

ARTICLE:
THE CDC'S NATIONAL COVID-19 EVICTION MORATORIUM AND ITS EFFECTS ON CALIFORNIA LANDLORDS AND TENANTS

*By Karl E. Geier**

A national “eviction moratorium” issued by the Centers for Disease Control and Prevention (CDC) on September 4, 2020, initially was set to expire December 31, 2020, and subsequently was extended through January 31, 2021, and then to March 31, 2021, and most recently to June 30, 2021. Unlike the California statutory eviction moratorium that currently prohibits residential notices to vacate and unlawful detainer actions through June 30, 2021,¹ the CDC moratorium is not self-actuating, and must be claimed by the tenant through direct communications with the landlord, but it also does not limit or affect the landlord’s right to recover rent through remedies other than eviction or dispossession of the tenant. It is an unusual regulatory intervention by a federal agency, compelled by executive order rather than legislation, into landlord-tenant law, which is traditionally within the province of local and state governments alone, and it operates independently of the California statewide eviction moratorium (SB 91) discussed in the lead article of the March 2021 issue of the Miller & Starr *Real Estate Newsalert*.² However, the requirements for a tenant to invoke the CDC Order are nominal, and a landlord that attempts to look behind the tenant’s claims and challenge his or her eligibility for the defense will do so at its peril. The CDC Order not only creates the potential for easily-claimed, federally-mandated defenses against eviction for tenants who ostensibly have been affected by COVID-19, it also poses the risk of potentially crippling fines and other criminal penalties for landlords who violate its strictures (up to \$250,000 per violation), and it accordingly is significant whether or not the state law continues to apply.

Format and Legal Basis

The CDC directive establishing the eviction moratorium (the Order) is an emergency order of the Surgeon General promulgated under section 361 of the Public Health Service Act.³ As such, it has been adopted outside the usual administrative rule-making process and without opportunities for public review

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and comment that ordinarily are applicable to federal agencies. The original Order and subsequent extensions have been published in the Federal Register⁴ but are not a part of the Code of Federal Regulations.

The ostensible statutory authority for the Order, under section 361, is a broad authorization of the Surgeon General, with the approval of the Secretary of Health and Human Services, “to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession.”⁵ This statute provides for various measures that might be invoked to prevent “introduction, transmission, or spread,” but these are all in the context of preventing the spread of communicable diseases “from foreign countries into the States or possessions, or from one State or possession into any other State or possession,”⁶ and none of these are in the nature of regulating the use or operation of real property, much less the terms of private occupancy agreements and landlord-tenant relationships. The CDC Order also cites a standing provision of the Code of Federal Regulations that implements section 361, 42 C.F.R. 70.2, as authority for its provisions, but that regulation is similarly limited:

“Whenever the Director of the Centers for Disease Control and Prevention determines that the measures taken by health authorities of any State or possession (including political subdivisions thereof) are insufficient to prevent the spread of any of the communicable diseases from such State or possession to any other State or possession, he/she may take such measures to prevent such spread of the diseases as he/she deems reasonably necessary, including inspection, fumigation, disinfection, sanitation, pest extermination, and destruction of animals or articles believed to be sources of infection.”⁷

In light of the narrow “transmission prevention” imprimatur of the authorizing statute and regulation, the legal underpinnings of an “eviction moratorium” seem particularly far-fetched. In promulgating the Order, therefore, the CDC took pains to associate the “spread of COVID-19” with “homelessness,” and to suggest that “eviction moratoria facilitate self-isolation by people who become ill or who are at risk for severe illness from COVID-19 due to an underlying medical condition” and “allow State and local entities to more easily implement stay-at-home and social distancing directives.”⁸ Both of these are slender threads for imposition of federal limitations on the usual exercise of police powers and legal rights and remedies in residential landlord-tenant relationships, which are quintessentially local and intra-state in nature, and unrelated to interstate or

international commerce within the traditional purview of the federal government.

