

Holding Back the Ocean

Fighting evictions during Covid-19

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Evictions: “normal” times

- Summary proceedings held in state trial courts
 - Case heard within days of filing
 - Very limited or no discovery
 - No right to counsel*
 - Scope of cognizable defenses may be limited
- Eviction tends to result in homelessness
 - Mere case filing usually major barrier to new housing
 - Money judgment associated with eviction also a barrier
 - If any housing available with UD record, often substandard

Eviction during Covid-19

- Ability to defend may be impaired even further
 - Reduced access to court/judicial procedures
 - Reduced access to ancillary services & resources
 - Information/notice issues
- Stakes may be higher
 - Emergency services & resources under greater strain
 - Risk of infection in shelters, public spaces

Community Impacts

- Overwhelming numbers:
 - Nearly 40 million new unemployment claims
 - Over 30% of tenants did not pay rent on time in April
 - Defaults expected to accelerate as savings exhausted
- Evictions antithetical to social distancing:
 - Process entails extensive interactions among strangers
 - Homelessness not compatible with stay-at-home orders

Strategies for Stopping Evictions

- Political:
 - Many public officials have the power to stop or slow down at least one aspect of the eviction process
 - Identify and bring pressure on all such officials
- Judicial:
 - Courts can stop evictions through administrative orders related to protecting public/staff safety
 - Higher courts can restrain acts of lower courts

Ideally, a judicial strategy supports (or creates) a viable political strategy

Asking courts to stop evictions

- Administrative
 - Courts can decline to process or hear eviction cases altogether to protect their staff or the public
 - Courts can impose conditions on resuming eviction cases (for safety, due process, or other good cause)
- Injunctive
 - Courts that do hear evictions must do so in accordance with relevant laws and rules
 - Some courts have the authority to enforce such laws and rules against other courts

Enjoining evictions: ideas

- 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
- Federal civil rights laws
 - Due process: quality of tenant's hearing insufficient
 - Fair housing: discriminatory intent or impact
 - CARES Act: court not prepared to comply with federal law

The Virginia writ theory

- Virginia Supreme Court:
 - Issued emergency order suspending in-person hearings on all non-emergency cases in March 16
 - On May 6, authorized courts to resume in-person hearings, but imposed conditions (safety, notice)
- Lynchburg General District Court:
 - Decided to resume in-person eviction hearings without fulfilling the conditions set by VSC
- Claim: Order Lynchburg GDC not to hear any eviction cases until it complies with VSC's conditions

Some due process issues

- Access to court
 - Inability to enter, or witnesses excluded
 - Inability to use public transportation
- Preparation
 - Inability to investigate due to business/office closures
 - Difficulties securing counsel, attendance of witnesses
- Remote hearings
 - Lack of technology/ access
 - Inability to present exhibits/documents
 - Lack of real-time interpretation
- Lack of notice (rules, procedures, alternatives, etc.)

Due process theory

- Plaintiff identifies one or more practices the court is following that tend to consistently violate tenants' due process rights
- Plaintiff sues state court/judicial official under 42 U.S.C. § 1983, seeks injunction to stop court from continuing to hearing evictions until the challenged practices have been rectified

CARES Act eviction moratorium

- Citation: Pub.L. 116-136, § 4024
- Effective dates: March 27 – July 25, 2020
- Summary:
 - Owner of “covered dwelling” may not initiate eviction lawsuit for nonpayment of rent or other charges
 - 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 federal housing programs:
 - Covered by VAWA (34 U.S.C. § 12491(a))
 - Rural Development voucher program

Is my home covered?

- Multifamily (5+ unit) properties
 - NLIHC and federal databases list most properties with project-based subsidies, tax credits, or federally-backed multifamily mortgage loans
 - No way to find out if tenant-based subsidies present
- Small properties (1-4 units)
 - Loan lookup tools only available to borrower (LL)
 - No way to find out if tenant-based subsidies present

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

Fair Housing Theories

- Disability:
 - Can challenge “methods of administration” that consistently disadvantage PWD
 - People with disabilities that prevent them from traveling to or entering court facilities will require accommodation
 - Remote hearings may accommodate some, but not all
- Race:
 - Both Covid-19 and evictions disproportionately harming African-Americans and African-American communities
 - Covid-19 circumstances may call usual justifications (\$) into question
 - Some evidence of intent may be enough to establish viable claim

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 UD's, debts
- Help the landlords too (forbearances, loan workouts)