

Eviction Defense During COVID-19

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Housekeeping

- All on mute. Use Questions function for substantive questions and for technical concerns.
- Problems getting on the webinar? Send an e-mail to NCLER@acl.hhs.gov.
- Written materials and a recording will be available at NCLER.acl.gov. See also the chat box for this web address.

About NCLER

The National Center on Law and Elder Rights (NCLER) provides the legal services and aging and disability communities with the tools and resources they need to serve older adults with the greatest economic and social needs. A centralized, one-stop shop for legal assistance, NCLER provides Legal Training, Case Consultations, and Technical Assistance on Legal Systems Development. Justice in Aging administers the NCLER through a contract with the Administration for Community Living's Administration on Aging.

About NHLP

The National Housing Law Project was founded as a support center to assist the newly formed legal services organizations. We continue to play that role, providing technical assistance and training to legal aid attorneys and co-counseling on key litigation. We now also operate more broadly, working with organizers and other advocacy and service organizations to achieve our mission.

From our earliest days, we took the lessons that we learned from our partners in the field and advocated for policy change in Washington and in state capitals. Policy advocacy and impact litigation are key components of our work and are always grounded in the lessons we learn from partners and from the Housing Justice Network.

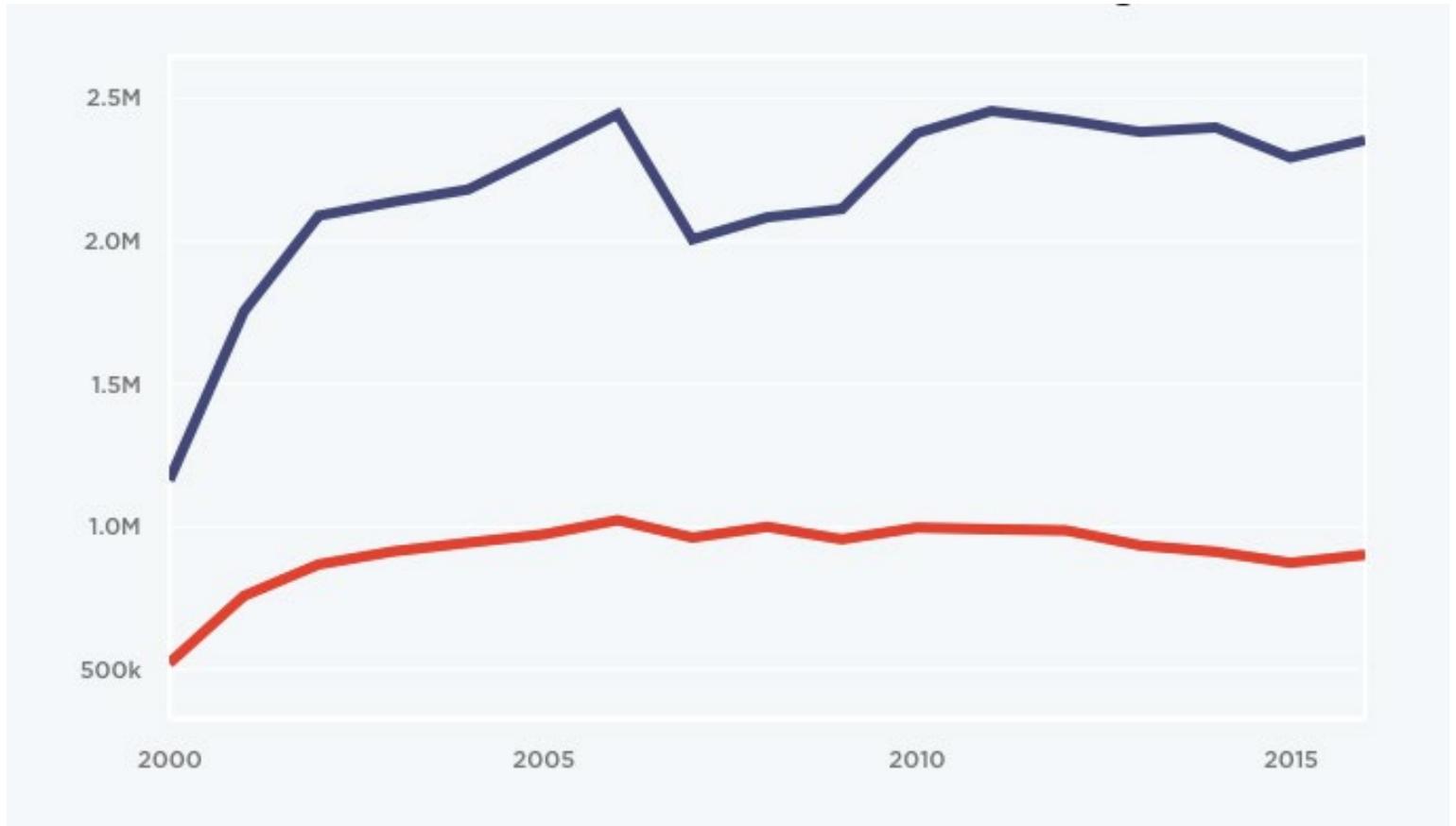
The Threat of Mass Evictions During COVID-19

