



September 21, 2020

Chief Justice Patience D. Roggensack
Justice Ann Walsh Bradley
Justice Annette Kingsland Ziegler
Justice Rebecca Grassl Bradley
Justice Jill Karofsky
Justice Rebecca Frank Dallet
Justice Brian Hagedorn

Wisconsin Supreme Court
110 E. Main St., Suite 440
Madison, WI 53703

via email:

clerk@wicourts.gov

[Supreme Court Commissioners@wicourts.gov](mailto:Supreme_Court_Commissioners@wicourts.gov)

Re: Requested Emergency Order/s in the Matter of
CDC Eviction Moratorium Compliance for Eviction Filings

To the Honorable Justices of the Supreme Court of Wisconsin:

I. THE PROBLEM

Circuit courts need an efficient and consistent approach to ensure compliance with the CDC moratorium on evictions. On September 4, 2020, the Centers for Disease Control and Prevention (CDC) ordered a halt to many residential eviction actions nation-wide, through December 31, 2020. Under the Order, evictions against “covered persons” cannot be initiated or continued for any reason except for those reasons enumerated in the Order. In order to be a “covered person” protected by the Order, the tenant must: 1) be able to truthfully swear to certain facts, 2) sign a declaration swearing to those facts, and 3) deliver the signed declaration to their landlord. Upon delivery of the declaration to the landlord at any point prior to the execution of the writ of restitution, the eviction defendant becomes a “covered” person under the act.

The purpose of the Order is to protect public health by mitigating the spread of COVID-19 within congregate or shared living settings, or through unsheltered homelessness. The CDC concluded that homeless individuals face significantly increased risk of contracting and spreading COVID-19. The CDC writes that “[h]omelessness poses multiple challenges that can exacerbate and amplify the spread of COVID-19. Homeless shelters are often crowded, making social distancing difficult. Many persons experiencing homelessness are older or have underlying medical conditions, placing them at

higher risk for severe COVID-19–associated illness.”¹ Acknowledging the CDC warnings, President Trump issued an executive order addressing the eviction crisis. He wrote, “Increased shared housing is also potentially problematic to the extent it results in increased in-person interactions between older, higher-risk individuals and their younger relatives or friends.”² The President noted:

Those who are dislocated from their homes may be unable to shelter in place and may have more difficulty maintaining a routine of social distancing. They will have to find alternative living arrangements, which may include a homeless shelter or a crowded family home and may also require traveling to other States.³

His Administration, President Trump said, “must do all that it can to help vulnerable populations stay in their homes in the midst of this pandemic.”⁴ Because the focus of the order is on preventing or minimizing the spread of this contagious disease to the community as a whole, the protections afforded by the Order should be granted as broadly as possible.

The health of the community is at risk if the protections of the Order are not granted to all who qualify for such protection. The CDC moratorium points out that people facing homelessness face difficulties adhering to public health recommendations to prevent COVID-19. These same people likely face difficulties in navigating the procedures required to prevent homelessness and further the goals of the Order. The protection of the community should not hinge on whether its most vulnerable members are savvy and capable enough to understand the process designed to keep us *all* safe.

II. REQUEST FOR EMERGENCY ACTION

Wisconsin Judicare and Legal Action of Wisconsin, the two largest providers of civil legal services to low income people in Wisconsin, respectfully urge the Court to institute a temporary rule requiring court officials presiding over residential evictions actions to: (1) inquire whether the defendants in those actions are already “covered persons” under the Order; and (2) to permit defendants to certify at the time of any court appearance in an eviction, including but not limited to the return date, joinder, or eviction trial, that they are “covered persons” under the Order. To ensure the rule is effective, all court commissioners and circuit court judges hearing eviction matters should make available to defendants the CDC’s form Certifications, found at <https://www.cdc.gov/coronavirus/2019-ncov/downloads/declaration-form.pdf>, by hard copy available in court and online on the court’s website. By ascertaining whether the tenant facing eviction is a “covered person” under the Order, the judicial system, would do its part to protect the health and welfare of the *entire* community.

