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FROM: TSCHETTER SULZER

TO: TS CLIENTS

DATE: OCTOBER 1, 2020

RE: **WHETHER TO FILE EVICTION CASES FOR NON-PAYMENT OF RENT WHILE THE CDC EVICTION MORATORIUM AND THE GOVERNOR'S EXECUTIVE ORDER 202 ARE IN EFFECT**

## BACKGROUND

On September 4, 2020, the Centers for Disease Control (CDC) published its Order (the "CDC Order") entitled *Temporary Halt in Residential Evictions To Prevent the Further Spread of COVID-19* (see: <https://www.govinfo.gov/content/pkg/FR-2020-09-04/pdf/2020-19654.pdf>). Pursuant to the CDC Order, a landlord, owner of 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 jurisdiction to which this Order applies during the effective period of the Order. The Order is effective until December 31, 2020, unless repealed, modified, rescinded, or enjoined by a Court of Law. Tenant's assert their right to not be evicted by signing a Declaration.

The Governor's Executive Order D2020-202 requires all landlords who initiate or file an eviction case to provide their tenant with a copy of the CDC Order and the corresponding Declaration. Additionally, some Courts are requiring landlords to serve their tenants with the CDC Order and Declaration in all eviction cases. A copy of the CDC Declaration can be found here: <https://www.cdc.gov/coronavirus/2019-ncov/downloads/declaration-form.pdf>

## ISSUE

Should landlords file eviction cases for non-payment of rent while the CDC Order and the Governor's Executive Order D2020 202 are in effect?

Important Note. Remember, the CDC Order does not prohibit non-monetary evictions or evictions based on non-compliance, repeat violations, substantial violations, or notices to quit (non-renewal). Because these evictions can move forward, you only need to consider whether to file cases based upon non-payment (based upon the service of a demand for rent or possession). Accordingly, when this Memo refers to and discusses “eviction cases” hereafter, the Memo is addressing non-payment (rent) cases only.

## **CONCLUSION**

The decision whether to pursue and file eviction cases should only be made after carefully reviewing and understanding the key elements of the CDC Order discussed in this Memo and how various County Courts are interpreting and ruling on the CDC Order. Landlords should also be aware of the practical implications and potential or likely results that will occur in eviction cases if the tenant provides a Declaration in the case filed. Accordingly, this Memo discusses the implications, ramifications, and risk factors associated with filing eviction cases while the CDC Order is in effect. Based on Court Orders issued after the effective date of the CDC Order in some counties, landlords should not file or attempt to file eviction cases in certain counties if the tenant provided the landlord with a Declaration prior to filing.

The decision to file is literally a county by county decision. Critical data that you should consider in reaching your decision appears in the table at the end of this Memo. The data listed is a compilation of Court rulings in existing eviction cases. If your county is not listed, we have no data for that particular county. Because Courts in different counties are ruling on these issues differently, Landlords may want to file in some counties and not in others. Court rulings are so fragmented that even different divisions of Courts in the same County are issuing different rulings on these issues.

## **KEY ELEMENTS OF THE CDC ORDER**

The decision whether to file evictions is determined by two key issues, arising from the CDC Order.

1. What is an eviction?
2. Can you challenge a tenant’s CDC Declaration?

Is an eviction any part of the eviction process (serving notices or filing a case)? Or is an eviction the actual physical removal of a tenant? Based on the definition set forth in the CDC Order, the better reasoned position is that an eviction is the physical removal of a tenant. Under this interpretation, only physical moves (execution of a writ of restitution would be prohibited). One Court (El Paso County) has specifically adopted this position in its order. However, the issue is not clear in other counties. Because some counties are allowing cases to be filed, the

implication is that they have adopted the eviction equals physical removal position but their rulings have not directly addressed the issue and could be modified in subsequent rulings.

Can you challenge a tenant's Declaration? Again, the answer depends on the county. Some counties allow landlords to challenge. But even some (most) of the counties that allow a challenge are limiting the challenge and thus not allowing a full challenge. A full challenge would allow a landlord to cross examine the tenant on the Declaration, introduce other evidence refuting the tenant's claims, and allow the landlord to testify. For example, the tenant may have told the landlord that they have made zero efforts to obtain rental assistance or sent the landlord an email stating this but since they have provided the landlord with a CDC Declaration there is nothing the landlord can do. In some counties that allow challenges, the landlord may be prohibited from testifying or introducing the email.

