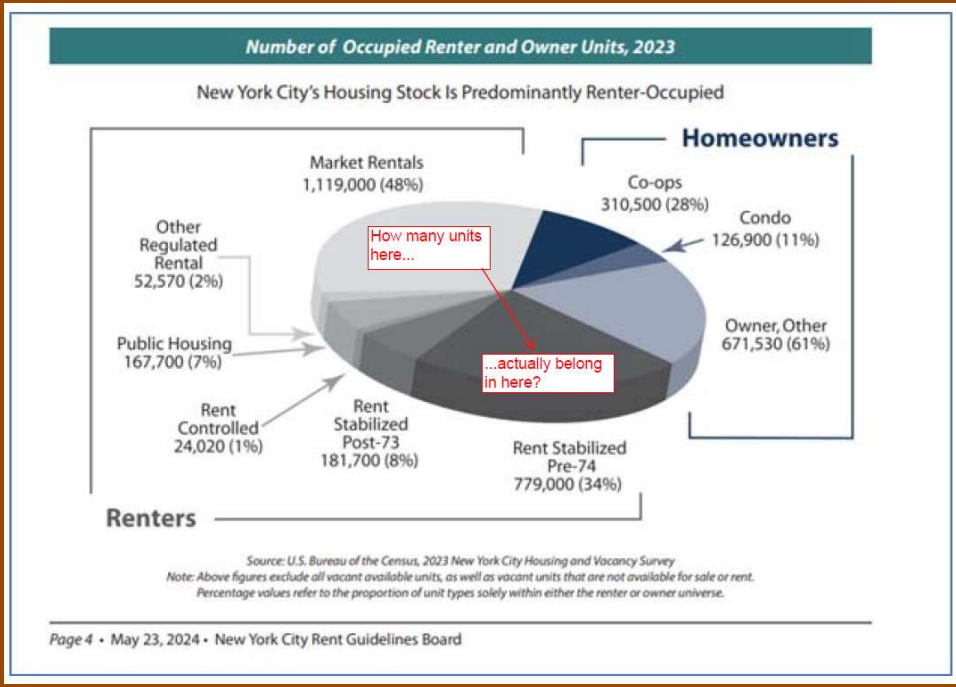
WRONGLY DEREGULATED RENT STABILIZED APARTMENTS – SETTING THE LEGAL RENT



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Wrongly Deregulated Rent Stabilized Apartments – Setting the Legal Rent

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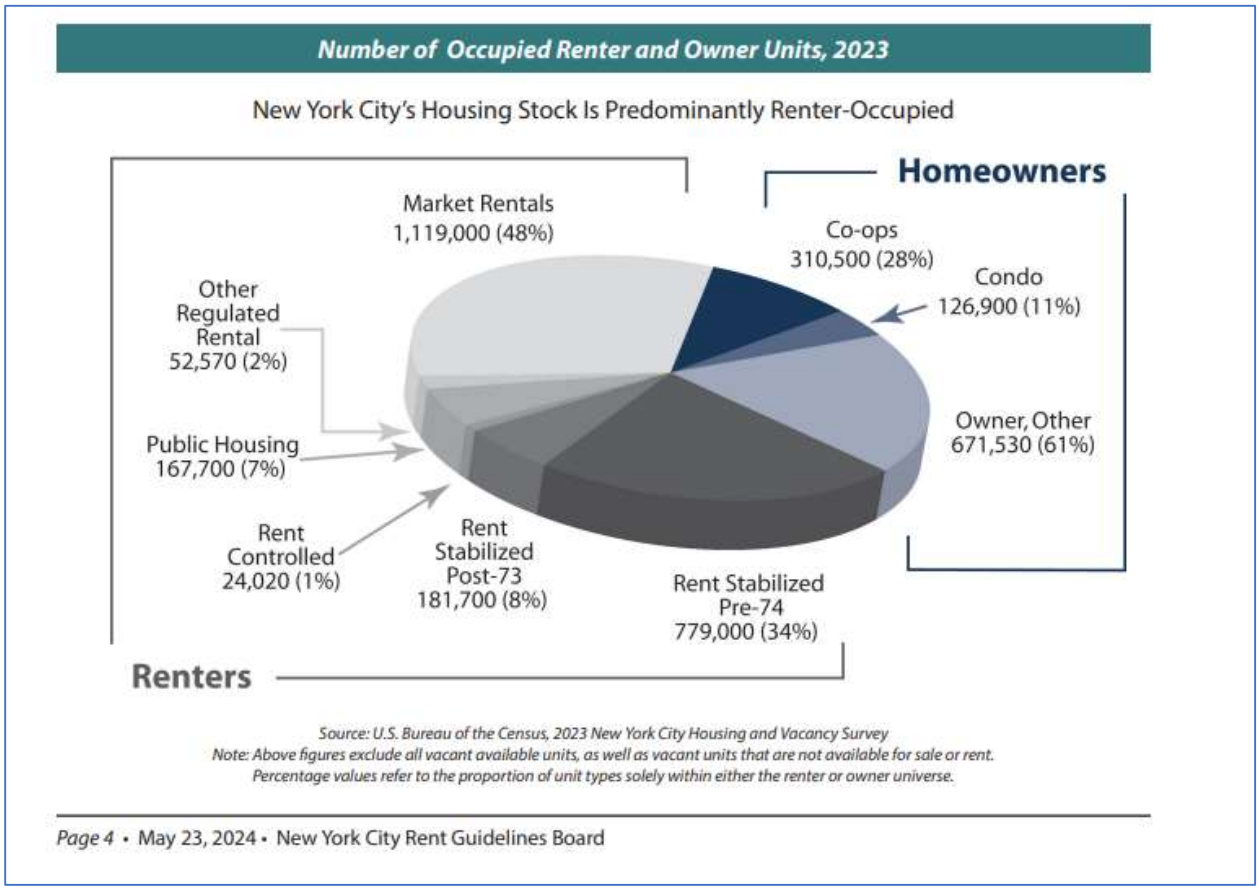
I. INTRODUCTION – WHAT THIS CLASS/BOOKLET IS ALL ABOUT

A. What Rent Stabilization Means to Landlords and Tenants

Rent Stabilization applies to about one million tenancies in New York City and many more around New York State.[1]



Rent Stabilization limits the rent an owner may charge for an apartment, restricts the right of an owner to evict tenants for no cause, and imposes other requirements on landlords and tenants.

Rent Stabilization is overseen by the New York State Division of Housing and Community Renewal **("DHCR")**. McKinney's Uncons Laws of NY § 26-516 [Rent Stabilization Law **("RSL")**].

Rent increases for Rent Stabilized tenants are controlled by the New York City Rent Guidelines Board **("RGB")**, which sets maximum rates for rent increases once a year, which are effective for leases beginning on or after October 1st.[2]

[1] https://rentguidelinesboard.cityofnewyork.us/wp-content/uploads/2024/05/2024-HSR.pdf.

[2] https://rentguidelinesboard.cityofnewyork.us/wp-content/uploads/2023/07/2023-Apartment-Chart.pdf

Rent Stabilized tenants are entitled to leases and lease renewals. Even if landlord fails to renew a Rent Stabilized tenant's lease, all tenant's rights remain intact. Rent Stabilization Code **("RSC")** § 2523.5. If a Rent Stabilized lease is not properly renewed, a landlord cannot sue tenant for the rent. *Paid Enters. v Gonzalez*, 173 Misc.2d 681, 682 [App Term 2d Dept 9th & 10th Jud Dists 1997] ("Rent [S]tabilization is a lease-based regulatory scheme. As such, a tenant's obligation to pay the stabilized rent is dependent on the tenant's agreement to pay it.").

Under Rent Stabilization, landlord is required to follow a very specific procedure for lease renewals. *Matter of AEJ 534 E. 88th, LLC v. DHCR,* 194 AD3d 464, 471 [1st Dept 2021] (requirements of a Rent Stabilized lease are "rigorous" and merely using "certain jargon" does not suffice); Leases must be entered into and renewed for one- or two-year terms, at the tenant's choice. RSC § 2522.5. Landlord must send the lease renewal offer between 150 and 90 days before the expiration of the current lease. RSC § 2523.5. A Rent Stabilized lease renewal offer must be on the same terms and conditions as the expired lease. RSC § 2522.5.

Owners are required to register all Rent Stabilized apartments initially and then annually with the DHCR and to provide tenants with a copy of the annual registration. Owners must be very careful when filing DHCR registrations because once they are filed, they cannot be amended without initiating a DHCR proceeding and explaining the reason for the amendment, which is time consuming and costly. RSC§ 2528.3. Furthermore, such amendments will only be granted for ministerial, as opposed to substantive, changes. *Selkirk 308 West 82nd St LLC*, LVT No. 30571 [DHCR Adm. Rev. Docket No. FW410026RO 11/27/19]. Furthermore, RSC § 2528.4(a) states that, "The failure to properly and timely comply, on or after the base date, with the rent registration requirements of this Part shall, until such time as such registration is completed, bar an owner from applying for or collecting any rent in excess of: the base date rent, plus any lawful adjustments allowable prior to the failure to register."

Family members of a Rent Stabilized tenant residing in a Rent Stabilized apartment often have succession rights to the tenancy. RSC § 2523.5(b)(1); RSC § 2520.6(o). It is not unusual to find two and three generations of a family associated with the same Rent Stabilized apartment.

Rent overcharges travel with the land. *East 163rd Street LLC v. DHCR*, 4 Misc.3d 169 [Supreme Court, New York County, 2004] ("Nor does this Court find any basis in fact or the law to support petitioner's claim that its reliance on the amount of rent charged by the prior landlord should shield the new owner from damages for rent overcharges including treble damages. The Rent Stabilization Code explicitly permits carryover liability for treble damages. When in 1987 DHCR implemented the amended Rent Stabilization Code, 9 NYCRR § 2520 et seq., it set forth its 'carryover' policy at section 2526.1(f), which deals with responsibility for overcharges.