¹ Center for Disease Control and Prevention, Assessment of SARS-CoV-2 Infection Prevalence in Homeless Shelters — Four U.S. Cities, March 27–April 15, 2020, April 22, 2020, available at <https://www.cdc.gov/mmwr/volumes/69/wr/mm6917e1.htm>.

² Executive Order on Fighting the Spread of COVID-19 by Providing Assistance to Renters and Homeowners, August 8, 2020, available at <https://www.whitehouse.gov/presidential-actions/executive-order-fighting-spread-covid-19-providing-assistance-renters-homeowners/>

³ Id.

⁴ Id.

The Court should take immediate action, as circuit courts are already facing the difficult task of enforcing the federal CDC eviction moratorium, which was not designed with the Wisconsin-specific eviction procedures in mind.

III. AUTHORITY

The Court has the authority to act on this request pursuant to Article VII of the Wisconsin Constitution and its inherent authority. *See Flynn v. Dep't of Admin.*, 216 Wis. 2d 521, 549–50, 576 N.W.2d 245, 256 (1998).

IV. PROPOSED ORDER

The proposed solution is for the Supreme Court to issue an order in substantially the following form:

WHEREAS the Centers for Disease Control and Prevention placed a moratorium on many residential evictions and terminations of tenancy; and

WHEREAS the CDC Order is in effect through December 31, 2020; and

WHEREAS it is not immediately apparent without further inquiry whether any particular tenant qualifies as a “covered person” within the ambit of the CDC Order; and

WHEREAS Wisconsin courts will need to enforce the CDC Order efficiently and while processing a high volume of evictions at one time; and

WHEREAS the Supreme Court has administrative and superintending authority over the courts and judicial system of this state and a duty to promote the efficient and effective operation of the state's judicial system, Wis. Const. Art. VII, § 3; *In re Kading*, 70 Wis. 2d 508, 519-20; 235 N.W.2d 409 (1976), and that authority includes ensuring that the state’s circuit courts provide consistent access to justice for all parties, including self-represented litigants; and

WHEREAS the constitutional and statutory rights of landlords and tenants remain in effect during the current public health crisis, as do the rights of every individual to equal protection under the law and uniform access to the courts.

The circuit courts are ordered: to temporarily require (through December 31, 2020) all court commissioners and judges presiding over residential eviction actions to

- a. inquire whether the defendants in those actions are already “covered persons” under the Order; and
- b. to permit the defendants in those actions to certify at the time of any court appearance in an eviction, including but not limited to the return date, joinder, or eviction trial, that they are “covered persons” under the Order.
- c. make available to defendants the CDC’s form Certifications by hard copy available in court and online on the court’s website.

V. MEMORANDUM IN SUPPORT OF PROPOSED ORDERS

This Court's authority to issue emergency orders to the lower courts arises from, and is guaranteed by, the Wisconsin Constitution. *See* Wis. Const. art. VII, sec. 2. ("The judicial power of this state shall be vested in a unified court system consisting of one supreme court, a court of appeals, a circuit court, such trial courts of general uniform statewide jurisdiction as the legislature may create by law, and a municipal court if authorized by the legislature. . . ."); *see also* Wis. Const. art. VII, sec. 3(1). ("The supreme court shall have superintending and administrative authority over all courts."). This Court also has such inherent powers as are "necessary" to preserve its constitutional duty to oversee the administration of justice.

Justice requires that courts enforce the law swiftly, thoroughly, and consistently, and that will be hard to do in evictions without an emergency order from this Court. About six weeks after the expiration of the federal CARES Act eviction moratorium, Wisconsin courts are faced with yet another eviction moratorium. Now, for the third time, the courts are trying to learn and apply a new and complicated order, which imposes a temporary moratorium on evictions on most residential evictions. This Order is completely unlike the last two orders. It prevents a landlord from proceeding with an eviction if the landlord has received a signed declaration from the tenant swearing to certain facts.

