STATE OF WISCONSIN
SUPREME COURT

District 1 Appeal No. 2013AP002207
Circuit Court Case No. 2013SC020628

MILWAUKEE CITY HOUSING AUTHORITY,

Plaintiff-Respondent-Petitioner

v.

FELTON COBB,

Defendant-Appellant.

REVIEW OF A DECISION OF THE
COURT OF APPEALS, DISTRICT 1
REVERSING A JUDGMENT OF THE CIRCUIT COURT FOR
MILWAUKEE COUNTY, PEDRO A. COLON, JUDGE

REPLY BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER

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A. Cases Cited by HACM Recognize That Congressional Objectives Prevail Over State Laws Permitting Tenant Defenses.

Cobb, in his Response Brief, goes to some lengths in an effort to distinguish *Dep't of Hous. v. Rucker*, 535 U.S. 125, 122 S. Ct. 1230, 152 L. Ed. 2d 258 (2002) and *Boston Hous. Auth. v. Garcia*, 449 Mass. 727, 871 N.E.2d 1073 (2007). The gist of Cobb's argument is that the tenants facing eviction in *Rucker* and *Garcia* presented "innocent tenant" defenses, as opposed to "right to cure" defenses, and so the decisions do not aid a pre-emption analysis. This argument misses HACM's purposes for citing and quoting *Rucker* and *Garcia*, which are three-fold.

First, both decisions weigh the public policies behind 42 U.S.C. § 1437d(*l*)(6) [which authorizes evictions for any drug-related criminal activity], against the "innocent tenant defense" in *Rucker*, and against the "special circumstances" defense in *Garcia*. With respect to the "innocent tenant defense," the U.S. Supreme Court, in *Rucker*, wrote there are "no 'serious constitutional doubts' about Congress' affording local public housing authorities the discretion to conduct no-fault evictions for drug related crime."

Rucker, 535 U.S. 125 at 135 (citation omitted). As to the "special circumstances defense," a variant of no-fault, the Massachusetts Supreme Judicial Court explained: "left undecided was whether Congress intended Federal law to make inoperative any State law that limits the exercise of discretion by local housing authorities in such circumstances. It is to this question we now turn." *Garcia*, 449 Mass. 727 at 733. The Court then observed that Congress and HUD intended "to reduce illegal drug activity in federally funded housing projects by eliminating the innocent tenant defense . . ." *Id.* at 735. The Massachusetts court ultimately concluded that the "special circumstances" defense "would run afoul of and substantially interfere with the congressional objective. It is therefore preempted." *Id.* at 734.

Second, both cases find that a no-fault defense to eviction, which HACM submits is a far more compelling tenant defense than Wisconsin's right-to-cure statute, cannot be sustained in the light of the Congressional objectives behind the federal 'One Strike and You're Out' policy. Both decisions recognize the principle: "strict liability maximizes deterrence and eases

enforcement difficulties." Garcia at 734 (citing *Rucker*, citing *Pacific Mut. Life Ins. Co. v. Haslip*, 449 U.S. 1, 14, 111 S. Ct. 1032, 113 L. Ed.2d 1 (1991)).

Thus, the caselaw cited by HACM demonstrates an understanding of the importance Congress and HUD placed on PHA's having discretion to evict by finding lawful a regulation, 24 C.F.R. § 966.4(f)(12)(i), that goes well beyond pre-empting a state procedural right to a second strike, at issue here, through that regulation's authorizing the eviction of even innocent tenants for the illegal activities of their guests and household members.

Third, both decisions arise from the highest level of appellate review available in their respective jurisdictions: the United States federal courts and the Massachusetts' state courts.

