

No. A12-2078

STATE OF MINNESOTA
IN SUPREME COURT

HOUSING AND REDEVELOPMENT AUTHORITY OF DULUTH,

Appellant,

vs.

BRIAN LEE,

Respondent,

RESPONDENT'S BRIEF
AND APPENDIX

LEGAL AID SERVICE OF
NORTHEASTERN MINNESOTA
GWEN UPDEGRAFF
302 Ordean Building
424 West Superior Street
Duluth, Minnesota 55802
(218) 623-8107
AIN: 197075

ATTORNEY FOR RESPONDENT

LANDRUM DOBBINS, LLC
MARY G. DOBBINS
7400 Metro Boulevard
Suite 100
Edina, MN 55439
(952-893-2925)
AIN: 14857X

ATTORNEY FOR AMICUS CURIAE

FRYBERGER, BUCHANAN, SMITH &
FREDERICK, PA
JOSEPH J. MIHALEK (#72904)
ERIC S. JOHNSON (AIN #389334)
700 Lonsdale Bldg.
302 W. Superior St.
Duluth, MN 55802-1863
(218) 725-6845

ATTORNEY FOR APPELLANT

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

TABLE OF CONTENTS

TABLE OF AUTHORITIES
STATEMENT OF LEGAL ISSUES..... 1
STATEMENT OF THE CASE..... 3
FACTS..... 3
APPLICABLE LAW 5
ARGUMENT 5
A) STANDARD OF REVIEW..... 6
B) MINN. STAT. 504B.177 (B) DOES NOT APPLY BECAUSE THERE IS NO CONFLICT BETWEEN
FEDERAL LAW OR HANDBOOK PROVISIONS AND STATE LAW..... 6
1. \$4 IS NOT AN UNREASONABLE LATE FEE FOR LATE PAYMENT OF \$50 IN RENT. 7
2. THERE CAN BE NO CONFLICT BETWEEN 504B.177(A) AND HUD REGULATION, HANDBOOK OR
GUIDEBOOKS BECAUSE HUD SPECIFICALLY INSTRUCTS HRA TO COMPLY WITH STATE OR LOCAL
LAW WHERE IT IS MORE FAVORABLE TO TENANTS..... 10
C) IF THE COURT FINDS 504B.177(B) AMBIGUOUS, THE LEGISLATIVE HISTORY DOES NOT SHOW
THAT THE LEGISLATURE INTENDED TO PERMIT PUBLIC HOUSING AUTHORITIES FLEXIBILITY TO
CHARGE WHATEVER LATE PAYMENT PENALTY THEY DEEMED REASONABLE. 11
D) THE WORD "CONFLICT" SHOULD BE INTERPRETED TO REFER TO THE LAW OF CONFLICT
PREEMPTION..... 17
E) THERE IS NO FEDERAL PREEMPTION. 19
CONCLUSION..... 27
CERTIFICATE OF BREIF LENGTH
APPENDIX

TABLE OF AUTHORITIES

Cases

<u>606 Vandalia P'ship v. JLT Mobil Bldg. Ltd. P'ship</u> , C3-99-1723, 2000 WL 462988 (Minn. Ct. App. Apr. 25, 2000)	10, 13
<u>A.J. Chromy Constr. Co. v. Commercial Mech. Servs., Inc.</u> , 260 N.W.2d 579, 582 (Minn.1977).....	6
<u>Auchampach v. IGO Co.</u> , Nos. C7-90-10716, C6-90-10559, and S9-90-6084 at 6-7 (Minn. Dist. Ct. 2nd Dist. Dec. 5, 1990).....	13
<u>Automobile Importers of America Inc. v. State of Minnesota</u> 871 F2d 717 (8th Cir. 1989) 2, 25	
<u>Barrientos v. 1801 – 1825 Morton LLC</u> 583 F3d 1197 (9th Circuit, 2009).....	2, 9, 24, 25
<u>Central Community Housing Trust v. Anderson</u> , No. UD-1900611534 at 3 (Minn. Dist. Ct. 4th Dist. July 6, 1990)	13
<u>Cherrier v. Harper</u> , No. UD-1940113508 (Minn. Dist. Ct. 4th Dist. Feb. 4, 1994)	13
<u>Cipollone v. Liggett Group, Inc.</u> , 505 U.S. 504, 516, 112 S.Ct. 2608, 2617, 120 L.Ed.2d 407 (1992).....	20
<u>Current Technology Concepts, Inc. v. Irie Enterprises, Inc.</u> , 530 N.W.2d 539 (Minn. 1995)2, 14	
<u>Fidelity Federal Savings v. De la Cuesta</u> , 458 US 141 (1982).....	23, 24, 25
<u>Florida Avocado and Lime Growers v. Paul</u> 373 US 132 (1963)	2, 21
<u>Gorco Constr. Co. v. Stein</u> , 256 Minn. 476, 481, 99 N.W.2d 69, 74 (1959).....	9
<u>Harrison ex. rel. Harrison</u> , 733 N.W.2d at 453	6, 7
<u>Hutchinson Tech., Inc. v. Comm'r of Revenue</u> , 698 N.W.2d 1, 8 (Minn. 2005).....	7
<u>In Re Estate of Gullberg</u> 652 NW 2d 709 (Minn. App. 2002)	20
<u>In re Welfare of J.J.P.</u> 831 N.W.2d 260 (Minn. 2013)	1, 18
<u>In the Matter of the Pamela Andreas Stisser Grantor Trust</u> 818 N.W.2d 495 (Minn. 2012) 1, 18	
<u>Isles Wellness, Inc. v. Progressive Northern Ins.</u> 725 N.W.2d 90 (Minn.2006).....	6
<u>Karst v. F.C. Hayer Co.</u> , 447 N.W.2d 180, 181 (Minn.1989).....	6
<u>Larson v. Cooper</u> , No. UD-1880209557 at 8 (Minn. Dist. Ct. 4th Dist. Mar. 21, 1988)	13
<u>Martin ex. Rel. Hoff v. City of Rochester</u> 642 NW 2d 1 (Minn. 2002).....	2, 19, 20
<u>Miller v. George</u> , No. UD-1941223501 (Minn. Dist. Ct. 4th Dist. Jan. 10, 1995).....	13
<u>Nylen v. Doral Park Apartments</u> , 535 N.E.2d 178 (Indiana App. 1989)	13
<u>Staab v. Diocese of St. Cloud</u> , 813 N.W.2d 68, 72 (Minn.2012).....	18

Statutes

15 USC 133	18
42 USC 1437	2, 9, 20
42 USC 1437d	2
42 USC 1437d(f).....	19
42 USC 1437d(l).....	19
42 USC 1437d(l)(4)	19
42 USC 1437d(l)(6)	19
Minn. Stat. 325F.665	23
Minn. Stat. 504B(a).....	2

Minn. Stat. 504B.177	2, 4, 11, 12
Minn. Stat. 504B.177 (a).....	passim
Minn. Stat. 645.16	2, 6, 10, 12
Minn. Stat. 654.08(1).....	1
Minn. Stat. Ann. § 645.08	16

Regulations

12 CFR § 545.8-3(f) (1982),3	21
12 CFR § 556.9(f)(2) (1982)	22
24 CFR 966.4 (b)(3)	5
24 CFR 966.4(b)(3)	9
24 CFR 966.6	16, 19
24 CFR 982.310(d)[(1)] (iv).....	22
7 CFR 3560.209	14

Federal Register

41 Fed.Reg. 18286, 18287 (1976).....	22
49 FR 12234 (March 29, 1984).....	23

STATEMENT OF LEGAL ISSUES

1. WHETHER UNDER THE PLAIN LANGUAGE 504B.177(B) THERE IS A CONFLICT BETWEEN 504B.177(A) AND FEDERAL LAW WHICH PERMITS A PUBLIC HOUSING AUTHORITY (PHA) TO IMPOSE A REASONABLE PENALTY FOR LATE PAYMENT.

