

April 27, 2020

**Governments can prohibit evictions and modify
rent and mortgage payment requirements
temporarily, for people suffering undue financial
hardship resulting from Covid-19 pandemic**

**Forgivable government loans also can help tenants and homeowners
through emergency**

**Courts may prevent unnecessary evictions and foreclosures by
upholding defenses that full housing payments have been made
impracticable by pandemic**

BOARD OF DIRECTORS
THOMAS A. LOFTUS, ESQ., CHAIRMAN
COL. JOHN M. RECTOR (USA, RET.),
VICE-CHAIRMAN
MICHAEL J. CLARK, ESQ., TREASURER

ADVISORY COMMITTEE
PROF. PHILIP M.
CAUGHRAN
PROF. WILLIAM A.
FISCHEL
SCOTT LINDLAW, ESQ.

The [national emergency due to the Covid-19 coronavirus pandemic](#) has led to extraordinary federal, state and local actions. Among them are unprecedented, measures to prevent tenants and homeowners being evicted or suffering foreclosure due to the massive economic dislocations caused by the pandemic.

Those measures are temporary and incomplete, however. Many Americans predictably will be unable, for a much longer time, to afford full rent and mortgage payments and still meet other crucial needs, such as sufficient food and health care for their families.

Those economic concerns are major factors behind calls to reopen non-essential businesses and loosen other restrictions that previously were ordered by federal and state governments. Partial reopening already is proceeding in many states, although many health officials continue to warn that reopening too soon may cause a new spike in Covid-19 infections and deaths, thus delaying full economic recovery.

The financial concerns of those who have lost jobs and/or other basic income sources could be reduced a great deal, if federal and state officials exercised their well-established authority to enact emergency debtor-relief legislation. For example, forgivable government loans to individual and business debtors could tide them over until the pandemic is over.

Also, legislation could permit tenants and homeowners to pay only what they are reasonably able to pay, for as long as their ability to pay is seriously impaired by the pandemic. That kind of legislation would be consistent with principles of modern

contract law, and it could ensure that tenants, homeowners and their advisors are aware of their legal rights. In fact,

This update will discuss several issues:

1. Emergency government authority to modify rent and mortgage payment requirements temporarily;
2. Governmental actions to aid tenants and homeowners during the Covid-19 pandemic;
3. Forgivable loans to individual and business debtors; and
4. The Impracticability defense to full rent and mortgage payments.

1. Emergency government authority to modify rent and mortgage payment requirements temporarily

The federal and state governments have ample legal authority to shield renters and homeowners from adverse actions based on their failure to make full rent and mortgage payments, where those payments become unduly burdensome due to a public emergency such as the Covid-19 pandemic.

For example, the U.S. Supreme Court has upheld the constitutionality of a state's emergency housing statute that prohibited eviction of tenants for two years, in numerous cities of the state, provided that the tenant paid "a reasonable rental, to be determined by the courts[.]" *Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242, 243 (1922). The Court found an adequate basis for the New York legislature's declaration of a "social emergency" which constituted a serious threat to the public welfare in those cities.

In that case, the Court relied on its previous decisions that in such a temporary emergency, housing may be "clothed . . . with a public interest sufficient to justify restricting property rights" of the buildings' owners, to the extent done in the statute. *Id.* at 247, citing *Block v. Hirsh*, 256 U.S. 135 (1921); *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170 (1921).

The same rationale has been applied to mortgage-related regulations of building-and-loan associations. *Veix v. Sixth Ward Bldg. & Loan Ass'n*, 310 U.S. 32 (1940). *See also, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982) (summarizing those and other relevant Supreme Court decisions).

The *National Emergencies Act*, 50 U.S.C. §§ 1601-1651, sets forth procedural requirements for the President's exercise of temporary, emergency powers. Since enactment of that statute in 1976, Presidents have declared a national emergency 56 times. The latest is President Trump's declaration regarding the Covid-19 outbreak, issued on March 13, 2020 (85 Fed. Reg. 15337).

The emergency powers that Congress has authorized the President to use include imposing temporary wage and price controls—including rent controls—nationwide (President Nixon, in 1970; President F. D. Roosevelt, 1942). State governments have comparable authority to protect their state’s citizens.