### **RISK FACTORS AND OTHER CONSIDERATIONS IN FILING EVICTION CASES WHILE THE CDC ORDER IS IN EFFECT**

We held a Webinar for our clients less than a week after the CDC Order became effective on September 4. A common question was should we notify our tenants about the CDC Order. At the time, this was a business decision. Pursuant to the Governor's Executive Order 202, this is now mandatory. Accordingly, every tenant that you file an eviction case against is going to know about the CDC Order and their ability to sign and deliver a Declaration to you. If a tenant executes a Declaration, this will significantly impact the case. It's not a matter if it will impact your case, but rather to what extent. Given the current chaotic climate and various conflicting court rulings, this is obviously a significant consideration. Thus, the first risk factor in filing eviction cases is uncertainty of outcome.

A tenant does not have to sign a Declaration prior to the case being filed. A tenant may provide a Declaration at any time during the case including up to and including the date the sheriff is scheduled to execute a writ of restitution. If a tenant executes a Declaration when a writ is about to be executed, you will have gone through the entire process including foregoing accepting some partial payments in some cases only to be potentially foiled at the very end. If you file an eviction, you should do so only if you are willing to accept this risk and potential outcome. This scenario illustrates that in many cases you are probably better off receiving a tenant's Declaration prior to the filing of an eviction. If you receive a Declaration upfront, you can factor this into your decision whether to file. If you are in a county such as Denver, you can now avoid the time and expense that would have been wasted if you filed an eviction against a tenant only to receive a Declaration post eviction filing.

The CDC Order has draconian monetary penalties for violations. Accordingly, potentially violating the Order and being penalized is a significant risk factor. In the opinion of many including ours, the CDC Order is illegal. Legal challenges to enjoin its enforcement are underway. Further, as of the writing of this Memo, we are not aware of any efforts to enforce the penalty provisions. Some contend that the severe penalties were included to literally frighten

landlords into compliance. Specifically, the CDC knows its Order is illegal, but who will not comply with an illegal Order given the potential six figure penalties.

When factoring the violation risk, landlords must also consider the Order's lack of clarity on the key issue of what constitutes an eviction. As discussed above, this issue is far from settled. For reference, the CDC Order defines "Evict" and "Eviction" as "any action by a landlord, owner of a residential property, or other person with a legal right to pursue eviction or a possessory action, to remove or cause the removal of a covered person from a residential property. This does not include foreclosure on a home mortgage."

Currently, two distinct interpretations of the definition are being argued before the Courts. The first interpretation is that any action by a landlord to remove or cause the removal of a tenant means physically removing the tenant from the rented property (only lockouts, physically moving out, or execution of a writ of restitution). The second interpretation (the "broadest interpretation) is that any action by a landlord to remove or cause the removal of a tenant means any action associated with or that is part of the eviction process. Logically, under the broadest interpretation, the act of serving eviction notices (rent demands) and filing eviction cases would be a violation of the CDC Order.

Currently, Court rulings bearing on this issue stack up as follows. El Paso County has issued an Order adopting the physically move out interpretation. No County has issued an Order adopting the broadest interpretation even in cases that were filed after receipt of a Declaration from a tenant. All counties (other than El Paso) have allowed the filing of cases and by allowing the filing of cases are implicitly adopting the more limited definition (eviction equals physical move out). However, without an express Court order, a landlord cannot be guaranteed that the court or others may not try to argue that the filing of the case and the serving of the underlying notices is prohibited under the broadest interpretation. Thus, in absence of an express Court Order, at least some risk exists that the service of rent demands and the filing of a non-payment case is a violation of the CDC Order.

Similar to the "eviction" definition issue is the challenge to the Declaration issue. Again, Counties are all over the board on this issue with Denver being the harshest. In Denver County, you cannot challenge the veracity of a tenant's Declaration. This means that if you receive a Declaration in Denver at any time during an eviction case, the case is effectively over. The Denver Courts are simply dismissing all eviction cases if the tenant provides a Declaration. The ability to challenge in other counties varies greatly. Landlords should consider the ability to challenge, if any, in deciding whether to file eviction cases.

