

The Ghosts of Eviction Moratoria: Past, Present and Future

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NAIHC Legal Symposium 2021

Mirage Hotel, Las Vegas, NV

Eviction Moratoria as a Response to COVID-19

- Why use this tool?
- What are the legal mechanisms for using this as a tool?
- Has it been effective?
- Will it be used in the future?

Why use eviction moratoria to fight COVID-19?

- In the context of a pandemic, eviction moratoria—like quarantine, isolation, and social distancing—can be an effective public health measure utilized to prevent the spread of communicable disease.
- Eviction moratoria facilitate self-isolation by people who become ill or who are at risk for severe illness from COVID-19 due to an underlying medical condition.
- They also allow State and local authorities to more easily implement stay-at-home and social distancing directives to mitigate the community spread of COVID-19.

Why use eviction moratoria to fight COVID-19?

- Furthermore, housing stability helps protect public health because homelessness increases the likelihood of individuals moving into congregate settings, such as homeless shelters, which then puts individuals at higher risk to COVID-19.
- The ability of these settings to adhere to best practices, such as social distancing and other infection control measures, decreases as populations increase.
- Unsheltered homelessness also increases the risk that individuals will experience severe illness from COVID-19.

Why use eviction moratoria to fight COVID-19?

- A blunt tool, with potentially significant economic impacts on landlords, managers, housing authorities and housing programs.
- If cannot evict, no mechanism to ensure payment, or to remove tenants who do not pay.
- Eventually lead, on a national level, to Emergency Rental Assistance Program.

Eviction moratoria for public emergencies not unprecedented

- In the last two decades, several states/local jurisdictions have implemented temporary eviction moratoria in response to hurricane damage:
 - 2005 – Louisiana – in response to Hurricane Katrina
 - 2012 – New York City – in response to Hurricane Sandy
 - 2019 – Miami-Dade County – in response to several hurricanes issued an order prohibiting evictions whenever a state of emergency is declared in response to a hurricane
- HUD also issued a foreclosure moratorium in response to Hurricane Sandy in 2013.

Legal Mechanisms for Eviction Moratoria

- Used by a number of jurisdictions across the United States.
- Cities, counties, and states.
- Many tribes also enacted eviction moratoria.
- Some did so formally, via Tribal Council resolution, ordinance or statute.
- A number of other tribes did so less formally, through their court systems, who simply refused to hear or grant evictions during the epidemic.

Legal Mechanisms for Eviction Moratoria

- Exercise of such authority based on general police power and/or emergency powers.
- Legal challenges brought.
- These challenges generally did not succeed against the local jurisdictions (will discuss the difference in the federal approach – and its ultimate failure).
- Informal Tribal Court approaches – no challenges because the court with jurisdiction over a challenge was the entity imposing the moratorium.

Legal Mechanisms for Eviction Moratoria

- Two examples of moratoria by States.
- Washington and Minnesota.
- Both survived legal challenges, but in cases that ultimately resulted in eviction because the cases were outside the prohibition.

Washington Eviction Moratorium

- Washington Eviction Moratorium:
 - Prohibited residential evictions based on nonpayment of rent
 - Exempted cases where the owner wishes to occupy the property personally.
- The Washington State eviction moratorium expired June 30, 2021.
- On June 24, 2021, the governor issued an eviction “bridge” proclamation to extend protections for tenants once the eviction moratorium expired. The bridge was originally effective July 1 through September 30, and was extended through October 31, 2021.

Washington - *Nyman v. Hanley*

- A landlord filed an eviction action against a tenant who stayed in the rental unit after the lease term expired
 - The Landlord also wanted to move into the unit herself
- **HELD:** Washington's eviction proclamation did not protect the tenant from eviction, as a landlord could evict a resident with advance written notice in order to personally move into a unit.

Washington - *Nyman v. Hanley*

- The tenant also filed a declaration that he met the hardship criteria under the CDC Eviction Moratorium and argued that he therefore could not be evicted
- The CDC Moratorium did not preclude an eviction based on a tenant violating any other contractual obligation
- **HELD:** The court held that holding over in leased unit after the lease expired constituted a violation of a contractual obligation, excluding tenant from protections from the CDC Eviction Moratorium.

Minnesota Eviction Moratorium

- On March 23, 2020, Minnesota issued an eviction moratorium (Executive Order 20-14),
- **Eviction Moratorium:** prohibited landlords and property owners from filing eviction actions or terminating residential tenancies for non-payment of rent and other forms of displacement (e.g., notices of termination of lease, notices of nonrenewal of a lease, or material violation of a lease).
- The moratorium did not prohibit eviction actions based on cases where the tenant seriously endangers the safety of other residents

Minnesota Eviction Moratorium

- June 30, 2021, the Minnesota legislature passed a session law replacing and phasing out the protections of the executive order and declaring the underlying executive orders “null and void” the day following final enactment.
- The session law also prohibits landlords from filing for eviction for non-payment of rent through June 2022 against any tenant who has a pending application for COVID-19 emergency rental assistance (ERA). Minn. Senate File No. 1470, Minnesota First Regular Session of the Ninety-Second Legislative Session, 2021, § 4.