Trial Court ruling: The trial court determined that there was a conflict and that federal law preempted 504B.177(a).

Court of Appeals ruling: The Court of Appeals ruled that when the legislature asks the Courts to determine whether laws “conflict” in this context (stating that a state statute shall have no effect if it conflicts with a federal statute, regulation or handbook provision), the Court presumes the legislature is referring to the well developed doctrine of conflict preemption. There is no conflict between federal law or handbook provisions and 504B.177(a) under the principles of conflict preemption.

Apposite cases:

In re Welfare of J.J.P. 831 N.W.2d 260 (Minn. 2013)

In the Matter of the Pamela Andreas Stisser Grantor Trust 818 N.W.2d 495 (Minn. 2012).

Minn. Stat. 654.08(1)

2. WHETHER 504B.177(B) IS AMBIGUOUS; AND IF SO WHETHER THE LEGISLATURE INTENDED TO PERMIT PUBLIC HOUSING AUTHORITIES FLEXIBILITY TO CHARGE WHATEVER LATE PAYMENT PENALTY THEY DEEMED REASONABLE.

Trial Court ruling: The trial court did not find that 504B.177(b) was ambiguous, but did find that the legislature intended to exempt public housing authorities from the 8% cap on late fees.

Court of Appeals Ruling: The statute is not ambiguous because “conflict” has a clearly defined meaning as applied to statutes, which is the conflict preemption doctrine.

Apposite cases:

Current Technology Concepts, Inc. v. Irie Enterprises, Inc., 530 N.W.2d 539 (Minn. 1995).

Minn. Stat. 654.16

3. WHETHER MINNESOTA STATUTE 504B.177(A), LIMITING LATE FEES TO 8% OF THE TENANT'S PAST DUE RENT IS PREEMPTED BY FEDERAL LAW, REGULATION OR HANDBOOK.

Trial Court ruling: There is conflict between federal law, which places no cap on late fees a housing authority may charge other than reasonableness, and Minn. Stat. 504B.177, which limits late fees to 8% of overdue rent. Therefore 504B.177(a) is preempted, and Plaintiff, the Housing and Redevelopment Authority of Duluth (HRA), may charge a \$25 per month late fee even though it exceeds 8% of Defendant's past due rent.

Court of Appeals Ruling: Federal law does not preempt 504B.177(a) because it is possible to comply with both the federal law, regulation and handbooks, and Minn. Stat. 504B(a) by imposing a late fee of less than 8% of the past due rent and neither Congress nor HUD expressed any intent to preempt state regulation.

Apposite Cases:

Florida Avocado and Lime Growers v. Paul 373 US 132 (1963)

Barrientos v. 1801 – 1825 Morton LLC 583 F3d 1197 (9th Circuit, 2009)

Automobile Importers of America Inc. v. State of Minnesota 871 F2d 717 (8th Cir. 1989)

Martin ex. Rel. Hoff v. City of Rochester 642 NW 2d 1 (Minn. 2002)

Apposite statutory provisions:

Minn. Stat. 504B.177

42 USC 1437, 42 USC 1437d

STATEMENT OF THE CASE

This appeal arises from an eviction case for nonpayment of rent filed in St. Louis County District Court on September 26, 2012. Defendant Brian Lee filed an answer, and the matter was scheduled for trial on October 18, 2012. The parties appeared before the Hon. H. Peter Albrecht, Senior Judge of the District Court, and submitted the matter to the court on stipulated facts.

The District Court issued its judgment upholding the eviction and awarding the premises to the Appellant landlord, on November 8, 2012. Respondent filed an appeal on November 13, 2012. The Court of Appeals reversed on July 1, 2013. On July 26, 2013 Appellant Housing and Redevelopment Authority of Duluth (HRA) filed a petition for Review of Decision of the Court of Appeals with this Court. On September 17, 2013 this Court granted HRA's petition for review.

FACTS

This matter was submitted to the trial court on October 18, 2012 on stipulated facts.

Appellant Brian Lee (hereinafter Mr. Lee) was a tenant living at

Duluth, Minnesota. The building, also known as "Tri-Towers," is a multi-unit apartment building owned and operated by Plaintiff-Respondent, the Housing and Redevelopment Authority of Duluth (HRA). The premises are conventional subsidized public housing, authorized by The United States Housing Act of 1937, 42 USC 1437 *et seq.*

Mr. Lee lived at Tri-Towers July of 2011 until his eviction in September of 2012. His income consisted of General Assistance of \$203 per month. Under the lease (Appellant's

Appendix, page 37), Mr. Lee's monthly rent was \$50. Paragraph 3 (d) of the lease provides that the tenant must pay a \$25 late fee whenever his rent payment is more than 5 days late. This fee applies regardless of the amount of rent that is past due. The late fee of \$25 is uniformly imposed by the HRA under the authority granted by federal regulations and the HUD handbook that permits reasonable late fees to be charged in tenant leases.

Under the lease the tenant agreed to pay posted fees for certain repairs and maintenance on his unit. The lease allows the landlord to apply payments received first to the oldest charges on the tenant's account.

Mr. Lee's account became delinquent in July 2012 after Mr. Lee failed to pay in full a \$95.50 charge assessed to his account for repairs and maintenance services provided to him. As a result, Mr. Lee's rent payments for July, August and September 2012 were not timely made and late payment fees of \$25 per month (a total of \$75) were assessed to Mr. Lee's account.

On September 26, 2012, HRA filed this eviction action for nonpayment of rent. The total amount in arrears when the eviction action was commenced was \$50.

The trial Court determined that Minn. Stat. 504B.177(a) conflicts with federal law, because state law sets a cap of 8% of monthly rent on late fees, while the federal regulations and handbook place no cap on the amount a late fee may be other than stating that lease provisions should be "reasonable". The trial Court found that federal law therefore preempted 504B.177(a).

