



## TEXAS APARTMENT ASSOCIATION

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### Supplemental Q&A (April 8, 2021)

The purpose of this Supplemental Q&A, which is being contributed by the Texas Apartment Association, is to share guidance from the federal agencies on the Centers for Disease Control (CDC) Order entitled Temporary Halt in Residential Evictions to Prevent the Further Spread of Covid-19.

The United States District Court, Eastern District of Texas in the case styled *Lauren Terkel et al.*, Plaintiffs, v. *Center for Disease Control and Prevention et al.*, Defendants, issued an Opinion and Order concluding that the federal government's Article I power to regulate interstate commerce and enact laws necessary and proper to that end does not include the power for the federal government to impose an eviction moratorium. The court entered summary judgment granting declaratory relief in favor of the Plaintiffs declaring that the CDC Order imposing an eviction moratorium is unconstitutional.

Likewise, courts in Ohio and Tennessee have also declared that the CDC did not have authority to impose an eviction moratorium. These cases have been appealed by the government and on March 28, 2021, the CDC extended its Order through June 30, 2021.

Notwithstanding various decisions by courts declaring that the CDC does not have authority to impose an eviction moratorium, in light of the extension of the CDC Order, courts will invariably be asked to rule on the truthfulness of a CDC declaration and deal with the issue of continuing cases through the expiration of the CDC Order. We hope this Supplemental Q&A will help navigate this process.

#### ***What does the expiration of the 34<sup>th</sup> Emergency Order mean for justice court evictions and CDC moratorium?***

The Texas Supreme Court's 34<sup>th</sup> Emergency Order provided an abatement and contest procedure for courts to follow. With the expiration of the Emergency Order, courts no longer are subject to following the process established by the court. However, according to the CDC Order, courts remain an integral part of the process of determining the truthfulness of a CDC declaration.

The HHS and CDC in their FAQs provide specific directions to courts with respect to the CDC Order.

HHS/CDC FAQs provide as follows:

*As indicated in the Order (CDC Order) courts should take into account the Order's instruction not to evict a covered person from rental properties where the Order applies. The Order is not intended to terminate or suspend the operations of any state or local court. Nor is it intended to prevent landlords from starting eviction proceedings, provided that the actual eviction of a covered person for non-payment of rent does NOT take place during the period of the Order. State and local courts may take judicial notice of the CDC Order, and the associated criminal penalties that may be imposed for non-compliance in making a formal judgment about any pending or future eviction action filed while the Order remains in effect.*

***What can a landlord do if a tenant has declared that they are a covered person under the CDC Order, but the landlord does not believe the tenant actually qualifies?***

The HHS/CDC FAQs provide as follows:

*The Order (CDC Order) does not preclude a landlord from challenging the truthfulness of a tenant's declaration in any state or municipal court. The protections of the Order apply to the tenant until the court decides the issue as long as the Order remains in effect.*

Based upon this language in the HHS/CDC FAQs, it is apparent that the CDC anticipated court involvement in determining a challenge to the truthfulness of a tenant's declaration. This is expressly permitted in any state or municipal court.

***What can a court do if, after a CDC declaration is provided, the parties want to continue the case until after the expiration of the CDC Order?***

Although the abatement process is no longer imposed by the Texas Supreme Court, pursuant to Rule 510.7(c), trial in an eviction case must not be postponed for more than 7 days total unless both parties agree in writing.

If both parties agree in writing, the eviction case can be postponed until a future date which could be after the CDC Order expires. If both parties do not agree to continue the case, the eviction must proceed in accordance with the applicable rules.