

Residential Eviction Procedures in Texas during COVID-19

A Practical Guidance® Article by Ian D. Ghrist, Ghrist Law Firm PLLC



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COVID-19 has upended eviction actions across the country and Texas is no exception. This article describes how Texas courts are interpreting and applying the latest Texas Supreme Court's emergency orders, the CARES Act, and the CDC Moratorium to residential evictions and offers practical advice to landlords dealing with nonpaying tenants in Texas during the COVID-19 pandemic. Procedures vary from court to court.

Relevant Orders and Legislation

Most Justice of the Peace Courts and County Courts at Law in Texas look to the latest Texas Supreme Court order, the CARES Act, and the CDC Moratorium, among other things, to determine what their COVID-19 eviction procedures should look like.

Texas Supreme Court Emergency Orders

As of January 22, 2021, the Texas Supreme Court's current emergency order related to evictions is the [TEXAS SUPREME COURT'S THIRTY-THIRD EMERGENCY ORDER REGARDING THE COVID-19 STATE OF DISASTER](#),

Misc. Docket No. 21-9004, signed January 14, 2021. Interestingly, two justices dissented from this order for reasons not explained in the order. In addition, as of January 17, 2021, the Texas Judicial Branch website indicated that portions of the [Thirty-First Emergency Order](#) and the [Thirty-Second Emergency Order](#) remain in effect despite many of the prior orders having been subsumed by the thirty-third order. The Thirty-First Emergency Order, for example, contains the Texas Eviction Diversion Program rules governing all eviction cases.

CARES Act

The CARES Act is an economic stimulus bill passed by the 116th U.S. Congress and signed into law by President Donald Trump on March 27, 2020. See 116 P.L. 136. (The full name for the CARES Act is the Coronavirus Aid, Relief, and Economic Security Act.) Fully explaining the CARES Act and the various Texas Supreme Court orders interpreting the CARES Act, which can change multiple times in any given month, is beyond the scope of this article. However, several implications of the CARES Act are discussed below.

CDC Moratorium

"CDC Moratorium" refers to [an order](#) from the Centers for Disease Control that temporarily halts residential evictions in some circumstances. The original order was set to expire on December 31, 2020, but was extended until January 31, 2021, by the Consolidated Appropriations Act, 2021, Public Law 116-260, signed by President Trump on December 27, 2020. On January 20, 2021, in response to an executive order signed by President Biden, the CDC [announced](#) it would extend the order through at least March 31, 2020.

Landlord's Pleadings

The Texas Supreme Court's latest emergency order contains provisions requiring the plaintiff in an eviction case to include allegations related to the CARES Act, the CDC Moratorium, and the Texas Eviction Diversion Program in the plaintiff's pleadings. Most Justice of the Peace Courts have forms available to the public in their offices that can be used to accomplish this.

CARES Act

As for the CARES Act, the landlord needs to sign certification representing to the court that the real estate at issue is not encumbered by any federally related loans. This generally means any mortgage loans that Fannie Mae, Ginnie Mae, Freddy Mac, or any other government-sponsored mortgage entities (GSEs) have an interest in. Many property owners have no idea whether their loan is a GSE loan or not. This puts the property owner in an awkward position where they have to decide whether to certify under penalty of perjury that no GSE loan exists on the property when there is no straightforward way to find out if the loan on the property is a GSE loan or not. Many loans, and maybe most loans, taken out through large banks or other financial institutions are federally related loans. Seller-finance lenders and private "hard money" loans are usually safe-to-say not federally related for CARES Act purposes. For guidance on seller financing in Texas, see [Regulation of Seller Financing for Residential Real Estate \(TX\)](#).

Texas Eviction Diversion Program

The current Texas Supreme Court emergency orders require that a brochure explaining the Texas Eviction Diversion Program be provided to the tenant in any eviction case. The brochure is available [here](#). The current Texas Supreme Court emergency orders also require the landlord, in its pleadings, to "state that the plaintiff has reviewed the information about the Texas Eviction Diversion Program available at www.txcourts.gov/eviction-diversion/." Furthermore, the citation to the tenant in the eviction case must include statements in both English and Spanish promulgated by the Texas Office of Court Administration. In some courts, even though these requirements arose after the eviction case was filed, judges are requiring the landlord to file and serve new pleadings that contain the appropriate disclosures, a copy of the brochure, and the landlord's certification to having reviewed the information about the Texas Eviction Diversion Program. This delays cases unless the landlord proactively amends pleadings without being prompted to do so by the court. Amending pleadings is, of course, much harder in many Justice Courts because they

do not all use the electronic filing system that all Texas District and County Courts use. Furthermore, many Justice Courts are also closed to the public, which makes figuring out how to file anything with them a challenge.

Hearing Date

Once the landlord signs the required certification and submits it to the Justice of the Peace Court, the Justice of the Peace Court will allow the eviction case to be set for a hearing. Before the COVID-19 crisis, under Tex. R. Civ. P. 510.4(a)(10), eviction trials could not be set more than 21 days after the "petition is filed." Under Tex. R. Civ. P. 510.7, the judge cannot delay an eviction trial setting for more than seven days unless both parties agree in writing. These limits on how long the Justice of the Peace Courts can take to set an eviction hearing have essentially been abolished until further notice during the current COVID-19 crisis. Some Justice of the Peace Courts are setting hearings relatively quickly, within a few weeks, whereas others are taking much longer. At the beginning of the COVID-19 outbreak, many Justice of the Peace Courts shut down entirely. To reopen, a Justice of the Peace Court must develop a COVID-19 plan, and have it approved by the state. Some Justice of the Peace Courts took a long time to obtain approval for their plans and set no hearings before the reopening, even once evictions resumed under the governor's COVID-19-related orders. So, even if the Texas governor's COVID-19 orders allowed evictions to occur, if your real estate was in a Justice of the Peace Court precinct where the Justice of the Peace Court did not reopen, the governor's decision to allow evictions to proceed was moot.

