

Preventing Eviction During the Ongoing COVID-19 Crisis & Beyond

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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.

About Justice in Aging

Justice in Aging is a national organization that uses the power of law to fight senior poverty by securing access to affordable health care, economic security, and the courts for older adults with limited resources.

Since 1972 we've focused our efforts primarily on populations that have traditionally lacked legal protection such as women, people of color, LGBT individuals, and people with limited English proficiency.

Road Map

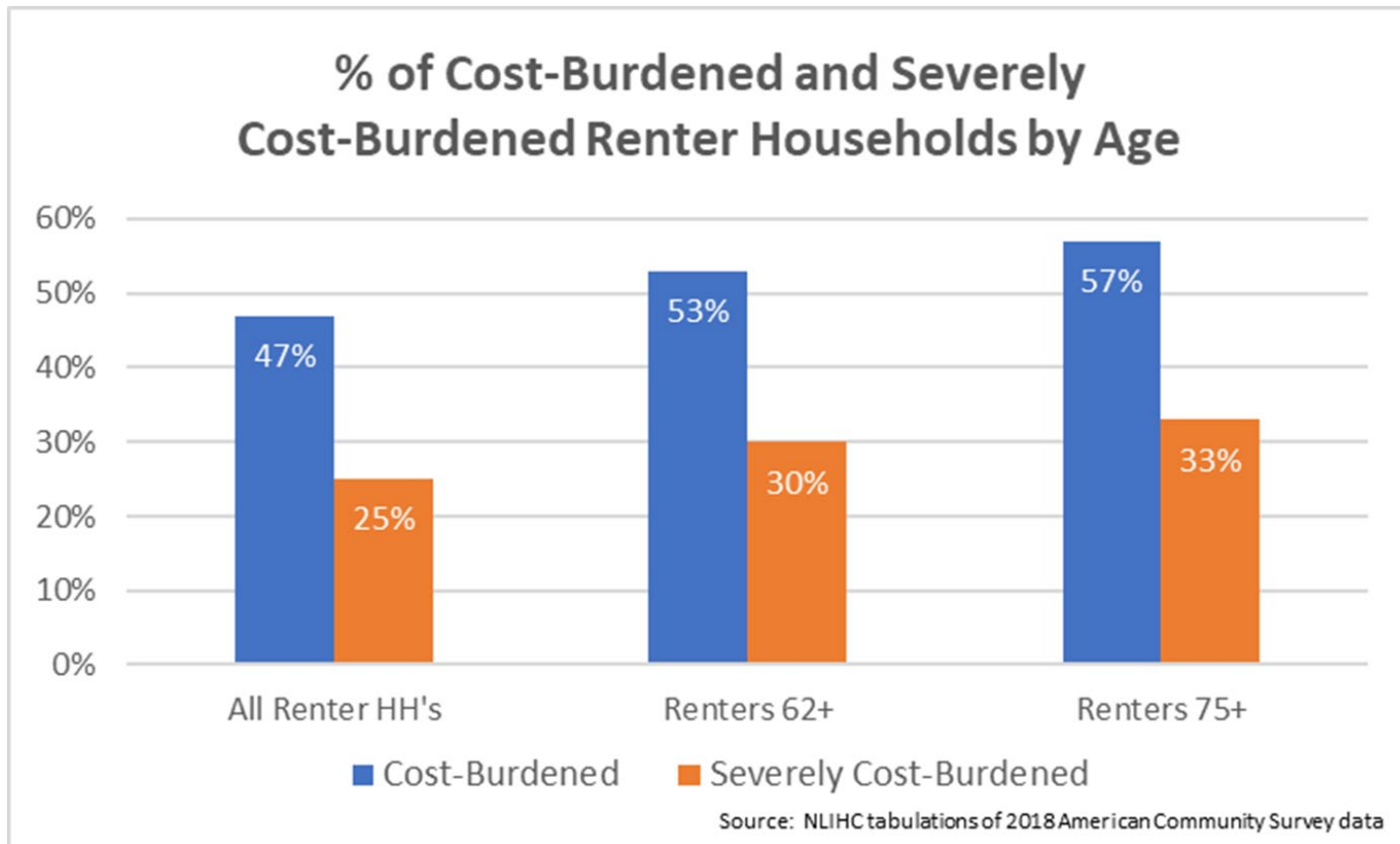
- Low-Income Older Adults' Rental Cost Burdens
- The Threat of Mass Evictions During COVID-19
- Federal Eviction Protections
- Dealing with Rent Arrearages
- Late/Post-Pandemic Rental Admissions

