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### Protecting the Unsophisticated Tenant: A Call for a Cap on Late Fees in the Housing Choice Voucher Program

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# **PROTECTING THE UNSOPHISTICATED TENANT: A CALL FOR A CAP ON LATE FEES IN THE HOUSING CHOICE VOUCHER PROGRAM**

*Wendy Tolson Ross\**

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## I. INTRODUCTION

Ms. Pamela Carter was a participant in the Housing Choice Voucher Program<sup>1</sup> (“Voucher Program”) administered locally by the Lynn Housing Authority.<sup>2</sup> Ms. Carter, a disabled mother of two children, moved from her apartment in Lynn, Massachusetts, pursuant to a negotiated settlement with her landlord, who, prior to the resolution, had sought to evict her.<sup>3</sup> As part of the settlement, Ms. Carter’s landlord agreed to return her security deposit and waive all existing claims against her.<sup>4</sup> However, three months later Ms. Carter’s landlord brought a small claims action against her seeking \$2000 in waste damages.<sup>5</sup> A housing court magistrate found in favor of Ms. Carter’s landlord and awarded him \$1440 in waste damages.<sup>6</sup> When the Lynn Housing Authority received notice of the judgment, it terminated Ms. Carter from the Voucher Program for failing to maintain her

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<sup>1</sup> The Voucher Program is a federal program administered by the U.S. Department of Housing & Urban Development (“HUD”) and locally by Public Housing Authorities (“PHAs”) that helps low-income participants afford housing. See U.S. Dep’t of Hous. & Urban Dev., Housing Choice Vouchers Fact Sheet, [http://www.hud.gov/offices/pih/programs/hcv/about/fact\\_sheet.cfm](http://www.hud.gov/offices/pih/programs/hcv/about/fact_sheet.cfm) (last visited Mar. 22, 2010) [hereinafter HUD Fact Sheet]. HUD provides funding to PHAs, who in turn provide housing vouchers to participants. *Id.* Participants are then charged with finding suitable housing with a landlord who will accept the housing voucher. *Id.* The PHA pays the amount the housing voucher is worth directly to the landlord and the participant makes up any potential difference. *Id.* There are two types of programs in the Voucher Program: tenant-based and project-based. 24 C.F.R. § 982.1(b) (2009). The project-based program is for specific properties (usually HUD owned or HUD subsidized properties). *Id.* In the tenant-based program, the tenant is given a voucher and allowed to choose housing with any private landlord who will accept the housing voucher. *Id.* HUD provides guidelines for PHAs in the administration of both programs. See U.S. DEP’T OF HOUS. & URBAN DEV., HUD HANDBOOK 4350.3: OCCUPANCY REQUIREMENTS OF SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS (2009) (detailing regulations for the HUD project-based programs) [hereinafter HUD HANDBOOK]; U.S. DEP’T OF HOUS. & URBAN DEV., HOUSING CHOICE VOUCHER PROGRAM GUIDEBOOK 7420.10g (2001) (detailing regulations for tenant-based programs) [hereinafter HUD GUIDEBOOK]. For purposes of this article, all references to the Voucher Program are in regard to the tenant-based Voucher Program unless otherwise indicated.

<sup>2</sup> Carter v. Lynn Hous. Auth., 880 N.E.2d 778, 779 (Mass. 2008).

<sup>3</sup> *Id.* at 781-83.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 781.

obligations.<sup>7</sup>

Unfortunately for Ms. Carter and other voucher tenants, the U.S. Department of Housing & Urban Development (“HUD”) insufficiently protects voucher tenants from unsavory landlords who can take advantage of voucher tenants’ limited sophistication. From the outset, a voucher tenant like Ms. Carter is placed in a difficult position. The voucher tenant is usually not savvy in negotiating lease terms and has little bargaining power to change conditions that are to his or her disadvantage.<sup>8</sup> In many cases, the voucher tenant will enter into an agreement that provides for significant late fees. These late fees can accumulate quickly and make it difficult for voucher tenants to remain up to date in rent payments. As a result, a landlord can pursue eviction proceedings culminating in an eviction judgment.<sup>9</sup> The judgment will then be reported to the local Public Housing Authority (“PHA”) which will remove the voucher tenant from the Voucher Program. HUD should protect voucher tenants from such abuses by revising its regulations to limit late fees that can be charged to voucher tenants.

This Article will first examine the current law on late fees as it pertains to rent in residential leases; second, it will examine why the current policy for the Voucher Program does not adequately protect the voucher tenant; and third, this Article will advocate that HUD should change the current policy in place, and specifically limit the amount of late fees a landlord may charge for late payment of rent under the Voucher Program.<sup>10</sup>

Part II of this Article will review the history and purpose of the Voucher Program. Part III will examine the existing HUD policy on late fees in Voucher Program leases. Part IV will discuss the protections available under state law while Part V will discuss the

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<sup>7</sup> *Id.*

<sup>8</sup> “Commercial and residential leases historically have been treated differently because it was thought the commercial tenants had more sophistication and bargaining power than their residential counterparts.” Troy S. Martin III, Recent Developments, *Landlord Tenant—Implied Warranty Of Suitability—Landlord Implicitly Warrants That Commercial Premises Suited For Intended Use; Tenant’s Duty To Pay Rent Dependent Upon Landlord Honoring Implied Warranty*, 20 ST. MARY’S L. J. 213, 215 (1988). “Residential tenant[s] [are] often placed in take-or-leave position due to lack of sophistication.” *Id.* (citing *Javins v. First Nat’l Realty Corp.*, 428 F.2d 1071, 1079 (D.C. Cir. 1970)).

<sup>9</sup> A landlord may evict a voucher tenant for a “[s]erious violation (including but not limited to failure to pay rent or other amounts due under the lease) or repeated violation of the terms and conditions of the lease.” 24 C.F.R. § 982.310(a)(1) (2009).

<sup>10</sup> A forthcoming article will examine late fees under the Texas eviction law of the Texas Property Code for non-voucher tenants.

federal protections afforded voucher tenants. Part V will also examine the Federal Debt Collection Practices Act (“FDCPA”) impact on voucher tenants. Additionally, Part V will analyze the potential liability of PHAs to voucher tenants under the FDCPA in the wake of the Second Circuit Court of Appeals decision in *Romea v. Heiberger & Associates*.<sup>11</sup> Part VI of this Article will discuss arguments against a cap on late fees. Finally, Part VII will assert that voucher tenants need more protections and urge that a change in the policy should be implemented. Part VIII will conclude by reiterating the advantages to implementing caps on late fees.

## **II. HISTORY AND PURPOSE OF THE HOUSING CHOICE VOUCHER PROGRAM**

The public housing program was established by the federal government under the U.S. Housing Act of 1937 (the “Housing Act”).<sup>12</sup> The Housing Act “was originally intended as a work program and as a way to house people who were temporarily unemployed, or employed at low wages, during the Great Depression.”<sup>13</sup> The Housing Act endeavored to accomplish these goals by providing funding to local governments to build housing for lower-income Americans.<sup>14</sup>

One of the results of the public housing program is the Voucher Program.<sup>15</sup> The Voucher Program aims to assist “very low-income families, the elderly, and the disabled to afford decent, safe, and sanitary housing in the private market.”<sup>16</sup> It is administered locally by PHAs<sup>17</sup>

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<sup>11</sup> See 988 F. Supp. 712 (S.D.N.Y. 1997).