As a result, the Order has been challenged by litigation in several jurisdictions on various theories, including that it exceeds the statutory authority of the Surgeon General under section 361 or is in fact a regulation that was illegally adopted without going through the federal rulemaking process under the Administrative Procedures Act, or on constitutional grounds, such as that it is an unlawful impairment of contract, that it is an invalid taking of private property without just compensation because it forces private landlords to provide a public benefit of allowing free occupancy to indigent or economically distressed persons, or that it exceeds the authority of the federal government to regulate commerce “among the several states” and impinges on the traditional police power and authority of local and state governments to regulate internal economic relationships. Some federal district court decisions have found the Order invalid under one or more of these theories, while others have not.⁹ The most recent iteration of the Order in connection with the March 28, 2021 extension to June 30, 2021, contains an additional recital asserting that evictions during the course of COVID-19 outbreaks, even when only effecting “intrastate displacement,” would “inevitably increase the interstate spread of COVID-19” and “further facilitate interstate spread in the context of communicable disease spread.”¹⁰

Applicability of the CDC Order in California

Although the Order is nationwide in scope, it does not apply within any “state, local, territorial, or tribal area with a moratorium on residential evictions that provides the same or greater level of public-health protection than the requirements listed in this Order.”¹¹ In other respects, however, the Order is enforceable by both federal and cooperating state and local authorities.¹² There is no mechanism in the Order or elsewhere in the authorizing regulations that would enable a landlord or other person to determine with certainty that it does not apply as a result of some other local or state eviction moratorium or restriction. A landlord or its agent who puts too fine a cut on the evaluation of whether a local or state regulation is more protective of public health in order to pursue an eviction proceeding against a person otherwise covered by the Order is taking a significant risk. The potential sanctions for violation of the Order are severe (“a fine of no more than \$100,000 if the violation does not result in a death, or a fine of no more than \$250,000 if the violation results in a death”).¹³

This article does not address the enforceability or legality of the CDC Order, other than to note that, thus far in California, there is no reported decision at the federal or state level that would prevent a tenant from raising the CDC Order as a defense to eviction or that would assure that a landlord could avoid the onerous civil or criminal penalties for violating the Order on the basis of invalidity. There is, moreover, no reported case that affirms or disaffirms the assumption that the California eviction moratorium and related legislation “provides the same or greater level of public health protection” than the CDC Order, and thereby supersedes the CDC Order by its terms. The remainder of the article assumes that the federal Order could apply and be binding upon landlords, tenants, and the courts in connection with specific eviction attempts and defenses throughout California.

Properties and Landlords Affected by the CDC Order

Basically, the Order should be assumed to apply to any landlord or owner of a property that includes a residential dwelling unit. The Order applies to any “landlord, owner of a residential property, or other person with a legal right to pursue eviction or possessory action,” and provides that no such person shall “evict any covered person from any residential property in any jurisdiction to which this Order applies during the effective period of the Order.”¹⁴ The term “residential property” is defined to include “any property leased for residential purposes, including any house, building, mobile home or land in a mobile home park, or similar dwelling leased for residential purposes.”¹⁵ The Order is not carefully drawn with respect to mixed-use property, and the possibility exists, however unlikely, that it could be construed as applying to a nonresidential tenant of a mixed-use property that includes a “dwelling leased for residential purposes.” The Order applies whether the landlord or other person is an individual or a corporation, company, association, firm, partnership, society, or joint stock company.¹⁶

The Order does not apply to a hotel, motel, or “other guest house rented to a temporary guest or seasonal tenant” within the term “residential property,” although it defers to state and local law for the definition of “temporary guest or seasonal tenant” and in that respect is somewhat ambiguous.¹⁷ The absence of protections for long-term residents of hotels and motels has been a basis for criticism of the CDC Order by some tenants’ rights organizations, and in some states, likely including California, longer term residential tenancies will be protected from eviction even if the property occupied is ostensibly a hotel or

motel. However, the Order has not been clarified in this regard by the CDC, and is subject to local law on this issue in any event.

