August 13, 2020

CLIENT ALERT

LITIGATION UPDATE:
STATE AND FEDERAL COURTS CONTINUE TO UPHOLD
THE CONSTITUTIONALITY OF COVID-19 EXECUTIVE ORDERS
(with the exception of the Clay County Circuit Court)
By: Jeffrey Monteleone and Peter Friedman

Two notable court decisions decided recently upheld the constitutionality and enforceability of Governor Pritzker's executive action to address the COVID-19 pandemic. On July 31, a Will County Circuit Judge denied a temporary restraining order finding that the Illinois Emergency Management Act, 20 ILCS 3305/1 *et seq*. (*"IEMA"*) granted the Governor the authority to place a moratorium on residential evictions. The following day, the Federal District Court for the Northern District of Illinois issued a similar opinion denying a temporary restraining order sought by the Village of Orland Park. Both courts found that to the extent that Plaintiffs could demonstrate an irreparable injury, the balance of harms to the public health, safety, and welfare weighed in favor of upholding the Governor's executive orders.

Background

JL Properties Group v. Pritzker was filed in Will County by a group of residential landlords seeking to invalidate the moratorium on residential evictions imposed by executive order. In a 10-count complaint, the Plaintiffs' allegations were predominately that: (i) the IEMA does not grant the Governor the authority to place a moratorium on residential evictions; (ii) the IEMA does not grant the Governor the authority to issue successive disaster declarations; and (iii) the Governor's executive action violates the equal protection and due process clauses of the 14th Amendment to the United States Constitution.

Similarly, *Village of Orland Park et al. v. Pritzker* was filed in the Federal Court for the Northern District of Illinois by the Village of Orland Park, together with a local restaurant owner and other local residents seeking to invalidate executive orders on the basis that the Governor lacks the authority to issue them. The Plaintiffs here made the same constitutional arguments as the Plaintiffs in the *JL Properties* case that the Governor's executive orders violate the equal protection and due process clause of the 14th Amendment to the United States Constitution.

A Different Conclusion than Clay County

Both decisions criticized the Clay County case filed by Representative Darren Bailey in which Rep. Bailey argues that the Governor's executive orders exceed the authority granted under the IEMA. In that case, Clay County Circuit Judge Michael McHaney agreed, and has found that the Governor could not issue

successive emergency declarations under the IEMA, and took the unprecedented approach of issuing an order that, at least on its face, invalidates all executive orders issued after April 8 *ab initio* and enjoins their enforcement against all citizens of the State of Illinois. Both parties are seeking additional clarification and relief in the Clay County Circuit Court, but the case continues to create unprecedented legal actions. On August 7, upon Rep. Bailey's motion, Judge McHaney ordered Governor Pritzker to appear in court on August 14 and show cause why he should not be held in contempt for continuing to issue executive orders and emergency declarations. Further, Rep. Bailey's attorney has filed similar suits in Bond, Clinton, Edgar, Richland, Sangamon, Adams, Grundy, Kendall, Montgomery, Winnebago, and White counties. The Illinois Attorney General is attempting to consolidate some or all of these cases before the Illinois Supreme Court. The Attorney General has since filed a motion with the Illinois Supreme Court to exercise supervisory authority over the proceedings in Clay County, and to also stay the contempt hearing until the underlying legal issues have been determined. On August 11, the Supreme Court granted the Attorney General's motion to stay while the motion for a supervisory order is pending. Stay tuned.

Meanwhile, the *JL Properties Group* decision specifically rebukes the *Bailey* decision as being completely bereft of any meaningful legal analysis. In strong contrast to *Bailey*, the *JL Properties* and *Orland Park* decisions both provide detailed rulings on two fundamental questions impacting the government's continued attempts to address the COVID-19 pandemic: (1) Does the IEMA grant the Governor the power to issue ongoing executive orders with prohibitions not expressly in the Act; and (2) does the constitution prohibit government action mandating the closure of businesses and similar restraints designed to curb the spread of COVID-19?

1. <u>**IEMA Authority**</u>

While the IEMA grants the Governor the authority to issue a disaster declaration for a period of 30 days, it does not specify whether and to what extent the Governor may continue to exercise this authority if the disaster continues beyond the initial 30-day period. While the Clay County decision found that the absence of such a provision means that successive declarations are prohibited, the *JL Properties* and *Orland Park* decisions found that the IEMA must be interpreted in its entirety in order to give effect to the extent of the Governor's power. In this regard, while some disasters may be short in duration - like an earthquake or tornado - the IEMA specifically notes that others are not, such as a drought or air contamination. Accordingly, the *JL Properties* and *Orland Park* courts both found that the IEMA must be interpreted in a fashion that gives the Governor ample power to address all of these disasters. These courts found that limiting the ability to declare a disaster for only 30 days would frustrate the very purpose of the IEMA.

Beyond the time durations, the *JL Properties* court further found that the specific actions within the Executive Orders were themselves permissible under the IEMA's general grant of power. While the IEMA includes some specific powers, such as the power to control ingress and egress from a disaster area, not everything that the Governor has ordered can be found expressly in the IEMA. Such is the case for residential evictions. The *JL Properties* court, however, found that the IEMA includes sufficient general language to justify the Governors executive orders. Specifically, the IEMA provides that during the disaster, the Governor is authorized to "perform and exercise such other functions, powers, and duties as may be necessary to promote and secure the safety and protections of the civilian population." 20 ILCS 3305/7(12). The court found that this includes a moratorium on residential evictions, which by their very nature require regular interaction between tenants, landlords, law enforcement, and court personnel.

Both the *JL Properties* and *Orland Park* courts interpreted the IEMA broadly to encompass a broad range of gubernatorial actions as lawful exercises of the general power granted under the IEMA.

2. **Constitutionality of Executive Action**

Both sets of Plaintiffs in *JL Properties* and *Orland Park* argued that they have distinct liberty interests protected pursuant to the 14th Amendment to the United States Constitution, and that the State lacks a sufficient justification to restrain that interest. In response, both courts found a broad extent of State police powers to address pandemics. Relying heavily on the United States Supreme Court's decision in *Jacobson v. Massachusetts* 197 U.S. 11 (1905), both courts noted that the liberties secured by the Constitution do not import an absolute right in each person to be, at all times and in all circumstances, wholly free from restraint. More importantly, the interest to move between locations in the state, to run a business, or work a job are not fundamental rights under the United States Constitution that might outweigh public health issues. Rather, these courts found, the government need only have a rational policy basis to institute the pandemic related restrictions. Both courts found that the State's interest to curb the spread of the virus to protect the general health, safety, and welfare clearly passed that test.