Fixing a Hole: The Fritz defense revisited

Eliminating the unconstitutional “pay-to-defend” barrier in Minnesota eviction actions

By James Poradek and Luke Grundman

Published in Bench & Bar of Minnesota

With state and federal moratoriums on evictions for nonpayment of rent coming to an end, it will be essential that those Minnesota tenants who have been forced to live in poorly maintained rental housing during the pandemic be allowed to exercise their legal rights to defend themselves before they are evicted from their homes by Minnesota courts. But Minnesota courts have erected a draconian procedural barrier that makes it impossible for many tenants to have their day in court: a “pay to defend” requirement that forces eviction defendants to deposit unpaid back rent with the court as a precondition for trial on the defense that the landlord has violated its legal obligation to maintain the property in habitable condition.

This article addresses why Minnesota’s “pay-to-defend” requirement is a fundamental violation of procedural due process. The U.S. Supreme Court has made it clear that such procedures are antithetical to the due process rights of low-income litigants: “Surely no one would contend that either a State or the Federal Government could constitutionally provide that defendants unable to

pay court costs in advance should be denied the right to… defend themselves in court… Notice, the right to be heard, and the right to counsel would under such circumstances be meaningless promises to the poor."[1]

Likewise, the Minnesota Supreme Court recently declared in *Central Housing Associates v. Olson* that "[a] lease is not a one-way street that entitles only the landlord to the aid of the law."[2] But that is exactly what has happened in Minnesota housing courts. The pay-to-defend requirement has turned Minnesota eviction actions into a one-way street flowing straight toward eviction; due process has become a meaningless promise to the poor.

Minnesota's unconstitutional "pay to defend" requirement

In theory, Minnesota law is among the most robust in the United States at protecting tenants from being evicted from their homes for nonpayment when landlords have breached their side of the rental bargain. In the early 1970s, the Minnesota Legislature passed remedial legislation—now set forth at Minn. Stat. §504B.161—that implies into every residential lease "covenants of habitability" in which the landlord promises "to maintain the premises in compliance with the applicable health and safety laws."

In 1973, the Minnesota Supreme Court issued the landmark decision *Fritz v. Warthen,*[3] in which it held that the covenants of habitability were a "statutory right" and "statutory mandate" that impose on landlords the affirmative duty to "maintain the premises in compliance with applicable health and safety laws."

In *Fritz,* the Court recognized an affirmative defense to eviction, now commonly known as the "*Fritz* defense": "The legislative objective in enacting the implied covenants of habitability is clearly to assure adequate and tenantable housing within the state. That objective is promoted by permitting breach of the statutory covenants to be asserted as a defense in unlawful detainer actions."[4] Thus, *Fritz* created a powerful eviction defense for tenants who have been forced to live in poorly maintained buildings by a landlord who now seeks to remove them from their homes for nonpayment of rent.

In practice, however, most Minnesota courts have set up in eviction actions exactly the "one-way street" condemned by the Minnesota Supreme Court in *Central Housing*, imposing a "pay to defend" requirement before an eviction defendant can raise a *Fritz* defense. Because most low-income tenants sued for eviction based on nonpayment of rent do not have the money to prepay back rent, their *Fritz* defenses are never heard. Instead, regardless of the merits of their *Fritz* defenses, these tenants are either promptly evicted under a court-ordered writ of recovery or forced to settle their cases unfavorably. This due process crisis will only expand in the wake of the vast economic disruptions of the pandemic.

Alarmingly, statements contained in the *Minnesota Housing Court Benchbook* (2d. ed 2020) suggest that Minnesota courts are knowingly putting expediency ahead of due process in conditioning *Fritz* defenses on back rent prepayment. The *Benchbook*'s back cover describes itself as "a guide to help Judges in Minnesota work through Housing Court cases that come before them," and it has been widely circulated among judicial officers in Minnesota.

