

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 took effect upon publication in the Federal Register on Sept. 4, declares a national moratorium on certain residential evictions in the name of protecting the public health. *See* 85 Fed.Reg. 55292 (Sept. 4, 2020).

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

- Expect to have income less than \$99,000 in 2020, or have received a stimulus check, or not have been required to report income to the IRS in 2019;
- Be unable to pay full rent due to an income loss or “extraordinary” medical bills
- Have used best efforts to obtain governmental rent assistance,
- Be likely to become homeless or forced to “live in close quarters” if evicted, and
- Promise to “make timely partial payments that are as close to the full payment as the individual’s circumstances may permit.”

See 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* 85 Fed.Reg. at 55296. “‘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.” 85 Fed.Reg. at 55293.

But for the CDC moratorium, the United States would likely have already begun experiencing a truly catastrophic level of evictions—20 million or more, affecting as many as 40 million tenants.¹ Even so, a combination of gaps and pitfalls in the CDC moratorium itself, aggressive landlords, and hostile courts have seen many evictions proceed nonetheless.² The CDC itself has contributed to this erosion and circumvention of the Sept. 4 order, issuing a guidance document (largely in the form of an FAQ) on October 9 that raises new ambiguities and appears to weaken some tenant protections. *See* CDC Eviction Moratorium FAQ (Oct. 9, 2020), on-line at: <https://www.cdc.gov/coronavirus/2019-ncov/downloads/eviction-moratoria-order-faqs.pdf>.

¹ *See, e.g.,* Emily Benfer et al., “The COVID-19 Eviction Crisis: An Estimated 30-40 Million People in America Are at Risk,” Aspen Institute (Aug. 7, 2020), <https://www.aspeninstitute.org/blog-posts/the-covid-19-eviction-crisis-an-estimated-30-40-million-people-in-america-are-at-risk/>

² *See, e.g.,* Chris Arnold, “Despite A New Federal Ban, Many Renters Are Still Getting Evicted,” NPR (Sept. 14, 2020), <https://www.npr.org/2020/09/14/911939055/despite-a-new-federal-ban-many-renters-are-still-getting-evicted>

Judicial challenges to the CDC Order and the FAQ document

The recent FAQ document appears to have been largely triggered by events transpiring in litigation of three federal lawsuits against the CDC order. Landlord groups filed those actions in September with the U.S. District Courts in Atlanta, Memphis, and Columbus, seeking orders declaring the CDC order unconstitutional.³ In each case, the landlord groups moved for preliminary injunctions to prohibit enforcement of the CDC order pending trial.

The government's first written response to these lawsuits was a legal brief the Department of Justice filed in defense of the CDC order on October 2. While generally refuting various legal challenges the landlord groups had leveled against the CDC order, the DOJ brief contained several statements that were surprising and disappointing to tenant advocates. Responding to landlord groups' contention that the CDC order impermissibly infringed on their right of access to the judicial system, the DOJ brief stated that the CDC order does not prevent landlords from filing state court eviction lawsuits:

"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."

Dkt. No. 22, Defendants' Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction at 42, Case No. 1:20-cv-03702-JPB (N.D.Ga. Oct. 2, 2020) (internal citation omitted).

Shortly after this brief was filed, DOJ entered into a stipulation for dismissal with the plaintiffs in the Columbus lawsuit, *KBW Investment Properties v. Azar*, predicated on the understanding that CDC and the DOJ adhered to this view of the order:

"NOW THEREFORE, the Federal Defendants having stated that the CDC Order does not prevent a landlord from seeking judicial review of a tenant's right to remain on his or her property, including seeking an evidentiary hearing to challenge the veracity of a declaration, provided that no actual eviction occurs while the Order remains in effect and applies to the tenant, Plaintiff and Federal Defendants hereby stipulate to dismissal of this Action..."

