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## **Eviction Defense during Covid-19: Top-5 Things to Think About**

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# 1. CONTEXTUALIZING COVID-19 EVICTIONS

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# A Tsunami of Evictions

NATIONAL  
HOUSING LAW  
PROJECT



# Evictions: estimates

## Amherst:

28 million households at risk of eviction (May 2020)

## U.S. Census Bureau:

8.5 million households “no confidence” in ability to make next rent payment

31 million households “some” or “moderate” confidence

Household pulse survey, July 2-7, 2020

## Aspen Institute:

19-23 million renters evicted by Sept. 30, 2020

Covid-19 Defense Project, June 2020

- The entire community is at stake
  - It's not just a handful of evictions – entire neighborhoods could be displaced
  - Where are the evicted tenants going to go? Homeless services cannot cope.
  - There is a raging pandemic. Mass evictions could accelerate community transmission.
- Tenants facing eviction during Covid-19 are victims of a large disaster
  - If they haven't paid rent, it's because of Covid-19
  - Eviction judges should never assume UD defendants are “deadbeats,” but especially not now
- Tenants deserve help from the government to avoid eviction
  - Token financial assistance has been provided so far
  - But there is likely much more in the pipeline (e.g. HEROES Act)
  - Tenants who do receive relief funds can pay rent, and the rent goes to their landlords

## 2. CARES ACT CONSIDERATIONS

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# CARES Act: Hey hey oh oh I'm still alive

- The CARES Act is still in effect (including Sec. 4024)
  - Initial 120-day moratorium period under Sec. 4024 has ended, but remains U.S. law
  - 30-day notice period under Sec. 4024(c) now applies, has no sunset
  - Other provisions of CARES Act still in effect (e.g., Sec. 4023)
- Issues in covered properties:
  - Nonpayment cases filed between March 27 – July 24 still prohibited (should be dismissed)
  - Tenant cannot be holding over until after new 30-day notice given (after July 24)
  - How will 30-day termination notice interact with state law?
    - State law may require termination date to correspond with end of a rental period
    - CARES Act does not define “notice to vacate” or specify a required manner of service
  - “Mini-moratorium” under Sec. 4023 or regulation could apply in multifamily properties

# CARES Act: Additional complexities

- Evictions also restricted in properties receiving forbearances:
  - CARES Act authorizes forbearances under § 4023 which can extend past July 24
  - Federal agencies have extended availability of forbearances through late August and may continue to do so (forbearances can last up to 90 days).
  - No resource for tenant to find out whether property has a forbearance or duration
- Interpretation issues
  - Burden to prove applicability/non-applicability.
  - Effect on evictions not ostensibly based on non-payment.
- Additional federal legislation likely
  - HEROES Act sec. 110203 (passed by House, now in Senate)



# CARES Act: Eviction defense checklist

- Is the premises a covered dwelling?
  - Do you know for sure?
  - If the landlord denies coverage, is the LL 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?
  - Notice given before July 25 is ineffective
  - LL would need to serve notice at least 30 days before date to quit
- Was eviction case filed after date to vacate premises?
- Has LL complied with any state CARES Act procedures?

