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NY's Housing Stability & Tenant Protect. Act–Part II

Gerald Lebovits

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New York's Housing Stability And Tenant Protection Act of 2019:

What Lawyers Must Know–Part II

Gerald Lebovits, John S. Lansden, and Damon P. Howard

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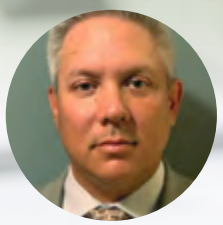

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In Part I of this series (91 N.Y. St. B.J. 35 (Sept./Oct. 2019)), we compared, in outline form, prior landlord-tenant law with New York's new Housing Stability and Tenant Protection Act of 2019 (HSTPA). In this article, we discuss HSTPA's rent-regulation provisions.

Most see HSTPA's passage on June 14, 2019, as a tectonic shift in New York rent regulation and landlord-tenant law and procedure, a shift that alters the balance of power between landlords and tenants. But the agreement ends there. Reception to the new law has varied among the different factions, ranging from triumphant celebration to apocalyptic prediction.

Rent regulation has a long history in New York. Early rent controls were born out of the post-WWI housing crisis. FDR revived them during WWII. The current rent-stabilization system began in 1969. It has compounded in complexity with each successive wave of legislation as power has changed hands in Albany. Those unfamiliar with the tangled history of New York's rent laws can be forgiven for not understanding the furor surrounding their newest addition.

The new law has introduced legal questions that will generate litigation for years. While historic in its scale, the language of the Act of 2019 is sometimes unclear. A federal lawsuit that claims that the new law violates the U.S. Constitution has already been filed in the United States District Court for Eastern District of New York.[1]

Much of the clamor has focused on the rent-regulation changes that will be the focus of this article. Other sweeping and structural changes enacted by the Act of 2019, which affect everything from security deposits to the day-to-day procedures of eviction proceedings and plenary actions in Upstate and Downstate New York, are equally deserving of attention. They will be discussed in another edition of the *Journal*, when this series concludes with Part III.

The authors take no position in the debate that has sprung up around the Act of 2019, but present both sides' positions vigorously for context and clarity and to shed light on some of the new law's ambiguities and possible consequences.

THE END OF THE SUNSET PROVISION; THE EXPANSION OF RENT STABILIZATION

A hallmark of New York's rent regulation is that it always included a sunset provision, a date by which the Legislature must renew the rent laws to prevent their expiration. Each time the laws neared expiration, stakeholders in this perennial struggle had an opportunity to convince lawmakers that the housing emergency has improved or that the laws should be revisited and tightened or loosened in response to economic and societal influences.

For landlords, the repeal of the sunset provision with HSTPA's passage ruptures a safety feature of the rent-regulation system. Landlord advocates contend that tenants have set fire to the house and then pulled the ladder up after themselves. For tenants, repeal of the sunset provision eliminates a perpetual, existential threat to rent regulation and is justified by New York's long-lasting shortage of affordable housing. For many tenant advocates, the sunset provision allowed landlords to water down protections in each renewal by leveraging tenants' fear that the law would not be renewed.

The sunset provision allowed the rent laws to ebb and flow over time with changing housing conditions (but mostly, in 1993 and 1997, with legislation that favored landlords). The repeal of the sunset provision means that the laws will remain at a historical high-water mark, until the next time there is political consensus among the Senate, Assembly, and the Governor. Every three years, however, the New York City Council will revisit whether a housing emergency still exists.

Although rent-stabilization coverage was previously limited to New York City and some localities in Nassau, Rockland, and Westchester counties, Albany concluded in its legislative findings that due to a reduced availability of federal subsidies, shortage of housing accommodations, increased cost of construction, and other inflationary factors, people not protected by rent stabilization are "being charged excessive and unwarranted rents and rent increases."[2] "To prevent speculative, unwarranted and abnormal increases in rent," the new law extends stabilization coverage to all New York State counties where local legislatures determine that an emergency exists.

Critics view an expansion of rent stabilization as overreaching and unnecessary. One pragmatic weakness that has been cited is that the expansion of rent stabilization will be overseen by local boards, appointed by the New York State Division of Housing and Community Renewal (DHCR), and that DHCR might lack the resources and staff to oversee these fledgling boards in implementing complex rent-stabilization laws.

