

CDC Eviction Moratorium – Revised Analysis

Overview

The Centers for Disease Control and Prevention’s order entitled “Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19,” which first took effect upon publication in the Federal Register on Sept. 4, declared a national moratorium on certain residential evictions in the name of protecting the public health. See 85 Fed.Reg. 55292 (Sept. 4, 2020). The original order was set to expire on December 31, 2020, but Congress extended the order in Sec. 502 of the Consolidated Appropriations Act of 2021.¹ The CDC then extended the order to March 31, 2021, 86 Fed.Reg. 8020 (Feb. 3, 2021), and has now extended it again in new Order effective through June 30, 2021 (hereafter, references to “Order” mean the new, March 29, 2021, order).²

How the Order works

In summary, the Order enables tenants who meet certain criteria to invoke protection against eviction by providing a signed declaration to their landlords. See Order at 12-13; see also 85 Fed.Reg. at 55293. To sign the declaration, a tenant needs to meet five essential criteria:

- Earned no more than \$99,000 in 2020 (\$198,000 if married and filing jointly), or expects to earn no more than \$99,000 in 2021, received an Economic Impact Payment (a.k.a. “stimulus check”), was not required to report income to the IRS in 2020;
- Be unable to pay full rent due to an income loss or “extraordinary” medical bills
- Have used best efforts to obtain “all available governmental assistance for rent or housing,”
- Be likely to become homeless or forced to “live in close quarters in a new congregate or shared living setting” if evicted, and
- Use best efforts to “make timely partial payments that are as close to the full payment as the individual’s circumstances may permit” taking into account other nondiscretionary expenses.”

See Order at 2; see also 85 Fed.Reg. at 55293. Once a tenant has provided the declaration, the text of the order states that a landlord shall not “evict” the tenant from residential premises. See Order at 13-14; see also 85 Fed.Reg. at 55296.

Shortcomings with the Order

“‘Evict’ and ‘Eviction’” are defined to mean “any action by a landlord, owner of a residential property, or other person with a legal right to pursue eviction or a possessory action, to remove or cause the removal of a covered person from a residential property.” Order at 2; see also 85 Fed.Reg. at 55293. However, the FAQ document³ that the CDC first issued in October 2020 suggested, and has continued to suggest,

¹ See Pub.L. 116-260, § 502 (Dec. 27, 2021).

² CDC, HHS, Temporary Halt in Residential Evictions to Prevent the Spread of Covid-19 (Mar. 29, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/more/pdf/CDC-Eviction-Moratorium-03292021.pdf>

³ Now at: <https://www.cdc.gov/coronavirus/2019-ncov/downloads/Eviction-Moratoria-Order-FAQs-02012021-508.pdf>

that the Order prohibits only the final step in the eviction process (i.e., the actual physical removal of a covered tenant), and not prior steps—such as issuing eviction notices or filing eviction lawsuits. See FAQ at 1. At least one federal court has found this to be a permissible construction of the order.⁴

Accordingly, in many jurisdictions landlords have continued to serve eviction notices, have been allowed to file eviction lawsuits even against covered tenants, and even obtain eviction judgments—with only the physical eviction being delayed by the CDC order. Advocates hoped to mitigate the impacts of this unfavorably interpretation by relying on state law, which generally requires a landlord to plead and prove a present or immediate right to possession of the disputed premises as a condition of filing a summary eviction lawsuit. See, e.g., Robert M. Schoenhaus, *Forcible Entry and Detainer: Requisite Right, Title or Possession of Plaintiff*, 21 Am. Jur. Proof of Facts 2d 567 (Originally published 1980, updated Sept. 2020). Unfortunately, reports from many jurisdictions suggest that many local courts are failing to abide by this longstanding tenet of landlord-tenant law.

Yet another crack in the CDC eviction halt that emerged with the FAQ document was its application to eviction cases not based formally on the nonpayment of rent. While the Order allows evictions only on five enumerated grounds,⁵ all of which involved lease violations other than “nonpayment of rent or similar housing-related payment,” the FAQ asserted in multiple places that that the Order protected covered persons from eviction “solely on the basis of the failure to pay rent or similar charges[.]” See FAQ at 1, 5, 7-8. Even though a closer analysis shows that the Order should still prevent evictions other than those falling within the five enumerated categories, many local courts have interpreted the Order not to apply where the landlord simply declines to renew an expiring term lease or terminates a periodic tenancy without cause—even if the landlord’s motive for doing so is the tenant’s failure to pay rent.⁶ As time has progressed, fewer and fewer tenants occupying under the CDC Order have unexpired lease and more and more landlords have learned of this work-around (in some instances from judges) and the plausibility of success based on the proclivities of their local courts.

Advocates had hoped the CDC would address these two major problems with the interpretation and enforcement of the Order in its most recent extension. But the CDC chose not to do so.

⁴ See *KC Tenants v. Byrn*, ___ F.Supp.3d ___, No. 20-000784-CV-W-HFS, 2020 WL 7063361, at *2 (W.D. Mo. Nov. 30, 2020) (“It is unreasonable to suppose that ‘covered persons’ are protected from preliminary law suits and the like, not mentioned in the Moratorium, when only removals or evictions are forbidden for protected tenants before January 1. I find nothing in the Moratorium that arguably prevents getting ready to evict early in the New Year. While the preliminary actions may be a very unfortunate practice, deeply troubling to tenants and even a health hazard, as the argument is developed by plaintiff and by amici, judges have no authority to add new requirements to the CDC regulations.”).

⁵ See Order at 11 (“(1) Engaging in criminal activity while on the premises; (2) threatening the health or safety of other residents; (3) damaging or posing an immediate and significant risk of damage to property; (4) violating any applicable building code, health ordinance, or similar regulation relating to health and safety; or (5) violating any other contractual obligation, other than the timely payment of rent or similar housing-related payment (including non-payment or late payment of fees, penalties, or interest).”).

⁶ For a more detailed discussion of the CDC Order’s application to such “no cause” eviction, see NHLP’s memorandum entitled “Application of CDC Eviction Halt Order to Lease Expiration and No-Cause Eviction Notices,” (Feb. 11, 2021), <https://www.nhlp.org/wp-content/uploads/CDC-no-cause.pdf>

Complications arising from judicial challenges

To make matters worse, a series of federal court decisions in recent weeks have declared the Order to have been outside the CDC's authority (or, in one case, even outside Congressional power to regulate interstate commerce). One such decision declared the order unenforceable in the Western District of Tennessee, and the Sixth Circuit Court of Appeals denied a stay of that order on the grounds that the government did not even show serious questions on the merits.⁷ Although previous federal courts had held rejected constitutional challenges to the Order⁸ and although none of the federal court decisions are clearly binding on state courts (except in the Western District of Tennessee, where the CDC Order has been explicitly vacated),⁹ the split in federal case law is now significant enough that many state courts will likely decide to follow those opinions holding the Order unconstitutional.

