



# Real Estate under Covid

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## Topics for today's program:

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- 1. Eviction moratoria and mortgage moratoria and forbearances
- 2. Force majeure clauses
- 3. Other tenant defenses (impossibility of performance; frustration of purpose)



# **Eviction Moratoria and Mortgage Forbearances**

# CDC Residential Eviction Moratorium

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- Extended to at least June 30, 2021.
- Does not apply if a state or local law provides more protection to tenants.
- Protects only against eviction for nonpayment of rent, not other reasons.
- Applies even to eviction proceedings begun before 9/4/20.
- Does not excuse payment of rent or late fees.
- (Thus, many tenants will owe balloon payments of multiple months of rent when the moratorium expires.)

# CDC Residential Eviction Moratorium

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Each adult on the lease must sign a declaration (to the landlord or to the court) that:

- The individual has used their best efforts to obtain all available government assistance for rent or housing.
- The individual either:
  - (a) expects to earn no more than \$99,000 in annual income for 2021 (or \$198,000 if filing jointly),
  - (b) was not required to report any income in 2019 to the IRS, or
  - (c) received an Economic Impact Payment (stimulus check) through the Coronavirus Aid, Relief and Economic Security Act (CARES Act).

# CDC Residential Eviction Moratorium

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The declaration must also state that:

- The individual cannot pay the full rent due to substantial loss of income, loss of compensable hours of work or wages, a layoff, or extraordinary out-of-pocket medical expenses.
- Eviction would likely render the individual homeless or force the individual to live in close quarters in a new shared living setting because they have no other housing options.
- The individual will use best efforts to make timely partial payments that are as close to the full payment as the tenant's circumstances permit.

# CDC Residential Eviction Moratorium

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The CDC eviction moratorium:

- Applies irrespective of the presence of any federally-connected financing of the dwelling unit.
- Bars only removal of tenants, not the obtaining of a judgment.
- Does not permanently excuse the payment of rent, late fees, or interest.
- Applies to all types of rental housing (single-family, multifamily, etc.), but not to hotel and motel rooms.
- Landlords may contest and litigate a tenant's qualification for the CDC protection.
- A landlord who violates the CDC order is subject to a fine of no more than \$100,000 or one year in jail.

# CFPB support for the CDC Eviction Moratorium

- CFPB issued a final rule on April 19, 2021, effective May 3.
- The rule is based on CFPB's authority under the FDCPA.
- Requires "debt collectors" to:
  - 1. Notify debtors to disclose the CDC eviction moratorium.
  - 2. Not misrepresent tenants' eligibility for the CDC moratorium.
- Landlords acting on their own behalf are not "debt collectors."
- But property management and law firms are "debt collectors."
- Back rent is a "debt" under the FDCPA.
- In an attack on the rule's validity, one federal district court denied injunctive relief to a landlord (despite the probability of plaintiff's success on the merits); The Property Mgm't Connection, LLC v. Acting Director Uejio, CFPB, 2021 WL 1946646 (M.D. Tenn. May 14, 2021)





# Is the CDC eviction moratorium valid?

1. Is it within the CDC's statutory authority?
2. If so, is it within the power of Congress under the Commerce Clause?

# CDC's statutory authority

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- Tiger Lily, LLC v. United States Dep't of Hous. & Urb. Dev., 2021 WL 1171887 (W.D. Tenn. Mar. 15, 2021)
  - CDC rule is invalid because it is not within the CDC's statutory authority.
  - Public Health Service Act, 42 U.S.C. § 264(a): To prevent the spread of infection, "the Surgeon General may 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."
  - Under "ejusdem generis," the CDC's authority is limited to the enumerated actions.
  - Congress could have (but has not) ratified the CDC's action.
  - The 6<sup>th</sup> Circuit refused to stay the district court's order pending appeal; it found the government had little likelihood of prevailing on the merits. Tiger Lily, LLC v. United States Dep't of Hous. & Urb. Dev., 992 F.3d 518 (6th Cir. Mar. 29, 2021)

# CDC's statutory authority

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- Alabama Ass'n of Realtors v. U.S. Dept. of Health & Human Services, 2021 WL 1779282 (D.D.C. May 5, 2021)
  - CDC order is *ultra vires*.
  - Applying *Chevron* deference does not save the order.
  - Courts “expect Congress to speak *clearly* if it wishes to assign to an agency decisions of vast ‘economic and political significance.’”
- The district court stayed its own order pending appeal; Alabama Ass'n of Realtors v. U.S. Dept. of Health & Human Services, 2021 WL 1946376 (D.D.C. May 14, 2021).
- No decision on appeal at this time.