<sup>12</sup> See United States Housing Act of 1937, 42 U.S.C. § 1437 (2006).

<sup>13</sup> Council of Large Pub. Hous. Auth., Quick Facts on Public and Assisted Housing, <http://www.clpha.org/page.cfm?pageID=3> (last visited Apr. 10, 2010) [hereinafter CLPHA Quick Facts].

<sup>14</sup> *Id.*

<sup>15</sup> HUD Fact Sheet, *supra* note 1.

<sup>16</sup> *Id.* Approximately 1.8 million families are in the Voucher Program. Eric Dunn, Ashley Fluhrer Greenberg, & Anisha Sundarraj, *Housing Choice Voucher Termination Hearings: Best Practices for Public Housing Agencies*, 42 CLEARINGHOUSE REV. 134, 134 (2008).

<sup>17</sup> The HUD website describes PHA responsibilities as follows:

(1) On-going functions: (a) Assure compliance with leases. The lease must be signed by both parties; (b) Set other charges (e.g., security deposit, excess utility consumption, and damages to unit); (c) Perform periodic reexaminations of the family’s income at least once every 12 months; (d) Transfer families from one unit to another, in order to correct over/under crowding, repair or renovate a dwelling, or because of a resident’s request to be transferred; (e) Terminate leases when necessary; and (f) maintain the development in a decent, safe, and sanitary condition.

and is federally administered by HUD.<sup>18</sup> Unlike other housing programs, the voucher tenant is given a housing voucher and required to independently find suitable housing.<sup>19</sup> The voucher tenant is required to locate an apartment, town home, or house where the landlord will accept the housing voucher and HUD stipulations.<sup>20</sup> While voucher tenants have significant leeway in choosing housing, “rental units must meet minimum standards of health and safety, as determined by the PHA.”<sup>21</sup> The landlord is directly paid a subsidy from the PHA, and the tenant is responsible for the balance of the rent.<sup>22</sup>

### III. CURRENT HUD REGULATIONS AND POLICIES

Under the current law, the Voucher Program requires that the landlord and voucher tenant negotiate and sign a written lease.<sup>23</sup> The lease may be a standardized form if the landlord typically uses one, but the standardized lease must include certain HUD required provisions.<sup>24</sup>

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U.S. Dep’t of Hous. & Urban Dev., HUD’s Public Housing Program, <http://www.hud.gov/renting/phprog.cfm> (last visited Apr. 10, 2010).

<sup>18</sup> HUD is a federal agency charged with regulating rules, and dispersing and administering funds for low-income housing. *Id.* “HUD furnishes technical and professional assistance, planning, developing and managing these developments.” *Id.* See also HUD Fact Sheet, *supra* note 1.

<sup>19</sup> HUD Fact Sheet, *supra* note 1.

<sup>20</sup> *Id.* HUD requires all PHAs to inspect all proposed housing and evaluate whether the rent is reasonable. See 24 C.F.R. § 982.305 (2009).

<sup>21</sup> HUD Fact Sheet, *supra* note 1.

<sup>22</sup> *Id.* The subsidy amount is determined by the PHA and is based on a set formula provided by HUD. *Id.* The formula is based on the family’s annual gross income. *Id.* This gross income: may not exceed 50% of the median income for the country or metropolitan area in which the family chooses to live. By law, a PHA must provide 75 percent of its voucher to applicants whose incomes do not exceed 30 percent of the area median income. Median income levels are published by HUD and vary by location.

*Id.* The “housing voucher family must pay 30% of its monthly adjusted gross income for rent and utilities, and if the unit rent is greater than the payment standard the family is required to pay the additional amount.” *Id.* In determining the subsidy amount that will be paid, “[t]he PHA calculates the maximum amount of housing assistance allowable. The maximum housing assistance is generally the lesser of the payment standard minus 30% of the family’s monthly adjusted income or the gross rent for the unit minus 30% of the family’s monthly adjusted income.” *Id.*

<sup>23</sup> 24 C.F.R. § 982.308(b)(1) (2009); HUD Fact Sheet, *supra* note 1. If the tenant requests, HUD must go out and help negotiate the rent with the owner. 24 C.F.R. § 982.506 (2009). However, the tenant is usually left to negotiate the terms on their own.

<sup>24</sup> 24 C.F.R. § 982.308(b)(2) (“If the owner uses a standard lease form for rental to unassisted tenants in the locality or the premises, the lease must be in such standard form (plus the HUD-prescribed tenancy addendum). If the owner does not use a standard lease form for rental to unassisted tenants, the owner may use another form of lease, such as a PHA model lease (including the HUD-prescribed tenancy addendum).”); 24 C.F.R. § 982.308(f)(2) (“All provisions in the HUD-required

The landlord may also choose to use the model lease that is used by the local PHA for its public housing units.<sup>25</sup> Under the Voucher Program, the tenant must sign a lease for a period of at least one year.<sup>26</sup> Once the lease has been signed, the PHA reviews the contents of the lease “to determine if the lease complies with state and local law.”<sup>27</sup> Upon reviewing the lease, “[t]he PHA may decline to approve the tenancy if the PHA determines that the lease does not comply with state or local law.”<sup>28</sup> Additionally, the PHA cannot approve any lease that calls for rent that is unreasonable given the relative location and market of the residence.<sup>29</sup>

The existing regulations and HUD policy allow landlords to charge voucher tenants late fees provided that such fees are permissible under local or state laws.<sup>30</sup> While there are some minor protections for voucher tenants, the existing HUD regulations do not adequately protect voucher tenants from excessive late fees.<sup>31</sup> Furthermore, there are no specific guidelines provided for PHAs in assessing fees landlords propose to charge, other than that they must be allowed under state and local law.<sup>32</sup> Thus, many leases are not thoroughly scrutinized and are summarily approved by the local PHAs.<sup>33</sup>

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tenancy addendum must be added word-for-word to the owner’s standard form lease that is used by the owner for unassisted tenants. The tenant shall have the right to enforce the tenancy addendum against the owner, and the terms of the tenancy addendum shall prevail over any other provisions of the lease.”). The Housing Assistance Payment (“HAP”) contract required by HUD “will contain the owner’s certification that if the owner uses a standard lease form for rental to unassisted tenants, the lease is in such standard form.” 24 C.F.R. § 982.308(b)(2).

<sup>25</sup> 24 C.F.R. § 982.308(b)(2). The model lease is a lease that is used by PHAs in public housing units. See HUD HANDBOOK, *supra* note 1, at ch. 6, ¶ 2 (detailing which programs require the use of the HUD model lease).

<sup>26</sup> 24 C.F.R. § 982.309 (2009).

<sup>27</sup> 24 C.F.R. § 982.308(c).

<sup>28</sup> *Id.*

<sup>29</sup> 24 C.F.R. § 982.507 (2009).

<sup>30</sup> In addition to the late fees that landlords can charge voucher tenants for their late payment of rent, landlords may charge PHAs fees for late payment of the PHA’s portion of rent under the HAP. See 24 C.F.R. § 982.451 (2009). However, landlords may not evict tenants for late payment caused by the PHA. 24 C.F.R. § 982.310(b) (2009).

