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## Minimum Rents and Hardship Exemption from Payment

*By Fred Fuchs*

Ms. Smith comes to your office in June. She lives in public housing, has been diagnosed with cancer, and has a pending claim for SSI benefits. At present she has absolutely no income, other than occasional small family loans and Food Stamps. Ms. Smith tells you that the public housing authority ("PHA") has a minimum rent of \$50, and that is her current monthly rent. Ms. Smith has been unable to pay the \$50 rent for April and May. She has received a fourteen day notice of lease termination from the PHA for failure to pay the \$50 minimum rent. She does not expect a final decision on her appeal of the denial of her claim for SSI for another six months. She tells you that she simply cannot pay the \$50 minimum rent. She seeks your help to avoid eviction.

Unfortunately, such cases are all too common for clients who live from paycheck to paycheck and whose lives are suddenly devastated because of a health or family emergency. With the

passage of the Quality Housing and Work Responsibility Act of 1998<sup>1</sup>, Congress required that PHAs and owners of project based Section 8 housing charge minimum rents.<sup>2</sup> Tenants in public housing, the Section 8 Housing Choice Voucher Program, and project-based Section 8 housing are required to pay the minimum rent if that amount is higher than the rent the tenant would be required to pay based on thirty percent of monthly adjusted income or ten percent of gross monthly income.<sup>3</sup> For example, if thirty percent of the family's adjusted monthly income is \$45, ten percent of gross monthly income is \$35, and the PHA has established a minimum rent of \$50, the tenant's monthly rent, prior to adjustment for any utility allowance for tenant-paid utilities, would be set at \$50.

Congress further directed that PHAs establish minimum rents for public housing and the Section 8 Housing Choice Voucher Program in an amount of not more than \$50 per

month.<sup>4</sup> Most PHAs in Texas have opted to set the minimum rent at either \$25 or \$50.<sup>5</sup> Project-based Section 8 landlords, however, do not have any authority to set the amount of the minimum rent; Congress gave the United States Department of Housing and Urban Development ("HUD") that authority.<sup>6</sup> HUD subsequently established a \$25 minimum rent for tenants living in project-based Section 8 housing.<sup>7</sup> Project-based landlords must charge \$25 as the minimum rent; they can neither increase nor decrease the amount.

Notwithstanding that the minimum rent law has been effective for several years, some PHAs and project-based landlords have misinterpreted the minimum rent requirement and its interaction with utility allowances for tenant-paid utilities.<sup>8</sup> The tenant rent in public housing and project-based Section 8 is the total tenant payment<sup>9</sup> minus any utility allowance for tenant-paid utilities.<sup>10</sup> Thus, for example, if the total tenant payment for a family in public housing or project-based Section 8 housing is the minimum rent of \$25 per month and the utility allowance on the apartment for tenant-paid utilities is \$65, the family will actually make no monthly payment to the PHA or project-based Section 8 landlord. In this instance, the family will receive a monthly utility reimbursement check of \$40 to be used to pay utilities.

Although rent is calculated differently under the Section 8 Housing Voucher Program, the principle is the same. Under the Voucher Program, PHAs are required to pay a monthly housing assistance payment on behalf of a family to a landlord that is equal to the lower of (1) the payment standard for the family minus the total tenant payment, or (2) the gross rent minus the total tenant payment.<sup>11</sup> Thus, when the rent to the owner plus the utility allowance (the gross rent) is less than the payment standard, a family paying minimum rent may be entitled to a monthly utility reimbursement.<sup>12</sup> To illustrate:

Payment Standard	=	\$1,000
Rent to Landlord	=	\$ 800
Utility Allowance	=	\$ 150
Gross Rent	=	\$ 950
Minimum Rent	=	\$ 50
30% Monthly Adjusted Income	=	\$ 35
10% Gross Monthly Income	=	\$ 20

Here, because the gross rent is less than the payment standard, the PHA calculates the housing assistance payment on the basis of the gross rent.<sup>13</sup> In this instance, the PHA will pay a housing assistance payment of \$900 (\$950 - \$50). The total tenant payment here is the minimum rent because it is more than either thirty percent of the family's adjusted monthly income or ten percent of the family's gross monthly income. Because the rent to the landlord is \$800 and the housing assis-

tance payment is \$900, the PHA will pay the tenant the \$100 difference as a utility reimbursement to help pay for the cost of the tenant-paid utilities.

