

CDC's Rocky Foray into Housing Policy

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For the second time in a just over a decade, the United States is experiencing a housing crisis affecting millions of residents across the nation, this time primarily involving tenants unable to meet monthly rent payments. During the coronavirus (COVID-19) pandemic, millions have lost jobs or seen their work dry up as business across the nation were closed under stay-at-home orders or other state restrictions. Logistically, many renters benefited temporarily from a logistical reprieve as court closures across the country made it impossible to proceed in eviction procedures. Eventually, many courts issued administrative orders preventing the filing or process of eviction pleadings or orders.¹ Nevertheless, as the pandemic continued wreaking havoc through the summer and fall of 2020, court orders began expiring and the federal government— not previously called in to intervene on this issue—attempted to fill the gap.

In August of 2020, former President Trump signed an executive order to stave off the ongoing housing crisis brought on (or, perhaps, exacerbated) by the raging coronavirus pandemic. Among other things, Executive Order 13945 tasked the Centers for Disease Control and Prevention (CDC) to “consider whether any measures temporarily halting residential evictions of any tenants for failure to pay rent are reasonably necessary to prevent the further spread of COVID-19 from one State or possession into any other State or possession.”²

Following through with President Trump’s directive, on September 4, 2020, the CDC issued an Agency Order, titled “Temporary Halt in Residential Evictions To Prevent the Further Spread of COVID-19”³ (the “Initial CDC Order”), citing the threat of the spread of the coronavirus as the reason for its action. In essence, this Initial CDC Order prohibited landlords, residential property owners, or any other person from evicting “any covered person from any residential property in any jurisdiction.”⁴ The CDC’s action was not explicitly based on economic conditions but was intended to reduce wholesale movement during the pandemic and the number of people who may be forced into shelters or other crowded living conditions. Most

¹ *E.g.*, *In re Gen. Statewide Judicial Emergency*, 228 A.3d 1283 (Pa. 2020), *supplemented*, 228 A.3d 253 (Pa. 020), and *supplemented*, 229 A.3d 229 (Pa. 2020).

² Exec. Order No. 13,945, *Fighting the Spread of COVID-19 by Providing Assistance to Renters and Homeowners*, 85 Fed. Reg. 49,935 (Aug. 8, 2020).

³ *Temporary Halt in Residential Evictions To Prevent the Further Spread of COVID-19*, 85 Fed. Reg. 55,292 (Sept. 4, 2020).

⁴ A “covered person” is one who uses “best efforts” to obtain government rental or housing assistance, expects to earn no more than \$99,000 in annual income for 2020 (or \$198,000 if filing jointly), was unable to make full housing payments, is using best efforts to make timely partial payments of rent, and would be forced into homelessness if evicted (or forced to move into congregate living situations). *Id.* at 55,293.

housing advocates lauded this action to protect vulnerable populations from homelessness, but some practitioners questioned the authority of a federal agency tasked with controlling and preventing disease spread to formulate policy traditionally left to state and local governments. Opponents mounted challenges and recently, at least two federal courts have voided the Initial CDC Order on separate constitutional and statutory grounds, discussed further below.

In the Initial CDC Order, the agency cited to its authority under Section 361 of the Public Health Services Act⁵ which ostensibly authorizes the Surgeon General, with the approval of the Secretary of Health and Human Services, to issue and enforce regulations which are “necessary to prevent the introduction, transmission, or spread of communicable diseases. . .” The statute identifies some possible regulations: “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 necessary.”

The Initial CDC Order has since expired, but was renewed and extended by the Congress in its December 2020 COVID-19 aid package, extending the eviction moratorium through January 31, 2021.⁶ Soon after taking office, President Biden directed the CDC to extend its Initial Order and again the CDC followed through, issuing a new order⁷ which, among other things, extended the eviction moratorium through March 31, 2021 (the Initial CDC Order together with the above extensions, the “CDC Order”).

The intent of the CDC Order was clearly focused on reducing disease transmission, a function that falls within the authorizing statute. But opponents argued that imposing a nationwide ban on residential evictions may be too far removed from the statutory authorization mentioned *supra*, and runs afoul of the canon instructing courts to read enumerated lists to include only items following a similar pattern or similar likeness under the maxim of *ejusdem generis*, or “of the same kind.” Just as many courts rejected COVID-19 era lawsuits seeking business interruption insurance coverage when presented with arguments that the COVID-19 pandemic caused physical harm to premises in the way that a tornado, earthquake, flood, or other Act of God could,⁸ some judges may find the statutory authority underpinning lacking sufficient

⁵ Codified at 42 U.S.C. § 264.

⁶ Consolidated Appropriations Act, 2021, H.R. 133, 116th Cong. § 502 (2020).

⁷ Order Under Section 361 of the Public Health Service Act (42 U.S.C. 264) and 42 Code of Federal Regulations 70.2, Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 8020 (Feb. 3, 2021).

⁸ *E.g.*, *Mattdogg, Inc. v. Philadelphia Indem. Ins. Co.*, No. L-820-20, 2020 WL 7702634, (N.J. Super. Law Div. Nov. 17, 2020); *Prime Time Sports Grill, Inc. v. DTW 1991 Underwriting Ltd.*, No. 8:20-CV-771-T-36JSS, 2020 WL 7398646 (M.D. Fla. Dec. 17, 2020); *Mace Marine Inc. v. Tokio Marine Specialty Ins. Co.*, No. 20-10044-CIV, 2020 WL 6469980 (S.D. Fla. June 9, 2020); see Paul K. Stafford, *Coping With COVID-19: Business & Insurance Considerations for the Virus that Made America Virtual*, 18 J. TEX. INS. L. 3, 4–5 (2020).

similarity to the examples of possible regulations provided by Congress in the Public Health Services Act.