Minnesota - *Fairmont Hous. & Redevelopment Auth. v. Winter*

- The tenants' guests broke a lockbox holding the master key to all of the apartment units and the tenants failed to report the damage for a month.
- The housing authority, the owner of the apartments, gave written notice of termination of the tenants' lease for seriously endangering the health or safety of other residents. After the tenants refused to leave, the housing authority filed an eviction action.
- The events all occurred during the time the Minnesota eviction moratorium was in place

Minnesota - *Fairmont Hous. & Redevelopment Auth. v. Winter*

- **HELD:** the tenants' rights and defenses under the eviction moratorium order were not extinguished by the "null and void" language in the session law that phased out the eviction moratorium.
- The court reasoned that the session law and its moratorium phaseout was meant to extend protections, not eviscerate them.
- **HELD:** the tenants' seriously violated a material term of their lease, authorizing its termination. The court therefore affirmed the tenant's eviction.

Federal Eviction Moratoria

- CARES Act eviction moratorium.
- CDC Eviction moratorium.
- HUD moratorium on Section 184 and other foreclosures.

CARES Act

- Section 4024 of the CARES Act provides a temporary moratorium on eviction filings as well as other protections for tenants in certain rental properties with federal assistance or federally related financing.
- In place for 120 days.
- These protections were designed to alleviate the economic and public health consequences of tenant displacement during the COVID-19 outbreak.
- They represented arguably unprecedented action by the federal government in an area of law that, largely, states and localities traditionally govern.

CARES Act

- The CARES Act's eviction protections only apply to “covered dwellings”, rental units in properties:
 - (1) that participate in federal assistance programs,
 - (2) are subject to a “federally backed mortgage loan,” or
 - (3) are subject to a “federally backed multifamily mortgage loan.”
- Covered federal assistance programs include most rental assistance and housing grant programs, including public housing, Housing Choice Vouchers, Section 8 Project-Based Rental Assistance, rural housing programs, and the Low Income Housing Tax Credit (LIHTC) program.
- Did not include NAHASDA on the list of programs.

CARES Act

- Section 4024(c) required landlords of the same properties to provide tenants at least 30 days-notice before they must vacate the property for causes other than non-payment.
- It also barred those landlords from issuing a notice to vacate during the 120-day period.
- In contrast to the eviction and late fee protections of Section 4024(b), which were expressly limited to nonpayment, Section 4024(c) did not expressly tie the notice to vacate requirement to a particular cause.
- Thus, Section 4024(c) arguably prohibited landlords from being able to force a tenant to vacate a covered dwelling for nonpayment or any other reason until after the moratorium expired.

CDC Eviction Moratorium

- On September 4, 2020, the Centers for Disease Control and Prevention (CDC) published an Eviction Moratorium Order.
- The Eviction Moratorium was extended four times (on December 27, January 29, March 28, and June 24)
- The Moratorium prohibited all private and public landlords and property owners from evicting individuals from residential properties **for failure to make rental or housing payments**, so long as the tenant submitted a declaration to the landlord.

CDC Eviction Moratorium

- CDC ordered the Moratorium to reduce the spread of COVID-19, noting that evictions often result in homelessness and overcrowding in other homes and homeless shelters, which facilitate the spread of COVID-19.
- The Moratorium applied nationwide.
- The order was to be enforced by federal, state, and local authorities. It contained criminal penalties for violations (up to \$100,000 if the violation did not result in a death, or up to one year in jail and a fine of up to \$250,000 if the violation resulted in a death).

CDC Eviction Moratorium

- Legal authorities cited:
- Section 361 of the Public Health Service Act ([42 U.S.C. 264](#))
- [42 CFR 70.2](#)

CDC Eviction Moratorium

42 USC §264. Regulations to control communicable diseases

(a) Promulgation and enforcement by Surgeon General

The Surgeon General, with the approval of the Secretary, is authorized to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession. For purposes of carrying out and enforcing such regulations, 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.

CDC Eviction Moratorium

42 CFR 70.2: Measures in the event of inadequate local control.

Whenever the Director of the Centers for Disease Control and Prevention determines that the measures taken by health authorities of any State or possession (including political subdivisions thereof) are insufficient to prevent the spread of any of the communicable diseases from such State or possession to any other State or possession, he/she may take such measures to prevent such spread of the diseases as he/she deems reasonably necessary, including inspection, fumigation, disinfection, sanitation, pest extermination, and destruction of animals or articles believed to be sources of infection.

CDC Eviction Moratorium

- **“Covered person”**: a tenant, lessee, or other resident of residential property who provided the landlord or other owner of the property a declaration, under the penalty of perjury, that:
 - The individual has used best efforts to obtain all available government assistances for rent or housing;
 - The individual will earn no more than \$99,000 (\$198,000 if filing a joint return) in 2020;

CDC Eviction Moratorium

- **“Covered person”** (cont.):
 - The individual is unable to pay the full rent or make the housing payment due to a substantial loss of income, loss of hours, lay-off, or “extraordinary” out of pocket medical expenses;
 - The individual is making best efforts to make timely partial payments; and
 - Eviction would likely render the individual homeless or force him or her to move into an overcrowded living situation.

