



Virginia Multifamily Landlord Lease Enforcement During COVID-19 Pandemic

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Multifamily landlords looking to enforce lease provisions during the COVID-19 pandemic face a complicated framework of quickly enacted emergency federal, state and local laws and uncertainty over a shifting regulatory landscape. This article seeks to clarify what multifamily landlords in Virginia can and cannot do under the current federal, state, and local regulations.

Federal Treatment

The CARES Act is the primary federal legislation governing multifamily landlord lease enforcement measures. For now, the CARES Act applies only to "covered dwellings," which include rental properties that:

1. Participate in federal assistance programs ? e.g. Housing Choice Vouchers, Section 8 Project-Based Rental Assistance, rural housing programs and the Low Income Housing Tax Credit (LIHTC) program;
2. Are subject to a federally backed mortgage loan ? e.g. single-family mortgage owned or securitized by Fannie Mae or Freddie Mac or insured, guaranteed or otherwise assisted by the federal government, including mortgages issues by the Federal Housing Administration and the Department of Veterans Affairs, and the Department of Agriculture's direct and guaranteed loans; or
3. Are subject to a federally backed multifamily loan ? e.g. almost identical to the above subsection 2 but as applied to properties designed for five or more families.[1]

Therefore, multifamily landlords renting units in a property participating in a federal assistance program or subject to a federally backed loan are within the purview of the CARES Act.

Section 4024(b) of the CARES Act prohibits covered multifamily landlords from initiating eviction proceedings or charging late fees and penalties against a tenant for the nonpayment of rent from March 27, 2020, until July 25, 2020.[2] Furthermore, Section 4024(c) of the Act requires covered landlords to

provide tenants with at least 30 days' notice before they must vacate the property; however, a landlord cannot issue a notice to vacate during the 120 day moratorium period.[3] Thus, the CARES Act prohibits a covered multifamily landlord from being able to force a tenant to vacate a covered dwelling for nonpayment until August 23, 2020 (i.e., 30 days after the end of the 120-day moratorium).

The CARES Act does not tie 'nonpayment of rent' to an economic hardship experienced by COVID-19 or provide any other definition that would otherwise limit and qualify that determination. However, nothing in the CARES Act prevents a landlord from requesting evidence of a tenant's ability to pay or entering into discussions with the tenant on partial payments provided those efforts comply with other applicable law, such as the Fair Housing Act. Furthermore, the CARES Act does not prevent a covered landlord from evicting a tenant during the moratorium period for a non-monetary breach, such as property damage, illegal activity, etc.

On May 15, 2020, the House of Representatives passed a \$3 trillion stimulus bill named the HEROES Act that, among other things, seeks to extend and expand the eviction moratorium in the CARES Act to all renters.[4] As currently written, the HEROES Act would extend the eviction moratorium for 12 months from the date of enactment of the CARES Act (i.e. until March 27, 2021) and change the definition of a 'covered dwelling' to 'a dwelling that is occupied by a tenant (a) pursuant to a residential lease; or (b) without a lease or with a lease terminable at will under State law.'⁵ The HEROES Act maintains the 30-day notice requirement before evicting a tenant.[6] However, the Bill passed largely along party lines, and it is unlikely to become law in its current form given Senate Majority Leader Mitch McConnell's statements that the bill is 'dead on arrival'⁷ in the Senate and President Trump's statement that he would veto the bill.[8]

It is important to note that the CARES Act does not prevent a landlord from declaring a tenant in breach for nonpayment of rent but, instead prevents a landlord from enforcing its rights as a consequence of that breach during the moratorium period. In other words, the CARES Act does not absolve tenants of the legal responsibilities to pay rent, and tenants who do not pay rent during the moratorium period may still face legal liabilities, including eviction, after the moratorium ends.[9]

Further Congressional guidance will likely be needed to clarify several unanswered questions once the moratorium ends. One such issue is that, although the CARES Act bars landlords from *charging* late fees and other penalties for nonpayment during the moratorium, it is unclear whether the accrual of such fees and interest during the moratorium, and the charging of such fees and interest after the moratorium ends, are prohibited. [10] But, in the meantime, covered multifamily landlords should follow the current CARES Act guidance as it relates to evictions and fees for nonpayment of rent and adjust to new guidance as it is issued.

