

## Publications

### U.S. District Court in Texas Finds CDC's Order Declaring a National Moratorium on Residential Evictions Unconstitutional

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On Thursday, February 25, 2021, the United States District Court for the Eastern District of Texas ruled that the Center for Disease Control and Prevention's (CDC) Order declaring a national moratorium on residential evictions was unconstitutional.<sup>1</sup> The Court addressed the question of whether the federal government has the authority to order property owners not to evict specified tenants as a function of its authority to legislate commerce among the States.<sup>2</sup> The case before the Court was limited in scope to the federal moratorium on evictions and did not address state and local-government eviction measures.<sup>3</sup>

In September 2020, the CDC issued an agency order entitled Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19 (Order).<sup>4</sup> This Order has been extended several times, and is currently set to expire on March 31, 2021.<sup>5</sup> The Order prohibits property owners or landlords from evicting a "covered person" from a residence.<sup>6</sup> Additionally, the Order "prohibits any action to remove or cause the removal of a covered person from a residential property" except under certain circumstances.<sup>7</sup> Individuals who violate the Order face criminal penalties of up to one year of imprisonment with one year of supervision upon release and a fine of up to \$250,000, and organizations engaged in a prohibited eviction face a criminal fine up to \$500,000.<sup>8</sup>

In addressing the applicability of the Commerce Clause to provide the government with its authority to issue the Order, the Court distinguished the moratorium on evictions from other regulated activities that affect interstate commerce, noting that because "residential buildings do not move across state lines[,] the regulated activity is not one that can be "traded in an interstate market."<sup>9</sup> The Court also found that the moratorium on evictions, accompanied by a criminal penalty, is a method of regulating the property rights of an owner of residential real estate - an act that is not economic in any material respect.<sup>10</sup> Additionally, the Court found that (a) the Order did not contain a jurisdictional element to limit its application to interstate commerce<sup>11</sup>; (b) the government did not provide findings that the Order was a part of "broader federal regulation of commerce among

the States” that would be “undercut without the order”<sup>12</sup>; (c) the “relationship between interstate commerce and an eviction criminalized by the order [was] attenuated” for several reasons<sup>13</sup>, including that the federal government’s Order entered into uncharted territory, as never before had the commerce power been invoked “to impose a nation-wide eviction moratorium”<sup>14</sup>, and, (d) the federal government’s view of its constitutional authority would “allow a federal eviction moratorium for any reason, including views on ‘fairness’” that would result in “prohibited federal police power.”<sup>15</sup>

Ultimately, the Order was deemed to exceed the federal government’s power to regulate Commerce.<sup>16</sup> The Court, as a United States District Court, has the authority to issue nationwide injunctions, but it chose not to at this time. The Court did, however, go so far as to advise the plaintiffs to seek an injunction if the federal government does not follow the declaratory judgment.<sup>17</sup> Because the Department of Justice is electing to appeal the Court’s decision, the Court could, upon request of the plaintiffs, issue a nationwide injunction, effectively ending the eviction moratorium nationwide. Should the Court choose to do so, the Department of Justice has the right to seek a stay of that order pending the appeal.<sup>18</sup>

If you have questions about the decision, please contact Ted Smith, Elizabeth Seedorf, or your regular Vorys real estate attorney.

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<sup>1</sup> *Terkel v. C.D.C.*, Case No. 6:20-cv-00564 (E.D. Texas February 25, 2021).

<sup>2</sup> *Id.* at 1.

<sup>3</sup> *Id.*

<sup>4</sup> Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19. 85 Fed. Reg. 55,292 (Sept. 4, 2020).

<sup>5</sup> *Terkel* at 4. See also Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19. 86 Fed. Reg. 8,020, 8,021 (Feb. 3, 2021).

<sup>6</sup> 86 Fed. Reg. at 8,020. “A ‘covered person’ is any resident who provides the landlord or property owner with a declaration that makes five certifications, namely: (1) the resident has used best efforts to obtain available government assistance for rent or housing; (2) the resident falls below certain income thresholds, generally \$99,000 annually or \$198,000 annually if filing a joint tax return; (3) the resident is unable to pay the full rent 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 resident is using best efforts to make timely partial payments that are as close to the full payment as circumstances permit; and (5) the resident has no other available space for occupancy at the same or less housing cost and, if evicted, would either need to live without housing or move into a congregate or shared-living setting.” *Terkel* at 4-5.

<sup>7</sup> *Terkel* at 5. “The order allows evictions, however, if a resident is (1) engaging in criminal activity on the premises; (2) threatening the health and 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

timely payment of rent or similar fees.” 86 Fed. Reg. at 8,022.

<sup>8</sup> *Terkel* at 5.

<sup>9</sup> *Id.* at 11.

<sup>10</sup> *Id.* at 11-12.

<sup>11</sup> *Id.* at 13-14.

<sup>12</sup> *Id.* at 15.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 17.

<sup>15</sup> *Id.* at 19-20.

<sup>16</sup> *Id.* at 20.

<sup>17</sup> *Id.*

<sup>18</sup> “Department of Justice Issues Statement Announcing Decision to Appeal *Terkel v. CDC*,” The United States Department of Justice, <https://www.justice.gov/opa/pr/departments-justice-issues-statement-announcing-decision-appeal-terkel-v-cdc> (last visited March 1, 2021).

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### Vorys COVID-19 Task Force

Vorys attorneys and professionals continue to counsel our clients in the myriad issues related to the coronavirus (COVID-19) pandemic. Vorys has also established a comprehensive Coronavirus Task Force, which includes attorneys with deep experience in the niche disciplines in which we have been and expect to continue to receive questions regarding coronavirus. Learn more and see the latest updates from the task force at [vorys.com/coronavirus](http://vorys.com/coronavirus).