Low-Income Older Adults' Rental Cost Burdens

Older Adult Rental Cost Burdens

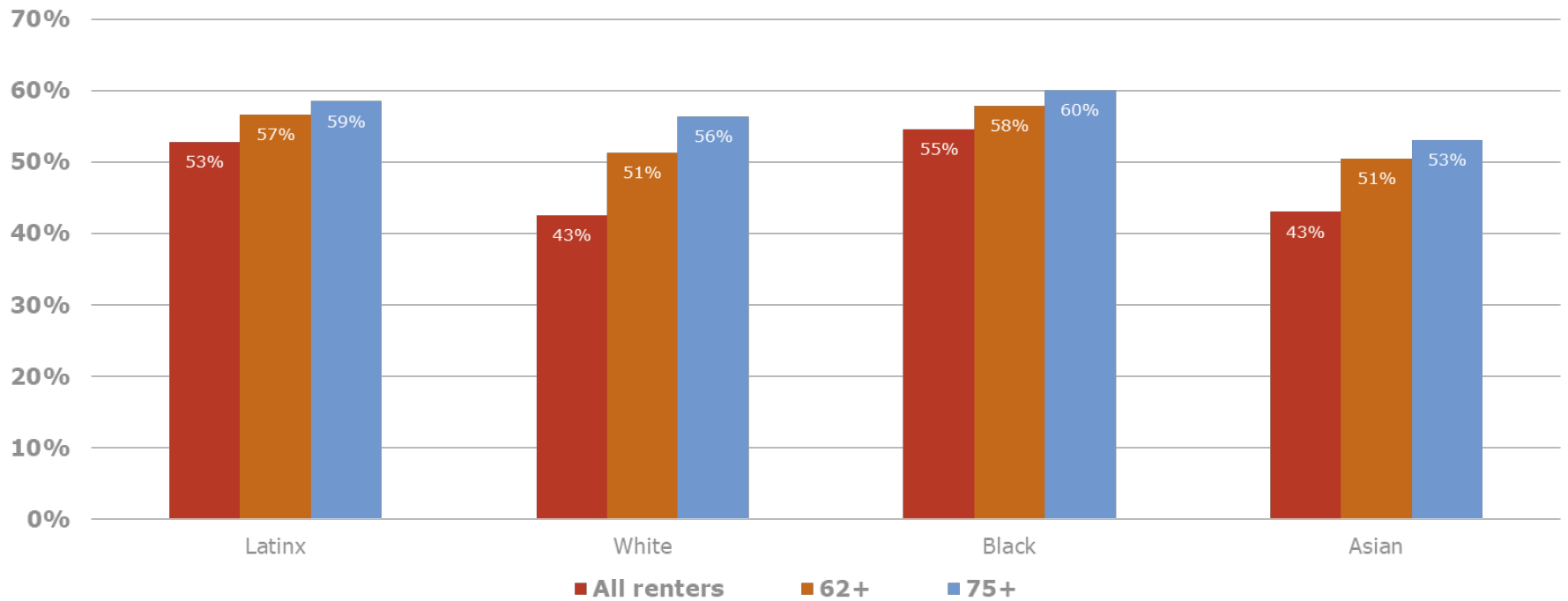
- Older renters are more likely to be cost-burdened than younger renters
 - Cost burdened = paying >30% of income for rent
 - Severely cost burdened = paying > 50% of income for rent
- Due (at least in part) to lower, fixed incomes
- Older Black and Latinx renter households are more likely to be cost burdened than older white renters

Cost-Burdened Renter Households by Age



Racial & Ethnic Disparities in Rental Cost Burden

% of Cost Burdened Renter Households by Age and Race/Ethnicity



Source: NLIHC tabulations of 2018 American Community Survey Data

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

Tsunami? What Tsunami?