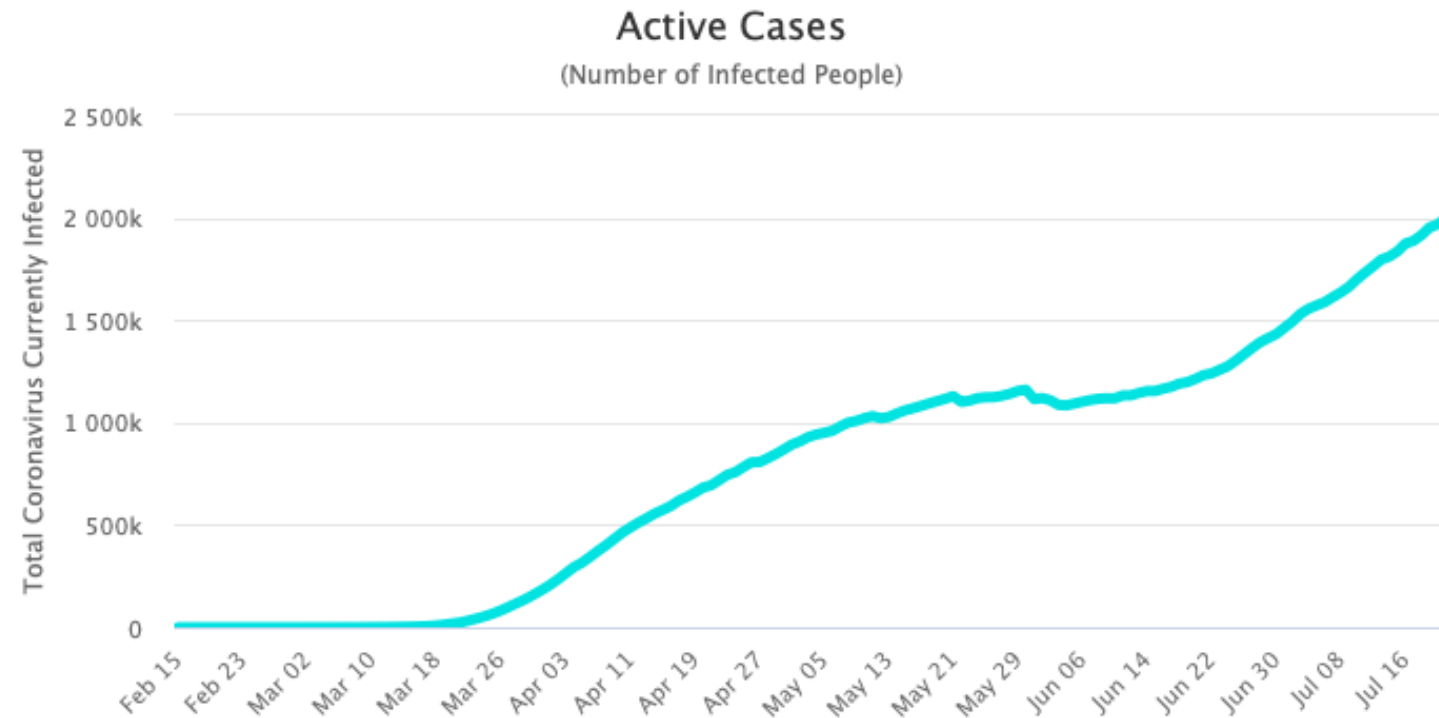
- Even in states where a landlord must submit an affidavit establishing non-coverage of the CARES Act, do not assume the LL properly determined the moratorium inapplicable
- Cross-examine of landlord:
  - Did the landlord identify every possible avenue of CARES Act coverage?
  - Did the landlord conduct a diligent inquiry to determine whether each avenue applied? (Identify steps taken)
  - Did that diligent inquiry verify non-applicability? (How so?)
- If LL denies knowledge of coverage as to any possible avenue, court should:
  - Dismiss case (as landlord has failed to establish non-coverage of CARES Act); or
  - Continue to allow for appropriate investigation (CARES Act treated as affirmative defense)

# 3. STATE LAW COVID-19 EVICTION RESTRICTIONS

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# Evictions: State moratoria

- Specifics differ across jurisdictions
  - Which tenants (Mobile homes? Motels? Exclusions?)
  - Which cases (non-payment, Covid-19 hardship, substantially all, etc.)
  - Which phases (notices, filings, hearings, orders/processing, executions)
  - Procedures (notice requirements, documentation, burdens of proof)
- Most have expired (not all!)
  - Jurisdictions may reconsider as Covid-19 resurges
  - A moratorium by another name...



# Evictions: State administrative restrictions

- Conditions imposed on resumed court operations generally:
  - Adoption of mask requirements, social distancing rules (also compliance & enforcement)
  - Discretionary determinations of safety (consideration of relevant information, process)
  - Public access (or lack thereof)
- Conditions imposed on eviction cases
  - Docket size, case prioritization, scheduling
  - Safe physical location with appropriate public health practices
  - Other access issues: public transportation, clerk's offices, etc.
  - Mediation/eviction diversion requirements

***# State prohibition/superintending control writs may be available to restrain courts from hearing evictions under unsafe conditions or in violation of administrative rules***

## 4. PROCEDURAL DUE PROCESS

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# Due process: Procedural minimums for eviction cases



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

# Due Process: Covid-19 threats

- Infection risk may chill litigants from appearing in court or otherwise defending
- Infection risk may diminish the quality of hearings
  - Deterring witnesses from attending
  - Jury trials may not be available
  - Excluding the public
- Court safety precautions may interfere with the ability of tenants or advocates to respond to, investigate, or otherwise defend against evictions.
- Notice issues arising from new rules and practices (often adopted in haste)
- Remote hearings may resolve safety concerns but raise separate challenges.



