

# Clients & Friends Memo

## **COVID-19 Update: CDC Issues New Eviction Moratorium while U.S. Supreme Court Grants Injunction against Enforcing the Eviction Moratorium in New York**

**August 18, 2021**

On August 3, 2021, the Centers for Disease Control and Prevention issued a new order banning residential evictions in counties where COVID-19 cases are quickly rising. The CDC's prior order instituting an eviction moratorium expired July 31, 2021, and the CDC Director had stated that the extension ending in July would be the final extension unless there was an unexpected change in the trajectory of the pandemic. Now, citing the rise of the Delta variant as an unexpected change in the trajectory of the pandemic, the new order is intended to target specific areas where mass evictions would exacerbate the spread of COVID-19. The new order is a temporary eviction moratorium in counties experiencing "substantial and high" levels of community transmission as of August 3, 2021. If a county that is not covered by the new order as of August 3 later experiences such substantial or high levels of transmission, then the order, if still in effect, will apply to that county as of the date the county begins experiencing substantial or high levels of transmission. On the other hand, if a county no longer experiences substantial or high levels of transmission for 14 consecutive days, the order will no longer apply to that county, unless and until the county again experiences such levels of transmission. The new order is effective through October 3, 2021. According to the CDC's COVID Data Tracker, every county in the State of New York except three (Clinton, Wyoming, and Schuylar Counties) has either substantial or high levels of community transmission, which means the eviction moratorium applies to almost the entire state.

In response to similar concerns of mass evictions contributing to the spread of COVID-19, the New York legislature passed an eviction and foreclosure moratorium in early May of this year. Under the COVID Emergency Eviction and Foreclosure Prevention Act (the "Act"), residential tenants can seek protection under the eviction and foreclosure moratorium by submitting a "hardship declaration" stating that the tenant has experienced financial hardship due to the COVID-19 pandemic. Once a tenant submits such a declaration, the landlord is barred from pursuing eviction and foreclosure proceedings until the moratorium expires. The current moratorium expires August 31, 2021. The Act was challenged by the plaintiffs in *Chrysafis, et al. v. Marks* as a constitutional violation. The plaintiffs argued that the Act denies landlords a meaningful opportunity to be heard in violation of their due process rights, and they sought emergency relief, which the

district court denied. The plaintiffs then appealed to the United States Court of Appeals for the Second Circuit seeking an injunction, which the court denied pending the resolution of the appeal. On August 12, 2021, the U.S. Supreme Court granted an injunction blocking enforcement of only Part A of the Act. The Court held that Part A of the Act, which allows a tenant to self-declare financial hardship and precludes a landlord from contesting that declaration, while denying the landlord a hearing, violates the Court's "longstanding teaching that ordinarily 'no man can be a judge in his own case'" consistent with the Due Process Clause. The injunction was granted pending disposition of the appeal in the Court of Appeals.

Justice Breyer wrote a dissent in the opinion. He noted that the applicants are seeking an "extraordinary" form of relief—an injunction against enforcement of a presumptively constitutional state legislative act—and that the request for an injunction had been denied in the lower courts, while the Court of Appeals has yet to issue a substantive ruling. He also pointed out that the Act expires August 31, 2021. Under such circumstances, an injunction would be appropriate if "the legal rights at issue were indisputably clear and, even then, sparingly and only in the most critical and exigent circumstances." Justice Breyer concluded that the standard had not been met for three reasons. First, the legal rights at issue are not indisputably clear, as the right to challenge a tenant's hardship claim has not been taken away from the landlord, just delayed, and precedents do not make it indisputably clear that this delay violates the Due Process Clause. Second, applicants have not shown critical circumstances justifying the Court's intervention, as the moratorium expires in a few weeks, and the Act still provides relief for property owners who own ten or fewer dwelling units and does not preclude landlords from seeking unpaid rent in a common-law action. He reasoned that any landlords' hardship should be balanced against the hardship of tenants who have relied on the Act's protections and now have to face eviction proceedings earlier than expected, especially when New York is in the process of distributing over \$2 billion in aid that will help tenants avoid eviction. He noted that ending the Act's protections early might lead to unnecessary evictions. Finally, he stated that he would not second-guess the New York legislature's determination of how to best "guard and protect" the people of New York. Justice Breyer concluded that he would not grant relief now, but that if New York extends the Act in its current form, the applicants could renew their request for an injunction.

Regardless of this injunction, it seems that most residential tenants in New York will be able to seek protection from eviction under the CDC's new order. We will continue to keep you apprised of any further developments.

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If you have any questions, please feel free to contact any of the following Cadwalader attorneys.

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