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OF WISCONSIN**

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

AMICUS CURIAE BRIEF AND APPENDIX OF
HOUSING AND DEVELOPMENT LAW INSTITUTE
IN SUPPORT OF PETITIONER

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I. INTEREST OF *AMICUS CURIAE*

The Housing and Development Law Institute (HDLI) serves as a legal resource on public and affordable housing issues nationwide. HDLI's 200+ members are composed of public housing and redevelopment agencies, legal counsel representing those agencies, and other industry stakeholders.¹ HDLI, its 22 directors, and members have considerable expertise in the public housing issues underlying this case. HDLI served as *amicus curiae* in *HUD v. Rucker*,² and is familiar with federal and housing agency initiatives regarding drug-related activity in public and affordable housing.

II. STATEMENT OF THE CASE

This case involves a public housing agency's (Petitioner) eviction of a public housing tenant (Respondent) based on the Respondent's alleged use and/or possession of marijuana in his unit, which was a violation of his dwelling lease. The Petitioner evicted the Respondent without providing him a statutory five day right to cure found under Wis. Stat. §704.17(2)(b), on the basis that federal law preempts state law. The circuit court below affirmed the Petitioner's position.³ The Wisconsin Court of Appeals reversed, finding that Petitioner's failure to provide Respondent with a pretermination notice that contained notice of a right to cure his

¹ Although counsel for the Petitioner, the Milwaukee City Attorney's Office, is an HDLI member, HDLI is participating as *amicus curiae* to represent the collective interest of all of its members on these very important issues of national significance.

² *Department of Housing and Urban Development v. Rucker*, 535 U.S. 125 (2002).

³ The decision is found in the appendix to the Petitioner's Brief @ p. 5 (APPX-172).

lease violation deprived the circuit court of competency to adjudicate the eviction action.⁴

III. ARGUMENT

A. Summary of Argument.

42 U.S.C. §1437d(1)(6), and the comprehensive federal scheme surrounding that statute, preempts Wis. Stat. §704.17(2)(b) insofar as it applies to lease violations by public housing residents that involve drug-related or other criminal activity.

This brief does not re-argue that the bases for preemption are present in this case, and hereby adopts the arguments set forth in the Petitioner’s Brief in that regard.⁵ Rather, it explains that a comprehensive federal scheme allows housing agencies to quickly evict tenants for drug-related criminal activity, and this scheme does not merely exist in a “pamphlet” or “agency manual,” as suggested by the Court of Appeals, below.

B. The Wisconsin Right To Cure Provision Significantly Frustrates the Federal Scheme to Eliminate Drug-Related Criminal Activity on Public Housing Property.

Congress and HUD consider drug-related criminal activity in public housing to be a very serious problem. The federal scheme designed to reduce and eliminate drug-related criminal activity in public housing properties is comprehensive. It began with the Anti-Drug Abuse Act of 1988⁶. President Clinton first articulated the “One Strike” policy discussed in the parties’ briefs in his 1996 *State*

⁴ Petitioner’s Brief @ p. 5 (Ct. App. Decision ¶¶ 1, 2, and 14; APPX-101-104 and APPX-113.).

⁵ HDLI hereby adopts and incorporates by reference pages 7-24 of the Petitioner’s Brief.

⁶ Anti-Drug Abuse Act of 1988, Pub.L. 100–690, 102 Stat. 4181 (1988).

of the Union Address. Federal anti-crime statutes, implementing regulations, a *mandated* form public housing dwelling lease, and a series of official HUD notices all contribute to this comprehensive regime.

In his January 23, 1996 *State of the Union Address*, President Bill Clinton laid the foundation of an omnibus “One Strike” policy, stating:

I challenge local housing authorities and tenant associations: Criminal gang members and drug dealers are destroying the lives of decent tenants. From now on, the rule for residents who commit crimes and peddle drugs should be one strike and you're out . . .

On March 28, 1996, President Clinton signed into law the "Housing Opportunity Program Extension Act of 1996" (Extender Act),⁷ which provided additional authority to housing agencies to provide stricter screening, lease enforcement, and eviction efforts. The Extender Act gave housing agencies new authority to deny occupancy on the basis of illegal use of a controlled substance, among other powers.⁸

Thereafter, in 1998 Congress passed the Quality Housing and Work Responsibility Act of 1998 (QHWRA).⁹ One of the purposes of QHWRA was to deregulate housing agencies and provide them more discretion to deal with criminal activity. Under QHWRA, a public housing lease could be terminated within a "reasonable time, not to exceed 30 days" for cases involving, *inter alia*, drug-related criminal activity. At least one judge has argued that Congress has

⁷ Housing Opportunity Program Extension Act of 1996, Pub. L. 104-120 (1996).