Tenants, therefore, can no longer defend against eviction merely by showing that they are covered persons and their evictions are not based on any of the enumerated exceptions to the CDC Order. Tenants must now be prepared to also persuade that the CDC Order is constitutional. If—as is likely—tenants are being evicted without formal cause, they must also be able to persuade the court that the CDC Order applies to their case.

These dynamics will naturally produce significant secondary effects. More landlords will likely choose to file eviction cases even against tenants covered by the CDC Order, in hopes the judge hearing the case will find the CDC Order unconstitutional and decline to enforce it. And tenants occupying their housing under the CDC Order, who in many jurisdictions already had to choose between physical displacement or asserting the protection at the cost of acquiring an eviction case record (that would drastically reduce their future access to rental housing) now have even greater incentive to move out. With the protection of the CDC Order not even reliably assured, tenants face the prospect of acquiring eviction records and being physically evicted anyway.

For advocates, the status of the CDC Order means it cannot reliably be counted upon to prevent the eviction of a covered person—even where it ought well to apply. Advocates must be prepared to advise tenants on the risks and limitations of relying upon the Order, to explain to courts why they can and should continue to enforce the Order, and to respond to the various artifices and circumlocutions landlords will use to defeat it.

Status of litigation challenging the CDC Order

Landlord groups have now filed (at least) nine civil actions challenging the CDC eviction halt order constitutional grounds.¹⁰ In several cases, the challengers moved for preliminary injunctions to prevent

⁷ These decisions occurred in the case of *Tiger Lilly LLC v. HUD*, No. 2:20-cv-02692 (W.D.Tenn.) and 21-5256 (6th Cir.). Neither opinion had appeared on Westlaw as of the time of this writing.

⁸ See *Chambless Enterprises, LLC v. Redfield*, 2020 WL 7588849 at *8 (W.D.La. 2020); see also *Brown v. Azar*, ___ F.Supp.3d ___, 2020 WL 6364310 (N.D.Ga. 2020).

⁹ See *U.S. v. Mendoza*, 464 U.S. 154, 160 (1984).

¹⁰ The known cases are *Brown v. Azar*, No. 1:20-cv-03702 (N.D.Ga.), *KBW Investment Properties LLC v. Azar*, No. 2:20-cv-04852 (S.D.Ohio), *Tiger Lilly LLC v. HUD*, No. 2:20-cv-02692 (W.D.Tenn.); *Skyworks, Ltd. v. CDC*, No. 5:20-cv-02407 (N.D.Ohio); *Chambless Enterprises LLC v. Redfield*, No. 20-1455 (W.D. La.); *Terkel v. Centers for Disease*

enforcement of the order. In three cases (*Brown*, *Tiger Lilly*, and *Chambliss*), the motions were denied at the preliminary injunction stage. See *Chambliss Enterprises, LLC v. Redfield*, No. 3:20-CV-01455, 2020 WL 7588849 (W.D. La. Dec. 22, 2020); *Tiger Lily LLC v. United States Dep't of Hous. & Urban Dev.*, No. 2:20-CV-2692-MSN-ATC, 2020 WL 7658126 (W.D. Tenn. Nov. 6, 2020); *Brown v. Azar*, No. 1:20-CV-03702-JPB, 2020 WL 6364310 (N.D. Ga. Oct. 29, 2020). The plaintiffs in two of those cases, *Brown* and *Chambliss*, have filed notices of appeal. In two other cases, *Skyworks LTD v. CDC* and *Terkel v. CDC*, the trial courts consolidated its ruling on the merits with the preliminary injunction motions and issued orders declaring the CDC Order unconstitutional. See *Terkel v. Centers for Disease Control & Prevention*, No. 6:20-CV-00564, ___ F.Supp.3d ___, 2021 WL 742877 (E.D. Tex. Feb. 25, 2021); see *Skyworks, Ltd. v. Centers for Disease Control & Prevention*, No. 5:20-CV-2407, 2021 WL 911720, at *1 (N.D. Ohio Mar. 10, 2021). In *Tiger Lily*, the Court granted summary judgment for the challengers after previously denying a preliminary injunction due to lack of irreparable harm to the plaintiffs. See *Tiger Lily LLC v. HUD*, No. 2:20-cv-02692 (W.D.Tenn.) and 21-5256 (6th Cir.) (discussed at note 6, supra). In *KBW Investment Properties*, the plaintiffs voluntarily dismissed their action after the court declined to enter a temporary restraining order. The remaining cases are still pending in trial courts, where no substantive rulings have yet been issued.

As discussed in greater depth in a separate memorandum,¹¹ *Terkel* is a wild decision which holds that not even Congress has the authority to restrict residential evictions. *Terkel*, a declaratory judgment action that applies only to the parties before the court, is on appeal to the Fifth Circuit. See *U.S. v. Mendoza*, 464 U.S. 154, 160 (1984) (nonmutual collateral estoppel inapplicable to constitutional claims against federal government). Note that certain additional findings about the impacts of evictions on interstate commerce have been added to the CDC Order, likely in response to the *Terkel* opinion. See Order at 8. Still, the author predicts courts inclined to find the CDC Order unconstitutional are more likely to follow the reasoning set forth in *Skyworks v. CDC* and the pair of *Tiger Lily v CDC* rulings.

Skyworks

The CDC Order is based on a regulation authorizing the CDC director to “take such measures to prevent such spread of the diseases as he/she deems reasonably necessary,” when state and local health officials have failed to do so. 42 C.F.R. § 70.2. Both that regulation and its enabling statute, a provision of the Public Health Services Act codified at 42 U.S.C. § 264(a), offer examples of the types of measures that might be taken under this authority: “including inspection, fumigation, disinfection, sanitation, pest extermination, and destruction of animals or articles believed to be sources of infection.” 42 C.F.R. § 70.2; see also 42 U.S.C. § 264(a) (“For purposes of carrying out and enforcing such regulations, the Surgeon General may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be

Control & Prevention, No. 6:20-CV-00564 (E.D.Tex), *Alabama Assn. of Realtors v. Dept. of Health & Human Services*, No. 20-cv-3377 (D.D.C.), *Dixon Ventures, Inc. v. USA* 4:20cv-1518-KGB (E.D.Ark.), and *Mossman v. CDC*, 1:21-cv-00028 (N.D.Iowa).

¹¹ See National Housing Law Project, “Regarding the declaratory judgment in *Terkel v. CDC* declaring the CDC eviction halt order unconstitutional,” (Feb. 28, 2021), <https://www.nhlp.org/wp-content/uploads/2021.02.28-Revised-Terkel-memo.pdf>

necessary.”). The *Skyworks* and *Tiger Lily* courts found that imposing an eviction moratorium was so different in kind to the types of disease control measures contemplated under the PHSA that the CDC was without authority to impose it. *See, e.g., Skyworks* at *10-11.