Against these cases, Cobb puts forth one Kentucky intermediate appellate court decision, *Housing Authority of Covington v. Turner*, 295 S.W.3d 123 (Ky. Ct. App. 2009), contending it is "better reasoned." Yet, in the only case advanced to bolster Cobb's argument, the Kentucky Court of Appeals split on whether the pre-emption doctrine should apply, with Judge Moore,

although concurring in the outcome, writing: "In my opinion there is no doubt that the federal law in this case occupies the field. Thus, it preempts any state law to the contrary." *Id.* at 128 (Moore, concur)[1]. After citing to the *Rucker* case, Judge Moore concluded: "Thus a state statute allowing a remedy is contrary to the clear language of the federal statute." *Id.* He then lists eight findings Congress made regarding elimination of drugs in public housing and adds:

> Consequently, the "one-strike" policy was implemented as a result of these findings. Accordingly, Congress sought to occupy the field in the area of drug-related crimes in public housing in an effort to eradicate it. Had Congress intended to mandate remedies to this policy, it would have so said. Thus, a state statute allowing remedies beyond any that may be granted by Congress is contrary to clear congressional language and intent. Thus, I conclude that KRS 383.660(1) is preempted by 42 U.S.C. §1437d(*l*)(6).

However, because *Turner* was also an "innocent tenant" case, Judge Moore sides with the majority to prevent Ms.

[1] It should be noting that the U.S. Supreme Court has stated with respect to the three categories in pre-emption analysis that the categorization "should not be taken to mean that they are rigidly distinct. Indeed, field pre-emption may be understood as a species of conflict pre-emption: a state law that falls within a pre-empted field conflicts with Congress' intent (either expressly or plainly implied) to exclude state regulation." *English v. Gen. Elec. Co.*, 496 U.S. 72, 79, fn. 5, 110 S. Ct. 2270, 110 L.Ed.2d 65 (1990).

Turner's eviction, concluding that the PHA failed to show it met the policy considerations behind the federal statute.

Thus, the cases cited by HACM demonstrate how courts have evaluated the Congressional policies for enacting 42 U.S.C. § 1437d(*l*)(6) and found that they trump the tenant defenses presented in those cases. Even the concurring opinion in Respondent's one case to the contrary supports HACM's "One Strike" position.

B. Contrary to the Defendant-Appellant's Contention, Wis. Stat. § 704.17(2)(b) Provides Multiple Opportunities to Cure.

Throughout his Response Brief (e.g. pages 7-9, 14), Cobb argues that even if the tenant cures an initial breach, a second breach of the tenant's lease will result in eviction *without any right to cure*, citing Wis. Stat. § 704.17(2)(b), Stat. The claim is contrary to the language of the statute.

HACM's initial brief highlighted the practical workings of the right to cure clause and its frustrating effect on a public housing landlord, like HACM, seeking to evict tenants who have engaged in criminal activity. If all that is necessary to cure

criminal lease violations is merely to "cease the activity," then clearly a first crime, standing alone, is insufficient to evict any tenant who can "remedy the default" (cure) during the statutory five-day cure period. Cobb contends that the absence of repeat criminal conduct ("ceasing the activity") amounts to "complying with the notice" and preserves the tenancy. In short, as HACM has argued, such a state of affairs amounts to the tenant deciding whether he will stay or go, rather than a public housing authority making that determination. Any such result under a state law would be contrary to Congress's purposes and objectives.

Once a tenant has breached the lease, but cured that breach, Cobb's Brief contends that the tenant may be evicted "if within one year from being served the first termination notice the tenant . . . breaches the same or any other covenant or condition of the tenant's lease." Through a paraphrasing of the statute, Cobb claims that "the tenancy may be terminated upon a 14-day notice, without any right to cure. . .. (Respondent's Brief at p. 8.)

