

Real Estate Litigation and Counseling

“The Order is Rapidly Fading”—Courts Begin to Protect Landlords’ Rights in the Face of Eviction Moratoria



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Since early 2020, the COVID-19 pandemic has caused substantial hardship across the globe, including significant and widespread economic distress. The hardship has impacted the nations’ landlords small and large. For example, according to a January 2021 report published by Moody’s Analytics, 18% of renters nationwide—more than 10 million people—are behind on rental payments.^[1] That is more than triple of an average year.

The federal government, along with some state and local governments, have furthered that distress by instituting rent and/or eviction moratoria that disregard landlords’ economic realities. These actions threaten the ability of landowners to meet their own mortgage, maintenance, employee, and other obligations, potentially resulting in debt, forced loss of property, and a cascading effect throughout the economy. Significantly, and the focus of this article, many or most of these continuing moratoria also violate the subjected landlords’ contractual, statutory, and constitutional rights.

The most-publicized moratorium order is the federal government’s eviction moratorium, issued by the Centers for Disease Control and Prevention on September 4, 2020 (the CDC Order),^[2] and extended twice, now through “at least March 31, 2021.”^[3] The CDC Order prevents landlords with a “legal right to pursue eviction” from doing so on the basis of missed rental payments if the renter executes a copy of the CDC-issued declaration form stating they have suffered economic distress due to the fallout from COVID-19.^[4]

On February 25, 2021, in deciding summary judgment on the claims brought by landlords challenging the CDC Order, Judge J. Campbell Barker in the Eastern District of Texas ruled that the Order is unlawful.^[5] The court found that the CDC lacked the authority to issue a nationwide eviction ban because the CDC’s Order does not bear a strong enough nexus to interstate commerce. The court reasoned that, while a person’s “residence in a property may have economic origins, that alone is not enough to make the regulated activity itself economic in character.”^[6] Judge Barker ruled that plaintiffs are entitled to declaratory relief, holding the CDC Order unlawful and unenforceable. Because the CDC stated it would “respect the declaratory judgment,” the Court did not issue an injunction against the Order. The DOJ announced that it will appeal the decision on behalf of the CDC, the Department of Health and Human Services, and the United States.^[7]

This decision is in line with what generally appears to be a shift now in favor of protecting landlords’ rights and an increasing focus on the rationales as set forth by the defenders of eviction bans, despite that previously only a few courts had agreed with landlords’ arguments that the CDC Order is unlawful.^[8]

The trend may also be developing as to state and local moratoria. Recently, Judge Anthony Epstein of the Superior Court of the District of Columbia held that a Washington, DC ban on *filing* eviction cases was an unconstitutional violation of landlords’ right to access the courts.^[9] The District of Columbia

Attorney General has announced he will appeal that decision.^[10] The court has also denied the District of Columbia's motion to stay the opinion pending appeal.^[11]

As noted, earlier in the pandemic, other federal court challenges to the CDC Order were litigated but all either failed in the district courts or remain pending:

- *Brown, et al. v. Azar, et al.*, Case No. 1:20-CV-03702-JPB (N.D. Ga. Sept. 8, 2020); Case No. 20-14210 (11th Cir. 2020) (currently before the Eleventh Circuit on appeal of the denial of preliminary injunction);
- *Skyworks, Ltd., et al. v. Cntrs. for Disease Control & Prevention, et al.*, Case No. 5:20-cv-02407-JRA (N.D. Ohio Oct. 23, 2020) (currently before the District Court on plaintiffs' motion for preliminary injunction);
- *Tiger Lily, LLC, et al. v. U.S. Dep't of Housing & Urban Dev., et al.*, Case No. 2:20-cv-2692 (W.D. Tenn. Sept. 16, 2020) (the District Court had denied the landlords' motion for preliminary injunction, leaving defendants' motion for judgment on the pleadings and plaintiffs' motion for judgment on the administrative record pending);
- *Chambless Enterprise LLC & Apartment Ass'n of Louisiana, Inc. v. Cntrs. for Disease Control & Prevention, et al.*, Case No. 3:20-cv-01455 (W.D. La. Nov. 12, 2020); Case No. 21-30037 (5th Cir. 2021) (currently before the Fifth Circuit on interlocutory appeal of the denial of preliminary injunction);
- *Alabama Ass'n of Realtors, et al. v. U.S. Dep't of Health & Human Servs.*, Case No. 1:20-cv-03377 (D.D.C. Nov. 20, 2020) (case stayed); and
- *Dixon Ventures Inc. v. Dep't of Health & Human Servs., et al.*, Case No. 4:20-cv-01518 (E.D. Ark. Dec. 30, 2020) (currently before the District Court, awaiting defendants' response to the complaint).

