Enforcing Eviction Moratoria: Guidance for Advocates

Since the onset of the COVID-19 pandemic in the United States, many cities, states, court systems, sheriffs' departments, and other local government entities have established moratoria reaching various parts of the eviction process. On March 27, 20202, the federal CARES Act imposed a national moratorium on evictions from certain federally-related properties—which includes both those receiving federal subsidies or tax credits as well as those with certain federally-backed mortgage loans. Generally, these moratoria either prevent the service of new eviction notices, disallow filing of new eviction cases, freeze unlawful detainer dockets, or prohibit physical evictions.

While extensive, this patchwork of federal, state, and local eviction moratoria does not extend to every type of tenancy, every type of eviction, or every state of the eviction process in every U.S. jurisdiction. Therefore, an advocate's first step in defending an eviction matter during the pandemic is likely to determine whether the eviction may be barred by any applicable moratoria.

Federal moratorium

The federal eviction moratorium took effect on March 27, 2020, and extends for 120 days (i.e., until July 25, 2020). See Coronavirus Aid, Relief, and Economic Security Act (CARES Act),[1] § 4024(b). The moratorium operates by restricting lessors of "covered properties" from filing new eviction actions for non-payment of rent, and also prohibits "charg[ing] fees, penalties, or other charges to the tenant related to such nonpayment of rent." See CARES Act, § 4024(b). The federal moratorium also provides that a lessor (of a covered property) may not evict a tenant after the moratorium expires except on 30 days' notice—which may not be given until after the moratorium period. See CARES Act, § 4024(c).

In addition to the federal eviction moratorium, the CARES Act also authorized forbearances on certain federally-backed multifamily mortgage loans, and prohibited borrowers from charging late fees or evicting tenants for non-payment of rent or other charges while such a forbearance is in effect. CARES Act, § 4023(d). While these protections are largely duplicative of those arising under Section 4024, theoretically a forbearance under Section 4023 could extend beyond the 120-day period provided for in Section 4024.

- *Properties covered*

Determining whether a tenancy is covered by the federal moratorium depends on whether the rental premises are in a "covered dwelling." See CARES Act, § 4024(a)(1). The Act defines "covered dwelling" to include substantially any type of residential tenancy, so long as (i) the tenant actually occupies the unit and (ii) the unit is in a "covered property." See § 4024(a)(1)(A). Most disputes over the coverage of the federal moratorium will likely turn on whether the premises are in a "covered property." See CARES Act, § 4024(a)(2).

[1] Link to CARES Act: https://www.congress.gov/bill/116th-congress/senate-bill/3548/text

A covered property includes any property that participates in a housing program covered under the Violence Against Women Act or the rural housing voucher program, or that has a federal backed mortgage loan or multifamily mortgage loan. See CARES Act, § 4024(a)(2).[2] Under the VAWA prong, this will include any property that participates in a HUD-subsidized low-income housing program—including tenant-based vouchers (a.k.a. "Housing Choice Vouchers" or "Section 8 Vouchers") and project-based assistance, public housing, Section 202 and 811 homes for the elderly and people with disabilities, the HOME program, properties participating in the Low-Income Housing Tax Credit program, and Rural Development Section 514/516, 515, 533 and 538 properties.[3] Note that while RD vouchers are not covered under VAWA, such tenancies are included in the CARES Act moratorium.

Some housing providers who participate in VAWA-covered programs or the RD voucher program may contend that the federal moratorium applies only to dwelling units whose occupants themselves participate in such programs. However, participation in a VAWA-covered program or acceptance of RD voucher subsidies on behalf of only some residents would make the entire property a "covered property." See CARES Act, § 4024(a)(2)(A)(i-ii). Non-participating tenants in the same property would thereby qualify as "covered dwellings" protected against eviction for nonpayment or rent or other charges during the moratorium period. See CARES Act, § 4024(b).

Federally-backed mortgage loans are defined to include loans secured by any lien on residential properties having 1-4 units and that are "made in whole or in part, or insured, guaranteed, supplemented, or assisted in any way, by any officer or agency of the Federal Government or under or in connection with a housing or urban development program administered by [HUD] or a housing or related program administered by any other such officer or agency, or is purchased or securitized by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association." CARES Act, § 4024(a)(4).