B. <u>How do you know if a tenancy is Rent Stabilized?</u>

Look back up at the Rent Guidelines Board chart in the previous section. For the pre-1974 type of Rent Stabilization (which accounts for almost 800,000 apartments), **there is no official list somewhere that definitively tells the world which apartments are subject to Rent Stabilization, and which are not.** The DHCR has jurisdiction over matters relating to

Rent Stabilization and the DHCR maintains some records. But the registration records the DHCR maintains contain information that is largely self-reported by landlords and that is often not controlling regarding an apartment's Rent Stabilization status. *LL 410 East 78th Street LLC v. DHCR,* 213 AD3d 558 [1st Dept 2023] ("DHCR notes that it oversees nearly one million apartments subject to rent stabilization, each of which must be registered annually, and thus it relies on unilaterally filed, unverified registrations by apartment owners.") Therefore, year after year, a landlord can report to the DHCR that an apartment is "permanently exempt", but that does not make it so. *Connors v Kushner Companies LLC*, 2021 WL 3468142 [Supreme Court, Kings County, 2021].

Moreover, a current or former tenant may have signed a document acknowledging that an apartment is not subject to Rent Stabilization. But this, also, does not make it so. Parties may not contract out of Rent Stabilization coverage. See RSC § 2520.13 (Waiver of benefit void); *Thornton v Baron*, 5 NY3d 175 [2005] ("A lease provision purporting to exempt an apartment from rent regulation in exchange for an agreement not to use the apartment as a primary residence is against public policy and void.") *Drucker v Mauro*, 30 AD3d 37 [1st Dept 2006] ("It is well settled that the parties to a lease governing a rent-stabilized apartment cannot, by agreement, incorporate terms that compromise the integrity and enforcement of the Rent Stabilization Law.") *Kattan v. 119 Christopher LLC*, 204 AD3d 470 [1st Dept 2022] ("...an agreement to circumvent the Rent Stabilization Law is void and…parties are not the arbiters of whether an apartment is subject to rent stabilization…").

It works the other way as well; landlords and tenants cannot contract *in* to Rent Stabilization. *Heller v Middagh Street Associates*, 4 AD3d 332 [2nd Dept 2004] (Landlord did not contractually agree to subject tenants' apartments to Rent Stabilization Law by attaching Rent Stabilization riders to certain leases and by tendering rent renewal leases using Rent Stabilization forms.); *Ruiz v Chwatt Associates*, 247 AD2d 308 [1st Dept 1998] ("Rent stabilization coverage is matter of statutory right and cannot be created by waiver or estoppel.")

In general, if a building was built before 1974 and contains six or more dwelling units, then the apartments therein are Rent Stabilized, unless certain exceptions apply. RSL 26-505(b).

Also, various real estate tax benefit programs, enacted to spur new construction or rehabilitation of residential housing (i.e., Real Property Tax Law **("RPTL")** §§ 421-a or g; RPTL § 489 **("J-51")**) are contingent on the building being subject to Rent Stabilization for a period of years. In some cases (*not all*), however, the Rent Stabilization status lasts only while the tax benefit is in place. If a unit was subject to Rent Stabilization in the absence of tax benefits, upon the termination of those benefits, the unit continues to be regulated. *72A Realty Associates v Lucas*, 101 AD3d 401 [1st Dept 2012] (J-51).

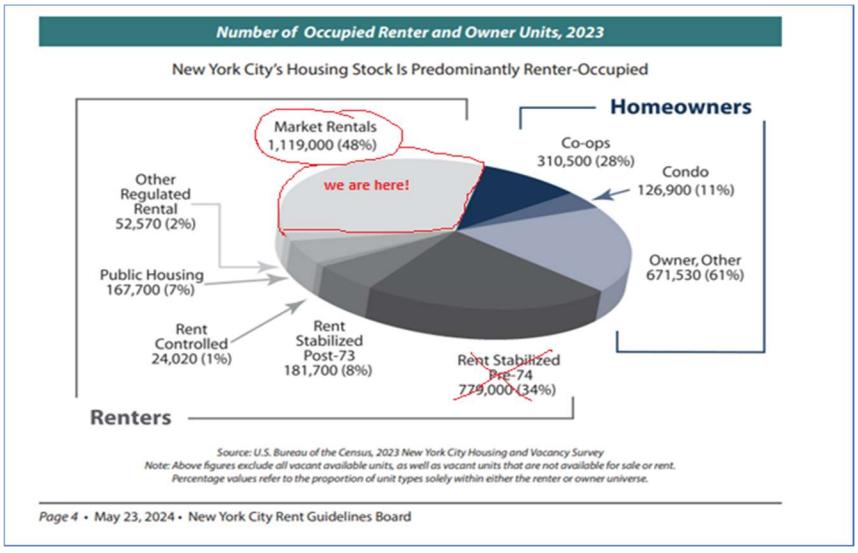
How do you ever get a definitive answer on an apartment's Rent Stabilization status? With some exceptions, the last word on whether an apartment is Rent Stabilized is in the hands of the courts or the DHCR. Until a judge is satisfied that an apartment is not Rent Stabilized (and the time to appeal that order has expired), the matter is always, in some measure, unsettled.

It is very important to keep in mind that a court or DHCR can look back in time endlessly to determine whether an apartment is subject to Rent Stabilization. *Gersten v 56 7th Avenue LLC,* 88 AD3d 189 [1st Dept 2013], *appeal withdrawn* 18 NY3d 954 [2012]. Upon such a challenge, "consideration of events beyond the [damage determination] period is permissible if done not for the purpose of calculating an overcharge but rather to determine whether an apartment is regulated" *East W. Renovating Co. v DHCR,* 16 AD3d 166, 167 [1st Dept 2005]; *150 E. Third St. LLC v Ryan*, 201 AD3d 582 [1st Dept 2022]. *See also* Rent Stabilization Code **("RSC")** § 26-516(h) (applicable after June 14, 2019), which allows a court or DHCR, "in investigating complaints of overcharge and in determining legal regulated rents, [to] consider all available rent history which is reasonably necessary to make such determinations…"

The burden is on the owner to show that an apartment is properly deregulated. *Matter of Kostic v DHCR*, 188 AD3d 569, 569 [1st Dept 2020] (It is landlord's burden to prove High Rent Vacancy Deregulation.); *Connors v Kushner Companies LLC*, 2021 WL 3468142 [Supreme Court, Kings County 2021]; *341 West 19th Street Partners 2 LLC v DHCR*, 2022 WL 1266402 [Supreme Court, New York County, 2022]; *Ahmad,* LVT No. 26921 [DHCR PAR Docket No. DO210037RO 2/5/2016] (It is landlord's burden to prove Substantial Rehabilitation deregulation.)

C. <u>Ironically, this class is less about the 800,000 pre-1974 Rent Stabilized units and more about the 1,100,000 free market apartments, many of which were wrongly deregulated and may still be Rent Stabilized.</u>

Ironically, this "Master Class" about Rent Stabilization is less about the 800,000 Rent Stabilized units out there, and more about the 1,100,000 free market apartments, many of which were wrongly deregulated and may still be Rent Stabilized. Let us look back at the chart again:



One of the few exceptions that would take an apartment out of Pre-1974 Rent Stabilization is High Rent Vacancy Deregulation. Therefore, most fights about wrongful deregulation from Rent Stabilization are about whether a unit has been High Rent Vacancy Deregulated.

High Rent Vacancy Deregulation occurred when an apartment's *legal* regulated rent had, upon the apartment becoming vacant (see *Altman v 285 West Fourth LLC*, 31 NY3d 178 [2018]), reached a prescribed deregulation threshold. Rent Stabilization Law **("RSL")** § 26-504.2(a). The High Rent Vacancy Deregulation Thresholds in New York City were as follows[3]:

4/1/1997 – 6/23/2011	$2,000
6/24/2011 – 6/14/2015	$2,500
6/15/2015 – 12/31/2017	$2,700
1/1/2018 – 12/31/2018	$2,733.75
1/1/2019 – 6/13/2019	$2,774.76
6/14/2019 - present	No HRVD

On June 14, 2019, High Rent Vacancy Deregulation was abolished by the Housing Stability and Tenant Projection Act of 2019 **("HSTPA").** Although High Rent Vacancy Deregulation was abolished, as per the HSTPA, past deregulations are still valid. RSL § 26-504.2.

So, for 22 years, landlords were allowed to High Rent Vacancy Deregulate apartments. It is almost impossible to find any real numbers about how many Rent Stabilized units were lost to High Rent Vacancy Deregulation. This next chart is from a New York City Rent Guidelines Board 2003 publication.[4] The chart notes that it is only counting the units that were voluntarily reported by landlords as having been deregulated. Thus, in the first five years of High Rent Vacancy Deregulation, at least 25,000 apartments were High Rent Vacancy Deregulated according to this chart. The number was probably much higher.

Subtractions from the Stabilized Housing Stock due to High Rent/Vacancy Decontrol, 1994-2002

Calendar Year	Number of Units					
	Bronx	Brooklyn	Manhattan	Queens	Staten Island	Total
1994	3	9	544	9	0	565*
1995	1	111	927	8	0	1,047*
1996	10	106	1,203	6	0	1,325*
1997	6	77	1,121	0	0	1,204*
1998	7	116	2,247	14	0	2,384*
1999	11	151	3,586	37	0	3,785*
2000	7	279	2,586	62	0	2,934*
2001	53	294	4,490	145	0	4,982
2002	64	391	5,431	251	7	6,144
Total	162	1,534	22,135	532	7	24,370*

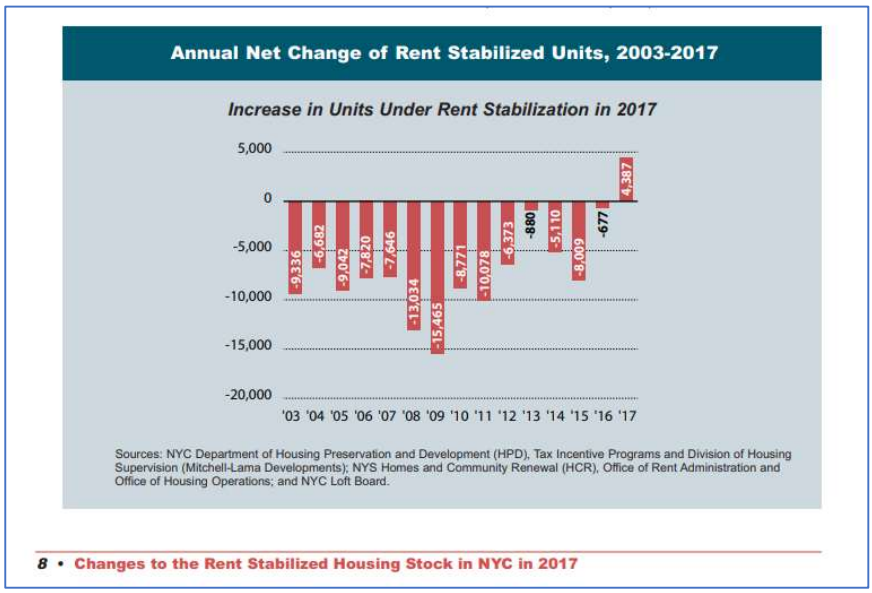
*Note:Registration of deregulated units with DHCR was voluntary and not required from 1994-2000.These totals represent a 'floor' or *minimum* count of the actual number of deregulated units in these years. The NYC City Council required proof of registration with DHCR of the unit as exempt to be sent to the tenant beginning in March 2000. The numbers for 2001 and 2002 can be viewed as more authoritative counts of the actual number of deregulated units (see Endnote 5).