# CDC's statutory authority

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- Skyworks, Ltd. v. Centers for Disease Control & Prevention, 2021 WL 911720 (N.D. Ohio Mar. 10, 2021)
  - CDC order is *ultra vires*.
  - Plaintiffs were given a declaratory order, but court denied an injunction on the ground that money damages could redress their injury.
- Dixon Ventures, Inc. v. Dep't of Health & Hum. Servs., 2021 WL 160425 (E.D. Ark. Apr. 23, 2021) (similar)
- **Contra, upholding the CDC's authority from Congress:**
- Chambless Enterprises, LLC v. Redfield, 2020 WL 7588849 (W.D. La. Dec. 22, 2020)
- Brown v. Azar, 497 F. Supp. 3d 1270 (N.D. Ga. Oct. 19, 2020)

# Constitutionality of the CDC rule

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- Terkel v. Centers for Disease Control & Prevention, 2021 WL 742877 (E.D. Tex. Feb. 25, 2021)
  - Evictions do not have “substantial effects” on interstate commerce. [With a detailed analysis.]
  - “Real estate is inherently local. Residential buildings do not move across state lines. And eviction is fundamentally the vindication of the property owner’s possessory interest.”
  - Appealed to Fifth Circuit, but as yet no decision on appeal.
- Contra: see Chambless Enterprises LLC v. Redfield, 2020 WL 7588849 (W.D. La. Dec. 22, 2020)
  - “The Supreme Court has explicitly held that the commercial activity regulated here—“rental of real estate”—is “unquestionably” an activity that substantially affects interstate commerce.” [But with no further analysis.]

# Other Federal Eviction Moratoria

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- FHA and VA ban evictions from REO properties secured by FHA-insured or VA-guaranteed single-family mortgages through June 30, 2021. (Mortgagee Ltr. 2021-05)
  - Includes HECM (“reverse”) mortgages.
  - Not applicable to vacant or abandoned properties.
- Freddie Mac and Fannie Mae ban evictions from single-family REO properties with Freddie Mac- and Fannie Mae-held mortgages until at least June 30, 2021. (FHFA news release, 2/25/2021)
- Freddie Mac and Fannie Mae have extended their deadline for loan forbearance applications by owners of multifamily properties to June 30, 2021. The forbearance period may be up to 90 days. Evictions of tenants and late fees are prohibited during forbearance.

# Foreclosure Moratoria and Mortgage Payment Forbearance

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- FHA and VA home loans: foreclosure is prohibited until June 30, 2021.
- Fannie and Freddie single-family loans: foreclosure is prohibited until June 30, 2021.
- Payment forbearance on federally-insured and GSE-held residential mortgages (under the CARES Act):
  - Borrower can request an initial 180-day forbearance period.
  - Borrower can also request a further 180-day extension.
  - Initial requests must be made within the time deadlines above.
  - Payments are deferred but not forgiven.

# Non-“federally-backed” loans

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- The CDC eviction moratorium applies irrespective of any federal connection.
- The FHA, VA, and GSE eviction and payment forbearance mandates apply only to properties with “federally-backed” single-family mortgage loans.
- There is no federal mortgage payment forbearance for:
  - Seller “carry-back” financing (e.g., seller D/Ts or installment contracts).
  - Other private financing or conventional institutional financing.



# Commercial Landlords and Tenants

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- No federal provisions for:
  - Commercial tenant eviction moratoria
  - Commercial landlord foreclosure moratoria (except GSE multifamily)
- Some states, cities, and counties continue to impose moratoria on commercial property evictions and foreclosures (see next slide).
- If the property is not in one of these jurisdictions, adjustments to the L-T and landlord-mortgagee relationships are largely a function of negotiation.



