

Clients & Friends Memo

COVID-19 Update: U.S. Supreme Court Holds that CDC Exceeded its Authority in Issuing Eviction Moratorium

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On August 26, 2021, the U.S. Supreme Court issued an order vacating the Centers for Disease Control and Prevention's latest eviction moratorium. Earlier this month the CDC issued an order banning evictions of residential tenants in counties experiencing high levels of community transmission of COVID-19, claiming that mass evictions would exacerbate the spread. The Alabama Association of Realtors, among other plaintiffs, applied to the Supreme Court to challenge this new moratorium. The plaintiffs had originally filed an action alleging that the CDC's first eviction moratorium (which expired July 31) exceeded its statutory authority, and the District Court had agreed that the CDC lacked authority and granted the plaintiffs summary judgment to enjoin the moratorium. However, the District Court stayed its judgment pending the Government's appeal to the D.C. Court of Appeals. When the plaintiffs then filed an emergency application to the Supreme Court to vacate the stay, the Court denied their application. Justice Kavanaugh concurred with the decision only because the then-current moratorium was set to expire in a few weeks. He warned that any extensions of the moratorium would require "clear and specific congressional authorization".

When the CDC issued the new moratorium, the plaintiffs returned to the District Court, seeking to vacate the stay. The District Court agreed that the stay was no longer warranted because the Government was unlikely to succeed on the merits and because vaccines and rental-assistance distribution shifted the equities in the plaintiffs' favor. However, the District Court was bound by the decision of the D.C. Court of Appeals to keep the stay in place. The D.C. Court of Appeals again declined to vacate the stay. The plaintiffs applied to the Supreme Court a second time to lift the District Court's stay.

In a *per curiam* opinion, the Supreme Court vacated the stay, deciding that the CDC exceeded its statutory authority in issuing the moratorium. To promulgate the eviction moratorium, the CDC relied on Section 361(a) of the Public Health Service Act, which states:

"The Surgeon General, with the approval of the [Secretary of Health and Human Services], is authorized to make and enforce such regulations as in

his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession. For purposes of carrying out and enforcing such regulations, the Surgeon General may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings and other measures, as in his judgment may be necessary.”

The Government argued that based on the first sentence of the provision, the CDC has broad authority to take measures to control the spread of COVID-19, including issuing the eviction moratorium. The Court noted that this provision has rarely been invoked, and in the cases when it has been used, it was to quarantine infected individuals and prohibit the import or sale of animals known to transmit disease, not to justify an eviction moratorium. Specifically, the second sentence informs the grant of authority by illustrating measures that directly relate to preventing the interstate spread of disease by tackling the disease itself. Conversely, the CDC’s moratorium is much more indirectly related to interstate spread: “if evictions occur, some subset of tenants might move from one State to another, and some subset of that group might do so while infected with COVID-19.” The Court saw it as a stretch that Section 361(a) gives the CDC authority to impose an eviction moratorium.

Even if the text were ambiguous, the Court reasoned that the extremely broad scope of authority is an indication that Congress did not intend to grant such authorization. The moratorium covers at least 80% of the country, and the fact that Congress has provided almost \$50 billion in emergency rental assistance illustrates the moratorium’s economic impact. Not only are the stakes financial, but the moratorium interferes with landlord-tenant relationships, a domain reserved for state law. The Court noted that precedents require Congress to enact “exceedingly clear” language if it wants to significantly change the balance between federal and state power and the power of the government over private property. Further, the criminal penalties (*i.e.*, up to a \$250,000 fine and one year in jail) imposed on those who violate the moratorium add to the over-expansive scope of authority. The Government’s interpretation of the statute places no limits on the measures that the CDC could take, and its claim of authority under such provision is unprecedented.

The Court further reasoned that the equities do not justify denying the plaintiffs the District Court’s judgment in their favor. The loss of rent with no guarantee of eventual recovery resulting from the moratorium puts landlords at risk of irreparable harm. Preventing landlords from evicting tenants who breach their leases intrudes on the right to exclude, one of the “most fundamental elements of property ownership”. While harm to landlords is increasing, the Government’s interests are decreasing, as the Government has had three additional months to distribute rental-assistance

funds. Congress had notice that a further extension of the moratorium would require new legislation, yet it did not act in the several weeks leading up to the expiration of the moratorium. While the public interest in mitigating the spread of COVID-19 is indisputable, agencies may not act unlawfully to reach such goals. Thus, Congress, not the CDC, should be making the decision of whether the public interest warrants further action.

Justice Breyer, joined by Justice Sotomayor and Justice Kagan, dissented in the opinion. Justice Breyer began with the standard that the Court may not vacate a stay entered by a lower court unless that court clearly and demonstrably erred in its application of accepted standards. He concluded that it is “far from demonstrably clear” that the CDC does not have the power to issue the new moratorium. He disagreed with the majority that Section 361(a) does not grant the CDC authority to issue a moratorium—the statute’s plain meaning includes the moratorium as a measure that, in the agency’s judgment, is essential to contain disease outbreaks. The second sentence should not be read to limit the first but to expressly authorize inspections and other steps necessary in the enforcement of quarantines. He noted that it is undisputed that the statute permits the CDC to adopt significant measures such as quarantines, which arguably impose greater restrictions on individuals’ rights and state police power than restrictions on evictions. Further, the rise in COVID-19 cases tips the balance of equities towards leaving the stay in place, and the public interest is not favored by the spread of COVID-19 or a court “second-guessing” the CDC’s judgment. He concluded that the legal questions that have been raised about this federal statute call for “considered decision-making, informed by full briefing and argument” and the CDC’s moratorium should not be vacated in a summary proceeding.

With this decision, the District Court’s judgment will be enforceable, which means the CDC’s eviction moratorium is no longer in effect. Residential landlords may pursue eviction proceedings regardless of a tenant’s financial status impacted by COVID-19. We will 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.

Steven M. Herman	+1 212 504 6054	steven.herman@cwt.com
Eunji Jo	+1 704 348 5153	eunji.jo@cwt.com