The *Benchbook* explicitly instructs at page 59 that "If Tenant alleges a FRITZ defense, then *you need to have Tenant deposit rent owed into court* and schedule a hearing." (Emphasis added.) The *Benchbook* makes clear at page 57 that the consequence of failing to prepay back rent into court is eviction without trial: "The order setting the hearing states that if Tenant does not deposit the money ordered into escrow that the hearing shall be cancelled and a Writ to be issued."

The *Benchbook* then provides commentary that raises an obvious constitutional red flag at page 57: "Sometimes, the real problem is that Tenant simply does not have the money to pay the rent owed, and the deposit requirement will resolve the issue. Often, when Tenants understand this will happen, they are more willing to settle out the case and work either on a payment agreement or they will agree to move out at some agreed date." In other words, the *Benchbook* embraces the use of back rent prepayment orders to "resolve" eviction actions before trial by forcing poor tenants who cannot prepay back rent to either "settle out the case" or be evicted from their apartments—no matter what the merits of their *Fritz* defenses.

Failing the procedural due process test

Obviously, this is not how the Minnesota court system is supposed to work.
"Due process requires that there be an opportunity to present every available defense."[5] In *Olson v. One 1999 Lexus MN License Plate*,[6] the Minnesota Supreme Court set forth in detail the legal test for analyzing procedural due process under "[b]oth the United States and Minnesota Constitutions," relying on the three-factor analysis in *Mathews v. Eldridge*:[7]

- "[f]irst, the private interest that will be affected by the official action";
- "second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and
- "finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[8]

Here, application of the three *Mathews* factors leaves no question that the pay-to-defend procedure violates procedural due process.

First, automatic back rent posting has a devastating effect on the private interests of Minnesota renters. Eviction defendants who cannot pay the back rent into court are deprived of their ability to assert their statutory habitability rights as a *Fritz* defense at the exact moment they need them most. The U.S. Supreme Court has made clear that "a cause of action [and a defense] is a species of property protected by the due process clause of the Fourteenth Amendment."[9] "The hallmark of property, the Court has emphasized, is an individual entitlement grounded in state law, which cannot be removed except 'for cause.'"[10] Accordingly, the U.S. Supreme Court has long held that the concept of "property" imposes "constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause."[11]

Even worse, the resulting eviction "deprive[s] [defendants] of a significant interest in property: indeed, of *the right to continued residence in their homes.*"[12] (Emphasis added.) "These constitutionally based interests are further threatened when the limitation that forces a person to leave a [] home renders him homeless."[13] And a court-ordered eviction greatly increases both the short-term and long-term risks of homelessness, because it becomes places a black mark on the defendant's rental history that often leads to a future of shelters and encampments for the defendant and defendant's family. The Minnesota Supreme Court itself has recognized that "[e]viction of tenants" can "result[] in homelessness" that is "inimical to public health, safety, and welfare."[14] "Not only are [defendants'] property interests involved, but the courts have also recognized that if a person's good name, reputation, honor, or integrity is at stake because of governmental action, the person is entitled to procedural due process."[15]

Further, even when eviction defendants are able to deposit back rent before trial, the property deprivations are significant. Money is a core property interest.[16] And the fact that the defendants may lose their money "only temporarily [does] not put the seizure beyond scrutiny under the Due Process Clause. The Fourteenth Amendment draws no bright lines around three-day, 10-day, or 50-day deprivations of property. Any significant taking of property by the State is within the purview of the Due Process Clause."[17] Moreover, defendants are deprived of their money at the exact moment their lives are being disrupted by court proceedings and they face the possibility of having to find new housing that requires a security deposit.

Second, erroneous deprivation of private interests is inevitable here because there is no pre-deprivation hearing at all before back rent has to be paid into court—much less the constitutionally mandated "opportunity to be heard at a meaningful time and in a meaningful way" on their *Fritz* defenses. As *Mathews* itself made clear, the "right to be heard *before* being condemned to suffer grievous loss of any kind… is a principle basic to our society."[18] (Emphasis added.) At the heart of the due process clause is the "root requirement that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event."[19] (Emphasis added.) Such a pre-deprivation hearing does not take place here. Worse still, there is no post-deprivation hearing on the *Fritz* defenses of those tenants who do not post back rent.

