



Application of CDC Eviction Halt Order to Lease Expiration and No-Cause Eviction Notices

In recent weeks, advocates have increasingly reported frustration with courts declining to dismiss what this memorandum will hereafter describe as “no-cause” evictions—i.e., unlawful detainer actions filed to evict tenants based either upon the tenant’s failure to vacate after an unexplained lease nonrenewal or upon expiration of a (typically 30-day) notice to terminate a month-to-month tenancy (without cause). Although no-cause evictions were addressed in prior NHLP memoranda concerning the CDC eviction halt order, the heightened significance of the issue now, coupled with the disappointing results in many local courts, calls for a reexamination in greater depth.

I. The text of the CDC eviction halt order does not authorize no cause evictions

Preliminarily, the halt order itself directs that the “Order shall be interpreted and implemented in a manner as to achieve the following objectives:

- Mitigating the spread of COVID-19 within congregate or shared living settings, or through unsheltered homelessness;
- Mitigating the further spread of COVID-19 from one state or territory into any other state or territory; and
- Supporting response efforts to COVID-19 at the Federal, state, local, territorial, and tribal levels.”

86 Fed.Reg. at 8021. With the CDC having repeatedly found that residential evictions spread Covid-19 within and between states, interpreting the order to prohibit no-cause evictions certainly effectuates these objectives better than the alternative conclusion. *See, e.g.*, 86 Fed.Reg. at 8022 (“Preliminary modeling projections and observational data from COVID-19 incidence comparisons across states that implemented and lifted eviction moratoria indicate that evictions substantially contribute to COVID-19 transmission.”).

Neither the original CDC halt order (85 Fed. Reg. 55292 (Sept. 4, 2020)) nor the renewed order (86 Fed. Reg. 8020 (Fe. 3, 2021)) expressly states that no-cause evictions of periodic tenants, or of tenants whose leases are not renewed upon expiration, are prohibited. However, the renewed order in this regard simply extends the duration of the original halt order, which stated that, “subject to the limitations under the ‘Applicability’ section, a landlord ... shall not evict any covered person from any residential property [where the order applies].” 85 Fed.Reg. at 55296; *see* 86 Fed.Reg. at 8025. The only limitations set forth in the ‘Applicability’ section were five enumerated grounds—all involving lease

violations by the tenant.¹ See 85 Fed.Reg. at 55294. Hence, the text of the order implied the five enumerated grounds comprised the only permissible reasons for evicting a covered tenant. The renewed order reflects the same structure with the same five enumerated grounds for permissible evictions. See 86 Fed.Reg. at 8022.

Furthermore, the enumerated exceptions made explicitly clear the CDC's intention to prohibit evictions that were based on nonpayment of rent. See 85 Fed.Reg. at 55294 (authorizing eviction for tenant's violation of a "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)" (underline added)). If the halt order did not cover no-cause evictions, then a landlord who wished to evict a tenant for nonpayment of rent could simply use a no-cause eviction notice instead. This would fully frustrate the purpose of the halt order. Though no-cause eviction tends to require a slightly longer notice period (usually about 30 days) than a nonpayment eviction (generally ranging from about 3-14 days depending on state law), the initial duration of the CDC halt order was four months long, and anticipated the possibility of being further extended. See 85 Fed.Reg. at 55297 ("This Order is effective upon publication in the Federal Register and will remain in effect, unless extended, modified, or rescinded, through December 31, 2020.").

Not only did the original CDC order extend four months in duration, but the order was not issued until September 2020—roughly six months after the Covid-19 pandemic arrived in the U.S. See 85 Fed.Reg. at 55292. By then, massive income disruptions and rent defaults were already well-documented, leading many states and cities to impose local eviction moratoria, and Congress to impose a 120-day eviction moratorium (from March 27-July 24, 2020) followed by a 30-day notice requirement (meaning evictions could not resume until, at the earliest, August 25, 2020). See 15 U.S.C. § 9058. Undoubtedly many tenants who faced eviction by the time of the CDC halt order were already month-to-month tenants or were holding over beyond the expiration date of a term lease. By February 3, 2021, when the renewed halt order was published, the pandemic had been present in the U.S. for approximately 11 months—very few one-year leases signed before the pandemic or in its earliest stages would not have expired by then. Since a restriction on eviction for nonpayment of rent only would have reached so few tenants, this context supplies a further basis to conclude that the CDC must have intended for its halt order to also protect tenants against no-cause eviction.