A Tsunami of Evictions



Photo by U.S. Navy Specialist 3rd Class Dylan McCord - Released)

Evictions: Typical Year



Source: [Eviction Lab](#)

Eviction Estimates

- Amherst:
 - 28 million households at risk of eviction (May 2020)
- U.S. Census Bureau:
 - 8 million households “no confidence” in ability to make next rent payment
 - 26 million households “some” or “moderate” confidence
 - Household pulse survey, June 5-9, 2020
- Aspen Institute:
 - 19-23 million renters evicted by Sept. 30, 2020
 - Covid-19 Defense Project, June 2020

Consequences of Eviction

- “Normal”
 - Disruption of employment, education, health care
 - Housing instability
 - Significant risk of homelessness
 - Prolonged effects of eviction record and debt
 - Risk of family separation
 - Toxic stress, other difficult-to-quantify effects
- Pandemic
 - Inability to social distance, wash, etc.
 - Unavoidable interactions (eviction, emergency services)
 - Scarcity/competition for emergency resources
 - Collective effects (especially communities of color)

Another Ending Is Possible

- Federal rental assistance and new vouchers
 - Help to pay down arrearages, preserve housing
 - Long-term assistance to those most in need
- Prohibit evictions based on rent arrearages
 - Tenants whose incomes are restored retain housing
 - Payment plans for any lingering debts
- Tenant-screening protections for those displaced
 - Prohibit denials based on Covid-19 related UDAs, debts
- Help the landlords too (forbearances, loan workouts)

Eviction Moratoria

- Federal CARES Act, Sec. 4024
 - Prohibits filing non-payment evictions until July 25
 - 30 days' written notice to evict after July 25
 - Applies to units in properties with federally-backed mortgages or that participate in certain federal housing programs (e.g., Section 8 vouchers or RD vouchers)
- State moratoria:
 - Specifics differ (which cases, how they work, etc.)
 - Most (not all) have expired or will expire soon
 - States may reconsider as Covid-19 rages, resurges

Eviction Defense During Covid-19

- Evictions: summary procedures generally limited to determining present right to possession of premises
 - Dispositive hearing generally held within days of filing
 - Ordinarily no opportunity for formal discovery
 - Some counterclaims and offsets may be disallowed
 - Generally upheld against constitutional procedural due process challenge in *Lindsey v. Normet*, 405 U.S. 56 (1972)
- During Covid-19:
 - Pre-trial investigation, preparation may be more difficult
 - New/emergency laws and protections may apply
 - Court may have adopted radically different procedures