Third, any procedure that impedes tenants in asserting their habitability rights is contrary to the government's interest to "assure adequate and tenantable housing within the state," as explained in *Fritz*: "The legislative objective in enacting the implied covenants of habitability is clearly to assure adequate and tenantable housing within the state…. If a landlord is entitled to regain possession of the premises in spite of his failure to fulfill the covenants, this purpose would be frustrated."[20]

It is for this reason that the Minnesota Supreme Court recently rejected the argument that the 14-day notice requirement in the rent escrow statute applies to the tenant's ability to assert a *Fritz* defense during eviction proceedings: "[R]equiring written notice before a tenant can raise a common-law habitability defense would frustrate the Legislature's goals and impose a procedural barrier for tenants defending against improper evictions."[21] It is also for this reason that the Minnesota Supreme Court last year provided a common law defense when a landlord

retaliates against a tenant for raising habitability concerns: "There is a compelling reason to recognize this defense: the protection of the health, safety, and welfare of tenants and their families."[22]

In sum, the back rent prepayment requirement plainly fails all three of the *Mathews* factors and thus violates procedural due process under both the U.S. and Minnesota Constitutions.

The misguided assumptions behind prepayment requirements

How did we get to this point? Ironically, it appears that *Fritz* itself has been misinterpreted to justify the pay-to-defend deposit of back rent in nonpayment cases. The confusion springs from the statements toward the end of the *Fritz* opinion endorsing *limited* rent escrow during eviction proceedings when there is a risk that "the landlord may prevail and may not then be able to collect the rents due and yet would have been unable to dispossess the tenant during the delays occasioned by court proceedings."[23] But *Fritz* does not approve the draconian back rent prepayment system that has become standard practice in Minnesota courts. Just the opposite: *Fritz* discusses the idea of depositing "*future* rent" and "rent *to be withheld*" or some other "adequate *security* therefor if such a procedure is more suitable under the circumstances" (emphases added)—*not* the prepayment of total back rent. Moreover, *Fritz* emphasizes that "[i]n the majority of cases, the final determination of the action will be made quickly and this procedure will not have to be used." Finally, *Fritz* cautions that "[w]e also expect that, as experience dictates, additional rules may be adopted to meet any problems encountered."[24] Obviously, the procedural due process violation that has become standard practice in Minnesota housing courts qualifies as a problem that needs to be addressed with additional rules.

Likewise, Minnesota General Rule of Practice 608 does not authorize automatic back-rent prepayment.[25] Rule 608 provides only that "[i]n any eviction action case where a tenant withholds rent in reliance on a defense, the defendant shall deposit forthwith into court an amount in cash, money order or certified check payable to the District Court equal to the *rent due as the same accrues or such other amount as determined by the court to be appropriate as security for the plaintiff, given the circumstances of the case*." (Emphasis added.) As in *Fritz*, Rule 608 refers to the deposit of ongoing "rent as the same accrues" or "other" "appropriate security"—*not* the deposit of back rent. And as in *Fritz*, Rule 608 requires the court to make this determination "given the circumstances of the case," which directly indicates that the court must have a meaningful hearing to evaluate those circumstances.

The constitutionally permissible alternative

Under the *Mathews* due process test, the court must evaluate the "probable value, if any, of additional or substitute procedural safeguards."[26] Fortunately, a constitutionally permissible substitute procedure already exists, and was specifically praised by Justice Douglas in *Lindsey v. Normet*[27] as "an excellent protective procedure": the process established by the D.C. Circuit in *Bell v. Tsintolas Realty Co*.[28] The *Bell* court set forth the following criteria for ordering limited rent escrow when a tenant asserts a habitability defense like the one recognized by *Fritz*:

