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Legal Sidebar

Litigation of the CDC's Eviction Moratorium

August 2, 2021

On August 1, 2021, the Centers for Disease Control and Prevention's (CDC's) order imposing a nationwide, temporary federal moratorium on residential evictions for the nonpayment of rent expired. The order was designed to prevent the further spread of Coronavirus Disease 2019 (COVID-19) by preventing homelessness and overcrowded housing conditions that would result from evictions. The action followed an Executive Order directing the CDC to consider such a measure in light of the expiration of a narrower set of eviction protections provided by the Coronavirus Aid, Relief, and Economic Security (CARES) Act (P.L. 116-136). The CDC originally issued the order on September 4, 2020, and it was set to expire December 31, 2020, but Congress extended the order through January 31, 2021, and the CDC extended it several times, resulting in the final expiration date of July 31, 2021. The eviction moratorium represented a broad federal inroad into what is traditionally state and local governance of landlord-tenant law and an unprecedented use of a public health authority for this purpose. A number of courts have addressed challenges to the CDC's legal authority to issue the order and reached conflicting conclusions on the order's legality.

This Legal Sidebar analyzes the court decisions on the CDC's eviction moratorium order and examines ways in which Congress, if it determines that the CDC should be delegated such authority, might explore means to increase clarity regarding the CDC's legal authority to halt evictions in response to a pandemic in the future.

CDC Eviction Moratorium Order

The CDC Director, acting on authority delegated from the Secretary of Health and Human Services (HHS), issued the eviction moratorium order pursuant to Section 361 of the Public Health Services Act (PHSA). Section 361, which is codified at 42 U.S.C. § 264, authorizes the CDC Director "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." Section 361 also includes a non-exhaustive list of activities that the CDC can take to exercise this authority, as well as an open-ended category of activities. These activities include "the apprehension, detention, or conditional release of individuals," as well as the "inspection, fumigation, disinfection, [and] sanitation [of] . . . sources of dangerous infection to human beings, and *other measures, as . . . may be necessary*" (emphasis added). An eviction moratorium is not one of the permissible activities expressly provided. As a result, the CDC Director relied on Section 361's

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LSB10632

"regulations as in his judgement are necessary" and "other measures, as . . . may be necessary" provisions to issue the order.

Citing public health-based data tying evictions to the heightened risk of spreading COVID-19 and its associated negative health consequences, the order imposed a nationwide moratorium on the eviction of certain "covered persons" for the nonpayment of rent. Specifically, the order explained that the eviction moratorium would "facilitate self-isolation and self-quarantine" of those with, or a heightened risk of, COVID-19 in order to help states and localities enforce social distancing mitigation activities and prevent homelessness. The CDC noted that evictions increase the spread of COVID-19 because they force people to move, often "into close quarters in shared housing or other congregate settings" with friends or family or in homeless shelters where social distancing and other infection control measures are difficult to maintain. Each time the CDC extended the moratorium, it supplemented the order with updated transmission data, new statistical modeling on the virus' spread, and additional findings, including information regarding emerging COVID-19 variants that, in the CDC's view, supported the continued need to halt evictions to prevent spread of COVID-19.

The order's protections were not self-executing. To assert the order's protections from eviction, tenants had to sign an affidavit declaring to their landlord, under penalty of perjury, that they qualified as a "covered person." The order defined "covered person" to mean a tenant who, among other things, "is unable to pay the full rent or make a full housing payment due to substantial loss of household income, loss of compensable hours of work or wages, a lay-off, or extraordinary out-of-pocket medical expenses" and for whom "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."

The order's protections also only applied to the nonpayment of rent and do not cover other lawful grounds for eviction. The order expressly did not "relieve any individual of any obligation to pay rent [or] make a housing payment," nor did it bar landlords from assessing or collecting otherwise permissible fees, interest, or penalties due as a result of a tenant's failure to pay rent on time. However, by barring evictions, the order temporarily eliminated one of the primary ways landlords enforce a tenant's contractual obligation to pay rent. Landlords who violated the order could have been incarcerated or subject to monetary penalties, and tenants who falsely declared their eligibility could have been held liable for perjury.