⁸ *Id.*

⁹ Quality Housing and Work Responsibility Act of 1998, Title V of HUD's FY1999 appropriations act, P.L. 105-276 (1988).

sought to occupy the field of evictions in public housing that are based upon drug-related criminal activity.¹⁰

Amendments to the 1937 United States Housing Act require that every public housing lease permit the agency to evict for illegal drug activity on or off public housing premises. Specifically, 42 U.S.C. §1437d(1)(6) provides that:

Each public housing agency shall utilize leases which . . . provide that . . . any drug-related criminal activity on or off such premises, engaged in by a public housing tenant . . . shall be cause for termination of tenancy.”

42 U.S.C. 1437d(1)(6) defines “drug-related criminal activity” as “*the illegal manufacture, sale, distribution, use, or possession . . . of a controlled substance (as such term is defined in Section 102 of the Controlled Substances Act, 21 U.S.C. 802.)*”

In 2001, HUD published revised regulations in the Federal Register in a Final Rule titled *Screening and Eviction for Drug Abuse and Other Criminal Activity*, 66 FR 28776 (May 24, 2001).¹¹ The revised regulations give housing agencies enhanced tools for adopting and implementing comprehensive screening and eviction policies for illegal drug use and other criminal activity.

¹⁰ See Judge Moore’s concurrence in *Housing Authority of Covington v. Turner*, 295 S.W.3d 123 (Ky. Ct. App. 2009), wherein he wrote: “there is no doubt that the federal law in this case occupies the field.” (Moore J concur. @128).

¹¹ Attached hereto as HDLI APPX-A

In particular, 24 C.F.R. §966.4(1)(5)(i)(B) states:

(B) Drug crime on or off the premises. The lease must provide that drug-related criminal activity engaged in on or off the premises by any tenant, member of the tenant's household or guest, and any such activity engaged in on the premises by any other person under the tenant's control, is grounds for the PHA to terminate tenancy. In addition, the lease must provide that a PHA may evict a family when the PHA determines that a household member is illegally using a drug or when the PHA determines that a pattern of illegal use of a drug interferes with the health, safety, or right to peaceful enjoyment of the premises by other residents.

Wisconsin's right to cure statute also compromises a housing agency's rights to evict persons involved with methamphetamine production on federally assisted property,¹² fleeing felons,¹³ and anyone else whose criminal activity threatens the health, safety, or right to peaceful enjoyment of the premises by other residents or agency staff residing on the premises.¹⁴ The right to cure renders the federal law and regulations a nullity.

Another regulation is noteworthy. 24 C.F.R. §966.4(1)(5)(vii) discusses HUD's formal assessments of public housing agencies:

. . . PHAs that have adopted policies, implemented procedures and can document that they appropriately evict any public housing residents who engage in certain activity detrimental to the public housing community receive points . . . This policy takes into account the importance of eviction of such residents to public housing communities and program integrity, and the demand for assisted housing by families who will adhere to lease responsibilities.

Assessment scores affect an agency's status with HUD and potentially future funding.

12 24 C.F.R. § 966.4(1)(5)(i)(A).

13 24 C.F.R. § 966.4(1)(5)(ii)(B).

14 24 C.F.R. § 966.4(1)(5)(ii)(A).

Respondent's Dwelling Lease

The HUD-mandated lease also is a part of this comprehensive scheme. In Section 5(Q) of the Respondent's Lease, titled "Resident Obligations (a provision mandated by HUD¹⁵)," the Respondent agrees not to engage in:

1. Any activity that threatens the health, safety or right to peaceful enjoyment of the premises, property or neighborhood by other residents, neighbors, or employees of the HACM; or
2. Any drug-related or violent criminal activity, on or off the public housing development's property ... or
3. Any illegal use of a controlled substance, or abuse of alcohol or use or controlled substance that in any way that interferes with the health, safety or right to peaceful enjoyment of the premises, property or neighborhood by other residents, neighbors or employees of the HACM.

Respondent's Brief, App. 5.