- **Pre-deprivation hearing:** Such a rent prepayment order would happen "only upon motion of the landlord and after notice and opportunity for oral argument by both parties."
- **Ongoing rent payments deposited:** Prepayment orders would "requir[e] only future payments falling due after the date the order is issued to be paid into the court registry."
- **Back rent payments not deposited:** "Any inclusion of back rent alleged to be due would depart from this protective purpose, since the landlord cannot recover back rent in a suit for possession, and would be in the nature of a penalty on the tenant."
- **Burden on landlord to demonstrate need for prepayment:** "[I]t may issue only when the landlord has demonstrated an obvious need for such protection."[29]

Bell provides a clear blueprint for Minnesota courts to fix their pay-to-defend due process problems. The *Bell* procedures align closely with the procedures indicated by *Fritz* and Rule 608. They conform to the procedural due process requirements of *Mathews*. And they begin to transform eviction proceedings into the "two-way streets" that the Minnesota Supreme Court has declared they must be.

JAMES PORADEK is a tenant rights litigator at Housing Justice Center in St. Paul, MN. Before joining HJC in 2020, Jim was a litigation partner at Faegre Baker Daniels. Jim graduated from University of Minnesota Law School and clerked for the Honorable David S. Doty at Minnesota federal court.

LUKE GRUNDMAN has defended the rights of homeowners and tenants with Mid-Minnesota Legal Aid since law school, beginning in 2007. He started as an Equal Justice Works fellow, spent five years fighting foreclosures and predatory lending, and then staffed a medical-legal partnership clinic at Hennepin County Medical Center. He has served as managing attorney of Legal Aid's Housing Unit since 2016.

The authors wish to thank Larry McDonough, Shana Tomenes, and Muria Kruger for their thoughtful contributions to the article.

Notes

[1] *Griffin v. Illinois*, 351 U.S. 12, 17 (1956).

[2] 929 N.W.2d 398, 409 (Minn. 2019).

[3] 213 N.W.2d 339, 342-43 (Minn. 1973).

[4] *Id.; see also id.* at 342. ("[T]he rent, or at least part of it, is not due under the terms of the lease when the landlord has breached the statutory covenants.").

[5] *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (citations omitted).

[6] 924 N.W.2d 594, 601 (Minn. 2019).

[7] 424 U.S. 319 (1976).

[8] *Supra note 7* at 602 (quoting *Mathews*, 424 U.S. at 335).

[9] *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982).

[10] *Id.* at 430.

[11] *Id.* at 429 (citing *Societe Internationale v. Rogers*, 357 U.S. 197, 209 (1958)).

[12] *Greene v. Lindsey*, 456 U.S. 444, 450-51 (1982).

[13] *Doe v. Police Comm'r of Boston*, 951 N.E.2d 337, 342 (Mass. 2011).

[14] *Central Housing*, 929 N.W.2d at 409.

[15] *Fosselman v. Commissioner of Human Servs.*, 612 N.W.2d 456, 461 (Minn. Ct. App. 2000) (citing *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971)).

[16] *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 572-73 (1972) (stating that "property interests protected by procedural due process" include ownership of "money").

[17] *N. Ga. Finishing v. Di-Chem, Inc.*, 419 U.S. 601, 606 (1975); *see also Fuentes v. Shevin*, 407 U.S. 67, 84-85 (1972)("[I]t is now well settled that a temporary,
nonfinal deprivation of property is nonetheless a 'deprivation' in the terms of the Fourteenth Amendment.' ").

[18] 424 U.S. at 333 (quoting *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 168 (Frankfurter, J., concurring)).

[19] *Boddie v. Connecticut*, 401 U.S. 371, 377-80 (1971).

[20] 213 N.W.2d at 342.

[21] *Ellis v. Doe*, 924 N.W.2d 258, 265 (Minn. 2019).

[22] *Central Housing*, 929 N.W.2d at 409 (citations omitted).

[23] 213 N.W.2d at 343.

[24] *Id.* at 343 n.5.

[25] The 600 series in the General Rules of Practice formally applies only to the Housing Courts in Ramsey and Hennepin Counties.

[26] 424 U.S. at 335.

[27] 405 U.S. at 88 (concurrence/dissent).

[28] 430 F.2d 474, 483-84 (D.C. Cir. 1970).

[29] *Id.* at 483-84.