New York's new rent law appears to be just the first in a wave of rent-control regulations gathering on both the East and West coasts. In February, Oregon became the first state to enact statewide rent-control measures. California was fast on its heels with a rent-control law limiting rent increases to five percent plus inflation. Washington state, as well as cities like Philadelphia, Chicago, Providence, and Denver, are considering similar protections.

A rash of studies and articles have challenged rent control's rationale. A 2018 New York Times article reported that "economists from both the left and right are in almost universal agreement that rent control makes housing problems worse in the long run."[3] The Washington

Post concurred with a September 21, 2019, editorial, *The Economists Are Right: Rent Control is Bad*, arguing that "[t]he economists are right, and the populists are wrong. Rent-control laws can be good for some privileged beneficiaries, who are often not the people who really need help. But they are bad for many others."[4]

The pragmatic counterargument from rent-stabilized tenants, more than a million strong in New York City alone, is that for those who have a rent-stabilized apartment, the limitations on rent and prohibitions on being evicted without just cause are a matter of survival.

Housing is one of the few essential needs in which the immediacy of the government remedy does not match the urgency of the need.

Housing is one of the few essential needs in which the immediacy of the government remedy does not match the urgency of the need. In the case of health care or food, government solutions like Medicaid and food-assistance programs provide a solution today. For housing, government options like homeless shelters and years-long waiting lists for housing and vouchers can be dire. Academics might have the luxury of advocating policies that ease the underlying housing shortage. But tenant advocates reject this approach on the principle that the perfect is the enemy of good. And while not all renters might ultimately benefit from regulation, it has the benefit of providing a solution now to millions of people, including many who vote. With rent regulation, the Legislature can provide a ready-made policy solution, with the rare satisfaction in politics of providing immediate results, all without raising taxes.

FEWER STABILIZED APARTMENTS WILL BE DEREGULATED: LUXURY DEREGULATION AND VACANCY INCREASES HAVE BEEN ELIMINATED; COOP AND CONDO CONVERSIONS WILL BE RARE

In 1993, the rent laws were amended to include high-rent and high-income deregulation (luxury deregulation) provisions, permitting apartments with rents above a certain threshold ($2,774.76 under the prior law) to be removed from rent stabilization when they become vacant or the tenants' income rose by a certain amount ($200,000 under the prior law). Since 1997, landlords have also benefitted from a 20% rent increase during vacancies, as well as a longevity bonus of 0.6% a year if there had not been a vacancy for eight or more years. The new law abolishes luxury deregulation and eliminates both these increases based on vacancies. It also expressly bars the New York City Rent Guidelines Board (RGB) from adopting vacancy increases.

Tenants praise the elimination of luxury deregulation, which they have long criticized as a loophole that fueled tenant harassment by unscrupulous landlords trying to obtain prized vacancies and which led to the loss of an estimated 170,000 rent-regulated apartments.[5]

Tenants further view the elimination of vacancy increases as removing a significant financial motivation for high-tenant turnover, susceptible to abuse and contrary to the aims of rent stabilization. Without vacancy increases, though, landlords in some instances might find it difficult to justify incurring the fees and expenses of eviction proceedings, even for nuisance tenants, illegal subtenants, or tenants who use a regulated apartment as a pied-à-terre. Rarely will landlords under HSTPA pay occupants cash for keys to move.

Landlords point out that to the extent that stabilization laws are premised on a housing shortage, evictions enforce the law and create vacancies. Because fewer evictions will mean fewer vacancies, this will, landlord advocates suggest, exacerbate the housing shortage that stabilization was meant to prevent.

Landlords also contend that far from being a loophole, luxury deregulation and vacancy increases were lawfully baked into the system's economics. Landlords and lenders have relied on these provisions for a quarter century in buying, financing, and operating stabilized buildings. Like the mix of affordable housing provided with tax incentives like the 421-a program, in which owners can offset decreased rents from affordable housing with revenue from market apartments, luxury deregulation permits owners to make owning stabilized buildings a viable investment. Landlords argue that protecting "luxury" apartments and "high income" tenants runs contrary to the policy objectives of the rent law: that abolishing luxury deregulation permits the possibility of a tenant with a $1M annual income living in a $10,000/month rent-stabilized apartment. Rent stabilization was intended in part to protect the most vulnerable from being dislocated from their homes. But, landlords opine, eliminating high-income deregulation does not further this purpose, because it permits tenants whose incomes afford them many housing options to occupy the limited stabilized housing available.

