



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

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1. CONTEXTUALIZING COVID-19 EVICTIONS

A Tsunami of Evictions

NATIONAL
HOUSING LAW
PROJECT



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

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

- 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

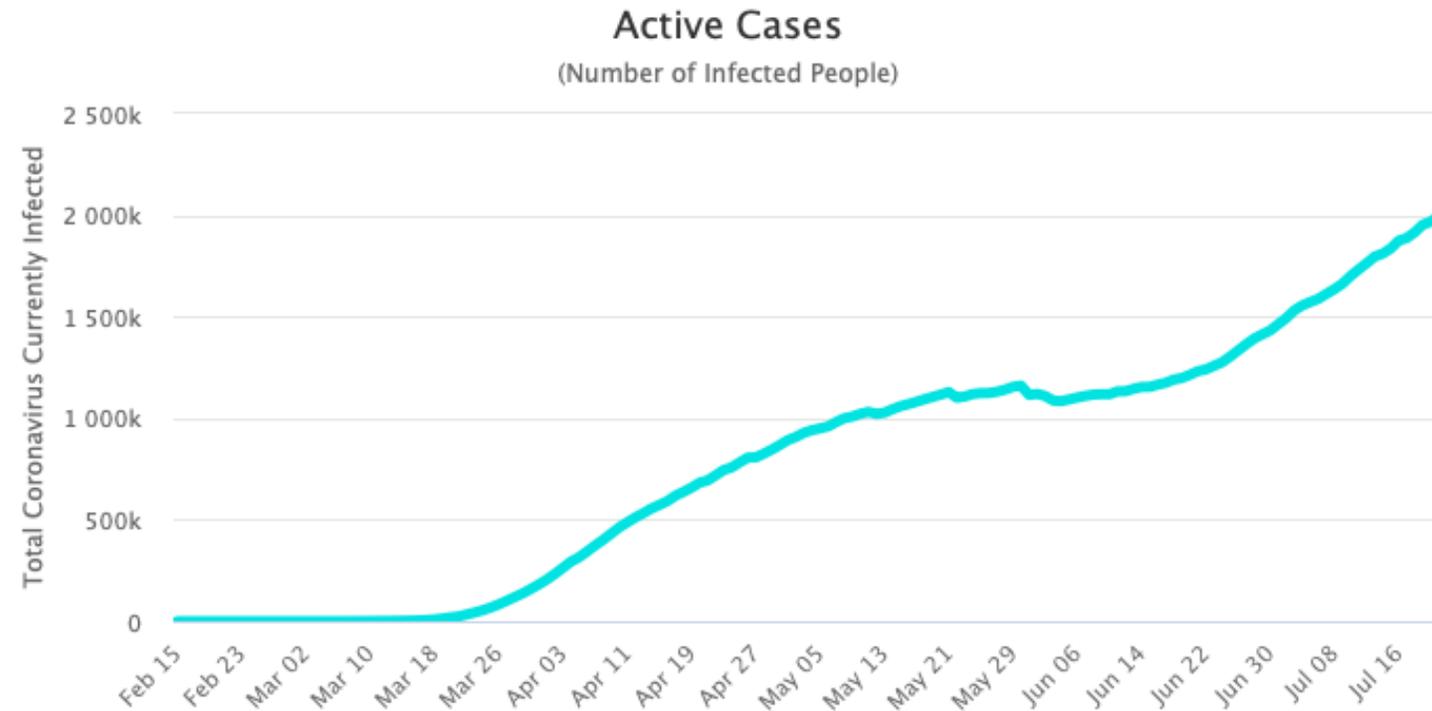
- Is the premises a covered dwelling?
 - Do you know for sure?
 - If the landlord denies coverage, is the LL sure?
- Is eviction case based on nonpayment?
 - Explicitly or implicitly
 - Be wary of pretextual grounds if tenant delinquent
- Was 30-day notice to vacate given? When?
 - Notice given before 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