Anti-Eviction Litigation

- Systematic defenses in individual cases
 - Statutory continuances or other emergency restrictions
 - Recurring notice issues or other due process problems
- Affirmative suits seeking to stop large numbers of cases collectively
 - Categories of eviction cases
 - Entire court/eviction docket
 - Entire court system (i.e., statewide)

Pandemic Conditions as a Threat to Procedural Due Process

Due Process: Procedural Minimums for Residential Eviction Cases

- Adequate notice
- Representation by counsel (tenant-supplied)
- Opportunity to be heard in meaningful time & manner
 - Chance to confront & cross-examine witnesses, respond to adverse evidence, present favorable evidence & defenses
 - Hearing must be held before the tenant is evicted (pre-deprivation)
- Impartial decision-maker (decision on merits)

COVID-19 Threats

- Infection risk may chill litigants from traveling to or appearing in court, otherwise defending.
- Infection risk may diminish the quality of hearings by deterring witnesses or the public from attending.
- Court safety precautions may interfere with the ability of tenants or advocates to respond to, investigate, or otherwise defend against evictions.
- Remote hearing procedures may resolve safety concerns but raise separate challenges.

Minimum Expectations Before Hearing Eviction Cases:

- Safety/public health:
 - Physical preparations (use alternative facility if necessary)
 - Adopt & give notice of safety rules, plan for enforcement
 - Reduce volume of court users (scheduling, case flow)
- Due process:
 - Fully-baked written procedures
 - Notice to all concerned
 - Meaningful public access
 - Totality of circumstances

Mathews Test

Whether a particular procedural safeguard is required in a specific instance depends on:

- (i) the nature and importance of the interest at stake;
- (ii) the risk of erroneous deprivation through the procedures employed; and
- (iii) the probable value of additional safeguards and the governmental interest and burdens the additional process would entail.

Mathews v. Eldridge, 424 U.S. 319 (1976)

Notice

- “An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”
 - *Mullane v. Central Hanover Bank*, 339 U.S. 306, 314 (1950)
- *Content*:
 - Termination of tenancy, grounds (if for cause), right to contest eviction and how to do so
- *Service*:
 - Manner reasonably calculated to actually inform tenant

COVID-19 Notice Issues

- Summons or other notice forms rendered misleading due to changes in court practices.
- Tenants not informed of COVID-19 policies affecting right to respond & contest eviction:
 - Restrictions, limitations on court access
 - Options & rules for remote hearings
- Tenants less likely to receive actual notice of case:
 - Personal service may be more difficult, causing increased use of (often unreliable) alternative service
 - Prolonged absences from home for tenants hospitalized or caring for others

Representation by Counsel

- Courts have not recognized a general right to (publicly-funded) counsel in eviction cases.
- But, COVID-19 circumstances may change the *Mathews* calculus, at least for some tenants:
 - Health risks may amplify importance of interest at stake;
 - Increased complexity of laws and defenses available, as well as procedural irregularities during pandemic heighten the risk of erroneous deprivation; and
 - Public health considerations may lessen governmental interest in speed and efficiency.
- At very least, court should allow ample opportunity for tenant to obtain counsel through own means.

Opportunity to be Heard

- Access to court:
 - Safe to enter? Safe to travel?
 - Access for witnesses, others?
- Case preparation:
 - Investigation/discovery
 - Ability to present exhibits
- Accommodations
 - Remote hearings available?
 - Language access procedures
 - Disability accommodations



Health Concerns: COVID-19 Hearings

- Physical characteristics of courthouse
 - Courtrooms, lobbies & hallways, security checkpoints
 - Clerk's offices and other facilities
- Volume of court users
 - Caseloads, dockets (not just evictions!)
 - Public right of access to observe court operations
- Rules & policies
 - Masks, social distancing rules, numerical limits
 - Notice given to court users
 - Compliance and enforcement

Remote Hearings, You Say?

