



## COVID-19 Update: Federal Eviction Moratorium Struck Down

March 30, 2021 | Issue No. 22

On February 25, 2021, the United States District Court in the Eastern District of Texas (“Texas Court”) granted summary judgment in favor of the plaintiffs in *Lauren Terkel et al. v. Centers for Disease Control and Prevention et al.*, [1] holding that a nationwide eviction moratorium issued by the Centers for Disease Control and Prevention (“CDC”) to mitigate the spread of COVID-19 exceeded the constitutional authority granted to the CDC.

On September 4, 2020, the CDC issued an order, the Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19[2] (the “Order”), under Section 361 of the Public Health Service Act, which was originally scheduled to expire on December 31, 2020 and was subsequently extended until March 31, 2021.[3] The Order was intended to mitigate the spread of COVID-19 within shared living spaces and the spread of the virus in between the States. Under the Order, any landlord, owner of a residential property[4] or other person with the legal right to pursue eviction was barred from evicting any “covered person”[5] from a residential property during the term of the Order. Any person who violates such Order is subject to a criminal penalty of up to one year imprisonment followed by one year of supervised release and a fine of up to \$250,000. Prior to issuance of the Order, the federal government had never previously invoked its commerce power to impose a nationwide eviction moratorium. The Order did not apply to any State, local, territorial or tribal area which had a moratorium on residential evictions in place that provided an equal or greater level of protection than those set forth in the Order. The Order also did not preclude the tenant’s obligation to pay full contractual rent under its lease.

The plaintiffs[6] in the lawsuit are owners or managers of residential properties that sought to evict one or more tenants for nonpayment of rent but were prohibited from doing so based on the Order. The defendants named in the lawsuit were the United States, CDC, U.S. Department of Health and Human Services (“HHS”) and three HHS officials responsible for the Order. The primary question in the lawsuit was whether the CDC had the authority, through the “legislative powers” granted to Congress in Article I of the Constitution, which could be delegated to a federal agency, to issue a national eviction moratorium.

The plaintiffs argued that the Order exceeded the federal government’s constitutional authority and the authority to issue such a moratorium is not within the limited powers granted to the federal government under the Constitution and sought a permanent injunction setting aside the Order and halting the enforcement of the Order. The Defendants defended the authority of the CDC to issue the Order under the Commerce Clause which authorizes Congress to “regulate Commerce...among the several States” and in the alternative, the Necessary and Proper Clause of Article I of the Constitution[7] which gives Congress the power to make “all Laws which shall be necessary and proper for carrying into Execution” other federal powers.

In determining whether such authority exists under the Commerce Clause, the Texas Court first determined if the Order fell within one of the three categories of activity that the Supreme Court has held allows regulation under the Commerce Clause: (1) “the use of the channels of interstate commerce”, (2) “the instrumentalities of interstate commerce, or persons or things in interstate commerce” and (3) “those activities that substantially affect interstate commerce.”[8] The parties agreed that if the Order was authorized, it would be under the third category also known as the substantial-effects test. Such substantial-effects test is based on “whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce.”[9] While the standard applied in the substantial-effects test gives certain deference to Congress to determine regulatory effectiveness, any court reviewing a Commerce Clause question must make an “independent evaluation” of the legal effect of such facts and findings.”[10] The Texas Court utilized the four “significant considerations” test enumerated in the Supreme Court’s decision in *United States v. Morrison*, 529 U.S. 598, 616 (2000) to determine whether Congress’s power extended to the applicable activity based on a local activity’s substantial effect on interstate commerce, which required analysis of “(1) the economic character of the intrastate activity; (2) whether the regulation contains a “jurisdictional element” that may “establish whether the enactment is in pursuance of Congress’ regulation of interstate commerce”; (3) any

congressional findings regarding the effect of the regulated activity on commerce among the States; and (4) attenuation in the link between the regulated interstate activity and commerce among the States.”<sup>[11]</sup>

In considering the first item, the parties disagreed on whether the Necessary and Proper Clause should be considered. While the government argued that it should not be, the Texas Court noted that the “Supreme Court has repeatedly grounded the substantial-effect test in the Necessary and Proper Clause.”<sup>[12]</sup> To analyze the economic character of the applicable activity, the Texas Court assessed “the nexus between the local activity and interstate commerce or federal regulation thereof.” The Texas Court determined that “[r]eal estate is inherently local” and noted that “[r]esidential buildings do not move across state lines.”<sup>[13]</sup> In addition, since the Order did not preclude the payment or collection of rents or other amounts due under the lease, the Texas Court found that the Order did not have any impact on the parties’ financial relationship and therefore should not be categorized as economic. The decision provided that while an individual’s residence in a property can have a commercial origin, that is not sufficient to cause such regulated activity to be categorized as economic.