Dkt. No. 22, Stipulation for Dismissal at 3, Case No. 2:20-cv-04852 (S.D. Ohio, Oct. 8, 2020). The next day, the CDC issued its FAQ document, which reflected the same strange concessions:

"The Order is not intended to terminate or suspend the operations of any state or local court. Nor is it intended to 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."

CDC FAQ at 1.

Is the DOJ brief, stipulation, or FAQ document entitled to deference?

Preliminarily, interpretive guidance documents that are not promulgated through notice and comment or other formal rulemaking are not entitled to the strongest form of deference (known as "*Chevron*

³ These 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), and *Tiger Lilly LLC v. HUD*, No. 2:20-cv-02692 (W.D. Tenn.).

deference” based on the case of *Chevron U.S.A. v. National Resources Defense Council*).⁴ See *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000) (“Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant Chevron-style deference.”). However, such materials can be entitled to lesser forms of deference in some circumstances. See, e.g., *Gonzales v. Oregon*, 546 U.S. 243, 268 (2006) (deference to agency may be appropriate “in accordance with ... the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”), citing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

A particular form of lesser deference, known as “*Auer*” deference, applies to agency interpretations of their own regulations. See *Auer v. Robbins*, 519 U.S. 452 (1997). The basic concept of *Auer* deference is that “the agency that promulgated a rule is in the ‘better position [to] reconstruct’ its original meaning.” *Kisor v. Wilkie*, ___ U.S. ___, 139 S. Ct. 2400, 2412 (2019), quoting *Martin v. Occupational Safety and Health Review Comm’n*, 499 U.S. 144, 152 (1991). Hence an agency’s interpretation of its own regulation is to be deemed controlling “unless plainly erroneous or inconsistent with the regulation.” *Auer* at 462, citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)).

The Supreme Court recently revisited the *Auer* deference standard, and further clarified that an agency’s interpretation of its own regulation has no possibility of deference unless the regulation is “genuinely ambiguous” and reflects “an agency’s authoritative, expertise-based, ‘fair [or] considered judgment.’” *Kisor v. Wilkie*, ___ U.S. ___, 139 S.Ct. 2400, 2414 (2019), quoting *Auer* at 462. The DOJ brief and stipulation (filed and made on behalf of CDC and the other governmental defendants) have no possibility of being entitled to *Auer* deference under this standard. As landlord-tenant law and eviction matters are outside CDC’s area of expertise, CDC’s interpretation of an eviction restriction is not based on authoritative expertise. See *Kisor* at 2417 (“the agency’s interpretation must in some way implicate its substantive expertise”). Even if it was, the original order was not genuinely ambiguous in prohibiting the eviction of covered tenants, having specifically defined “evict” to include “any action by a landlord ... to remove or cause the removal of a covered person from a residential property.” 85 Fed. Reg. at 55293.

The *Kisor* court also stated that “a court should decline to defer to a merely ‘convenient litigating position’ or ‘*post hoc* rationalizatio[n] advanced’ to ‘defend past agency action against attack.’” *Kisor* at 2417, quoting from *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012). The statements in the DOJ brief (and reiterated in the stipulation) were clearly products of a “convenient litigation position,” having been asserted in legal pleadings responding to claims challenging the order as an unconstitutional restriction on court access.⁵

⁴ *Chevron U.S.A., Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (court defers to reasonable interpretation of a statute by agency to whom Congress has delegated power to speak with the force of law).

⁵ Irrespective of this purpose, the position taken by DOJ was not necessary to defend against these court access claims. Multiple courts have held that emergency eviction moratoria do not completely foreclose access to court (as is necessary to establish a judicial access claim), both because of their temporary nature and the availability of other judicial mechanisms to adjudicate the claims. See, e.g., *Baptiste v. Kennedy*, ___ F.Supp.3d ___, 2020 WL 5751572 at *25 (D. Mass. 2020); *Elmsford Apartment Assocs., LLC v. Cuomo*, ___ F.Supp.3d ___, 2020 WL 3498456, at

A potentially significant difference between the FAQ and the DOJ materials is that the FAQ purports to incorporate HUD's views on the CDC Order as well as CDC's own. See FAQ at 1 (italization added). Since HUD would likely be presumed (however incorrectly) to have expertise in the relevant aspects of housing law, this suggests some possibility that the document might be viewed to reflect substantive expertise in the relevant subject matter (even though in that case, the expertise would be that of HUD, not the agency that issued the order⁶). The imprimatur of HUD could potentially entitle the FAQ to *Auer* deference then, at least with respect to contents interpreting genuinely ambiguous portions of the original order. See *Kisor* at 2414, c.f. FAQ at 1 ("This non-binding guidance document...").