A federally-backed multifamily mortgage loan has the same definition, except that is secured by a property with five or more dwelling units. See CARES Act, § 4024(a)(5).

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[2] "The term ''covered property'' means any property that— (A) participates in—(i) a covered housing program (as defined in section 41411(a) of the Violence Against Women Act of 1994 (34 U.S.C. 12491(a))); or (ii) the rural housing voucher program under section 542 of the Housing Act of 1949 (42 U.S.C. 1490r); or(B) has a—(i) Federally backed mortgage loan; or (ii) Federally backed multifamily mortgage loan. "

[3] The VAWA -covered housing programs include: Public housing (42 U.S.C. § 1437d), Section 8 Housing Choice Voucher program (42 U.S.C. § 1437f), Section 8 project-based housing (42 U.S.C. § 1437f), Section 202 housing for the elderly (12 U.S.C. § 1701q), Section 811 housing for people with disabilities (42 U.S.C. § 8013), Section 236 multifamily rental housing (12 U.S.C. § 1715z–1), Section 221(d)(3) Below Market Interest Rate (BMIR) housing (12 U.S.C. § 17151(d)), HOME (42 U.S.C. § 12741 et seq.), Housing Opportunities for Persons with AIDS (HOPWA) (42 U.S.C. § 12901, et seq.), McKinney-Vento Act homelessness programs (42 U.S.C. § 11360, et seq.), Section 515 Rural Rental Housing (42 U.S.C. § 1485), Sections 514 and 516 Farm Labor Housing (42 U.S.C. §§ 1484, 1486), Section 533 Housing Preservation Grants (42 U.S.C. § 1490m), Section 538 multifamily rental housing (42 U.S.C. § 1490p-2), Section 515 Rural Rental Housing (42 U.S.C. § 1485), Sections 514 and 516 Farm Labor Housing (42 U.S.C. §§ 1484, 1486), Section 533 Housing Preservation Grants (42 U.S.C. § 1490m), Section 538 multifamily rental housing (42 U.S.C. § 1490p-2), Low-Income Housing Tax Credit (LIHTC) (26 U.S.C. § 42).

Whether the CARES Act definition is broad enough to include certain types of bond-financed developments or other forms of financing that receives favorable federal tax treatment remains to be seen.

- *Determining whether a property is a "covered property"*

For tenants who themselves participate in housing subsidy programs or benefit from low-income housing tax credit rent limits, determining that the federal eviction moratorium applies is not difficult. But discerning whether a property has a federally-backed mortgage loan, receives RD voucher subsidies on behalf of other residents, or participates in VAWA-covered programs the tenant does not know about may be considerably more difficult.

For properties that receive unit-based subsidies, low-income housing tax credits, and similar federal benefits, advocates should be able to use resources such as the National Housing Preservation Database[4] to determine whether and how a property is covered. But tenants will generally not know or have access to information from which to determine whether other residents participate in voucher programs—especially as tenant privacy protections may bar PHAs or other administrators from disclosing or identifying properties where their participants reside.

Similarly, tenants will often not be in a position to know what loans may be secured by their rental properties, or have access to the documents from which to find out. While an advocate might be able to detect the presence of a federally-related loan by reviewing the contents of any mortgages, deeds of trust, or other instruments recorded for a property, not all federally-related loans necessarily require a public filing that identifies the loan as federally-backed. Such public documents also do not necessarily indicate the involvement or subsequent acquisition by a relevant federal enterprise or the cancellation of federal insurance. In many communities, only some—if any—land records may be available on line, and records offices may be closed to the public for reasons related to the pandemic. Even if available to the public, such records may not be up-to-date.