<sup>31</sup> Landlords must attach the HUD tenancy addendum to the lease and certify that that lease is the standard lease that they use with other non-voucher tenants. See 24 C.F.R. § 982.308; HUD GUIDEBOOK, *supra* note 1, at ch. 8, ¶ 11. Additionally, landlords are prohibited from discriminating against the tenant. HUD GUIDEBOOK, *supra* note 1, at ch. 11, ¶ 13.

<sup>32</sup> See 24 C.F.R. § 982.308(c).

<sup>33</sup> Many of the leases are reviewed by their HUD caseworker, who is not an attorney. Therefore, without specific caps in the HUD regulations, the caseworker might not know what is excessive under state law.

The current regulations and HUD policies afford voucher tenants less protection than other public housing tenants.<sup>34</sup> For example, HUD limits the amount of late fees that landlords can charge individuals in certain HUD project-based programs to thirty dollars per month.<sup>35</sup> Additionally, in other HUD programs, landlords are prohibited from charging any late fees at all.<sup>36</sup> Yet, for the voucher tenant, there is no specific dollar limit or prohibition on late fees. Finally, and perhaps most importantly, a landlord may not evict a tenant in the HUD property based program for a failure to pay late fees.<sup>37</sup> Thus, voucher tenants are more susceptible to large losses due to late fees than those in other HUD programs.

### *A. The Problem*

Current regulations permitting landlords to charge voucher tenants exorbitant late fees leave voucher tenants particularly susceptible to hardships. When they fall behind on their rent the landlord will seek to evict the tenant and bring a claim for back rent, often including late fees in the calculation, in an administrative or judicial court.<sup>38</sup> Once the landlord seeks an eviction action and claim for past due rent, it is reported to the local PHA.<sup>39</sup> Subsequently, the PHA will terminate the voucher tenant's assistance unless the back due rent and late fees are paid. As a result of being evicted and removed from the Voucher Program, the voucher tenant could be forced to move in with a relative, live in a shelter, reside in substandard housing, or even become homeless.<sup>40</sup> Therefore, seemingly inconsequential late fees<sup>41</sup> can amount

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<sup>34</sup> HUD outlines what clauses are prohibited in leases to tenants in HUD's project-based programs. HUD HANDBOOK, *supra* note 1, at ch. 6, ¶ 1.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* Landlords are prohibited from charging late fees to tenants in the Section 202/8, Section 202 PAC, and Section 811 PRAC programs. *Id.* These tenants may not be evicted for late payment of rent. *Id.* at ch. 6, ¶ 23(F).

<sup>37</sup> *Id.*

<sup>38</sup> Before a landlord may evict a voucher tenant, they must first provide the tenant with notice and a right to a conference with the landlord before an eviction suit is filed. HUD GUIDEBOOK, *supra* note 1, at ch. 15, ¶ 15(4).

<sup>39</sup> *See, e.g.,* *Stevenson v. Willis*, 579 F. Supp. 2d 913, 916 (N.D. Ohio 2008); *Carter v. Lynn Hous. Auth.*, 880 N.E.2d 778, 781 (Mass. 2008).

<sup>40</sup> Nelson Mock, Note, *Punishing the Innocent: No Fault Eviction in Public Housing Tenants for the Actions of Third Parties*, 76 TEX. L. REV. 1495, 1499 (1998).

<sup>41</sup> For example, a lease may provide for an initial fee of thirty or fifty dollars and then ten dollars per-day.



to a significant sum and cause real havoc on the lives of the voucher tenant.<sup>42</sup>

### *B. Need for Protection*

A voucher tenant faces a host of problems when entering into an agreement with a landlord. Generally, landlords use attorney drafted forms and leases.<sup>43</sup> These prepared forms and leases are tailored for the protection of the landlord. The use of a prepared lease minimizes the landlord's financial loss and time to the detriment of the voucher tenant because "[f]orm contracts benefit the . . . drafting parties by increasing organizational efficiency. However, the efficiency benefits are one-sided because, 'where the non-drafting party is a consumer[.]. . . the advantages of a form agreement are negligible while the disadvantages are numerous.'"<sup>44</sup> Furthermore the leases tend to use boilerplate language that is foreign to most tenants.<sup>45</sup> Due to the use of boilerplate language and disparities in bargaining power, landlords are in a superior position over the average voucher tenant.

Housing leases contain foreign legal terms that most voucher tenants are unable to read or understand.<sup>46</sup> Many voucher tenants do not have the means to hire an attorney to explain lease terms. Furthermore, "[l]egal obligations commonly aris[ing] from standard form terms in the absence of a substantial understanding and a substantially unconstrained choice . . . are clearly not best understood as voluntary

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<sup>42</sup> Mock, *supra* note 40. A landlord may evict the tenant under the lease for a "[s]erious violation (including but not limited to failure to pay rent or other amounts due under the lease) or repeated violation of the terms and conditions of the lease." 24 C.F.R. § 982.310(a)(1) (2009). Therefore, chronic late payment of rent could result in eviction for the tenant. See Kristin Siegesmund & Leah Weaver, *Minnesota Statutes Chapter 325N: A Model for Substantive Consumer Protection*, 33 WM. MITCHELL L. REV. 223, 236 (2006) ("Such a situation can—and does—quickly lead to eviction and homelessness.").

<sup>43</sup> See Fred Fuchs, *Defending Against Eviction from Public and Federally Subsidized Housing*, 39 CLEARINGHOUSE REV. 302, 304 (2005) ("[S]ubsidized owners use form leases and do not bargain over the terms of the lease.").

<sup>44</sup> David I. Blower, *Colorado HB 1061 and Advocating for The End of Caveat Emptor In Residential Lease*, 78 U. COLO. L. REV. 957, 978 (2007) (citing Nancy S. Kim, *Evolving Business and Social Norms and Interpretation Rules: The Need for a Dynamic Approach to Contract Disputes*, 84 NEB. L. REV. 506, 547-48 (2005)).

<sup>45</sup> *Id.*

<sup>46</sup> A consumer's poor command of English and reading ability limits his understanding when it comes to other legal documents such as consumer disclosures. See Siegesmund & Weaver, *supra* note 42, at 228.

obligations.”<sup>47</sup> Typical residential leases “involve[] gross inequality of bargaining power between landlord and tenant, making the lease a virtual adhesion contract.”<sup>48</sup> Even if there is no actual disparity in bargaining power, many voucher tenants believe that they have no bargaining power and sign the document.<sup>49</sup> Most voucher tenants are accustomed to signing form documents in the Voucher Program which they have no opportunity to bargain over. They simply sign the required forms without question.