Of course, *Auer* deference would remain inappropriate as to any portions of the original CDC order that are not genuinely ambiguous—in particular, the question of whether eviction lawsuits or other actions to remove or cause the removal of covered persons could lawfully be taken as the original order made clear that they could not). See *Kisor* at 2415 ("if there is only one reasonable construction of a regulation—then a court has no business deferring to any other reading, no matter how much the agency insists it would make more sense. Deference in that circumstance would 'permit the agency, under the guise of interpreting a regulation, to create de facto a new regulation.'"), quoting from *Christensen*, 529 U.S. at 588. And while the FAQ may not be as clearly a product of defensive litigation as the DOJ's actual response brief or resulting stipulation, the circumstances leading up to the FAQ's issuance certainly suggest courts ought not defer to the FAQ on the permissibility of filing eviction lawsuits for that reason as well.

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." 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.

Thus, American Samoa, having no reported cases of Covid-19, is clearly not covered "until such time as cases are reported." 85 Fed.Reg. at 55294. Other U.S. jurisdictions having no eviction moratoria of their own are clearly covered.

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

*16 (S.D.N.Y. 2020). Even if judicial access claim were cognizable, restrictions on court access in the civil context that do not implicate fundamental rights require only a rational basis—which the prevention of mass evictions during an infectious disease pandemic would easily fulfill. See *U.S. v. Kras*, 409 U.S. 434, 445 (1973) (bankruptcy filing fees did not unconstitutionally infringe on debtor's access to court because the fees had a rational basis and debtor did not have a fundamental right in filing a bankruptcy petition).

⁶ Note *U.S. v. Mead Corp.*, 533 U.S. 218, 228 (2001) ("The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position. The approach has produced a spectrum of judicial responses, from great respect at one end to near indifference at the other.") (underline added, internal citations omitted).

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.⁷ 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 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 case-by-case basis.

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...”).

⁷ 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.

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 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 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).”

See 85 Fed.Reg. at 55294.

Accordingly, advocates should argue that the 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 original 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,” 85 Fed.Reg. at 55296. The Applicability section provides only the enumerated list of grounds for eviction set forth above. See 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 to the order. FAQ at 7. These provisions create ambiguity upon which some landlords will likely contend that the CDC order only restricts cases based on nonpayment of rent (and possibly “similar” charges). Courts should reject any contentions of this nature.

First, the FAQ statements above were not made in the context of questions geared to delineating the universe of reasons for eviction and specifying which are permissible and which are not. One of the

statements appeared in a broader discussion of a tenant’s liability for rent during the period of the order and the permissibility of partial payments and payment plans, FAQ at 6, while the other dealt with the timing of the order and its application to previously-filed cases, FAQ at 6-7. Second, while neither the original order nor the FAQ specifically consider the permissibility of evictions other than for either nonpayment of rent or charges or for other lease violations, an honest reading of the original order and the FAQ reveals 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”). Nothing in the FAQ or other document indicate any intent by CDC to expand these categories.

For this reason, some landlords may attempt to use semantic methods that characterize particular circumstances as lease violations fitting within the fifth enumerated ground (“violating any other contractual obligation, other than the timely payment of rent or similar housing-related payment”). See 85 Fed.Reg. at 55294. Probably the most common of these would be a tenant’s failure to vacate upon lease expiration, as many leases expressly obligate a tenant to vacate upon expiration of a fixed lease term. Yet requiring a tenant to vacate the premises in order to avoid eviction for having failed to vacate would be an absurd result that courts will likely 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 would also run contrary to the public health purpose of the order. See 85 Fed.Reg. at 55294 (“Evicted renters must move, which leads to multiple outcomes that increase the risk of COVID–19 spread.”). Instead, courts will likely 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.