Accordingly, the rational interpretation of the CDC halt order leads to the conclusion that the five enumerated lease violations—none of which are satisfied by mere lease expiration or no-cause eviction notice—are the only permissible grounds for eviction.² The opposite conclusion conflicts with both the

¹ Because each of the first four enumerated grounds for eviction involves some kind of tenant misconduct, the fifth "catch-all" ground should likewise require some type of behavioral lease violation by the tenant. 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")

² Advocates may note that a related issue has arisen in connection where landlords have attempted to characterize a tenant's failure to vacate premises upon lease expiration as a lease violation, thus authorizing eviction under the fifth enumerated ground ("violating any other contractual obligation, other than the timely payment of rent or similar housing-related payment"). We initially anticipated that courts would reject that argument for the reason that requiring a tenant to vacate the premises in order to avoid eviction for having failed to vacate would be an absurd result. See, e.g., *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) "[I]nterpretations of a statute

plain meaning and natural implications of the text, and provides landlords a simple and expedient path to circumvent the intent and public health purpose of the order.

II. The FAQ document does not and cannot authorize evictions prohibited by the halt order

Despite the clear implication from the halt order itself that no-cause evictions (of covered tenants) are prohibited, the ensuing FAQ document—as well as updates to the FAQ—purporting to interpret the order has stated in various places that the purpose of the halt order was (and is) to prevent evictions for nonpayment of rent. *See, e.g.*, FAQ at 1 (“The Order temporarily halts residential evictions of covered persons for nonpayment of rent during September 4, 2020, through March 31, 2021. This means that a landlord, owner of a residential property, or other person with a legal right to pursue an eviction or a possessory action cannot evict for nonpayment of rent any covered person from any residential property in any U.S. state or U.S. territory where the Order applies.”), at 5 (“CDC has issued this Order to temporarily halt residential evictions of covered persons for nonpayment of rent from September 4, 2020 through March 31, 2021”), at 7 (“Covered persons located in jurisdictions in which this Order applies 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.”), at 8 (“The 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, 2020, and have yet to be completed, will be subject to the Order.”).

In repeatedly stressing that the halt order prohibits eviction for nonpayment of rent, parts of the FAQ strongly the converse: that the halt order does not prohibit eviction except when based on nonpayment of rent. Yet the most applicable portion of the FAQ still implies, consistent with the original halt order text, that the universe of permissible evictions (of covered persons) is limited to those based on the enumerated lease violations:

Can I still be evicted for reasons other than not paying full rent?

Yes, you may still be evicted for reasons other than not paying full rent or making a full housing payment. The Order does not prevent you from being evicted for

- (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;

which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.”). That interpretation also conflicts with the public health objectives of the halt order. *See* 85 Fed.Reg. at 55294 (“Evicted renters must move, which leads to multiple outcomes that increase the risk of COVID–19 spread.”); *see* 86 Fed.Reg. at 8025 (“The conditions that existed on September 4, 2020 have only worsened. As of January 21, 2021, there have been over 24,400,000 cases and over 400,000 deaths. Data collected by Princeton University show that eviction filings are occurring; it is therefore expected that large numbers of evictions would be processed if the Order were to expire. [<https://evictionlab.org/eviction-tracking>]. Without this Order, there is every reason to expect that evictions will increase significantly, resulting in further spread of COVID-19.”). Unfortunately, advocates have reported that some courts have relied upon this basis in evicting tenants. Most notable among these courts is the First City Court of New Orleans, which drew that conclusion in a case now pending review in the Louisiana Court of Appeals (*Carson, Inc. v. Robinson*, Louisiana Court of Appeal, 4th Cir., No. 2020-CA-0643).

- (4) violating any applicable building code, health ordinance, or similar regulation relating to health and safety; or
- (5) violating any other contractual obligation of a tenant's lease, other than the timely payment of rent or similar housing-related payment (including nonpayment or late payment of any fees, penalties, or interest).

FAQ at 5-6.

Accordingly, only by ignoring the most applicable portion of the FAQ and seizing on other parts are landlords, their advocates, and sympathetic courts able to conclude that the FAQ interprets the halt order not to forbid no-cause evictions. This is not proper judicial interpretation. *See, e.g., Beeler v. Saul*, 977 F.3d 577, 585 (7th Cir. 2020) (“The ‘whole text’ canon of statutory interpretation also ‘calls on the judicial interpreter to consider the entire text, in view of its structure and the physical and logical relation of its many parts.’”), *citing* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012).

Even if the FAQ could be fairly read to conclude that no-cause evictions of covered tenants are permitted, the FAQ itself is not the halt order—but a mere interpretation of the halt order. Courts should still disregard that interpretation as being neither persuasive nor entitled to any deference.

Indeed, the FAQ states in its very opening paragraph that the guidance is “nonbinding.” *See* FAQ at 1. And as recent U.S. Supreme Court precedent has made clear, an agency’s interpretation of its own regulation can be entitled to deference only where the regulation being interpreted is “genuinely ambiguous.” *Kisor v. Wilkie*, 588 U.S. ___, 139 S.Ct. 2400, 2414 (2019) (“And when we use that term, we mean it—genuinely ambiguous, even after a court has resorted to all the standard tools of interpretation.”).³ As discussed above, whether the CDC halt order prohibited no-cause evictions was not genuinely ambiguous; the text did not exclude no-cause evictions, and to allow them would substantially frustrate the purpose of the halt order.