Source: NYS Division of Housing and Community Renewal annual registration data.

[3] https://hcr.ny.gov/system/files/documents/2024/08/fact-sheet-36-08-2024.pdf.

[4] https://rentguidelinesboard.cityofnewyork.us/wp-content/uploads/2019/08/2003-Changes.pdf.

This next chart is from a New York City Rent Guidelines Board 2017 publication.[5] It estimates that from 2003 to 2017 another 108,000 Rent Stabilized apartments disappeared.



By June 2019, when High Rent Vacancy Deregulation was finally eliminated, many of us in this field estimate that 250,000 apartments were deregulated, some of them wrongly.[6]

Obviously, whether a unit is Rent Stabilized has huge repercussions for both a landlord and a tenant. For a tenant, having your presumed-free-market apartment converted by an adjudication into a Rent Stabilized apartment is a life-changing occurrence. Imagine being told your rent is much lower than you thought it was, you can almost never be evicted as long as you pay the rent, and that the landlord owes you money! For a landlord who gets such news, the damage is devastating and goes beyond that single apartment because such a finding lowers the rent roll of the building, which is what the value of the asset is based on. This will have repercussions for investment in and lending on the building for decades to come.

Thus, landlords and tenants have been arguing for a few decades over whether High Rent Vacancy Deregulations were wrongful. You may, at this point, ask, *"why wouldn't every single free market tenant challenge their regulatory status?"* Here are the answers. Such challenges are expensive. Very few lawyers understand this area of law. If a tenant loses such a challenge, she

[5] https://rentguidelinesboard.cityofnewyork.us/wp-content/uploads/2019/08/2018-Changes.pdf.

[6] Author Michelle Itkowitz bases her assumption on the following. The 2003 chart indicates 25,000 deregulations. The 2017 chart indicates 108,000 (or, on average, 7,000 per year) leaving Rent Stabilization (and the most ubiquitous exit from Rent Stabilization is via High rent Vacancy Deregulation). The additional Rent Stabilized units on the 2017 chart for 2017 are likely attributable to 421-a. Assuming, however, that there were 14,000 more units lost to High Rent Vacancy Deregulation from 2017 through 2018, that adds up to 147,000 units ([25k (pre 2003) + 108k (2003 – 2016) + 14k (2017 – 2018) = 147k] x 2 = 294k). Based on her anecdotal experience in this field, Michelle doubles that number and rounds down to 250,000 apartments High Rent Vacancy Deregulated, some of them (or many of them, depending on your perspective) wrongly. One wonders why nobody in a position to marshal the real data ever does this math. But I digress…

could be saddled with paying her landlord's legal fees. Many tenants do not have the time or emotional energy to take on their landlord. And perhaps most importantly, for many tenants it only makes sense to push an apartment back into Rent Stabilization if doing so results in a much lower rent. It is another proclivity of this area that the "legal rent" may not be set so much lower than the free market rent the tenant was paying.

A few days before we were set to teach the class that accompanies these materials, a sweep of Westlaw for new cases came up with the following case, which demonstrates the point made in this paragraph perfectly. In *Nadler v. Carmine Limited*, 218 NYS3d 59 [1st Dept 2024], the tenant lived to fight another day on their fraudulent deregulation claim but lost all hope of being awarded an overcharge. For some tenants, winning a Rent Stabilized unit is reward enough at the end of one of these battles. For many tenants, however, if the rent is not set lower, the fight and the risk are not worth it. *Nadler v. Carmine Limited*, 218 NYS3d 59 [1st Dept 2024] holds:

> As to plaintiff's first cause of action, which seeks a declaratory judgment that her apartment located in defendant's building is subject to rent stabilization, defendant failed to meet its prima facie burden establishing that the apartment was legally deregulated in 2003 [citations omitted throughout]. The Division of Housing and Community Renewal rent registration history report for the apartment did not establish the lawful rent for the apartment. Notably, the report stated that it "merely report[ed] the statements made by the owner" and "d[id] not attest to the truthfulness" of those statements. Meanwhile, the leases defendant submitted showed only what the apartment's former tenants actually paid, not what they should have paid. Nor do the New York City Rent Guidelines Board (RGB) orders aid defendant. Although RGB Order 23 explains the jump in rent from $895.52 in 1992 to $998.50 in 1993, as the order allowed defendant's predecessor owner to increase the rent by the annual renewal adjustment, the RGB orders do not explain the monthly rent jump from $998.50 in 1993 to $1,663.91 in 1994, which the DHCR report states were based in part on improvements to the Apartment. Defendant furnished no evidence concerning these improvements. Defendant's argument that it was not required to furnish evidence from 1993 and 1994 supporting the apartment's regulated status is unavailing…
>
> **However, plaintiff's third claim for rent overcharges was properly dismissed. Plaintiff filed this action in 2022, 16 years after she claims she was first overcharged**…**Plaintiff could not use discovery to establish her overcharge claim, as the 1993 rent bump occurred 10 years before the apartment was deregulated and nearly three decades before she filed her complaint**… [Emphasis supplied.]

This is what we in the Rent Stabilization space have been fighting about, up and down from DHCR and the New York City Civil Court all the way to the Court of Appeals and back again, for two decades. These materials and the seminar they accompany are a window into our world.

II. RENT OVERCHARGE

A. Rent Overcharge Generally

There are always two big questions to answer in a rent regulatory due diligence. The first is – what is the status of this apartment? If the status is that the unit is likely still subject to regulation, then the next question is – what are the implications of that status in terms of the effect on the legal rent? The second question creates a moving target, because it depends upon when the finding of improper deregulation is made and whether such finding is accompanied by fraud or failure to register and some other factors.

In November 2023, the Rent Stabilization Code was finally updated to conform to the 2019 Housing Stability and Tenant Protection Act. RSC § 2526.7 (Determination of legal regulated rents; penalties; fines; assessment of costs; attorney's fees; rent credits; where the proceeding is commenced on or after June 14, 2019; Effective: November 8, 2023)

> (a) Definitions.
>
> (1) *Base Date:* For the purposes of this section, the Base Date shall be the date of the most recent reliable annual rent registration statement, filed and served upon a tenant six or more years prior to the filing of a complaint of overcharge or the initiation of a proceeding to determine the legal regulated rent of an apartment. Any registration statement filed contemporaneously with a certification of service shall be presumed to have been served upon the tenant in occupancy. In no event shall the base date be prior to June 14, 2015.
>
> Absent an exception set forth in section 2526.1 of this Part, if no base date can be determined subsequent to June 14, 2015, the base date shall be June 14, 2015.
>
> (2) *Reliable rent registration statement:* A rent registration shall be considered to be reliable if, prior to the filing of such registration statement, and subsequent to June 14, 2015, the rent history contains no unexplained increases in the rent.
>
> (b) The DHCR shall consider all available reasonably necessary evidence when making a determination as to the reliability of a rent registration statement, including but not limited to:

(1) any rent registration or other records filed with the state division of housing and community renewal, or any other state, municipal or federal agency, regardless of the date to which the information on such registration refers;

(2) any order issued by any state, municipal or federal agency;

(3) any records maintained by the owner or tenants; and

(4) any public record kept in the regular course of business by any state, municipal or federal agency.

(c) The DHCR shall set the legal regulated rent by adding any lawful rent increases and adjustments to the rent on the base date.

(d) The DHCR shall examine the rent prior to the base date and subsequent to June 14, 2015 to make a determination as to:

(1) whether the legality of a rental amount charged or registered is reliable in light of all available evidence including, but not limited to, whether an unexplained increase in the registered or lease rents, or a fraudulent scheme to destabilize the housing accommodation, rendered such rent or registration unreliable.

(2) whether an accommodation is subject to the emergency tenant protection act or the rent stabilization law;

(3) whether an order issued by the division of housing and community renewal or by a court, including, but not limited to an order issued pursuant to section 2523.4(a) of this title [failure to maintain services], or any regulatory agreement or other contract with any governmental agency, and remaining in effect within six years of the filing of a complaint pursuant to this section, affects or limits the amount of rent that may be charged or collected;

(4) whether an overcharge was or was not willful;

(5) whether a rent adjustment that requires information regarding the length of occupancy by a present or prior tenant was lawful;

(6) the existence or terms and conditions of a preferential rent, or the propriety of a legal registered rent during a period when the tenants were charged a preferential rent;

(7) the legality of a rent charged or registered immediately prior to the registration of a preferential rent; or

(8) the amount of the legal regulated rent where the apartment was vacant or temporarily exempt on the date six years prior to a tenant's complaint.

(e) The DHCR shall examine the rent prior to June 14, 2015, pursuant to 9 NYCRR § 2526.1.

(f) A tenant may file a complaint of overcharge at any time.

(g) An owner may, prior to the issuance of an order determining the existence of an overcharge, file late registration statements. Provided that increases in the legal regulated rent were lawful except for the failure to file a timely registration, the owner, upon the service and filing of a late registration, shall not be found to have collected an overcharge at any time prior to the filing of the late registration.

(h)

(1) Any affected tenant shall be given notice of and an opportunity to commence a subsequent proceeding or an opportunity to join in any proceeding commenced by the DHCR pursuant to this section.

(2) Where a complainant pursuant to this subdivision vacates the housing accommodation, and the DHCR continues the proceeding, the DHCR shall give any affected tenant notice of and an opportunity to commence a subsequent proceeding or an opportunity to join in such proceeding.