Furthermore, many standard leases contain excessive fees. As previously discussed, leases typically protect the landlord. Although lease terms vary in the housing industry, many leases call for an initial lump sum fee for not paying on the date the rent is due and a subsequent fee for each day there remains an outstanding balance. These fees can accumulate quickly and can become quite excessive, therefore resulting in a large sum. This impact is often made more significant if the tenant continues to be late with rent payments and the fees carry over into the following month or months.<sup>50</sup>

Late fees of this sort are punitive in nature, contrary to the purpose of late fees. Late fees are designed to compensate the landlord for any damages caused by the tenant breaching the contract, for example, not paying the rent on time.<sup>51</sup> Late fees should not be used, however, as instruments to encourage timely payment of rent.<sup>52</sup> As one scholar noted:

late fees are not designed to be an “economic incentive.” Instead, late fees in a lease function as liquidated damages, which are the sum a party agrees to pay for breaching a contract and are a good-faith forecast of the “actual damages that will probably ensue from the breach”. If the purpose of the liquidated damages provision is to

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<sup>47</sup> Blower, *supra* note 44 (quoting Anderson Robertson, *The Limits of Voluntariness in Contract*, 29 MELB. U. L. REV. 179, 202 (2005)).

<sup>48</sup> *Id.* at 977 (quoting Benjamin J. Lambiotte, Comment, *Defensively Pleading Commercial Landlord Breaches in Summary Actions for Possession: A Retrospective and Proposal*, 37 CATH. U. L. REV. 705, 726 (1988)).

<sup>49</sup> *Id.* at 978.

<sup>50</sup> Siegesmund & Weaver, *supra* note 42.

<sup>51</sup> Lawrence R. McDonough, *Wait A Minute! Residential Eviction Defense is Much More Than “Did You Pay the Rent?”*, 28 WM. MITCHELL L. REV. 65, 95-6 (2001). See also Blower, *supra* note 44, at 974; Siegesmund & Weaver, *supra* note 42 (“Many leases have late fee policies that, on their face, bear no relation to actual damages and are therefore illegal penalties.”).

<sup>52</sup> Blower, *supra* note 44, at 974.

merely to secure performance, it will be treated as a penalty . . . .<sup>53</sup>

Finally, tenants lack business savvy and education. Most voucher tenants have very little education and have little or no business training, especially on how to negotiate contracts.<sup>54</sup> Some voucher tenants cannot read or have limited reading skills. The confluence of these factors underscores the importance of additional protections for voucher tenants.

#### IV. STATE PROTECTION

Most states offer little to no protection for voucher tenants. There is considerable variation across the nation as to what little protection states afford to the average residential tenant, let alone the voucher tenant. In fact, most state statutes do not mention any specific cap on late fees for tenants at all. Typically, state statutes only require that the late fees in the lease must be “reasonable.”<sup>55</sup> This standard of reasonableness varies from state to state.<sup>56</sup> Unless the late fee is in the form of a flat rate, the fee must be based on the damages suffered by the landlord in the form of liquidated damages.<sup>57</sup> Although many state statutes allow late fees through the insertion of a liquidated damages clause in a lease, they do not allow late fees that rise to the level of penalties.<sup>58</sup>

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<sup>53</sup> *Id.* (quoting 22 AM. JUR. 2D *Damages* § 490 (2003)).

<sup>54</sup> Mock, *supra* note 40 (“Half of public housing tenant have not graduated from high school.”).

<sup>55</sup> In Texas, late fees are allowed if they are “a reasonable estimate of uncertain damages to landlord that are incapable of precise calculation.” TEX. PROP. CODE ANN. § 92.019(a)(2) (Vernon 2009). Furthermore, the Texas statute provides that late fees may consist of an initial fee and then a subsequent daily fee. *Id.* § 92.019(b). Arizona and Nevada are two such states that provide that the late fees must be “reasonable.” See ARIZ. REV. STAT. § 33-1368(B) (LexisNexis 2009); NEV. REV. STAT. § 118A.150 (LexisNexis 2010).

<sup>56</sup> One Minnesota court found a ten dollar per day late fee to be unenforceable. See McDonough, *supra* note 51, at 96 n.179 (citing *Larson v. Cooper*, No. UD-1880209557, at 8 (Minn. Dist. Ct. 4th Dist. Mar. 21, 1988)); see also, Suzanne Carey McAllister, *Recent Developments in Kansas Residential Landlord-Tenant and Eviction Law*, 55 U. KAN. L. REV. 933, 952 n.135 (citing other state courts’ varied decisions in regards to the enforceability of late fees).

<sup>57</sup> McDonough, *supra* note 51, at 96. Liquidated damages are a “reasonable forecast of general damages resulting from a breach.” *Id.*

<sup>58</sup> *Id.* at 95-96. In determining whether late fees are permissible fees or impermissible penalties, courts look to “whether the amount agreed upon is reasonable or unreasonable in light of the contract as a whole, the nature of the damages contemplated, and the surrounding circumstances, and not the intention of the parties nor their expression of intention.” *Id.* Generally, “liquidated damages not manifestly disproportionate to actual damages are enforceable. Where actual damages are susceptible of definite measurement, an amount greatly disproportionate is an unenforceable penalty. The actual damages for late payment of rent may be measured without difficulty: the legal rate of interest plus the

For example, in *Gershin v. Demming*, the Indiana Court of Appeals found that late fees totaling \$975 for unpaid rent were permissible under the liquidated damage provision of the lease, which called for a one-percent per-day late fee.<sup>59</sup> The tenants in *Gershin* entered into a one-year lease with the landlord.<sup>60</sup> After six months, the tenants notified the landlord that they intended to vacate the premises.<sup>61</sup> The tenants left the premises, but failed to pay the remaining rent.<sup>62</sup> The landlord subsequently brought suit for unpaid rent, late fees, and attorney fees.<sup>63</sup> The late fees represented fees assessed from the initial day the tenants should have paid the rent until the end the lease, for a total of seventy-five days.<sup>64</sup> The court stated that “liquidated damages provisions are generally enforceable where the nature of the agreement is such that when a breach occurs the resulting damages would be uncertain and difficult to ascertain.”<sup>65</sup> The court found that the late fees charged to the tenant did not constitute an impermissible late fee because the landlord incurs “administrative expense and inconvenience associated with untimely rent, including late payment notices and additional bookkeeping, and for the loss of rental income.”<sup>66</sup> Specifically, the court found that the late fee was not an unenforceable penalty because it was “not grossly disproportionate to the landlord’s loss.”<sup>67</sup>

In contrast, North Carolina restricts late fees and provides more protection for tenants through statute. Section 42-46 of the North Carolina General Statute provides that late fees may be assessed against the tenant after the fifth day of each month.<sup>68</sup> However, it limits the late fees to fifteen dollars or five percent of the rent, whichever is more on monthly rentals; and four dollars or five percent, whichever is greater for weekly rentals.<sup>69</sup> For voucher tenants, the landlord may only levy

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actual costs caused by the late payment.” *Id.* at 96.

<sup>59</sup> *Gershin v. Demming*, 685 N.E.2d 1125, 1130-31 (Ind. Ct. App. 1997).

<sup>60</sup> *Id.* at 1127.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 1128.

<sup>65</sup> *Gershin*, 685 N.E.2d at 1127.

<sup>66</sup> *Id.* at 1130.

<sup>67</sup> *Id.* at 1131.

<sup>68</sup> N.C. GEN. STAT. § 42-46 (2009).

<sup>69</sup> *Id.*

the late fees on the tenant's portion of the rent.<sup>70</sup> Additionally, the landlord may not deduct the late fees from the rent first so as to make the current rent late and may charge only one late fee per incident.<sup>71</sup> As the above discussion illustrates, states vary greatly as to what is or is not permitted for late fees.