By contrast, a landlord should know or have access to the documents from which to determine whether a property is subject to a federally-backed mortgage loan. These may include the note or mortgage instruments themselves, other closing documents, servicing notices, account statements, or other correspondence. Both Fannie Mae and Freddie Mac maintain websites borrowers (but not others) may use to look-up whether each enterprise owns their loan.[5]

Therefore, advocates should assert that a landlord who files an eviction action (for nonpayment of rent) during the federal moratorium period has the burden to plead and prove that the property is *not* subject to the federal eviction moratorium because it neither participates in a VAWA-covered program or RD voucher program, nor is secured by a

[4] Link: https://preservationdatabase.org/

[5] See https://ww3.freddiemac.com/loanlookup/ and https://www.knowyouroptions.com/loanlookup#.

federally-backed loan. Advocates may test this theory by moving to dismiss any eviction complaint that does not aver the lack of participation in a VAWA-covered program or RD voucher program or the absence of a federally-backed mortgage loan (for a property with four or fewer dwelling units) or federally-backed multifamily mortgage loan (for a property with five or more units).

Whether or not courts interpret the CARES Act moratorium as requiring a landlord to plead its non-applicability, the possibility that a property *might* be covered would tend to raise a triable issue of fact. Hence a court should not enter judgment in favor of a landlord in any such case unless and until the landlord has satisfactory demonstrated that the property is not subject to the federal moratorium.[6] And even if a court placed the burden on the tenants to prove the dwelling unit is in a covered property, a tenant should still have a full and fair opportunity to investigate possible coverage before being evicted.

Advocates should nonetheless zealously investigate any possible ways a property might be covered. This includes conducting discovery into the presence of any contracts the landlord may have with PHAs or federal housing contract administrators or participation in any tenant-based voucher or subsidy programs, as well as regarding any financing, liens, or security interests on the property. Advocates should also verify that any allegations of non-applicability (of the moratorium) were made upon a diligent inquiry—which at minimum would seem to require a review of relevant documents and use of the Fannie Mae and Freddie Mac loan-lookup websites for any properties subject to mortgages.

- *Types of evictions covered*

The federal moratorium only purports to bar evictions only "for nonpayment of rent or other fees or charges[.]" CARES Act, § 4024(b)(1). This text should obviously bar evictions based on "pay-or-vacate" notices or other eviction cases explicitly predicated on non-payment of rent, late fees, or other charges. But advocates should argue the moratorium bars any eviction case that is motivated (wholly or in part) by a tenant's nonpayment of rent or other fees or charges, whether or not the action is formally based on such non-payment. Probably the most likely example of such a situation would a landlord's non-renewal of a term lease or termination (by "no cause" notice) of month-to-month tenancy where the tenant has become delinquent in rent during the pandemic.

[6]Landlords may contend that such an interpretation unfairly requires them to "prove a negative"—i.e., the absence of a VAWA-covered program or federally-backed mortgage loan. However, in a typical case the landlord should likely establish this requirement though a declaration that the property does not have any voucher tenants and does not participate in any other federal housing program, and either that the property is not subject to any lien, or that the property is subject to a lien but the landlord has conducted a diligent inquiry and determined that lien does not secure repayment of any loan that was "made in whole or in part, or insured, guaranteed, supplemented, or assisted in any way, by any officer or agency of the Federal Government or under or in connection with a housing or urban development program administered by the Secretary of Housing and Urban Development or a housing or related program administered by any other such officer or agency, or is purchased or securitized by [Freddie Mac or Fannie Mae]."

Some landlords are likely to assert that the moratorium does not prohibit such "no cause" evictions, even if the landlord may have been motived by a rent or other financial default related to COVID-19, and this interpretation may draw some superficial support from the text. Yet this interpretation leads to an absurd result when considered alongside subsection (c), which requires the lessor of a covered property to give 30 days' notice to evict a tenant upon expiration of the moratorium period. See CARES Act, § 4024(c)(1).

The 30-day notice requirement in subsection (c) is not limited to non-payment cases (or actually to any particular types of evictions or lease terminations). But since no such 30-day notice is required during the moratorium period, reading subsection (b)(1) as a restriction only on evictions explicitly for non-payment of rent (or other fees or charges) would provide a covered lessor *greater* latitude to evict tenants without formal cause *during* the moratorium period than after its expiration. Such a reading frustrates the purpose of the Act where such a no-cause eviction is in fact motivated by a rent default. Allowing landlords to skirt the effect of the moratorium by using "no cause" eviction procedures to evict tenants for delinquent rent would further undermine the key policies underlying the moratorium (such as enabling social distancing by minimizing evictions during the pandemic) and the 30-day notice requirement (such as ensuring those who must lose their housing as a consequence of the pandemic receive reasonable post-moratorium notice).

