# COVID Eviction Bans May Not Continue To Survive In Court

By **Allison Schoenthal, Jordan Bock and Jaime Santos** (April 30, 2021)

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In response to the COVID-19 pandemic, the federal government and a number of states and localities have taken seemingly drastic action by limiting landlords' ability to evict tenants for failing to pay rent. These moratoriums were issued after the Coronavirus Aid, Relief and Economic Security, or CARES, Act's 120-day eviction moratorium expired on July 24, 2020, and many remain in place today.

Shortly after being enacted, landlords began to challenge both the federal moratoriums and the state and local moratoriums on various statutory and constitutional grounds.

The challenges to the federal ban have found some success, both on constitutional grounds, under the commerce clause, and statutory grounds, generally under the theory that the bans exceeded the statutory authority of the Centers for Disease Control and Prevention, which issued the ban.

Thus far, that success has not translated to cases against state and local bans: District courts have almost uniformly rejected challenges to these measures under the First, Fifth and Fourteenth Amendments.

The federal moratorium currently extends until June 30, 2021, and therefore more challenges may lie ahead. On the state level, some bans have already expired, but if states and localities are reluctant to lift the remaining bans in the coming months, plaintiffs may start to see more success in challenging the reasonableness of the government action.

The argument that the moratoriums no longer serve a significant legitimate public purpose may also become more viable if the moratoriums are extended past summer.

Similar constitutional arguments may also be advanced regarding the validity of further foreclosure moratoriums, or other restrictions on debt collection and property rights.

Understanding the constitutional law principles that guide courts' decisions in the challenges to the eviction moratoriums may inform whether other pandemic regulations can be successfully challenged as well.

**Challenges to the CDC Ban**

On Sept. 4, 2020, after the expiration of a congressionally authorized 120-day moratorium that was included in the CARES Act,[1] the CDC banned landlords and property owners from evicting any tenant who provides a declaration that she is unable to make a full housing payment for COVID-19-related reasons and that eviction would likely render her homeless, among other conditions and subject to an income cap.

It does not relieve tenants of the obligation to pay rent, nor does it relieve landlords or

property owners from charges, fees, penalties or interest as a result of the failure to pay rent where permitted under the terms of the landlord's contract. The federal ban acts as a floor but not a ceiling — it does not supersede more protective state and local bans. The moratorium was recently extended through June 30, 2021.

There have been five challenges to the CDC ban, four of which turn on whether the ban exceeds the agency's statutory authority. In issuing the ban, the CDC relied on Section 361 of the Public Health Service Act, which empowers the agency (via delegated authority from the U.S. Department of Health and Human Services secretary) to "make and enforce such regulations as in [its] judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases."[2]

"For purposes of carrying out and enforcing such regulations," the statute authorizes the CDC to "provide for such 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."[3]

The viability of landlords' statutory challenge hinges on the breadth of other measures in Section 264(a). Landlords have a forceful argument that an eviction moratorium is of an entirely different character than the other powers listed in the statute (fumigation, disinfection, etc.) and therefore cannot be justified as a reasonable exercise of the other measures catch-all — particularly because landlord-tenant relationships typically fall within the purview of the states.

The four district courts that have addressed this issue have split. In Chambless Enterprises LLC v. Redfield and Brown v. Azar, the U.S. District Court for the Western District of Louisiana and the U.S. District Court for the Northern District of Georgia rejected landlords' arguments; both cases are currently on appeal to the U.S. Courts of Appeals for the Eleventh Circuit and the U.S. Court of Appeals for the Fifth Circuit, respectively.[4]

Breaking with these decisions, the U.S. District Courts for the Northern District of Ohio and the Western District of Tennessee ruled against the CDC in Skyworks Ltd. v. CDC and Tiger Lily v. HUD.[5]

In Skyworks, the government has not yet appealed to the U.S. Court of Appeals for the Sixth Circuit, but it has until May 10 to do so, and in Tiger Lily, the government has appealed to the Sixth Circuit, which notably denied its request for a stay pending appeal, concluding that the government was unlikely to prevail on the merits.[6]

While technically not a merits ruling, the Sixth Circuit's decision strongly suggests that it will uphold the district court's injunction.

