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## MEMORANDUM

TO: Magistrates  
District Court Judges  
Clerks of Superior Court

FROM: Nicole Brinkley, Assistant Legal Counsel

DATE: July 24, 2020

SUBJECT: CARES Act and Summary Ejectment Actions  
[Public Law 116-136](#)

At this point in time, many of you are familiar with the federal Coronavirus Aid, Relief, and Economic Security Act or “CARES Act” enacted on March 27, 2020. Sections 4022, 4023, 4024 of the Act are likely most familiar to magistrates and clerks of superior court. These provisions relate to foreclosure and summary ejectment actions and set out protections for both homeowners, landlords, and tenants of properties connected to some form of federal support by way of a federally backed mortgage or federal housing assistance through subsidy or voucher programs.

Subsection 4024(b) established a moratorium on certain evictions based on nonpayment of rent or other fees or charges and expires today, July 24, 2020. This memo provides an overview of the relevant sections that will continue to impact summary ejectment actions after the moratorium expires. [Note: This information is subject to change if the federal government acts to extend and/or modify certain provisions of the CARES Act.]

**Chief Justice Beasley [entered an order today](#) extending and modifying Emergency Directive 18. Emergency Directive 18 expires on August 23<sup>rd</sup> and was modified as follows:**

“In actions commenced on or after 27 March 2020, no writ of possession for real property shall be issued unless the magistrate or judge concludes that the property is not a “covered dwelling” as defined by Section 4024(a)(1) of the CARES Act or an “applicable property” as defined by Section 4023(f)(1) of the CARES Act [emphasis added].”

Plaintiffs will continue to be required to file the [CARES Act Affidavit \(Summary Ejectment\)](#) in summary ejectment actions commenced pursuant to Article 3 of G.S. Chapter 42 for nonpayment of rent or other fees or charges through August 23<sup>rd</sup>. The Directive was extended to ensure that magistrates have the necessary information to determine whether Sections 4023 or 4024 of the Act apply to a particular case. **This modification does not change the current process of the clerks of superior court in filing and processing summary ejectment filings. The CARES Act Affidavit, when filed with the complaint, must be served on the defendant with the summons and complaint.**

Two sections of the CARES Act, Sections 4023 and 4024, will continue to, at least temporarily, prohibit many lessors from immediately initiating summary ejectment actions upon expiration of the moratorium based on nonpayment due to a requirement that the lessors subject to these provisions provide tenants with a 30-day notice to vacate.



## **Overview of Section 4023. Forbearance of Residential Loan Payments for Multifamily Properties with Federally Backed Loans**

### Forbearance Protection for Borrowers/Landlords

Section 4023 of the Act provides mortgage payment forbearance assistance to a multifamily borrower with a federally backed multifamily mortgage loan (premises has 5 or more dwelling units) who experiences “a financial hardship due, directly or indirectly, to the COVID-19 emergency” so long as the mortgage payments were current as of February 1, 2020. Forbearance is a familiar term to clerks and assistant clerks of superior court who preside over non-judicial foreclosure proceedings. The borrower may request up to two additional 30-day periods during the “covered period” for a total forbearance period of up to 90 days. The “covered period” begins March 27, 2020 and ends upon the sooner of (1) the termination date of the COVID-19 national emergency declared by the President under the National Emergencies Act or (2) December 31, 2020. [Note: There is a similar forbearance provision in Section 4022 of the Act that applies to borrowers with a federally backed mortgage loan, which includes any loan that is secured by a first or subordinate lien on residential real property designed for the occupancy of 1 to 4 families. However, this provision is beyond the scope of this memo as it does not impact summary ejectment actions.]

### Protection for Tenants

Section 4023(d) provides protections to residential tenants of these subject multifamily dwellings (5 or more dwelling units) when the borrower on a federally backed multifamily mortgage loan receives a forbearance on the mortgage payments based on financial hardship that is due directly or indirectly to the COVID-19 emergency. As a condition of receiving the forbearance, the lessor “may not, for the duration of the forbearance, (1) **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** or (2) **charge any late fees, penalties, or other charges to a tenant described in paragraph (1) for late payment of rent**” [emphasis added]. The result is that a lessor (borrower on the mortgage), who may be dependent on a tenant’s rental payment to pay the mortgage payment, will get a reprieve from the threat of foreclosure through the forbearance if the tenant is unable to pay rent during the COVID-19 emergency.

An “applicable property” under the Act means a residential multifamily property against which secures a federally backed multifamily mortgage loan (other than temporary financing such as a construction loan) *designed principally for occupancy of 5 or more families*. The definition of “covered property” in Section 4024(a)(2) encompasses properties with federally backed multifamily mortgage loans, thus subjecting these multifamily properties to the moratorium expiring today.

### 30-Day Notice to Vacate – Section 4023(e)

Once the forbearance period expires, a multifamily borrower must provide the tenant with a **30-day notice to vacate**. The notice to vacate may not be issued until *after* the expiration of the moratorium and the forbearance period, and the lessor may not require the tenant to vacate the property “before the date that is 30 days after the date on which the borrower provides the tenant with a notice to vacate.”