Considered separately from tenant income, however, the fact that an apartment has high rent is perhaps an unreliable indicator that the people occupying the apartment do not need the protections of rent stabilization. A $3,500/month 3-bedroom apartment might be occupied by families or roommates pooling their resources. But

this logic might falter when you reach the example of a tenant's occupying a $4,000 per month 1-bedroom rent-stabilized apartment. Tenants respond that this is a rare example, far from representative of the stabilized housing stock. Factual disputes of this nature would be more readily resolved by more granular data on the housing stock within the stabilization system, so that the Legislature – and potential developers of residential housing – can determine whether supply matches demand and calibrate their decisions accordingly.

HSTPA calls for greater DHCR reporting requirements, such as statistical data on the number of regulated units by county, the number of units with preferential rents, and the number of overcharge complaints processed and granted. HSTPA does not call for more particularized information regarding, for example, the number, and average rent, of 3-bedroom apartments. Thus, whether $4,000 per month one-bedroom stabilized apartments are more like exotic birds or common pigeons might go unanswered unless the Legislature imposes even greater reporting requirements.

Although HSTPA abolished the 20% vacancy and the longevity increases, it remains unclear whether a "renewal" increase is permitted for a vacancy lease. DHCR guidance since HSTPA's enactment provides that "[w]hen a tenant signs a vacancy lease, they can choose between a 1 or 2-year option and the allowable increase is set by the local rent guidelines board."[6] Landlords that choose to follow DHCR's guidance, however, worry that they do so at their peril. Those familiar with the landmark *Roberts v. Tishman Speyer Props. L.P.*[7] and the ensuing tempest of litigation that followed in its wake need no reminding that courts are willing to overrule DHCR guidance.

Historically, owners have also been able to exempt stabilized apartments from rent stabilization as part of the General Business Law's condominium and co-operative conversion process. The new law imposes significant limitations on this process, eliminating the eviction-plan option and increasing the purchasing percentage required for non-eviction plans from 15% to 51%. The co-op/condo exemption was viewed as exacerbating the housing crisis by allowing the conversion of affordable housing to apartments that few can afford. But this exemption gave some regulated tenants the option of home ownership and a greater voice in how their buildings are operated. Attaining the requisite 51% will be extremely difficult, foreclosing to some regulated tenants this route to home ownership.

In an apparent attempt to reduce any confusion surrounding the status of units deregulated before HSTPA, the new law provides that apartments lawfully deregulated before to June 14, 2019, will remain deregulated. The law is unclear, however, about how to determine the date of deregulation. In the case of apartments claimed to be luxury deregulated based on a high-rent vacancy, for example, it is unclear whether the triggering event is the date of the vacancy by the last stabilized tenant, the date of completion of any renovations necessary to raise the rent to the requisite threshold for deregulation, or the date of the first fair-market lease. The stakes are high for landlords and tenants alike; these questions will be litigated.

HSTPA removes many options for landlords to deregulate or raise rents for stabilized apartments. But it has not closed all avenues to realize these objectives. Enterprising landlords will now consider substantial rehabilitation, which permits the exemption from rent stabilization of an entire building if 75% of building-wide and individual apartment systems have been replaced in a building in a substandard or seriously deteriorated condition. Similarly, landlords might apply for a demolition eviction, which permits recovering an unlimited number of stabilized apartments if the landlord seeks in good faith to demolish them to build a new building.

Vacancy increases and increases based on capital improvements (discussed below) are no longer on the table for landlords. But the "first-rent rule" might still be used to raise legal rents by an unlimited amount if the perimeter walls of the apartment have been substantially altered.[8] Landlords might also raise economic infeasibility as a defense to a Housing Part repair proceeding;[9] try to convert units or buildings to and from commercial use; and apply to DHCR for an "alternative hardship" increase if they do not maintain an annual gross building rental income exceeding operating expenses by 5%. Under the inexorable pull of profits, landlords will test the outer boundaries of all legal options to maximize rent.

PREFERENTIAL RENTS

Preferential rents, in which a tenant is charged a rent lower than the legal rent, are widespread in New York City. When a landlord cannot find a tenant willing to pay the full legal rent for an apartment, landlords often charge a lower, or preferential, rent to avoid losing rent while the apartment remains vacant. Under the prior law, landlords could preserve the right to charge the higher legal rent when the lease expired, provided that the first lease in which the preferential rent was charged allowed the landlord to eliminate the preferential rent at lease expiration.