(i) Damages

(1) Any owner who is found by the DHCR, after a reasonable opportunity to be heard, to have collected any rent or other consideration in excess of the collectable rent shall be ordered to pay to the tenant a penalty equal to three times the amount of such excess, except as provided under subdivision (f) of this section. If the owner establishes by a preponderance of the evidence that the overcharge was not willful, the DHCR shall establish the penalty as the amount of the overcharge plus interest, which interest shall accrue from the date of the first overcharge on or after the base date, at the rate of interest payable on a judgment pursuant to section 5004 of the Civil

Practice Law and Rules, and the order shall direct such a payment to be made to the tenant.

(2) Any recovery of overcharge penalties, including treble damages, where appropriate, shall be limited to the six years preceding the complaint, provided, however, that there shall be no recovery of treble damages for overcharges that occurred prior to June 15, 2017, and no recovery of damages for overcharges that occurred prior to June 15, 2015. After a complaint of rent overcharge has been filed and served on an owner, the voluntary adjustment of the rent and/or the voluntary tender of a refund of rent overcharges shall not be considered by the division of housing and community renewal as evidence that the overcharge was not willful.

(3) a penalty of three times the overcharge may not be based upon an overcharge having occurred prior to April 1, 1984.

(4)

(i) Complaints filed prior to April 1, 1984 shall be determined in accordance with the RSL and Code provisions in effect on March 31, 1984, except that an overcharge collected on or after April 1, 1984 may be subject to treble damages pursuant to this section.

(ii) Complaints filed on or after April 1, 1984 and prior to June 14, 2019 shall be determined pursuant to 9 NYCRR § 2526.1.

(5) The DHCR shall determine the owner's liability between or among two or more tenants found to have been overcharged during their particular occupancy of a housing accommodation, and at its discretion, may require the owner to make diligent efforts to locate prior tenants who are not parties to the proceeding, and to make refunds to such tenants or pay the amount of such penalty as a fine.

(6) An owner who is found to have overcharged by the DHCR shall be assessed and ordered to pay as an additional penalty the reasonable costs and attorney's fees of the proceeding, and except where treble damages are awarded, interest from the date of the overcharge occurring on or after April 1, 1984, at the rate of interest payable on a judgment pursuant to section 5004 of the Civil Practice Law and Rules.

(7) A tenant may recover any overcharge penalty established by the DHCR by deducting it from the rent due to the present owner at a rate not in excess of 20 percent of the amount of the penalty for any one month's rent. If no such rent credit has been taken, the order of the DHCR awarding penalties may be entered, filed and enforced by a tenant in the same manner as a judgment of the Supreme Court, on a form prescribed by the DHCR, provided that the amount of the penalty exceeds $1,000 or the tenant is no longer in possession. Neither of these remedies are available until the expiration of the period in which the owner may institute a proceeding pursuant to Part 2530 of this Title.

(8) Responsibility for overcharges.

(i). For overcharges collected prior to April 1, 1984, an owner will be held responsible only for his or her portion of the overcharges, in the absence of collusion or any relationship between such owner and any prior owners.

(ii).

(*a*) For overcharge complaints filed or overcharges collected on or after April 1, 1984, a current owner shall be responsible for all overcharge penalties, including penalties based upon overcharges collected by any prior owner. However, in the absence of collusion or any relationship between such owner and any prior owner, where no records sufficient to establish the legal regulated rent were provided at a judicial sale, or such other sale effected in connection with, or to resolve, in whole or in part, a bankruptcy proceeding, mortgage foreclosure action or other judicial proceeding, an owner who purchases upon or subsequent to such sale shall not be liable for overcharges collected by any owner prior to such sale, and treble damages upon overcharges that he or she collects which result from overcharges collected by any owner prior to such sale. An owner who did not purchase at such sale, but who purchased subsequent to such sale, shall also not be liable for overcharges collected by any prior owner subsequent to such sale to the extent that such overcharges are the result of overcharges collected prior to such sale.

(*b*) Court-appointed receivers. A receiver who is appointed by a court of competent jurisdiction to receive rent for the use or occupation of a housing accommodation shall not, in the absence of collusion or any relationship between such receiver and any owner or other receiver, be liable for

> overcharges collected by any owner or other receiver, and treble damages upon overcharges that he or she collects which result from overcharges collected by any owner or other receiver, where records sufficient to establish the legal regulated rent have not been made available to such receiver. Penalties pursuant to this paragraph shall be subject to the time limitations set forth in paragraph (a)(2) of this section.
>
> (9) This subdivision shall not be construed to entitle a tenant to more than one refund for the same overcharge.
>
> (j) Where no rent history for the housing accommodation is available, the rent shall be determined in the manner set forth in Section 2522.6 of this title.

Rent overcharges are governed by Rent Stabilization Code § 2526.7. Where there was no fraud and there is a reliable rent to find by looking back four years (or six years depending on when the overcharge occurred) (but no farther back than June 14, 2015), the standard method of calculating legal regulated rent governs. *Matter of Regina Metro Co., LLC v. DHCR*, 35 NY3d 332 [2020]. If a tenant files an overcharge complaint, the court or DHCR will look backward for six (or four) years in its efforts to determine the legal rent. Even if there were no DHCR filings, you still only look back as far as the "look-back" period allows and no farther. *AEJ 534 East 88th, LLC v. DHCR*, 194 AD3d 464 [1st Dept 2021]:

> The absence of contemporaneous DHCR filings does not allow for a lookback beyond the [look back] period to an earlier legal regulated rent reported to DHCR (*see* 472 *Corcoran v. Narrows Bayview Co., LLC,* 183 A.D.3d 511, 512, 125 N.Y.S.3d 404 [1st Dept. 2020]). Furthermore, in the absence of fraud, "for overcharge calculation purposes, the base date rent [is] the rent actually charged on the base date (four years prior to initiation of the claim) and overcharges [are] to be calculated by adding the rent increases legally available to the owner under the RSL during the four-year recovery period." (*Regina* at 355–356, 130 N.Y.S.3d 759, 154 N.E.3d 972).

Once the court or the DHCR looks back and finds its starting place six years ago, then it adds Rent Guidelines Board increases on to the rent (assuming the registrations of the rent actually charged get filed if they were not filed at the time of the overcharge complaint) to get to the current legal rent that should be charged.

If the court or the DHCR finds an overcharge, then it will calculate the damages by taking the difference between the legal rent that should have been paid and the rent actually paid, back for as long as six (or four) years. If the court or DHCR finds that such overcharge was willful (which it almost always does) it will triple those damages, in accordance with the statute.

Here it is obviously important to emphasize, as demonstrated above, that rent overcharges travel with the land. *East 163rd Street LLC v. DHCR*, 4 Misc.3d 169 [Supreme Court, New York County, 2004].

B. Setting the Rent Where There is No Fraud, There is a Reliable Rent, and There are Registrations

Matter of Regina Metro Co., LLC v. DHCR, 35 NY3d 332 [2020], states:

> …The tenants and DHCR urge several bases for creating an exception to the standard pre-HSTPA overcharge calculation method that would enable courts to use these alternative approaches, but their arguments do not withstand scrutiny. First, an exception predicated on the fact that the base date rent was higher than what would have been permitted under the RSL for a stabilized apartment would swallow the four-year lookback rule. In every overcharge case, the rent charged was, by definition, illegally inflated – otherwise there would be no overcharge. Prior to the HSTPA, nothing in the rent stabilization scheme suggested that where an unrecoverable overcharge occurred before the base date, thus resulting in a higher base date rent, the four-year lookback rule operated differently. To the contrary, the limitations provisions – in order to promote repose – precluded consideration of overcharges prior to the recovery period (former RSL § 26–516[a][2]; former CPLR 213–a), and it is clear from *Boyd* that use of a potentially inflated base date rent, flowing from an overcharge predating the limitations and lookback period, was proper in the absence of fraud. Likewise, no exception is justified by the fact that the inflated base date rent in *Roberts* cases resulted from improper deregulation, as opposed to an improperly high increase to a stabilized rent. The RSL makes no such distinction, and there is no indication that, under the pre-HSTPA law, an overcharge resulting from improper (but non-fraudulent) luxury deregulation warranted anything but the application of the standard lookback provisions…
>
> Civil liability is always bounded by the public policy of repose embodied in statutes of limitations [citations omitted]… Overcharge liability under the RSL is no different. That *Roberts* revealed particular conduct to be illegal does not mean that tenants must be able to recover a certain measure of monetary damages for associated rent increases despite their failure to seek recovery within the limitations and lookback periods. Critically, our decision in *Roberts* has led to the return of many apartments to the rent stabilization scheme, including those at issue in these appeals; one amicus estimates the number of *Roberts* apartments at upwards

> of 50,000. While the statute of limitations and lookback period preclude tenants in those apartments from recovering certain damages they could have recovered if their claims had been initiated earlier, as a result of *Roberts* they may now enjoy rent stabilization protection…
>
> We therefore decline to create a new exception to the lookback rule and instead clarify that, under pre-HSTPA law, the four-year lookback rule and standard method of calculating legal regulated rent govern in *Roberts* overcharge cases, absent fraud. Applying the correct interpretation of the pre-HSTPA law to the present cases, in *Regina Metro.* the Appellate Division properly annulled DHCRs overcharge determination, which violated the lookback rule by relying on a reconstructed rent, despite finding that the overcharge was not willful (and there was no colorable fraud claim).

Even if there were no *contemporaneous* DHCR filings, you still only look back as far as the "look-back" period allows and no farther. *AEJ 534 East 88th, LLC v. DHCR*, 194 AD3d 464 [1st Dept 2021]:

> The absence of contemporaneous DHCR filings does not allow for a lookback beyond the four-year period to an earlier legal regulated rent reported to DHCR (*see* 472 *Corcoran v. Narrows Bayview Co., LLC,* 183 A.D.3d 511, 512, 125 N.Y.S.3d 404 [1st Dept. 2020]). Furthermore, in the absence of fraud, "for overcharge calculation purposes, the base date rent [is] the rent actually charged on the base date (four years prior to initiation of the claim) and overcharges [are] to be calculated by adding the rent increases legally available to the owner under the RSL during the four-year recovery period." (*Regina* at 355–356, 130 N.Y.S.3d 759, 154 N.E.3d 972).

There are many examples of cases where the decision maker found an improper deregulation but did not find fraud. Here I am including a few that are: (a) post *Regina*; and (b) contain detailed explanations for their findings.