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

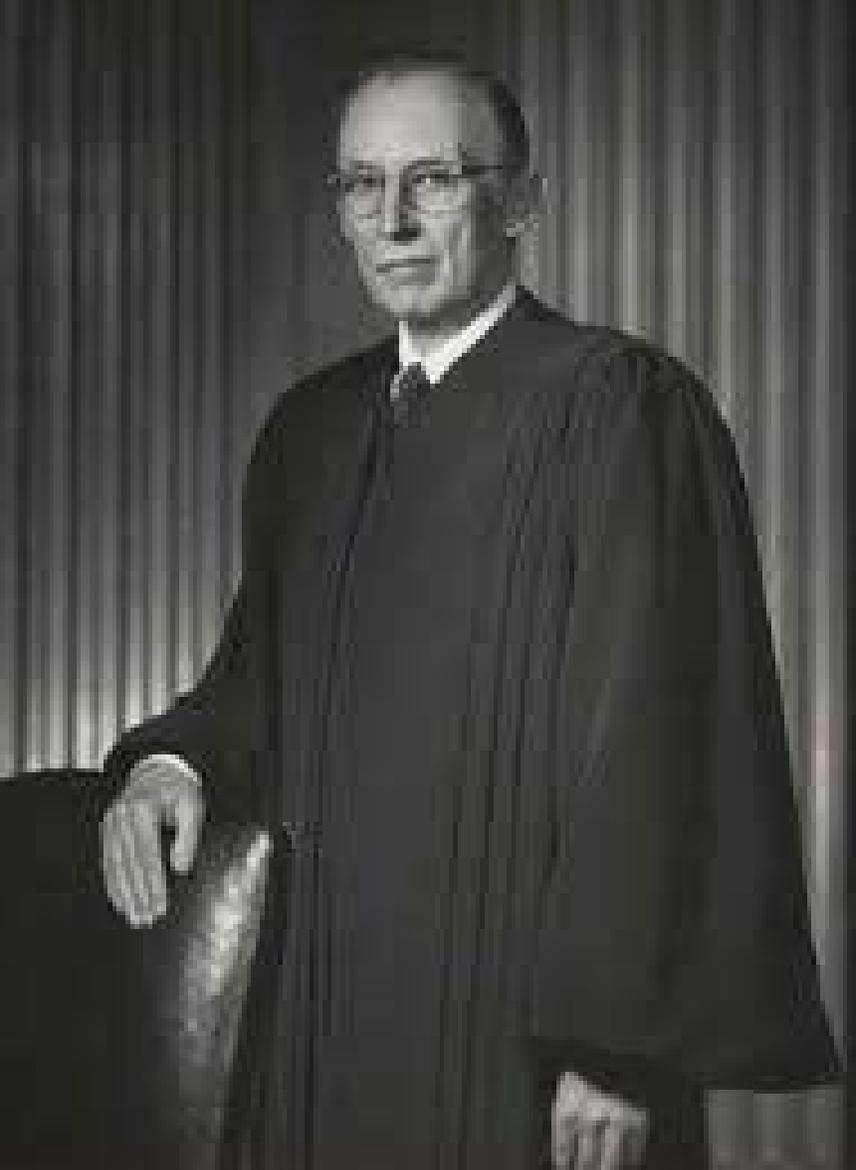
Due process: Procedural minimums for eviction cases



- 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)

- 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



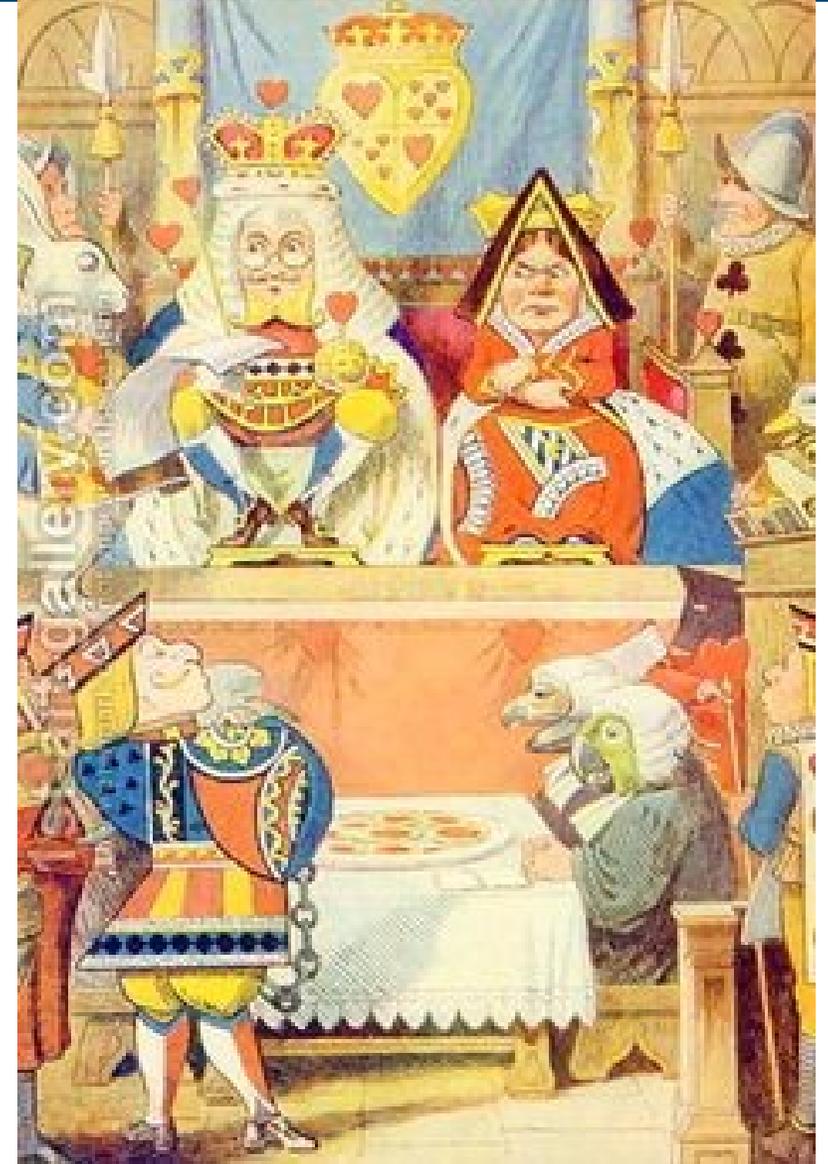
- Whether a particular procedural safeguard is required in a specific instance depends on:
 - the nature and importance of the interest at stake,
 - the risk of erroneous deprivation through the procedures employed,
 - the probable value of additional safeguards, and the governmental interest and burdens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

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



- 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