CDC Eviction Moratorium - Repayment

- The Moratorium did not remove the obligation to pay rent—all rent, housing payments, fees, penalties, and interests may have continued to accrue since September 4, 2020.
- The Moratorium contained no provisions encouraging or requiring renters to enter into repayment plans.
- Renters who deferred payments will be faced with paying the accrued charges now that the Moratorium has ended, with no plan in place to protect them from having to pay the accrued charges and interest all at once.

CDC Eviction Moratorium

- The Moratorium did not prohibit foreclosure on a home mortgage.
- Individuals could still have be evicted for reasons other than not paying rent or making a housing payment. E.g.:
 - Criminal activity
 - Nuisance
 - Drug-related criminal activity
 - Violations of public health codes or ordinances

CDC Moratorium and Tribes

- The Moratorium terms created confusion as to whether it applied to Indian tribes. It prohibited persons “in any State or U.S. territory” from carrying out evictions, and the definitions of those terms do not include tribes.
- However, there are several references to tribes in the Moratorium:
 - E.g., excluding from coverage “any State, local, territorial, or tribal area with a moratorium on evictions that provides the same or greater level of public-health protection than the requirements listed in this Order.”
- It therefore appears that the CDC intended that the Moratorium apply to tribes

CDC Moratorium - Alabama Ass'n of Realtors v. Dep't of Health and Human Serv.

- On June 29, 2021, the Supreme Court denied a request from a coalition of landlords and Realtor groups to lift the CDC Eviction Moratorium in a 5-4 vote.
- In doing so, the Supreme Court left the CDC Eviction Moratorium in place.
- However, Justice Kavanaugh, one of the justices in the majority, indicated his vote in favor was reluctant, and only because there was only a month left before the Moratorium expired (at that time).

CDC Moratorium Extension

- On August 3, 2021, the CDC issued an order extending its Eviction Moratorium through October 3, but only for persons located in counties that had “substantial” or “high” transmission levels of COVID-19.
- The Order was ongoing. If the county in which renters were located was not in a “substantial” or a “high” transmission level one week, but moved into that situation the next week, the Order would have applied to individuals in that county at the point when the county moved into that new level.

CDC Moratorium -Second *Alabama Ass'n of Realtors v. Dep't of Health and Human Serv.*

- On August 26, 2021, the Supreme Court issued a per curiam (unsigned) opinion striking down the CDC Eviction Moratorium.
- The six justices who voted to strike down the moratorium felt that CDC exceeded its legal authority. The CDC had based its action on a decades-old statute that gave it certain authorities to address pandemics (e.g., ordering quarantines and fumigation).
- **HELD:** statute did not provide CDC further authority to mandate an eviction moratorium, and that additional Congressional action would be needed.

HUD Section 184/184A Foreclosure Moratorium

- On March 20, 2020, HUD issued a 60-day moratorium on foreclosures of Section 184 or 184A guaranteed loans and evictions. HUD has issued multiple extensions of this foreclosure moratorium
- The moratorium applied to the initiation of foreclosures and to foreclosures in process.
- Evictions of tenants occupying properties with Section 184 and 184A guaranteed loans were also suspended (excluding actions to evict occupants of legally vacant or abandoned properties).

HUD Section 184/184A Foreclosure Moratorium

- HUD also extended loan processing flexibilities related to appraisals, verification of employment, and IRS transcripts.
- The extended moratorium also provides foreclosure forbearance relief for borrowers if the financial hardship is due to COVID-19. The forbearance relief lasts six months beyond the end of the COVID-19 National Emergency or September 30, 2022, whichever is later.

HUD Section 184/184A Foreclosure Moratorium

- The foreclosure moratorium ended on July 31, 2021. Foreclosures of Office of Native American Programs (ONAP) guaranteed loans may be initiated or resumed as of July 31, 2021.
- Lenders could not initiate or continue with an eviction to acquire possession of the foreclosed property until September 30, 2021.

Have eviction moratoria been effective?

- Even though overturned, CDC moratorium remained in effect for nearly a year.
- Tribal, state and local moratoria remained in place even longer, and some are still in effect.
- News stories about landlords avoiding the restrictions, or about tenants not aware of how to utilize the restrictions.
- Overall, however, these various moratoria resulted in a substantial slow-down of evictions if not a complete halt.

Have eviction moratoria been effective?

- Effectiveness as a public health measure?
- Going to take significant time and epidemiological research to determine whether it had a public health impact.
- Very preliminary, early review, tenants who remained in place as opposed to being evicted had lower rates of infection and transmission.
- This early data was the basis of the CDC moratorium, which followed on heels of local and CARES Act moratoria.

Will we see it in the future?

- Unlikely on the federal level unless by Congress. Which means unlikely.
- Tribal, State and local approaches may be used, depending on severity of the outbreak in the area.
- Informal approach by TDHEs and Tribal Courts also likely.

Questions?

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