The Court of Appeals reversed. It found that there was no federal preemption because it was possible to comply with both federal law and state law, and neither

Congress nor HUD has expressed any intent to preempt state or local regulation of late fees. The 8% late fee limit furthers the congressional objectives of maximizing protections for public housing tenants, and increasing the availability and affordability of housing. The Court also determined that while the common definition of “conflict” might include “difference”, it was appropriate to assume that the legislature intended courts to apply the doctrine of conflict preemption, because that is the meaning it has acquired in the context of statutory interpretation.

APPLICABLE LAW

Minn. Stat. 504B.177 provides in relevant part as follows:

(a) A landlord of a residential building may not charge a late fee if the rent is paid after the due date, unless the tenant and landlord have agreed in writing that a late fee may be imposed. The agreement must specify when the late fee will be imposed. In no case may the late fee exceed eight percent of the overdue rent payment.

(b) Notwithstanding paragraph (a), if a federal statute, regulation, or handbook permitting late fees for a tenancy subsidized under a federal program conflicts with paragraph (a), then the landlord may publish and implement a late payment fee schedule that complies with the federal statute, regulation, or handbook.

Controlling federal law, 24 CFR 966.4 (b)(3) (Appellant’s Addendum, 30) provides that “At the option of the Public Housing Authority, the lease may provide for payment of penalties for late payment.” Likewise, the handbook, the Public Housing Occupancy Guidebook written by the Federal Department of Housing and Urban Development (HUD), provides in Chapter 17.3, page 189 (Appendix, document 11), that “The lease may require payment penalties for late payment.”

ARGUMENT

a) STANDARD OF REVIEW.

This case presents a question of statutory interpretation. When the issue presented is purely an issue of law, the Appellate Court reviews the question de novo. Isles Wellness, Inc. v. Progressive Northern Ins. 725 N.W.2d 90 (Minn.2006); Karst v. F.C. Hayer Co., 447 N.W.2d 180, 181 (Minn.1989); A.J. Chromy Constr. Co. v. Commercial Mech. Servs., Inc., 260 N.W.2d 579, 582 (Minn.1977).

b) MINN. STAT. 504B.177 (B) DOES NOT APPLY BECAUSE THERE IS NO CONFLICT BETWEEN FEDERAL LAW OR HANDBOOK PROVISIONS AND THE CLEAR AND UNAMBIGUOUS WORDS OF THE STATE LAW.

HRA takes the position that since the \$25 late fee is permitted by federal law, it cannot be prohibited by state law. However, that argument ignores the first part of 504B.177 (b) which provides that “ **If** the federal law, regulation or handbook provision permitting late fees **conflicts** with paragraph (a), **then** the landlord may implement a late payment fee that complies with federal law”. (Emphasis added).

When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit.

Minn. Stat. 645.16.

"Statutory interpretation begins with an inquiry into whether the law is ambiguous; that is, whether it is subject to more than one plausible interpretation." Harrison ex. rel. Harrison v. Harrison, 733 N.W.2d 451, 453 (Minn. 2007). Words and phrases are construed according to the rules of grammar and their common and approved usage. MINN. STAT. § 645.08(1). The court must give effect to the plain meaning of statutory text when it is clear and unambiguous. MINN. STAT. § 645.16; Hutchinson Tech., Inc. v.

Comm'r of Revenue, 698 N.W.2d 1, 8 (Minn. 2005). When the language of a statute is unambiguous, the court's role is to give effect to the legislature's will as expressed in the statutory language. Harrison ex. rel. Harrison, 733 N.W.2d at 453.

The words and meaning of this legislation are clear and free of ambiguity. The exception to the 8% late fee limit applies if and only if there is a conflict between federal law or handbook provisions and Minn. Stat. 504B.177 (a).

HRA argues, on page 8 of its brief, that there is a conflict because federal law authorizes HRA to charge a late fee that is not permitted under 504B.177(a).¹ However, the statute exempts HRA from the 8% limit only "if a federal statute, regulation, or handbook permitting late fees for a tenancy subsidized under a federal program conflicts with paragraph (a)". It is the actual law or handbook provision, not any late fee it might authorize, which must conflict in order to bring the exception into play.

"Conflict" is defined in the American Heritage Dictionary 1978 Edition as:

(1) A prolonged battle; a struggle; clash. (2) A controversy; disagreement; opposition. (3) Psychology. The opposition or simultaneous functioning of mutually exclusive impulses, desires, or tendencies. (4) A crashing together; collision.

1. \$4 IS NOT AN UNREASONABLE LATE FEE FOR LATE PAYMENT OF \$50 IN RENT.

Minn. Stat. 5404B.177(a) permits HRA to charge Respondent a late fee of \$4 for late payment of his \$50 rent. The only way there would be a conflict under the common meaning of the word is if \$4 was clearly and obviously not a "reasonable" late fee for late

¹ HRA's statement on page 14 of its brief, that "under Minn. Stat. 504B.177(b) a landlord may charge a late fee of greater than eight percent of an overdue rent payment if (1) the tenancy is subsidized under a federal program, and (2) a late fee standard established by a federal statute, regulation, or handbook "conflicts" with the eight percent cap provided in Minn. Stat. 504B.177(a) by permitting the greater late fee" misstates the statute. The statute refers not to a "late fee standard" but to a federal statute, regulation or handbook permitting late fees.

payment of a \$50 rent obligation.² There is no evidence to support such a proposition.

The District Court Judge in this case found that 504B.177(a) was preempted by federal law, but also noted:

Reasonable minds can differ on what is reasonable. For instance, Representative Holberg and the legislature apparently concluded that \$4 or \$50 is an insufficient penalty to deter late rent payments. While this would likely be true for a person paying \$1,000 per month, one might well conclude that \$4 or \$5 would be a significant imposition on a tenant trying to live on an income of \$203 per month. (Appellant's Addendum, p. 5).

An ordinary person applying the commonly accepted meaning of the word would not see a conflict between a rule that allows a landlord to charge a "reasonable" late fee, and another rule which restricts a late fee to 8% of rent.

Under the common law liquidated damages analysis, which governed late fees before the enactment of 504B.177(a), courts relied on a reasonableness test to determine the validity of the fee. Black's Law Dictionary (9th Edition, 2009) defines a liquidated-damages clause as:

A contractual provision that determines in advance the measure of damages if a party breaches the agreement. • Traditionally, courts have upheld such a clause unless the agreed-on sum is deemed a penalty for one of the following reasons: (1) **the sum grossly exceeds the probable damages on breach**, (2) the same sum is made payable for any variety of different breaches (some major, some minor), or (3) a mere delay in payment has been listed among the events of default. (Emphasis added.)

Courts have found late fees unreasonable and unenforceable on the basis of excessiveness, not inadequacy. This tenant centered approach is further supported by HUD's emphasis in its charge to PHAs which is unquestionably tenant protection. The

² Appellant correctly states in section III, page 35 of his brief that the parties did not raise or litigate the question of the reasonableness of the \$25 late fee in the HRA lease. The question of whether or not the late fee permitted under Minn. Stat. 504B.177(a) is reasonable may be relevant to the issue of whether or not a conflict exists.