Although Congress mandated minimum rents, it recognized that situations would arise in which a family would be unable to pay the minimum rent. Thus, it created an exception for hardship circumstances.<sup>14</sup> Congress required that a hardship exemption be granted to families unable to pay the minimum rent because of financial hardship in the following circumstances: (1) the family has lost eligibility for or is waiting on an eligibility determination for a federal, state or local assistance program; (2) the family would be evicted as a result of the minimum rent requirement; (3) the income of the family has decreased because of changed circumstances, including loss of employment; (4) a death in the family has occurred; and (5) such other circumstances determined by HUD or the PHA.<sup>15</sup> When HUD published implementing regulations, it did not expand the list of circumstances but tracked the hardship circumstances established by Congress.<sup>16</sup> PHAs and project-based Section 8 landlords, are free, however, to establish other circumstances in their local policies.<sup>17</sup>

If a family requests a financial hardship exemption, the PHA or project-based Section 8 landlord must suspend the minimum rent beginning the month following the family's request.<sup>18</sup> The suspension continues until the PHA or landlord determines whether a hardship exists and whether it is temporary or long term.<sup>19</sup> In addition, PHAs are prohibited from evicting the family for nonpayment of the minimum rent during the ninety days following the family's request for a hardship exemption even if the PHA determines that the family does not qualify for a financial hardship exemption.<sup>20</sup> Unfortunately, this same ninety day protection does not apply to project-based Section 8 landlords who determine that the family does not qualify for an exemption.<sup>21</sup>

It is not perfectly clear under the regulations whether a family is protected from eviction for any unpaid minimum rent that came due before the family requested an exemption.<sup>22</sup> But, the most reasonable interpretation is that the family is protected for the ninety day period. The family cannot avail itself of the hardship exemption until the month following the request, but the eviction protection prohibits eviction for the ninety day period – even for unpaid minimum rent due prior to the request for a hardship exemption. This makes sense because most families will first request a hardship exemption only after they have defaulted on paying the minimum rent.

For instance, in Ms. Smith's case, she will clearly be protected from eviction for nonpayment of the minimum rent that comes due during the ninety day period following her request for a hardship exemption. But, the ninety day window of pro-

tection also seems to prohibit her eviction for ninety days for nonpayment of the minimum rent that came due prior to the date of her request.<sup>23</sup> Regardless, however, of whether her request for a hardship exemption is granted, she will remain liable for the minimum rent due before the date of her request. Thus, after the ninety day period, she will have to pay the minimum rent due before the date of her request even if she is granted a financial hardship exemption.

Both PHAs and project-based Section 8 landlords are required to promptly determine whether the tenant qualifies for a hardship exemption and whether the hardship is temporary or long term.<sup>24</sup> If the PHA or project-based Section 8 landlord determines that the hardship is long term, it must exempt the family from the minimum rent requirement so long as the hardship continues.<sup>25</sup> No time limits exist. Also, when the hardship is long term, the family is not required to pay the back minimum rent when the hardship ends.<sup>26</sup> Thus, for example, in Ms. Smith's case, if the PHA determines it will take six months before a final determination on her eligibility for SSI benefits, this is a long term hardship. She will not have any liability to reimburse the PHA once she begins receiving SSI benefits. Her only liability is for the minimum rent that came due before the date of her hardship exemption request.

On the other hand, if the PHA determines that the financial hardship for a public housing tenant is temporary, it must reinstate the minimum rent after the ninety days and offer the family a reasonable repayment agreement.<sup>27</sup> Similarly, if a project-based Section 8 landlord or the PHA under the Section 8 Voucher Program determines that the financial hardship is temporary, it may not impose the minimum rent during the ninety day period following the date of the family's request.<sup>28</sup> At the end of the ninety days, however, the PHA or subsidized landlord must reinstate the minimum rent from the beginning of the suspension and offer the tenant a reasonable repayment agreement.<sup>29</sup> (The regulations do not specify whether that payment agreement must include amounts due prior to the hardship exemption request.)

A different result follows if the PHA or subsidized landlord determines the family does not qualify for a hardship exemption. In that case, the minimum rent is reinstated retroactively and the family must pay the back rent on terms established by the PHA or subsidized landlord.<sup>30</sup> The regulations do not require a repayment agreement in this instance.<sup>31</sup> A public housing family may use the grievance procedure to challenge the PHA's denial of a request for a hardship exemption in public housing or the Section 8 Housing Voucher Program.<sup>32</sup> Project-based Section 8 tenants do not have access to a similar grievance procedure. In either case, however, a tenant could challenge an arbitrary decision by the landlord or the PHA. The tenant could

either file suit affirmatively or raise as an affirmative defense to eviction the failure of the PHA or subsidized landlord to grant an exemption.<sup>33</sup>

Ms. Smith's case is not hopeless. She should not simply be told that she needs to pay the rent and shown the door. She should immediately request a financial hardship exemption from the minimum rent. If the PHA or project-based Section 8 landlord ignores the request, Ms. Smith should either sue affirmatively or defend the eviction on the grounds that she qualifies for the financial hardship exemption. Congress provided this important protection for the most vulnerable of our citizens, but it is of no benefit unless advocates use that statutory protection on behalf of their clients.