## **Overview of Section 4024. Temporary Moratorium on Eviction Filings**

### Protection for Tenants

Section 4024(b) of the CARES Act prohibits lessors of “covered dwellings” from (1) **initiating summary ejectment actions based on nonpayment** of rent or other fees or charges during a 120-day period (3/27/20 through 7/24/20) and (2) **charging fees, penalties, or other charges to tenants related to such nonpayment** of rent during this same period. You will recall that, generally speaking, “covered

dwelling” are properties that participate in certain federal assistance programs or are subject to a federally backed mortgage loan (occupancy of from 1-4 families) or a federally backed multifamily mortgage loan (occupancy of 5 or more families). This includes, but is not limited to, the Low Income Housing Tax Credit (LIHTC), a Section 8 voucher program, mortgage loans owned or securitized by Fannie Mae or Freddie Mac, and mortgages insured by the Federal Housing Administration (FHA), the Department of Veterans Affairs (VA), the Department of Agriculture (USDA), or the Department of Housing and Urban Development (HUD).

### 30-Day Notice to Vacate – Section 4024(c)

After the expiration of the eviction moratorium, Section 4024(c) of the Act also requires a lessor of a “covered dwelling unit” subject to the moratorium to provide the tenant with a **30-day notice to vacate** before requiring the tenant to vacate the dwelling. The notice to vacate may not be issued until *after* the expiration of the moratorium. Under this provision, if the initial default in rental payment occurs after the expiration of the moratorium, the notice to vacate is not required since it is not a “covered property” subject to the Act. For example, if the tenant is current in paying rent through July, but defaults for the first time on August 1<sup>st</sup>, the notice to vacate is not required under the Act.

The language in Section 4024(c) omits reference to nonpayment of rent or other fees or charges when requiring the notice to vacate, which has created a legal question of intent. One interpretation of this provision would require a lessor of a covered dwelling to provide a tenant with a 30-day notice to vacate only in cases based on nonpayment. A second interpretation would more broadly require a lessor of a covered dwelling to provide a tenant with a 30-day notice to vacate, regardless of the basis for eviction. However, given that the moratorium in Section 4024(b) is limited to cases of nonpayment of rent or other fees or charges, the first interpretation appears more consistent with the moratorium provision.

### **Key Points for Magistrates and Judges Post-Moratorium**

Information provided by a plaintiff in the CARES Act Affidavit (Summary Ejectment) form [AOC-CVM-207](#) may be used by a presiding judicial official as a starting point to assist in determining whether a landlord is required to provide a 30-day notice to vacate to a tenant residing in a “covered property” or an “applicable property” pursuant to Section 4023(e) or 4024(c) of the CARES Act prior to initiating a summary ejectment action. Failure to comply with the notice requirement violates the federal law. Below are tips and possible questions a presiding magistrate or judge may want to consider when reviewing the CARES Act Affidavit:

Are the premises a “covered dwelling”?

- **No** – The premises **is not** a “covered dwelling” (number 3 on the CARES Act Affidavit). The 30-day notice to vacate under either Section 4023(e) or 4024(c) is not required by the Act, even if the basis for initiating the action is nonpayment. (Remember: The definition of “covered dwelling” is a dwelling occupied by a tenant on a covered property. A “covered property” encompasses a property with a federally backed multifamily mortgage loan.)
- **Yes** – The premises **is** a “covered dwelling” (number 3 on the CARES Act Affidavit).
  - (i) Section 4023 – A 30-day notice to vacate must be provided to a tenant *after* the expiration of the moratorium and the forbearance period if:
    - 1) the basis for filing is nonpayment of rent or other fees or charges;
    - 2) the applicable property is a multifamily property subject to a federally backed multifamily mortgage loan (5 or more dwelling units); and

- 3) the lessor received a forbearance during the “covered period” (on or after 3/27/20 and possibly through 12/31/20).
- (ii) Section 4024 - A 30-day notice to vacate must be provided to a tenant *after* the expiration of the moratorium if:
- 1) the basis for filing is nonpayment of rent or other fees or charges;
  - 2) the default occurred before the expiration of the moratorium; and
  - 3) the property is a “covered dwelling”.

Below are some questions a presiding judicial official may want to consider in determining whether a lessor has complied with Section 4023 or 4024 of the Act by providing a tenant with a 30-day notice to vacate *before* initiating a summary ejectment action:

Section 4023:

- ✓ Is nonpayment of rent or other fees or charges alleged in the complaint?
- ✓ Is the property a residential multifamily property with a federally backed multifamily mortgage loan (“applicable property)? If number 5 of the affidavit is checked “yes”, then this question will provide a more specific answer. A federally backed multifamily mortgage loan is one secured by a lien on residential multifamily real property designed principally for the occupancy of 5 or more families and is made in part or whole, insured, guaranteed, or supplemented by any officer of the federal government or under or in connection a program administered by the Secretary of Housing and Urban Development. (e.g. Fannie Mae, Freddie Mac, USDA, VA, or HUD backed mortgage).
- ✓ Did the landlord obtain a forbearance?
- ✓ Has the forbearance period expired?
- ✓ If there was a forbearance, did the landlord provide the tenant a 30-day notice to vacate *after* the expiration of the forbearance period and the moratorium?
- ✓ Have at least 30 days elapsed since the tenant was provided the notice to vacate?

Section 4024:

- ✓ Is nonpayment of rent or other fees or charges alleged in the complaint?
- ✓ Does the CARES Act Affidavit indicate that the subject property is a “covered dwelling” under the Act?
- ✓ Did the default occur before the expiration of the moratorium (notice to vacate required)?
- ✓ Did the landlord provide the tenant a 30-day notice to vacate *after* the expiration of the moratorium?
- ✓ Have at least 30 days elapsed since the tenant was provided the notice to vacate?

Court officials with any questions may contact me at [Nicole.N.Brinkley@nccourts.org](mailto:Nicole.N.Brinkley@nccourts.org) or Matt Kraus at [Matthew.R.Kraus@nccourts.org](mailto:Matthew.R.Kraus@nccourts.org). Thank you.