HUD Guidebook also instructs Public Housing Authorities “In the case of any conflict between the proposed HUD lease and state law, the lease adopted must follow the rule that is the most beneficial to the tenant.” Public Housing Occupancy Guidebook, Chapter 17, p. 185. (Appellant’ Appendix, 57) See other Guidebook citations, and HUD statements from the Federal Register, below, section (e) of this brief. “The HUD regulation merely creates a floor of protection, which local laws may enhance.” Barrientos V. 1801 1825 Morton LLC, 583 F3d 1197, at 1207.(9th Cir. 2009); “Congress and HUD intended to provide assisted tenants with more protections than unassisted tenants, not less.” Id., at 1210.

The fee HRA may assess under 504B.177(a) is clearly reasonable.

HRA argues that 8% of Respondent’s rent is not a reasonable late fee because the fair market rent of his apartment is \$545 per month, and if he were charged 8% of that the late fee would be \$43. (Appellant’s brief, p. 22) It is unclear how the fair market rent is relevant to the reasonableness of a late fee. Under the reasonableness standard HRA is seeking to use, the reasonableness of the fee would be based on a consideration of the damages that could reasonably be expected to flow from late payment of Respondent’s \$50 rent, regardless of the fair market value of his apartment.³

³ As discussed below, determining whether a late fee is enforceable under common law requires that it meet the test for liquidated damages, and not a penalty. “A contract’s liquidated damage clause is prima facie valid based on the assumption that it is not a penalty for nonperformance but represents fair compensation for breach-related damages caused by a party’s nonperformance. Gorco Constr. Co. v. Stein, 256 Minn. 476, 481, 99 N.W.2d 69, 74 (1959). In deciding whether a clause is an acceptable amount of liquidated damages or an unacceptable penalty, the “controlling” factor is whether its amount is reasonable “in the light of the contract as a whole, the nature of the damages contemplated, and the surrounding circumstances.” Id. at 482, 99 N.W.2d at 74 (footnote omitted). If “actual damages” cannot be determined under “ordinary rules” and if a liquidated damage provision is “not manifestly disproportionate” to actual damages, a liquidated damage provision “will be sustained.” Id., at 483, 99 N.W.2d at 75 (footnote omitted). If, however, “damages resulting from a breach of contract [are] susceptible of definite measurement,” the Supreme Court has “uniformly held an amount greatly disproportionate to be a penalty.” Id., 99 N.W.2d at 75 (footnote omitted). 606 Vandalia P’ship v. JLT Mobil Bldg. Ltd. P’ship, C3-99-1723, 2000 WL 462988 (Minn. Ct. App. Apr. 25,

Appellant appears to argue that a reasonable late fee in public housing is an amount based on the Fair Market value of a tenant's apartment. Such a fee would not only violate the reasonableness requirement of the liquidated damage analysis, but also undermine the goal of the United States Housing Act of "providing decent and affordable housing for all citizens". The reason Respondent and other tenants live in Public Housing is because they cannot afford to pay market rents, and that is why the federal government does not charge them market rents. 42 USC 1437. HRA cites HUD discussion of the proposed rule permitting late payment penalties (24 CFR 966.4) in the Federal Register. One of the reasons HUD gives for permitting a late fee is that "By charging fees for late payment of rent or other charges, the PHA may be able to avoid the need for a more drastic sanction against a non-paying tenant – by evicting the family from the unit". (Appellant's Brief, p. 29, citing 53 Fed. Reg. 33216 Aug. 30, 1988)

A late fee which is based on the Fair market rent of a tenant's apartment would be just as unaffordable to the tenant as the fair market rent, and have the effect of getting the tenant evicted rather than encouraging him to pay his rent on time.

2. THERE CAN BE NO CONFLICT BETWEEN 504B.177(A) AND HUD REGULATION, HANDBOOK OR GUIDEBOOKS BECAUSE HUD SPECIFICALLY INSTRUCTS HRA TO COMPLY WITH STATE OR LOCAL LAW WHERE IT IS MORE FAVORABLE TO TENANTS.

When the regulation (24 CFR 966.4(b)(3) and the handbook provision permitting a penalty for late payment of rent is considered with other parts of the handbook it becomes increasingly apparent that there is no conflict in any sense of the word.

The Guidebook permits the housing authority to charge a late fee, but also says that "Lease provisions, taken as a whole, should be 'reasonable' according to their plain

meaning.” (Appellant’s Appendix, 61, p. 189 of Handbook). The Minnesota legislature has determined that 8% of the past due rent is a reasonable charge.

The HUD Guidebook also instructs Public Housing Authorities “In the case of any conflict between the proposed HUD lease and state law, the lease adopted must follow the rule that is the most beneficial to the tenant.” Public Housing Occupancy Guidebook, Chapter 17, p. 185. (Appellant’ Appendix, 57) Not only is there no conflict between state law and federal provisions, but the HUD handbook specifically instructs HRA to follow state law, which restricts late fees, and is more beneficial to the tenant than the \$25 late fee included in the HRA lease. See also excerpts from 53 Federal Register, cited in section (e) of this brief, reproduced in Respondent’s Appendix p. 44).

c) IF THE COURT FINDS 504B.177(B) AMBIGUOUS, THE LEGISLATIVE HISTORY DOES NOT SHOW THAT THE LEGISLATURE INTENDED TO PERMIT PUBLIC HOUSING AUTHORITIES FLEXIBILITY TO CHARGE WHATEVER LATE PAYMENT PENALTY THEY DEEMED REASONABLE.

The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature. Every law shall be construed, if possible, to give effect to all its provisions.

When the words of a law are not explicit, the intention of the legislature may be ascertained by considering, among other matters:

- (1) the occasion and necessity for the law;
- (2) the circumstances under which it was enacted;
- (3) the mischief to be remedied;
- (4) the object to be attained;
- (5) the former law, if any, including other laws upon the same or similar subjects;
- (6) the consequences of a particular interpretation;
- (7) the contemporaneous legislative history; and
- (8) legislative and administrative interpretations of the statute.

Minn. Stat. 645.16

HRA argues that the legislative history of Minn. Stat. 504B.177(b) shows that the legislature intended to allow it to charge the late fee allowed under federal law, which is a "reasonable" penalty, as determined by HRA. (Appellant's Brief, p. 21) HRA refers to the April 27, 2011 testimony of Representative Holberg in the Civil Justice Committee of the House in support of this claim.

In determining the legislative intent behind 504B.177, the Court should consider the reasons for the statute's original enactment in 2010 as well as the 2011 amendment.