Advocates should also note, however, that the same reasoning could potentially enable landlords to argue that the 30-day notice requirement does not apply to certain types of lease violations in the post-moratorium period. That is, since the moratorium would not have prevented an eviction for criminal activity or other misconduct during the initial 120-day period, courts may find that an eviction for such activity need not require 30 days' notice in the post-moratorium period either.

Local moratoria

The federal eviction moratorium does not affect cases that are not based on nonpayment of rent, that were filed before the moratorium took effect (or that are filed after it sunsets), or that involve non-covered tenancies. For cases that are not barred (or not *clearly* barred) by the federal moratorium, advocates should next check to see whether any state or local eviction moratorium protects the client. NHLP and its partners are maintaining a national list of state and local moratoria.[7] Indeed, even where the federal moratorium does apply, a state or local moratorium may provide additional protections, have begun earlier or extend longer into the future, or provide an easier procedural path for resolving the case.

The two most significant characteristics of a state and local moratorium, are its coverage (i.e., which types of tenancies and which types of evictions) and its mechanics (i.e., which parts of the eviction process does it restrict or block). Together with its chronological

[7] *COVID-19 Eviction Moratoria by State, Commonwealth and Territory*; link: https://docs.google.com/spreadsheets/u/1/d/e/2PACX-1vTH8dUIbfnt3X52TrY3dEHQCAm60e5nqo0Rn1rNCf15dPGeXxM9QN9UdxUfEjxwvfTKzbCbZxJMdR7X/pubhtml

duration, these two key factors will tend to dictate not only whether a moratorium actually applies in a particular case, but also what steps may be needed to secure protection and how to help a tenant plan for the time after the moratorium is lifted.

- *Coverage of moratorium.*

Ideally, an eviction moratorium should apply to every type of tenancy and every type of eviction case. However, many moratoria contain exceptions for certain types of lease violations, such as criminal activity or violence. Others are even more limited, reaching only non-payment of rent cases or even requiring a demonstrable link to COVID-19. Still others may exclude (or passively fail to reach) certain kinds of tenancies, such as mobile home lot tenancies or tenancies in residential motels. And some orders may be ambiguous about whether particular types of tenancies or evictions are covered—leaving tenants vulnerable to misinterpretations, uncertainties, pressure from anxious landlords or even threats from abusive ones.

It is likely inevitable that some landlords will attempt to evict tenants during moratorium periods, asserting that the relevant order does not apply to a particular lease violation or that a tenancy falls within some exception. In responding to such claims, advocates should argue that any limitations or exceptions to an eviction moratorium should be interpreted narrowly. Such narrow interpretation is in the public interest because eviction during a pandemic is contrary to social distancing requirements. To prosecute, hear, and decide a judicial eviction case entails numerous interpersonal contacts, as does physically carrying out an eviction. A tenant's actual displacement from housing results in even greater burdens on the ability to self-isolate, often including needs for shelters and heightened demands on public services. Unless contradicted by the text of a particular order or enactment, advocates should contend that any exceptions were likely intended only to address problems that could not be resolved without eviction and thus narrow interpretation fulfills the intent of the moratorium and the public health interest.

Advocates should also forcefully contest any denial of moratorium protection based on a failure to meet procedural requirements. Tenants may struggle to provide documents or meet other procedural obstacles due to the closure of businesses and government offices, the inability to use public transportation, a need to self-quarantine due to infection or exposure to COVID-19, a need to care for children while schools are close, or various other reasons. Allowing the strict enforcement of procedural impediments to result in evictions of tenants who qualify for the substantive protections of a moratorium further conflicts with public health objectives.

