Circumventing Procedure in Eviction Court

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Nicole Summers, *Civil Probation* (Aug. 3, 2021), available at SSRN.

Although 98% of cases in the United States are filed in state courts, it has become common to lament the lack of state-court-focused scholarship. Statements such as "staggeringly little legal scholarship focuses on state courts and judges" and "[w]e know astonishingly little about [state courts]" abound. A recent jot highlighted an article calling for more attention on "the actual," not just "the ideal," in procedural due process.

Luckily these tides are changing. Nicole Summers is an important member of an emerging vanguard here to help.

Summers studies eviction courts from the ground up. In her latest article, *Civil Probation*, she not only provides invaluable empirical data about the real workings of eviction courts, but she contextualizes her findings in theories that enhance our understanding of state civil courts generally and eviction courts in particular. (See also her earlier study of NYC housing court.)

Her empirical contribution is extraordinary. It is well documented that the vast majority of the over 3.6 million eviction cases filed annually in the United States end in settlements brokered between landlords' lawyers and unrepresented tenants, primarily in courthouse hallways. Focusing on eastern Massachusetts, Summers analyzed 1000 randomly selected cases to determine the most prevalent features of these settlements. Summers' study investigates the terms of those settlements, asking an important question: "What are the parties settling for?" One might expect the settlements to result in some compromise between the landlord and tenant—for example, an arrangement that the tenant would pay some or all of the outstanding rent over time. But these settlements do far more than ensure that landlords collect rent.

Summers' data reveals that these settlement agreements usually contain three features: 1) the landlord gets judgment of possession; but 2) execution of that judgment—meaning actual eviction—is stayed, provided that the tenant complies with certain conditions for a certain length of time; and 3) during that period, the landlord can move the court to execute the eviction if the tenant violates one of those conditions. Those conditions can include otherwise eviction-worthy missteps like missing rent. But they can include mundane, less eviction-worthy missteps, such as failing to file certain paperwork. The settlement agreement requires compliance with these additional requests—sometimes reflecting all of the lease terms—to avoid nearly immediate eviction. These settlements are common with sophisticated, represented institutional landlords (as opposed to mom-and-pop lessors).

Summers analogizes these settlements to probation—which, like all good insights, seems obvious in retrospect. Summers rejects the typical categorization of settlements as either repayment agreements (settlements that require repayment of outstanding rent) and probationary agreements (settlements imposing behavioral terms, such as not having pets). Summers instead offers the new label of civil probation to describe settlement agreements that impose conditions on tenants (whether the conditions address repayment or behavior) and subject them to eviction if those conditions are violated.

The irony of studying Massachusetts is that it has relatively tenant-friendly housing laws, which might protect tenants from eviction for failure to comply with one minor lease term. But these settlement agreements effectively re-write those laws via contract. Like consumer contracts whose arbitration clauses effectively deny consumers the opportunity to access courts and class-action lawsuits, these agreements enable landlords to circumvent ordinary eviction proceedings when they return to court to execute their judgments. The result, as in the consumer context, is that contractual arrangements replace the underlying regulatory law—substantive and procedural.

The core insight is that these settlement agreements "place tenants under a more restrictive regime by which they can be evicted through an alternative legal process." Landlords, having threatened eviction once, can impose onerous conditions with a hair trigger to future eviction, which helps the landlord not only collect rent but also compel other kinds of compliance. Indeed, this arrangement affords the landlord access to eviction as a remedy for minor missteps even if tenants have paid all rent. Eighty one percent of eviction orders in Summers' study are issued within this civil-probation system, in contrast to 19% issued pursuant to judgment for the landlord after trial. This creates a shadow legal system, dictated not by housing law but by settlement agreements designed by landlords and their lawyers and imposing more onerous terms and obligations on tenants.

This shadow system also changes the procedural rules for eviction in four ways. It circumvents the statutorily prescribed system for serving a summons and complaint required for seeking first-order evictions; no such notice measures are required before moving to enforce a probationary settlement agreement. It circumvents statutory rules granting tenants extensive written discovery rights in regular eviction proceedings; when facing eviction for breach of a settlement agreement, "the tenant is not entitled to any discovery whatsoever." It replaces tenants' right to a trial for ordinary eviction with a right to a motion hearing over violation of a settlement agreement. Finally, after issuance of an eviction order, tenants are ordinarily entitled to an automatic 10-day stay (akin to the statutory period for filing a notice of appeal); that does not apply to evictions based on a probationary settlement agreement.

Summers' article makes important contributions to the much-needed scholarship on state civil courts. Some of these trends are reminiscent of themes often examined in the federal court literature, such as the role of parties in crafting procedures and potentially circumventing procedural rules. Here, however, these dynamics play out in the context of what Carpenter, Shanahan, Mark, and Steinberg call "lawyerless courts," where in most cases at least one party is unrepresented. Wherever one falls on the propriety of party-driven procedure in federal court, where 90% of cases involve parties represented on both sides, one-party-driven procedure should concern us all.

Summers concludes the article by calling for even more research. Her study focuses on Massachusetts, a state with tenant-friendly eviction rules. One could imagine that civil probation agreements in other states might have different features operating against a different legal regime. Likewise, Summers states that civil probation settlements are the most common means of resolving cases in the Massachusetts courts she surveyed, but comprise only 37% of cases. There are non-trivial numbers of voluntary dismissals (24%), move-out agreements (19%), default judgments (15%), and even trials (4%). One might expect these percentages to vary across different jurisdictions. (See, for example, Lauren Sudeall and Daniel Pasciuti's excellent recent study of Georgia's housing courts.) But each category raises its own issues, and there is value to identifying them and their prevalence in different contexts.

The contribution here is undeniable. Summers adds to a growing wealth of scholarship on state civil courts that will help us all better understand civil procedure across all kinds of courts all across the country. It is a welcome answer to our pleas.

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