Laurence McDonough and Jack Horner testified at the February 24, 2010 House Civil Justice Committee regarding the proposed late fee legislation (House File 2668). Mr. McDonough, testifying on behalf of Legal Aid and low income tenants, said

Section one is to add some regulation into the late fee area. Right now late fees are regulated by the common law. There are a number of court decisions that say kind of how to do it and how not to do it, but obviously most tenants and landlords don't read the common law and so this is an attempt to codify that so it's a little more clear. And also to regulate it a little bit. We see quite a disparity in very large late fees, some that accrue on a daily basis, I've seen \$50 a day late fees and late fees that really add up very fast. So this is an attempt to regulate that and take standards out of others statutes to put a cap on the late fee and to give a tenant a five day grace period which a lot of leases do already to pay the rent before getting a late fee.

Mr. Horner, testifying on behalf of the Minnesota Multi-Housing Association, supported the need for regulation of late fees:

Late fees. We're okay with putting it in writing as has been suggested, it's probably the law anyway, we think it is. A statute, to put it in writing, you know, require it for a tenant to pay a late fee is fine. We don't think an exact amount; the amount in the bill is very low. We would absolutely need a higher amount. Whether the other side would go for an amount that we think is right, I don't know. Right now it is common law you can't charge a late fee that constitutes a penalty. I won't explore that further, but obviously in any of this, questions I would be happy to respond to them. (Respondent's Appendix p. 1)

As Mr. Horner stated in his testimony before the House Committee on Civil Justice, prior to the enactment of Minn. Stat. 504B.177 (in 2010, effective January 2011), the Courts determined the enforceability of late fees under a liquidated damages analysis. "In deciding whether a clause is an acceptable amount of liquidated damages or an unacceptable penalty, the "controlling" factor is whether its amount is reasonable "in the light of the contract as a whole, the nature of the damages contemplated, and the surrounding circumstances." 606 Vandalia Partnership v. JLT Mobil Building Limited Partnership 2000 WL 462988 (Minn. App. 2000). (See footnote 3, supra).

This was a burdensome procedure which produced varying results, and offered neither landlord nor tenant certainty in knowing how much money was owed under the lease. District Court rulings invalidated many late fees, including ones that were similar to the late fee charged by HRA.⁴ Conversely, courts have employed the liquidated damages analysis to uphold late fees that appear very high. See Nylen v. Doral Park Apartments, 535 N.E.2d 178 (Indiana App. 1989), (holding a \$180 late fee on rent of \$420 not unreasonable).

Minn. Stat. 504B.177 was promulgated in order to bring fairness and predictability to late fees. As such it is a remedial statute.

⁴ Mr. McDonough's Eviction Defense Manual, Chapter VI (E)(10) includes a list of cases in which District Courts have invalidated late fees, including: Miller v. George, No. UD-1941223501 (Minn. Dist. Ct. 4th Dist. Jan. 10, 1995) (\$25.00 late fee for non-payment of \$10.00 rent is unconscionable); Cherrier v. Harper, No. UD-1940113508 (Minn. Dist. Ct. 4th Dist. Feb. 4, 1994) (late charge of \$15 if rent was more than one day late, and \$20 after two days, was an unenforceable penalty); Central Community Housing Trust v. Anderson, No. UD-1900611534 at 3 (Minn. Dist. Ct. 4th Dist. July 6, 1990) (government subsidized housing: \$20.00 late fee bore no relation to cost of landlord's preparation of form notice and slipping the notice under the tenant's door, triggering the tenant's prompt action in paying the rent); Auchampach v. IGO Co., Nos. C7-90-10716, C6-90-10559, and S9-90-6084 at 6-7 (Minn. Dist. Ct. 2nd Dist. Dec. 5, 1990) (late charge of 4 percent of the amount of rent unpaid plus \$2.00 per day is excessive and unenforceable, intended as a penalty for nonperformance of the tenant's obligation to pay rent in a timely manner); Larson v. Cooper, No. UD-1880209557 at 8 (Minn. Dist. Ct. 4th Dist. Mar. 21, 1988) (\$10.00 per day late fee was an unenforceable penalty). Copies of these cases are included in Respondent's Appendix, pp. 58, 19, 16, 8, 32 -- respectively.

When engaging in statutory construction, we interpret remedial legislation broadly to better effectuate its purpose. We interpret exceptions contained within remedial legislation narrowly.

Current Technology Concepts, Inc. v. Irie Enterprises, Inc. 530 N.W.2d 539 (Minn. 1995).

In 504B.177 (b), the Legislature created a limited exception to the statutory limit on late fees. That exception should be narrowly construed.

HRA urges the Court to return landlords and tenants of public housing to the reasonableness standard, along with the attendant uncertainties and the administrative burden on the Courts of deciding what is reasonable for each lease. HRA provided the trial Court with an excerpt from the legislative history of 504B.177 (b), in which Representative Holberg stated "There are federal regulations around these programs as well, so this would allow for the late fee to reflect the standards in the federal programs that govern the subsidized housing."

Senator Newman, testifying in support of the companion bill, Senate File 1272 before the Senate Public Safety Committee on February 28, 2012, said:

One of the provisions that was passed last year establishes a limit on late fees that landlords can charge. That limit was set at not to exceed 8% of the tenant's monthly rent. There was also a provision made for public agencies to rely upon federal statute regulations or handbooks to set late fees for tenants who are late in paying their rent. Since the 2010 session there has been some question about whether the language clearly separates the public agencies abilities to set their limits in accordance with federal statutes, rules, or handbooks from the 8% cap. This was clearly the intention last year of all of the parties to the negotiations. This bill simply makes it clear the distinction between the 8% cap and the ability of public agencies to rely upon the guidance they have received from the public programs that support the public housing facilities.

Neither Representative Holberg nor Senator Newman testified in favor of allowing Housing Authorities to set late fees based on the Housing Authority's determination of what was reasonable. They both expected landlords of federally subsidized rentals to

follow federal guidelines. Since the purpose of the original legislation was to create an objective standard for late fees, and get rid of the subjective "reasonableness" standard, they clearly assumed that a federal law or handbook provided an alternative objective standard. This assumption also explains their use of the word "conflict" in the legislation. If the legislature had intended to exempt public and subsidized housing providers from any objective standards, they could have done so. Instead they chose to allow the exemption only if there was a conflicting federal standard.

Some kinds of federally subsidized housing do in fact provide an objective standard for late fees, although none make imposing a late fee mandatory. As Minnesota NAHRO points out in its Amicus brief, the HUD Handbook 4350.3, which applies to Subsidized Multifamily Housing Programs (which excludes Public Housing), provides a precise formula for calculating late fees. (\$5 may be assessed on the 6th day rent remains unpaid, and \$1 per day after that) (Minnesota NAHRO Amicus Appendix, 33). Most subsidized housing projects are required to use one of the HUD model leases. (HUD Handbook 4350.3, 6-4 - 6-6, Respondent's Appendix, p. 5.)

The guidelines for Rural Housing Service subsidized units (under the US Department of Agriculture) are even stricter. The landlord must allow a grace period of 10 days, after which he may charge \$10 or 5% of tenant payment, whichever is more. 7 CFR 3560.209.