Persons Protected by the CDC Order (“Covered Persons”)

The CDC Order restricts evictions and otherwise protects only “covered persons”; specifically, a landlord, owner, or other person with a right to evict may not evict “any covered person from any residential property.”¹⁸ By and large, a tenant will be a “covered person” if he or she is willing to state, under penalty of perjury, that he or she earns less than \$100,000 a year and has been unable to pay rent in full due to loss of income, loss of employment, or extraordinary medical expenses, without regard to whether any of these circumstances are related to COVID-19, and that eviction might render the individual homeless or force the person to move into a “shared living setting.” More particularly, the Order provides:

“For purposes of the Order, a “covered person” is any tenant, lessee, or resident of a residential property who provides to their landlord, the owner of the residential property, or other person with a legal right to pursue eviction or a possessory action, a declaration under penalty of perjury that:

- (1) The individual has used best efforts to obtain all available government assistance for rent or housing;
- (2) The individual either (i) expects to earn no more than \$99,000 in annual income for Calendar Year 2020-2021 (or no more than \$198,000 if filing a joint tax return), (ii) was not required to report any income in 2019 to the U.S. Internal Revenue Service, or (iii) received an Economic Impact Payment (stimulus check) pursuant to Section 2201 of the CARES Act;
- (3) The individual is unable to pay the full rent or make a full housing payment due to substantial loss of household income, loss of compensable hours of work or wages, a lay-off, or extraordinary out-of-pocket medical expenses;
- (4) The individual is 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; *and*
- (5) Eviction would likely render the individual homeless—or force the individual to move into and live in close quarters in a new congregate or shared living setting—because the individual has no other available housing options.” (emphasis added).¹⁹

As noted, the term “covered person” is defined in such a way as to make the order applicable only when the tenant or other occupant has provided a prescribed statement to the landlord that invokes its provisions. But there is no requirement that the tenant provide the statement at any particular time, and there is no reason it could not be invoked by the tenant after commencement of eviction proceedings by service of a three-day notice to quit or the filing of an

action for possession. Indeed, it is most probable that is when it would be invoked.

Moreover, there is no clear requirement that the individual who claims “covered person” status must be able to document any of the statements in the declaration or respond to a landlord request for proof of eligibility. In fact, the form of such a declaration is attached as an exhibit to the Order, and includes no requirement for detailed specifics such as dates, efforts, or amounts of deficiencies as related to income, or any other property- or tenant-specific information.²⁰ A landlord who receives such a declaration from a tenant before or in response to an eviction notice proceeds at his or her peril, and there are no safe harbors for a landlord to proceed, even if the tenant has demonstrably lied or committed perjury in the declaration.

In connection with the March 28, 2021, extension of the Order, the CDC made further “clarifications” as to the form and content of the declaration required to establish that a particular tenant or occupant is a “covered person.” Among others, these include the following:²¹

- (a) The declaration need not be in the form specifically attached to prior versions of the order; any form is acceptable and effective if it contains the required elements (1) through (5), above, contains an express acknowledgment that the signatory may be liable for perjury for any false or misleading statements or omissions, and is signed under penalty of perjury.
- (b) “In some circumstances,” the declaration can be signed on behalf of other occupants by a single occupant on behalf of “the other adult residents who are party to the lease, rental agreement, or housing contract”; the only identified “circumstance” is where the parties file joint tax returns, but that is not the exclusive circumstance that may be appropriate.
- (c) The declaration can be translated into any language selected by the tenant, occupant, or resident.
- (d) The Order “does not preclude a landlord challenging the truthfulness of a tenant’s, lessee’s, or resident’s declaration in court, as permitted under state or local law.”

While these changes may clarify the application of the Order to a particular

tenant, the last item, providing for the landlord's right to "challenge the truthfulness" of a tenant's declaration in court, does not provide a clear safe harbor for proceeding with an eviction proceeding against a tenant or occupant whose declaration is considered by the landlord not to be truthful, if there has not been a prior judicial determination of falsity of the declaration that results in the declaration not being effective to trigger the protections of the Order for that particular tenant.

Scope of Protections for Tenants and Prohibited Actions for Landlords

The CDC Order's only direct prohibition is embodied in a single operative sentence:

"Subject to the limitations under 'Applicability,' a landlord, owner of a residential property, or other person with a legal right to pursue eviction or possessory action, shall not evict any covered person from any residential property in any jurisdiction to which this Order applies during the effective period of the Order."²²

