

## Consumer Financial Protection Bureau Enters Eviction Fray With New Ruling Under FDCPA

On April 19, 2021, the Consumer Financial Protection Bureau (CFPB) issued an interim final rule intended to help residential tenants facing eviction for nonpayment of rent.<sup>1 2</sup> This rule was issued under the CFPB's authority to interpret the Fair Debt Collection Practice Act (FDCPA). It requires debt collectors to disclose in writing to tenants, before they are evicted, their rights under the moratorium issued by the Centers for Disease Control and Prevention (CDC), which moratorium protects tenants from eviction for nonpayment of rent. Under the new CFPB rule, the disclosure may be mailed to the tenant along with the eviction notice, but the disclosure must clearly and conspicuously disclose that tenants may have rights to remain in possession of the premises under the CDC moratorium.

The CFPB rule was issued due to concerns that consumers are unaware of protections under the CDC moratorium, and that "debt collectors" may be engaging in eviction-related conduct in violation of the FDCPA because landlords have not completed the required CDC eviction moratorium declaration. Without completion of the CDC declaration, tenants facing eviction may be unaware of the CDC moratorium or the steps they may take to enlist its protections and oppose the eviction action. The CDC moratorium was enacted on September 4, 2020, and has been extended three times through June 20, 2021, in response to community spread of COVID-19.

### Requirements Under the CFPB Rule

The CFPB suggests the following language for use in a notice provided to a tenant under the new rule:

Because of the global COVID-19 pandemic, you may be eligible for temporary protection from eviction under federal law. Learn the steps you should take now: visit [www.cfpb.gov/eviction](http://www.cfpb.gov/eviction) or call a housing counselor at 800-569-4287.

or

Because of the global COVID-19 pandemic, you may be eligible for temporary protection from eviction under the laws of your state, territory, locality, or tribal area, or under federal law. Learn the steps you should take now: visit [www.cfpb.gov/eviction](http://www.cfpb.gov/eviction) or call a housing counselor at 800-569-4287.<sup>3</sup>

The rule also requires that the disclosure be "clear and conspicuous" and "readily noticeable," although location and type size are not mandated. The rule applies only when a landlord employs an attorney or agent to collect delinquent rent or evict a tenant, and not when a landlord takes direct action against a tenant, following the distinction made under FDCPA that limits its application to third-party debt collectors and not to principals themselves. Attorneys who regularly engage in debt collection activity fall squarely within the CFPB rule and those that engage in eviction proceedings on behalf of residential property owners that seek unpaid rent may be debt collectors under the FDCPA.

### The CDC Moratorium and First Amendment Challenges

The CDC moratorium is currently scheduled to end on June 30, 2021, unless it is further extended. It has been attacked in several federal court cases on both constitutional and statutory bases. The results of the litigation so far are mixed.

The CFPB rule follows a number of state and local moratoria in its requirement that landlords inform tenants of their rights under the CDC moratorium, as well as the requirement that landlords



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provide information to tenants about how to obtain assistance.<sup>4</sup> This rule is likely to encounter First Amendment compelled speech challenges under the U.S. Constitution similar to some encountered by the CDC moratorium and implementing state laws and orders.

The First Amendment has been the basis of challenges of laws and orders based on the CDC moratorium in district courts in Massachusetts, Minnesota, New York, and Tennessee. While some such challenges have been specifically on the basis of the Petition Clause,<sup>5 6</sup> others have involved the question of whether the information landlords are required to provide to tenants under the moratoria violates the Free Speech Clause.

In *Baptiste v. Kennealy*,<sup>7</sup> plaintiff landlords challenged the Massachusetts Act providing for a moratorium on evictions on several bases, including that that act compelled them to provide information that violated their First Amendments rights. The court held that the plaintiffs had a “reasonable likelihood of proving their compelled speech claim,” and were therefore eligible for preliminary injunctive relief.<sup>8</sup>

The court based this holding on a clause in the Massachusetts law that “requires any landlord who wishes to send a notice to a tenant about missed rent payments to include certain language, and provide tenants with addresses to non-governmental websites of groups that will assist tenants in resisting their landlords’ efforts to regain possession of their property,” and stated that the requirement that landlords provide information regarding tenant advocacy organizations specifically was “likely to be proven to violate the First Amendment.”<sup>9</sup> The language the Massachusetts law required landlords to use in such notice was similar to that required by the new CFPB rule.