Even if the halt order had been ambiguous as to whether no-cause evictions were barred, “courts should not give deference to an agency’s reading, except to the extent it has the ‘power to persuade.’” *Kisor* at 2414, *quoting Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 159 (2012). Since the FAQ’s implication that the halt order bars only nonpayment of rent evictions conflicts with the text and frustrates the purpose of the halt order, the interpretation is likewise unpersuasive. Even further, the *Kisor* decision highlighted a number of distinct factors that tend to show an agency interpretation being unworthy of deference, several of which appear relevant here:

- Where the interpretation does not “in some way implicate its substantive expertise;”
- Where the interpretation falls outside “the bounds of reasonable interpretation;”
- Where the subject matter of the regulation is “distant from the agency’s ordinary duties;”
- Where the interpretation reflects “merely [a] ‘convenient litigating position’ or ‘post hoc rationalization advanced’ to ‘defend past agency action against attack;”
- Where the interpretation creates “‘unfair surprise’ to regulated parties [or] substitutes one view of a rule for another.”

³ “Deference in that circumstance would “permit the agency, under the guise of interpreting a regulation, to create de facto a new regulation.” *Kisor* at 2414, *quoting Christensen v. Harris County*, 529 U.S. 576, 588 (2000).

Kisor at 2414-18.

The (interpretation of the) FAQ interpretation that no-cause evictions are allowed falls outside the bounds of reasonableness because, as discussed previously, it reaches a conclusion not supported by the halt order text and that produces results contrary to the order’s objectives. The interpretation creates unfair surprise to tenants relying on the moratorium and who suddenly face the prospect of eviction under no-cause notices. The subject matter of the halt order and interpretation are far from CDC’s ordinary duties as a public health agency and does not implicate CDC’s substantive expertise—rather, the materials concern housing law or state eviction procedures (with which CDC has no discernable expertise). The FAQ purports to reflect also the views of the Departments of Health & Human Services and of Housing & Urban Development, but HHS is also no more a housing agency than CDC and HUD—which played no role in drafting or issuing the halt order—has no relevant insight into its meaning or purpose. See *Kisor* at 24__ (“we have thought that when granting rulemaking power to agencies, Congress usually intends to give them, too, considerable latitude to interpret the ambiguous rules they issue. In part, that is because the agency that promulgated a rule is in the ‘better position [to] reconstruct’ its original meaning.”), quoting *Martin v. Occupational Safety and Health Review Comm’n*, 499 U.S. 144, 152 (1991).

Also, the FAQ was adopted in response to litigation challenging the halt order in Ohio (as well as Georgia and Tennessee).⁴ By lessening the scope and application of the eviction moratorium, the interpretation helped the CDC fend off motions seeking to preliminarily enjoin the order based on constitutional challenges. Hence the interpretation truly was a convenient litigating position and post hoc justification to help defend against an attack. See, e.g., *Brown v. Azar*, No. 1:20-CV-03702-JPB, 2020 WL 6364310 (N.D. Ga. Oct. 29, 2020).

III. Even if the CDC halt order did not prohibit all no-cause evictions of covered tenants, the order at least prohibits those motivated by nonpayment of rent

Even if a court determines both the FAQ document restricts application of the CDC halt order to nonpayment of rent evictions only, and that the FAQ document should be followed, the fact remains that many (indeed, probably the large majority) of no-cause eviction cases presently being brought are motivated by nonpayment of rent—even if not formally based on a nonpayment eviction notice.

Nothing in the halt order or FAQ document purports to define what an eviction “for nonpayment of rent” actually means—except to make clear that it includes a failure to pay on time, or to make other housing-related payments such as late fees or interest. See FAQ at 6. Hence, whether an eviction “for nonpayment of rent” means any eviction motivated (wholly or in substantial part) by a tenant’s failure to pay rent or charge on time, or is limited to an eviction formally based on a pay-or-vacate type notice, would be an ambiguous matter.

⁴ The FAQ appears to have been adopted in response to the case of *KBW Inv. Properties LLC v. Azar*, No. 2-20-CV-4852 (S.D. Ohio); at the time, two other cases challenging the halt order were pending (*Brown v. Azar*, No. 1:20-CV-3702 (N.D. Ga.) and *Tiger Lily LLC v. HUD*, No. 2:20-CV-2692 (W.D. Tenn). Two additional cases, *Chambless Enterprises, LLC v. Redfield*, No. 3:20-CV-01455, 2020 WL 7588849 (W.D. La. Dec. 22, 2020) and *Skyworks LTD v. CDC*, No. 5:20-cv-02407 (N.D. Ohio) were filed well after the FAQ was released.