# Due Process: *Mathews v. Eldridge* test



- Whether a particular procedural safeguard is required in a specific instance depends on:
  - the nature and importance of the interest at stake,
  - the risk of erroneous deprivation through the procedures employed,
  - 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)

# Due Process: Likely Covid-19 notice problems

- Summons or other notice forms misleading due to changes in laws, court practices
  - Court may be holding proceedings at a different location or electronically
  - Possibility of confusion related to state, federal moratoria or other policies
- Tenants not informed of COVID-19 policies affecting right to defend:
  - Restrictions, limitations on court access
  - Options & rules for remote hearings
- Difficulties in receiving actual notice of eviction case
  - Prolonged absences from home for tenants hospitalized or caring for others
  - Personal service may be more difficult, alternative service methods may be unreliable

# Due Process: Opportunity to be heard during Covid-19

- 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?



# Due Process: Representation by counsel

- Courts have not recognized general right to publicly-funded counsel in eviction cases.
- COVID-19 circumstances may change *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, heighten the risk of erroneous deprivation; and
  - Public health considerations militate governmental interest in speed and efficiency.
- Court should allow ample opportunity for tenant to obtain counsel by own means
  - Continuances
  - Referrals to legal aid programs or eviction defense clinics
- Right to appointed counsel? Talk to John Pollock first!

# Due Process: Remote hearings

- By consent or mandatory?
- Video is available, right?
- 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 court's practice if defendant fails to appear for a remote hearing?
- What is the court's policy for those unable to use technology effectively?



## 5. ADDRESSING RENT ARREARAGES

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# Arrearages: Recommended state responses

- 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
- Some tenants can no longer afford their rental housing
  - Facilitate transition to more affordable housing by authorizing early termination of lease without liability for early termination fees or unused months
  - Tenant-screening protections necessary to prevent Covid-19 arrearage or eviction records from trapping tenants in substandard housing market long-term
    - Eviction records sealing
    - Restrictions on denial for Covid-19 related arrearages, evictions
    - Notice of reason for housing denial
    - Prohibition of rental application fees

# Arrearages: Payment plans

- Three types of delinquent tenants:
  - Owes arrearage but can pay current rent
  - Cannot afford current housing but could afford some housing
  - Cannot afford any housing
- Benefits of payment plan:
  - Enables tenant who can afford current rent to keep housing
  - Might enable tenant to obtain other housing (now or in future)
    - 15 USC 1681s-2(a)(F))
- Risks of payment plans:
  - Could prevent tenant from taking advantage of forthcoming protections
  - Could waive or undermine defenses, set-offs
  - Possible interest rates, fees, other charges
  - Tenant must pay current rent + installment on arrearage





# Arrearages: Payment plans

- Best: new lease + payment plan on unliquidated debt
- Tenant-friendly provisions:
  - Default on payment plan not grounds for eviction
  - Landlord promises to 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
- Terms to avoid:
  - Interest and fees on arrearage
  - Payments applied to payment plan before new rent & charges
  - Default in payment plan = default on lease
  - Confession of judgment/waiver of notice (commonly violate state LL-T Acts)

# Arrearages: other sources of negotiation leverage

- *Ability to pay future rent:* how confident can LL be in finding new paying tenant quickly?
- *Ability to move:* usually the unwillingness of other housing providers to accept tenants with past rent arrearages facilitates collection – dynamics could be different in relevant market
- *Source of income discrimination laws:* would potentially prohibit landlord from failing to cooperate with tenant's application for relief funds
- *Bankruptcy petitions:*
  - 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 Ch. 7
- *Legislative proposals:*
  - “Cancel the rent” or “Non-evictable debt” ideas
  - Anticipated eligibility criteria for relief funds