- Is video available?
- Are there written procedures on-line?
- Are the necessary devices and WiFi provided?
- Does the court have an accessible exhibit practice?
- Is real-time interpretation available?
- Does the public have meaningful access?
- Is tech help available if problems arise?
- What is the court's policy for those unable to use technology effectively?

Issues Arising Under the Federal CARES Act, Sec. 4024

CARES Act Eviction Moratorium

- Citation: 15 U.S.C. § 9058
- Summary:
 - Owner of “covered dwelling” may not initiate eviction lawsuit for nonpayment of rent or other charges between March 27 – July 25, 2020.
 - Post-moratorium: 30 days’ written notice required to terminate a tenancy (cannot be given before July 25).

Covered Dwellings

- Tenant occupies unit in “covered property”
- Covered properties:
 - Federally-backed mortgage loan (1-4 units)
 - Federally-backed multifamily mortgage loan (5+ units)
 - Participation in certain federal housing programs:
 - Covered by VAWA (34 U.S.C. § 12491(a))
 - Rural Development Voucher Program

How Many “Covered Dwellings?”

- Unknown how many units covered:
 - 12.3 million units covered through financing
 - 10 million units participate in covered programs
- Factors that lower count:
 - Overlap between financing, covered programs
 - Possible errors/delays in removing retired federal mortgages from databases
- Factors that increase count:
 - Presence of vouchers in multifamily properties

Additional Complexities

- Evictions also restricted in properties receiving forbearances authorized by CARES Act (§ 4023)
 - Federal agencies have extended availability of forbearances through late August and may continue to do so (forbearances can last up to 90 days)
 - But no resource for tenant to find out whether property has a forbearance or duration thereof
- Interpretation issues
 - Burden to prove applicability/non-applicability
 - Effect on evictions not ostensibly based on non-payment
- Pending/future federal legislation likely

§ 4024: State Responses

- Some states have established court rules requiring landlord to establish non-coverage
 - Arkansas, Texas, Iowa, Oklahoma, S. Carolina, Georgia, Michigan, Illinois, Idaho
- Other states have issued guidance to local judges
 - Louisiana, Virginia
- Other states: unknown
- *Argument*: Landlord should bear the burden of establishing non-applicability since landlord has access to the information from which to determine whether the moratorium applies, and tenants do not.

Practice Tip: Cross-Examination

- Even in states where a landlord must submit an affidavit establishing non-coverage of the CARES Act, do not take for granted that the LL property determined the moratorium inapplicable
- Be prepared to cross-examine the landlord:
 - Did the landlord identify every possible avenue of moratorium coverage?
 - Did the landlord conduct a diligent inquiry to determine whether each avenue applied? (Identify steps taken)
 - Did that diligent inquiry verify non-applicability? (How so?)

Other Legal Considerations for Courts Hearing Eviction Cases

Quasi-Administrative Law Claims

- Many state judicial systems have imposed conditions on resuming operations:
 - Social distancing & mask requirements
 - Case scheduling and docket management rules
 - Discretionary safety determinations
- Courts that resume evictions in violation of such conditions can potentially be enjoined:
 - Social distancing protocols inadequate or unenforced
 - Re-opening decisions made arbitrarily or without consideration of relevant evidence, circumstances

State-Specific Examples (1 of 2)

- Michigan AO 2020-17
 - Courts must sort evictions into five tiers of priority.
 - Every eviction case must be scheduled for unique time.
 - Lower-priority cases may not be scheduled until after all higher-priority cases have been scheduled.

State-Specific Examples (2 of 2)

- Virginia Sixth Order Extending Declaration of Judicial Emergency in Response to COVID-19 Emergency
 - “...all courts may hear in-person non-emergency matters and non-jury cases if they determine it is safe to do so, and provided they comply with (i) the guidance for transitioning from emergency to routine operations provided by the Office of the Executive Secretary (“OES”) and (ii) information from the Centers for Disease Control and Prevention (“CDC”) in order to minimize the risk of the spread of COVID-19 from in-person court proceedings.”