The CDC's eviction moratorium originally went into effect from September 4, 2020 until December 31, 2020. Congress, through the passage of Section 502 of the Consolidated Appropriations Act, 2021, legislatively extended the order's effective date by an additional month until January 31, 2021. On January 29, 2021, the CDC further extended the order administratively until March 31, 2021. The CDC subsequently announced two further extensions, first through June 30, 2021, and then a final time through July 31, 2021. The CDC explained that the final extension was made in part to provide additional time for states and localities to distribute congressionally appropriated rental assistance to tenants in need.

Summary of the Litigation

A number of landlords, property managers, and other plaintiffs challenged the eviction moratorium on various statutory and constitutional grounds. These conflicting decisions are analyzed in turn.

Suits Addressing Statutory Claims

Several federal courts refused to enjoin enforcement of the CDC's order at the preliminary injunction phase of litigation. These courts included:

- the U.S. Court for the Northern District of Georgia in *Brown v. Azar* (holding that the plaintiffs failed to demonstrate a substantial likelihood of success on the merits); and

- the U.S. Court for the Western District of Louisiana in *Chambliss Enterprises v. Redfield* (holding that "Plaintiffs have not carried their burden of showing a likelihood that they will succeed on the merits");
- the U.S. Court for the Eastern District of Arkansas, in *Dixon Ventures v. HHS*, (refusing to enjoin enforcement of the eviction moratorium because the plaintiffs had failed to show they would be irreparably harmed by the CDC order.)

Several other federal district courts found the order unlawful because it exceeds the CDC's statutory authority under the PHSA and set the order aside in accordance with the Administrative Procedure Act (APA). These courts included:

- the U.S. District Court for the Western District of Tennessee in *Tiger Lily, LLC. v. Department of Housing and Urban Development* (affirmed by the U.S. Court of Appeals for the Sixth Circuit);
- the U.S. Court for the Northern District of Ohio in *Skyworks v. CDC*;
- the U.S. Court for the District of Columbia in *Alabama Association of Realtors v. HHS* (the district court granted the government's motion to stay its order pending appeal; a motion to vacate the stay was denied first by the U.S. Court of Appeals for the District of Columbia and then by the U.S. Supreme Court).

The decisions in *Tiger Lily* and *Alabama Association of Realtors* resulted in conflicting decisions by the Sixth Circuit and D.C. Circuit, respectively. The Sixth Circuit affirmed the lower court's holding that the CDC lacked the statutory authority to issue the order. The D.C. Circuit, in contrast, indicated in an order upholding the district court's stay that "the CDC's eviction moratorium falls within the plain text of 42 U.S.C. § 264(a)."

The district courts in *Alabama Association of Realtors, Skyworks*, and *Tiger Lily*, as well as the Sixth Circuit decision in *Tiger Lily* all ruled against the CDC, in large part because they believed the expressly listed activities in Section 264(a) constrained the HHS Secretary's authority to take measures that "in his judgment [are] necessary" to stop the spread of COVID-19. The Sixth Circuit, for example, emphasized that Section 264(a) expressly authorizes the Secretary to "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 dangers infection to human beings" before providing the catchall authority to take "other measures, as in his judgment may be necessary." The court applied the *ejusdem generis* canon of statutory interpretation, which provides that "where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." In the Sixth Circuit's view, the "other measures" provision of Section 264 "encompasses measures that are similar to" the activities explicitly authorized by the statute. The court concluded that "[p]lainly, an eviction moratorium does not fit that mold."

In contrast, the district courts in *Brown* and *Chambliss Enterprises*, as well as the D.C. Circuit in *Alabama Association of Realtors* came to the opposite conclusion and held that the eviction moratorium fell within the plain meaning of the statute. For example, in its order upholding the stay in *Alabama Association of Realtors*, the D.C. Circuit stressed that "Congress . . . designated the HHS Secretary the expert best positioned to determine the need for such preventative measures, twice stating that it authorizes such measures as the Secretary determines 'in his judgment [are] necessary.'" According to the D.C. Circuit, the CDC, acting through delegated authority from HHS, properly utilized this discretionary statutory authority by "carefully target[ing] [the moratorium] to the subset of evictions it determined to be necessary to cure the spread of the deadly and quickly spreading Covid-19 pandemic." Consequently, the court concluded that "the CDC's eviction moratorium falls within the plain text of 42 U.S.C. § 264(a)"

and that the CDC would likely to succeed on the merits of its case. The court thus declined to vacate the stay.