### *A. Deceptive Trade Practices Act Protection*

Under certain circumstances, voucher tenants may be protected by some states consumer protection laws. Typically, these protections are covered under the individual state's Deceptive Trade Protection Act ("DTPA").<sup>72</sup> DTPA laws aim to prohibit contract terms that unfairly take advantage of consumers.<sup>73</sup> Therefore, for a voucher tenant to avail themselves of a state's DTPA, the lease must be so egregious that it clearly takes an advantage of the tenant. Additionally, most state DTPA laws do not allow contracts that contain offensive terms of adhesion.<sup>74</sup>

In order for the tenant to have a cause of action under a state's DTPA the tenant must be a consumer; the claim must involve goods or services; and the landlord must have done some prohibited act under the state's DTPA law.<sup>75</sup> Specifically in the voucher tenant's case, the landlord would have sought to charge late fees that were unconscionable.<sup>76</sup>

### *1. Voucher Tenant and Property*

Most state DTPA laws require that a tenant qualify as a consumer and the leased property must be defined as "goods or services" under State law.<sup>77</sup> A consumer is generally defined as a person who uses

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<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> See, e.g., N.J. STAT. ANN. §§ 56:8-1 to -109 (West 2009); TEX. BUS. & COM. CODE ANN. §§ 17.41 to .63 (Vernon 2007).

<sup>73</sup> See TEX. BUS. & COM. CODE ANN. § 17.44 (Vernon 2007).

<sup>74</sup> "Terms of Adhesion" or "adhesion contracts" are "a standardize[d] contract, which imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it." *Badie v. Bank of America*, 79 Cal. Rptr. 2d 273, 277 n.5 (Cal. Ct. App. 1998) (citing *Neal v. State Farm Ins. Cos.*, 10 Cal. Rptr. 781, 784 (Cal. Ct. App. 1961)).

<sup>75</sup> Enotes.com, Deceptive Trade Practices, <http://www.enotes.com/everyday-law-encyclopedia/deceptive-trade-practices> (last visited Apr. 14, 2010).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

goods or services for personal, family, or household purposes.<sup>78</sup> Additionally, the apartment or home must qualify as “goods or services”. “Goods” typically include real property purchased or leased for “personal, family, or household purpose” under the state DTPA statute.<sup>79</sup> Therefore, under many state jurisdictions, the voucher tenant and the leased premises would qualify under DTPA law.

## 2. Violations Under DTPAs

To have a viable claim under a state’s DTPA, the landlord must attempt to do something prohibited under the DTPA. For the voucher tenant, the most probable claim would be based on the theory that the late fees the landlord seeks to charge are unconscionable. Unconscionability varies from state to state, but is typically found when:

no decent, fair-minded person would view the result of its enforcement without being possessed with a profound sense of injustice. In other words, a contract is unconscionable if it is “such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other.”<sup>80</sup>

Specifically, late fees may be deemed unconscionable if the late fee is “to a consumer’s detriment, takes advantage of the lack of knowledge, ability, experience, or capacity of the consumer to a grossly unfair degree.”<sup>81</sup> In making a determination of whether a late fee is unconscionable, a court will look to a number of factors, including the presence of:

(1) boilerplate language, that the landlord, who may be in a stronger economic position than the tenant, incorporates into a lease; (2) a significant or excessive fee for the tenant’s breach of the lease; (3) inclusion of clauses that are clearly penalties or punitive in nature; (4) the circumstances leading up to the clauses within the lease that adversely affect the tenant; (5) the hiding of unfair or disadvantageous clauses within the lease that adversely affect the tenant; (6) the use of incomprehensible language within the lease;

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<sup>78</sup> See, e.g., TEX. BUS. & COM. CODE ANN. § 17.45(5) (Vernon 2007).

<sup>79</sup> TEX. BUS. & COM. CODE ANN. § 17.45(3).

<sup>80</sup> McDonough, *supra* note 51, at 133 (quoting *In re Estate of Hoffbeck*, 415 N.W.2d 447, 449 (Minn. Ct. App. 1987)).

<sup>81</sup> TEX. BUS. & COM. CODE ANN. § 17.45(5) (Vernon 2007). See also *James V. Mazuca & Assocs. v. Schumann*, 82 S.W.3d 90 (Tex. App. 2002).

and (7) the overall imbalance of the rights and obligations of each party to the lease; and (8) the lease's exploitation of the undereducated, illiterate, or unsophisticated tenant.<sup>82</sup>

Thus, as has been discussed, excessive late fees that a landlord charges in a lease would qualify as unconscionable. Consequently a voucher tenant could prevail on a claim under a state's DTPA. Unfortunately, most voucher tenants fail to avail themselves of this protection.

### *B. Inadequate Protection*

Although state DTPA statutes may seem to provide adequate protection, voucher tenants are still quite vulnerable. Most importantly, DTPA statutes do not protect voucher tenants when they enter into a lease agreement. The DTPA is only applicable if the voucher tenant challenges the late fee after it is imposed. In order to prevail, a voucher tenant must convince a court that the late fees fall within the meaning of unconscionability, a high burden to carry for the average voucher tenant.<sup>83</sup> Additionally, because it is a state cause of action, this burden will vary between states and various courts. This can lead to disparate treatment of voucher tenants.

Most voucher tenants do not know how to bring such a claim if they were to actually contest the late fees in their leases. Furthermore, voucher tenants are typically ignorant of their rights under the law and typically feel ill-equipped to contest unfair terms under the lease if they chose to do so. Therefore, tenants often fail to assert their rights, and end up being forced to pay unreasonable and excessive late fees that they cannot afford. In sum, current state statutes fail to adequately protect voucher tenants at the outset of lease negotiations and fail to protect voucher tenants during the lease.

## **V. FEDERAL PROTECTION AND THE FDCPA**

There is no federal statute or regulation specifically limiting the amount of late fees in residential leases for a voucher tenant. Under the FDCPA, however, there is some limited protection.<sup>84</sup> The FDCPA, while not directly limiting late fees, aims to protect consumers from

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<sup>82</sup> McAllister, *supra* note 56, at 947.

<sup>83</sup> See McDonough, *supra* note 51, at 133.