Next, Section 9(C)(1)-(3) of the Lease titled "Termination" states:

The HACM may evict the resident only by bringing a court action. The HACM termination notice shall be given 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 which constitutes a threat to other Residents or employees of the HACM or any drug related criminal activity on or off the development grounds;
3. Thirty (30) days in all other cases:

Respondent's Brief, App. 7. Thus, in cases involving criminal activity Congress and HUD have given housing agencies discretion to determine what constitutes a "reasonable" amount of time to

¹⁵ 24 C.F.R. §966.4(1)(5)(i)(B).

provide notice before initiating the eviction process. Wis. Stat. §704.17(2)(b) takes away that discretion.

Extensive HUD Guidance

HUD has issued a series of official federal notices explaining the breadth and importance of the “One Strike” policy for housing agencies. Shortly after the passage of the Extender Act, on April 12, 1996, HUD issued Notice PIH 96-16 (HA), titled "*One Strike and You're Out*" *Screening and Eviction Policies for Public Housing Authorities (HAs)*¹⁶," providing guidelines to assist housing agencies in the development and enforcement of stricter screening and eviction procedures. The following month, HUD followed with Notice PIH 96-27 (HA), titled "Occupancy Provisions of the Housing Opportunity Program Extension Act of 1996"¹⁷, describing, *inter alia*, the screening, lease, and eviction provisions that housing agencies must adopt as a result of the Extender Act.

These series of notices signify how extensive an effort the federal government has made to establish protocols to address the problem of rampant crime in public housing, including promoting the use of evictions to make public housing sites safer.

C. The Respondent’s Lease Addresses the Absurdity of the Result that the Respondent Seeks. The Law Does Not Permit an Absurdity.

The “absurd result” principle authorizes a court to ignore a statute's plain words in order to avoid the outcome those words

¹⁶ Attached hereto as HDLI APPX-B

¹⁷ Attached hereto as HDLI APPX-C

would require in a particular situation.¹⁸ The U.S. Supreme Court, other federal courts, and state courts refer to the absurd result principle with great frequency.¹⁹ Indeed, the highest courts of all 50 states, including the Wisconsin Supreme Court, have endorsed this principle.²⁰

To find that a right to cure is applicable to the circumstances of this case would produce an absurd result. Federal regulations prohibit housing agencies from admitting persons who previously were evicted from federally assisted housing for drug related activity, for a period of 3 years from the date of eviction.²¹ A right to cure permits an illegal drug user at least one free opportunity, if not more, to use an illegal drug on public housing property in violation of federal regulations and avoid an eviction. Other criminals enjoy the same “get-out-of-jail-free-card.”

Housing agencies are not allowed to admit into public housing a person whom the housing agency believes is *currently* engaged in illegal drug use.²² It would be absurd under the law to allow an illegal drug user to “cure” and remain in federally assisted housing, upon nothing more than his simple promise not to continue to engage in illegal drug use. This contradicts HUD regulations that would not allow this person to be admitted in the first place.

¹⁸ Dougherty, Absurdity And The Limits Of Literalism: Defining The Absurd Result Principle In Statutory Interpretation, American Univ. Law. Rev., Vol. 44:127 (1994) at 145.

¹⁹ See, e.g., *Rowland v. California Men's Colony*, 113 S. Ct. 716, 720, n.3 (1993).

²⁰ For the Supreme Court of Wisconsin, see *Reyes v. Greatway Ins. Co.*, 227 Wis. 2d 357, 376-377 (Wis. 1999) (“statutes must be interpreted in a way that avoids absurd or unreasonable results”). For a compilation of other state decisions, see *Dougherty*, *supra* n. 18 at 129, fn. 9.

²¹ See 24 C.F.R. §960.204(a)(1).

²² See 24 C.F.R. §960.204(a)(2).

These examples illustrate the absurdity of the application of a right to cure statute to federally assisted housing programs that, by federal statute and regulation, must deny admission, and evict, for criminal activity.

Not by accident, Respondent's Lease, which is *mandated* by federal regulations, takes care of this. Sections 9(C)(2) of the Lease provides an exception to the Wisconsin right to cure. The Lease states in pertinent part:

The HACM may evict the resident only by bringing a court action. The HACM termination notice shall be given 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 which constitutes a threat to other Residents or employees of the HACM or any drug related criminal activity on or off the development grounds;
3. Thirty (30) days in all other cases:

Respondent's Brief, App. 7.