With respect to the other parts of the test, since the government had acknowledged that the Order “does not limit its application based on a connection to interstate commerce”, the Texas Court found that the Order did not have the jurisdictional element necessary to satisfy the second prong of the test. In their analysis of the third prong of the test, the Texas Court noted that the government’s briefs referred to findings by the CDC about the public health benefits of the Order in fighting COVID-19<sup>[14]</sup>, but found that such findings were not adequate to demonstrate how federal regulation of commerce between the States would be negatively impacted without the Order. Finally, in analyzing the attenuation between interstate commerce and the regulated activity, the Texas Court found that the government failed to provide any findings demonstrating that residential eviction of a tenant had a substantial effect on interstate commerce. In addition, the fact that the Order was applicable regardless of whether the applicable tenant moved between States further undermined this prong. The Texas Court further stated that the attenuation analysis requires preservation of “the distinction between what is national and what is local in the activities of commerce.”<sup>[15]</sup> The Texas Court found that the Order which impacted remedies in the protection of individual property rights crossed into an area which is typically a state concern. In particular, the Texas Court noted that while a quarantine order would prevent individuals infected with the virus from spreading it across state lines, the Order did not include any such quarantine provision and eviction of an individual from a residential dwelling does not on its own have a substantial effect on interstate commerce.

Based on the foregoing determinations, the Texas Court found that “[s]uch broad authority over state remedies begins to resemble, in operation, a prohibited federal police power.”<sup>[16]</sup> The Texas Court entered summary judgment granting declaratory judgment in favor of the plaintiff that the nationwide eviction moratorium in the Order exceeded the authority of the CDC, but did not issue an injunction because the Texas Court anticipated that the CDC would comply with the judgment. The CDC and the government have not yet indicated if they will appeal the decision. The judgment of the Texas Court does not implicate or affect any eviction moratorium that has been issued by state and local governments in response to the COVID-19 pandemic.

While it is possible that this decision will be appealed, there are a few reasons it might not. First, the moratorium at issue expires March 31, 2021 so an appeal would mostly likely be moot unless the Order is further extended. Second, the Texas Court’s reasoning was very detailed and explicitly stated that the economic underpinnings required pursuant to the Commerce Clause were either tenuous or non-existent, making any appeal difficult. Finally, with the rollout of the various vaccines, the need for this moratorium may not be as exigent as when initially enacted. We will continue to keep you apprised of further developments, if any, of this case.

<sup>[1]</sup> See Case Number 6:20-cv-00564 in U.S. District Court for the Eastern District of Texas.

<sup>[2]</sup> 85 Fed. Reg. 55,292 (Sept. 4, 2020).

<sup>[3]</sup> Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, § 502, 134 Stat. 1182, 2078-79 (2020) and 86 Fed. Reg. 8,020, 8,021 (Feb. 3, 2021).

<sup>[4]</sup> “Residential Property” means any property leased for residential purposes, including any house, building, mobile home or land in a mobile home park, or similar dwelling leased for residential purposes, but excludes any hotel, motel, or other guest house rented to a temporary guest or seasonable tenant as defined under the laws of the applicable State, territorial, tribal or local jurisdiction.

**[5]** A “covered person” means any tenant, lessee or resident of a residential property who provides a declaration to their landlord, owner of the residential property or other person with a legal right to pursue eviction, which provides (i) the individual has used best efforts to obtain all available government assistance for rent or housing, (ii) the individual either (x) expects to earn no more than \$99,000 (or \$198,000 if filing a joint tax return) in Calendar Year 2021, (y) was not required to report any income in 2020 to the IRS, or (z) received a stimulus check pursuant to Section 2201 of the Cares Act, (iii) the individual is unable to pay the full rent or make a full housing payment due to a substantial loss of household income, loss of compensable hours of work or wages, a layoff, or extraordinary out-of-pocket medical expenses, (iv) the individual is using best efforts to make timely partial payments that are as close to the full payment as the individual’s circumstances may permit, taking into account other nondiscretionary items and (v) eviction would likely render the individual homeless, or force the individual to move into and live in close quarters in a new congregate or shared living setting, because the individual has no other available housing options. 86 Fed. Reg. at 8,020, 8,021.

**[6]** The plaintiffs in the lawsuit include Lauren Terkel, Lufkin Creekside Apartments, Ltd.; Lakeridge Apartments, Ltd. and MacDonald Property Management LLC. Two of the original plaintiffs, Pineywoods Arcadia Home Team Ltd. and Weatherford Meadow Vista Apartments did not represent that tenants of their properties had presented a declaration pursuant to the Order, which resulted in their claims being dismissed without prejudice for lack of standing.

**[7]** Case Number 6:20-cv-00564 in U.S. District Court for the Eastern District of Texas.

**[8]** *United States v. Lopez*, 514 U.S. at 558-59.

**[9]** *Id.*, at 557.

**[10]** Case Number 6:20-cv-00564 in U.S. District Court for the Eastern District of Texas quoting *Lopez*, 514 U.S. at 562.

**[11]** Case Number 6:20-cv-00564 in U.S. District Court for the Eastern District of Texas quoting *Morrison*, 529 U.S. at 609-613.

**[12]** Case Number 6:20-cv-00564 in U.S. District Court for the Eastern District of Texas.

**[13]** *Id.*

**[14]** The government noted: “[H]ousing stability helps protect public health because homelessness increases the likelihood of individuals moving into close quarters in congregate settings, such as homeless shelters, which then puts individuals at higher risk to COVID-19” Case Number 6:20-cv-00564 in U.S. District Court for the Eastern District of Texas.

**[15]** Case Number 6:20-cv-00564 in U.S. District Court for the Eastern District of Texas quoting *Lopez*, 514 U.S. at 567.

**[16]** Case Number 6:20-cv-00564 in U.S. District Court for the Eastern District of Texas.