State & Local Moratoria

- Which tenancies, tenants covered?
 - Mobile homes? Motels? COVID-19 connection?
- Which types of evictions covered?
 - Non-payment? COVID-related only? All? Any exceptions?
- Dates in operation
- Which phase(s) of eviction affected?
 - Giving notices, filing cases, hearings, rulings, executions
- Procedural requirements?
 - Proof of COVID-19 related rent default?
 - Notice to landlord?

Plausible Fair Housing Claims (1 of 2)

- Disability
 - Failing to make adequate remote hearings available for people whose disabilities make appearing in public places during the Covid-19 pandemic unreasonably dangerous
 - Failing to adopt appropriate alternatives for those who cannot utilize remote hearing procedures

Plausible Fair Housing Claims (2 of 2)

- National origin/LEP:
 - Failure to adopt remote hearing practices that allow for real-time interpretation and otherwise accommodate LEP populations (such as through document translation, accessible assistance with tech, etc.)
- Race/color:
 - Discriminatory animus motivated a decision to allow or resume eviction proceedings

Seeking Orders Compelling Courts to Stop Evictions *En Masse*

Litigation

- State administrative/quasi-administrative law
 - Where state trial court resumes eviction hearings in a manner prohibited by a higher state court order
 - Most likely applies where conditions have been imposed
 - Possible vehicle for enforcing state moratorium
- Federal civil rights laws
 - Due process: insufficient notice or hearing
 - Fair Housing: discriminatory policy
 - CARES Act: court not prepared to identify prohibited suits

Due Process Theory

- Must identify recurring due process violation
 - Taints access to or quality of hearings across entire dockets or categories of cases
 - Individual violations: strong basis to seek remedy for affected tenant but not necessarily collective relief
- Claim: court should be enjoined from hearing evictions until challenged practice is corrected
 - Defendant: state court/judicial official
 - Statute: 42 U.S.C. § 1983 or state law

Due Process: Suspect Practices (1 of 2)

- Use of inaccurate or misleading form pleadings
- Failure to notify of court access limitations
- Lack of adequate health measures at court facilities
 - Lack of sufficient policies
 - Lack of consistent enforcement

Due Process: Suspect Practices (2 of 2)

- Remote participation options unavailable or inadequate
 - Parties not notified of availability or how to utilize
 - Audio only, or video w/o ability to present documents
 - Insufficient provisions for interpretation, tech barriers, etc.
- Failure to appoint counsel for an unrepresented tenant
 - Especially if CARES Act or state/local law may prohibit eviction
 - Especially if tenant may need assistance with remote hearing
- No reasonable opportunity for public access/oversight

CARES Act Theory

- Theory:
 - CARES Act prohibits the filing of certain eviction cases through at least July 25, 2020
 - The CARES Act moratorium applies to lots of rental housing (28% based on financing alone), but not clear which ones
 - Courts need to establish rules & practices to detect and avoid/dismiss illegal filings or will participate in violations
- Similar to Due Process Theory:
 - Relies on Sec. 1983, but claim is statutory
 - Depends on whether privately enforceable right recognized

Anti-Discrimination Theories

- Disability, language access (national origin) appear most feasible grounds for fair housing claims
 - For tenants who can utilize remote hearings, difficult to see justification for not making remote hearings available where disability makes court visit dangerous
 - That hearing is held electronically would not diminish tenant's right to language access services
- Statutory vehicles:
 - ADA Title II applies to courts, but may be limited to declaratory relief and damages
 - Unclear whether FHA would reach an eviction tribunal

Federal Court: Procedural Hurdles

- Standing
- Ripeness
- Federalism
 - Anti-Injunction Act
 - Abstention doctrines
 - *Rooker-Feldman* doctrine
 - Eleventh Amendment)
- Judicial immunity