Advocates were concerned about such an argument from the time the CDC first announced the Order in September 2020. However, two U.S. District Courts evaluated the argument in depth and rejected it. *See Chambless Enterprises, LLC v. Redfield*, No. 3:20-CV-01455, 2020 WL 7588849 at *3-*11 (W.D. La. Dec. 22, 2020); *Brown v. Azar*, No. 1:20-CV-03702-JPB, 2020 WL 6364310 *10 (N.D. Ga. Oct. 29, 2020). Both courts found, in essence, that Congress had broadly delegated authority to public health experts at the Department of Health & Human Services and the CDC to determine what measures would be necessary to respond to an infectious disease outbreak and to impose those measures—and had put adequate guardrails in place such as the requirement that intrusions on private property be reasonably necessary and that state and local public health officials had failed to take sufficient steps. *See Chambless Enterprises* at *6-7, *citing Brown* at *8. Then, the legal issue was seemingly rendered moot altogether when Congress statutorily extended the CDC order in December 2020. *See Pub.L. 116-260, Sec. 502 (Dec. 27, 2020)*; *see also Isbrandtsen-Moller Co. v. United States*, 300 U.S. 139, 147 (1937) (recognizing that Congress may ratify and give effect to executive actions that were unauthorized when taken).

Nevertheless, the court in *Skyworks* found that Congress did not ratify the CDC Order:

“Ratification, or ‘congressional authorization,’ requires something more than ‘mere Acquiescence’ to the action. Here, Congress in the Appropriations Act extended the date on which the CDC’s first order expired. But Congress did not speak to the merits of the policy at issue, as it did in the CARES Act. Nor did Congress amend the organic statute, Section 361 of the Public Health Services Act, either to create a new subsection authorizing an eviction moratorium or add such an action to the list of permissible agency actions[.] All Congress did was change the expiration date of the first order.”

Skyworks at *12 (internal citations omitted). The court went on to say that “At that moment, congressional action facilitated the transition between presidential administrations and, effectively, gave the incoming administration the opportunity to determine its own policies for responding to the pandemic.” *Id.* at *12.

The principal flaw with the *Skyworks* reasoning is that Congress did not “merely acquiesce” to the CDC eviction halt order. The doctrine of Congressional acquiescence is actually a completely separate line of analysis than ratification, in which party may establish Congressional approval of an agency action by showing Congress was aware of the action and declined to overrule it. *See, e.g., Schism v. U.S.*, 316 F.3d 1259, 1294 (Fed. Cir. 2002) (“The doctrine of acquiescence is premised upon Congress’ failure to act in response to an action it might view as previously unauthorized, unlike the ratification context where Congress affirmatively acted to demonstrate its approval of an agency action.”). A party’s burden to establish Congressional approval through acquiescence is more difficult because various factors other than actual agreement may explain the failure to enact legislation overturning an agency’s action; as a result, acquiescence generally requires showing that Congress allowed an agency action to stand for a significant period of time and declined to reverse the agency action when reviewing or amending the relevant statute. *See generally Schism* at 1295.

Here, however, Congress did not signal its approval merely by declining to overturn the CDC's Order; Congress affirmatively demonstrated its approval by extending the Order itself. Ratification occurs where Congress has knowledge of the agency's action and gives effect to it as if originally authorized by Congress. *See Schism* at 1289, *citing* Restatement (Second) of Agency, § 82 (1958). Both prongs are clear in this instance. And there was no need for Congress to amend the enabling legislation (i.e., the Public Health Services Act) to authorize the CDC to impose an eviction moratorium because the CDC had already exercised that power under its preexisting statutory authority; in extending the Order, Congress implicitly recognized that the CDC did, indeed possess such authority.

Furthermore, the *Skyworks* court's suggestion that Congress extended the Order only to allow the Biden administration an opportunity to determine its own pandemic policies would seem to corroborate, not undercut, the showing of Congressional ratification. The outgoing Trump administration had adopted the eviction halt Order and if Congress truly wanted to enable the Biden administration latitude to set its own policies, then one alternative that needed to be available to Biden administration was to keep that Order in place. A finding of ratification is thus consistent with, not contrary to, the supposed Congressional objective of enabling the incoming administration to set its own policies on the pandemic.

Tiger Lily

Like the *Skyworks* court before it, the *Tiger Lily* decision found first that Congress did not empower the CDC to issue eviction moratoriums under the Public Health Services Act, and then that Congress did not make the CDC's Order effective through the Appropriations Act. *See Tiger Lily* (Dist. Ct. Order) at p. 19. Unlike the *Skyworks* decision, however, the *Tiger Lily* court did not find that Congress had failed to ratify the Order—but instead that Congress had not “permanently” ratified the Order:

The Consolidated Appropriations Act, 2021 extended the eviction moratorium only through the end of January. Despite the winding history of the Halt Order, it now rests within the Executive Branch, and it would no longer be effective but for executive action. As a result, it makes little sense to find that the Halt Order was permanently ratified by a Congressional extension of limited duration.

Tiger Lily (Dist. Ct. Order) at 19. The court went on to suggest that, had Congress given CDC the authority to further extend the Order, such would have amounted to an “open-ended delegation” of legislative authority. *Id.* at 19-20.

Reviewing this ruling, the Sixth Circuit adopted the same essential reasoning, declaring that “nothing in § 502 expressly approved the agency's interpretation. All § 502 did was congressionally extend the agency's action until January 31, 2021. After that date, Congress withdrew its support[.]” *Tiger Lily* (Order Denying Stay) at p. 7. The Sixth Circuit went on to disregard consideration of the public interest in the CDC Order because it found no serious questions going to the merits of the appeal. *Id.* at 7. This latter finding is particularly indefensible given that two federal district courts reached opposite conclusions regarding CDC's authority under the Public Health Services Act. *See Chambless Enterprises, LLC v. Redfield*, No. 3:20-CV-01455, 2020 WL 7588849 at *3-*11 (W.D. La. Dec. 22, 2020); *Brown v. Azar*, No. 1:20-CV-03702-JPB, 2020 WL 6364310 at *10 (N.D. Ga. Oct. 29, 2020).

While the *Tiger Lily* rulings finally center on the correct question of whether a Congressional ratification occurred, both arbitrarily and incorrectly interpret the Congressional extension as something other than

an acknowledgement of and assent to the CDC's authority to restrain evictions (when necessary as a public health measure during a pandemic). The trial court, making no effort to analyze or describe Congress' intentions, viewed this as a seemingly random one-month extension and "temporal limit." See *Tiger Lily* (Dist. Ct. Order) at p. 19. The appellate court went further, stating that Congress affirmatively "withdrew its support" at the conclusion of the brief extension. *Tiger Lily* (Order Denying Stay) at p. 7. In reaching these findings, both courts ignore both the text and the context of the Congressional action.