- CARES Act prohibited new eviction filings in approximately 45% of U.S. rental units from March 27 - August 31, 2020
- CDC eviction halt order has protected most tenants behind in rent from eviction since Sept. 4, 2020
- State and local eviction moratoria
 - Most expired or were lifted by May 2020
 - Those still in effect provide broader protection:
 - Tenancies not covered by federal moratorium
 - Grounds for eviction not prevented by federal moratorium
 - Fewer procedural burdens

New Priorities for Late Stage of Pandemic

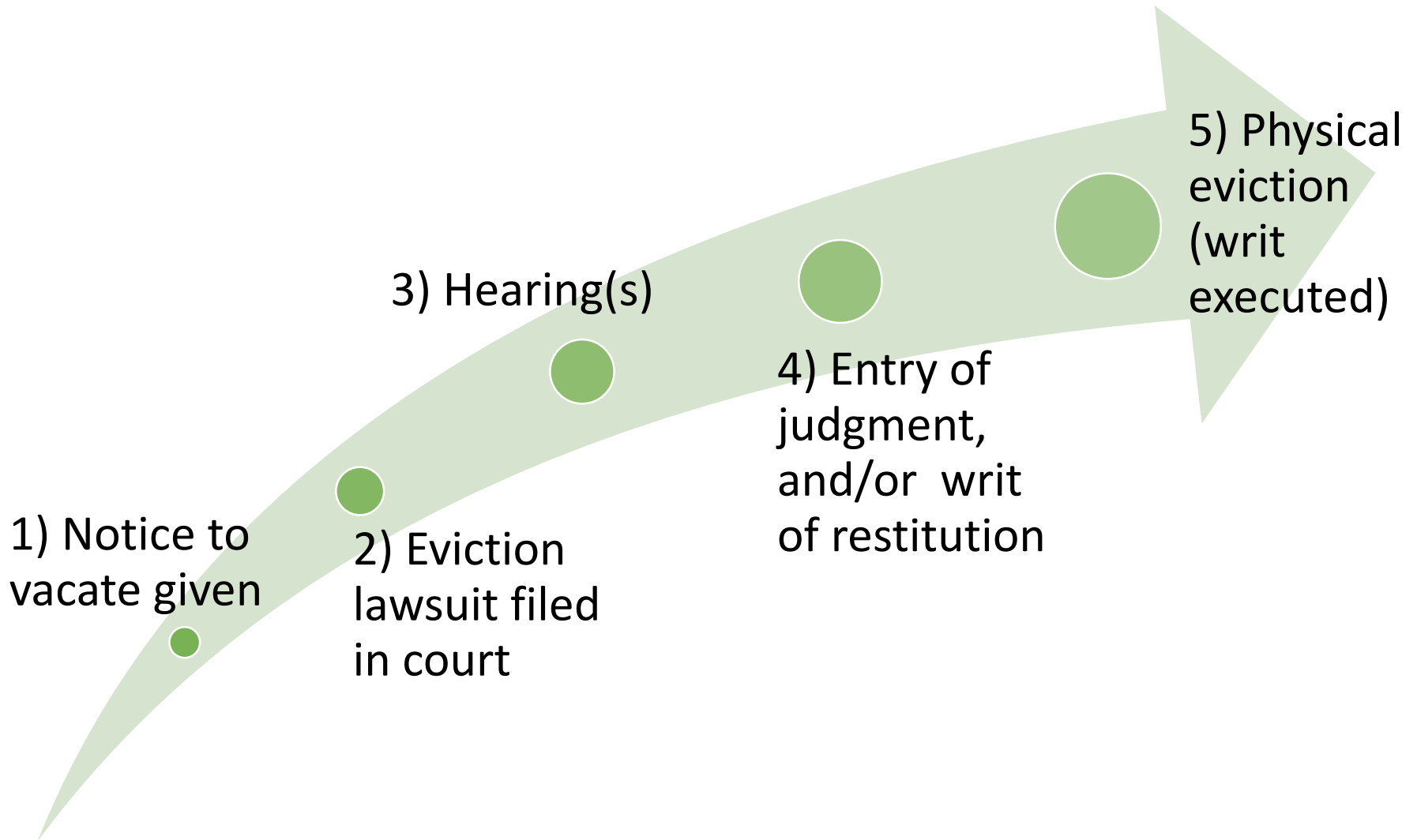
- Continue to prevent evictions as vaccines are administered and economic activity resumes
- Help tenants deal with rent arrearages they have accumulated during the pandemic
- Assist those who have been evicted, displaced, or are otherwise in need of new housing overcome admission barriers, such as landlord-tenant debts and eviction case records

Federal Eviction Protections

Declaration Forms: FAQ

- Do I need to use the CDC form?
 - *No, a “similar declaration” is allowed. But changing the text risks losing the protection.*
 - *FAQ: “Any written document . . . will comply with the Order, as long as it contains the same information as the CDC declaration form,” including “declarations in other languages”*
- Do I need to provide the landlord a paper copy signed by hand?
 - *No.*
 - *Clarified by the FAQ: “The declaration may be signed and transmitted either electronically or by hard copy.”*

Five Basic Stages of Judicial Eviction



CDC Order: Timing & Deadlines (1 of 2)

- Is there a deadline to give declaration to landlord?
 - No deadline, but “action” must remain for landlord to complete the eviction.
 - FAQ: “Any tenant who qualifies as a ‘Covered Person’ and is still present in a rental unit is entitled to protections.”
- Can I still give the declaration if the landlord has already taken me to court?
 - Yes. The CDC order applies to pending cases.