Even if the defendant-appellant's characterization of Wis. Stat. § 704.12(2)(b) were accurate, the federal 'One Strike"

policy objectives would be frustrated if state law required two strikes before a tenant could be evicted by a public housing authority. But Cobb's citation to Wis. Stat. § 704.17(2)(b) ignores a further statutory cure option, adding further frustration to PHAs. The statute reads:

> (b) If a tenant under a lease for a term of one year or less . . . breaches any covenant or condition of the tenant's lease, other than for payment of rent, the tenant's tenancy is terminated if the landlord gives the tenant a notice requiring the tenant to remedy the default or vacate the premises on or before a date at least 5 days after the giving of the notice, and if the tenant fails to comply with such notice. A tenant is deemed to be complying with the notice if promptly upon receipt of such notice the tenant takes reasonable steps to remedy the default and proceeds with reasonable diligence . . . If within one year from the giving of any such notice, the tenant again . . . breaches the same or any other covenant or condition of the tenant's lease, other than for payment of rent, the tenant's tenancy is terminated if the landlord, **prior to the tenant's remedying the waste or breach**, gives the tenant notice to vacate on or before a date at least 14 days after the giving of the notice.

(underlining and emphasis added). Thus, the statute contains not one but at least two cure opportunities within every 12-month period. The first opportunity falls in the five-day window following service of the first termination notice. Then, contrary to Cobb's assertion that a subsequent breach can bring a 14-day notice "without any right to cure," the bold text reveals that even

enforcement of the second termination notice may be frustrated by the tenant who contends he or she has again cured, this time prior to the landlord giving the tenant notice to vacate. Moreover, the cycle repeats every 12 months.

For clarity's sake, applying the statute to a common lease violation, like harboring a pet, is instructive. Under Wis. Stat. § 704.17(2)(b), a tenant who keeps a pet in violation of the lease would cure by removing the pet after being served a first termination notice. Should the tenant, in the ensuing 12 months, again harbor a pet, a second termination notice could be served. However, pursuant to the second cure clause in the statute, it appears the tenant would have a defense to the eviction by arguing the second pet had been removed before service of the second notice. One need only substitute any of a laundry list of drug related or criminal lease violations to reveal how unworkable the statute is. Conceivably, Cobb could use the statute to play cat and mouse with HACM after a second illegal drug use, arguing that he remedied by ceasing his marijuana smoking activity before being served the non-curable second notice.

In sum, notwithstanding Cobb's protestations of how state law compliments and peacefully co-exists with federal law, Wis. Stat. § 704.17(2)(b) impermissibly obstructs the accomplishment and execution of Congressional policy applicable to public housing authorities. If the defendant-appellant's position prevails, a tenant who beats up his neighbor, robs the development office, or breaks out all the windows in the building with a bat may, upon receipt of a (termination) notice, remedy the default by "ceasing the activity" (in Cobb's words). Such practical applications of the right to cure criminal activity demonstrate how Wis. Stat. § 704.17(2)(b) "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 61 Sup. Ct. 399, 85 L. Ed. 581 (1941).

As the defendant-appellant has rightly recognized, "Congress left the decision of *whether* to terminate a tenancy for drug-related criminal activity up to each individual housing authority." (Respondent's brief, p. 19) (emphasis in original). Yet the application of Wis. Stat. § 704.17(2)(b) sought by Cobb would

prevent public housing authorities from making that judgment, contrary to the intent of Congress.

C. Executive Order 13132 Comports with HACM's Position on Pre-Emption.

In his efforts to rebut the simple directive of the 'One Strike' policy, Cobb points to Executive Order 13132, entitled 'Federalism,' and cited in the Final Rule, 66 Fed. Reg. 28, 776 (May 24, 2001). It reads: "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." (emphasis added). Cobb calls the Order: "[T]he most explicit statement of the lack of pre-emption." However, Cobb's analysis again stops short, this time of that portion of the Order that expressly allows for the conflict pre-emption HACM contends is appropriate in this case.

The fourth section of the Order provides:

> **Sec. 4**. *Special Requirements for Preemption.* Agencies, in taking action that preempts Sate law, shall act in strict accordance with governing law.
>
> (a) Agencies shall construe, in regulations and otherwise, a Federal statute to preempt State law only where the statute contains an express preemption provision or there is some other clear evidence that the Congress intended preemption of State law, or where the exercise of State authority conflicts with the exercise of Federal authority under the Federal statute.