As with the other two eviction moratoriums, the Order's effectiveness depends on how well the parties and the courts know about and understand the brand-new law. Savvy tenants will know of the order, be able to print the declaration, and submit it to their landlord. Many tenants will not. Many landlords will not understand the ramifications of receiving the declaration or will dispute its validity or whether the CDC Order applies. Indeed, this is already happening in courts around the state.

To streamline and equalize the process of invoking the CDC's Order, court officials can ask tenants all the necessary questions at a return date, joinder hearing, or trial. At the same time, they can address concerns and questions of landlords. Many pro-se tenants will be unaware of the federal moratorium and thus will not know to submit a declaration under the CDC order or raise the issue before the court. This will inevitably lead to emergency post-judgment motions for the tenants who discover the CDC order after an eviction is ordered. Landlords and courts will be frustrated by delays, and tenants will be frustrated to defend against illegally brought evictions.

Consistency is key to ensuring equal access to justice for all litigants, as well as furthering the Order's goal of protecting the public health. Many of Wisconsin's seventy-two counties have attempted to respond individually to the public health crisis. The COVID-19 section of the Wisconsin Courts website shows many voluminous, varied, and changing emergency orders from various courts. The result is a confusing mixture of new and inconsistent protective measures and old procedural requirements.

That mixture has created peculiar difficulties for vulnerable actors in the court system, namely pro-se litigants. Pro-se litigants, who are disproportionately low-income and people of color, find themselves in a confusing and complex world, trying to protect themselves and their interests at a time when it has never been more difficult to navigate the court systems. This is especially true for

tenants and landlords, who often go unrepresented in evictions and have had to decode three completely different eviction moratoriums. Indeed, 90% of tenants in residential evictions have no representation.⁵ These parties likely lack a thorough understanding of the layered and new CDC Order.

In these cases, uniformity means equal access to justice and public health protections in communities across the state. A uniform rule temporarily requiring courts to ascertain whether eviction defendants are “covered persons” under the Order would help guarantee that communities receive protections under the order regardless of the income, education, skill, or ability to obtain an attorney of the litigants. Moreover, court resources would be protected by reducing the number of post-judgment emergency motions filed by tenants who learn of the CDC order when the Sheriff posts a notice of eviction.

This emergency rule would not require that the courts advocate on behalf of the defendants in evictions actions. Rather, the courts would merely establish whether an eviction action was properly “commenced” under Wisconsin Statutes. A complaint for eviction, or any further action in pursuit of a judgment and writ of restitution, against a “covered person” would not be legal, because the landlord bringing it would not be “entitled to the possession” of the real property in which the covered person resides. See, Wis. Stats. s. 799.40(1). Therefore, in making inquiry into whether the defendant is covered by the Order, the courts would only be ascertaining their own capacity to proceed in the case, just as they do in determining the validity of a termination notice. Execution of the declaration early in the eviction process maximizes judicial economy.

In sum, a temporary rule requiring courts presiding over eviction actions to determine whether the defendants are covered by the CDC’s eviction moratorium would facilitate the proper administration of justice, in addition to protecting the public welfare.

VI. CONTACT PERSON

The contact person for this request is: Chris Donahoe, Housing Priority Coordinator, Legal Action of Wisconsin, 230 West Wells Street, Room 800, Milwaukee, WI. Attorney Donahoe can be reached at 414.274.3431 or at cad@legalaction.org.

Legal Action and Wisconsin Judicare, the co-requestors of this emergency rule, believe this rule is necessary for the administration of justice across the state and to ensure that the poor and vulnerable can still access the courts’ protection in the most difficult of times.

Respectfully submitted on behalf of
Legal Action of Wisconsin and Wisconsin Judicare

/s/ Chris Donahoe
Chris Donahoe, Housing Priority Coordinator
Legal Action of Wisconsin

⁵ Matthew Desmond, “Unaffordable America: Poverty, housing, and eviction,” *Fast Focus* 22 (2015): 1–6, available at <https://www.irp.wisc.edu/publications/fastfocus/pdfs/FF22-2015.pdf>