Congress could have fashioned and enacted its own eviction moratorium, as with the CARES Act. See 15 U.S.C. § 9058. Instead, Congress extended the eviction restrictions that CDC had created and imposed. In so doing, Congress signaled approval not only of CDC's authority to impose an eviction moratorium but of the exact moratorium the CDC had crafted. And by "extending" the moratorium, Congress necessarily implied it was furthering an order that was already in effect—not imposing a new eviction restriction in place of an unauthorized one. By its very text, the CDC moratorium was meant to be extended in short increments tied to the status of the pandemic. Furthermore, as the *Skyworks* court was perhaps alluding to, the extension to January 31, 2021, enabled the extension to keep the eviction protections in place through the presidential transition period, where it could then be further extended or modified by a new CDC director. Not only is there no support for the notion that Congress intended the CDC Order to last until January 31, 2021, and no further, but Covid-19 infections were at an all-time high around the time of the Appropriations Act and no reasonable person could have determined that the need for eviction restrictions would have disappeared by then.

The *Tiger Lily* trial court's suggestion that Congressional ratification of the CDC Order would have amounted to an unconstitutional delegation of legislative authority also cannot be taken seriously. That Congress approved one specific type of CDC action (i.e., an eviction halt order), limited in scope and duration and supported by extensive evidence linking the spread of Covid-19 to residential evictions, would not somehow vest the CDC with uncontrolled federal police powers.

Chambless Enterprises & Brown

As both *Chambless Enterprises & Brown* were decided before the Appropriations Act was passed, neither case discusses Congressional ratification. But both cases upheld the Order against judicial challenges on the grounds that the CDC did have authority under the Public Health Services Act to impose an eviction moratorium. See *Chambless Enterprises, LLC v. Redfield*, No. 3:20-CV-01455, 2020 WL 7588849 at *3-*11 (W.D. La. Dec. 22, 2020); *Brown v. Azar*, No. 1:20-CV-03702-JPB, 2020 WL 6364310 at *10 (N.D. Ga. Oct. 29, 2020). "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pons*, 434 U.S. 575, 580 (1978), citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, (1975). Under this rationale, Congress can likely be presumed to have adopted the view of the *Chambless Enterprises & Brown* courts—that the Public Health Services Act authorized the CDC to impose an eviction moratorium when necessary under pandemic conditions to control the spread of a communicable disease—when it enacted the CDC Order without substantive change. See *Lorillard* at 580 ("So too, where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.").

Advocates should therefore make two arguments in favor of the CDC Order’s constitutionality. The first is to urge courts to follow *Chambless Enterprises & Brown*, and find that the CDC had authority to issue the eviction halt order from the onset. The second is that, even if the CDC did not have that authority from the outset, Congress gave the CDC that authority when it ratified the CDC Order in the Appropriations Act—both because the text and circumstances of the Appropriations Act make clear that Congress intended to do so and because Congress was presumably aware of and adopted the *Chambless Enterprises & Brown* decisions by adopting the CDC Order unchanged.

Geographical applicability

The CDC order applies in every U.S. state and territory with reported cases of Covid-19, except for states, local territorial, or tribal areas that already have “a moratorium on residential evictions that provides the same or greater level of public health protection than the requirements listed in this Order.” Order at 11; *see also* 85 Fed.Reg. at 55294. “Public-health protection” is not expressly defined in the CDC Order but presumably means protection against residential eviction, given the overall thrust of the order is to stop residential evictions so as to reduce the spread Covid-19.

For jurisdictions that do have their own eviction moratoria, the original text was unclear as to how CDC applicability would be determined. One possible interpretation was that some person or entity (perhaps the CDC, a court, or other official) would make a threshold determination of whether the local moratorium provides equal or better public health protection—in which case the local moratorium would apply and the CDC order would not. Alternatively, the CDC order could be interpreted as establishing a “floor,” with local eviction moratoria able to afford equal or greater protection against eviction but irrelevant if they afford less protection.¹² This would call for the CDC order to be compared with local restrictions on a case-by-case basis, with the more protective provision applying and the local provisions taking precedence over the CDC order where the protections are equivalent.

The October 9, 2020 FAQ resolves this question, drawing the same conclusion most advocates had drawn (given the purpose of the order and the many practical difficulties of a threshold-assessment approach), that the order’s applicability is to be determined by courts:

“The Order applies only in states (including the District of Columbia), localities, territories, or tribal areas that do not have in place a moratorium on residential evictions that provides the same or greater level of public-health protection than the CDC’s Order. Relevant courts deciding these matters should make the decision about whether a state order or legislation provides the same or greater level of public health protection.”

FAQ at 4.

While the text does not make this explicit, this can only mean the CDC order provides a baseline level of protection for residential tenants against eviction with other protections arising under state, local, territorial, or tribal law applying in addition to the CDC Order where they exist—as adjudicated on a

¹² Though the order uses the term “public-health protection,” this term appears synonymous with protection from eviction in this context because the threat to public health under discussion is the anticipated spread of Covid-19 that residential evictions would cause. *See* 85 Fed.Reg. at 55294.

case-by-case basis. Otherwise, courts hearing eviction cases would presumably need to hear expert testimony and engage in searching comparisons to determine whether a state or local eviction restriction imposes equal or greater protection than the CDC Order. Note at least one pending state appellate case (*Nyman v. Hanley*, Washington Supreme Court No. 99249-5) concerns this specific issue.

Covered housing types

The CDC order prohibits any “a landlord, owner of a residential property, or other person with a legal right to pursue eviction or possessory action” from evicting a covered person from “from any residential property” in a jurisdiction where the order applies. See 85 Fed.Reg. at 55296. The terms “landlord” and “owner” are not further defined. “Residential property” is defined to include “any property leased for residential purposes,” and goes on to specify the term includes “any house, building, mobile home or land in a mobile home park, or similar dwelling leased for residential purposes.” See 85 Fed.Reg. at 55293. However, the definition does “not include any hotel, motel, or other guest house rented to a temporary guest or seasonal tenant” as defined under state law. See 85 Fed.Reg. at 55293.

Therefore, the order clearly applies to all standard rental housing, whether publicly or privately operated. Persons leasing rooms in residential motels and other marginal housing situations may not be covered, however—though coverage of such properties will depend heavily on state law (particularly how a “temporary guest or seasonal tenant” might be distinguished from an ordinary tenant). The FAQ does not add significant clarity to this definition, though does employ the terms “hotel rooms” and “motel rooms,” which could be significant in some instances. See FAQ at 5 (“[t]he Order does not apply to hotel rooms, motel rooms, or other guest house rented to a temporary guest or seasonal tenant...”).