Preferential rents have long provoked the ire of tenant advocates, who believe that preferential rents have allowed landlords to raise rents by hundreds of dollars in some cases, even as the RGB has set historically low renewal rates in recent years, sometimes forcing out tenants who did not understand the preferential rent or appreciate its temporary nature. Tenants also argue that landlords used preferential rents to mask wrongdoing,

allowing them improperly to hike the legal rent while avoiding tenant overcharge challenges. After four years, the landlord could rescind the preferential rent, force the tenant out, and in some cases even deregulate the apartment – and any improper increase would be beyond the statute of limitations. Landlords dispute these contentions, arguing that preferential rents allow them simply to charge a lower rent than what they are legally permitted to charge and that the tenants' argument calls for higher rents for stabilized tenants.

HSTPA now makes preferential rents permanent while tenants remain in their apartment. All rent increases for lease renewals must be based on the preferential rent.[10] If an apartment becomes vacant, the landlord may charge a higher, legal regulated rent to the incoming tenant.

Once the tenant with the preferential rent moves out, the landlord need no longer offer a preferential rent. Still, some landlords will prefer to leave apartments vacant than to re-lease them indefinitely below the legal rent to which they are entitled. This phenomenon is already widespread in the commercial context, where many storefronts remain empty as landlords avoid committing to long-term leases while they hold out for a tenant willing to pay a higher rent. Landlords warn that the resulting warehousing of stabilized apartments will worsen the housing shortage. Tenants respond that preferential rents are not philanthropic: landlords offer them because they serve the landlord's own economic interest. These economic interests will, tenants say, dictate that landlords continue to offer lower preferential rents rather than lose rent while apartments sit vacant.

One criticism both landlords and tenants level at HSTPA's preferential-rent provisions is that the new law is unclear about whether the limitations on preferential rent apply to lease-renewal offers made before HSTPA was enacted but which are effective after June 14, 2019.

INVESTMENT IN BUILDING IMPROVEMENTS (IAIS AND MCIS)

Background and History

The former rent regulations provided financial incentives for landlords to improve rent regulated buildings, which in many cases are many decades old, by allowing them to recoup the cost of improvements and for a return on investment in the form of permanent rent increases. The law provided for investment in the building in the form of Major Capital Improvements (MCIs) and, in apartments, as Individual Apartment Improvements (IAIs). These capital expenditure provisions were available in New York City's first rent-stabilization code, which were drafted by a real-estate industry group in 1969 and were later enacted into state law in 1993[11] as lawmakers grappled with an epidemic of neglected and derelict buildings abandoned by landlords in the 1970s and 1980s, even as rental vacancy rates consistently hovered below 3%.[12]

MCIs' rent increases are based on the actual cost of the improvement, often an installation of new equipment servicing the entire building, such as a new boiler or plumbing – repairs to old equipment do not qualify. Owners must apply to DHCR for approval for MCIs and, if approved, the rent increases are apportioned among the building's tenants on a per room basis. Prior to the recent changes, owners of smaller buildings with 35 or fewer apartments could recoup their MCI costs over an eight-year amortization period, and owners of larger buildings with 36 or more apartments were given a nine-year amortization period. Annual rent increases were capped at 6% in New York City and 15% in the rest of the state.

No prior application or approval was necessary for an IAI (unlike for MCI rent increases), and tenant consent to the improvements was required only if the apartment was occupied. Owners could increase the monthly rent by 1/40th of the cost of the improvements in buildings with 35 or fewer apartments and 1/60th in buildings with 36 or more apartments. Tenant advocates note, though, that however severely the new law restricts recoupment, the old law allowed a landlord to recoup costs quickly (for a 1/40th) and then continually earn profit by allowing it to be collected again each month and to collect it in multiples by allowing it to be added to the legal rent, upon which increases were taken.

Changes Under the 2019 Law

Under the new law, the recoupment periods for MCIs have been lengthened to 12 and 12 ½ years, respectively; a 2% annual cap has been imposed; and the rent increases are now temporary and must be removed from the rent after 30 years. There is also an element of retroactivity: The 2% cap is made effective to MCI orders granted as early as June 16, 2012. DHCR is required to establish a schedule of reasonable MCI costs and more stringent rules for improvements, such as excluding cosmetic improvements, imposing energy efficiency requirements, and not permitting MCI in buildings with 35% or fewer rent regulated tenants. DHCR is now directed to inspect and audit 25% of MCI applications,

The new law caps the cost and number of IAIs for the first time, permitting no more than three separate IAIs, with a total aggregate cost of no more than $15,000.00, within a 15-year period. HSTPA also reduces the increases to 1/168th and 1/180th, respectively.[13] Like MCI increases, IAI rent increases are now temporary; they must be removed from the rent after 30 years. Additionally, owners may raise the rent only if they first remove all hazardous and immediately hazardous violations in the apartment or the building, depending on which increase is sought.

