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June 16, 2015

The Trial Court Public Access to Court Records Committee
c/o Mr. Joseph Stanton, Clerk
Massachusetts Appeals Court
John Adams Courthouse
One Pemberton Square, Room 1200
Boston, MA 02108-1705

Re: Remote Online Access to Docket Information in Landlord-Tenant Cases

Dear Members of the Committee:

As a lawyer representing low income tenants in eviction cases and a law professor training the next generation of lawyers to do the same, I appreciate the convenience of being able to look up my cases online rather than having to travel downtown, or to several towns, to check on them. This efficiency comes at a cost to my clients, however.

Because of the easy availability of landlord-tenant case information online, landlords can – and do – inexpensively and indiscriminately block vulnerable people who would be good tenants from renting apartments for their families. The prevalence of inaccuracies in the displayed information, most of which disfavor tenants, makes the problem even worse.

We ask the Committee to weigh the benefits of expanded public access against these harmful effects and to consider scaling back remote online access, or, at a minimum, to put in place safeguards to help protect tenants from unfair blacklisting based on an unreliable but easily accessible online database.

I. Many Landlords Refuse to Rent to Tenants Simply Because They Appear in the MassCourts Database.

There is no question that landlords are using MassCourts.org (hereinafter "MassCourts") to screen prospective tenants, and that more landlords are doing it more often than they were before the records were online. When the system went live, popular real estate blogger Richard Vetstein[1] called MassCourts "a powerful new and free tool for tenant screening" and described it as the result of "years of lobbying from real estate groups." *See* "Massachusetts Housing Court And Tenant Eviction History Now Online," April 24, 2013 (emphasis added),

[1] Vetstein claims an audience of 50,000 views per month.

http://massrealestatelawblog.com/2013/04/24/massachusetts-housing-court-and-tenant-eviction-history-now-online/. While advising against it, the article acknowledged that the system could be put to nefarious purposes by landlords seeking to determine whether a tenant had children, for example, in order to keep them out of the building in violation of the antidiscrimination laws. But, tellingly, the article celebrated outright the fact that landlords could now discover *not* whether a tenant had previously been evicted and for what reason, but "whether [she] has been a party to a previous eviction, small claims or related housing case."

In other words, merely by showing up in MassCourts, a tenant becomes a blacklisting target.[2] This means that a tenant who seeks an injunction ordering the LL to put the heat back on at Christmastime is blacklisted. The tenant who fixes the heat herself and then exercises her right to deduct the cost of the repairs from her rent is blacklisted. The tenant who has lived in her apartment for 25 years and is now being priced out of her gentrifying neighborhood is blacklisted.

The lucky few who are able to access legal help are particularly at risk. As Massachusetts landlord Elmir Simov put it on his blog last week:

> If I see that a prospective tenant has ever had a lawyer in any proceeding at http://www.masscourts.org as of this case forward I no longer take them as a tenant. This is a free country. They certainly have a right to hire a lawyer and I have a right to not take them as tenants because of that. http://massachusettslandlords.com/42f/ (June 12, 2015).

Having MassCourts available for free, 24 hours a day, to anyone with access to a computer or a smartphone makes this kind of blacklisting too easy, and thus increases its frequency. And the effect is not only to exclude from housing the group of people with the most restricted access to housing in the first place – low income people of color – but also to chill their exercise of their legal rights. Free online access effectively erects an additional barrier to access to justice for this already marginalized population.

II. The Data in MassCourts is Unreliable, Making Its Use as a Tenant Screening Tool Particularly Inappropriate

Some landlords, of course, will try to look more closely at the information in MassCourts to determine whether to refuse to rent to a tenant. Even this practice has an undue harmful

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[2] The practice of refusing to rent to tenants based solely on court filings, rather than dispositions, has been documented and addressed in other states, as well. *See, e.g.,* Rudy Kleysteuber, *Tenant Screening Thirty Years Later: A Statutory Proposal to Protect Public Records*, 116 Yale L. Rev. 1344, 1347 (Apr. 2007) (quoting a tenant screening bureau as saying, "it is the policy of our [landlord] customers in New York to flat out reject anybody with a landlord-tenant record, no matter what the reason is and no matter what the outcome it, because if their dispute has escalated to going to court, an owner will view them as a pain"); Eric Dunn and Marina Grabchuk, *Background Checks and Social Effects: Contemporary Residential Tenant-Screening Problems in Washington State*, 9 Seattle J. Soc. Just. 319, 336 (2010-2011) (finding that in much of Washington, residential landlords commonly reject any applicant who has been involved in an eviction case regardless of the outcome); NY State Bar Association, LegalEase: The Use of Tenant Screening Reports and Tenant Blacklisting (2013), p. 9, http://old.nysba.org/AM/Template.cfm?Section=Home&Template=/CM/ContentDisplay.cfm&ContentID=153855 (noting that merely appearing on lists leads to blacklisting and advising tenants on how to invoke protections that do not exist in MA). We also know from local interviews and sample tenant screening reports that some tenant screening bureaus will fail a tenant based on filings rather than dispositions.

impact on tenants, who may appear to be at fault merely because they moved voluntarily and gave an "agreement for judgment" to their landlords as part of the process. [3] But the harm is exacerbated by widespread inaccuracies in the displayed information that unduly prejudice tenants and their family members. Some examples follow; others can be found in the comments of Mac McCreight of Greater Boston Legal Services, submitted separately.