On March 10th, one federal jurist agreed. In *Skyworks, Ltd. v. Ctrs. for Disease Control & Prevention*, No. 5:20-cv-2407, ___ F. Supp. 3d ___, 2021 WL 911720 (N.D. Ohio Mar. 10, 2021), a judge in the Northern District of Ohio held that the CDC Order went beyond the statutory authorization underpinning the CDC's authority and that Congress had not granted the CDC the authority to issue a "nationwide moratorium on evictions" and that the moratorium itself was *ultra vires*. Rejecting the CDC's assertion that public policy mandates a residential eviction moratorium during a public health crisis, the court engaged in a textual analysis of CDC's quarantine authorizing statute and found that authorizing the CDC to extend the interpretation of its quarantine authority would be "tantamount to creating a general federal police power."

On separate grounds, a second federal court voided the CDC Order in late February, holding that the CDC Order violated the U.S. Constitution's Interstate Commerce Clause. In *Terkel v. Centers for Disease Control & Prevention*, No. 6:20-cv-00564, ___ F. Supp. 3d ___, 2021 WL 742877 (E.D. Tex. Feb. 25, 2021), a federal judge district court judge in Texas held that the CDC Order regulated activity that was squarely within the realm of authority best controlled by the states based on the judicial finding of fact that the order was not an "economic one." *Id.* at *6. Finding that the allowance of evictions *vel non* does not have a substantial effect on interstate commerce, the judge struck down the CDC Order in its entirety.

A third federal judge struck down the CDC Order on March 15, 2021 on statutory grounds, finding that the Congressional grant of authority to the CDC was more limited than the CDC claimed. In *Tiger Lily, LLC v. U.S. Dep't of Housing & Urban Devel.*, No. 2:20-cv-02692-MSN-atc, ___ F. Supp. 3d ___, 2021 WL _____ (M.D. Tenn. Mar. 15, 2021), the court applied the canon of constitutional avoidance (i.e. construing a statute in a narrower way as to not present a question of unconstitutionality)⁹ and thus held that the statutory grant of authority to issue regulations for measures like inspection, fumigation, disinfection, etc., did "not include moratoria on evictions," emphasizing the issue of (*noscitur a sociis*) *ejusdem generis*. In other words, the court held that when Congress listed the types of regulations the CDC Director may issue, Congress intended to *limit* the Director's authority to the type of regulations enumerated rather than give a *carte blanche* to regulate around public health crises.

The federal government has already filed notice to appeal in the Texas *Terkel* case, and may soon do the same in the Ohio *Skyworks* and the Tennessee *Tiger Lily* cases. Of course, as with most things COVID-related, circumstances change quickly,¹⁰ and Congress, President

⁹ See Lindsay Wiley (@ProfLWiley), Twitter (Mar. 17, 2021, 7:55 AM), <https://twitter.com/ProfLWiley/status/1372154744374968320?s=20> (discussing the implications of growing backlash to public health orders, including potential reverberations in other regulatory schema).

¹⁰ Since the initial draft of this article in early February, 2021, the authors have had to conduct three rewrites to address each of the cases discussed herein. It is possible (and likely) that between submission and publication of this article, yet another case will have been decided.

Biden, or other government authorities might reengage to provide express statutory authority to CDC to issue such an order or implement an eviction moratorium independently of the CDC.

This federal judicial intervention may have increased reverberations throughout the country as many states have since allowed their initial eviction moratoria to expire relying on the federal CDC Order. Other jurisdictions, like Philadelphia, for example, have “recognized” the CDC Order but have independently implemented procedures which have had the effect of operationally halting evictions.¹¹ Over the next several weeks, housing advocates and their legislative and executive allies may soon need to scramble to prevent yet another housing crisis in America’s big cities. They may, however, be less likely to rely on the CDC’s authority and may have to look instead to state and local laws, regulations and orders.¹²

Notably, neither judge in either the *Terkel* nor the *Skyworks* case issued an injunction, so the voiding of the CDC Order has no current effect on landlords or tenants beyond the parties involved in those cases.¹³ Time will tell if future plaintiffs objecting to the CDC’s authority and relying on *Terkel* and/or *Skyworks* will take a more aggressive approach and seek a nationwide injunction thus declaring the CDC Order null and void. It is possible that as the CDC Order expires, this distinct issue will become moot, but if state and local moratoria remain in effect on their own, it is likely that challenges, based on different theories, may very well continue.

Note: On the date of the submission of this article, the CDC extended the CDC Order through June 30, 2021.

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¹¹ See Administrative Order No. 06 of 2021, In Re: Residential Eviction Moratorium and Exceptions. Service of Writs and Alias Writs of Possession.

¹² For example, California has a statutory eviction moratorium with procedural nuances through June 30, 2021. See Cal. Civ. Proc. Code § 1179.03. Washington, D.C.’s eviction moratorium persists through the termination of the mayor’s state of emergency and sixty (60) days thereafter. D.C. Code Ann. § 42-3505.01(q).

¹³ See also Ilya Somin, *Federal District Court Rules Against CDC Eviction Moratorium*, Reason (Mar. 11, 2021) (“Therefore, at least for the moment, the decision will have little effect on enforcement of the moratorium beyond the plaintiffs in the specific case.”).