REACTIONS FROM LANDLORDS AND TENANTS

Tenant groups and advocates argue that MCI and IAI programs undermine the rent-regulation system – that, at best, IAIs encourage unnecessary or cosmetic improvements that gentrify communities but do not ameliorate the housing crisis. At worst, tenant groups argue, they reward fraud, as landlords take exorbitant rent increases with no oversight over the work or the validity of costs beyond the tenants themselves, who might not know or understand their rights. An additional tenant concern is that landlords use these increases to deregulate stabilized apartments and thus decrease the already-scarce affordable housing stock.

Similarly, tenants argue that although DHCR approval is required for MCIs, the agency lacks the personnel to do more than rubber-stamp MCIs; that MCIs are for building essentials that should be provided as part of the rent tenants already pay; and that the resulting building-wide rent increases have caused the very hardship and dislocation of tenants and families that rent regulation is intended to prevent.

For example, if the rent for a two-bedroom apartment in a 30-unit building is $2,000 and the landlord performs $15,000 in qualifying IAIs while the apartment is vacant, the rent can be raised $375 to $2375 (and the apartment could also be removed from rent stabilization at the next vacancy). Tenants argue that a $375 increase (and for lower-income and rent-burdened tenants, even smaller increases) in the rent represents a hardship, representing a nearly 20% increase in the rent, placing it out of reach to a large swath of people who could otherwise have afforded a $2000 apartment, and that the rent revenue from stabilized buildings is already a sufficient profit motive without additional rent increases for capital expenditures. According to the RGB's 2019 Income and Expense Study, the profits of the owners of stabilized apartments have increased for 13 consecutive years, reaching an all-time average high of $540 per month from apartment leases in 2017.[14]

Landlords counter that far from reforming the MCI and IAI programs, the new law eviscerates these programs, discouraging landlords from making desperately needed capital infusions into stabilized buildings that can be upward of a century old. Investment in stabilized buildings will be economically unsustainable, landlord groups contend, because landlords will be forced to wait as long as 12 1/2 years to recoup the cost of MCIs and as long as 15 years for IAIs. Landlords argue that they are already obligated to perform ordinary maintenance and repairs, with no increase in rent, as these were already excluded from IAIs and MCIs, and that they are operating buildings at a loss as the RGB-approved renewal increases since 2015 have hit a 50-year low, with a 1.5% increase for 1-year renewals recently approved by the RGB, despite the RGB's own data reflecting that costs increased by 4.9%.

Landlords caution that the changes to the MCI and IAI programs will trigger a downward spiral of declining property values and dilapidated buildings. The rent-stabilization laws do not require that landlords lease stabilized apartments, and some of New York's largest landlords have already threatened to warehouse vacant rent-stabilized apartments because, they allege, HSTPA has limited the profit they can collect from these units.

Landlords also cry foul that the retroactive element of the 2% cap unjustly penalizes landlords who relied on then-existing law. They point out that it can already take years for DHCR to decide an MCI application and that HSTPA's approach will delay the process only further, making it even less likely that improvements to the housing stock will be made in the future.

Turning again to the example of the 2-bedroom apartment above, the landlord in a 15-year period could perform no more than $15,000.00 in improvements, with the landlord's only incentive being a maximum rent increase of $89.29. At best, it will take an owner 14 years to recoup its costs. Tenant advocates argue (we have heard) that a landlord's return on an investment under the old law was 30% but that even a 1/168th recoupment still amounts to a 7% annual return.

For landlord and tenant alike, the amendments to the IAI provisions have created a number of open questions. For example, because rent increases based on IAIs are now temporary, it is unclear whether any IAI increase should be included in the base rent when renewal increases are calculated. Additionally, significant ambiguity remains about the effective date of the new IAI provisions. The Clean Up Bill attempts to clarify the issue by stating that the cap on IAIs applies to the first IAI after June 14, 2019. But it remains unclear whether the costs of improvements already incurred for an apartment in mid-renovation on June 14, 2019, would be counted toward the $15,000.00 cap or grandfathered in under the prior law.