<sup>84</sup> See Federal Debt Collection Practices Act, 15 U.S.C. §1692 (1994).

abusive practices employed by debt collectors.<sup>85</sup> Thus, if a landlord uses a third-party debt collector to seek back rent and late fees from a voucher tenant, a voucher tenant would be able to recover damages from the third-party debt collector if they do not comply with the FDCPA. To find themselves in compliance with FDCPA, debt collectors must provide consumers with written notice that provides the debt amount, the creditor's name, notification of thirty days to contest the validity of the debt; the freedom to conduct communications about the debt with others; and the right not to be contacted until the debt is validated.<sup>86</sup>

*A. Romea v. Heiberger & Associates*

The Second Circuit Court of Appeals found a law firm, seeking to collect delinquent rent on behalf of a landlord, in violation of the FDCPA in *Romea v. Heiberger & Associates*.<sup>87</sup> The defendant, the law offices of Heiberger & Associates, representing a landlord seeking delinquent rent, sent a letter to plaintiff demanding back rent for \$2800.<sup>88</sup> In the letter, the plaintiff was advised to pay the delinquent rent or give up possession of the property.<sup>89</sup> The plaintiff did not pay the delinquent rent and instead filed a class action lawsuit in New York, claiming that the defendants failed to comply with FDCPA.<sup>90</sup> Specifically, the plaintiff alleged that the defendant ran afoul of the FDCPA by not validating the debt and not providing the required thirty-day notice to dispute the debt.<sup>91</sup> Additionally, the plaintiff argued that the letter needed to include language advising her that the defendant "was attempting to collect a debt, and that any information obtained

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<sup>85</sup> Bennett S. Silverberg, *Advantage Tenant: Fair Debt Collection Practices Act Gives Tenants Oversized Rackets In the Eviction Match*, 8 J.L. & POL'Y 227, 228 n.8 (1999) (citing 15 U.S.C. § 1692(c) (1994)). The purpose of Congress in implementing the FDCPA was to "eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent state action to protect consumers against debt collection abuses." 15 U.S.C. § 1692(c).

<sup>86</sup> 15 U.S.C. § 1692g (2006).

<sup>87</sup> *Romea v. Heiberger & Assocs.*, 163 F.3d 111 (2d. Cir. 1988). See also McAlister, *supra* note 42, at 961-67 (contending that under *Romea*, attorneys representing the landlord in collection of back rent could be exposed to liability).

<sup>88</sup> *Romea*, 163 F.3d at 113.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*



would be used for that purpose.”<sup>92</sup> In response to the plaintiff’s claim, Heiberger moved to dismiss the suit alleging that the FDCPA was not applicable because the delinquent rent was not a “debt” and the letter was not a “debt communication” as defined by the FDCPA.<sup>93</sup>

Ultimately, the court found the back rent constituted a debt.<sup>94</sup> In its discussion, the court determined that:

[b]ack rent by its nature is an obligation that arises only from a tenant’s failure to pay the amounts due under the contractual lease transaction. In this respect back rent is much like the obligation arising out of a dishonored check where a service has been rendered or goods sold on the premise of immediate payment.<sup>95</sup>

The court further posited that an obligation to pay back rent is a debt because the obligation “does not derive from an extension of credit but rather because the payor breached its payment obligation in the contract between the parties.”<sup>96</sup> Additionally, the court decided that the FDCPA does not even require that a “transaction” occur between the parties.<sup>97</sup>

The court determined that the law firm of Heiberger & Associates was not exempt from FDCPA notice regulations.<sup>98</sup> Specifically, it found that Heiberger “undeniably [sent] a ‘communication’ as defined by FDCPA in that it ‘conveyed information regarding a debt’ to another person.”<sup>99</sup> The court found this notice was “sent to induce Romea to pay back rent she allegedly owed.”<sup>100</sup> Consequently, Heiberger & Associates was liable to Romea for failing to comply with the FDCPA.<sup>101</sup>

### *B. Potential Liability Under FDCPA Post-Romea*

This section will argue that PHAs should be required to meet the FDCPA mandates. In order for FDCPA to apply there must be: (1) a

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<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 114.

<sup>94</sup> *Romea*, 163 F.3d at 114-16.

<sup>95</sup> *Id.* at 115.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 116-18.

<sup>99</sup> *Id.* at 116.

<sup>100</sup> *Romea*, 163 F.3d at 116.

<sup>101</sup> Post-*Romea*, other jurisdictions have held that law firms are debt collectors under the FDCPA when they attempt to collect debts on the behalf of landlords. See, e.g., *Hodges v. Sasil Corp.*, 915 A.2d 1, 15 (N.J. 2007).

debt; (2) the third-party seeking to collect the debt must be a debt collector; (3) and the person from whom the debt is sought must be a consumer.<sup>102</sup> The current HUD regulations permit landlords to terminate the lease and bring an eviction action and claims for any unpaid rent and late fees owed to them by a voucher tenant.<sup>103</sup> Upon filing a notice for eviction, the landlord must notify the PHA of the pending eviction action and claims for back rent and late fees.<sup>104</sup> When the PHA learns of the eviction proceedings, the PHA may terminate the voucher tenant's assistance; however the PHA must first provide a notice advising the voucher tenant of their right to a hearing before terminating assistance.<sup>105</sup> The notice will also contain information as to the basis for termination.<sup>106</sup> If the landlord is seeking eviction because of overdue rent and late fees, the notice from the PHA would advise the voucher tenant of a debt to the landlord. While the PHA doesn't function as a traditional debt collection, it can compel the voucher tenant to pay their debts through threatening termination of assistance. This compulsion indirectly serves the function of collecting the debt on behalf of the landlord. The following will argue that PHAs should be liable to voucher tenants under the FDCPA by analyzing the requirements of the FDPCA.

### 1. Debt

For the FDCPA to apply, the money sought to be recovered must be a debt. The Second Circuit determined in *Romea*, that back rent qualified as a debt.<sup>107</sup> The court's conclusion that back rent qualified as a debt was based on the observation that back rent was an amount due under the lease contract.<sup>108</sup> Using the court's logic, delinquent late fees would be a debt since late fees result from a tenant's failure to pay amounts due under their lease.<sup>109</sup> Therefore, late fees demanded by the

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<sup>102</sup> 15 U.S.C. § 1692g (2006).

<sup>103</sup> See 24 C.F.R. § 982.310(a)(1) (2009); HUD GUIDEBOOK, *supra* note 1, at ch. 15, ¶ 2.

<sup>104</sup> HUD GUIDEBOOK, *supra* note 1, at ch. 15, ¶ 2.

<sup>105</sup> See *id.* at ch. 15, ¶ 4; Dunn, Greenberg & Sudarraj, *supra* note 16, at 137 (citing the fact that a tenant must request an informal hearing or meeting with landlord within ten days of receiving the notice of eviction to contest the landlord's complaint of eviction, back rent, and late fees, or likely lose the opportunity to challenge the eviction or fees).

<sup>106</sup> HUD GUIDEBOOK, *supra* note 1, at ch. 15, ¶ 4.

<sup>107</sup> *Romea*, 163 F.3d. at 115.

<sup>108</sup> *Id.*

<sup>109</sup> See *id.*

landlord would be a debt under the FDCPA.

## 2. Debt Collector

The second requirement pursuant to the FDCPA is that the third-party seeking to collect the debt involved must qualify as a debt collector. The FDCPA defines a debt collector as “any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.”<sup>110</sup> Since most local PHAs use interstate commerce or mail to notify the tenant of the alleged debt, it would meet this definition. Furthermore, the PHA is regularly in the business of collecting debts, such as rent, back rent, and other charges due from tenants in the other HUD project-based programs.<sup>111</sup> In the case of the Voucher Program, the PHA indirectly seeks payment of the voucher tenant’s debt to the landlord by threatening termination from the Voucher Program if the debt is not paid.