An eviction moratorium in Arizona, for example, limits protection to tenants who fail to pay rent for reasons related to of COVID-19 and requires that tenants to notify their landlords in writing with documentation substantiating their job loss or other basis for claiming protection. These procedural burdens could theoretically result in the eviction of a tenant who notified a landlord orally but not in writing, or who did not supply documentation (or whose documentation was deemed insufficient), or where a landlord denied or disputed a valid connection between the rent default and COVID-19. Such unjust results would harm

not only the affected tenants themselves, but would lead to litigation or evictions that counteract community public health needs.

Accordingly, where such procedural impediments exist substantial compliance ought to be deemed sufficient. A tenant should not be denied the protection of a moratorium based on a failure to fulfill procedural requirements absent some actual harm to the landlord (or other relevant person) that cannot be addressed by any less severe remedy. In the Arizona example, for instance, a tenant's assertion that COVID-19 caused or contributed to a rent default should be accepted at face value to stop an eviction. Documentation could be provided later or the requirement waived entirely—especially if the tenant's employer or other source of such documentation has closed, gone out of business, or is unable to respond because key staff are unable or unwilling to cooperate. At the very least, a tenant who asserts facts that would entitle him or her to the protection of such a moratorium should be given a continuance or other brief reprieve in which to cure any procedural shortcomings.

- *Mechanics of moratorium*

The second key characteristic of an eviction moratorium involves the actual step, or set of steps, in the eviction process that the moratorium arrests. Though specific details vary in different states and jurisdictions, eviction is generally a five-step process: (1) first, the landlord serves the tenant with an eviction notice, (2) then the landlord must initiate an eviction lawsuit, typically through filing with the court and serving the tenant with process, (3) next, the court must process and hear the claim, (4) the court must then enter an order awarding possession to the landlord and directing the removal of the tenant, and (5) finally, the physical eviction order must be carried out, usually by a sheriff or other local law enforcement agency. A moratorium on any of these five phases will stop at least some evictions. But any phases that are not enjoined will either allow some evictions to proceed, or may affect a tenant's right or ability to preserve a tenancy after the moratorium is lifted.

For example, the eviction moratorium in Seattle prohibits landlords from serving new eviction notices or filing new eviction cases. But as the City of Seattle does not have the power to order the King County Sheriff not to execute eviction orders, the Seattle order does not keep previously filed cases from proceeding. For another example, the Arizona moratorium only directs certain Arizona law enforcement officers to "temporarily delay enforcement of eviction orders" to remove people protected by the moratorium—meaning landlords may still serve new eviction notices and file new cases, and courts may still hold hearings and issue eviction judgments, which may be carried out as soon as the moratorium expires.

Fortunately, in some jurisdictions there exist multiple moratoria from different agencies that stop different stages of the eviction process. In Seattle, for instance, while the City's order prohibited new notices and filings, an emergency order from the Washington Supreme Court automatically continued all non-emergency civil matters—effectively blocking any new hearings from being held or eviction orders from being entered. Then a gubernatorial order states that "[l]ocal law enforcement is prohibited from serving or

otherwise acting on eviction orders that are issued solely for default payment of rent related to such property." Through this combination of orders, Seattle tenants have protection against eviction at all five phases of the process—at least for non-payment of rent cases—while the different orders remain in effect.

Accordingly, properly advising tenants facing or potentially facing eviction during the COVID-19 pandemic requires knowing each of potentially multiple moratoria in effect within the tenant's local jurisdiction, which components of eviction each such moratorium pertains to, and the effective dates of each. Tenants for whom a moratorium does nothing more than temporarily delay a physical eviction will likely need to make different plans for the time period after the moratorium is lifted than may be appropriate for a tenant who cannot be charged late fees and would be entitled to 30 days' written notice before a post-moratorium eviction suit could be filed.

Note: NHLP anticipates that numerous other legal defenses and arguments may be available to tenants facing eviction during the COVID-19 pandemic under theories such as reasonable accommodation (or other fair housing arguments), due process, public policy, administrative law, and more. While this guidance deals exclusively with the enforcement of eviction moratoria in defense against unlawful detainer actions, advocates should not overlook such other potential arguments when they may be available. NHLP continues to develop resources to assist advocates in identifying, raising, and prevailing on such legal theories.