspected violation, with a right to cure, provides a powerful incentive to the tenant household to be vigilant, even against future allegations of breach. It removes

the incentive to litigate the first allegations and focuses on ensuring that future unacceptable conduct is prevented. The *Turner* court specifically found that the right to remedy an alleged lease violation is consistent with the Department of Housing and Development's (HUD) polices and prior holdings of the United States Supreme Court. *Id*.

By contrast, a District of Columbia court decision is an example of bad facts making bad law. The allegations against the tenant in *Scarborough v. Winn Residential L.L.P./Atl. Terrace Apartments,* 890 A. 2d 249 (D.C. 2006) were very serious. Ms. Scarborough was found responsible for the presence in her apartment of a loaded, unregistered, 12-gauge shotgun that had been used in a fatal shooting, which had happened in her apartment, the previous day. 890 A.2d 249, 251. Importantly, the D.C. Code at issue in *Scarborough* required a 30-day notice to correct an alleged breach, with no apparent limit in how often a tenant must be given the opportunity to correct any alleged future breaches before the landlord might initiate an eviction action. *Id.* at 253.

Unlike the District of Columbia, Wisconsin places a strict limit on the right to cure, providing a short, five-day cure period and allowing a tenant only one chance to cure within a year. Wis. Stat. § 704.17(2)(b). If a tenant does not cure the alleged behavior within five days, an eviction action may be filed. *Id.* If a tenant cures the behavior, but breaches the lease again within twelve months of the 5-day-right-to-cure notice, a fourteen-day notice with no right to cure will validly terminate the tenancy. *Id.* Applying Wisconsin's law, Ms. Scarborough may well have been evicted because after one potential breach (violent crime between guests) she may have committed a second breach (hiding an illegal gun). A Wisconsin court may have found that Ms. Scarborough failed to take reasonable steps to remedy a breach of the lease, or that she committed two distinct breaches within a twelve-month period. *See* Wis. Stat. § 704.17(2)(b).

Conclusion

For the reasons stated above, the court of appeals decision should be affirmed.

Dated this 11th day of November, 2014 at Milwaukee, Wisconsin

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif fond. The length of this brief is 7,689 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

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I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 11th day of November at Milwaukee, Wisconsin.

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Jeffery R. Myer, SBN 1017339

CERTIFICATION OF MAILING AND SERVICE

I hereby certify that:

On this day, I caused Twenty-two (22) copies of Defendant-Appellant-Respondent's Brief and Appendix to be deposited with a third-party commercial carrier (FedEx) for delivery to the Clerk of the Supreme Court and Court of Appeals by first class mail or other class of mail that is as expeditious.

I further certify that on this day, I caused three copies of this brief and appendix to be served by third-party commercial carrier (FedEx) on Assistant City Attorney John Heinen.

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