While the CDC did not address this specific circumstance in the FAQ, the document did make 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.” FAQ at 5. This statement lends some 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 at stake.

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 85 Fed.Reg. at 55293.

The order includes, as an attachment, a 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 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 (form declaration). The FAQ further clarifies that “[t]he

declaration may be signed and transmitted either electronically or by hard copy,” and further that “declarations in languages other than English are compliant if they contain the information required to be in a declaration, are signed, and include a statement that the covered person understands that they could be liable for perjury...” FAQ at 1-2.

The preamble to the form declaration, the supplementary information accompanying the order, and now the new FAQ state that “[e]ach adult listed on the lease, rental agreement, or housing contract should complete this declaration,” though it remains unclear 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 reinforce this conclusion. See FAQ at 1-2.

The FAQ states 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 other adult residents party to the lease, rental agreement, or housing contract at issue.” FAQ at 1. This provision could 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 (from the form declaration at 85 Fed.Reg. 55297):

- I have 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 85 Fed.Reg. at 55293. The wording of the form declaration is unfortunate here. The use of the past tense suggests a tenant 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.” Moreover, a tenant can scarcely be expected to have foreseen before September that a failure to apply for assistance funds would deny that tenant protection under a future CDC order. Therefore, even if the tenant may have failed to make best efforts to apply for assistance funds in the past, a tenant could still credibly make the declaration 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.

The FAQ adds a series of links to resources that landlords and tenants “are encouraged” to access for learning about possible rental assistance. 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 governmental rental assistance.

- I either expect to earn no more than \$99,000 in annual income for Calendar Year 2020 (or no more than \$198,000 if filing a joint tax return), was not required to report any income in 2019

to the U.S. Internal Revenue Service, or received an Economic Impact Payment (stimulus check) pursuant to Section 2201 of the CARES Act.

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 have not received them at all.⁸ 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.” 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 may landlord think the tenant could have afforded 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 is sworn testimony, meaning that [a tenant] can be prosecuted, go to jail, or pay a fine if [they] lie, mislead, or omit important information.” 85 Fed.Reg. at 55297. 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 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 DOJ materials and ensuing FAQ have stated that “[t]he Order does not preclude a landlord from challenging the truthfulness of a tenant’s declaration in any state or municipal court.” FAQ at 6. 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

⁸ *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.

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 court 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.

- If evicted I would likely become homeless, need to move into a homeless shelter, or need to move into a new residence shared by other people who live in close quarters because I have 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 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.

- I understand that I must still pay rent or make a housing payment, and comply with other obligations that I may have under my tenancy, lease agreement, or similar contract. I further understand that fees, penalties, or interest for not paying rent or making a housing payment on time as required by my tenancy, lease agreement, or similar contract may still be charged or collected.

Unlike the CARES Act eviction moratorium,⁹ the CDC order 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 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.¹⁰

- I further understand that at the end of this temporary halt on evictions on December 31, 2020, my housing provider may require payment in full for all payments not made prior to and during the temporary halt and failure to pay may make me subject to eviction pursuant to State and local laws.

Advocates may wish to evaluate how this statement interacts 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.

- I understand that any false or misleading statements or omissions may result in criminal and civil actions for fines, penalties, damages, or imprisonment;

The form affidavit is big on intimidating language.

⁹ See 15 U.S.C. § 9058(b)(2).

¹⁰ 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.

- Declarant must certify the truth and correctness of the contents “under penalty of perjury, pursuant to 28 U.S.C. 1746.”