Some may argue the PHA would be exempt under the FDCPA’s exemption for parties providing notice of a debt, because the PHA is merely serving notice of the debt on behalf of the landlord.<sup>112</sup> In *Romea*, the defendant law firm argued that it was exempt under the FDCPA because it was not attempting to collect a debt but merely serving notice of back rent on behalf of the landlord.<sup>113</sup> The Court rejected this argument and found that the FDCPA’s exemption was intended to apply to the person who physically served the notice upon the delinquent debt payor. The Court found the defendant law firm’s preparation of the notice “extended beyond mere service of the notice.”<sup>114</sup> A PHA is analogous to the law firm in *Romea*, since it is actively helping to collect debts on behalf of the landlord. The PHA’s actions extend beyond merely providing notice to the voucher tenant and include actively trying to help the landlord recoup delinquent late fees. Therefore, the PHA would be a “debt collector” on behalf of landlords.

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<sup>110</sup> 15 U.S.C. § 1692a(6) (2006).

<sup>111</sup> See HUD HANDBOOK, *supra* note 1, at ch. 9, ¶ 14.

<sup>112</sup> See 15 U.S.C. § 1692a(6)(D).

<sup>113</sup> *Romea*, 163 F.3d. at 117.

<sup>114</sup> *Id.*

### 3. Must Be A Consumer

The third criterion under the FDCPA is that the tenant must be a consumer.<sup>115</sup> A consumer is “any natural person obligated or allegedly obligated to pay any debt.”<sup>116</sup> In *Romea*, the tenant was found to satisfy this element. The court specifically rejected the notion that credit must be involved.<sup>117</sup> The court additionally posited that the FDCPA is applicable “to any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.”<sup>118</sup> Thus, the tenant qualified as a consumer. Similar to the debt in *Romea*, late fees charged to voucher tenants arise out a transaction involving property that is used for family and household purposes. Consequently, the voucher tenant would qualify as a “consumer” for FDCPA purposes.

### 4. Notice

Under the FDCPA, the debt collector must send out a notice of the debt claim to the consumer.<sup>119</sup> The notice must attempt to validate the debt by providing a statement that is an attempt to collect a debt, the amount of the debt, the creditor’s name, and a statement that says the consumer has thirty days to dispute the debt.<sup>120</sup> Moreover, the debt collector must cease all collection attempts once the consumer contests the charges until the debt is validated.<sup>121</sup> Failure to comply with FDCPA guidelines could subject the debt collector to actual damages suffered by the consumer, statutory damages of \$1000, and attorney fees.<sup>122</sup>

As a debt collector on behalf of the landlord, the PHA should be required to provide the voucher tenant with a notice that meets FDCPA

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<sup>115</sup> 15 U.S.C. § 1692g (2006).

<sup>116</sup> 15 U.S.C. § 1692a(3).

<sup>117</sup> *Romea*, 163 F.3d at 115. See Silverberg, *supra* note 85, at 236 (citing Brown v. Budget Rent-A-Car Systems Inc., 119 F.3d 922, 925 (11th Cir. 1997)). But see Zimmerman v. HBO Affiliate Group, 834 F.2d 1163-69 (3d Cir. 1987) (requiring that some sort of “extension of credit” be involved for the FDCPA statute to be invoked).

<sup>118</sup> *Romea*, 163 F.3d at 114 (citing 15 U.S.C. § 1692a(5)).

<sup>119</sup> 15 U.S.C. § 1692g.

<sup>120</sup> *Id.*

<sup>121</sup> 15 U.S.C. § 1692g(b).

<sup>122</sup> 15 U.S.C. § 1692k(2)(a) (2006).

standards.<sup>123</sup> Thus, the PHA should be required to inform the voucher tenant that a debt claim has been made by the landlord and that they are entitled to dispute the debt within thirty days. Furthermore, if the tenant disputes the debt, then the PHA should be forced to allow the tenant to continue on the Voucher Program until the debt is validated. Consequently, if the PHAs' attempt to collect debt on behalf of the landlord does not conform to the FDCPA's requirements, a voucher tenant should be able to seek damages authorized by the statute.

## ***VI. OPPOSITION TO A CAP ON LATE FEES***

### *A. Free Market*

Opponents of late fee caps may assert that a cap would create undue restraints on the free market.<sup>124</sup> These opponents of a cap on late fees "see the market as an effective regulatory tool [and] assume that parties on both sides of the transaction make rational decisions."<sup>125</sup> Critics also contend that caps would unnecessarily involve state governments in private negotiations between landlords and tenants.<sup>126</sup> These criticisms, while not without merit, fail to recognize the realities of the market place. Lease negotiations do not involve negotiations between parties with equal bargaining power.<sup>127</sup> Additionally, it is this hands-off approach that gave rise to consumer protection laws that protect consumers from unfair practices in the market.

The laissez faire argument may be a popular sentiment among private landlords but it fails to consider the associated problems for the voucher tenant. First, these critics fail to recall the motivations behind the Voucher Program, which were to prevent landlord abuses and afford low-wage working tenants the opportunity to live in decent housing.<sup>128</sup> Second, voucher tenants are more vulnerable and need more protection

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<sup>123</sup> See 15 U.S.C. § 1692g.

<sup>124</sup> New York Mayor Michael Bloomberg vetoed a bill that would prohibit landlords from refusing voucher tenants. See Manny Fernandez, *Mayor Vetoes Bill Protecting Section 8 Tenants from Landlord Bias*, N.Y. TIMES, Mar. 1, 2008, at B4. Mayor Bloomberg criticized the bill arguing that it kept landlords from making independent business decisions. *Id.*

<sup>125</sup> Siegesmund & Weaver, *supra* note 42, at 226.

<sup>126</sup> Blower, *supra* note 44, at 972 (noting opposition arguments to a Colorado bill aimed at increasing tenants' rights).

<sup>127</sup> See *supra* Part III.B.

<sup>128</sup> CLPHA Quick Facts, *supra* note 13.

from the “free market caveat emptor” beliefs.<sup>129</sup> Third, and finally, A PHA is already vested with the responsibility of approving all leases under the Voucher Program.<sup>130</sup> Yet, most PHAs send the tenant out on their own and fail to properly review the leases. Thus, voucher tenants are particularly susceptible to unsavory landlords who seek to charge excessive late fees. Ultimately, if the private market had been operating as it should have, the Voucher Program would have been unnecessary.

### *B. Other Arguments*

An additional argument levied against protections from abusive late fees is that a cap on late fees will only increase the likelihood that a voucher tenant pays other expenses instead of paying their rent.<sup>131</sup> Furthermore, critics contend that “landlords may impose harsher eviction and screening policies in reaction to this wave of consumer protectionism.”<sup>132</sup> These arguments fail to recognize that most state and federal laws allow the landlord to seek reasonable fees for breaches of the lease and do not remove any landlord recovery rights. A cap on late fees would not preclude a landlord from charging a voucher tenant for late payment of rent but would merely ensure that the landlord treats the voucher tenant fairly.

## **VII. ADVOCACY**

### *A. HUD’s Responsibility*

HUD is the federal agency charged with ensuring that affordable housing is accessible to the poor.<sup>133</sup> One of its stated missions is the oversight of providing the poor with affordable housing.<sup>134</sup> To serve that

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<sup>129</sup> Siegesmund & Weaver, *supra* note 42, at 224.