State & Local Treatment

Landlords not covered by the CARES Act may nevertheless be governed by state-level regulations or local courts exercising their judicial discretion limiting lease enforcement rights. Most states have enacted some kind of lease enforcement limitation either through enacted legislation, executive order, or judicial order that prohibits filing new eviction proceedings for nonpayment of rent. Virginia's primary renter limitations are legislative and judicial with limited executive intervention.

Legislative Restrictions

On April 22, 2020, the Virginia General Assembly enacted House Bill 340, as amended pursuant to a recommendation by Governor Northam that was passed by the General Assembly during the veto session, that afforded certain tenants an opportunity to continue any unlawful detainer case brought by landlord for nonpayment of rent for 60 days from the initial return date^[11] However, to avail oneself of this protection, a tenant must appear in court on the initial return and provide "written proof" that he or she experienced a loss of income due to the Commonwealth's declared state of emergency and that he or she is not "currently receiving wages or payments from a public or private source as a result of the Emergency."^[12] Sufficient written proof is (i) a paystub showing zero dollars in earnings for a pay period during the declared emergency, (ii) a copy of a furlough notification letter or essential employee status letter indicating the employee's status as nonessential due to the emergency, or (iii) any other documentation the court deems appropriate.^[13] Notably, the legislation is unclear on what qualifies as "wages or payments from a public or private source" and whether the receipt of federal stimulus funds or unemployment payments would disqualify the tenant from meeting that requirement.

The bill states that the 60-day continuance right expires 90 days following the end of the Governor's declared state of emergency.^[14] Currently, the state of emergency is scheduled to end on June 10, 2020,^[15] despite most of the Commonwealth beginning a phased reopening starting May 15. Therefore, qualifying tenants will be able to continue unlawful detainer cases for 60-days until September 8, 2020.

Judicial Restrictions

Just as with commercial leases, the largest barriers to multifamily lease enforcement are the restrictions imposed by the Virginia Supreme Court's judicial emergency. Since the Court first declared a judicial emergency on March 16, lower courts could not accept new filings of any non-emergency matters, which included unlawful detainer and eviction cases.^[16] However, on May 6, the Court issued an Order extending the emergency until June 7, 2020, but allowing courts, in their discretion, to begin hearing new non-emergency matters starting May 18, 2020.^[17]

Nevertheless, a backlog of already filed cases may affect the speed with which trial courts hear new cases. For example, although the Virginia Beach General District Court will start accepting new unlawful detainer filings as of May 18, it requires the return date to be no earlier than June 10, and the Court has limited itself to hearing a maximum of 450 civil cases per day in an attempt to address the backlog of cases efficiently. Given the current backlog of cases, the court's civil calendar is filling up quickly, and the clerk's office advises that a new unlawful detainer case filed on May 18 may not be heard until mid-August or early-September.^[18] On the other hand, Chesapeake General District Court advises that it is

currently setting new unlawful detainer cases filed on May 18 for first return at the end of June or early July.[19] Norfolk General District Court is accepting new cases as of May 18th but the courthouse will remain closed until June 11 so it will not issue those cases for service until then and advises return dates in early September.[20] That being said, and assuming the emergency declaration date remains the same, strategic landlords may seek to set return dates after September 8 if a tenant qualifies for a 60-day extension under HB340 so that the tenant cannot continue that matter until early November.

Executive Restrictions

As mentioned above, Governor Northam recommended amendments to HB 340 to expand its protections to all tenants who can show need instead of only to government employees as it was originally passed by the General Assembly. Although that was ultimately a legislative action, it shows an executive priority on protecting renters that has otherwise been missing from the Governor's Executive Orders, which have not imposed restrictions on lease enforcement measures. The only executive mention of lease enforcement issues is in Executive Orders 55 and 61 where the Governor mandates that "[a]ll relevant state agencies shall continue to work with all housing partners" to assist Virginians in avoiding evictions or foreclosures.[21] Those public housing partners and agencies, however, primarily issue informational resources to the public regarding tenant rights and best practices for cleaning and managing a positive COVID case on-site instead of regulations that landlord's must follow[22] There are no other Virginia executive restrictions on multifamily lease enforcement at this time.