Types of evictions prohibited

There are two key limitations on the types of evictions prevented by the Order. First, the Order prohibits only the eviction of “covered persons.” See Order at 12-13; see also 85 Fed.Reg. at 55296. To be a covered person, a tenant must sign a form declaration and provide a copy to the lessor, and only those meeting certain need-based criteria and agreeing to make partial payments and seek government rental assistance may properly sign the declaration (see below for more detail). See Order at 1-2; see also 85 Fed.Reg. at 55293.

Second, the Order lists five categories of evictions that it does not preclude:

“Nothing in this Order precludes evictions based on a tenant, lessee, or resident: (1) engaging in criminal activity while on the premises; (2) threatening the health or safety of other residents; (3) damaging or posing an immediate and significant risk of damage to property; (4) violating any applicable building code, health ordinance, or similar regulation relating to health and safety; or (5) violating any other contractual obligation, other than the timely payment of rent or similar housing-related payment (including non-payment or late payment of fees, penalties, or interest).”

Order at 11; see also 85 Fed.Reg. at 55294.

Accordingly, advocates should still begin from the argument that the CDC Order prohibits any eviction (of a covered person) not falling into the five exempted categories. This interpretation would at least

block all evictions (of covered persons) for nonpayment of rent, lease expiration/no cause, and any other evictions unrelated to a tenant's lease violation.

The text of the Order supports this position. While the Order does not explicitly state that the included list of permissible grounds for eviction is exclusive, the Order does state that the prohibition on evicting covered persons is "subject to the limitations in the 'Applicability' section," Order at 13; *see also* 85 Fed.Reg. at 55296. The Applicability section provides only the enumerated list of grounds for eviction set forth above. *See* Order at 11; *see also* 85 Fed.Reg. at 55294. One portion of the FAQ states that a tenant "may still be evicted for reasons other than not paying full rent or making a full housing payment" and then goes on to repeat the list of enumerated grounds. FAQ at 4-5. Nothing in the original order or the FAQ appears to authorize eviction for a reason other than one of the enumerated grounds.

In other places, however, the FAQ suggests that the Order only prevents evictions based on nonpayment. In response to the question "What does it mean when a tenant has declared themselves to be a covered person under the CDC Order," the FAQ states that covered persons "may not be evicted for non-payment of rent solely on the basis of the failure to pay rent or similar charges at any time during the effective period of the Order." FAQ at 6 (underline added). In another place, the FAQ states "[t]he effective date of the CDC Order is September 4, 2020. That means that any evictions for nonpayment of rent that may have been initiated before September 4" are subject. FAQ at 7.

Provisions such as these create ambiguity upon which some landlords contend that the CDC Order only restricts cases based on nonpayment of rent (and possibly "similar" charges). Indeed, reports from many states have shown that local courts all over the country routinely decline to treat the list of enumerated grounds for eviction as exhaustive. In particular, many courts allow evictions to proceed if the type of notice directing the tenant to vacate is anything other than a notice specifically alleging nonpayment of rent. A separate memo drafted in February 2021 discusses specific responses to this issue,¹³ but it was widely hoped the new CDC Order would address this problem.

Instead of helpful clarification, however, the new CDC Order merely declares in its statement of intent that the "Order shall be interpreted and implemented in a manner as to achieve the following objectives ... [m]itigating the further spread of Covid-19 by temporarily suspending the eviction of covered persons from residential property for nonpayment of rent[.]" Order at 3.

Hopefully, courts considering the new statement of intent will recognize that interpreting the Order in a manner to mitigate the spread of Covid-19 by suspending evictions for nonpayment of rent means applying the order to all cases *motivated* by nonpayment of rent even if not formally based on eviction notices citing nonpayment (such as no-cause lease termination notices or lease nonrenewals). Unfortunately, experience has shown that many courts are unlikely to embrace this interpretation—and by transporting the problems in the FAQ document into the Order itself, the result could be even further acceleration of this semantic workaround.

On the topic of semantic workarounds, another remains the characterization of a tenant's failure to vacate upon lease expiration as a violation of the fifth enumerated ground for permissible eviction ("violating any other contractual obligation, other than the timely payment of rent or similar housing-related payment"). *See* Order at 11; *see also* 85 Fed.Reg. at 55294. Many leases expressly obligate a

¹³ See National Housing Law Project, "Application of CDC Eviction Halt Order to Lease Expiration and No-Cause Eviction Notices," (Feb. 11, 2021), <https://www.nhlp.org/wp-content/uploads/CDC-no-cause.pdf>

tenant to vacate upon expiration of a fixed lease term, but requiring a tenant to vacate the premises in order to avoid eviction for having failed to vacate would be an absurd result that courts should reject. *See, e.g. Haggar Co. v. Helvering*, 308 U.S. 389, 394 (1940) (“All statutes must be construed in the light of their purpose. A literal reading of them which would lead to absurd results is to be avoided when they can be given a reasonable application consistent with their words and with the legislative purpose.”). Such a construction also runs contrary to the public health purpose of the order. *See* Order at 7-8; *see also* 85 Fed.Reg. at 55294 (“Evicted renters must move, which leads to multiple outcomes that increase the risk of COVID-19 spread.”). Instead, courts should read the provision authorizing eviction for violations of “other contractual obligations” to mean contractual obligations to be carried out *during the term of the lease*—not after the lease has expired. *See* 85 Fed.Reg. at 55294; *see also Haggar Co.* at 394. An honest reading of the Order shows a clear purpose and intent only to allow evictions based on tenant misconduct—not financial defaults, and certainly not evictions where the tenant committed no lease violation whatsoever. All of the enumerated grounds for eviction involved behavioral lease violations. *See Beecham v. United States*, 511 U.S. 368, 371 (1994) (“That several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well.”); *see also U.S. v. Williams*, 553 U.S. 285, 294 (2008) (“common sense canon of *noscitur a sociis* ... counsels that a word is given more precise content by the neighboring words with which it is associated”).

While the CDC did not address this issue specifically in connection with the “other contractual violation” prong, the Order does clarify that “covered persons may not be evicted on the sole basis that they are alleged to have committed the crime of trespass (or similar state-law offense) where the underlying activity is a covered person remaining in a residential property for nonpayment of rent.” Order at 12. Why the CDC chose to clarify that a criminal activity eviction may not be based on the supposed crime of “trespassing” in a unit the tenant lawfully occupies is unclear, but advocates should not hesitate to draw the obvious analogy with “other contractual violation” scenarios based on the same essential activity.

After previously appearing in the FAQ, the Order now makes clear that “[i]ndividuals who are confirmed to have, have been exposed to, or might have COVID-19 and take reasonable precautions to not spread the disease should not be evicted on the ground that they may pose a health or safety threat to other residents.” Order at 12. This statement lends further support to the notion that courts should interpret the permissible grounds for eviction practically and in a manner consistent with the overall purpose of the Order, avoiding highly-technical assessments that lose sight of the public health imperatives.