The form affidavit is big on intimidating language, as may have been previously mentioned. The FAQ mitigates these provisions somewhat, acknowledging that perjury prosecutions (based on the declaration) should be limited to circumstances where the tenant makes a false statement in bad faith:

What if individuals act in bad faith when completing and submitting the declaration?

Anyone who falsely claims to be a covered person under this Order by attesting to any material information which they do not believe to be true may be subject to criminal penalties under 18 U.S.C. § 1621 (perjury) or other applicable criminal law.

FAQ at 7 (i.e., the final page of the document that few tenants are likely read).

Stages of eviction process affected

The order prohibits a landlord from “evict[ing]” a covered person from residential rental property. See 85 Fed.Reg. at 55296. Again, the order defines “‘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.” 85 Fed.Reg. at 55293. Hence, under its plain meaning the CDC order 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 recent FAQ and DOJ materials have muddied.

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

One item the FAQ document makes crystal clear is 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.”).

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 85 Fed.Reg. at 55296. While a court may hear challenges to a tenant declaration, such challenges are proper only where the landlord contends the tenant is not actually a covered person (which would render the order inapplicable). See FAQ at 6.

Furthermore, as a general matter of state law, a landlord would not be entitled to judgment unless the landlord 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 orders could be entered, doing so would create extensive practical problems and burdens on courts considering that tenants are likely to remain for two months or longer in their homes and tender partial payments (or even fully catch up in rent) during that time—and that in many cases, new agreements or facts would 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 document 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 85 Fed.Reg. at 55293.

Problematically, the DOJ stipulation—quoting from its prior brief—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 states, 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 these materials does not leave one with the frank DOJ or CDC meant any such thing by these statements; 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 as discussed above, that reading is fully contradictory to the text of the original order and not entitled to deference. See *Kisor* at 2414.

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.

Perhaps most problematically, 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 January 1, 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 Dec. 31, 2020, 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.

The FAQ states that "[t]he U.S. Department of Justice prosecutes violations of this Order." See FAQ at 7. To date, however, there have been no reports of any indictment or other attempts at prosecution of any landlord for violations of the order.

Additional considerations.

The DOJ brief and ensuing FAQ document have now raised new questions pertaining to the tenant protections, posing significant risks of confusion and intimidation that may deter covered persons from invoking the protection of the CDC order. And with just roughly ten weeks remaining before the order expires, the likelihood of securing timely clarification through judicial interpretation appears remote in the large majority of jurisdictions. Rather, the practical meaning and ultimate effect of the CDC order will likely fall into the hands of eviction trial judges far and wide, who will be called upon to interpret and apply the CDC order in conjunction with their own state and local laws. Many such courts may be sympathetic to the claims of landlords, who may not have received rent in some time (though an Eviction Lab study has shown that the median amount of rent claimed in eviction cases filed during Covid-19 was around \$1,500, with a significant number of cases filed for less than \$500).¹¹ But those courts should also be made to understand the most important reasons why stopping evictions is critical to the health and well-being of communities:

- *The extent of the mass eviction threat.* As noted above, the threat of mass evictions looms over the entire nation, and courts must be made to understand the magnitude of this threat. In a typical calendar year, about 900,000 judicial evictions take place in the U.S. By comparison, the scope of the Covid-19 eviction crisis could sweep ten, twenty, or even more times as many families out of their homes in just a matter of weeks. The effects of such an eviction tsunami would be devastating—not only on the affected families, but on the neighborhoods, businesses, schools, local governments, and other community institutions where those displacements occur. In many communities, tenants evicted from their homes would wind up homeless in large numbers. Both the U.S. Census Bureau's household pulse survey¹² and the Stout eviction estimator¹³ offer quality tools for providing state and local eviction statistics on the magnitude of the mass eviction threat in a particular jurisdiction. Advocates should make sure that courts

¹¹ Renee Louis et al., "Preliminary Analysis: Eviction Claim Amounts During the COVID-19 Pandemic," Eviction Lab (Aug. 27, 2020), <https://evictionlab.org/covid-eviction-claims/>