Whether HUD subsidized housing or Rural Housing Service housing are bound by the 8% late fee limit in 504B.177(a) is not part of this proceeding, and may well present a different question. However, no such objective standards exist for Public Housing. The

result of excepting leases in public housing from the 8% cap on late fees would be to subject the parties to the uncertainties of the “reasonableness” standard.

The Public housing sample lease provides for a formula for calculating late fees. However, no PHA is required to use the sample lease. In contrast, HUD Handbook 4350.3 provides a “model lease” and requires subsidized Housing providers to use it unless they permission from HUD to vary its terms. The Public Housing Occupancy Guidebook makes no reference to a prescribed lease form in the body of Guidebook itself, but does provide a “Sample” (in contrast to the “model” lease prescribed for Subsidized housing providers) lease in the appendix. In his introduction to the Guidebook, Assistant Secretary for Public and Indian Housing Michael Liu says “The guidebook also contains appendices of sample policies and forms that can be used by PHA staff.” (Respondent Appendix p. 4.)

HRA does not use the HUD sample lease; there are a number of significant provisions in the HRA lease, including the late fee, which are different. They include:

1. The HUD sample lease provision on late fees says: “Late charges: A charge of \$1 per day for rent or other charges paid after the seventh calendar day of the month”. (Appellant’s Appendix, p. 80). The HRA lease provides that: If you do not pay your rent and all other charges by the fifth day of the month, and the landlord has not agreed to accept payment at a later date, a notice to pay or vacate will be issued to you. In addition you will have to pay a \$25 (twenty-five dollar) late charge.” (Appellant’s Appendix, p. 38). The Sample lease provision provides for a maximum late fee of \$24 in a 31 day month, but a much smaller

fee if the rent is only a few days late. The HRA lease in contrast levies a \$25 fee if the rent is paid after the 5th day of the month.

2. Paragraph 3(c), gives HRA the right to apply tenant payments “in the order and manner the landlord chooses” application of payments. No such provision appears in the sample lease.
3. At paragraph 3(g) the HRA lease provides that “If legal proceedings are required to recover possession of the Premises, you will be charged with the actual cost of such proceedings (including reasonable legal fees).” No such provision appears in the sample lease, and the provision may violate 24 CFR 966.6, which prohibits charging tenants with the cost of legal actions regardless of outcome.
4. Paragraph 4(b) of the HRA lease provides for a \$200 pet deposit. No such provision appears in the HUD sample lease.

The existence of an optional sample lease in the appendix to the Public Housing Occupancy Guidebook does not create a standard for late fees other than the “reasonableness” standard in the law and regulation.

d) THE WORD “CONFLICT” SHOULD BE INTERPRETED TO REFER TO THE LAW OF CONFLICT PREEMPTION.

Words and phrases are construed according to rules of grammar and according to their common and approved usage; but technical words and phrases and such others as have acquired a special meaning, or are defined in this chapter, are construed according to such special meaning or their definition;

Minn. Stat. Ann. § 645.08

As the Court of Appeals noted, the term “conflict” when used in legislation, in reference to the interaction between federal and state law has a special meaning. Courts

have dealt extensively with different laws (different state laws, federal laws) which apply to the same subject matter and developed the doctrine of conflict preemption." The canons of construction provide that technical words and phrases be given their special or defined meaning. Staab v. Diocese of St. Cloud, 813 N.W.2d 68, 72 (Minn.2012); In the Matter of the Welfare Of J.J.P. 831 N.W.2d 260 (Minn. 2013).

In JJP the phrase the Court was interpreting was a legal phrase, "adjudication of delinquency". However, in another case, In the Matter of the Pamela Andreas Stisser Grantor Trust 818 N.W.2d 495 (Minn. 2012) the phrase in question was "legal debt", a phrase that is common and not technical. This Court, however, gave "legal debts" as used in a trust agreement its technical meaning, developed under common law, which excluded debts secured by real estate.

This case has a somewhat different presentation from a typical conflict preemption case because it is the state legislature allowing an exemption from late fee limits to certain landlords if there is a federal law or handbook provision which conflicts. The legislature's use of the word "conflict" however requires a conflict preemption analysis, because that is the only meaning courts have given that word when deciding what law to apply.

HRA argues on page 15 of its brief that the legislature could not have meant intended "conflict" to have the meaning courts have given it in conflict preemption cases, because the statute provides that a conflict with the HUD handbook will also trigger the exemption from the late fee limit.

Without specific legislation authorizing it, 504B.177(a) could have been preempted by federal statute or regulation, but not by a HUD handbook provision. It is, however, within the Legislature's power to allow conflict preemption by a handbook, and that is what they

have done. The fact that the Legislature extended the power of preemption to a handbook does not change the conflict preemption analysis.

e) THERE IS NO FEDERAL PREEMPTION.

The Minnesota Legislature chose to exempt public and subsidized landlords from the 8% cap on late fees where there is a “conflict” with federal law or HUD handbook provisions. The District Court determined that 504B.177(a) is preempted by federal law. Where a federal law conflicts with a state statute, the state statute is preempted.

There are three distinct situations in which federal law preempts and invalidates state law. First, state law is preempted when Congress explicitly states that the federal scheme preempts any state action in the field. The second arises when Congress implicitly preempts state involvement in a particular field of law because the scope of federal involvement or interest is so extensive that it fully “occupies the field.” The final type of preemption, “conflict preemption,” takes two forms and arises when state law conflicts with federal law, either because compliance with both federal and state law is impossible or because the state law is an obstacle to the accomplishment of the purposes of the federal scheme. Preemption of state laws is generally disfavored. When federal laws do preempt conflicting state laws, the state laws are preempted only to the extent that they are in conflict with federal law. Martin ex. Rel. Hoff v. City of Rochester 642 NW 2d 1 (Minn. 2002).

The first two types of preemption clearly do not apply. There is no federal statute prohibiting states from passing laws affecting public housing tenants. This is in contrast to areas in which Congress has passed legislation clearly occupying the field. The Federal

Cigarette Labeling and Advertising Act, for example, do include language in which it clearly preempts the field of cigarette labeling and advertising:

No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act. 15 USC 133.

See Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516, 112 S.Ct. 2608, 2617, 120 L.Ed.2d 407 (1992) (state regulation preempted by federal law).

As with the Medicaid law referred to in Martin ex. Rel. Hoff v. City of Rochester 642 NW 2d 1 (Minn. 2002) and In Re Estate of Gullberg 652 NW 2d 709 (Minn. App. 2002), the federal statutes provide a framework, and require action on the part of the state to create its own plan in accordance with federal requirements. The United States Housing Act, 42 USC 1437 et seq requires Public Housing Authorities to act to create a lease in conformity with federal law as well as state statutes. In areas in which the Public Housing Authority has discretion, and there are both federal and state law rules, the Department of Housing and Urban Development has specifically instructed the PHA to adopt the lease provision most beneficial to the tenant. (Appellant's Appendix, p 57).

