CARES Act and Multifamily Housing

By Mordechai Sutton | May 14, 2020

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On March 27, 2020, Congress passed the Coronavirus Aid, Relief and Economic Security Act (the "CARES Act"). The CARES Act, among other things, aims to provide relief to tenants and borrowers who participate in HUD's housing programs. This alert highlights those provisions that address such multifamily housing.

It is important to note that, while this alert discusses Federal law, readers should also look to state law, which may provide for additional restrictions, and should consult with their Haynes Boone attorney for guidance.

General Moratorium on Evictions

Section 4024 of the CARES Act provides for a temporary moratorium on evictions (and certain other specified actions) with respect to tenants that are occupying "covered dwellings," which is defined as dwellings on any property where the loan secured by the mortgage on the property is made by, insured, guaranteed, supplemented, protected or assisted in any way by Fannie Mae, Freddie Mac, or HUD or any property that participates in the rural housing voucher program or a covered housing program under the Violence Against Women Act of 1994.

Specifically, during the 120-day period beginning on March 27, 2020 (the date of enactment of the CARES Act) and ending on July 24, 2020, the lessor of a covered dwelling may not make, or cause to be made, any filing to initiate a legal action to recover possession of the covered dwelling from the tenant for nonpayment of rent or other fees or charges. In addition, the lessor may not assess fees, penalties, or other charges to the tenant related to such nonpayment of rent. Furthermore, the lessor of a covered dwelling unit may not require the tenant to vacate the covered dwelling unit before the date that is 30 days after the date on which the lessor provides the tenant with a notice to vacate, and the lessor may not issue such a notice to vacate until after July 24, 2020. Thus, a tenant in a covered dwelling may not be effectively evicted until August 24, 2020 at the earliest (assuming a notice to vacated is sent out on July 25).

Forbearances

Separately from but partially overlapping with the moratorium on evictions, Section 4023 of the CARES Act provides that during the "covered period" (which begins on March 27, 2020 and ends on the sooner of the date that the national emergency ends and December 31, 2020), a borrower that (a) took a loan secured by a mortgage on real property designed for 5 or more families and that is (i) made, insured, guaranteed, supplemented or assisted by any agency of the federal government, (ii) made in connection with a program administered by HUD or (iii) purchased or securitized by Freddie Mac or Fannie Mae, (b) has been current on its payments as of February 1, 2020, and (c) is experiencing a financial hardship due to the COVID–19 emergency, may request a forbearance.

Upon receipt of an oral or written request for forbearance from a multifamily borrower, a servicer shall document the financial hardship and provide a forbearance for up to 30 days. In addition, the

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servicer shall extend such forbearance period for up to 2 additional 30-day periods upon the request of the borrower provided that, the borrower's request for an extension is made during the covered period, and, at least 15 days prior to the expiration of the forbearance period then in place. Thus, the forbearance period may last up to 90 days.

A multifamily borrower that receives such a forbearance may not, for the duration of the forbearance, evict or initiate the eviction of a tenant from a dwelling unit located in or on the applicable property solely for nonpayment of rent or other fees or charges. In addition, the borrower may not charge any late fees, penalties, or other charges for late payment of rent. Furthermore, the borrower may not require a tenant to vacate a dwelling unit located in or on the applicable property before the date that is 30 days after the date on which the borrower provides the tenant with a notice to vacate, and may not issue such notice to vacate until after the expiration of the forbearance. Thus, a borrower that subjects itself to the full 90-day forbearance period may not effectively evict a tenant for 120 days. Notably, however, a borrower has the option to discontinue the forbearance at any time.

While the tenant protections that arise when a multifamily borrower subjects itself to the forbearance (Section 4023) and those that are contained in the general moratorium on evictions (Section 4024) overlap, the key differences for landlords of properties that are subject to both sections are the timing and duration of the tenant protections and whether the landlord itself is getting relief under the CARES Act. Whereas the automatic moratorium over initiating evictions of tenants for non-payment of rent under Section 4024 of the CARES Act is in effect through July 24, 2020, the moratorium over initiating evictions for non-payment of rent under Section 4023 of the CARES Act is only triggered by the landlord's request for forbearance with respect to a loan eligible for forbearance under Section 4023 of the CARES Act, and such moratorium is only in effect during any such forbearance period (which the landlord can terminate at any time). Under Section 4023 of the CARES Act, a forbearance period for the landlord (and the resulting moratorium with respect to tenant evictions) could potentially exist until the end of January 2021.

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