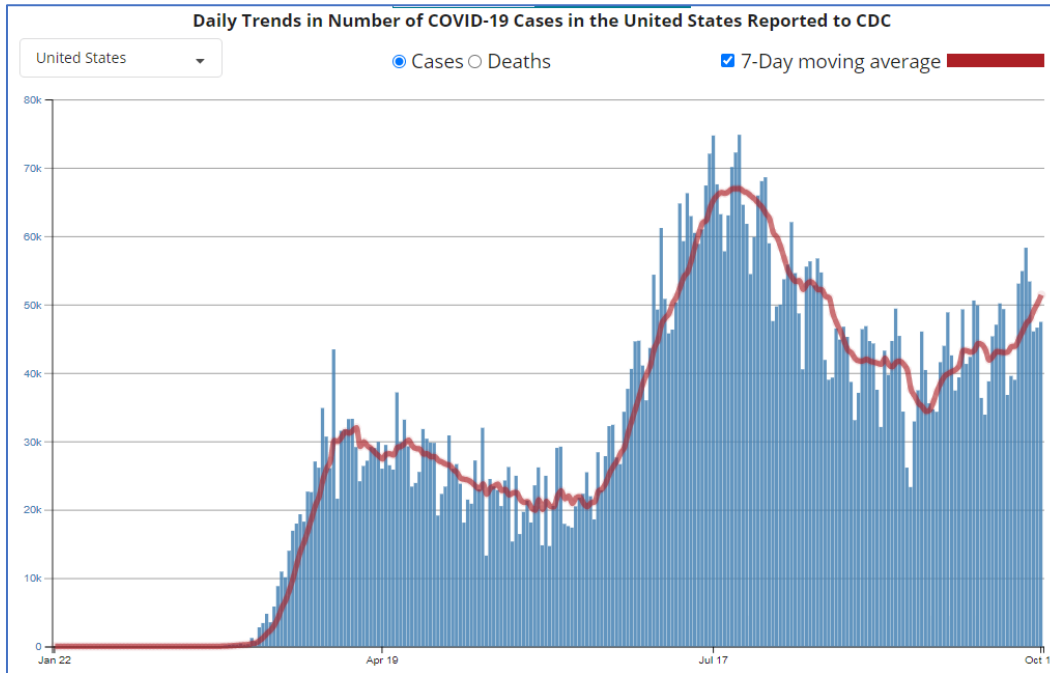
¹² <https://www.census.gov/data/experimental-data-products/household-pulse-survey.html>

¹³

<https://app.powerbi.com/view?r=eyJrIjoibzRhYjg2NzAtMGE1MC00NmNjLTllOTMtYjM2NjFmOTA4ZjMyliwidCI6Ijc5MGJmNjk2LTE3NDYtNGE4OS1hZjI0LTc4ZGE5Y2RhZGE2MSlsmMiOjN9>

deciding whether and how to hear and decide eviction cases during the CDC moratorium do so with a clear understanding of just how many households are depending on that protection.

- *The stakes with respect to Covid-19 transmission.* As the CDC’s original order makes clear, the danger mass evictions pose to the public health is enormous. See 85 Fed.Reg. at 55295-96. The U.S. has never brought Covid-19 under control (as some industrialized countries have managed to do), and case numbers have consistently risen since mid-September:¹⁴



The CDC issued its order ostensibly as a means of helping tamp down the spread of new Covid cases. See 85 Fed.Reg. at 55294 (“In the context of a pandemic, eviction moratoria—like quarantine, isolation, and social distancing—can be an effective public health measure utilized to prevent the spread of communicable disease.”). Indeed, data gathered from the pandemic itself already show that eviction moratoria have indeed slowed the spread of Covid-19 in those locations where moratoria have been in effect. A study comparing states that lifted their eviction moratoria to those that did not found, “[a]fter controlling for mask orders, stay at home orders, school closures, and testing rates, as well characteristics of states and underlying time trends,” that states lifting eviction moratoriums had 1.5 times higher incidence of Covid-19 and 2.1 times higher mortality rates after eighteen weeks than states that kept eviction moratoria in place.¹⁵ Courts must understand that evictions directly undermine public health efforts, spread Covid-19, and ultimately lead to hospitalizations and deaths.