Corcoran v. Narrows Bayview Company, LLC, 183 AD3d 511 [1st Dept 2020]:

> Plaintiffs' rent-stabilized apartment could not be deregulated pursuant to luxury decontrol laws during the period the building was receiving J–51 tax benefits [citations omitted throughout]. Given the lack of evidence that defendant engaged in fraud in deregulating the apartment, plaintiffs' claims for rent overcharge and to calculate the legal regulated rent are subject to a four-year look back period…

> The parties agree that the applicable base date is April 2006, four years prior to the April 2010 date of the complaint, and we reject plaintiffs' suggestion that the lack of DHCR filings contemporaneous with the base date requires one to look beyond the four-year period to an earlier legal regulated rent reported in a DHCR filing. This Court has held that "rental history," as that term is used in CPLR 213–a, is not restrained to DHCR records and may include the records of the landlord and the tenant [*Regina*]. Accordingly, the correct base rent is $2,000, which is the rent actually paid by the prior tenants in April 2006.
>
> When the prior tenants vacated on or about May 31, 2006 and plaintiff executed a two-year lease effective July 1, 2006, defendant was entitled to a 20% vacancy increase equal to $400 (20% of $2,000), bringing the legal regulated rent to $2,400...Additionally, defendant was entitled to a 5.75% rent guidelines increase of $138.00 (5.75% of $2,400) when plaintiffs executed a two-year renewal lease effective from July 1, 2008 through June 30, 2010. This resulted in a legal regulated rent of $2,538.

Goldfeder v. Cenpark Realty LLC, 187 AD3d 572 [1st Dept 2020]:

> Concerning plaintiffs' initial rent, the fair market rent agreed upon in plaintiffs' initial lease comported with applicable law [citations omitted throughout], as the unit became rent-stabilized by operation of law when the previous rent-controlled tenant vacated the prior year…;. Plaintiffs concede that they were served with an Initial Apartment Registration Form, but did not bring a Fair Market Rent Appeal before the Division of Housing and Community Renewal...
>
> As to the alleged rent overcharges, plaintiffs do not show that "a fraudulent scheme to destabilize the apartment tainted the reliability of the rent on the base date"…"[T]he fraud exception to the lookback rule is generally inapplicable to *Roberts* overcharge claims," where the landlord relied on pre-*Roberts* administrative guidance to deregulate…
>
> Plaintiffs failed to demonstrate that individual apartment improvements between the tenancies were not performed (*compare* [*Nolte*]). While defendants' condominium conversion plan should have identified the unit as rent-stabilized, and defendants should not have waited until 2015 to register the unit, their application for high-income deregulation was not improper, as the J–51 tax

> benefits had long expired…Further, their action seeking to declare the unit deregulated due to their reliance on the pre-*Roberts* regulations, though unsuccessful, was not fraudulent…

Kostic v. DHCR, 188 AD3d 569 [1st Dept 2020]:

> [Appellant-tenant seeks] to annul the [Supreme Court] [d]etermination to the extent it utilized an allegedly improper base date for calculation of the legal regulated rent and failed to impose treble damages…
>
> The agency rationally found that [landlord's] failure to prove that J–51 riders were included in all of the tenant's renewal leases was not proof of a fraudulent scheme to deregulate the apartment. Under the circumstances, the fact that the owner filed an erroneous exit registration on the ground of high-rent vacancy, does not compel a finding of fraud. The error was plain on its face, since Kostic never vacated the apartment. Therefore, she could not have reasonably relied on the exit registration. Reasonable reliance is an element of fraud for purposes of evading the four-year lookback restriction for pre-HSTPA overcharge claims [*Regina*].

Gridley v. Turnbury Village, LLC, 196 AD3d 95 [2d Dept 2021], *lv denied,* 2021 WL 5898137 [2021]:

> Turnbury purchased the subject building in 2006, and was granted a so-called J–51 tax abatement in 2008. At that time, the apartments in the building were rent-stabilized or rent-controlled [citations omitted throughout]. In years after it purchased the subject building, Turnbury registered 26 apartments, including the apartment later rented by the plaintiff, with…DHCR…as exempt from rent stabilization regulation, on the ground that the rent under rent stabilization reached the high-rent, vacancy decontrol amount.
>
> By letter dated January 6, 2016, the DHCR notified Turnbury and approximately 4,000 other property owners that the New York courts had determined that "any apartment that was subject to Rent Stabilization at the date of the receipt of the J–51 benefits must register those units as rent stabilized with the DHCR." Pursuant to that directive, Turnbury registered each of its rent-stabilized apartments with the DHCR, and the plaintiff was offered a rent-stabilized renewal lease on or about February 28, 2016, which he accepted.
>
> In January 2019, the plaintiff commenced the instant action, alleging that Turnbury's failure to register his apartment as a rent-

stabilized apartment with the DHCR in the years prior to 2016 was part of a fraudulent scheme to deregulate the apartment…

Thereafter, Turnbury moved, in effect, for summary judgment dismissing the complaint…

In opposition, the plaintiff admitted that Turnbury was correct that, had it followed the law, and charged rents permissible for rent-stabilized apartments during the period when the apartments were not registered, "the legal regulated rent would be higher than Plaintiff Gridley's current rent, which is calculated based on market conditions in the Building's neighborhood." However, according to the plaintiff, Turnbury was required to compute his rent pursuant to the "default formula"…

Supreme Court granted Turnbury's motion, in effect, for summary judgment dismissing the complaint. The court determined that the plaintiff was never charged more than the legal regulated rent that would have been charged if the rent stabilization regulations had been complied with, and Turnbury never engaged in a fraudulent scheme to deregulate the apartment…

Turnbury registered the plaintiff's apartment and the other apartments in the subject building with the DHCR in 2016 and in subsequent years. The registration of the plaintiff's apartment indicated that he was charged a "preferential rent," which was substantially less than the "legal regulated rent."

Here, the deregulation of the plaintiff's apartment was made in good faith (*see Matter of Park v. New York State Div. of Hous. & Community Renewal,* 150 A.D.3d 105, 50 N.Y.S.3d 377). Further, the late registration of the apartment as rent-stabilized, only after notification by the DHCR of a change in the law several years in the making, does not indicate that Turnbury was engaged in a fraudulent scheme to deregulate the apartment…

There are instances in which failure to timely register an apartment as rent stabilized could constitute evidence of fraud. Prior to 2016, and the DHCRs blanket notification to landlords of the change in the law, there were landlords involved in litigation over failure to register apartments as rent stabilized who nevertheless persisted in that practice (*see* [*Kreisler*]; [*Townsend*]; [*Butterworth*] ...[*Nolte*] ...It is clear that the plaintiff's apartment was in fact rent stabilized, but that fact was not evidence of fraud, and allegations of fraud based upon speculation are insufficient…

> Further, there is no evidence here that the plaintiff was overcharged. As previously noted, the plaintiff acknowledged that "the legal regulated rent would be higher than Plaintiff Gridley's current rent, which is calculated based on market conditions in the Building's neighborhood." The plaintiff argues that since the subject apartment was improperly deregulated, there was no "legal regulated rent," but Turnbury could have raised the rent to a "false legal regulated rent." Although rent spikes or unexplained increases in rent could be evidence of fraud…there is no evidence of that in this case.
>
> An increase in rent alone is insufficient to establish a colorable claim of fraud…
>
> Moreover, in this case, a rental history of the subject apartment was available to the DHCR, and there is no evidence of any misrepresentations by Turnbury…

Sandlow v. 305 Riverside Corp., 201 AD3d 418 [1st Dept 2022]:

> Defendant's failure to provide plaintiff's predecessor with notice of the last legal regulated rent, although a violation of law, was not fraudulent [citations omitted throughout], especially since, as Supreme Court found, the deregulation of the apartment in 1997 was proper…Defendant's agent, whose credibility is not addressed in the order under review, testified that he relied on the 1996 advisory opinion by the Division of Housing and Community Renewal to support his belief that the receipt of J–51 benefits would not affect apartment regulation. Though the agent's reliance proved to be misplaced (*see* [*Roberts*]*...),* his testimony does not show a conscious and knowing violation…
>
> That defendant did not file retroactive rent registrations until 2011, and, even then, only back to 2007, also does not demonstrate fraud, since "the retroactivity of *Roberts* was not settled until 2012," when an appeal of this Court's decision finding retroactivity was withdrawn…Nor does defendant's decision not to file additional registrations retroactively show fraud, given defendant's reliance on the four-year statutory lookback period…
>
> Further, the 2004 apartment renovation does not demonstrate fraud. On the contrary, defendant "sufficiently documented the apartment improvements" by proffering the estimate, invoices, checks showing payment of all the sums charged, and testimony from its own agents and the general contractor that the work was done…Plaintiff's expert's credible testimony as to the amount the

> contractor should have charged, how much of the renovation would have qualified as individual apartment improvements, and the contractor's subpar work or failure to install crown molding does not prove that the work was not performed...

See also *Casey v. Whitehouse Estates, Inc.*, 39 NY3d 1104 [2023] ("For purposes of calculating overcharges, where it is possible to determine the rent "actually charged on the base date"—here October 14, 2007—that amount should be used and rent increases legally available to defendants pursuant to the RSL during the four-year period should be added.")

III. SETTING THE LEGAL RENT IF THERE IS FRAUD, NO RELIABLE RENT, OR A FAILURE TO REGISTER

The method of setting the legal rent may not be as simple, however, as looking back to what was being paid six years ago. There are three scenarios where a court or the DHCR will either look back farther than the statutory look-back period or where it will set the rent according to a statutory formula. See RSC § 2522.6(b) (Orders where the legal regulated rent or other facts are in dispute, in doubt, or not known, or where the legal regulated rent must be fixed), also referred to as the "DHCR Default Method".

A. Fraud

If there was fraud, then the decision maker can look back beyond the applicable statutory look-back period, without limitation, when setting the base rent and, if the decision maker can find no reliable rents, can resort to the DHCR default method (RSC § 2522.6(b)) for setting the base rent. The case survey below, presented in chronological order, provides examples (most of them recent) of where a decision maker finds fraud.

Fraud has been found where there was no proof of recent apartment improvements that were alleged to lead to rent increases (*Bogatin v Windermere Owners LLC*, 98 AD3d 896 [1st Dept 2012]) and where there were illusory prime tenancies (*Conason v Megan Holding*, LLC, 25 NY3d 1 [2015]).