This language only limits the landlord's right to evict, not the right to recover rent, and it does not exonerate the tenant from the obligation to pay rent. The terms "evict" and "eviction" are specifically defined to include only the effort to remove or cause the removal of a covered person from a residential property.²³ The Order does not even restrict the landlord from pursuing a claim for collection of rent becoming due before or during the duration of the Order, although it should be noted that this would violate the current California law that prohibits COVID-19 related rent collection actions prior to July 1, 2021.²⁴ The CDC Order makes its limited scope clear in another provision, which specifically says it "does not relieve any individual of any obligation to pay rent, make a housing payment, or comply with any other obligation that the individual may have under a tenancy, lease, or similar contract."²⁵ The Order also provides that it does not prohibit the imposition of late charges, penalties, interest and the like,²⁶ although again the California statute, while it remains effective, would prohibit such actions with regard to COVID-19 related rent.²⁷

To summarize, the CDC Order would not prevent a landlord from pursuing a collection action or otherwise enforcing the terms of the lease or rental agreement requiring the payment of rent, provided the landlord is not seeking to dispossess the tenant in the process. It also does not dilute the rental arrearages that accumulate before a collection action is implemented, or create disincentives for the landlord to preserve rental claims and pursue them after the

moratorium expires, if not sooner. Thus, while eviction of a non-paying tenant may be the preferred remedy, particularly where the tenant is impecunious or bankrupt, the Order does not materially impact the landlord's other potential remedies for nonpayment.

The CDC Order also directly allows for an eviction based on causes other than nonpayment of rent, even if a tenant has provided a declaration of inability to pay rent under penalty of perjury. Specifically, the CDC Order does not preclude an eviction based on a tenant, lessee, or resident engaging in criminal activity on the premises, threatening the health or safety of other residents, damaging or posing a significant risk of damage to property, violating applicable building codes or other health and safety laws and regulations, or violating other contractual obligations, other than non-payment of rent or similar housing-related payments.²⁸ (Some of these also may be permitted grounds for eviction under the California statute, although California's just cause eviction law, when it applies, would restrict the landlord's ability to rely on some of these grounds for eviction once a tenant has been in possession for 12 months or more.)²⁹

Summary and Significance of the CDC Order in California

The federally imposed CDC Order, both before and after it expires, is not particularly restrictive on landlord remedies except in the narrow context of causing removal from occupancy of a tenant who claims COVID-19 related protections. In this regard, it bears repeating, California law appears to be more restrictive of landlord remedies, both under rent-controlled regulations enacted at the local level, and under the statewide just cause eviction law enacted in 2019, as well as under the numerous specific COVID-19 related changes in California landlord-tenant law as most recently revised by SB 91 in January 2021,³⁰ regardless of whether the CDC Order continues in effect in accordance with its current terms.

Even so, a blanket assumption that the CDC Order is not applicable in California on the basis that California eviction restrictions are "more protective of public health" is not warranted. The California statute (SB 91) includes requirements that the tenant provide documentation of financial distress and pay certain amounts of COVID-19 related indebtedness in some instances, but these documentation requirements and exceptions for COVID-19 debt to be collected under the California statute are different from the federal

requirements. A landlord who concludes it can proceed with eviction proceedings based on a perceived exception to the blanket prohibition on evictions under SB 91 should still consider whether the tenant remains protected by the federal Order, particularly if the tenant has delivered the declaration under penalty of perjury in the form provided by the CDC Order.

Also, it should be noted that the March 28, 2021, extension of the CDC Order makes it clear (although it would likely have been implied regardless) that the exception allowing eviction for criminal activity does not include criminal trespass or similar state law crimes resulting from non-payment of rent by a “covered person,” and that the fact a person has been exposed to or contracted COVID-19 cannot be used as the basis for eviction based on a “threat to health or safety of other residents.”³¹ These changes bring the CDC Order more into line with the more detailed restrictions on COVID-19 related evictions and rent collection efforts imposed by California statutory law, and underscore the importance of reviewing both the federal Order and applicable state law in connection with any specific effort to evict a residential tenant in the period up to, and including, June 30, 2021.

ENDNOTES:

¹Civ. Code, §§ 1179.01 et seq.

²See Geier, *Just Compensation or Just More Complications? The New COVID-19 Relief Bill (SB 91) and Its Implications for Residential Landlords and Their Tenants*, published in Miller & Starr, *Real Estate Newsalert*, Vol. 31, Issue No. 4 (March 2021), pp. 258 et seq.

³42 U.S.C.A. § 264. See also 42 C.F.R. 70.2.

⁴Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55292 (Sept. 4, 2020); Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 8020 (Feb. 3, 2021); Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 16731 (Mar. 31, 2021). These iterations of the Order are cited, collectively, as the “CDC Order,” with reference to the applicable Federal Register pages.

