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Client Alert: The CDC Eviction Order: What Does it Mean for Landlords?

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Under a broad claim of authority, on September 4, 2020, the Centers for Disease Control and Prevention ("CDC") issued an Order (85 FR 55292) to temporarily halt certain residential evictions effective immediately until December 31, 2020. The Order provides in part that "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 State or U.S. territory." The stated purpose of the Order is to slow the spread of COVID-19 by preventing people from being forced out of their homes due to non-payment of rent. By its terms, the Order does not apply in American Samoa or in any U.S. State or territory with a moratorium on residential evictions that provides the same or greater level of public health protection than the requirements listed in the Order. Setting aside the possibility that the CDC has overstepped its legal authority, which is an issue that will certainly be litigated, this article discusses what this Order means for landlords at this time.

First, let's start with what this Order does not do:

It does not stop all evictions, and it does not stop evictions for any reason other than the non-payment of rent. If the tenant has breached the lease for **any other reason**, or if the term of tenancy has ended, eviction may be sought, and the tenant may not use this Order to prevent eviction.

This Order also does not stay the accrual of rent, late charges, fees, interest, or penalties. In fact, the Order requires that the tenant continue to make best efforts to pay rent as it comes due. Importantly, on January 1, 2021, when this Order expires (unless the Order is extended), the entire amount then owed by the tenant under the lease is due and payable.

This Order does not stay evictions as a result of foreclosure.

This Order does not automatically stay evictions. The tenant must take affirmative action before the tenant can use this Order to stop an eviction and, notably, the tenant must follow all of the terms of the Order if the tenant wishes to qualify for the stay it provides.

What must the tenant do to invoke this Order?

The CDC has included a Declaration, which the tenant must execute under penalty of perjury. (A copy of the Declaration is [here](#)). The Declaration sets forth the criteria that the tenant must meet under the Order to obtain protection under the Order. The tenant must attest to each of the following:

- The tenant has used best efforts to obtain all available government assistance for rent or housing.
- The tenant either expects 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 tenant is unable to pay 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 (defined as an unreimbursed medical expense that exceeds 7.5 percent of the tenant's adjusted gross income for the year); the Order does not require that the tenant demonstrate that the loss of income is related to COVID-19.
- The tenant 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 non discretionary expenses.
- If evicted, the tenant 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 the tenant has no other available housing options.
- The tenant understands that the tenant must still pay rent or make a housing payment, and comply with other obligations that the tenant may have under its tenancy, lease agreement, or similar contract. The tenant further understands that fees, penalties, or interest for not paying rent or making a housing payment on time as required by tenancy, lease agreement, or similar contract may still be charged or collected.
- The tenant further understands that at the end of this temporary halt on evictions on December 31, 2020, the 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 the tenant subject to eviction pursuant to state and local laws.

If the tenant(s) satisfy each of the above requirements, the Declaration must be executed under penalty of perjury by all adults listed on the lease, rental agreement, or housing contract. Without signatures from all adults listed, the tenant may not invoke the Order.

After the Declaration is signed by all adults listed, the Declaration must be delivered by the tenant to their landlord, owner of the residential property, or other person who has a right to seek eviction, such as a property manager.

Under the CDC Order, a landlord (who is an individual) who violates the Order may be fined up to \$100,000, face up to one year in jail, or both, and, if the evicted tenant dies of Coronavirus, the individual landlord may be fined up to \$250,000, face up to one year in jail, or both. A landlord organization that violates the Order may be fined up to \$200,000 per event and, if the evicted tenant dies of Coronavirus, the landlord organization may be fined up to \$500,000 per event. Under the Order, "evict" is defined very broadly to mean "any action by a landlord ... to remove or cause the removal of a covered person from a residential property." Arguably, after a landlord has received a signed Declaration by the tenant, any action taken by a

landlord, even before a legal action is filed, to “evict” a tenant could be found to be a violation of the Order. As a result, landlords and others covered by the Order will need to be extremely cautious before taking any action to evict after a tenant delivers an executed Declaration to them.

Practically, what does the Order mean for courts who handle most evictions? In South Carolina, Magistrates in Summary Courts and their staff may not give legal advice. What this means is that they cannot advise tenants or landlords of the existence of this Order, how to use this Order as an affirmative defense, or how to complete the needed steps to invoke the Order. Magistrates may only refer tenants and landlords to CDC.gov, and it is up to the tenants and landlords to take it from there. The threshold question for South Carolina judges is whether the Declaration has been executed and provided to the landlord (or others) as specified in the Order. If not, evictions may be filed, rules and writs may be sought, and the cases may otherwise proceed until the Summary Court finds that tenants have provided the signed Declaration to the necessary people. Magistrates are also not going to “look behind” the statements made on the Declaration to question or confirm the statements made. The Declaration will be taken on face value. No matter where the co

urt action is in its process-from day of filing of the action, to the very day of eviction-whenver the tenant completes the necessary steps to invoke the Order and inform the court of this, the eviction and related action stop as of that moment. To be safe, once a landlord receives an executed Declaration from a tenant, the landlord should immediately stop the eviction process until the court overseeing the eviction allows otherwise. The case will remain stayed until January 1, 2021, or until such time as the Order expires if it is renewed. Note that rent continues to accrue, and many tenant beneficiaries of the Order will find themselves facing eviction as soon as the Order expires if they are unable to pay the lump sum amount owed at the time the Order expires.

Outside of South Carolina, different jurisdictions will treat the Order differently. It is likely that, in every jurisdiction covered by the Order, Judges and Magistrates (and their staffs) will not provide legal advice but this may mean different things in different jurisdictions. Some courts may advise the tenant of the existence of the Order and grant the tenant an extension of time to obtain counsel or determine if the tenant qualifies for protection under the Order. (This type of notice to the tenant and extension of time to respond to the eviction proceeding has already occurred in some eviction proceedings in Ohio Courts). The next question in most jurisdictions will likely be whether the tenant has properly executed the Declaration and provided it to the landlord (or others) as specified in the Order. In some jurisdictions, the Judge or Magistrate overseeing the eviction may not accept the Declaration at face value and, at an eviction hearing, the Judge or Magistrate may allow a landlord or the landlord’s counsel to cross-examine a tenant on the truthfulness or accuracy of the statements contained in the Declaration. It is possible that some courts may allow for discovery from the tenant on the limited issue of the accuracy of the statements contained in the Declaration. Most jurisdictions covered by the Order will likely find that, until a properly executed Declaration has been signed and delivered to the landlord or the others covered by the Order, evictions may be pursued and filed, writs and eviction orders may be sought, and the cases may otherwise proceed until the court overseeing the eviction finds that the tenant(s) have provided the executed Declaration to the necessary people. In most jurisdictions, once a proper, executed Declaration has been provided to the landlord and the court is notified of that fact, the eviction process will stop as of that moment, no matter where the eviction is in the process, unless the court overseeing the eviction, or a higher court in its jurisdiction, has determined that the CDC Order is ineffective because the Order was beyond the scope of the CDC’s authority or jurisdiction. To be safe, once a landlord receives an executed Declaration from a tenant, the landlord should immediately stop the eviction process until the court overseeing the eviction allows otherwise. Once an eviction proceeding is stayed as a result of the Order, the eviction process will remain stayed until January 1, 2021, or until such time as the Order expires if it is extended. In all jurisdictions, the rent and late charges will continue to accrue, and many tenant beneficiaries of the Order will find themselves facing eviction as soon as the Order

expires if they are unable to pay the lump sum amount owed at the time the Order expires.