A. Inaccurate or Misleading Reporting of Case Outcomes

In 2014, a student of mine, Nora Mahlberg, conducted a study of 47 housing cases that our office had closed in calendar year 2013. For each, she looked at the case disposition on MassCourts and compared it against the actual outcome of the case according to our case file. In just that small sample from our office alone, Ms. Mahlberg found 4 cases – almost 10% -- in which MassCourts displayed a judgment of eviction against the tenant when in fact there was no such judgment.

It is understandable that a busy and under-staffed clerk's office would accidentally code a simple "agreement" between landlord and tenant as the ubiquitous "agreement for judgment" against the tenant, and such errors will continue, probably at this same rate. Permitting easy remote access to MassCourts magnifies the negative impact of these errors by broadcasting them to every potential landlord with a computer or a smartphone, tarring tenants who have not been evicted with the stigma of an eviction judgment.

Similarly, MassCourts underreports dismissals of eviction cases, making it look as if tenants have judgments against them when those judgments have been vacated with the landlord's consent. Often a landlord and tenant will agree to dismiss a case once something occurs – a payment is made, repairs are completed, a reasonable accommodation plan is developed – but MassCourts will not display the dismissal in the "Disposition" tab. Instead, the system will either indicate that the case resulted in an agreement for judgment for the landlord or that it the case is still active with an "agreement" in place. A tenant who wins a dismissal of her case is entitled to have the disposition of the case reflect that dismissal, especially where it will impact her access to housing in the future.

So long as our clerks' offices remain underfunded, it will be impossible to avoid such errors. Their negative impact on tenants' lives is exacerbated by full public remote online access to eviction records.

B. Misreporting that Tenants Have Active Eviction Cases

It is not just case outcomes that are misreported in MassCourts, but also the very question of whether a tenant has an active eviction case against her. Earlier this year, a legal services colleague of mine plugged just her own name into the system and drew 36 "Active" summary process cases that were not in fact active. All had been resolved.

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[3] The vast majority of tenants are not represented, and landlords' lawyers will bring to court standard form agreements that give their clients judgments for possession. Tenants lucky enough to have legal assistance often do not agree to have judgment enter against them and instead demand dismissal of the case or a pure agreement, in which the parties make commitments to each other, like payment of rent in exchange for repairs.

Again, remote access for the public can turn these simple clerical errors into barriers to stable housing for vulnerable families.

C. Children and Other People Unnecessarily Named as Eviction Defendants

Plaintiffs in summary process cases often name as defendants more people than are necessary to achieve the goal of regaining possession of the premises. As explained in more detail in the written submission of Mac McCreight of Greater Boston Legal Services, summary process plaintiffs sometimes, in a misguided attempt to cover their bases, name every adult in a household, and sometimes even minor children, even though the head of household is the only responsible tenant.[4] This is particularly inexcusable in subsidized tenancies, where with limited exceptions state and Federal law require the lease to name explicitly all persons with contract obligations.

Inclusion of persons as parties who should not be named can have important negative collateral consequences even beyond blacklisting. Adult children of a subsidized tenant might not appear in court in their parent's case, for example, and end up with an online record of default. A judgment against the head of household may result in a negative credit history for the child, who has never engaged in any credit history at all on his own (such as major purchases or loans). It can even bar the child from future access to subsidized housing and to shelter based on the existence of a prior subsidized housing eviction on his record. Given the very real impact, safeguards are needed to prevent overinclusion of eviction defendants – particularly in a free, permanent, online database.

III. Requested Safeguards

To prevent undue harm to vulnerable, mostly indigent minority tenants, we ask the Committee to reconsider giving landlords easy, online, free, remote access to the names of defendants in summary process and housing cases and instead limit remote MassCourts access to the original purpose for which it was intended – to enhance sound management through a web-based case management system. Landlords and tenant screening agencies would still be allowed to come into court and look at files; the court records would still be public. However, making the information less easily accessible would help to mitigate abuse of the information. In particular, as a supplement to the excellent suggestions made by Mac McCreight of Greater Boston Legal Services, we request that the Committee:

1. **Have parties' names displayed online only as initials**. This could likely be accomplished through the addition of a field into which parties' initials could be entered, or automatically imported by the MassCourts program, at the start of a case.

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[4] It has long been recognized that persons may be "holding under" the tenant or leaseholder, such as a spouse and children, or sublettors or others who do not stand in the relationship of tenancy with the owner. If the leaseholder or tenant is named, and the owner obtains a judgment of possession and execution in a summary process action against that person, the execution is good to displace such other persons without them being named. See Keith v. Perlig, 231 Mass. 409, 413 (1918); Fiske v. Chamberlin, 103 Mass. 495 (1870).

This field, rather than the field containing full party names, would be searchable and displayed online.

2. **Devote resources to ensuring the accuracy of case information**, with a particular focus on:

    a. Scrutinizing agreements before coding as "agreements for judgment" in favor of landlords;

    b. Ensuring that the "Final Disposition" is truly the final disposition, rather than a temporary judgment that has later been vacated and replaced with a dismissal;

    c. Displaying only heads of household as defendants in subsidized evictions. This can be accomplished in part by collaborating with HUD and DHCD to bring clarity – and then educate the major subsidized housing providers – on the question of who should, and should not, be named as a defendant in a subsidized housing eviction;

3. **Create and publicize a protocol for tenants to easily correct inaccurate data** via the court itself or the Administrative Office of the Trial Courts.

Thank you for the care with which you are addressing the question of online docket access thus far and for the opportunity to share our particular concerns in the housing context. We look forward to further conversations, and are happy to contribute additional information or details as needed, as the Committee hones its approach.

Respectfully,

Esme Caramello
Deputy Director
Clinical Professor of Law, Harvard Law School