In these cases, the plaintiff-landlords have argued:

- The CDC Order violates their legal right to contract in violation of Article I, § 10, Cl. 1 of the United States Constitution because the Order unjustly keeps plaintiffs from enforcing the central obligation to pay rent through legal action.
- The CDC Order constitutes an uncompensated taking under the Fifth Amendment of the United States Constitution because it forces rental unit owners to bear the costs of providing tenant public assistance which, in all fairness and justice, should be borne by the public as a whole.
- The CDC Order violates plaintiffs' due process under the Fifth and Fourteenth Amendments of the United States Constitution by systematically frustrating a landlord's ability to access state courts to commence eviction proceedings to collect rent or recover possession of their property.
- The CDC Order oversteps the Government's authority to regulate interstate commerce under the Constitution's Commerce Clause.
- The authorizing statutes giving power to the US Department of Health and Human Services and the CDC are not broad enough to grant this type of authority because the statute includes an archetypal list including inspection, fumigation, disinfection, sanitation, extermination, and destruction of infected animals or articles. This list does not include the type of massive intrusion that a nationwide eviction ban does.

- The CDC Order violates the Administrative Procedure Act because it is not supported by substantial evidence or data as to why a temporary ban on evictions is reasonably necessary to fight the COVID-19 pandemic.

In the Northern District of Georgia case, for example, the court did not squarely address Commerce Clause concerns identified by Judge Barker, but addressed other statutory and constitutional authority questions in rejecting the landlords' claims. That court held that "Congress gave Secretary of HHS broad power to issue regulations as necessary to prevent the introduction, transmission, or spread of communicable diseases."^[12] The court went on: "the Order is necessary to control the COVID-19 pandemic, the CDC was authorized to issue it."^[13] The landlords have appealed to the Eleventh Circuit.^[14]

In addition to the federal challenges described above, state-level eviction bans have been challenged in New York and a host of other states, including in at least California,^[15] Florida, Illinois, Minnesota, Missouri, New Jersey, Pennsylvania, and Washington^[16] state and federal courts, protesting the specifics of those states' executive actions and raising claims based on state law, the US Constitution, and the particular state's constitution. These state-based challenges raise many of the same issues as the federal cases, with unique claims based on the individual state's actions.

For example, a case recently filed on behalf of landlords in the Eastern District of New York challenges New York State's most recent extension of the state eviction moratorium, Part A of the COVID-19 Emergency Eviction and Foreclosure Prevent Act of 2020 (NY Act). The NY Act imposes a blanket stay on nearly all summary proceedings, new or pending, staying all eviction proceedings until at least May 1, 2021 if tenants provide a hardship declaration in the statute's form. The moratorium also compels landlords to produce, with every written demand for rent, an informational form—the text of which is mandated by the government to the tenant explaining the NY Act and legal resources available. The suit alleges that the NY Act violates landlords' First Amendment rights in compelling speech to tenants, and violates other federal and state constitutional protections.^[17]

In sum, to the extent governments continue to ignore the economic and legal rights impacted by rent and/or eviction moratoria, landlords will want to closely track these laws, ordinances, and orders, as well as the challenges to them, considering their rights and options at each turn. We will continue to be a resource for landlords to do so.

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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[1] Jim Parrott & Mark Zandi, *Averting an Eviction Crisis*, Moody's Analytics (Jan. 2021)
<https://www.moodyanalytics.com/-/media/article/2021/averting-an-eviction-crisis.pdf>.

[2] Temporary Halt in Residential Evictions to Prevent Further Spread of COVID-19, 85 Fed. Reg. 55,292 (Sept. 4, 2020).

[3] Temporary Halt in Residential Evictions to Prevent Further Spread of COVID-19, 86 Fed. Reg. 8,020 (Feb. 3, 2021).

[4] Currently, 16 states and the District of Columbia have eviction bans of their own that may supersede the protections laid out in the CDC Order: California, Connecticut, Delaware, the District of Columbia, Hawai'i, Illinois, Maryland, Minnesota, Montana, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Vermont, and Washington. A Cheat Sheet of the current residential and commercial eviction moratoria can be found [here](#).