The United States legislature has provided a list of lease requirements for public housing authorities. 42 USC 1437d(l). It is clear there is no field preemption because congress specifically provided for deference to and application of state law. For example, the statute provides for a lease termination notice of 30 days, unless State law provides for a shorter period of time. 42 USC 1437d(l)(4). The statute has limited requirements and prohibitions for leases, and permits the Housing Authority to adopt others as it sees fit. The statute also instructs the Housing Authority to comply with state law where it provides a greater degree of protection for tenants. (e.g. 42 USC 1437d(f) – housing

quality standards, and 42 USC 1437d(l)(6) providing that the housing authority is bound by state or local law providing greater protection to victims of domestic violence).

The Public Housing Occupancy Handbook repeatedly instructs Public Housing Authorities to adopt leases that comply with state and local laws. The following statements appear in Chapter 17 of the Handbook (Appellant's Appendix, p. 57):

In addition to HUD's requirements for lease language, PHAs are bound by state and local landlord-tenant law. (Appellant's Appendix, p. 57)

To ensure compliance with state and local requirements, each PHA should request that its Legal Counsel review the lease for compliance with state and local requirements. (Appellant's Appendix p. 57)

Beyond the prohibited [lease] provisions established by 24 CFR 966.6, State and local landlord-tenant statutes may establish additional prohibited provisions. (Appellant's Appendix p. 59)

Subject to state and local laws, interest earned on security deposits may be refunded to the tenant on vacation of the dwelling unit or used for tenant services or activities. (Appellant's Appendix p. 61)

The HUD regulations governing leases give PHSs valuable flexibility to tailor their leases to local situations and issues so long as the HUD required provisions are included and the prohibited provisions are excluded. PHAs must also consider the requirements imposed by state and local laws. (Appellant's Appendix, p. 57.)

Similarly there is no explicit preemption because there is no congressional statement that state law does not apply to public housing leases, and in fact except for a few specific exceptions, state law does control.

Conflict preemption does not apply because it is possible to comply with both the federal regulation and the state statute. Florida Avocado and Lime Growers Inc. v. Paul, 373 US 132 (1963). Since the federal regulation only PERMITS a late fee and does not require one, any late fee, as long as it is reasonable, or no late fee at all both comply with

federal law. The late fee permitted under state law (8% of past due rent) complies with federal law.

Nor does the state limit on late fees present an obstacle to the accomplishment of the purposes of the federal scheme. The goals of the United States Housing Act are to provide decent and affordable housing to low income families⁵. HRA's ability to charge indigent tenants late fees amounting to 50% of the past due rent does not further that goal. In addition, as noted above, HUD, the agency charged with administering the public housing program, has specifically instructed public housing agencies to apply the policy most beneficial to tenants in the event of a conflict between a proposed lease provision and state law.

⁵ 42 USC 1437

(1) to promote the general welfare of the Nation by employing the funds and credit of the Nation, as provided in this chapter--

(A) to assist States and political subdivisions of States to remedy the unsafe housing conditions and the acute shortage of decent and safe dwellings for low-income families;

(B) to assist States and political subdivisions of States to address the shortage of housing affordable to low-income families; and

(C) consistent with the objectives of this subchapter, to vest in public housing agencies that perform well, the maximum amount of responsibility and flexibility in program administration, with appropriate accountability to public housing residents, localities, and the general public;

(2) that the Federal Government cannot through its direct action alone provide for the housing of every American citizen, or even a majority of its citizens, but it is the responsibility of the Government to promote and protect the independent and collective actions of private citizens to develop housing and strengthen their own neighborhoods;

(3) that the Federal Government should act where there is a serious need that private citizens or groups cannot or are not addressing responsibly; and

(4) that our Nation should promote the goal of providing decent and affordable housing for all citizens through the efforts and encouragement of Federal, State, and local governments, and by the independent and collective actions of private citizens, organizations, and the private sector.

HRA relies on Fidelity Federal Savings v. De la Cuesta, 458 US 141 (1982) for the proposition that state law may be preempted where it prohibits something that federal law allows. In that case, a federal agency, the Federal Home Loan Bank Board, became concerned about restrictions California and other states had imposed on the ability of Federal Saving and Loan Associations to include due on sale clauses in mortgage contracts, and to enforce those clauses. The Board believed that the loss of this tool would have an adverse impact both on Federal S & Ls and their customers.

Accordingly, the Board issued a regulation in 1976 governing due-on-sale clauses. The regulation, now 12 CFR § 545.8-3(f) (1982),³ provides in relevant part:

“[A federal savings and loan] association continues to have the power to include, as a matter of contract between it and the borrower, a provision in its loan instrument whereby the association may, at its option, declare immediately due and payable sums secured by the association’s security instrument if all or any part of the real property securing the loan is sold or transferred by the borrower without the association’s prior written consent.

In the preamble accompanying final publication of the due-on-sale regulation, the Board explained its intent that the due-on-sale practices of federal savings and loans be governed “exclusively by Federal law.” 41 Fed.Reg. 18286, 18287 (1976). The Board emphasized that “[f]ederal associations shall not be bound by or subject to any conflicting State law which imposes different ... due-on-sale requirements.”

In addition, the Board recently has “confirm[ed]” that the due-on-sale practices of federal savings and loans “shall be governed exclusively by the Board’s regulations in pre-emption of and without regard to any limitations imposed by state law on either their inclusion or exercise.” 12 CFR § 556.9(f)(2) (1982). Thus, we conclude that the Board’s due-on-sale regulation was meant to pre-empt conflicting state limitations on the due-on-sale practices of federal savings and loans, and that the California Supreme Court’s decision in Wellenkamp creates such a conflict.

Fidelity Federal Savings and Loan Assn. v. De La Cuesta, at 145, 146, 159

California law prohibited due on sale clauses unless the lender could demonstrate that enforcement was reasonably necessary to protect against impairment to its security.

or the risk of default. The Supreme Court noted that although it was technically possible to comply with both California law and the federal regulation, the Board had clearly intended to preempt state regulation in the area of due on sale clauses. Although the Court discussed both conflict preemption and express preemption, it relied heavily on the Board's statement explicitly preempting state action on due on sale clauses.

As discussed above, HUD's statements on what law governs lease clauses could not be more different. The 9th Circuit Court of Appeals discussed de la Cuesta in a case involving the tenant based Section 8 housing program, which is also regulated by HUD.⁶ In Barrientos v. 1801-1825 Morton LLC, 583 F3d 1197 (9th Cir. 2009), the landlord claimed that he had the right to terminate an assisted tenant's tenancy under 24 CFR 982.310(d)[(1)] (iv), which allows the landlord to terminate the rental agreement for a business or economic reason, including but not limited to, the desire to opt-out of the Tenant Based Section 8 Program and or the desire to lease the unit at a higher rental rate. The city of Los Angeles rent control ordinance, however, prohibited eviction of tenants from rent controlled housing except for good cause. The ordinance's definition of good cause did not include the desire to lease the unit at a higher rental rate or cease participation in the Section 8 program (the reasons given by the landlord).