2. Governmental actions to aid tenants and homeowners during pandemic

On March 27, the federal government eased the burden of rent and mortgage payments for people adversely affected by the Covid-19 emergency, under the [CARES Act](#). Among its provisions:

- American adults with an income of \$75,000 or less (\$150,000 or less for married couples) were due to receive \$1,200 in direct, financial relief—plus \$500 for each child;
- Unemployment insurance coverage and time limits have been greatly expanded; and
- There is a 120-day moratorium (set to expire July 25) on evictions involving any property that is covered by federal housing programs generally, or that has a federally-backed mortgage loan.
- There also is a foreclosure moratorium (set to expire on May 17th) for single-family mortgages backed by Fannie Mae or Freddie Mac. “During this national health emergency, no one should be forced from their home,” in the words of Federal Housing Finance Agency (FHFA) Director Mark Calabria.

However, that CARES Act help is limited as well as temporary. For example:

- Many residential mortgages are not federally backed, and thus are not subject to the CARES Act moratorium. It often will be difficult for tenants to determine whether rental properties other than public housing or housing voucher properties are covered by the CARES Act.
- That Act does not affect the amounts that are due under the terms of rental and mortgage contracts. As things stand, as of July 25—even as to rental homes covered under the CARES Act—landlords would be permitted to pursue evictions against tenants who are not fully caught up in rent payments.

Many states and cities also have paused evictions and foreclosures, even as to properties not covered by the CARES Act. Local codes or orders may provide additional remedies. However, state and local actions generally have not affected the payment requirements in the underlying rental and mortgage contracts. Also, many of those actions are set to end when courts reopen.

To bring order out of the current chaos regarding tenants’ and homeowners’ payment obligations, EHI urges further legislation that (a) provides forgivable loans to tenants and homeowners, to protect them as well as their landlords and lenders; and (b)

protects people’s rights to reasonable limitations on their contractual payment obligations, where their ability to pay has been seriously disrupted by reasonably unforeseeable circumstances such as the pandemic. Those subjects are discussed below.

3. Forgivable loans to individual and business debtors

Forgivable government loans to individual and business debtors would enable debtors to refinance their contract obligations (including leases, mortgages, and other real estate-related loans) at very low interest rates for the duration of the pandemic. Those loans could promote the nation’s general economic stability and recovery.

That strategy has been described by nationally-recognized housing economics expert, Prof. William A. Fischel (a member of our Institute’s (EHI’s) Advisory Committee). Federal authorities such as the U.S. Treasury and the Federal Reserve Board are the best institutions to do this, according to Prof. Fischel. He points out that doing so:

spreads out the cost of the bailout to taxpayers generally. Saving the economy and preventing hardship are everybody's business. . . . A loan whose repayment terms are contingent on need would give immediate relief and allow determination of need to be figured out later.

4. Impracticability defense to full rent and mortgage payments

Among the possible sources of help to tenants and homeowners whose ability to pay according to their contracts’ terms has been impaired due to the pandemic, is the contract defense of “Impracticability of Performance” (originally “Impossibility of Performance”). Under that doctrine, failure to pay the full amount called for by a rental agreement or mortgage, when it comes due, may be excusable—if that payment was impracticable for the tenant or homeowner, because of a reasonably unforeseeable event occurring after the contract was made.

The Covid-19 pandemic seems to be a textbook case of a reasonably unforeseeable event intervening after the creation a rental contract or mortgage—a *force majeure* (“superior force”)—that justifies modification of the payment terms where they have become unduly burdensome. The Impracticability of Performance defense may be invoked even if there is no provision in the contract on the subject.

See, e.g., Opera Co. of Boston, Inc. v. Wolf Trap Foundation for Performing Arts, 817 F.2d 1094, 1097-1102 (4th Cir. 1987) (discussing the history and evolution of the “impracticability” doctrine). *See generally, e.g., Restatement 2d of Contracts*, §§ 261, 269, and 270 (1981) (discussing effect of total, temporary, or partial impracticability of performance by a party to a contract). (The U.S. Supreme Court treated *Restatement* § 261 as authoritative in a case involving contract rights of federal savings and loan associations—whose function is to provide citizens with affordable housing funds. *U.S.*

v. Winstar Corp., 518 U.S. 839, 904-910 (1996) (plurality opinion, per Souter J.). *Id.* at 911 (Breyer, J., concurring).)

Of course, other means of maintaining housing stability—such as forgivable government loans (as outlined by Prof. Fischel and summarized above) to tenants, homeowners, and even landlords who are suffering financial hardship—may be at least equally effective and also may better promote the nation’s general economic stability and recovery .

The Equitable Housing Institute (EHI) believes that, in any event, tenants and homeowners adversely affected by the national emergency may not lawfully be forced to make full rent or mortgage payments, if doing so leaves them without enough money to provide for food, health care, and other necessities.

Please note: *this discussion does not constitute or replace professional legal advice.*
EHI does not provide professional legal advice.