The Supreme Court addressed a motion to vacate the stay in *Alabama Association of Realtors*. The district court in that case determined that the plaintiffs were likely to succeed on the merits but granted the CDC's motion to stay its order vacating the eviction moratorium while the case is pending appeal, allowing the moratorium to remain in force. After the D.C. Circuit rejected plaintiffs' request to lift the stay, as discussed above, the plaintiffs sought review before the Supreme Court. The Supreme Court did not settle the conflict over the meaning of Section 264. Five Justices voted to keep the stay in place, thus allowing the eviction moratorium to remain in effect through July 31, 2021. Four justices would have granted the motion, which means they likely would have set aside the CDC's order and prevented it from being enforced nationwide. Of the nine justices, only Justice Kavanaugh wrote an opinion. In a one paragraph concurrence that no other justice joined, Justice Kavanaugh agreed with the district court that the CDC "exceeded its existing statutory authority by issuing a nationwide eviction moratorium." To support this conclusion, Justice Kavanaugh cited *Utility Air Reg. Grp., v. EPA*, which held that a statutory interpretation by the Environmental Protection Agency (EPA) was unreasonable "because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization." Justice Kavanaugh explained that, "[i]n [his] view, clear and specific congressional authorization (via new legislation) would be necessary for the CDC to extend the moratorium past July 31." Justice Kavanaugh ultimately voted to deny the motion to vacate the stay on equitable grounds "[b]ecause the CDC plan[ned] to end the moratorium in only a few weeks . . . and because those few weeks w[ould] allow for additional and more orderly distribution of the congressionally appropriated rental assistance funds."

Although the Court did not reach the merits of the case, the breakdown of the justices coupled with Justice Kavanaugh's concurrence signals that there may potentially be a majority of justices who might have determined that the CDC lacked the statutory authority to issue an eviction moratorium without, in the words of Justice Kavanaugh, "clear and specific congressional authorization (via new legislation)." On July 29, 2021, the White House released a statement explaining that the President believes the eviction moratorium should remain in effect because of the circulation of the a highly transmissible variant of COVID-19, but instead of ordering the CDC to issue another extension, he urged Congress to do so through new legislation because "the Supreme Court has made clear that [an administrative extension by the CDC] is no longer available."

Suit Addressing Constitutional Claims

In *Terkel v. CDC*, issued before the Supreme Court's ruling in *Alabama Association of Realtors*, Judge Barker of the U.S. Court for the Eastern District of Texas held that the CDC's order exceeds Congress's authority under the Commerce and Necessary and Proper Clauses of the U.S. Constitution. (The *Terkel* plaintiffs did not raise statutory claims.)

Congress's authority to legislate derives from enumerated powers of Article I of the U.S. Constitution, as augmented by the Necessary and Proper Clause, which empowers Congress to "make all Laws which shall be necessary and proper for carrying into Execution" its enumerated powers. One of its most expansive enumerated powers is the Commerce Clause, which empowers Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Although the Supreme Court interpreted the Commerce Clause narrowly early in the nation's history, the Court has interpreted the authority expansively, though not limitlessly, since the 1942 decision *Wickard v. Filburn*. The *Wickard* Court held that Congress may regulate any activity that it rationally believes has, in the aggregate, more than a trivial impact on commerce.

The Supreme Court has further explained that the Commerce Clause authorizes Congress to regulate three broad categories of activity:

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 having a substantial relation to interstate commerce, . . . i.e., those activities that substantially affect interstate commerce."