¹⁴ See CDC Covid Data Tracker, https://covid.cdc.gov/covid-data-tracker/#trends_dailytrendscases, last visited Oct. 14, 2020.

¹⁵ Dkt. No. 31-1, Br. of Amici Curiae American Academy of Pediatrics, et al. at 27-28, *Brown v. Azar*, Case No. 20-cv-030702-JPB (N.D.Ga.), citing Kathryn M. Leifheit, Sabriya L. Linton, Julia Raifman, Gabriel L. Schwartz,

Emily A. Benfer, Frederick J. Zimmerman & Craig Evan Pollack, *Expiring Eviction Moratoriums and COVID-19 Incidence and Mortality* (Oct. 2020).

- *The impacts of Covid-19 and the related eviction crisis are being felt most heavily in communities of color.* To date, the U.S. has already seen “more COVID-19 cases, hospitalizations, and deaths in areas where racial and ethnic minority groups live, learn, work, play, and worship.”¹⁶ Part of this is due to the overrepresentation of BIPOC workers in occupations posing a higher risk of infection, as well as reduced access to high quality health care. But another key factor is unsafe and unstable housing. Even before Covid-19, Black women—especially mothers—faced eviction at rates substantially higher than any other demographic group and were more likely to live in housing that exposes them to health hazards.¹⁷ This means the impacts of mass evictions will not be spread evenly throughout communities, but are likely to displace families *en masse* from neighborhoods and communities of color and impose great disruptions on the businesses, schools, local government services, and other institutions in those areas.

State courts hearing eviction cases during the pandemic should also understand the heightened importance for tenants to have legal representation. Eviction cases are far more complicated during Covid-19, and unrepresented tenants cannot realistically be expected to understand or properly assert defenses they may have based on the CARES Act, the CDC moratorium, or any state or local eviction restrictions that may exist in addition to whatever other defenses might exist. Failing to ensure tenants’ access to counsel under such circumstances presents an exceedingly high risk of erroneous eviction at a time when the importance of safe and decent housing is amplified and the usual governmental interest in fast and efficient eviction proceedings is overshadowed by extraordinary public health imperatives.¹⁸

¹⁶ Danyelle Solomon and Derrick Hamilton, “The Coronavirus Pandemic and the Racial Wealth Gap,” Center for American Progress (Mar. 19, 2020), <https://www.americanprogress.org/issues/race/news/2020/03/19/481962/coronavirus-pandemic-racial-wealth-gap/>; see also CDC, “Health equity considerations and racial and ethnic minority groups” (Jul. 24, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html> (recognizing “increasing evidence that some racial and ethnic minority groups are being disproportionately affected by Covid-19.”).

¹⁷ See, e.g., Matthew Desmond, “Poor Black Women Are Evicted at Alarming Rate, Setting Off a Chain of Hardship,” MacArthur Foundation How Housing Matters (March 2014), https://www.macfound.org/media/files/HHM_Research_Brief_-_Poor_Black_Women_Are_Evicted_at_Alarming_Rates.pdf

¹⁸ Under *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), the process due in a particular situation depends on importance of the interest at stake, risk of erroneous deprivation, probable value of additional safeguards, governmental interest, and burdens of additional process. The use of summary proceedings to adjudicate residential eviction cases may fulfill basic federal procedural due process requirements under usual circumstances. See *Lindsey v. Normet*, 405 U.S. 56, 65 (1972). But pandemic conditions alter the procedural due process calculus significantly: the need for a safe home in which to quarantine from others and practice good hygiene and social distancing heightens the importance of housing, Covid-related impediments to preparing and presenting defenses amplify the risk of erroneous eviction, and overriding public health considerations militate against the ordinary governmental interest in quickly and efficiently adjudicating the present right of possession.