Qualifying as a covered person

To be a “covered person” entitled to the protection of the order, one must be a “tenant, lessee, or resident of a residential property” and provide the required declaration, sworn under penalty of perjury, to the landlord. *See* Order at 12-13; *see also* 85 Fed.Reg. at 55293.

The CDC has provided a revised form declaration for this purpose, though the Order also makes clear that tenants may use a different form as long as the required contents are present and the declaration is sworn under penalty of perjury. *See* Order at 13; *see* 85 Fed.Reg. at 55292 (“To invoke the CDC’s order these persons must provide an executed copy of the Declaration form (or a similar declaration under penalty of perjury) to their landlord...”), 55297 (original form declaration). “In addition [tenants] are allowed to declare in writing that they meet the elements of covered person in other languages.” Order at 13. “The declaration may be signed and transmitted either electronically or by hard copy.” Order at 13. The Order also makes clear that “[a] signed declaration submitted under a previous order remains

valid notwithstanding the issuance of this extended and modified order, and covered persons do not need to submit a new declaration under this Order.” Order at 12.

The preamble to the original form declaration, the supplementary information accompanying the order, and the new FAQ all stated that “[e]ach adult listed on the lease, rental agreement, or housing contract should complete this declaration,” though it was never clear what the effect of having fewer than all listed adults sign the declaration could possibly be. See 85 Fed. Reg. at 55292, 55297; see FAQ at 1-2. Surely CDC would not intend to authorize the eviction of some adults and not others from the same household, as such an absurd interpretation would neither advance the purpose of the order (preventing displacements that could spread Covid-19) nor serve the landlord’s objective (regaining possession of rental premises in hopes of securing a new tenant able to pay full rent). The CDC’s ongoing and consistent use of the non-mandatory term “should” throughout the original materials as well as the FAQ reinforced this conclusion. See FAQ at 1-2. However, the new CDC Order appears to dispense with this requirement for multiple declarations altogether.

The Order also incorporates a provision, which had previously appeared in the FAQ, that “[i]n certain circumstances, such as individuals filing a joint tax return, it may be appropriate for one member of the residence to provide an executed declaration on behalf of the other adult residents party to the lease, rental agreement, or housing contract.” Order at 13. This provision may be of value in households where an adult member is unable to sign a declaration due to disability, unavailability, or other impediment (though the reason third-party signers are limited to other household members or contractual parties rather than anyone with personal knowledge is not clear).

The contents of the declaration, which essentially function as eligibility criteria for the protection of the CDC order, are as follows:

- The individual has used best efforts to obtain all available government assistance for rent or housing;

“Available governmental assistance” is a term of art in the order, which means “any governmental rental or housing payment benefits available to the individual or any household member.” See Order at 1; see 85 Fed. Reg. at 55293.

The revised form declaration¹⁴ is helpful here. The tenant needs to check a box which states “I have done my best to ... get government assistance in making my rent or housing payments,” and bears a footnote which directs the declarant that “Calling a local expert is the best way to figure out all the help that is available to you. Find a listing for a local HUD-approved housing counselor by calling (800) 569-4287.” See Eviction Protection Declaration at 2.

Advocates advising tenants on this requirement should anticipate that some tenants who may have failed to apply for rental assistance grants previously available might be reluctant to sign the affidavit. However, any tenant with any passable reason for not having applied (e.g., unaware of the funds, did not qualify, funds ran out before tenant could apply, tenant was not delinquent at the time the funds were available, etc.) should still be able to claim “best efforts” by undertaking in the present a best effort to investigate and apply for any funds presently available before signing. **Note the definition only applies to governmental benefits** so does not require the tenant to have investigated all private sources of assistance.

¹⁴ https://www.cdc.gov/coronavirus/2019-ncov/downloads/EvictionDeclare_d508.pdf

The form declaration provides a toll-free number and website address for HUD-approved housing counselors, and the FAQ adds a series of links to resources that landlords and tenants “are encouraged” to access for learning about possible rental assistance. Eviction Protection Dec. at 1, FAQ at 5. While the order neither requires use of these resources nor attributes specific legal significance to not using them, a best practice may be to ensure tenants investigate possible rental assistance available at each of the links in the FAQ before certifying they have made best efforts to obtain rental assistance.

- I either expect to earned or expect to earn no more than \$99,000 in annual income for Calendar Year 2020 or 2021 (or no more than \$198,000 if filing a joint tax return), was not required to report any income in 2020 to the U.S. Internal Revenue Service, or received an Economic Impact Payment (stimulus check) in 2020 or 2021.

The key here is that these are **three alternative ways of qualifying for protection**. That is, a tenant may have income less than \$99,000 (or \$198,000 together with spouse if married and filing jointly) or have not been required to report income in 2019 or have received a stimulus check.

As has been well-reported in the media, many individuals eligible for stimulus checks did not receive them in a timely manner—and some may never have received them at all.¹⁵ Advocates should assert that a tenant qualifies for protection under the stimulus check prong if the tenant was eligible to receive a stimulus check, whether or not the funds were ever actually received.

- I am unable to pay my full rent or make a full housing payment due to substantial loss of household income, loss of compensable hours of work or wages, lay-offs, or extraordinary out-of-pocket medical expenses.

Note that **there is no requirement here of demonstrating a link between income loss and Covid-19**. The order defines “extraordinary” medical expenses as “unreimbursed medical expense likely to exceed 7.5% of one’s adjusted gross income for the year.” Order at 2; *see also* 85 Fed.Reg. at 55297 (fn 38). The order imposes no obligation to supply documentation of any income loss or medical expenses.

- I am using best efforts to make timely partial payments that are as close to the full payment as the individual’s circumstances may permit, taking into account other nondiscretionary expenses.

Presumably a tenant who calculates, in good faith, a reasonable partial payment she can afford and tenders those funds complies with this obligation—even if the landlord may think the tenant could afford more. No provision in the order purports to allow a landlord to proceed with eviction of a tenant who fails to make partial payments—let alone partial payments the landlord considers insufficient.

The order and form declaration both ensure tenants understand the declaration must be signed under penalty “and must include a statement that the tenant, lessee, or resident of a residential property understands that they could be liable for perjury for any false or misleading statements or omissions in the declaration.” Order at 13; *see also* Eviction Protection Dec. at 2. This suggests the intended consequence for a false declaration is prosecution for perjury—not eviction. *See also HAPCO v. City of Philadelphia*, 2020 WL 5095496 (E.D.Pa. 2020) (Rejecting claim that local eviction moratorium that protects tenants who submit certification of Covid-related financial hardship violates due process clause

¹⁵ *See, e.g.*, Lorie Konish, “Still waiting on stimulus check money? IRS urges you to take action before these two deadlines,” CNBC (Aug. 17, 2020), on-line at: <https://www.cnbc.com/2020/08/17/missing-1200-stimulus-checks-irs-urges-action-before-these-deadlines.html>, last visited Sept. 4, 2020.

on basis that “the certifications of hardship must comply with Section 1-108 of the Philadelphia Code which require certifications to be sworn to under oath and, in any event, it is not arbitrary and irrational for the City to not provide landlords with the means of challenging whether tenants have truly experienced a COVID-19 financial hardship”).