CDC Order: Timing & Deadlines (2 of 2)

- Can I still give the declaration if a court has already entered an eviction judgment or writ of restitution against me?
 - Probably. The landlord likely still needs to take action to cause a physical eviction.
- If I have already been physically evicted, can I use the CDC order to recover my housing?
 - No. CDC order does not apply to evictions that have already taken place.

CDC Order: Exceptions (1 of 2)

“Nothing in this Order precludes evictions based on a tenant, lessee, or resident:

1. engaging in criminal activity while on the premises;
2. threatening the health or safety of other residents;
3. damaging or posing an immediate and significant risk of damage to property;
4. violating any applicable building code, health ordinance, or similar regulation relating to health and safety; or
5. violating any other contractual obligation, other than the timely payment of rent or similar housing-related payment (including non-payment or late payment of fees, penalties, or interest).”

CDC Order: Exceptions (2 of 2)

- *In most jurisdictions, tenant may cure most ordinary lease violations*
- **FAQ:** “Individuals who are confirmed to have, have been exposed to, or might have COVID-19 and take reasonable precautions to not spread the disease should not be evicted on the ground that they may pose a health or safety threat to other residents.”

Lease Expiration/ “No Cause” (1 of 3)

- CDC order clearly prohibits evictions for nonpayment of rent or charges
 - Should apply to any eviction where nonpayment is a motivating factor
 - No cause notice/lease nonrenewal for tenant delinquent in rent should raise presumption
- CDC order likely prohibits any eviction not based on a lease violation
 - Probably the main subject of litigation around the order
 - Determination that lease expiration/no cause eviction is permitted would functionally eviscerate the order

Lease Expiration/ “No Cause” (2 of 3)

- Text-based argument:
 - Prohibition on eviction is subject to limitation in applicability section
 - Applicability section contains list of enumerated exceptions
 - Enumerated list does not include lease expiration
 - Failing to vacate at end of lease term not a lease violation for this purpose
 - Court should avoid reaching absurd result (that tenant must move out or else be evicted for not moving out)
 - Not material even if a violation

Lease Expiration/ “No Cause” (3 of 3)

- Other arguments:

- Even if enumerated list is not exhaustive, additional grounds must be similar to enumerated examples
 - Other enumerated grounds lease violations involve misconduct
 - Lease expiration is not culpable misconduct
- CDC order is remedial and should be liberally construed
- Equitable doctrines against forfeiture, strict construction of eviction laws
- Duration of CDC moratorium implies intent to cover no cause eviction

May Landlords Still File Eviction Lawsuits?

- Text of CDC order says no:
 - prohibits “any action” to remove or cause removal of covered person
- FAQ says yes:
 - “The Order is not intended to terminate or suspend the operations of any state or local court. Nor is it intended to prevent landlords from starting eviction proceedings, provided that the actual eviction ... does NOT take place during the period of the Order”
- Best bet: state law usually prohibits summary eviction suits before tenant holding over, even though many judges failing to enforce state law

May Landlords Still Serve Eviction Notices?

- Again, text of CDC order suggests not (“any action”)
- But FAQ provides otherwise (landlords may “start eviction proceedings”)

May Landlords Dispute the Tenant's Declaration?

- FAQ:
 - *“What can a landlord do if a tenant has declared that they are a covered person under the CDC Order, but the landlord does not believe the tenant actually qualifies?”*
 - *The Order does not preclude a landlord from challenging the truthfulness of a tenant's declaration in any state or municipal court. The protections of the Order apply to the tenant until the court decides...”*
- Legal standards governing such a challenge not included
 - Materiality of particular contents
 - Burden of proof (which party bears, preponderance or clear & convincing)
- Procedures
 - Presumably depend on state law, court rules, case posture, etc.
 - What happens if declaration found not to be true?