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#### Endnotes

1. Pub. L. No. 105-276, 112 Stat.2461, 2518 (October 21, 1998) (codified in scattered sections of Title 42 of the United States Code).
2. See 42 U.S.C. A. § 1437a(a)(3) (West 2003).
3. See *id.*
4. *Id.*; 24 C.F.R. § 5.630(a)(2) (2004).
5. This observation is based on my personal experience with the PHAs in our program's geographical service area.
6. 42 U.S.C.A. § 1437a(a)(3)(ii) (West 2003).
7. See 24 C.F.R. § 5.630(a)(3) (2004).
8. For example, our program dealt with a PHA that was not giving minimum rent tenants the benefit of a utility allowance. In that case, two clients each received rent reimbursements from the PHA of over \$900, and the PHA adjusted its policy. The PHA had misinterpreted the law as requiring minimum rent tenants to pay the \$50 minimum rent without adjustment for a utility allowance for tenant-paid utilities.
9. See *id.* at § 5.628(a) (definition of total tenant payment).
10. *Id.* at § 5.634(a) (project-based Section 8 programs); § 960.253(c) (3) (public housing). Although the rent share paid by a Section 8 voucher participant is computed very differently, the same principle applies. When the rent to the owner plus the utility allowance is less than the payment standard, minimum rent tenants may be entitled to a utility reimbursement. See *id.* at § 982.514, § 982.505(b) (Section 8 Housing Voucher Program).
11. *Id.* at § 982.505(b).
12. See *id.* at § 982.514, § 982.505(b) (Section 8 Housing Voucher Program).

13. *See id.* at § 982.505(b).
14. *See* 42 U.S.C.A. § 1437a(a)(3)(B) (West 2003).
15. *Id.*
16. *See* 24 C.F.R. § 5.630(b) (2004). HUD has provided additional guidance on the minimum rent hardship exemption in its handbooks governing the programs. *See* U.S. Dept. of Housing and Urban Development, *HUD Handbook 4350.3: Occupancy Requirements of Subsidized Multifamily Housing Programs*, at chp.5, para. 5-26-D (May 2003) (project-based Section 8 landlords); *Public Housing Occupancy Guidebook*, at chp. 13, para. 13.1 (June 2003) (public housing program); *Housing Choice Voucher Program Guidebook*, 7420.10G, at chp. 6, para. 6-4 (April 2001) (Section 8 Housing Voucher Program).
17. *See* 24 C.F.R. § 5.630(b)(1)(v) (2004).
18. *Id.* at § 5.630 (b)(2)(i) (public housing); § 5.630(b)(2)(ii) (all Section 8 programs). Public housing authorities must also “advise any family who pays the minimum rent of the right to request the exemption.” U. S. Department of Housing and Urban Development, *Public Housing Occupancy Guidebook*, at chp. 13, para. 13.1 (June 2003). Thus, if the PHA has not advised a family paying the minimum rent in public housing of the right to request a hardship exemption, the family has a defense to failure to pay based on the failure of the PHA to advise the family of this important right. The *Housing Choice Voucher Program Guidebook* and *HUD Handbook 4350.3: Occupancy Requirements of Subsidized Multifamily Housing Programs* do not include a similar notification provision for the Section 8 Voucher Program and the Project-Based Section 8 Program.
19. *Id.*
20. *See id.* at § 5.630(b)(2)(i) (C).
21. *See id.*; § 5.630(b)(2)(ii) (directing that project-based Section 8 landlords suspend the minimum rent until they determine whether a qualifying financial hardship exists and whether it is temporary or long term but imposing no mandatory ninety day suspension period.).
22. *See id.* (“The PHA may not evict the family for nonpayment of minimum rent during the 90-day period beginning the month following the family’s request for a hardship exemption.”).
23. *See id.*
24. *Id.* at § 5.630(b)(2)(i)(B) (public housing); § 5.630(b)(2)(ii)(B) (all Section 8 programs).
25. *Id.* at § 5.630(b)(2) (iii)(B).
26. *See id.*
27. *Id.* at § 5.630(b)(2)(i)(D).
28. *Id.* at § 5.630(b)(2)(ii)(C).
29. *Id.*
30. *Id.* at § 5.630(b)(2)(iii).
31. *See id.*
32. *Id.* at 5.630(b)(3).
33. The Supremacy Clause of the United States Constitution requires that state courts consider federal claims or defenses. *See Flynn v. 3900 Watson Place, Inc.*, 63 F. Supp.2d 18, 23 (D.D.C. 1999); *Fayyumi v. City of Hickory Hills*, 18 F. Supp.2d 909, 912 (N.D. Ill. 1998); *Rodriguez v. Westhab*, 833 F. Supp. 425 (S.D. N.Y. 1993).