<sup>130</sup> See 24 C.F.R. § 982.308(c) (2009). The PHA must assist a voucher tenant who requests help with negotiating a lease. 24 C.F.R. § 982.506 (2009). However, most tenants do not ask for help and are not advised they can get help.

<sup>131</sup> Blower, *supra* note 44, at 973 (noting opposition arguments to a Colorado bill aimed at increasing tenants’ rights).

<sup>132</sup> Silverberg, *supra* note 85, at 275.

<sup>133</sup> HUD Fact Sheet, *supra* note 1.

<sup>134</sup> *Id.* Public housing is in dwindling supply throughout the country despite the benefits that public housing brings to communities. Samantha M. Tuttle, *Tenants Force a Policy Change at HUD and Protect Subsidized Housing Stock in Doing So*, 42 CLEARINGHOUSE REV. 190, 190 (2008) (“Experts estimate that in the past decade we have lost well over 100,000 public housing throughout the country. Public housing residents [who] revitalize neighborhoods . . . are increasingly being forced out of their community.”).

end, HUD has delegated the authority to approve all leases that are subsidized with HUD money to the local PHAs.<sup>135</sup> Furthermore, the tenant possesses a property interest in staying with the program.<sup>136</sup> Therefore, responsibility and oversight carry the correlative duty to ensure that the poor are not taken advantage of by landlords who impose unreasonable late fees. At the very minimum, HUD, through the PHAs, should be the gatekeeper in ensuring the availability of housing to the working poor and not participants in helping voucher tenants become homeless. Voucher tenants should not be penalized by being removed from the Voucher Program and landlords should be limited to charging a thirty dollars per-month late fee. This would treat landlords no differently than they already are in other public housing programs.<sup>137</sup> Furthermore, a cap on late fees reduces the homelessness rate as those who need assistance will continue in the program.

*B. HUD Should Protect Tenants Who Are Not Sophisticated*

Most voucher tenants are vulnerable to savvy landlords. In nearly all cases, the voucher tenant is happy to find a place that will accept their voucher. The voucher tenant is usually unaware of the unfair terms in their lease. Moreover, voucher tenants are the least prepared for sudden and unexpected life events. They usually have no emergency funds. Consequently, when exigencies arise in their lives, such as the car breaking down, reduction in work hours, increases in utilities bills, or extra expenses for their children, they cannot afford to make ends meet. Thus, when emergencies do arise, voucher tenants cannot afford to pay their share of the rent that is due and subsequently get behind on their rent. The landlord begins to charge late fees on their unpaid portion of the rent, and the voucher tenant is unable to afford any of these fees due to their limited resources and the fact they are behind on their bills. These fees create a snowball of problems for the voucher tenant. The landlord will evict voucher tenant and subsequently, the voucher tenant will be forced out of the Voucher Program. When the voucher tenant is evicted, it increases the odds that the voucher tenant and their family will be homeless, living in

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<sup>135</sup> HUD Fact Sheet, *supra* note 1.

<sup>136</sup> Fuchs, *supra* note 43, at 315.

<sup>137</sup> See HUD HANDBOOK, *supra* note 1, at ch. 6, ¶ 23(D) (restricting late fees to thirty dollars for tenants in HUD project-based programs).

substandard housing, or forced to move in with other family members.<sup>138</sup> Therefore, these voucher tenants need more protection.

### *C. Changes In Policy*

#### 1. PHAs Should be Required to Provide FDCPA Notice

Pursuant to the FDCPA and the *Romea* decision, PHAs should be required to provide voucher tenants with a thirty-day notice of a landlord's claim for unpaid late fees.<sup>139</sup> Upon receipt of the notice, the voucher tenant should be allowed to contest the late fees and other fees assessed by the landlord in writing and require the landlord to validate the debt, just like any other consumer. Consequently, the voucher tenant would have an opportunity to, at a minimum, attack excessive late fees discouraging abusive situations such as the one presented in the introduction, and allow the voucher tenant to remain in the Voucher Program.

Additionally, voucher tenants should not be removed from the Voucher Program in situations where the voucher tenant only owes late fees. This policy already exists for those tenants renting HUD-owned properties.<sup>140</sup> Since the voucher tenants typically have very limited means, paying a lump sum amount could pose a substantial burden to a financially struggling voucher tenant. Therefore, where fees are significant, voucher tenants should be allowed to stay in the Voucher Program while paying off the past-due late fees over a period of time.

#### 2. Change HUD Regulations to Prohibit Excessive Late Fees

HUD should change its guidelines to prohibit approval of leases with excessive late fees in the Voucher Program. The current guidelines and federal regulations provide that HUD must approve leases that conform to state and local law under the Voucher Program.<sup>141</sup> These minimal guidelines are insufficient to protect voucher tenants. What is permissible under the law is hard to determine, varies between states, and would prove difficult for the average public housing worker

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<sup>138</sup> Mock, *supra* note 40 (“Simply put, the residents of public housing comprise one of our more fragile populations; such tenants face grave adversity in the event of an eviction.”).

<sup>139</sup> 15 U.S.C. § 1692g (2006).

<sup>140</sup> See HUD HANDBOOK, *supra* note 1, at ch. 6, ¶ 23(F) (prohibiting landlords from evicting tenants from HUD-owned property solely for non-payment of late fees).

<sup>141</sup> 24 C.F.R. § 982.308(c) (2009).



to oversee. Therefore, the guidelines should specifically limit the amount of late fees that a landlord may charge the voucher tenant to no more than \$30, the same cap for other public housing tenants.<sup>142</sup> This cap would increase national uniformity and prevent abusive practices against the voucher tenant.

### 3. Require PHAs to Provide Notice of Fees to Voucher Tenants

In the alternative, the very least HUD should do is change its policy to require that PHAs provide voucher tenants with a notice advising them of abusive late fees.<sup>143</sup> This notice should be similar to consumer protection warning notices. The font should be in bold letters advising voucher tenants of the late fee provision, the rate of interest, whether it is a lump sum or daily rate, and that failure to pay these fees could result in the voucher tenant being evicted from their residence and dismissed from the Voucher Program. A change in policy would at a minimum, serve as a warning to voucher tenants of the potential consequences of the late fee provisions in their lease.

## VIII. CONCLUSION

The existing HUD regulation of late fees in the Voucher Program should be amended. These amendments should include capping the late fees that landlords can charge for late payment of rent just as they are for other public housing residents. Current HUD regulations leave the voucher tenant vulnerable to being victimized by private landlords. At a minimum, PHAs should require that the voucher tenant be fully advised of the landlord's charges and should allow the voucher tenant to contest the validity of the charges. If the late fees a landlord seeks to charge are fair and reasonable, the voucher tenant can pay the fees. This will allow the landlord to be repaid for rational charges and the voucher tenant to remain in the Voucher Program. Additionally, by capping late fees and requiring a FDCPA notice be sent to the voucher tenant, HUD will ensure nationwide uniformity in all Voucher Programs.

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<sup>142</sup> See Siegesmund & Weaver, *supra* note 42, at 237 ("Providing a dollar limit for late fees and an objective definition to reasonable would not be excessive regulation.").

<sup>143</sup> See *id.* at 225-27 (discussing the various consumer protection notices required under federal and Minnesota law).