Summary Ejectment: Will the CARES Act Solve the Backlog Problem?

On June 2 Chief Justice Beasley's order continuing pending actions – including actions for summary ejectment – will expire. While that expiration date may be extended, it seems more likely that small claims magistrates will once again be hearing cases after that date, albeit under quite different conditions.

In this post am going to talk in considerable detail about a new federal law that affects eviction cases in North Carolina (and every other state). This law establishes an eviction moratorium and new notice requirements on two different types of "covered properties:" housing subsidized by participation in a federal assistance program, and housing financed by a federally-backed mortgage loan. Significant questions exist about how these provisions should be applied in North Carolina's courts.

Landlords have good reason to support the resumption of small claims court. Across the state, tenants unable to pay rent are occupying rental property belonging to landlords who are in turn unable to pay their mortgages. Already, landlords are trying to determine how to get near the front of the (extremely long) line of landlord/litigants when court resumes. And magistrates are already voicing very legitimate concerns about how to work through backlogged cases in a manner that assures the impartial administration of justice with which they are tasked. In an almost coincidental confluence of events, an answer to both concerns may be found in the application of the new federal law known as the CARES Act (the Coronavirus Aid, Relief, and Economic Security Act) (hereinafter, the Act).

The eviction filing moratorium provisions in the Act are brief and seemingly straightforward:

Assuming the Act applies to a particular rental agreement:

- Until July 25, the landlord is prohibited from filing a summary ejectment action due to the tenant's failure to pay rent.
- The landlord is prohibited from charging "fees, penalties, or other charges to the tenant related to such nonpayment of rent."
- Until July 25, the landlord is prohibited from issuing a notice to vacate to a tenant.
- After July 25, a landlord is permitted to issue a notice to vacate, but such notice must be given at least 30 days in advance.

But does the Act apply?

The Act applies in two broad categories of situations:

First, if the housing is subsidized by participation in a federal assistance program, the Act applies. Magistrates are likely to be familiar with some of these programs (such as public housing, the Section 8 voucher program, and the Section 8 project-based programs). There are many others, with which magistrates may be less familiar, including subsidized housing for elderly and disabled tenants, the Low Income Housing Tax Credit (LIHTC) program, and various programs related to low-income housing in rural areas (USDA/RHS). Hopefully, magistrates will see few cases falling within this category before August 25; landlords participating in subsidized housing are likely to have had ample notice of the moratorium from HUD and similar agencies.

But it gets more complicated.

Most of the time the complaint form will indicate whether a federal subsidy is involved in a case. That is not always true, of course, and we've talked before about other factors that might alert the magistrate to this important fact. But that problem pales in comparison to the second category of rental properties subject to the Act. The Act also applies to any rental property subject to "a federally-backed mortgage loan." The statute defines that term as any mortgage loan "*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 the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association*."

That certainly covers a lot of ground! If you are wondering how in the world a magistrate might make that determination, you are far from alone.

Who is responsible for raising the question of whether the Act applies? My initial assumption in considering this legislation was that it would be up to a tenant to raise the Act's application in defense to a landlord's otherwise valid claim for summary ejectment. Further research reveals that matters are considerably more complicated from a legal point of view, and a discussion of the relevant factors beyond the scope of this post. It is safe to say, though, that the nature of the legal limitations imposed by the Act is quite different from typical "affirmative defenses." Rule 8's provisions requiring affirmative defenses to be pleaded or waived is in part based on a concern that plaintiffs may be unaware of additional circumstances that might bar their right to recover. The opposite circumstance is likely in the cases we're talking about, however: it is defendants who are unaware of specific details related to financing of the rental property, and there is no readily available way for them to find out. When considered along with the two-day minimum period between service and trial in summary ejectment cases, requiring the defendant to prove that the Act applies becomes an insurmountable burden, effectively gutting the federal law's protection for (unrepresented) tenants whose rental premises fall into this category and are subject to the moratorium.

An imperfect solution

The common discovery procedures in civil lawsuits are typically not permitted in small claims court. There is a little-known statute, however, that allows parties in small claims cases to request the production of documents under Rule 34 . GS 7A-231. If the tenant has the burden of raising and proving a defense based on the Act, then any tenant's attorney in this situation is virtually compelled to use this procedure to determine whether a CARES Act defense is available. By examining mortgage-related documents in the landlord's possession, the attorney can determine whether the rental premises are secured by a "federally-backed mortgage loan." Whether or not the Act is eventually found to apply, the additional time required for this procedure is likely to be frustrating for landlords, many of whom have already been waiting for months to have their cases heard.

An alternative solution

This problem may be eliminated or minimized if landlords, rather than tenants, affirmatively show to the court at the time of filing that the particular rental premises are not covered by the Act. Landlords, of course, have ready access to information about their own mortgage loans. A growing number of states have acted to implement just such a requirement. South Carolina, for example, requires that a landlord provide written certification that the rental premises are not subject to the CARES Act requirements. Landlords in Michigan are required to submit a sworn statement to the same effect on a court-approved form. A quick search indicates similar rules have been adopted by Georgia, Oklahoma, and Arkansas. We don't know yet whether our courts will adopt a similar approach.

Why this seems like a good idea

I admit that I tend to favor interpretations/implementation procedures that effectuate the clear purpose of laws. Congress passed the CARES Act in response to a national emergency, and I find it troubling to imagine its protections, so sweeping in theory, to be in fact available only to the small number of tenants who are represented by counsel. Even if you don't join me in that particular point of view, though, there are other pragmatic advantages to requiring landlords, rather than tenants, to address the question of whether rental property is or is not governed by the Act.

My, what a big backlog you have! Estimates of the percentage of rental agreements covered by the CARES Act are all over the place, but everyone seems to agree that a significant number fall into that category. Given the large number of accumulated cases, whether filed or waiting to be filed, there are clear advantages to removing or heading off cases prohibited by the Act at as early a stage as possible.

In addition to reducing the volume of cases which must be dealt with by clerks and sheriffs, diversion before the complaint is filed would allow the landlord to avoid potential liability for unfair trade and/or debt collection practices and also unnecessary court costs. The tenant may be spared the need to decide between missing work to attend the trial or hanging on to a job when so many

jobs are in jeopardy. The tenant is also able to avoid collateral consequences that sometimes arise from having been sued – even if unsuccessfully – for eviction. The district court, which has its own backlog to worry about, escapes adding to its backlog the small claims appeals likely to result when tenants learn too late that they may well have an effective defense. Magistrates can then focus their immediate time and energy on trying summary ejectment actions not falling within the scope of the Act. Because trial of the cases that DO fall under the Act will be delayed until late summer, it seems likely that many landlords and tenants will settle their dispute by voluntary agreement prior to that time, so that many of those cases will never need to be heard at all.

All the other things we don't yet know

At the moment, the most pressing issue about evictions governed by the CARES Act is the one we've been discussing, but many other questions remain. There are several issues related to the details of how that 30-day notice requirement should be applied, for example. Another issue likely to be hotly debated arises out of Congress's decision to hinge the Act's application on whether the rental property is a "covered dwelling" under the statute. The plain language of the Act would classify all rental units in multi-family housing as falling within its scope if rental of any unit in that housing is subsidized. A recent HUD publication, however, is not supportive of that understanding. Stay tuned to find out what the courts do with that issue!

Such questions are quite beyond the scope of today's blog post, but you can expect to hear more from me soon about the CARES Act and small claims court. In the meantime, please share your thoughts, comments, and additional questions by emailing me at lewandowski@sog.unc.edu.