HSTPA also does not clarify the timing of the requirement that all hazardous and immediately hazardous violations be cleared for an MCI application to be granted. That could be interpreted to require dismissal of the application or simply a delay while the landlord addresses the violation.

HSTPA calls for greater scrutiny and DHCR oversight over MCIs and IAIs, including provisions requiring that DHCR set a schedule of costs for MCIs and audit 25% of applications to confirm that the work was completed. HSTPA further requires that all IAIs be reported to DHCR and maintained in a "centralized electronic

retention system" so they can be tracked. DHCR must establish systems and guidance for landlords. The New York City Housing Court will ensure that Housing Maintenance Code (and other health-and-safety codes) issues are properly adjudicated and that the warranty of habitability is maintained. Yet neither the Code nor the warranty require a landlord to provide new fixtures or appliances. Some landlords will not hazard the risk of investing in renovations and new equipment while compliance with the IAI and MCI provisions of rent stabilization remains an uncertain proposition.

One potential effect of this part of HSTPA, say landlord advocates, is that it will create a disparity between modern, unregulated housing and older, regulated housing – a market-wide equivalent of the "poor doors" prevalent for low-income residents of luxury buildings.

OVERCHARGE PENALTIES ARE STEEPER; THE "SAFE HARBOR" PROVISION HAS BEEN ABOLISHED

A defining feature of the stabilization laws is that DHCR does not, under ordinary circumstances, play an active role in approving or supervising the rents registrations that landlords must file annually. Instead, the stabilization system relies on tenants to exercise their right to file an overcharge claim within the statute of limitations, either as an overcharge complaint before the DHCR, in a plenary overcharge action, or as a defense in a nonpayment or to use and occupancy in a holdover proceeding. The rent-stabilization laws also penalized unscrupulous landlords by allowing tenants to collect treble damages going back two years if the overcharge was found willful.

Landlords did not have to defend the rents charged indefinitely. DHCR and the courts were not permitted to examine the rent history beyond four years, subject to exceptions like fraud. Landlords also had "safe harbor" from treble damages if, within the landlord's time to answer an overcharge claim, the landlord refunded any overcharge and adjusted the rent.

The new law extends the statute of limitations on overcharge claims from four to six years and increase the treble-damages period from two to six years.[15] This dramatically increases a landlord's potential liability for rent overcharges. Although the statute previously made treble damages discretionary, HSTPA provides that treble damages are now mandatory if the overcharge is found willful. Similarly, awarding attorney fees, costs, and interest are non-discretionary if a landlord is found to have overcharged a tenant.

The four-year lookback period had become riddled with exceptions even before HSTPA went into effect. But not only does the new law eliminate the lookback period altogether, it directs the court or DHCR to consider all available rent history "reasonably necessary" to their determination. The prior law required owners to maintain their records for four years, moreover, and the new law extends this time period to six years and requires that records of MCI and IAIs be kept indefinitely. An owner's failure to maintain records triggers an unlimited lookback period.

The safe-harbor provision has also been eliminated and, for the first time, treble damages might be imposed on a landlord whose rent is proper and whose only failure was not properly filing a rent registration. Under prior law, tenants had the option of filing an overcharge complaint with DHCR or in court. In practice, many courts would rely on the doctrine of primary jurisdiction to relegate these claims to DHCR, where the time to process a complaint can take years. The new law allows tenants to choose their forum and forbids a court to interfere with that choice.

Tenants applaud these changes as long overdue, arguing that the existing system of enforcement, which provides for minimal oversight,[16] allows the fox to guard the henhouse, and that steep penalties are an indispensable deterrent to landlord abuse. Owners condemn the new measures as unjustly punitive, arguing that they cast such a wide net that even unintentional overcharges, based on a misunderstanding of bafflingly complex laws, could meet with harsh sanctions. They also argue that owners that wish to return an unintentional overcharge must do so at significant risk since the safe-harbor exception has been eliminated. Landlords further warn that rent-stabilized buildings with problematic or even incomplete rent histories could become toxic assets, avoided by purchasers and lenders alike, given the uncertain potential liability and the high costs of reviewing decades of (sometimes unavailable) rent histories.

