

## Real Estate Litigation and Counseling

# “Like a Rolling Stone”: Federal Courts Continue to Find CDC Order Unlawful



By: [Andrew W. Vail](#), [Sara M. Stappert](#), and [Connor S.W. Rubin](#)

We write to follow up on our March 4, 2021 client alert, “[The Order is Rapidly Fading](#),” in which we summarized a ruling by a court in the Eastern District of Texas that the CDC Order is unlawful and we observed a shift in favor of protecting landlords’ rights. We now write to update you about two recent decisions in which two federal courts also found the CDC Order to be unlawful.

On March 10, 2021, Judge J. Philip Calabrese in the Northern District of Ohio held that the 2021 Consolidated Appropriations Act (CAA), which included significant COVID-19 relief, did not ratify the CDC Order to extend its deadline from December 31, 2020 to January 31, 2021.<sup>[1]</sup> The court found that such an extension would require explicit language from Congress, not present in the CAA.

Judge Calabrese proceeded to find that because Congress had not ratified the CDC Order, it stands as only a CDC agency order and not an act of Congress. And, although the CDC has broad power to regulate “animals or articles” found to be the source of infection, those animals or articles must be specific things “at least [] likely to be” the source of infection, and tied to interstate commerce.<sup>[2]</sup> Evictions do not qualify as an “article” under the CDC’s authority and the CDC cannot target action at “amorphous disease spread.”<sup>[3]</sup> The court reasoned that reading the Public Health Act to allow the CDC Order, as the government argued, would “authorize action with few, if any, limits—tantamount to creating a general federal police power.”<sup>[4]</sup>

The court issued a declaratory judgment providing that the CDC Order was beyond the statutory authority of the CDC. It did not grant injunctive relief, explaining that “money damages can redress Plaintiffs’ injury . . . such that an injunction is not appropriate.”<sup>[5]</sup>

Similarly, on March 15, 2021, Judge Mark Norris in the Western District of Tennessee held that even if Congress did ratify the action, the ratification was temporary and expired on January 31, 2021.<sup>[6]</sup> The court did not address the constitutional power of Congress to issue the CDC Order because the Order “now rests [once again] with the executive branch” and therefore the proper analysis is under the Administrative Procedures Act and the Public Health Act.<sup>[7]</sup> The court further held that reading the Public Health Act as being expansive enough to incorporate an eviction moratorium would (1) render the exemplary list of acceptable actions as nugatory and surplusage because “other acts” would be all inclusive, and (2) grant the CDC such drastic authority as to run afoul of the non-delegation doctrine.

Accordingly, we were correct in our previous alert to say that the CDC Order is fading and that there is a general shift in favor of protecting landlords’ rights. That said, these federal courts’ decisions regarding the CDC Order focus on that Order along with issues of federalism, federal agency authority, and separation of powers. They do not address the core constitutional issues that landlords across the country continue to face with regard to state and local eviction moratoria.

We will continue to track relevant decisions and be a resource for those also monitoring these important matters concerning constitutional and property rights.

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Conscious of the human, operational and financial strain that coronavirus is placing on businesses and organizations worldwide, Jenner & Block has assembled a multi-disciplinary Task Force to support clients as they navigate the legal and strategic challenges of the COVID-19 / Coronavirus situation.

For additional information and materials, please visit our COVID-19 / Coronavirus Resource Center.

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## Contact Us



**Andrew W. Vail**

[avail@jenner.com](mailto:avail@jenner.com) | [Download V-Card](#)



**Sara M. Stappert**

[sstappert@jenner.com](mailto:sstappert@jenner.com) | [Download V-Card](#)



**Connor S.W. Rubin**

[connor.rubin@jenner.com](mailto:connor.rubin@jenner.com) | [Download V-Card](#)

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## Practice Leaders

### **Daniel J. Weiss**

Partner

[dweiss@jenner.com](mailto:dweiss@jenner.com)

[Download V-Card](#)

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[1] *Skyworks Ltd., et al. v. Cntrs. for Disease Control & Prevention, et al.*, No. 5:20-cv-02407-JRA, Doc. 54, Opinion and Order (N.D. Ohio Mar. 10, 2021).

[2] *Id.* at \*22.

[3] *Id.*

[4] *Id.* at \*23.

[5] *Id.* at \*30.

[6] *Tiger Lilly, LLC v. U.S. Dep't of Housing & Urban Dev., et al.*, No. 2:20-CV-269, Doc. 103, Order Granting Plaintiffs' Motion for Judgment on the Administrative Record and Order Denying Defendants' Motion for Judgment on the Pleadings, at \*19 (W.D. Tenn. Mar. 15, 2021).

[7] *Id.*

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