Nevertheless, the Order also states it “does not preclude a landlord challenging the truthfulness of a tenant’s ... declaration in court, as permitted under state or local law.” Order at 13. The rationale for this conclusion is the theory that a tenant who does not actually qualify as a covered person is not entitled to the protection of the CDC order and should not be able to benefit from the protection by submitting a false declaration. While this reasoning is hardly assailable, allowing a landlord to challenge the contents of a declaration (and thereby forcing a tenant to defend it) denies that tenant the full benefit of the protection and directly undercuts the public purpose of the CDC Order—particularly if such challenges are routine and some tenants who do qualify as covered persons fail to receive protection simply because they are unable to comply with judicial procedures or are found to lack credibility by courts.

Accordingly, advocates should urge courts to take a balanced approach to claims challenging the veracity of tenant declarations:

- Courts should generally accept tenant “covered person” declarations as prima facie evidence that the declarant is a covered person—thus placing the burden of refuting the declarant’s covered person status on the landlord;
- A landlord seeking to challenge the contents of a tenant’s declaration should be required to establish material falsity—e.g., that the tenant’s declaration contained a false statement, without which the tenant would not have fulfilled the requirements to be a covered person; and
- The showing of material falsity should be supported by documentation or other proof that would be sufficient to overcome the tenant’s declaration if un rebutted.

Courts should be extremely reluctant to entertain allegations of material falsity based on statements requiring tenants to exercise judgment (such as in determining how much of a partial rent payment the tenant can afford) or predict hypothetical outcomes (such as whether the tenant would become homeless or forced to live in close quarters if evicted). Challenges predicated on statements of that nature should require evidence either that the tenant knew the statement was false (or, at least, made the statement recklessly without knowledge as to its truth or falsity), or else that no reasonable tenant would have made the statement.

Note that this approach is similar to the framework the U.S. Supreme Court established for determining when a criminal defendant may challenge the veracity of statements in a police informant’s affidavit used to obtain a search warrant:

There is, of course, a presumption of validity with respect to the affidavit supporting the search warrant. To mandate an evidentiary hearing, the challenger’s attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient.

Delaware v. Franks, 438 U.S. 154, 171 (1978). The specific public policy reasons for according finality to a covered person declaration are obviously different than those for according finality to an affidavit

presented in support of a search warrant application, but in both situations, merely allowing the challenge could be damaging to the public interest—and therefore should be conditioned on more than conclusory allegations or a “mere desire to cross-examine.” *Id.* at 171.

Nothing in the FAQ or other materials suggests what procedures courts should use in hearing these challenges. However, one logical method would be to require landlords to apply for a show cause order from the court, which may then be served upon a tenant (ordering the tenant to show cause why a declaration should not be found invalid because of a fraudulent statement). Before issuing such a show cause order, the court would review the landlord’s allegations and corroborating evidence, and grant the order only if it finds sufficient evidence of material falsity to overcome the tenant’s declaration. Where CDC declarations are presented in the course of pending eviction actions, a court could replace the show cause requirement with an offer of proof.

Whether courts adopt these or other procedures for hearing landlord challenges to tenant declarations, such challenges will likely gain the most traction where landlords are able to present evidence of bad faith (or, perhaps, lack of good faith) on the tenant’s part. Thus, tenants should avoid making unreasonably low partial payments (based on their ability to pay) and should use discretion in sharing information about their available resources with landlords or publicly that might be used to question the amount of their payments or the integrity of other declaration contents.

- Eviction would likely render the individual homeless—or force the individual to move into and live in close quarters in a new congregate or shared living setting—because the individual has no other available housing options.

The order defines “[a]vailable housing” as essentially meaning decent and affordable housing that is presently available to the tenant. *See* Order at 1; *see also* 85 Fed.Reg. at 55293 (“any available, unoccupied residential property, or other space for occupancy in any seasonal or temporary housing, that would not violate Federal, State, or local occupancy standards and that would not result in an overall increase of housing cost to you.”). Hence, a tenant need not be willing to accept any housing irrespective of price, condition, or location as an alternative to becoming homeless.

The CDC order, unlike the CARES Act eviction moratorium had done,¹⁶ provides no relief from late fees and related charges—except that the tenant may not be evicted for nonpayment of those amounts while the CDC order is in effect. *See* Order at 11; *see also* 85 Fed.Reg. at 55294; *see also* FAQ at 3. This could be one area where state and local protections commonly exceed the CDC minimum.¹⁷

Advocates should consider how certain other statements in the CDC form declaration, such as those accepting liability for “back rent, fees, penalties, or interest” interact with any rights or protections under state and local laws—particularly provisions of state landlord-tenant acts that may provide non-waivable rights likely unaffected by the CDC order.

Stages of eviction process affected

¹⁶ *See* 15 U.S.C. § 9058(b)(2).

¹⁷ Note that preserving the landlord’s right to collect late fees and other charges authorized by the lease may help the order avoid a takings challenge.

The Order prohibits a landlord from “evict[ing]” a covered person from residential rental property. See Order at 2; see also 85 Fed.Reg. at 55296. Again, the Order continues to define “‘Evict’ and ‘Eviction’ [to] mean[] any action by a landlord, owner of a residential property, or other person with a legal right to pursue eviction or a possessory action, to remove or cause the removal of a covered person from a residential property.” Order at 2; see also 85 Fed.Reg. at 55293. Hence, under its plain meaning the CDC Order still reaches all phases of the eviction process (issuance of notices to vacate, filing unlawful detainer actions, holding hearings, entering judgments for possession and writs of restitution, physical execution of writ). Of course, these are the waters the FAQ has long since muddied.

Physical evictions of tenants against whom judgments or writs have been entered

One item the FAQ document did make crystal clear was that physical evictions cannot be carried out during the period of the CDC order. See FAQ at 6-7 (“any evictions for nonpayment of rent that may have been initiated before September 4, 2020, and have yet to be completed, will be subject to the Order.”). The Order now incorporates this requirement, stating that “[a]ny evictions for nonpayment of rent initiated prior to September 4, 2020, but not yet completed, are subject to this Order” and that tenant “who qualifies as a ‘Covered Person’ and is still present in a rental unit is entitled to protections under this Order.” Order at 12.