On both sides of the fence, the new law has created confusion regarding overcharge claims. The rent-overcharge provisions expressly apply to any claims pending or filed on and after June 14, 2019. In some cases, though, overcharge claims have been pending in DHCR for years. DHCR has already notified the parties in some pending overcharge cases that pre-date the recent changes to the law that they must provide records going back six years. Owners argue that this works an injustice, penalizing them for DHCR's delay and retroactively expanding their liability; that the new law does not increase DHCR's obligation to review or approve landlords' registrations but instead focuses on penalizing imperfection. Landlords fear that HSTPA makes them strictly liable for any deviation from the registration process and rewards tenants even if they are no worse off than if the landlord had complied with the requirements.

Recent decisions have enforced HSTPA in pending overcharge claims. In *3440 Broadway BCR LLC v. Greenfield*,[17] Housing Court found that HSTPA applies in a pending nonpayment proceeding and that the stat-

ute of limitations or prior case law requiring a showing of fraud did not limit the tenant's discovery request for documents going back 18 years. In *699 Venture Corp. v. Zuniga*,[18] Housing Court relied on HSTPA to grant discovery going back 23 years, although, since 1997, the law required only that records be kept going back four years. Housing Court determined that, considered together, HSTPA and the amended CPLR 213-a indicate the Legislature's intention that courts and the DHCR review the entire rent history, if necessary, to find the most reliable rent registration.[19]

In *Arnold v. 4-6 Bleecker St. LLC*, Supreme Court had already determined that the Rent Stabilization Law protected the tenants and that the default formula would determine any overcharge, but the court now found that HSTPA mandates that the overcharge calculations be amended to include six years for both overcharge and treble-damages claims.[20] In *Fuentes v. Kwik Realty LLC*, however, which the First Department decided after HSTPA's enactment, the Court applied the four-year statute of limitations and the prior law in excusing the landlord's failure to maintain records of an IAI, because "there is no requirement under the statute that such records be maintained indefinitely."[21]

A number of Housing Court decisions have limited HSTPA's application and declined to reopen cases already decided.[22] But in *Dugan v. London Terrace Gardens, L.P.*, decided in mid-September 2019 by the First Department less than two months after its decision in *Kwik Realty*, the Court determined that the tenants' overcharge claims should be deemed "pending" under HSTPA and that the expanded statute of limitations should be applied, even though the tenants were granted partial summary judgment on their claims in 2017. The First Department in *Dugan* also denied the owner's claim that applying HSTPA violated due process, noting that the Legislature expressly applied HSTPA to pending claims, giving it "an exceedingly strong presumption of constitutionality." In *560-568 Audubon Tenants Assoc. v. 560-568 Audubon Realty LLC*, Supreme Court, New York County, on renewal, vacated its prior decision dismissing the complaint and finding that DHCR was better suited than the courts to determine rent-regulation issues, because the action was pending on appeal and HSTPA changed the law relating to primary jurisdiction.[23]

In one case, Housing Court invoked HSTPA's expanded lookback period to re-open a case a year after it was settled by so-ordered stipulation, based on a claim that the rent records were unreliable.[24]

HSTPA's retroactive application will be hotly contested. Court interpretations might can down to this: The courts will interpret HSTPA's ambiguous aspects strictly if they find that those aspects have a penal nature to them. Conversely, the courts will interpret HSTPA's ambiguous aspects liberally if they find that those aspects have a remedial nature to them.

This series on HSPTA of 2019 will continue in a forthcoming edition of the Journal with the Act's non-regulation items.

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1. *Comm. Hous. Improv. Prog., Rent Stabilization Assoc. of N.Y.C., Inc. v. City of New York* (E.D.N.Y. 2019).

2. HSTPA, Part G, Sec. 2.

3. Conor Dougherty, Why Rent Control is a Lightning Rod, N.Y. Times, Oct. 13, 2018, B2.

4. https://www.washingtonpost.com/opinions/rent-control-is-back-and-thats-bad/2019/09/21/31abb05c-dbdb-11e9a688-303693fb4b0b_story.html (last visited Oct. 2, 2019).

5. Latrice Walker, Assemblywoman Walker: New Yorkers Should Never Be Priced Out of Their Homes, https://nyassembly.gov/mem/Latrice-Walker/story/81748 (last visited Oct. 2, 2019).

6. DHCR Fact Sheet #26, Guide to Rent Increases for Rent Stabilized Apartments.

7. 13 N.Y.3d 270, 918 N.E.2d 900 (2009).