The parties in *Terkel* all agreed that only the third "substantially affects" category is relevant to the CDC Order. When evaluating whether a regulated activity substantially affects interstate commerce, the Supreme Court considers four factors:

1. "the economic nature of the regulated activity";
2. whether the statute has an "express jurisdictional element which might limit its reach to a discreet set of [regulated activities] that additionally have an explicit connection with or effect on interstate commerce";
3. whether the statute or the legislative history contains any "express congressional findings regarding the effects upon interstate commerce . . . that may enable [the Court] to evaluate the legislative judgment that the activity in question substantially affects interstate commerce, even though no such substantial effect is visible to the naked eye"; and
4. whether "the link between [the regulated activity] and a substantial effect on interstate commerce was attenuated."

On the first factor, the government argued that the CDC order's regulated activity is the rental of real estate—an activity that Supreme Court has expressly held is "unquestionably" an activity affecting commerce within Congress's Commerce Clause authority. In that case, *Russell v. United States*, an individual had challenged his federal arson conviction on the grounds that the building he attempted to set ablaze—an apartment building he owned and from which he received rental income—"was not commercial or business property, and therefore was not capable of being the subject of an offense [under the federal criminal code]." The Court concluded that the relevant statute's "reference to 'any building . . . used . . . in any activity affecting interstate or foreign commerce' expresses an intent by Congress to exercise its full power under the Commerce Clause." The Court explained that, "[b]y its terms, however, the statute only applies to property that is 'used' in an 'activity' that affects commerce." The Court concluded that "*[t]he rental of real estate is unquestionably such an activity*" (emphasis added). The Court recognized "that the local rental of an apartment unit is merely an element of a much broader commercial market in rental properties" and that, because Congress has the authority "to regulate the class of activities that" comprise the rental real estate market, it also has "the power to regulate individual activity within that class."

The government further supported this argument by citing *Groome Resources Ltd. v. Parish of Jefferson*, in which the Fifth Circuit upheld the constitutionality of the Fair Housing Amendments Act (FHAA) against a Commerce Clause challenge. The FHAA prohibits discrimination against individuals with disabilities, as well as other protected classes, "in the purchase, sale, or rental of housing." The FHAA and the underlying Fair Housing Act makes it unlawful to, among other things, evict tenants because of their "race, color, religion, sex, handicap, familial status, or national origin. . . ." The *Groome* court specifically addressed the constitutionality of a provision in the FHAA that prohibits "refus[ing] to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such [disabled] person equal opportunity to use and enjoy [a] dwelling." The court applied the four substantial-effects test factors and notably concluded that "the commercial rental of housing . . . fits

well within the broad definition of economic activity established by the Supreme Court" and that "[a] denial of reasonable accommodations affects a disabled individual's ability to buy, sell, or rent housing . . . [and] directly interferes with a commercial transaction. . . ." Thus, the Fifth Circuit held the FHAA's protections against discrimination of "a disabled buyer or renter of real property was an activity 'economic in nature,'" and "was enacted pursuant to Congress's legitimate authority under the Commerce Clause."

Judge Barker, however, disagreed with the government's characterization of the CDC order's regulated activity and concluded that it is distinguishable from the regulated activities in *Russell* and *Groome*. While acknowledging that "rental housing consists of economic relationships between landlords and tenants," Judge Barker defined the order's regulated activity narrowly as "only eviction." In his view, the noneconomic nature of this regulated activity—which he described as the "vindication" of the right to possess "inherently local" buildings that "do not move across states lines"—is highlighted by the fact that the order "disclaims any effect on the parties' financial relationship." He determined that the CDC order was distinguishable from *Russell* because that decision did not address "[w]hether evictions themselves are economic in nature," and from *Groome* because, unlike the reasonable accommodations provision of the FHAA, the CDC order does not regulate "conduct that directly interfered with a commercial transaction."

Moving to the second factor, Judge Barker concluded that the CDC order does not have a jurisdictional element because it does not include a provision that "'ensure[s], through case-by-case inquiry,' that all applications of [the order] 'have an explicit connection with or effect on interstate commerce.'"