In a fifth case, Terkel v. CDC, the U.S. District Court for the Eastern District of Texas agreed with the plaintiffs but on a different ground, holding that the CDC ban violates the commerce clause.[7]

While the CDC ban currently extends to June 30, 2021, the recent decisions in Skyworks, Tiger Lily and Terkel suggest that CDC may be enjoined from enforcing the ban before it expires.

The ban is currently inoperative in the Western District of Tennessee as a result of the Tiger Lily decision, and there is a pending motion for clarification in Skyworks regarding whether

the declaratory judgment in that case applies just to the plaintiffs, to the Northern District of Ohio or even nationwide.

More broadly, plaintiffs' successes in these cases are sure to prompt further litigation in other districts around the country, likely leading to further injunctions.

Increasing the odds of future litigation, the Consumer Financial Protection Bureau appears to be focused on evictions, and increasing enforcement for violations of the CDC ban or unlawful evictions. The bureau issued a debt collection interim final rule on April 19, effective May 3, that requires debt collectors to provide certain consumers with written notice of their rights under the CDC ban, and further prohibits any misrepresentations in connection with tenants' rights under the ban.[8]

Failure to comply is a violation of the Fair Debt Collection Practices Act that may be prosecuted by federal agencies and state attorneys general; the rule also provides tenants with a private right of action. This regulation strengthens the CDC ban, while also opening up potential new avenues for challenging the federal government's actions under the First and Fourteenth Amendments, akin to the challenges that have been raised against the state bans.

**Challenges to State and Local Bans**

Nearly every state enacted some limitation on evictions in response to COVID-19. Challenges to state and local bans have proceeded in federal and state courts around the country, including in California, Connecticut, Massachusetts, New York, Oregon and Pennsylvania.

In broad strokes, these bans prevent landlords from taking steps to evict tenants who have attested that they are unable to pay rent due to COVID and would need to move into shared housing if evicted. The origin of the state and local bans vary: Some, such as California's and New York's, were implemented by legislation, while others, such as Hawaii's, stem from executive order.

Challenges to state eviction bans have been largely unsuccessful thus far,[9] though several cases are currently on appeal, including those challenging the bans implemented by Connecticut, New York and Los Angeles. New cases also continue to be filed, including recent suits challenging the moratoriums in New York and Pittsburgh.

In addition to running into difficulties on the merits, as described below, several cases — including the recent New York case — have been dismissed under the Eleventh Amendment because the plaintiffs failed to sue the government official with enforcement authority.[10]

On the merits, the challenges to state eviction moratoriums involve a variety of federal constitutional claims. The majority of the complaints include a claim under the contract clause, but plaintiffs have struggled to show that the ban violates the Constitution's prohibition on any "Law impairing the Obligation of Contracts" by interfering with a landlord's contractual right to evict a tenant.[11]

To prevail on this theory, landlords must show that the ban "substantially impair[ed]" their rights under their lease, and, even assuming it did, that the ban lacked "a significant legitimate public purpose."[12]

Plaintiffs have been unable to show substantial impairment because the state bans do not

actually excuse tenants from their contractual obligation to pay rent, and landlords can still bring a breach-of-contract claim for back rent, even if they cannot rely on eviction as an enforcement mechanism.[13]

Moreover, because landlord-tenant relations are highly regulated, landlords are unable to show that they could reasonably expect to be free from additional regulations.[14]

The second factor, whether the bans serve a significant legitimate public purpose, is likewise a high hurdle, particularly in light of the U.S. Supreme Court's 1934 decision in Home Building and Loan Association v. Blaisdell.[15] In Blaisdell, the Supreme Court upheld a Minnesota moratorium on foreclosures enacted during the Great Depression, noting that "the economic emergency … was a potent cause for the enactment of the statute."[16]

The landlords' argument may become more viable over time, however, in states that are slow to reopen. As the pandemic recedes, courts are likely to be less willing to defer to states on the degree to which the ban serves a public purpose: An interim emergency measure that drastically displaces parties' contractual expectations can only be justified so long as there is a cognizable emergency.