(emphasis added). (Respondent's Appendix A44). As is evident from its section on "Special Requirements for Preemption," Executive Order 13132 sets out parameters for pre-emption of state law consistent with principles of federalism. The language, however, expressly allows for HACM's position, that Wis. Stat. § 704.17(2)(b) **conflicts** with the **exercise** of the 'One Strike and You're Out' Federal policy, and is, therefore, pre-empted.

D. Prohibited Drug-Related and Threatening Criminal Activity Given Unique Treatment in HACM Lease Section 9.

Cobb challenges HACM's unique treatment of termination notices issued pursuant to HACM lease section 9(C)(2) for threatening or drug-related criminal activity, arguing: "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." The subsequent subsections, however, serve to rebut the argument.

In addition to how Lease Section 9(C)(2) vests HACM with the discretion to determine what will constitute a "reasonable time" before lease termination for each 'One Strike' lease violation,

the next subsection, 9(D)(4), provides that termination notices shall state that the Resident has a right to request a hearing in accordance with the HACM's Grievance Procedures (administrative review procedure), **except**:

> 5. That a notice given under Section 9(C)(2) shall state that the circumstances have been considered by HACM and that a Resident is not entitled to a Grievance Hearing and the HUD has determined the Sate judicial eviction procedure contains the basic elements of due process requirements and provides the opportunity for a hearing in court.

(emphasis added).

As can be seen, HACM's lease distinguishes terminations for illegal drug related and other criminal activity in several ways: a variable number of days to vacate subject to HACM's discretion (depending on "the exigencies of the situation"); no right to HACM's grievance procedure; and an affirmative acknowledgment that a state court proceeding is all the due process to which such tenants are entitled. These exceptions include HACM's determination that the same class of lease violators is not entitled to the right to cure afforded by Wis. Stat. § 704.17(2)(b).

CONCLUSION

Therefore, for all of the reasons set forth here and in its Brief of October 20, 2014, the Plaintiff-Respondent-Petitioner, Housing Authority of the City of Milwaukee, respectfully requests that the Supreme Court vacate the Order and Decision of the Court of Appeals dated May 28, 2014, and reinstate the decision and order of the Circuit Court of Milwaukee County dated September 17, 2013.

Respectfully submitted, dated, and signed at Milwaukee, Wisconsin this 25th day of November, 2014.

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CERTIFICATION OF FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19 (8)(c)(2), Wis. Stat., for a brief produced with a proportional serif font. The length of this brief is 2,388 words

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CERTIFICATION OF ELECTRONIC FILING

I hereby certify that I have submitted an electronic copy of this Reply Brief which complies with the requirements of § 809.19(12), Wis. Stat.

I further certify that the electronic Reply Brief is identical in text, content and format to the printed form of the brief filed as of this date.

Dated and signed at Milwaukee, Wisconsin this 25th day of November, 2014.

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CERTIFICATION OF THIRD-PARTY COMMERCIAL DELIVERY AND CERTIFICATION OF MAILING

I, Wilhelmina Taylor, herein certify that I am employed by the Housing Authority of the City of Milwaukee as a Legal Assistant, assigned to duty in the City Attorney's Office, for Assistant City Attorney, John J. Heinen, located at 841 North Broadway, Room 1018, Milwaukee, Wisconsin 53202; that on the 25th day of November, 2014, I sent twenty-two (22) copies of the Reply Brief of Plaintiff-Respondent-Petitioner, in the above-entitled case, via third-party commercial delivery, addressed to: Clerk of the Wisconsin Supreme Court, 110 East Main Street, Suite 215, Madison, Wisconsin 53703.

I further certify that three copies of the Reply Brief of Plaintiff-Appellant-Petitioner, in the above-entitled case, were mailed on November 25, 2014 to all counsel for the Defendant-Appellant-Respondent, Attorneys Jeffrey R. Myer, April A.G. Hartman, and Christine Donahoe, of Legal Action of Wisconsin, Inc., located at 230 West Wells Street, Suite 800, Milwaukee, Wisconsin 53203-1700.

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