# New York State Foreclosure Moratoria and Eviction protection

- COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020 extended to August 31, 2021.
  - Prohibits residential evictions and mortgage foreclosures for tenants and homeowners who file a hardship declaration.
- COVID-19 Emergency Protect Our Small Businesses Act of 2021 extended until August 31, 2021.
  - Provides eviction protection for small businesses of under 50 employees that demonstrate a financial hardship; and
  - Foreclosure protections for small businesses which have 10 or less units.

## Other states and cities with eviction or foreclosure moratoria

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- This list is not exhaustive.
- Some of these apply to commercial property.
- Check for expiration dates.
  - New Jersey
  - Oregon
  - Seattle
  - Certain counties in Texas
  - Cook County, Illinois
  - San Francisco and Los Angeles, CA

# Force Majeure Clauses



# Force Majeure Clauses in existing leases

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- Is Covid-19 the sort of natural disaster covered by the clause?
- Typical events covered by the clause:
  - Acts of God, such as severe acts of nature or weather events
  - Typically include floods, fires, earthquakes, hurricanes, and explosions
  - Epidemics and government orders may or may not be covered
- The clause will probably be construed narrowly, covering only the events listed in the clause.
- Proving economic hardship or loss of revenue is not enough.
- Even if Covid-19 is covered, does the clause excuse payment of rent? Some clauses don't cover financial obligations.
- The clause may require the tenant to give the landlord notice.

# Cases finding Force Majeure clauses not applicable to government closure orders:


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- Ponte Gadea Chicago, LLC v. Banana Republic, LLC, No. 20 L 6235 (Ill. Cir. Ct., Cook Cty Mar. 24, 2021) (also rejecting impossibility and frustration defenses)
- St. John Properties Utah, LLC v. Grove Tower BoxOffice, et. al., No. 200400976 (Utah 4th Dist. Ct. Mar. 15, 2021)
- The Gap Inc. v. Ponte Gadea New York LLC, 2021 WL 861121 (S.D.N.Y. Mar. 8, 2021) (closure order was not a “casualty” under Force Majeure clause; also rejecting impossibility and frustration defenses).
- But see In re Hitz Restaurant Group, 2020 WL 2924523 (Bankr. N.D. Ill. June 3, 2020) (applying force majeure clause where it expressly covered government orders).

# Negotiating Force Majeure Clauses in new leases

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- Covid-19 is probably not the last pandemic.
- Tenants negotiating new leases will probably want to include as Force Majeure triggering events:
  - Epidemics and pandemics causing loss of business
  - Government orders or quarantines
- Ideally, tenants will include language providing that the triggering event need not make the tenant's performance impossible, but only that the event close down or materially interfere the tenant's business
- Expressly provide that the tenant's rent will abate in proportion to the tenant's lost business or lost sales resulting from the triggering event.



# **Other Tenant Defenses (Impossibility and Frustration)**



# •Other defenses: Impossibility or impracticability of performance, frustration of purpose.

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- The New York courts have consistently refused to find impossibility or frustration due to mere loss of business revenue:
  - 1140 Broadway LLC v. Bold Food, LLC, KBFK Restaurant Corp., 2020 WL 7137817 (Dec. 3, 2020): Tenant provided management and consulting services for restaurants, many of which were shut down, causing a large loss of business to tenant.
  - 35 East 75th Street Corporation v. Christian Louboutin L.L.C.: Tenant operated a high-end shoe store in Manhattan which lost business due to Covid.
  - RHP Hotels 51st Street Owner, LLC v. HJ Parking LLC, 2021 NY Slip Op 30286, decided January 28, 2021 (parking garage).

# •Other defenses: Impossibility or impracticability of performance, frustration of purpose.

- 1515 Broadway Owner LLC v. Astor Parking LLC, 2021 NY Slip Op 30661, decided February 25, 2021 (parking garage lessee held liable for rent despite reduction in revenue).
- MEPT 757 Third Ave. LLC v. Grant, 2021 NY Slip Op 30592(U) (N.Y. Sup. Ct., March 1, 2021) (office space lease; no governmental shutdown order. Guarantors of lease held liable and frustration argument rejected).
- **Even a temporary governmental shutdown order may not be enough.**
- CAB Bedford LLC v. Equinox Bedford Ave Inc. (2020 WL 7629593 (N.Y. Sup.), 2020 N.Y. Slip Op. 34296(U)(Trial Order)) (temporary shutdown order imposed on gym)
- Valentino U.S.A., Inc. v. 693 Fifth Owner LLC, 70 Misc. 3d 1218(A), 2021 WL 668788 (N.Y. Sup. Ct. 2021) (luxury goods store ordered temporarily closed).