Entry of judgments or writs against tenants in pending eviction cases

Under the plain text of the Order, prosecuting a pending eviction lawsuit against a covered person—such as filing or advancing any motion for judgment or writ of restitution—would appear to be prohibited as such actions are clearly taken to remove or cause the tenant’s removal. See Order at 2; see also 85 Fed.Reg. at 55296. However, the FAQ document has long suggested that the Order prohibits only the final eviction step—physical removal of the tenant—and thus earlier steps, including the entry of judgments and writs—is permissible. See FAQ at 1. The court in *KC Tenants v. Byrn* found this to be a permissible interpretation of the order, largely relying upon a slippery-slope theory under which prohibiting “any action” to remove or cause the removal of a covered tenant might extend to actions such as hiring a lawyer or other preparatory steps far removed from the eviction process. See *KC Tenants v. Byrn*, ___ F.Supp.3d ___, No. 20-000784-CV-W-HFS, 2020 WL 7063361, at *2 (W.D. Mo. Nov. 30, 2020).

Perhaps most notably, the *KC Tenants* court upheld this practice despite finding it to pose an actual health hazard:

“I find nothing in the Moratorium that arguably prevents getting ready to evict early in the New Year. While the preliminary actions may be a very unfortunate practice, deeply troubling to tenants and even a health hazard, as the argument is developed by plaintiff and by amici, judges have no authority to add new requirements to the CDC regulations.”

KC Tenants at *2. This conclusion is difficult to reconcile with the Order’s mandate that it be interpreted so as to mitigate the further spread of Covid-19. See Order at 3.

Nevertheless, as the CDC has indicated its intention to prohibit only the final removal of tenants, the best argument for advocates remains the contention under state law that a landlord is not entitled to judgment for possession unless the landlord has proved a present or immediate right to possession of the disputed premises. See, e.g., Robert M. Schoenhaus, *Forcible Entry and Detainer: Requisite Right, Title or Possession of Plaintiff*, 21 Am. Jur. Proof of Facts 2d 567 (Originally published 1980, updated

Sept. 2020). The CDC order does not preempt or supplant state law. See FAQ at 6. Since the CDC order entitles a covered person to possession of his or her home for the duration of the order, a court could not properly enter a judgment or writ against such person while the order remains in effect.

Even if such judgments may properly be entered, doing so creates extensive practical problems and burdens on courts considering that tenants are likely to remain for months or longer in their homes, tender partial payments, apply for rental assistance, and often fully catch up in rent during that time. In many cases, new agreements or at least new facts will require courts to revisit judgments, set aside writs of restitution, and otherwise conduct further proceedings in cases that had already been heard and supposedly decided.

Some landlords may contend that entry of judgments and writs during the CDC order is proper, noting the FAQ also states “[t]he Order is not intended to terminate or suspend the operations of any state or local court.” FAQ at 1. But this general statement does not support the conclusion that judgments and writs of restitution are proper—only that some (not otherwise specified) proceedings may be held.

Filing new eviction cases

Again, the definition of “eviction” to include any action to remove or cause the removal of a covered person would appear to prohibit the filing of eviction actions against covered tenants during the CDC order. See Order at 2; see also 85 Fed.Reg. at 55293.

Problematically, the DOJ stipulation—quoting from its original brief in *Brown v. Azar*—stated as follows:

“The [CDC] Order does not prevent a landlord from filing an eviction action in state court. First, the Order expressly permits eviction for various reasons other than nonpayment of rent. . . . Second, nowhere does the Order prohibit a landlord from attempting to demonstrate that a tenant has wrongfully claimed its protections. And third, even where a tenant is entitled to its protections, the Order does not bar a landlord from commencing a state court eviction proceeding, provided that that actual eviction does not occur while the Order remains in place.”

The FAQ then stated, similarly, that the Order does not “prevent landlords from starting eviction proceedings, provided that the actual eviction of a covered person for non-payment of rent does NOT take place during the period of the Order.” FAQ at 1.

Arguably, these statements can be reconciled with the text of the original Order by construing the stipulation to establish that (i) landlords can still file eviction lawsuits during the CDC order either where they dispute a tenant’s status as a covered person or assert an authorized basis, and (ii) a landlord may take steps to tee-up a state court eviction proceeding, such as retaining counsel, even against a covered person. A fair reading of the FAQ does not leave one with the frank impression that DOJ or CDC meant any such thing; rather, the plain meaning of the new material appears to allow for the filing of state court eviction lawsuits even against covered tenants during the CDC order. But being fully contradictory to the text of the original order, courts need not defer to—and should not abide by—that reading. See *Kisor v. Wilkie*, ___ U.S. ___, 139 S. Ct. 2400, 2412 (2019) (agency’s interpretation of its own regulation cannot be “plainly erroneous or inconsistent with the regulation,” and has no possibility of deference unless the regulation is “genuinely ambiguous” and reflects “an agency’s authoritative, expertise-based, ‘fair [or] considered judgment’”), quoting *Auer v. Robbins*, 519 U.S. 452, 462 (1997).

Even so, the fact that in most—if not all—states, the plaintiff’s present right to possession is an indispensable element of an eviction lawsuit creates a practical state law impediment to filing an eviction lawsuit against a person who is occupying under the CDC order. See 21 Am. Jur. Proof of Facts

2d 567, *supra*. Advocates may prefer to seek orders dismissing such improper lawsuits on state law grounds for failure to state claims upon which relief may be granted rather than litigate what paltry deference the CDC and DOJ interpretive documents may deserve.

Issuing eviction notices

The CDC and DOJ assertions that eviction lawsuits are permissible against covered persons during the term of the order necessarily implies that landlords may serve notices to vacate premises (directing tenants to move out before June 30, 2021). This is a truly self-defeating bit of guidance in that tenants frequently move out of rental premises upon receiving such notices, not only because they are “supposed to” (as a matter of state law) but also to avoid being sued and acquiring an unlawful detainer case record that will seriously hamper their access to future housing opportunities. Again, since the CDC order effectively authorizes a covered tenant to remain through June 30, 2021, any such notice to vacate stating an earlier date to quit would presumably at least be ineffective if issued to a covered tenant, a further reason for dismissal of any lawsuit filed upon expiration of such notice.

Self-help/extrajudicial eviction

Finally, the CDC order’s definition of “eviction” likely also reaches at least some, if not all, conduct such as threats, intimidation, misinformation, or self-help measures taken to remove a tenant. While state landlord-tenant laws generally already provide superior civil remedies for lockouts and other extrajudicial eviction practices, the significant criminal penalties available under the CDC order may pose a more powerful deterrent against such practices—or enable a truly far-reaching remedy for egregious violators.

To date, there have been no reports of any indictment or other attempts at prosecution of any landlord for violations of the order. However, the White House has announced new enforcement plans, including a complaint portal and phone number for the Consumer Financial Protection Bureau and Federal Trade Commission monitoring and investigation.¹⁸

¹⁸ See White House, Fact Sheet: The Biden-Harris Administration’s Multi-Agency Effort to Support Renters and Landlords (Mar. 29, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/29/fact-sheet-the-biden-harris-administrations-multi-agency-effort-to-support-renters-and-landlords/>