⁵42 U.S.C.A. § 264(a).

⁶*Id.*

⁷42 C.F.R. 70.2.

⁸85 Fed. Reg. at 55292; 86 Fed. Reg. at 16733.

⁹E.g., *Terkel v. Centers for Disease Control and Prevention*, 2021 WL 742877 (E.D. Tex. 2021) (rejecting the CDC Order as outside federal authority to

regulate internal commercial and economic relationships); *Skyworks, Ltd. v. Centers for Disease Control and Prevention*, 2021 WL 911720 (N.D. Ohio 2021) (finding the CDC Order to exceed its statutory authorization, which is limited to prescribing measures to prevent transmission of communicable diseases and does not authorize economic regulation); *Brown v. Azar*, 2020 WL 6364310 (N.D. Ga. 2020) (upholding the CDC Order against claim of unlawful delegation of authority to regulate commerce); *Chambless Enterprises, LLC v. Redfield*, 2020 WL 7588849 (W.D. La. 2020) (also deferring to CDC's determination that a temporary eviction moratorium was necessary to limit the spread of COVID-19 and therefore within the statutory authority granted by 42 U.S.C.A. § 264).

¹⁰86 Fed. Reg. at 16735.

¹¹85 Fed. Reg. at 55292; 86 Fed. Reg. at 8021; 86 Fed. Reg. at 16736.

¹²86 Fed. Reg. at 8025; 86 Fed. Reg. at 16738 (both citing 18 U.S.C.A. §§ 3559, 3571; 42 U.S.C.A. §§ 243, 268, 271; and 42 C.F.R. 70.18).

¹³86 Fed. Reg. at 8025; 86 Fed. Reg. at 16738 (both citing 18 U.S.C.A. §§ 3559, 3571; 42 U.S.C.A. § 271; and 42 C.F.R. 70.18).

¹⁴85 Fed. Reg. at 55292; 86 Fed. Reg. at 8022; 86 Fed. Reg. at 16736 (under the caption "Applicability").

¹⁵86 Fed. Reg. at 8021; 86 Fed. Reg. at 16732.

¹⁶85 Fed. Reg. at 55292, n. 3; 86 Fed. Reg. at 8020, n. 1; 86 Fed. Reg. at 16731, n. 1.

¹⁷86 Fed. Reg. at 8021; 86 Fed. Reg. at 16732.

¹⁸85 Fed. Reg. at 55293; 86 Fed. Reg. at 8020; 86 Fed. Reg. at 16731.

¹⁹85 Fed. Reg. at 55293; 86 Fed. Reg. at 8020-8021; 86 Fed. Reg. at 16731-16732.

²⁰See 85 Fed. Reg. at 55297 (Attachment to the Order); 86 Fed. Reg. at 16735, 16736-16737 (includes a link to a downloadable form of "standardized declaration form").

²¹86 Fed. Reg. at 16736-16737.

²²85 Fed. Reg. at 55293; 86 Fed. Reg. at 8020; 86 Fed. Reg. at 16731.

²³85 Fed. Reg. at 55293; 86 Fed. Reg. at 8021; 86 Fed. Reg. at 16732.

²⁴Civ. Proc. Code, § 871.10. See also Civ. Proc. Code, § 116.223, subd. (b)(3), postponing small claims court actions to August 1, 2021 or later.

²⁵85 Fed. Reg. at 55294; 86 Fed. Reg. at 8021-8022; 86 Fed. Reg. at 16736.

²⁶85 Fed. Reg. at 55294; 86 Fed. Reg. at 8022; 86 Fed. Reg. at 16736.

²⁷Civ. Code, § 1942.9 (as added by 2021 Stats., ch. 2 (SB 91), S. 7).

²⁸85 Fed. Reg. at 55294; 86 Fed. Reg. at 8022; 86 Fed. Reg. at 16736.

²⁹Civ. Code, § 1946.2, subd. (b).

³⁰Stats. 2021, ch. 2 (SB 91), enacted effective January 29, 2021. For further information on this law, see my previous article in the March 2021 issue of the *Real Estate Newsalert*, cited in note 2, *supra*.

³¹86 Fed. Reg. at 16736.