Landlords should also consider whether a Court is dismissing or staying the case when deciding to file. In our opinion, the CDC Order should not prevent eviction cases going forward to their conclusion (judgment for possession if the tenant owes the rent). Rather, the CDC Order should only prevent the execution of a writ of restitution (the physically removal of the tenant) if the Court determines that the tenant is a "covered person" after the landlord is given

an opportunity to fully challenge the tenant's Declaration (the tenant's written statement asserting that they are a covered person). In other words, if the Court determines the tenant is a covered person the case should just be stayed and not dismissed until the CDC Order expires. However, not all Courts are doing this. Some Courts are dismissing eviction cases upon determining the tenant is a covered person. If your case is dismissed, you must get back in line and start over when the CDC Order expires. If you are going to be put back in line upon receipt of a Declaration, you should evaluate whether you want to take this risk by filing in the first place. Conversely, if the case is stayed upon receipt of a Declaration, you are at the head of the line when the CDC Order is lifted.

As discussed at length, every County is different. If you have multiple assets in multiple counties you have to manage multiple processes and deal with different rules of the road in different counties. Further, these rules aren't guaranteed and may change at any time. In deciding to move forward on non-payment cases, you should evaluate if you can even manage the process.

### **YOU MUST NOTIFY US IF YOU RECEIVE A DECLARATION**

If you do file an eviction case and at any point in time during the processing of the case you receive a Declaration from your tenant in the case, you must notify us immediately. Thus, if you file cases while the CDC Order is in effect, you must always be aware of this significant responsibility on your part. Both you and we have a duty to notify the Court of this fact. TS accomplishes this by filing a Notification of Receipt of Declaration with the Court. Any point in time means any point up to and including the date a writ of restitution is executed. For example, you have a judgment for possession, a writ of restitution has been issued, and the sheriff is scheduled to physically remove the tenant on the 28th. On the 27th, the tenant delivers a Declaration to you. You must notify us so that we can notify the Court, and the issue can be determined by the Court. If you fail to notify us and the tenant is physically moved out by the sheriff, you are subjected to the penalties in the CDC Order and may face liability for wrongful eviction if the tenant turns out to be a covered person as defined by the Order. The definition of eviction in the CDC Order is not clear but there can be no doubt that the physical removal of a tenant that is a covered person is prohibited by the CDC Order.

### **IT IS YOUR DECISION**

This Memo and the accompanying table contain our best and most up to date analysis of the situation today. The situation is highly fluid and unstable. Today's Court orders could be different tomorrow. Some have rightly characterized the situation as highly chaotic. Accordingly, only you can decide whether you want to pursue non-payment cases in this landscape. If you need more specific advice or want to have an individual conversation about your particular situation, we are always here for you.

**CDC ORDER COUNTY BY COUNTY  
RENT EVICTION TABLE**

The following Table lists by County the most current information we have on the two key issues (can you file and can you challenge). The table was compiled based on Court orders issued in existing eviction cases. The Table is subject to change. The Table assumes that a Declaration has been received prior to filing an eviction for non-payment of rent.

County	Div/CtRm	Can You File	If you receive Dec prior to filing should you file	Can You Challenge the Dec?	Is the Challenge to the Dec Limited?	If the Court finds tenant is covered, Case is . . .
Arapahoe	A-1	Yes	Your Decision	Yes	TBD	Stayed
Arapahoe	A-2	Yes	Your Decision	No	TBD	Stayed
Adams	Div 1	Yes	Your Decision	Yes	Yes	Stayed
Boulder	Various	Yes	Your Decision	Yes	TBD	TBD
Broomfield	1C	Yes	Your Decision	TBD	TBD	TBD
Denver	170/175/186	Yes	No	No	NA	Dismissed
Douglas	A2	Yes	Your Decision	Yes	TBD	Stayed
El Paso	S	Yes	Yes	Yes	TBD	Stayed
Jefferson	H	Yes	Your Decision	Yes	Yes	Stayed
Larimer	Various	Yes	Your Decision	Yes	TBD	TBD
Larimer/Lovel and	L1	Yes	Your Decision	Yes	TBD	TBD
Pueblo	304	Yes	Your Decision	Yes	TBD	TBD
Weld	Division C	Yes	No	No	NA	Dismissed