CDC Declaration

Assuming the CARES Act and Eviction Diversion Plan pleadings and certifications have been completed by the landlord to the satisfaction of the relevant Justice of the Peace Court, the landlord's next hurdle is the CDC Moratorium. To take advantage of the CDC Moratorium, the tenant must fill out a [CDC declaration form](#) (OMB Control No. 0920-1303), serve it on the landlord, and file it with the Justice of the Peace Court. The latest Texas Supreme Court orders mandate that the court must attach to the citation in the eviction case a statement about the CDC Moratorium and a copy of the CDC Moratorium declaration form. See [TEXAS SUPREME COURT'S THIRTY-SECOND EMERGENCY ORDER REGARDING THE COVID-19 STATE OF DISASTER](#), Misc. Docket No. 20-9161, signed Dec. 29, 2020. The Texas Supreme Court goes on to say that the judge has authority to "develop

the facts of the case” including questioning whether the premises are a “covered dwelling” subject to Section 4024 of the CARES Act and whether the defendant has been made aware of the CDC Moratorium and has had an opportunity to complete the CDC Declaration.

If a tenant completes a CDC Declaration, then, under the Texas Supreme Court order, the court must “abate the eviction action, including the issuance and execution of any writ of possession.” But the landlord is permitted to contest the CDC Declaration. So, after the abatement due to the filing of the CDC Declaration, the landlord can ask for a hearing over whether the tenant’s allegations in the CDC Declaration are true or not. If the trial judge does not believe that the tenant’s allegations in the CDC Declaration were true, then the eviction can proceed.

Some Justice of the Peace Courts will make an on-the-spot determination on the merits as to a CDC Declaration if a trial setting occurs and the parties attend. Others will reset the case for a CDC Declaration hearing at some later time. The landlord then has to win the CDC Declaration hearing to gain the right to ask for a trial setting. Given that the current CDC Moratorium expires January 31, 2021, it remains to be seen whether asking for a CDC Declaration hearing just to get a trial setting is a worthwhile endeavor for any landlord. Because of how long it takes to get a CDC Declaration hearing and the risk of losing the CDC Declaration hearing, many landlords just wait out the CDC Moratorium or seek a trial setting after the Moratorium deadline. However, landlords pursuing this strategy in December found themselves with trial settings in January during the CDC Moratorium extension. This created a situation where many eviction trials were set only to face the difficult question of whether the trial should morph into a CDC Declaration legitimacy hearing or whether the CDC Declaration legitimacy hearing should be reset along with the trial or whether a new trial should be set sometime in February of 2021. Of course, no one knows if the CDC Moratorium will extend again after January of 2021, so the prudent thing for the landlord seems to be to set a hearing on the CDC Declaration legitimacy.

Many tenants struggle to prove up the CDC Declaration allegations. Some allegations are proven easily, such as

proving that the tenant expects to earn no more than \$99,000 in income. Others present challenges. The tenant must prove that the tenant is “using best efforts to make timely partial payments that are as close to the full payment as the individual’s circumstances may permit.” Landlords that are receiving partial rent payments during the COVID-19 crisis are often not the ones contesting CDC Declarations. More often, issues arise when the tenant makes no partial payments yet files the CDC Declaration. Most tenants can afford something more than zero dollars in rent. The CDC Declaration allows any tenant to stop any eviction process merely by filing a document that is very easy to complete and that the current Texas Supreme Court orders require the court and the plaintiff to provide to the tenant. Thus, in many cases, a CDC Declaration is filed to delay the eviction process while the tenant continues to pay no rent for as long as the court takes to set a trial on the merits and issue a writ. By simply filing this document, the tenant obligates the judge to put the case back onto the judge’s calendar before an eviction can occur. The benefits to the tenant of delaying the eviction process greatly outweigh the risks of possibly losing a CDC Declaration hearing. From the landlord’s perspective, some tenants cannot “lose” the CDC Declaration hearing because, regardless of the outcome, the tenant already succeeded in delaying the eviction.

Key Takeaways

CDC Declarations are being filed before Justice of the Peace Court eviction trials, after the trials but before the writ of possession is executed, or even during an appeal to County Court at Law. At the moment, all a landlord can do is amend his or her pleadings to include CARES Act, CDC Moratorium, Texas Eviction Diversion Program, and Texas Supreme Court order allegations; fill out whatever forms the Justice Court has related to the foregoing; and keep calling court clerks for trial settings and CDC Declaration hearings. As explained above, at any stage, a tenant is well-served by making partial rent payments. At some point, the procedures may even out from court to court, but for now, each Justice Court precinct follows the Texas Supreme Court emergency order guidance in their own way.

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Ian practices general civil litigation, primarily in the areas of Debtor/Creditor, Real Estate, and Mineral Rights. Ian has handled cases involving deed restrictions, mechanic's liens, mortgages, lien subrogation, class actions, the Texas Mineral Interest Pooling Act, title disputes, fraud, deceptive trade practices, evictions, foreclosures, lift stay motions and bankruptcy-related matters, post-judgment collections, breach of contract, insurance claims, cases under the Uniform Fraudulent Transfer Act, contract-for-deed litigation, etc.

Before law school, Ian spent about four years as a banker for J.P. Morgan Chase where he held a Series 7 license and served as both a stockbroker and a loan officer.

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