Challenges to Tenant Declaration: Best Argument (1 of 2)

- Landlord bears burden of proof to establish tenant not a covered person
 - Declaration prima facie evidence tenant covered
 - Landlord should bear burden to overcome
- Court should condition challenge on evidence of material falsity
 - Landlord should at least identify specific material defect and evidentiary basis
 - Focuses inquiry and deters landlord “fishing expeditions”

Challenges to Tenant Declaration: Best Argument (2 of 2)

- Challenges to tenant judgment calls should be heavily disfavored
- Authority:
 - *Hapco v. City of Philadelphia*, 2020 U.S. Dist. LEXIS 156327 (E.D.Pa. 2020)
 - No due process right for LL to challenge veracity of tenant
 - *Franks v. Delaware*, 438 U.S. 154 (1978) (concerns search warrant affidavits)
 - Evidence of fraud required to challenge veracity of declaration
public policy supports treating as conclusive

Multiple Adults in Household

- CDC order states each adult in a tenant household “should” sign their own declaration
 - What if one or more adults can sign, but other(s) cannot?
- Considerations:
 - Single declaration likely protects entire household
 - Use of term “should” is significant; “must” is mandatory, “should” is not
 - Allowing eviction of non-signing adults only would serve no purpose, undermine intent of order
 - Prevents individual tenants from having to swear to facts known by other household members

Self-Help/Extrajudicial Eviction

- Does order prohibit self-help/extrajudicial eviction:
 - Yes, and criminal penalties apply
- “Self-help” or “extrajudicial eviction” means actions a landlord might take to remove a tenant other than through the judicial process, such as changing locks, interrupting utility service, denying repairs or maintenance, harassing or threatening a tenant, etc.

CDC Eviction Moratorium: Difficulties

- Timing/duration
 - Extended by Congressional act on December 29, 2020
 - Formal extension on January 29 to March 31
 - Additional extensions uncertain
- Procedural obstacles
 - Only applies to tenants who can make the 5 key averments
 - Tenants must provide signed declaration to landlord
- Inconsistent interpretation, adherence
 - Order text suggested order stops all five phases of eviction, but FAQ implies only the last step may be covered
 - A few local courts simply not honoring the order

CDC Moratorium: Legal Challenges

- Five challenges filed in U.S. District Courts
 - Atlanta, Columbus, Memphis, Louisiana, Akron
 - Constitutional and APA arguments
- Current status of cases:
 - Columbus: TRO denied, plaintiffs voluntarily dismissed
 - Memphis: Preliminary injunction denied
 - Atlanta, Louisiana: PI denied, notice of appeal filed
 - Akron: motion for preliminary injunction pending
- Cases likely to fail
 - Constitutional arguments have been uniformly rejected
 - Congressional ratification undercut APA arguments

Lingering CARES Act Notice Requirement

- Citation: 15 U.S.C. § 9058
- Summary:
 - Owner of “covered dwelling” could 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
 - No comprehensive resource to determine coverage
 - Publicly-available databases contain most federally-financed or subsidized multifamily properties and LIHTC (some errors)
 - Fannie & Freddie websites accessible to borrowers only
 - No resource for ascertaining presence of voucher tenants

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

CARES Act: Eviction Defense Checklist

- Is the premises a covered dwelling?
 - Do you know for sure?
 - If the landlord denies coverage, is the landlord sure?
- Is eviction case based on nonpayment?
 - Explicitly or implicitly; be wary of pretextual grounds if tenant delinquent
- Was 30-day notice to vacate given? When?
 - Any notice given before July 25 is ineffective
 - Landlord would need to serve notice at least 30 days before date to quit
- Was eviction case filed after date to vacate premises?
- Has landlord complied with any applicable state or local CARES Act procedures?

Practice Tip: CARES Act Notice

- *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
- Do not take for granted that landlord properly determined the premises were not covered by CARES Act
- Be prepared to cross-examine the landlord:
 - Did the landlord actually determine if the property is covered?
 - Did the landlord identify every possible avenue of 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?)

Dealing with Rent Arrearages

Rent Relief Programs

- Estimates of rent shortfall:
 - Have ranged from \$25 - \$100 billion
 - Current estimate: \$13.2 - \$24.3 billion through 1/31/21
 - Shortfall likely reduced by renter borrowing
- Substantial federal funds appropriated for relief:
 - CARES Act: \$4 billion for rent relief (not all was spent)
 - 2021 Appropriations Act: \$25 billion for rent relief
 - Additional funds could be added
- Other funds:
 - State & local programs
 - Private foundations (e.g. Open Societies)

