

What Should You Do After The Supreme Court Struck Down the CDC's Second Eviction Moratorium?

August 31, 2021

The United States Supreme Court upheld the District Court's judgment vacating the Centers for Disease Control and Prevention's (CDC) second eviction moratorium that had prevented the eviction of any tenants who live in counties that are experiencing substantial or high levels of COVID-19 transmission and who make certain declarations of financial need. [*Alabama Association of Realtors v. Department of Health and Human Services*, 21A23 \(Aug. 26, 2021\)](#) (AAR). Among other things, the Court held that the CDC lacked the authority to issue the injunction, and invited Congress to enact the eviction moratorium with proper legislation.

At the start of the pandemic, in March 2020, Congress passed the Coronavirus Aid, Relief, and Economic Security (CARES) Act to alleviate the burdens caused by the COVID-19 pandemic. One of the programs was a 120-day eviction moratorium for properties that participated in federal assistance programs or were secured by federally backed mortgage loans. See CARES Act, § 4024. Congress did not extend the eviction ban when it expired on July 25, 2020. The CDC stepped into the void and issued an order temporarily halting residential evictions to prevent the further spread of COVID-19. [85 Fed. Reg. 55292 \(2020\)](#). The CDC Order broadly covered all residential properties nationwide and imposed criminal penalties on violators.

Congress extended the CDC eviction moratorium for one month in the Consolidated Appropriations Act, 2021, Pub. L. 116-260, § 502. When that expired, the CDC extended the eviction moratorium through March, then through June, and then through July 2021, when it expired.

Several appellate courts considered the CDC's eviction order. In *Alabama Association of Realtors v. US Department of Health and Human Services*, the trial court entered a judgment barring enforcement of the CDC Order, 1:20-cv-03377-DLF (D.D.C. May 5, 2021), but stayed its order pending appeal. On June 29, 2021, the [Supreme Court considered the order](#) and left the stay in place because, among other reasons, the Order expired by its own terms on July 31, 2021, and the stay would give time for landlords and tenants to apply for federal rental assistance funds. The Court also invited Congress to act. On July 14, 2021, the Eleventh Circuit rejected a Landlord's appeal of a denial of a request for a preliminary injunction before trial staying the CDC's eviction order. *Brown v. Secretary U.S. Department of Health and Human Services*, 1:20-cv-03702-JPB (11th Cir. 7-14-21). However, on July 23, 2021, the Sixth Circuit affirmed the district court's decision finding that the CDC

overstepped its rulemaking authority and was not authorized by explicit language in the statute to issue an eviction moratorium order. *Tiger Lily, LLC v. United States Department of Housing and Urban Development*, 2:20-cv-02692, 21-5256 (6th Cir. 7-23-21).

When the CDC's Eviction Moratorium expired on July 31, 2021, Congress did not reauthorize it. Instead, on August 3, 2021, the CDC issued a new order temporarily halting residential evictions in communities with substantial or high levels of community transmission of COVID-19. [86 Fed. Reg. 43244 \(Aug. 6, 2021\)](#). The Order provided that a landlord, owner of a residential property, or other person with a legal right to evict shall not evict a tenant who completes a specific financial declaration and otherwise qualifies under the CDC Order. At the same time, several federal rental assistance programs exist to help tenants pay their rent. These programs include the American Rescue Plan's Homeowner Assistance Fund, and the Emergency Rental Assistance (ERA) programs, which are administered by the Treasury Department through States, Local Governments, Territories, Tribes and Tribally designated housing entities, and Hawaiian Home Lands. The programs have been slow to start and have distributed approximately one-tenth of the allocated funds.

Realtor associations and rental property managers in Alabama and Georgia again sued to enjoin the CDC's new moratorium. The District Court entered judgment for the landlords and the Supreme Court affirmed. The Court stated that the CDC's eviction order was based on the Public Health Services Act, which provides in relevant part:

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.

AAR, at 2, citing 42 U.S.C. § 264(a). The Court acknowledged the CDC's authority to take action to prevent the interstate spread of disease by identifying, isolating, and destroying the disease itself. However, the Court stated that the CDC's Order was too indirect. It attempted to regulate evictions of a subset of tenants who might move from one State to another, with some smaller subset possibly being infected with COVID-19. The Court found that Congress could speak clearly when authorizing an agency to exercise the powers of vast economic and political significance that the CDC exercised in its Order, but Congress had not done so. In addition, the CDC Order "intruded" in an area that is the particular domain of state law: the landlord-tenant relationship. Absent clear Congressional authority, which was lacking, the CDC Order was too broad and was properly struck down.

Following the Supreme Court's ruling, the Secretary of the Treasury Janet L. Yellen, the United States Attorney General Merrick B. Garland, and the Secretary of the Department of Housing and Urban Development Marcia L. Fudge [issued a letter](#) to all State Governors, City Mayors, County Executives, and Chief Justices and State Court Administrators requesting help preventing unnecessary evictions during the pandemic. The letter requested that all evictions be stayed until the occupants have a chance to apply for rental assistance, permitting continued occupancy while a pool of federal money is accessed to pay the rent. The agencies also asked that states and localities enact eviction moratoriums during the remainder of the pandemic, that landlords be required to apply

for Emergency Rental Assistance funds before filing any eviction actions, that eviction actions are stayed while the ERA application is pending, and that the ERA and American Rescue Plan State and Local Fiscal Recovery Funds be used to support the right to counsel and eviction diversion strategies. In short, the federal government wants tenants, landlords, and courts to ensure that federal funds are used to help renters before landlords pursue evictions for non-payment of rent.

Congress failed to act when the CDC's eviction moratorium expired on July 31, 2021. It is unknown whether Congress will act now that the Supreme Court has again invited it to do so. Without Congressional action, there is no current federally-imposed eviction moratorium. Landlords may proceed with residential evictions unless a state or local eviction moratorium applies. Nevertheless, landlords are encouraged to apply for ERA funds to satisfy their tenants' rent obligations before they initiate an eviction action, and which could prove to be a benefit to both the tenant and the landlord.

McGlinchey will continue to monitor the situation and provide updates as they arise.

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