The Court determined that although the federal regulation allowed the landlords to do something which the city ordinance did not, there was no conflict because in its response to comments on the regulation HUD stated "good cause" would be determined by local landlord tenant courts, Section 8 Housing Assistance Payments Program; Existing

⁶ In the tenant based Section 8 program, the assisted tenant rents from a private landlord, and the PHA pays part of his rent. The lease is between the tenant and the private landlord.

Housing, 49 FR 12234 (March 29, 1984). The Barrientos Court distinguished de la Cuesta:

[t]he de la Cuesta Court relied heavily on the “unambiguous” intent of the federal agency to preempt contrary state law. 458 U.S. at 154–59, 102 S.Ct. 3014; see also *id.* at 158, 102 S.Ct. 3014 (“The preamble unequivocally expresses the Board’s determination to displace state law.”). That sort of unambiguous intent, as explained above, is not present here.

Barrientos, at 1212. In Automobile Importers of America Inc. v. State of Minnesota 871 F2d 717 (8thCir. 1989), the 8th Circuit Court of Appeals found no actual conflict between the Magnuson Moss Warranty Act and the Minnesota Lemon Law, Minn. Stat. 325F.665, although the federal law permitted the manufacturer greater flexibility than the state law. Federal law allowed manufacturers to require consumers to use its dispute resolution mechanism before the consumer could seek direct redress from the warrantor. Minnesota law required manufacturers to offer such a mechanism; federal law allowed oral presentations only if both parties consented; Minnesota law gave consumers the right to make oral presentations; federal law prohibited fees being charged to consumers for use of dispute resolution mechanism; Minnesota law allowed it.

The Court found no conflict preemption because compliance with both laws was possible. Manufacturers could comply with federal law by complying with Minnesota law. Although Minnesota law may have the effect of “limiting the availability of a federally-created option”, where there was no clear federal agency statement of intent to preempt state regulation or legislation in the field, and compliance with both laws was possible, there could be no preemption. The Court distinguished the facts in de la Cuesta, where the history of the regulation and the statements of the Federal Home Loan Bank Board made clear that the Board intended to prohibit state limitations on due on sale clauses.

With regard to provisions which may or may not be included in public housing leases, the HUD statements in the Public Housing Occupancy Guidebook (reproduced above) direct PHAs to follow state and local law when it is more beneficial to the tenant. In addition, HUD's August 30, 1988 statements in its responses to comments on the proposed regulation governing leases (24 CFR 966.4) 53 Federal Register 33216 (which Appellant cites on page 29 – 31 of his brief) manifest an intent to defer to state and local law:

At 33224: (in reference to a tenant's right to withhold rent for a PHA's failure to maintain): Absent a federal requirement or prohibition, the existence or non-existence of a right to abatement is determined by state law.

At 33243: (regarding a proposed rule requiring a 24 hour notice of landlord's intention to enter unit) HUD regulation establishes minimum federal requirements, for notice to a tenant but does not preempt state laws which require longer notice to a tenant. Since HUD regulation does not override tenant rights under local law that do not contradict specific provisions of the federal rule, public housing tenants enjoy tenant rights vouchsafed by state law as well as federal protections under the HUD regulations.

At 33250: (regarding notice of termination of tenancy): the Rule is intended to assure that tenant has adequate notice of lease termination. The HUD requirement does not override service requirements imposed by state law. For termination of tenancy and eviction of the unit occupants the PHA must satisfy any notice requirements imposed by state law and procedure.

At 33257: b. Effect of Federal Rule on State Procedures. Comment states that the rule should require compliance with procedural protections for a tenant under State law, or should provide that State law controls where the Federal rule interferes with tenant protections under State law. Comment expresses concern that the rule deprives a public housing tenant of rights of a private tenant under State law. Other comment is concerned that the Federal rule may preempt State protections.

At a minimum, tenants are entitled to all the protections afforded by Federal law and this rule. State law may not override rights under Federal law or regulation, but may give a tenant the right to additional protections. Federal statute and regulation governing lease rights and termination of tenancy in the public housing program is not a comprehensive scheme that precludes other State regulation concerning this subject. To the contrary, it is assumed that the procedural and substantive law

affecting a tenancy in the public housing program is compounded of elements established by both Federal and State law.

State laws are binding without incorporation in a Federal rule, or in the Federally-required lease requirements. State tenant protections may be enforced through the State courts or other procedures available under State law, without any need to create a Federal right to State law protections. (Respondent's Appendix, p. 44.)

In light of HUD's consistent position that state law controls where its effect is to increase tenant protections, and the fact that compliance with both federal law, regulations and handbook provision, Minn. Stat. 504B.177(a) is not preempted by the regulation and handbook, which allow a landlord to impose a reasonable penalty for late payment of rent.

CONCLUSION

Under the plain meaning of its language, Minnesota Statute 504B.177(b) does not exempt the \$25 late fee charged in Appellant's lease from the 8% limit imposed in 504B.177(a), because there is no conflict between that late fee restriction and federal law and handbooks, which permit a "reasonable" penalty for late payment of rent. 8% of Respondent's \$50 rent, which is \$4, is a reasonable penalty.

The legislature enacted the 8% limit in order to replace the "reasonableness" standard for the enforceability of late fees with an objective one. 504B.177(b) creates a limited exception where an objective late fee standard exists in federal law or handbooks which conflict with 504B.177(a). The Legislature did not intend to allow federally subsidized landlords an exemption from the 8% limit where neither federal law nor HUD guidebooks create an alternative, objective standard for late fees.

Neither federal law or handbooks preempt Minn. Stat. 504B.177(a) because it is possible to comply with both by charging a late fee that does not exceed 8% of past due

rent, and such a fee is reasonable. Both Congress and HUD made clear that Public Housing Authorities are expected to defer to state and local laws which provide tenants with more protection.

For the reasons set forth above, Appellant Brian Lee requests that this Court affirm the decision of the Court of Appeals.

LEGAL AID SERVICE OF
NORTHEASTERN MINNESOTA



BY: Gwen Updegraff
Attorney for Appellant
302 Ordean Building
Duluth, Minnesota 55802
(218) 623-8107
AIN: 197075

Case No. A12-2078

STATE OF MINNESOTA
IN SUPREME COURT

In the Matter of:

Housing and Redevelopment Authority of Duluth,
Appellant,

vs.

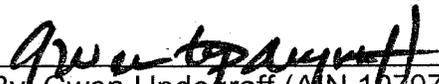
Brian Lee,
Respondent.

CERTIFICATE OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with an Arial 12 point font. The length of this brief is 783 lines and 8,607 words. This brief was prepared using Microsoft Office Word 2010.

LEGAL AID SERVICE OF
NORTHEASTERN MINNESOTA

Dated: 11-12-2013


By: Gwen Updegraff (A/N 107075)

Attorney for Brian Lee
424 West Superior Street
302 Ordean Bldg.
Duluth, MN 55802
(218) 623-8100