Emergency Rental Assistance Program

- \$25 billion for rent & utilities (and related costs)
- Distributed through state, local, & tribal governments
- Eligibility:
 - “Qualifies for unemployment or has experienced a reduction in household income, incurred significant costs, or experienced a financial hardship due to COVID-19;”
 - Risk of homelessness or housing instability; and
 - Household income at or below 80% of area median.
- Benefit:
 - Up to 12 months of housing arrears
 - Up to 3 months of future assistance

ERAP Programs

- Household or landlord may apply (to local program)
 - Funds generally paid directly to landlord or utility provider
 - May be paid to tenant household if landlord declines participation
- Local programs establish own terms & conditions
 - May require landlords to waive fees, negotiate amount of claim
 - May condition funds on tenant protections
 - May prioritize lower-income, higher-vulnerability tenants
 - [NHLP's recommendations](#)

Payment Plans

- Maybe a good solution for some tenants, not all
 - Enables tenant who can afford current rent to keep housing
 - Effect of 15 USC § 1681s-2(a)(F) might enable tenant to obtain other housing (now or in future)
- Risks of payment plans:
 - Could waive or undermine defenses, set-offs
 - Possible interest rates, fees, other charges
 - Tenant must pay current rent + installment on arrearage

Payment Plans: Terms

- Best: new lease + payment plan on unliquidated debt
- Tenant-friendly provisions:
 - Default on payment plan not grounds for eviction
 - Landlord will cooperate with tenant's application for relief funds
 - Amount of payment adjustable based on tenant's circumstances
 - Landlord represents tenant's balance as current so long as in compliance with plan

Payment Plans: Terms to Avoid

- Interest and fees on arrearage
- Payments applied to payment plan before new rent and charges
- Default in payment plan = default on lease
- Confession of judgment/waiver of notice (commonly prohibited under state landlord-tenant acts)

“Non-Evictable Debt”

- State and local governments could stabilize households and communities 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
- Public policy considerations
 - Allowing a tenant who is paying current rent to remain despite an arrearage makes landlord no worse off
 - The ability to subject a family to homelessness is not a reasonable debt collection tool

Bankruptcy

- Automatic stay may prevent/delay eviction filing
- Post-judgment bankruptcy can stop eviction if state law provides right to redeem
- Potential discharge of past-due rent under Chapter 7

Late/Post-Pandemic Rental Admissions

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 currently afford any housing
 - Need significant assistance to avoid homelessness
 - Will need to be able to obtain housing in future

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:
 - Substantive (limiting grounds for denial of housing)
 - Procedural (removing financial and information barriers)

Rental Admissions: Common Grounds for Denial

Sometimes

- Lots of delinquent debt (non-housing)
- Low credit score (e.g. FICO)
- Dismissed eviction suit
- Old eviction judgment
- Criminal record: dismissed, old, or unrelated to housing
- Negative reference (current or former LL)
- Disfavored income source (e.g., voucher)

Almost
always

- Insufficient income/resources
- Recent eviction judgment
- Debt to former landlord
- Conviction or pending charge:
 - Violent or destructive behavior or drug-related
 - Dishonesty or theft-related
- Registered sex offender
- Pending bankruptcy petition

Rental Admissions: Substantive Protections

- COVID-19 related:
 - Denial for rental arrearage or landlord-tenant debt arising during COVID-19
 - Denial for eviction records during or related to COVID-19
 - Denial for other COVID-19 related debts (utilities, medical, consumer, etc.)
- Not (necessarily) COVID-19 related:
 - Source of income (enables use of vouchers, rent relief, other benefits)
 - Grounds that were problematic before COVID-19 (criminal history, eviction records, DV, etc.)

Rental Admissions: Procedural

- Application fees deter those with barriers from applying
- Limited insight into admission decisions
 - No right in most jurisdictions to be told reason(s) for denial
 - Policy being applied seldom disclosed
 - Automated decision making even more inscrutable
 - Proprietary algorithms
 - Data inputs on file, but sorting & filtering unknown
- Generally no right or opportunity to appeal denial

Rental Admissions Reforms

- Substantive:
 - Protections against denial for objectively unfair reasons
 - Protections against denial for reasons contrary to public policy
- Procedural:
 - Tenants should not be deterred from applying for appropriate housing
 - Rental admissions rules not effective without transparency

Rental Admissions: COVID-19 Related Reforms

- Substantive protections:
 - No denial for COVID-19 related landlord-tenant arrearages
 - No denial for COVID-19 related eviction record
 - Eviction record sealing, limitation of inquiries
 - Protection against source-of-income discrimination
- Procedural protections:
 - Written notice of reason for housing denial
 - Prohibition of rental application fees
 - Right to appeal/human review of denied application

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