# But a few courts have adopted impossibility or frustration defenses where there was a governmental shutdown order:

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- 1877 Webster Ave. Inc. v. Tremont Ctr., LLC, 2021 WL 1621431 (N.Y. Sup. Ct. Mar. 29, 2021) (nightclub tenant closed; no force majeure clause; impossibility and frustration found).
- UMNV 2-05-207 Newbury, LLC v. Caffé Nero Americas, Inc. (Mass. Superior Ct. Feb. 8, 2021) (restaurant tenant closed for on-premises food service by state order was excused from paying rent under the doctrine of “frustration of purpose.” (The lease restricted the tenant to restaurant use of the premises.) The decision was not based on the *force majeure* clause).
- Simon Property Group L.P. v. Pacific Sunwear Stores LLC (2020 WL 5984297 (Ind. Super. June 26, 2020) (Trial Order) (mall closure resulted in likely success on impossibility defense).

# •The Chuck E. Cheese bankruptcy, 2020 WL 7356380 (Bankr. Dec. 14, 2020)

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- The tenant operated numerous locations where state or local government orders (1) preventing gaming, (2) restricted dining capacity or shut down restaurants, or (3) prohibited large group gatherings.
  - A tenant in bankruptcy must generally pay rent until the lease is either assumed or rejected. (That hadn't happened yet and the court it had no power to relieve the rent obligation.)
  - The Force Majeure clauses were held inapplicable because they excluded "the inability to pay any sum of money due."
  - Frustration of purpose was held inapplicable because the orders were only temporary. The court said it could not find a case "in which such a temporary reduction in the value of the lease was adequate for the Court to determine that there had been a frustration of purpose."

# In re Pier 1 Imports, Inc.,

## **615 B.R. 196 (Bankr. E.D. Va. May 10, 2020)**

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Many of tenant's stores were shut down due to state and local government "stay at home orders."

- The Bankruptcy Court held it had the power to give T temporary relief from the obligation to pay rent, provided the Landlords were given "adequate protection." This could be done by...
  - Requiring the tenant to make all insurance payments, security obligations, utility payments, and other similar obligations.
  - Deferring rent only temporarily (until May 31, 2020), with an obligation by the tenant to pay catch-up rent beginning in June, 2020.
- The court did not decide any impossibility or frustration of purpose arguments.

# Consolidated Appropriations Act, eff. Dec. 27, 2020 (sunsetting Dec. 27, 2022)

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- A small business debtor in bankruptcy will have an additional 60 days to pay rent or perform other lease obligations if it is “experiencing or has experienced a material financial hardship due, directly or indirectly, to the coronavirus disease 2019 (COVID-19) pandemic.” This extends the previous 60-day leeway period.
  - Payment of the missed rent is not excused permanently, but may be spread out over a period of several years under an approved plan of reorganization.
- The period of time a tenant in bankruptcy will have to assume or reject existing leases is extended from 120 days to 210 days.
- Payments of arrearages under lease modifications or rent deferrals negotiated between commercial landlords and tenants are not subject to being labeled “preferences” if agreed to after March 13, 2020.

# Mezz Loans: Should UCC foreclosure sales be suspended because of Covid?

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- Shelbourne BRF LLC v. SR 677 Bway LLC, 192 A.D.3d 444, 139 N.Y.S.3d 799 (App. Div. 2021), refusing to enjoin a UCC sale under a mezz loan; harm could be compensated by money damages.
- The Supreme Court had previously issued an Administrative Order prohibiting residential and commercial foreclosure sales through Oct. 15, 2020.

- For a vigorous defense of the CDC eviction moratorium in policy terms, see
- Emily Benfer  
Visiting Professor, Wake Forest University,  
[Fixing the Harms of Our Eviction System](#)
- Available at [Fixing the Harms of Our Eviction System: An Interview with Emily Benfer \(shelterforce.org\)](#)





**Time for  
comments  
by  
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