And as vaccine availability increases, schools reopen and gainful employment does not pose the serious health risk that it has for the past year, the argument for displacing contractual expectations becomes much less compelling.[17]

Many of the cases also raise a regulatory takings challenge under the Fifth Amendment. Because the bans are temporary, the plaintiffs are unlikely to be able to show that a categorical taking has occurred.[18] Instead, the more viable argument is that the ban results in a noncategorical taking under the Supreme Court's 1978 decision in Penn Central Transportation Co. v. City of New York.[19]

The Penn Central test considers (1) the economic effect of the regulation, (2) whether the government action "interferes with reasonable investment-backed expectations," and (3) the character of the government action.[20] But it is generally quite difficult to invalidate a regulatory taking under the Penn Central test.

While the ban clearly "interferes with reasonable investment-backed expectations," plaintiffs face an uphill battle to satisfy the first and third prongs.

On the first, because the ban is only temporary, it is likely insufficient to constitute a taking.[21] That said, the strength of this argument could shift over time: The longer the bans last, the harder it is to characterize them fairly as a mere "temporary delay in plaintiffs' ability to make economic use of their property."[22]

The same is true as to third prong. Because the "interference with the property rights ... arises from a public program that adjusts the benefits and burdens of economic life to promote the common good," it is challenging for plaintiffs to demonstrate that the bans are unconstitutional.[23] But as with economic effect, courts may be more willing to accept this claim the longer the pandemic continues, particularly if a plaintiff is able to show that the ban causes significant hardship to landlords, or that tenants who do not truly need relief are taking advantage of the ban.

Moreover, this same general analysis under the contracts clause and takings clause will guide courts considering challenges to other similar COVID-19 restrictions, including limitations on foreclosures and debt collection. There, too, courts will likely grow more

skeptical of the governments' justifications as the economy continues to reopen.

Plaintiffs have raised a handful of additional theories as one might expect in a challenge to a law that restricts a contractual right or imposes seemingly burdensome obligations, but they have thus far garnered less attention from courts and likely present a narrower path to success.

***First Amendment***

Many state and local moratoriums require landlords to inform tenants of their rights under the CDC moratorium, and some further require landlords to provide tenants with information about tenants rights advocacy organizations.

Landlords in several suits have challenged these directives under the First Amendment's prohibition against compelled speech, and landlords might consider challenging the new CFPB rule on this ground.

It will be difficult for landlords to prevail on their challenge to the requirement that they provide general information about the moratoriums: States and localities have a strong argument that these restrictions apply to commercial speech, which is subject to a lesser degree of scrutiny, and the requirements are reasonably related to the state's interest in minimizing evictions during the pandemic.[24]

Landlords have a far stronger argument as to the latter requirement, and plaintiffs were in fact successful on this aspect of their challenge to the Massachusetts ban.[25] This issue is thus important to keep in mind for landlords challenging a ban, although success on this issue will not affect the viability of the ban itself.

***Right of Access to the Courts***

The plaintiffs in several cases have argued that the moratoriums prevent a class of property owners from exercising their rights to seek redress in the courts. Because the plaintiffs' ability to seek redress has been delayed, not eliminated, the moratoriums are likely subject to rational basis review with respect to the right-of-access claim.[26]

Even assuming courts become less willing to defer to state executives the longer the pandemic continues, it is unlikely that a court would deem the ban unreasonable.

***Fourteenth Amendment Procedural Due Process***

The recent New York challenges included a procedural due process claim premised on the New York law's automatic stay provision. Once a tenant submits a hardship form, any eviction premised on nonpayment of rent is automatically stayed until at least May 1, 2021, preventing landlords from contesting or obtaining review of a tenant's hardship declaration.

But even assuming the state's system for identifying qualifying tenants does not operate as an effective screening mechanism, courts will likely be concerned about the implication of plaintiff's argument with respect to feasibility — i.e., whether the states have the capacity to adjudicate these disputes.

***Fourteenth Amendment Substantive Due Process***

A substantive due process claim is likely to be an uphill battle, as the ban will be subject to

rational basis review. To the extent plaintiffs argue that the law is an abuse of power, a plaintiff is unlikely to be able to show that the consequences of the ban are sufficiently harsh and oppressive to rise to the level of a due process violation.[27]

***Fourteenth Amendment Void for Vagueness***

Many of the state and local bans use ambiguous language to describe which tenants qualify for eviction relief. If a landlord were prosecuted for violating an eviction moratorium, this claim might have legs — including for debt collectors prosecuted under the CFPB's new rule. But it is unlikely to be an effective, standalone charge in states where landlords are not subject to penalty for violating the eviction moratorium.