In *Altschuler v Jobman 478/480, LLC.*, 135 AD3d 439 [1st Dept 2016], *lv denied* 29 NY3d 903 [2017], the court held:

> Plaintiff claimed that defendant engaged in a "fraudulent scheme" to deregulate the apartment by increasing the 1995 rent of $422.04 to over $2,000 in subsequent years, executing market rent leases during a time it was receiving J–51 tax benefits, failing to provide him with a lease rider, and failing to file the required annual registrations with DHCR during his tenancy. Defendant failed to refute these allegations of fraud. Its argument that the apartment was deregulated because it was renovated in 1995 is unavailing, as it fails to support it with sufficient evidence. The affidavit of its lease administrator, stating that at least $6,296.14 of individual

> apartment capital improvements were performed prior to plaintiff's first lease, is insufficient, as it was unsupported by "bills from a contractor, an agreement or contract for work in the apartment, or records of payments for the [claimed improvements]" [citation omitted].
>
> Because plaintiff established a colorable claim of fraud, Supreme Court properly disregarded the rent charged four years prior to the filing of the rent overcharge claim, and properly examined the entire rent history to determine the legality of the base rent [*Grimm*[7]]. Further, the application of DHCR's default formula was warranted, given the unreliability of the rental history since 1995, due to defendant's failure to file a number of the annual rent registrations prior to the commencement of this action...

Butterworth v. 281 St. Nicholas Partners, LLC, 160 AD3d 434 [2d Dept 2018]:

> The court properly looked back beyond the four-year limitations period for plaintiffs' rent-overcharge claim [citations omitted throughout] to establish the proper base rent, in that sufficient indicia of fraud existed...While neither an increase in rent, standing alone, nor plaintiffs' skepticism about apartment improvements suffice to establish indicia of fraud…, here at the same time that the predecessor landlord increased the rent from $949.34 to $1,600 in plaintiffs' initial lease, it also ceased filing annual registration statements for 2007 through 2012. Moreover, plaintiffs' initial lease contained a "Deregulation Rider for First Unregulated Rent," which left blank spaces which would have indicated either that the last legal regulated rent or the new legal rent exceeded the $2,000 threshold for deregulation, and may well be viewed as an attempt to obfuscate the regulatory status of the apartment, despite that the rent had not reached the $2,000 threshold.

Kreisler v B-U Realty Corp., 164 AD3d 1117 [1st Dept 2018]:

> Where, as here, a landlord has engaged in fraud in initially setting the rent or removing an apartment from rent regulation, the court may examine the rental history for an apartment [citation omitted] and, moreover, may do so beyond the statutory period allowed by CPLR 213-a [citation omitted]…
>
> The record reflects evidence of a fraudulent scheme to deregulate plaintiffs' apartment, as well as other apartments in the building, including evidence of defendants' failure, while in receipt of J-51 tax benefits, to notify plaintiffs their apartment was protected by

[7] Cited and examined below in § IV.

> rent stabilization laws or to issue them a rent-stabilized lease, and further reflects that defendants only addressed the issue when their conduct, which violated [*Roberts*], came to light in connection with an anonymous complaint, which in turn triggered the involvement of an Assemblyman in 2014.
>
> We reject defendants' asserted reliance on a "pre-*Roberts*" framework to justify their actions, given that the wrongdoing here occurred in 2010, after *Roberts* was decided. Moreover, and notwithstanding defendants' arguments to the contrary, we find the evidence of other litigations by plaintiffs' co-tenants against defendants alleging the same or similar misconduct relevant and probative of a fraudulent scheme to deregulate [citation omitted].
>
> In turn, we find defendants have not shown that Supreme Court erred in directing the Special Referee to use the default formula of 9 NYCRR 2522.6 (b) (2) to determine plaintiffs' base rent, on the theory that such rent was the product of a fraudulent scheme to deregulate the apartment.

Nolte v. Bridgestone Assoc. LLC, 167 AD.3d 498 [1st Dept 2018]:

> The court properly examined the rental history of the subject apartment beyond the four-year statutory limitations period (CPLR 213-a) upon finding that defendant was engaged in a fraudulent scheme to deregulate apartments [citation omitted]. The record shows that defendant failed to promptly register the apartment and 30 other apartments in the building as rent-stabilized in March 2012, when the applicability of [*Roberts*] was clear [citation omitted].
>
> Moreover, defendant failed to raise an issue of fact as to whether the rent was improperly increased between 1999 and 2000 based on false claims of individual apartment improvements. While defendant was not the owner at that time, it submitted no evidence that controverted plaintiff's expert's affidavit stating that there was no evidence of such improvements.

Montera v. KMR Amsterdam LLC, 193 AD3d 102 [1st Dept 2021]:

> The primary issue on this appeal is whether defendant's alleged illegal scheme to deregulate the subject apartment after [*Roberts*]...and its continued failure to register the apartment are sufficient indicia of fraud to warrant review of the apartment history beyond the four-year lookback period. Supreme Court correctly found that plaintiff made a colorable claim of fraud

which permits the review of the rental history outside the four-year lookback period…

Importantly, the Court in *Regina* recognized that each of the cases before it concerned apartments that were deregulated in accordance with then-prevailing DHCR regulations and guidance…The Court noted that "the tenants took occupancy years prior to [*Roberts*] following a deregulation later revealed by that decision to have been improper, believing they were renting non-stabilized apartments at market rents. None of these tenants promptly challenged the deregulated status of their apartments and years – in some cases, over a decade – passed during which the tenants and their landlords renewed and renegotiated free-market leases"…Accordingly, no colorable fraud claim had been made out.

Thus, in pre-*Roberts* cases where landlords relied on DHCR guidance there could be no fraudulent scheme to deregulate. This rule was explained by us in *Matter of Park v. New York State Div. of Hous. & Community Renewal,* 150 A.D.3d 105, 115, 50 N.Y.S.3d 377 (1st Dept. 2017), *lv dismissed* 30 N.Y.3d 961, 64 N.Y.S.3d 662, 86 N.E.3d 555 (2017), where we found that DHCR rationally concluded that there was no basis to lookback beyond the four-year limitation period, as the owner did not engage in fraud when removing the apartment from rent regulation in 2005. We explained that the owner "was relying on DHCR's own contemporaneous interpretation of the relevant laws and regulations" (*id.*). In fact, we gave the owner safe harbor, finding that fraud was not committed before 2012, when *Roberts* was applied retroactively.

However, we have not extended this rule to cases decided after *Roberts* and *Gersten.* To the contrary, our jurisprudence holds that an owner may not flout the teachings of *Roberts.* In [*Kreisler*], we affirmed Supreme Court's declaration that the defendant owners engaged in a fraudulent scheme to remove the plaintiff tenants' apartment from rent regulation. The owner failed to notify the tenants that their apartments were subject to rent stabilization or to issue rent stabilized leases. The owner finally addressed deregulation only after its conduct was revealed by an anonymous complaint. We affirmatively "reject[ed] defendants' asserted reliance on a 'pre-*Roberts* ' framework to justify their actions, given that the wrongdoing here occurred in 2010, after *Roberts* was decided"…Similarly, in [*Nolte*], we did not give the owner safe harbor under the pre-*Roberts* line of cases because the "defendant failed to promptly register the apartment and 30 other

apartments in the building as rent-stabilized in March 2012, when the applicability of [*Roberts*] was clear."

We disagree with the dissent that the *Kreisler* and *Nolte* line of cases is no longer good law in light of *Regina.* This reading of *Regina* is overly broad and does not comport with this State's public policy recognizing the serious emergency in the residential housing market exacerbated by the deregulation of housing stock (*see* Emergency Tenant Protection Act (ETPA) § 2 [1974] and the HSTPA). Moreover, unlike *Kreisler* and *Nolte,* the four cases decided in *Regina* are model pre-*Roberts* cases. In fact, the issue framed by the *Regina* majority was "what is the proper method for calculating the recoverable rent overcharge for New York City apartments that were improperly removed from rent stabilization during receipt of J–51 benefits *prior* to our 2009 decision in [*Roberts*]"…

Regina does not grant an owner carte blanche in post-*Roberts*/*Gersten* cases to willfully disregard the law, by failing to re-register illegally deregulated apartments, enjoying tax benefits while continuing to misrepresent the regulatory status of the apartments, and taking steps to comply with the law only after its scheme is uncovered. Owners should not be incentivized to remove regulated housing from the statutory scheme by simply ignoring the law. It is axiomatic that ignorance of the law is not a defense for the failure to comply with unambiguous legal obligations (*see Stauber v. Antelo,* 163 A.D.2d 246, 249, 558 N.Y.S.2d 67 [1st Dept. 1990]).

Here, in 2003, defendant's predecessor applied for J–51 tax benefits for the building. Defendant acquired the building the following year. The J–51 tax benefits expired in or around June 2013. Defendant was required to re-register the apartments with DHCR, provide the building tenants with rent stabilized leases, and seek rent increases in accordance with rent regulations.

Plaintiff became the tenant in apartment 4E pursuant to a non-regulated lease dated March 10, 2010, for the monthly rent of $1,150. On July 28, 2010, defendant filed a high-rent destabilization exemption with DHCR, based on a 17% vacancy increase from the previous legal rent that pushed it above the then-applicable $2,000 threshold for deregulation. A free-market lease extension dated December 18, 2012, covering March 1, 2013 to February 28, 2014, set plaintiff's monthly rent at $1,350. Another free-market lease extension dated January 6, 2017, covering March

> 1, 2017 through July 31, 2018, set plaintiff's monthly rent at $1,595. Defendant finally re-registered the apartment in 2018.
>
> We disagree with the dissent that there was a "mere lack of registration" and that there are "no facts" to support defendant's scheme to deregulate. The hallmarks of a fraudulent scheme to deregulate are present here. Defendant deregulated the apartment after *Roberts* was decided and did not re-register with DHCR, despite receiving J–51 tax benefits after *Gersten* applied *Roberts* retroactively. During the four-year period preceding commencement of the lawsuit, plaintiff was still not given a rent-stabilized lease. Unlike in *Park,* where the owner promptly registered the apartment, defendant waited until 2018 to re-register the apartment, one year after the complaint in this case was filed alleging that defendant unlawfully deregulated the building's apartments – more than a decade after *Roberts* was decided and eight years after our decision in *Gersten*. Defendant's actions cannot be deemed to be prompt compliance. Rather, at this stage, plaintiff has sufficiently alleged a six-year scheme to illegally deregulate 27 units or approximately 32% of the building…
>
> For these reasons, we find that the apartment history beyond the four-year lookback period may be reviewed to determine whether fraud occurred.

