

April 5, 2021

Dear Signatories:

Thank you for your Statement of April 2, 2021 concerning the decision of the Texas Supreme Court not to extend the 34th Emergency Order implementing the CDC Moratorium on certain evictions. We very much appreciate your comments and have carefully considered them. However, we believe they tend to confirm the TJCTC position on these issues for the reasons stated below.

As you know, the CARES Act imposed a moratorium on evictions for “covered properties” from March 27 through July 25, 2020. Following the expiration of that moratorium under the terms of the statute, the CDC issued an Order imposing a Moratorium on certain evictions for “covered persons” in September 2020. Both the CARES Act moratorium and the CDC moratorium were implemented in Texas courts through Emergency Orders issued by the Texas Supreme Court. The most recent Emergency Order relating to the CARES Act and CDC Moratorium is the 34th Emergency Order issued on January 29, 2021.

The 34th Emergency Order required justice courts to take specific measures with respect to both the CARES Act and the CDC Moratorium, including requirements that information be provided in an eviction petition concerning whether the premises are a “covered property,” whether the plaintiff has received a Declaration stating that a tenant is a “covered person,” requiring the court to deliver a Declaration form to a defendant with the citation in an eviction case, procedures for cases where a Declaration has been provided to the landlord (including a possible Contest of the Declaration), and abatement of an eviction suit for nonpayment of rent or other amounts due where a valid Declaration has been provided. Justice courts carefully applied the procedures required in the 34th Emergency Order while it was in effect, and TJCTC created forms for courts to use in implementing the requirements of the Emergency Orders and provided frequent and extensive updates on these requirements through webinars and explanations on the coronavirus page of our website. However, the 34th Emergency Order expired by its terms on March 31 and the Texas Supreme Court elected not to extend it.

Although the CDC did extend its Order through June 30, 2021, with the expiration of the 34th Emergency Order a justice court is no longer authorized by the Texas Supreme Court to take the measures specified in that Order. Instead, justice courts must follow the law and procedures that apply to them according to the rules issued by the Texas Supreme Court. This means primarily Rule 510 of the Texas Rules of Civil Procedure and the 35th and 36th Emergency Orders, which are still in effect.

Your position appears to be that the CDC Order, standing alone, without any implementing procedures from the Texas Supreme Court, requires justice courts to continue to abate cases subject to the CDC Moratorium. We believe this is incorrect as explained below:

First, the Order itself states: “Accordingly, a landlord, owner or 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 in which there are documented cases of COVID-19 that provides a level of public-health protections below the requirements listed in this Order.” See <https://www.cdc.gov/coronavirus/2019-ncov/covid-eviction-declaration.html> (at pages 13-14). The Order is clearly directed to a **landlord** and imposes very substantial civil and criminal liability on a landlord who violates it (specifically, a criminal penalty of up to one year of imprisonment, to be followed by up to one year of supervised release, and a fine of up to \$250,000). The CDC Order is not

directed to a state court, nor does it purport to impose any requirements or procedures on a court with respect to how an eviction case is conducted. That is precisely what the 34th Emergency Order did but it is no longer in effect. A justice court may not simply pretend the 34th Emergency Order has been extended when the Texas Supreme Court chose not to do so.

Second, you rely on the following statement in the FAQ issued by the CDC: “As indicated in the Order, courts should take into account the Order’s instruction not to evict a covered person from rental properties where the Order applies.” But we believe courts may only do this to the extent that it is allowed by state law, as explained by the statement that appears just before: “The judicial process will be carried out according to state and local laws and rules. The Order is not intended to terminate or suspend the operations of any state or local court.” It is the state law, as expressed in the 34th Emergency Order, that justice courts were applying prior to April 1 but that is no longer in effect.

Third, you rely upon two federal court cases upholding the constitutionality of the CDC Order. However, as you are no doubt aware, three more recent federal court decisions have held the CDC Order unconstitutional or invalid or in the case of the Sixth Circuit that it is likely to be found invalid. *Tiger Lily, LLC v. HUD*, 2021 WL 1165170 (6th Cir. March 29, 2021); *Skyworks, Ltd. V. CDC*, 2021 WL 911720 (N.D. Ohio March 10, 2021); *Terkel v. CDC*, 2021 WL 742877 (E.D. Tex. Feb. 25, 2021). In particular, we note that in holding the CDC Moratorium unconstitutional and invalid in *Terkel*, the United States District Court for the Eastern District of Texas observed that, “This lawsuit does not question that the States may regulate residential evictions and foreclosures, as they have long done.” Because there were procedures in place under state law through the 34th Emergency Order, we recognized even after *Terkel* that justice courts could continue to implement the CDC Moratorium as a matter of state law. But that state law no longer applies to justice courts.

In short, while federal courts have recently held that the CDC did not have legal authority to issue the Moratorium, even if the CDC had had such authority, the Order it issued is not applicable to justice courts in the absence of rules and procedures issued by the Texas Supreme Court, and in any event the language of the Order itself applies only to landlords.

We also note that there remains in place a mechanism by which justice courts will continue to abate eviction cases under existing Texas Supreme Court Orders. The Texas Eviction Diversion Program is still in effect and under the 35th Emergency Order justice courts are required to inform parties about the program and ask if they wish to participate. If they do, then the case is abated for 60 days and if the court does not receive a request to reinstate the case within that 60-day period, the case is dismissed with prejudice. The Eviction Diversion Program provides a means for landlords to recover up to 12 months of past due rent and up to three months of future rent. This program is thus designed to resolve the underlying problem of nonpayment of rent whereas under the CDC Moratorium rent continues to accrue.

Finally, it is important to keep in mind that restrictions may be imposed on evictions by cities and counties, including an opportunity by a tenant to respond to a notice of proposed eviction prior to serving a notice to vacate. A city or county could potentially require a 90-day cure period prior to a notice to vacate for any case involving nonpayment of rent, similar to the 90-day notice to vacate provision that Congress imposed in the Permanently Protecting Tenants at Foreclosure Act. If a city or county takes such action, justice courts will of course enforce those requirements under Section 24.005(e) of the Property Code.

As elected members of the judiciary, justices of the peace are free to reach their own conclusions as to how to apply the CDC Order in the absence of any state law implementing it. Therefore, while we believe your comments serve to confirm our understanding of the applicable law in light of the expiration of the 34th Emergency Order, we will share your comments and this response with the justice courts for their independent review of these issues.

Very truly yours,

Thea Whalen
Executive Director