[5] See *Terkel, et al. v. Cntrs. for Disease Control & Prevention, et al.*, No. 6:20-cv-00564, Doc. 45, Opinion and Order (E.D. Tex., Feb. 25, 2021).

[6] *Id.* at *12.

[7] *Terkel, et al.*, Doc. 47, Notice of Appeal (E.D. Tex. Feb. 27, 2021).

[8] Prior to Judge Barker, no federal courts had agreed with landlords' claims. However, two state courts have questioned the enforceability of the CDC Order. The County Court for Escambia County, Florida found that "[a]bsent payments [from the government] to landlords, landlords have had their property 'taken' without just compensation, which is prohibited by the Fifth Amendment." *Morguard Woodcliff Apartments, Inc. v. Cowley*, 2020 CC 003778, at *3 (Fla. Escambia Cnty. Ct., Nov. 24, 2020). The court went on to state that if the government had stepped in and paid landlords, it would likely not have constituted an unconstitutional taking. See *id.* In addition, Judge Holly Meyer, a judge in Cleburne County, Arkansas, entered an order declaring the CDC Order unconstitutional in early December of 2020. See *Ray v. Woodall*, No. 12-cv-20-175 (Ark. Cir. Ct. Cleburne Cty., Dec. 8, 2020). Judge Meyer cited the Arkansas Constitution for special considerations of rights to private property, noting that "The United States Constitution and Arkansas Constitution principally entrust the safety and health of the people of Arkansas to the elected officials of the state of Arkansas. Judges typically show deference to state elected officials acting under police powers in emergency circumstances like the COVID-19 Pandemic. Arkansas officials, unlike Massachusetts, New York, and Pennsylvania, for example, have determined not to act regarding residential evictions although there has been other state action addressing COVID-19." *Id.* Finally, it is also worth noting that in Georgia, judges in at least two counties are refusing to acknowledge the CDC Order.

Magistrate Judges in Carroll and Coweta Counties have indicated they are not halting evictions despite the CDC Order in place, arguing that the CDC does not have power to mandate a halt in evictions in the state of Georgia. See The Associated Press, *In 2 Georgia counties, CDC order doesn't stop evictions*, Associated Press (Feb. 8, 2021), <https://apnews.com/article/pandemics-georgia-carrollton-coronavirus-pandemic-a5a168682b7e6f1b0f88992fb190c9ed>.

[9] See *Borger Management, Inc. v. Abel Hernandez-Cruz, et al.*, Case No. 2020 LTB 006637 (D.C. Sup. Ct. Dec. 16, 2020).

[10] *Id.* Notice of Appeal (D.C. Sup. Ct. Jan 14, 2021).

[11] *Id.* Order Denying District of Columbia's Motion to Stay (D.C. Sup. Ct. Feb. 19, 2021).

[12] *Brown, et al. v. Azar*, No. 1:20-cv-03702-JPB, 2020 WL 6364310, at *19 (N.D. Ga. Oct. 29, 2020).

[13] *Id.*

[14] *Brown, et al.*, case No. 20-14210 (11th Cir. 2020)

[15] In California, the San Francisco Apartment Association brought suit against the City of San Francisco, challenging the statewide moratorium on residential evictions that Governor Newsom ordered on March 16, 2020 through Executive Order N-28-20 and seeking an emergency injunction of its enforcement. *San Francisco Apt. Ass'n v. City of San Francisco*, No. CPF-20-517136 (Cal. Sp. Ct. June 29, 2020). A motion for injunctive relief was denied by the court on August 3, 2020.

[16] In Seattle, the Rental Housing Association of Washington brought suit against the City of Seattle over its eviction bans that went into effect in March of 2020. The Seattle City Council also enacted an Ordinance that provided defenses to residential rental eviction proceedings for those tenants unable to pay rent. This suit brings claims for violations of procedural due process, preemption of state law, unlawful impairment of contract, violation of separation of powers, violation of equal protection, unlawful taking of property, and violation of substantive due process. *Rental Housing Ass'n. v. City of Seattle* (Wash. Sup. Ct. King Cty. Sept. 21, 2020).

[17] *Chrysafis, et al. v. James*, Case No. 2:21-cv-00998-SJF-ARL (E.D.N.Y. Feb. 24, 2021).