In the New York case of *Chrysafis v. James*,<sup>10</sup> plaintiff landlords challenged a New York eviction moratorium on five grounds, including that it:

compels property owners to disseminate government messages with which they disagree in violation of their rights under the First Amendment [...] by requiring them [...] to distribute to their tenants with every written demand for rent (i) hardship declaration forms drafted by the government, which invite tenants to avail themselves of the government’s eviction moratorium and (ii) a government-curated list of not-for-profit legal service providers who are able to assist the tenants in seeking to avoid eviction [...] <sup>11</sup>

The *Chrysafis* court granted the New York Attorney General’s motion to dismiss on April 14, on the basis that the attorney general was not a proper party to the action, and the court therefore lacked subject matter jurisdiction,<sup>12</sup> leaving the *Baptiste* decision the only reported case addressing the compelled speech question on the merits.

It remains to be seen whether other courts follow the same line of reasoning as *Baptiste*, but the CFPB rule is likely to encounter similar challenges. We will continue to monitor the litigation in this area.

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<sup>1</sup> [https://files.consumerfinance.gov/f/documents/cfpb\\_debt\\_collection-practices-global-covid-19-pandemic\\_interim-final-rule\\_2021-04.pdf](https://files.consumerfinance.gov/f/documents/cfpb_debt_collection-practices-global-covid-19-pandemic_interim-final-rule_2021-04.pdf).

<sup>2</sup> 12 CFR Part 1006.

<sup>3</sup> [https://files.consumerfinance.gov/f/documents/cfpb\\_debt\\_collection-practices-global-covid-19-pandemic\\_interim-final-rule\\_2021-04.pdf](https://files.consumerfinance.gov/f/documents/cfpb_debt_collection-practices-global-covid-19-pandemic_interim-final-rule_2021-04.pdf), at page 68-69.

<sup>4</sup> <https://www.law360.com/articles/1380117/print?section=Illinois>.

<sup>5</sup> In the New York case *Elmsford Apt. Assocs., LLC v. Cuomo*, plaintiff landlords claimed that an executive order put in place by the governor violated their rights under the Petition Clause of the First Amendment by denying them access to housing court for the prosecution of summary nonpayment proceedings. That court held that the executive order at issue did not violate their rights under the Petition Clause because they could “still sue their tenants for arrearages through a breach of contract action in the New York Supreme Court,” and because they would maintain the right to evict their tenants upon expiration of the order. *Elmsford Apt. Assocs., LLC v. Cuomo*, 469 F. Supp. 3d 148, 2020 WL 3498456 (June 29, 2020).

<sup>6</sup> In Minnesota, plaintiff landlords in *Heights Apts., LLC v. Walz* challenged the constitutionality of an executive order based on the CDC eviction moratorium under the Petition Clause of the First Amendment, among other bases. Similar to the New York court in *Elmsford*, the court in *Heights* held that “[b]ecause the EOs foreclose the Landlords’ ability to obtain only one kind of relief and only does so temporarily, the EOs do not violate the Petition Clause. *Heights Apts., LLC v. Walz*, 2020 WL 7828818 (December 31, 2020).

<sup>7</sup> 2020 U.S. Dist. LEXIS 176264, 490 F. Supp 3d 353 (September 25, 2020).

<sup>8</sup> *Id.* at \*101.

<sup>9</sup> *Id.* at \*84 and 96.

<sup>10</sup> 2021 WL 1405884 (April 14, 2021).

<sup>11</sup> *Id.* at \*31.

<sup>12</sup> *Id.*