Virginia's lease enforcement regulations are notably different from the CARES Act in that they do not expressly prohibit a landlord from charging late fees or penalties. Like the CARES Act, however, Virginia's regulations do not expressly address nonmonetary lease defaults even though the regulations have affected those matters to the extent that courts cannot accept new filings. In addition, the Virginia regulations do not apply to all tenants. Taken together, as of May 18, a Virginia multifamily landlord of a property not covered by the CARES Act can file an unlawful detainer matter against a defaulting tenant either for nonpayment of rent or for a nonmonetary breach, and, until September 8, only those tenants who appear in court and provide written proof to the judge showing sufficient economic hardship and no source of income are entitled to continue the matter.

Conclusion

The ability of multifamily landlords to enforce lease rights is inhibited by legal and practical restrictions from all levels of government. In order for a landlord to determine what it can and cannot do with a defaulting tenant, it must carefully consider the situation by analyzing the nature of the default, determining if the property falls within the scope of the CARES Act, evaluating the tenant's economic hardship, understanding the local Court's filing procedure, and several other fact specific determinations that will inform what the landlord can and cannot do either legally or practically. Ultimately whether a landlord will decide to pursue its lease enforcement rights may largely depend on business factors such as the strength of the rental market and the supply of qualified renters.

[1] Congressional Research Service, *CARES Act Eviction Moratorium*, pg. 2 (April 7, 2020) (available at <https://crsreports.congress.gov/product/pdf/IN/IN11320>).

[2] CARES Act, § 4042(b) (available at: <https://www.congress.gov/116/bills/hr748/BILLS-116hr748enr.pdf>)

[3] *Id.*

[4] HEROES Act, § 110203, pg. 961 (available at: <https://www.congress.gov/116/bills/hr6800/BILLS-116hr6800ih.pdf>)

[5] *Id.* at pg. 963.

[6] *Id.*

[7] Jordain Carney, *The Hill* (May 12, 2020) (available at: <https://thehill.com/homenews/senate/497433-mcconnell-senate-gop-declare-house-3t-coronavirus-bill-dead-on-arrival>)

[8] Executive Office of the President, *Statement of Administration Policy* (May 14, 2020) (available at: https://www.whitehouse.gov/wp-content/uploads/2020/05/SAP_H.R.-6800.pdf)

[9] Congressional Research Service, *CARES Act Eviction Moratorium*, pg. 1 (April 7, 2020) (available at <https://crsreports.congress.gov/product/pdf/IN/IN11320>).

[10] *Id.*

[11] HB 340, §2(1) (available at:
<https://lis.virginia.gov/cgi-bin/legp604.exe?201+ful+CHAP1202+pdf>)

[12] *Id.* at § (2)(5).

[13] *Id.*

[14] *Id.* at § 4.

[15] Governor Northam Executive Order, Second Amendment to Number 53, pg. 1, ¶ 1 (May 4, 2020) (available at:
[https://www.governor.virginia.gov/media/governorviriniagov/executive-actions/EO-53-SECOND-AMENDED-Extension-of-Temporary-Restrictions-Due-To-Novel-Coronavirus-\(COVID-19\).pdf](https://www.governor.virginia.gov/media/governorviriniagov/executive-actions/EO-53-SECOND-AMENDED-Extension-of-Temporary-Restrictions-Due-To-Novel-Coronavirus-(COVID-19).pdf)).

[16] Presumably, courts would hear emergency eviction proceedings involving domestic violence or health and safety concerns, but those would be evaluated on a case-by-case basis.

[17] Virginia Supreme Court, Fourth Order Modifying and Extending Declaration of Judicial Emergency in Response to COVID-19 Emergency, pg. 4, ¶ 4 (May 6, 2020) (available at:
http://www.courts.state.va.us/news/items/covid/scv_emergency_orders.pdf
)

[18] Telephone call with Virginia Beach General District Court Clerk's Office on May 14, 2020.

[19] Telephone call with Chesapeake General District Court Clerk's Office on May 15, 2020.

[20] Telephone call with Norfolk General District Court Clerk's Office

on May 15, 2020.

[21] E.O. 55, pg. 2 (March 30, 2020); E.O. 61, pg. 10 (May 8, 2020).

[22] H.U.D., *Public House Agency Website: Virginia* (last accessed May 15, 2020) (available at: <https://www.hud.gov/states/virginia/renting/hawebsites>)

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