Without repeating the arguments set forth above, again the totality of the regulatory materials and the public health goals behind the halt order point inexorably to a conclusion that any residential eviction (of a covered person) motivated by a tenant's failure to make a rent or housing payment on time should be prohibited, irrespective of the state procedure used to effectuate the eviction. Prohibiting no-cause evictions motivated by nonpayment is fully consistent with the purpose as described in the FAQ and mitigates the spread of Covid-19 better than allowing all no-cause evictions.

Thus, at the very least, any court inclined to find that the CDC halt order allows no-cause eviction should at least recognize that such evictions are nevertheless prohibited where nonpayment is a significant motivating factor⁵ behind the nonrenewal of a lease or the issuance of the no-cause eviction notice. As many landlords will likely be less-than-forthcoming about whether a no-cause eviction was motivated by nonpayment, advocates may employ the *McDonnell Douglas v. Green* analysis, normally used to infer discriminatory intent based on circumstantial evidence, to establish such a motive. See *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973).

Under *McDonnell Douglas*, a Title VII case, an employment discrimination complainant may establish a prima facie case of racial by showing "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." *McDonnell Douglas* at 802. If such a prima facie case is established, the employer must set forth a "legitimate, nondiscriminatory reason" for not hiring the complainant. See *Id.* at 802-03. If the employer carries that burden, then the charge will be dismissed unless the complainant is able to show the employer's proffered reason was pretextual. See *Id.* at 804.

While *McDonnell Douglas* may have been an employment discrimination case, the same framework has long been used to evaluate claims of intentional discrimination in housing as well. See, e.g., *U.S. v. Badgett*, 976 F.2d 1176, 1178 (8th Cir. 1992) ("The *McDonnell Douglas* test recognizes that direct proof of unlawful discrimination is rarely available. Therefore, after a plaintiff makes a prima facie case, a presumption of illegality arises and respondent has the burden of articulating a legitimate, non-discriminatory justification for the challenged policy. This scheme is routinely used in housing and employment discrimination cases."). Versions of the test are also used to evaluate claims of landlord retaliation against tenants under state anti-retaliation statutes. See, e.g., *Barnes v. Weis Management Co.*, 347 N.W.2d 519, 522 (Minn.App. 1984) (discussing Minnesota statute prohibiting landlord reprisals against tenants and adopting *McDonnell Douglas* burden-shifting analysis).

Applying the *McDonnell Douglas* framework to the present context, evidence that the landlord refused to renew a lease or served a no-cause eviction notice after the tenant became delinquent in rent would seem to make a prima facie case that the eviction is motivated by the tenants' nonpayment of rent in a timely manner. Where such evidence is present, the court should presume that the tenant's failure to

⁵ Because certain decisions, such as a landlord's decision to evict a tenant, may have more than one motive, courts commonly require a showing that an improper consideration was a "substantial or motivating factor" in the challenged decision—even if other factors may have contributed to the outcome. See, e.g., *Hunter v Underwood*, 471 U.S. 222, 228 (1996) ("Once racial discrimination is shown to have been a 'substantial' or 'motivating' factor behind enactment of the [challenged] law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor.").

pay rent (in a timely manner) was a significant motivating factor behind the eviction, and dismiss the case unless the landlord rebuts that presumption (likely by setting forth legitimate reasons for which the landlord would still have evicted the tenant even apart from the rent default). Even if the landlord does so, the court should still allow the tenant an opportunity to prove the landlord's reason is pretextual, and the eviction was truly motivated by nonpayment.

To best effectuate such a policy, courts that determine the CDC eviction halt order does not preclude no-cause eviction cases altogether should require landlords who bring such cases to disclose at the outset whether the tenant is delinquent in rent or has failed to pay rent on time since the onset of the Covid-19 pandemic—and if so, the reason for the no-cause eviction. Courts should not accept for this purpose circular or tautological reasons, such as “owner want possession” or “lease term has expired.”

Even if a court agrees that evictions motivated by nonpayment remain restricted and applies a *McDonnell Douglas*-type analysis to ascertain the reasons for which such cases are filed, advocates should nevertheless consider appealing such decisions. It may be that few landlords will be able to successfully show that a no-cause eviction was motivated by a reason other than nonpayment of rent, but not within the five enumerated grounds for which the CDC halt order expressly permits eviction. But some may be able to do so, and these recommended procedures (for discerning the landlord's motivation for evicting a tenant through a no-cause eviction notice) become necessary only where a court reaches the demonstrably incorrect threshold determination that no-cause evictions remain permissible under the CDC halt order.