Regarding the third factor, Judge Barker noted that the Supreme Court has stated that "the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation" and that the determination of whether a particular regulated activity falls within Congress's constitutional authority "is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court." The judge noted, however, that such legislative findings can help show the court that the regulation is "an essential part of a larger regulation of economic activity." Judge Barker concluded that "neither Congress nor the agency made findings that a broader regulation of commerce among the States would be undercut without the order." He continued that the evidence provided as part of the judicial record tying the CDC order "to national-employment or socio-economic statistics . . . is not enough of a nexus under the constitutional test." Similarly, Judge Barker viewed the findings included in the CDC order as focused on public health benefits. The judge noted that, while public health-related findings might be potentially relevant to an evaluation of whether the CDC had statutory authority to issue the order under the PHSA, he did not believe they "explain[ed] how a broader federal regulation of commerce among the States is undercut without the order" for the purposes of the substantial-effects test.

Finally, on the fourth factor, Judge Barker concluded that "the relationship between interstate commerce and an eviction criminalized by the order is attenuated in several dimensions." According to the judge , these dimensions include: the lack of a "self-evident" tie between the eviction of a single individual and a substantial effect on interstate commerce; that the order's eviction protections are not part of a larger commercial regulatory scheme or limited to those who might move interstate or even to a different city; and that the order threatens federal infringement on a traditional state matter, i.e., "remedies protecting property rights."

Thus, Judge Barker concluded that "the CDC order exceeds the power granted to the federal government to 'regulate Commerce . . . among the several States' and to 'make all Laws which shall be necessary and proper for carrying into Execution' that power."

Considerations for Congress

The conflicting judicial decisions regarding the legality of the CDC order have raised questions about the extent of the CDC's authority under the PHSA to respond to both the current and future health crises.

To the extent Congress determines that the CDC should be authorized to implement a nationwide eviction moratorium to control the spread of a communicable disease, Congress could follow the roadmap offered by Justice Kavanaugh and enact new legislation that provides "clear and specific congressional authorization" for the CDC to undertake such a measure and specify the conditions under which such authority may be exercised.

The *Terkel* court's conclusion, that Congress's ability to empower the CDC to implement an eviction moratorium may be limited by the Commerce Clause, appears to be an outlier opinion that, thus far, no other court has followed. If the constitutional principles delineated in *Terkel* become more widely adopted by courts, Congress's ability to address the relevant constitutional limits would be more circumscribed. Nevertheless, Congress could take steps that might shore up some of the constitutional infirmities with the CDC order noted by the *Terkel* court. For example, some of the *Terkel*-highlighted infirmities stem from the fact that the CDC order was issued pursuant to authority granted under PHSA Section 361, which generally authorizes the agency to take measures necessary to prevent the interstate spread of communicable diseases. The relevant agency findings supporting the order focus on its public health effects, rather than the economic character of the eviction moratorium and its effect on interstate commerce. Moreover, eviction moratoria are not expressly included in the non-exhaustive list of activities authorized under Section 361. Consequently, the PHSA does not include legislative findings specifically related to eviction moratoria or a jurisdictional hook tailored specifically to address Commerce Clause limitations to such moratoria.

Consequently, Congress could potentially alleviate, though possibly not entirely eliminate, some of the CDC order's weaknesses under the substantial-effects test through the passage of new legislation that expressly authorizes the CDC (or some other federal agency) to implement an eviction moratorium. Moreover, through that express authorization, Congress could both explicitly explain its rationale of how such a moratorium affects interstate commerce and establish a jurisdictional hook.

Congress could, for example, expressly include legislative findings designed to tie the eviction moratorium to interstate commerce, similar to those findings that were included in the narrower eviction protections proposed in the Heroes Act, H.R. 6800 (116th Cong.). Additionally, Congress could enact an eviction moratorium as part of a broader bill regulating commerce, for instance, by incorporating it into a stimulus bill like the CARES Act, the American Rescue Plan Act of 2021 (H.R. 1319), or the Heroes Act.

For potential guidance for establishing a jurisdictional hook, Congress could look to the limits of the narrower eviction moratorium in the CARES Act, which generally only applied to tenants in certain rental properties with federal assistance or federally related financing. The Fair Housing Act's jurisdictional limits, which exempt from its protections certain properties that arguably are less clearly tied to interstate commerce, might also be a useful guide. The Fair Housing Act's anti-discrimination protections, for example, do not apply to single-family homes that, along with other conditions, are rented or sold without the use of a real estate agent by a party who owns no more than three single family homes at the same time.

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