See also Hess v. EDR Assets LLC, 200 A.D.3d 491 [1st Dept 2021] (fraud found where landlord, while "enjoying J–51 tax benefits, failed to re-register the units until years after *Roberts* was decided and applied retroactively, waited over a year to re-register units after being notified by DHCR that they had to do so, took steps to comply only after their scheme was uncovered, and continued to inform tenants that the units were not subject to regulation even after DHCR notified them otherwise.")

On March 1, 2024, New York State Assembly bill A. 08506 (S. 08011) was passed into law. The purpose of this statute is to define, "clearly the scope of the fraud exception to the pre-HSTPA four-year rule for calculating rents…" **("New Fraud Law")**. The New Fraud Law states:

> § 2-a. When a colorable claim that an owner has engaged in a fraudulent scheme to deregulate a unit is properly raised as part of a proceeding before a court of competent jurisdiction or the state division of housing and community renewal, a court of competent jurisdiction or the state division of housing and community renewal shall issue a determination as to whether the owner knowingly engaged in such fraudulent scheme **after a consideration of the totality of the circumstances.**

> In making such determination, the court or the division shall consider all of the relevant facts and all applicable statutory and regulatory law and controlling authorities, **provided that there need not be a finding that all of the elements of common law fraud**, including evidence of a misrepresentation of material fact, falsity, scienter, reliance and injury, were satisfied in order to make a determination that a fraudulent scheme to deregulate a unit was committed **if the totality of the circumstances nonetheless indicate that such fraudulent scheme to deregulate a unit was committed.**
>
> [Emphasis supplied.]

Here is the first case utilizing the New Fraud Law (that I know of). *Buffo v. East 7th LLC*, 2024 WL 3221222 [New York State Supreme Court 2024], where Justice Lyle utilized the new definition of fraud-not-fraud and still found…wait for it…no fraud, holding:

> Plaintiff Keith Buffo (hereafter "Plaintiff") brings this action alleging that Defendants 208-10 East 176 LLC and Birchwood Properties, LLC's predecessor fraudulent raised the rent of his apartment in January 2001 to remove the apartment from the rent regulation program pursuant to the law in effect at that time. [Footnote omitted.] Plaintiff seeks to challenge the deregulated status of his apartment and damages for rent overcharges.
>
> The Court of Appeals has made clear that for complaints based on upon an alleged fraudulent rent originating prior to June 14, 2019, enactment of the Housing Stabilization and Tenant Protection Act of 2019 (HSTPA), the law in effect prior to HSTPA applies (*Regina Metro Co LLC v DHCR,* 35 NY3d 332, 130 NYS3d 759 [2020]["the law in effect at the time the overcharges occurred" applied to any fraudulent rent increase originating prior to June 14,2019]). Since the allegations regarding fraudulent deregulation in this case all occurred prior to June 14, 2019, pre-HSTPA law applies.
>
> Though "an apartment's rent history is always subject to review to determine whether a unit is rent-stabilized" (*Matter of Kostic v NY State Div. of Hous. & Community Renewal,* 188 AD3d 569, 569 [1st Dept 2020]), the party challenging the status must assert a legal basis for that challenge. Similarly, "review of rental history, outside the four-year lookback period is only permitted where the tenant produced evidence of a fraudulent scheme to deregulate" (*Burrows v 75-25 153rd St., LLC,* 215 AD3d 105, 109, 189 N.Y.S.3d 1 [1st Dept 2023] *[quoting Casey v Whitehouse Estates,*

> *Inc.,* 39 NY3d 1104, 1106, 186 N.Y.S.3d 599, 207 N.E.3d 565 [2023]).
>
> On December 23, 2023, Governor Hochul signed into law Chapter 760 of the Laws of New York of 2023,…
>
> After a consideration of the totality of the circumstances and all the relevant pleaded facts (and those in the proposed pleading) and all applicable statutory and regulatory law and controlling authorities, this Court finds that Plaintiff has not alleged facts which fit either the Defendants or their predecessors conduct into a fraudulent scheme to deregulate Plaintiff's apartment. The facts alleged by the Plaintiff, which are wholly conclusory, are that Defendants' predecessors improperly deregulated the apartment by claiming to have made improvements that were either not made or exaggerated. Plaintiff's affidavit in opposition to this motion merely states he does not believe that the improvements were performed without providing any basis for his belief. This is insufficient, even under the new, more lenient, standard to allege a fraudulent scheme to deregulate a unit.
>
> Accordingly, it is hereby ORDERED that, Plaintiff's motion to amend the complaint is denied as futile; and it is further ORDERED that Defendants 208-10 East 176 LLC and Birchwood Properties, LLC's motion for summary judgment is granted and this action is dismissed.

B. <u>No Reliable Rent</u>

Even if the decision maker does not find fraud, if there is no reliable legal rent to find by looking back within the statutory look-back period (or no farther than June 14, 2015), then the decision maker can look beyond the statutory look-back period.

This is where it gets tricky, because the lead case in this area, *Grimm v. DHCR*, 15 NY3d 358 [2010], is often cited as a fraud case. But the court in *Grimm* did not conclude that there was (or was not) fraud in *Grimm*. Rather, the court in *Grimm* determined that there was an allegation that there was no reliable rent upon which to set the base rent, thus triggering the factfinder to investigate whether the rent on the base date is reliable. *Grimm v. DHCR*, 15 NY3d 358 [2010] holds:

> We…conclude that, where the overcharge complaint **alleges** fraud, as here, DHCR has an obligation to ascertain whether the rent on the base date is a lawful rent. Accordingly, here, as the Appellate Division concluded, DHCR acted arbitrarily and capriciously in failing to meet that obligation where there existed substantial indicia of fraud on the record.

> In particular, here it is alleged that the tenants immediately preceding petitioner paid significantly more than the previously registered rent, and were not given a rent-stabilized lease rider. Moreover those tenants were informed that their rent would be higher but for their performance of upgrades and improvements at their own expense. Almost simultaneously with the substantial increase in the rent for the affected unit, the owner ceased filing annual registration statements (*see* Rent Stabilization Code [9 NYCRR] § 2528.3[a] [requiring annual registration statements be filed with DHCR]) and later filed several years' registration statements retroactively after receiving petitioner's overcharge complaint. Finally, petitioner's initial lease did not contain a rent-stabilized rider. **The combination of these factors should have led DHCR to investigate the legality of the base date rent, rather than blindly using the rent charged on the date four years prior to the filing of the rent overcharge claim.**
>
> **Our holding should not be construed as concluding that fraud exists, or that the default formula should be used in this case.** Rather, we merely conclude that DHCR acted arbitrarily in disregarding the nature of petitioner's allegations and in using a base date without, at a minimum, **examining its own records to ascertain the reliability and the legality of the rent charged on that date.**
>
> DHCR also argues that, under the Appellate Division's holding, any "bump" in an apartment's rent—even those authorized without prior DHCR approval, such as rent increases upon installation of improvements to an apartment (see Rent Stabilization Law § 26–511[c][13])—will establish a colorable claim of fraud requiring DHCR investigation. Again, we disagree. Generally, an increase in the rent alone will not be sufficient to establish a "colorable claim of fraud," and a mere allegation of fraud alone, without more, will not be sufficient to require DHCR to inquire further. What is required is evidence of a landlord's fraudulent deregulation scheme to remove an apartment from the protections of rent stabilization. As in *Thornton,* **the rental history may be examined for the limited purpose of determining whether a fraudulent scheme to destabilize the apartment tainted the reliability of the rent on the base date**.
>
> [Emphasis supplied.]

In *Simpson v 16-26 E. 105, LLC*, 176 AD3d 418 [1st Dept 2019], this rule is more explicitly stated, **"…the default formula is applied to calculate compensatory overcharge**

damages where no other method is available. <u>Moreover, it is applied equally in cases in which the owner has engaged in fraud and in cases in which the base date rent simply cannot be determined or the rent history is unavailable.</u>" [Emphasis supplied.]

More support is found farther back in First Department jurisprudence, which is still good and widely cited law, for the concept that the DHCR Default Method can and should be utilized where there is no finding of a landlord' fraudulent scheme. *Levinson v. 390 West End Associates, L.L.C.*, 22 AD3d 397 [1st Dept 2005] explains that particularly when there is no fraud look-back, the default method may apply if there is no reliable base rent, holding, "Here, as in *Thornton,* a default formula must be used to determine the current legal rent, since it is conceded that the rent actually charged on the base date was unlawful, and the statute of limitations does not permit us to use any rental history prior to the base date in setting the current legal rent." *Wasserman v. Gordon*, 24 AD3d 201 [1st Dept 2005], was a case where the rent might have been decided by a fair market rent appeal upon the apartment leaving Rent Control, but the appeal was never made. Therefore, in a case where no fraud was alleged, because there was no reliable base rent, the appellate court approved of the lower court employing the DHCR Default Method. *215 W 88th Street Holdings LLC v. DHCR*, 143 AD3d 652 [1st Dept 2016], alludes to a "fraudulent nonprimary residence rider", rendering tenants' initial lease…a legal nullity", but stops short of finding a fraudulent scheme to deregulate. Nevertheless the appellate court in *215 W 88th Street* approved of the requirement, "that the base date rent, for purposes of calculating the rent overcharge, be arrived at using the 'default method'".

The rule is expressed well also in *Lexford Properties, L.P. v. Alter Realty Co., Inc.*, 31 Misc.3d 142(A) [App Term, 1st Dept, 2011]:

> Contrary to tenant's contention, the cited Code section, not the *Thornton* default formula (*see Thornton v. Baron,* 5 NY3d 175 [2005]) provides a proper basis to fix the legal rent in the matter at hand, in which **no tenable showing was made that the landlord or its predecessor attempted to evade or circumvent the rent regulatory scheme and where the difficulty in establishing the base date rent arises not from any alleged illegality-the rent actually charged tenant on the March 12, 2005 base date was $0–but because such rent "cannot be established"…**
>
> [Emphasis supplied.]

See West Pierre Associates LLC v. Harvey, 2025 WL 2247588 [1st Dept, 2025)] ("Here, although the tenant does not assert fraud, she does assert that the 2014 individual apartment improvement increase was not supported and, therefore, that the legal regulated rent set forth in her lease commencing December 1, 2020, was not reliable.")