Section 9(C)(2) is an exception to the statutory notice requirements and carves out a shorter notice for drug-related and other criminal activity and *allows the housing agency* to decide what time is "reasonable," depending on the facts of the lease violation. This exception parallels 24 C.F.R. §966.4(l)(5)(i)(B), and is consistent with Congress' grant of power to housing agencies to use their discretion in terminating leases for criminal activity. This lease provision avoids Respondent's absurd result.

D. Unlike Private Leases, Public Housing Leases Do Not Expire. Health and Safety Dictates That Public Housing Agencies Be Able to Evict As Soon As Illegal Drug Use is Discovered.

Unlike a private lease issued by a private landlord, a public housing lease never expires. It is critical that housing agencies be able to *meaningfully* use the tool of eviction as a viable means of controlling illegal drug activity, and otherwise maintain the safety of their developments. A housing agency is in the best position to determine the measures necessary to eliminate illegal drugs from its sites, and to judge how drug activity by its tenants affects other crime rates, such as theft, prostitution, and violence.

A housing agency may find that its duty to provide safe and secure housing for all residents is compromised when illegal drug users reside in its developments, when marijuana smoke wafts throughout the public housing building, and the housing agency does not have a means to remove the offender as quickly as the federal regulations allow. Since the eviction process may take several weeks or even months to conclude, delays exacerbate the problem.

Illegal drug users can be undesirable tenants for a variety of other reasons. While perhaps not applicable to all, illegal drug users who also are addicts may obtain money illegally to support their habit; their subsidized rent may help to fund the illegal habit; they may prey on the elderly and disabled to fund their habit; they may associate with other illegal drug users; they may invite illegal drug dealers onto public housing property; and they may not care about the habitability of their living environment, as long as their illegal habit is satisfied.

Perhaps the best way to combat illegal drugs is to evict illegal drug users as soon as they are discovered. If a housing agency is compelled to offer a right to cure that can be satisfied by simply promising to refrain from illegal activity during the short five-day period set forth in the cure statute,²³ the agency's other residents, staff, and property remain exposed to the potential ills of illegal drug use for an indeterminate amount of time, until the agency is fortunate enough to "catch" the resident in a subsequent wrongdoing.

As recognized by the District of Columbia Court of Appeals in *Scarborough v. Winn Residential L.L.P.*,²⁴ permitting a right to cure significantly compromises the housing agency's authority to fight rampant drug problems in its developments and to fulfill its mission to provide safe and decent housing for low-income people.²⁵

²³ Brief of Appellant @ p. 25.

²⁴ *Scarborough v. Winn Residential L.L.P.*, 890 A.2d 249 (D.C. 2006).

²⁵ *Id.*@257. Respondent attempts to distinguish *Scarborough* by, *inter alia* recounting the "bad facts" relating to the criminal conduct in that case. (Respondent's Brief @39-40). To the extent that Respondent is suggesting that his own criminal activity is not "serious" enough to fit within the holding in *Scarborough*, HDLI does not deem it appropriate for HDLI, Respondent, or the courts, to dictate to a housing agency which types of criminal activity can be cured. Congress and HUD have given the housing agency the authority to decide what criminal activity in its public housing program cannot be cured.

IV. CONCLUSION

For the foregoing reasons, *Amicus Curiae* Housing and Development Law Institute respectfully requests that this Court overturn the 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,

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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), Wis. Stat. for a brief and appendix produced with a proportional serif font. The length of this brief is 12 pages; 2,944 words.

Dated and signed at Washington, DC this 24st day of November, 2014.

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ELECTRONIC FILING CERTIFICATION

I hereby certify that I have submitted an electronic copy of this Brief which complies with the requirements of § 809.19(12), Wis. Stat. I further certify that the electronic Brief is identical in text, content and format to the printed forms of the Brief filed as of this date.

Dated and signed at Washington, DC this 24th day of November, 2014.

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**CERTIFICATE OF THIRD-PARTY COMMERCIAL
DELIVERY AND CERTIFICATION OF MAILING**

I, Wilhelmina Taylor, herein certify that I am employed by the City of Milwaukee as a Legal Assistant, assigned to duty in the City Attorney's Office, located at 841 North Broadway, Room 1018, Milwaukee, Wisconsin 53202; that on November 24, 2014, I sent twenty-two (22) copies of the Brief of *Amicus Curiae* Housing and Development Law Institute 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 on November 24, 2014, three (3) copies of the Brief of *Amicus Curiae* Housing and Development Law Institute in the above-entitled case, were mailed 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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