**Conclusion**

While many state moratoriums have now expired, those that remain will likely survive challenge in the short term. Plaintiffs face an uphill battle in convincing a court to invalidate a state or local ban on constitutional grounds. Plaintiffs' constitutional theories generally account, in some form or another, for the reasonableness of government action, and courts have been hesitant to interfere with government decisions in this area.

But challenges are not impossible. If states and localities keep their bans in place as conditions improve this spring and summer, or if any further extensions — or new restrictions to property rights — are contemplated at a state or federal level, plaintiffs may start to see more success, particularly with respect to their contracts clause and takings claims.

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[1] See Pub. L. No. 116-136, 134 Stat. 281 (2020).

[2] 42 U.S.C. §264(a).

[3] Id.

[4] See Brown v. Azar, 2020 WL 6364310 (N.D. Ga. Oct. 29, 2020); Chambless Enterprises v. Redfield, 2020 WL 758849 (W.D. La. Dec. 22, 2020).

[5] See Skyworks, Ltd. v. CDC, 2021 WL 911720 (N.D. Oh. Mar. 10, 2021); Tiger Lily v. HUD, 2021 WL 1171187 (W.D. Tenn. Mar. 15, 2021).

[6] See Tiger Lily, LLC v. HUD, 2021 WL 1165170 (6th Cir. Mar. 29, 2021).

[7] See Terkel v. CDC, 2021 WL 742877 (E.D. Tex. Feb. 25, 2021).

[8] See 12 C.F.R. 1006, Docket No. CFPB-2021-0008.

[9] The plaintiffs challenging Massachusetts's ban had a small measure of success. The court largely denied the plaintiffs' motion for a preliminary injunction, but concluded that they were likely to succeed under the First Amendment on the portion of the ban requiring landlords to provide tenants with information about tenant advocacy organizations. See Baptiste v. Kennealy, 2020 WL 5751572, at *38 (Sept. 25, 2020).

[10] See Chrysafis v. James, 2021 WL 1405884, at *16 (E.D.N.Y. Apr. 14, 2021).

[11] U.S. Const., Art. I, §10, cl. 1.

[12] Energy Reserves Grp., Inc. v. Kansas Power & Light Co., 459 U.S. 400, 410 (1983).

[13] See, e.g., Apartment Assoc. of L.A. Cty. v. Los Angeles, 2020 WL 6700568, at *6 (C.D. Cal. 2020); see also Sveen v. Mellin, 138 S. Ct. 1815, 1822 (2018) (significant impairment turns on "the extent to which the law undermines the contractual bargain, interferes with a party's reasonable expectations, and prevents the party from safeguarding or reinstating his rights").

[14] See, e.g., Elmsford Apartment Assocs. v. Cuomo, 469 F. Supp. 3d 148, 169 (S.D.N.Y. 2020).

[15] 290 U.S. 398 (1934).

[16] Id. at 445 (internal quotation marks omitted).

[17] See id. (noting that "the relief afforded and justified by the emergency…could only be of a character appropriate to that emergency, and could be granted only upon reasonable conditions).

[18] See Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992) (categorical regulatory taking occurs "where regulation denies all economically beneficial or productive use of land").

[19] 438 U.S. 104, 124 (1978).

[20] Id.

[21] See Baptiste v. Kennealy, 2020 WL 5751572, at *21 (D. Mass. 2020).

[22] Id.

[23] Connolly v. Pension Ben. Guar. Corp., 475 U.S. 211, 225 (1986).

[24] See Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 637 (1985).

[25] See Baptiste, 2020 WL 5751572, at *38 (explaining that plaintiffs were likely to prove that they could not be compelled "to encourage their tenants to work with private organizations to frustrate the landlords' efforts to regain possession of their property").

[26] See Baptiste, 2020 WL 5751572, at *27 (discussing Sosna v. Iowa, 419 U.S. 393, 410 (1975)).

[27] See Welch v. Henry, 305 U.S. 134, 147 (1938).