C. Effect on Base Rent of Failure to Register

Rent Stabilization Code § 2528.4 (Penalty for failure to register) states:

> (a) The failure to properly and timely comply with the rent registration requirements of this Part shall, until such time as such registration is completed, bar an owner from applying for or collecting any rent in excess of: the base date rent, plus any lawful adjustments allowable prior to the failure to register. Such a bar includes but is not limited to rent adjustments pursuant to section 2522.8 of this Title [vacancy increases]. **The late filing of a registration shall result in the elimination, prospectively, of such penalty**, and for proceedings commenced on or after July 1, 1991, **provided that increases in the legal regulated rent were lawful except for the failure to file a timely registration, an owner, upon the service and filing of a late registration, shall not be found to have collected a rent in excess of the legal regulated rent at any time prior to the filing of the late registration.**
>
> [Emphasis supplied.]

Without ever mentioning the words "fraud" or "lookback", the Appellate Division in *Jazilek v. Abart Holdings, LLC*, 72 AD3d 529 [1st Dept 2010], holds:

> In calculating the amount of the rent overcharges, the motion court correctly declined to apply any periodic or other rent increases, other than a vacancy increase of 20% (*see* RSC [9 NYCRR] § 2522.8[a][1]), which the parties agreed applied. A landlord's failure to file a "proper and timely" annual rent registration statement results in the rent being frozen at the level of the "legal regulated rent in effect on the date of the last preceding registration statement" (RSL § 26–517[e]; *see* RSC [9 NYCRR] § 2528.4 [a]). The rent registration filed by the landlord in February 2004 was false, as it continued to list the prior tenant as tenant of record, and listed the prior rent of $812.34, instead of the actual paid "preferential" rent of $1,800. The rent registration filed in June 2004 was also defective, as it listed a legal rent of $2,200, vastly in excess of $974.81, the highest possible legal rent at that time. As such, both the February and the June 2004 rent registration statements were nullities (*Thornton v. Baron,* 5 N.Y.3d 175, 800 N.Y.S.2d 118, 833 N.E.2d 261 [2005]), and no further registration statements were filed.

Then came *Bradbury v. 342 West 30th Street Corp.,* 84 AD3d 681 [1st Dept 2011], where the Appellate Division holds:

> The matter went to trial, and in a decision dated November 29, 2007, the court determined that the apartment was subject to the Rent Stabilization Law. **The court found that the testimony of defendant's principal, Anthony Argento, was "unbelievable in all material matters" and "unworthy of belief." The court also rejected most of the other defense witnesses' testimony, finding that two of them had lied on the stand. The court concluded that bills and invoices were fabricated for the litigation and that at least one forged document was submitted to the court. In sum, the court stated that defendant's case was "a sham, filled with perjury, forgery, [and] fabrications all designed not only to raise the rent of the apartment ... to an unlawful level, but to mislead the plaintiff, counsel and the Court." The court rejected defendant's claimed renovation costs of $90,000 and found instead that defendant had spent no more than $34,000. The court also found that plaintiff's unlawful $2,000 rent was imposed willfully and intentionally.**
>
> [Emphasis supplied.]

It seems that the Appellate Division clarified the modern role of *Jazilek/Bradbury* in *Enriquez v. DHCR*, 166 AD3d 404 [1st Dept 2018], holding:

> DHCR correctly calculated the legal regulated rent by taking the base rent (as of four years before the rent overcharge petition) and adding thereto all "subsequent lawful increases and adjustments" (Rent Stabilization Code [9 NYCRR] § 2526.1[a][3][i]). Contrary to the court's finding, the subject rent registration statements were "proper" within the meaning of Rent Stabilization Law (RSL) (Administrative Code of City of NY) § 26–517(e). **That provision requires landlords to "file a proper and timely initial or annual rent registration statement," which means a statement of the "rent charged on the registration date" (*id.* § 26–517[a]), or "current rent" (*id.* § 26–517[f]), rather than the technically legally collectible rent (*see Dodd v. 98 Riverside Dr., LLC,* 2012 N.Y. Slip Op 31653 [U], 2012 WL 2502774 [Sup. Ct., N.Y. County 2012]). The rent registration statements recorded the actual amount of rent charged to the tenant and were not the product of fraudulent leases or otherwise legal "nullities" (*see Bradbury v. 342 W. 30th St. Corp.,* 84 A.D.3d 681, 683–684, 924 N.Y.S.2d 349 [1st Dept. 2011]; *Jazilek v. Abart Holdings, LLC,* 72 A.D.3d 529, 531, 899 N.Y.S.2d 198 [1st Dept. 2010]).**
> [Emphasis supplied.]

See also *Queens Fresh Meadows, LLC v. Beckford*, 85 Misc.3d 136(A) [App Term 2d Dept 2025]:

> Landlord alleged in the petition in this holdover proceeding that the subject apartment is not subject to rent stabilization because it had been luxury decontrolled. Tenants interposed affirmative defenses and counterclaims alleging, insofar as is relevant to this appeal, that the apartment was not properly luxury decontrolled and is, therefore, rent stabilized…Landlord appeals…from so much of an order of the Civil Court (Logan J. Schiff, J.) dated June 8, 2023 as, upon denying landlord's cross-motion, searched the record and awarded tenants summary judgment dismissing the petition on the ground that the apartment is rent-stabilized, rendering the petition fatally defective.
>
> …Landlord's position is that the apartment was properly luxury decontrolled at the commencement of a 2014 vacancy lease, at which time the legal rent surpassed the luxury decontrol threshold then in effect. Tenants have consistently argued in the Civil Court and on appeal that landlord's failure to register its rents with the Division of Housing and Community Renewal (DHCR) for several years before 2014 resulted in a rent freeze which precluded luxury decontrol. Landlord argues that its failure to register was based on the then-common "misunderstanding," corrected by the Court of Appeals in 2009, that units could be luxury decontrolled while the building was still accepting J-51 benefits (*Roberts v Tishman Speyer Props., L.P.*, 13 NY3d 270 [2009]). Therefore, landlord argues, a rent freeze is inappropriate (*see Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d 332, 358 n 9 [2020] ["rent freezing is inapplicable in *Roberts* cases where the failure to timely register resulted directly from DHCR's endorsement of a misunderstanding of the law"]). The record demonstrates that landlord registered the apartment as exempt from rent stabilization in 2006 and stopped filing registrations with DHCR in 2007. It was not until after the commencement of this proceeding that landlord, in 2023, filed registrations for the years 2007-2013. Those registrations, and the leases for those periods, show that the legal rent for the subject apartment did not surpass the $2,000 luxury decontrol threshold in effect at that time until, at the earliest, 2008. Since the legal regulated rent did not allow for luxury decontrol in 2006, regardless of the J-51 status of the building, landlord's failure to register the subject apartment starting in 2007 was, demonstrably, not based upon the pre-*Roberts* misunderstanding.

> "Where an owner fails to file a proper and timely registration, until such registration is filed, the rent is frozen at the legal regulated rent listed in the preceding registration statement" (*Bradbury v 342 W. 30th St. Corp.*, 84 AD3d 681, 684 [2011]; *see* Rent Stabilization Law of 1969 [RSL] [Administrative Code of City of NY] § 26-517 [e]; *Jazilek v Abart Holdings, LLC*, 72 AD3d 529, 531 [2010]). Generally, "amended registrations have no retroactive effect" (*125 Ct. St., LLC v Sher*, 58 Misc 3d 150[A], 2018 NY Slip Op 50092[U], [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2018]). Here, the legal rent was frozen at $1,500.81, registered in 2005 for a lease in effect from September 1, 2004 through August 31, 2005. **Landlord's filing of late registrations in 2023 only resulted in the prospective lifting of the rent freeze as of 2023 (*see* RSL § 26-517 [e] ["The filing of a late registration shall result in the prospective elimination of such sanctions," including the prohibition against applying for a rent increase]).** As the subject apartment was not properly luxury decontrolled, it is subject to rent stabilization and, thus, this holdover proceeding, based solely on the expiration of the lease…does not lie...
>
> [Emphasis supplied.]

IV. CONCLUSION

You could read this booklet on September 6, and by September 7, things could be different. That is how the law is. Please make sure to check all the statutes herein and key cite all the cases before you use them.

ABOUT THE AUTHOR

Michelle Itkowitz is the founder of Itkowitz PLLC and she has been practicing commercial and complex-residential landlord and tenant litigation in the City of New York for over 25 years. Michelle represents both landlords and tenants as a litigator and a consultant.

Michelle works on pretty much anything having to do with Rent Stabilization, including but not limited to: Rent Stabilization coverage issues; non-primary residence; succession rights; owner's use proceedings; chronic non-payment of rent; rent overcharges; substantial rehabilitation; preferential rents; illegal sublets; and 421-a and J-51 Rent Stabilization. Michelle does extensive co-living consulting. Michelle works on commercial landlord and tenant litigation, including good guy guaranty enforcement and defense, Yellowstone Injunctions, and commercial lease build out disputes. Michelle handles the landlord and tenant aspects of development projects. Michelle represents residential tenants in buyouts. Michelle helps to clean up "hairy" buildings and apartments with chronic landlord and tenant problems. Michelle works on matters having to do with short-term leasing problems (like Airbnb). Michelle works on matters involving special types of apartments, such as SRO's (single room occupancy), luxury apartments, co-op apartments, and Loft Law (interim multiple dwelling) apartments. Michelle deals with all kinds of occupancy issues, regarding roommates, family members, subtenants, and running a business in an apartment.

Michelle creates and shares original and useful content on landlord and tenant law in the City of New York, through numerous articles, books, lectures, and continuing legal education presentations. Michelle is one of three co-authors of the New York State Bar Association's 423-page, 2,668-footnote *New York Residential Landlord-Tenant Law and Procedure* treatise with the Hon. Gerald Lebovitz and Damon Howard, Esq. Michelle writes the commercial lease remedies and good guy guaranty litigation chapters for the New York State Bar Association's Commercial Leasing treatise. Michelle is frequently quoted in the press on a variety of landlord and tenant issues. Every three years, Michelle develops a fresh seven-part continuing legal education curriculum for Lawline entitled "Landlord and Tenant Litigation in New York". Lawline named Michelle as one of their top faculty.

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Michelle is a pioneer of Legal Project Management, a system by which project management principles are imposed upon the practice of law.

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Michelle is admitted to practice in New York State and the United States District Court for the Southern District of New York. She received a Bachelor of Arts in Political Science in 1989 from Union College and a Juris Doctor in 1992 from Brooklyn Law School. She began her legal career at Cullen & Dykman.

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