Federal Court: Steering a Path

- Standing:
 - Tenant facing eviction in the relevant court
 - Organization: injured by the practice, or associational
- Ripeness:
 - Imminent threat of injury (e.g., notice to vacate served, tenant will not vacate)
 - Issue teed-up... (e.g., by requesting a procedure)
 - ...but not mooted by presence of counsel
 - *Consider: tenant whose eviction case was dismissed on procedural grounds but could be sued again*

Federal Court: Avoiding AIA

- Anti-Injunction Act: generally prohibits federal court from enjoining state judicial functions
 - Three exceptions: (i) expressly authorized by Congress, (ii) necessary in aid of jurisdiction, (iii) effectuate judgments
- Fitting exceptions:
 - Due process claim under 42 U.S.C. § expressly authorized, *Mitchum v. Foster*, 407 U.S. 225 (1972)
 - Fair housing claims: unclear
 - Cannot enjoin state court if discrimination claim cognizable
 - But may be necessary in aid of jurisdiction where eviction court will not consider the fair housing claim, *Sinisgallo v. Islip Housing Authority*, 865 F.Supp.2d 307, 328 (E.D.N.Y. 2012)
- If AIA applies, can still seek declaratory judgment

Federal Courts: Abstention

- *Younger* abstention: federal court must abstain if:
 - Case implicates important state interests; and
 - May litigate federal claim in pending state case
- *Rooker-Feldman* doctrine:
 - Precludes collateral attack on state judgment in federal court, if federal claims “inextricably intertwined”
- *Filing suit in federal court before a state eviction action is brought avoids both doctrines*
- Other abstention doctrines likely inapplicable
 - *Pullman* abstention, *Burford* abstention

Eleventh Amendment

- Bars suits against state except where state has waived immunity, or where Congress has abrogated state sovereign immunity
 - Note: *Tennessee v. Lane*, 541 U.S. 509 (2004) (holding ADA Title II waived state immunity)
- *Ex Parte Young*, 209 U.S. 123 (1908)
 - Avoid Eleventh Amendment immunity by suing state official in personal capacity to restrain challenged acts
 - Judicial immunity: only bars suits pertaining to adjudicatory functions, not administrative functions, *Forrester v. White*, 484 U.S. 219 (1988)

Procedural Summary: Federal Claims

- Plaintiff:
 - Person or entity that has not already been sued (for eviction or in some intertwined matter) in state court;
 - Has been or anticipates imminently being injured
- Defendant
 - Local government that is not an arm of the state; or
 - State official in his or her individual capacity
 - (unless statute waives state's Eleventh Am. Immunity)
- Challenged practice:
 - Rule or practice broadly applying to across all or categories of cases

Post-Eviction Remedies

Types of Tenants Affected

- Tenants whose incomes are temporarily disrupted
 - Unable to pay rent for a time, acquire an arrearage
 - Income restored and able to pay rent going forward
- Tenants who can afford less-expensive housing
 - Income has been permanently reduced
 - Can no longer afford the housing they have
 - But could afford a less-expensive rental
- Tenants who cannot afford any housing
 - Need significant assistance to avoid homelessness
 - Will need to be able to obtain housing in future

COVID-19 Rent Arrearages

- State and local governments could stem the tide of mass evictions by prohibiting eviction for rent arrearages arising during the pandemic
 - Tenants would still owe past rent
 - But would retain housing so long as *current* rent paid
 - Rental assistance funds could potentially help with arrearages
 - Payment plans also an option

Tenants Who Need to Move

- Prohibiting early lease termination fees and liability for unused months on leases could facilitate moves to more affordable housing
- Screening protections:
 - Prohibiting denial based on rent arrearages
 - Prohibiting denial based on Covid-19 related eviction
 - Requiring disclosure of reasons for reason(s) for denial
 - Restrict rental application fees
 - Sealing eviction records

Tenants Who Cannot Afford Housing

- Priority for issuance of available subsidies and assistance funds
- Screening protections necessary to ensure they are not excluded from quality housing long-term

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