8. *See, e.g., 300 W. 49th St. Assoc. v. N.Y.S. Div. of Hous. & Community Renewal,* 212 A.D.2d 250, 253, 629 N.Y.S.2d 194 (1st Dep't 1995).

9. See Gerald Lebovits & Deborah E. Fisher, HP Proceedings: The Tenuous Nature of the Economic-Infeasibility Defense, 1 Landlord-Tenant Prac. Rep. 1 (Oct. 2000), available at works.bepress.com/gerald_lebovits/70/.

10. 10. HSTPA provides an exception to this new rule for buildings (1) subject to rent stabilization by virtue of a regulatory agreement with a government agency and (2) which receive federal project-based rental assistance, N.Y. Law.

11. Rent Regulation Reform Act of 1993 (L. 1993, ch. 253).

12. According to U.S. Census Bureau Housing and Vacancy Surveys conducted in New York City.

13. IAIs must also be performed by a licensed contractor, and any outstanding hazardous or immediately hazardous violations must be cleared to be eligible for an IAI rent increase. IAIs still do not require prior DHCR approval. DHCR must establish, by June 14, 2020, a centralized electronic retention system to document IAIs.

14. https://www1.nyc.gov/assets/rentguidelinesboard/pdf/ie19.pdf (last visited Oct. 2, 2019).

15. As the First Department decided on October 1, 2019, "[t]he Rent Stabilization Code requires that a 'base date' be established for calculating the legal regulated rent for an apartment (*see* 9 N.Y.C.R.R. 2522.6(b)(2)). Generally, the legal regulated rent is the rent registered with . . . [DHCR) for the apartment six years before the overcharge proceeding was commenced (CPLR 213–a)." *Simpson v. 16–26 E. 105, LLC,* 2019 N.Y. Slip Op. 07026 (1st Dep't 2019) (discussing HSTPA at note 1).

16. DHCR's Tenant Protection Unit performs audits and investigations to ensure compliance with the rent regulations, but only a small percentage of stabilized units receive that oversight.

17. 64 Misc. 3d 1217(A), 2019 N.Y. Slip Op. 51194(U) at *2 (Civ. Ct., N.Y. Co. 2019).

18. 64 Misc. 3d 847, 853 (Civ. Ct., Bronx Co. 2019).

19. *Id.* at 854.

20. 2019 N.Y. Slip Op. 32453(U) (Sup. Ct., N.Y. Co. 2019).

21. 174 A.D.3d 483, 486 (1st Dep't 2019).

22. *See, e.g.*, 400 E. 58 Owner LLC v. Hernsson, https://casetext.com/case/400-e58-owner-llc-v- herrnson, L&T Index No. 771000/18 (Civ. Ct., N.Y. Co.); 315 Jefferson LLC v. Dominguez, 2019 N.Y. Slip Op. 29255, 2019 WL 3884587 (Civ. Ct., Kings County 2019). In both cases, the tenant's overcharge claim was dismissed before June 14, 2019. The tenants later sought to re-open their cases after HSTPA's passage. Both courts denied the motions.

23. 2019 N.Y. Slip Op. 29285 (Sup. Ct., N.Y. Co. Sept. 12, 2019) (HSTPA "not only overrules case law holding that DHCR has primary jurisdiction over rent overcharge claims, but it affords tenants their choice of forum. Consequently, as plaintiffs have chosen to have their rent overcharge claims brought in this court, their action may not be dismissed in favor of the claims being heard by DHCR.") (citation omitted).

24. *SF 878 E. 176th LLC v. Grullon*, 65 Misc. 3d 171, 2019 N.Y. Slip Op. 29201 (Civ. Ct., Bronx Co. 2019). Other helpful Housing Court decisions interpreting HSTPA's overcharge provisions include *Gold Rivka 2 LLC v Santiago*, 2019 N.Y. Slip Op. 51341(U) (Civ. Ct., Bronx Co. 2019); *1068 Winthrop St. LLC v. Zimmerman,* 2019 N.Y. Slip Op. 29288 (Civ. Ct., Kings Co. 2019); *Ollie Assoc. LLC v. Santos*, 2019 N.Y. Slip Op. 51085(U) (Civ. Ct., Bronx Co. 2019); *Dani Lake v. Torres,* 2019 N.Y. Slip Op. 51383(U) (Civ. Ct. Bronx Co. 2019).