

CDC Eviction Moratorium Not Quite Over: Where Do We Go From Here?

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Last September, the Centers for Disease Control and Prevention (CDC) ordered a nationwide eviction moratorium on residential properties. 85 Fed. Reg. 55,292 (Sept. 4, 2020). On May 5, 2021, the United States District Court for the District of Columbia held that this order was invalid; but on May 14, 2021, despite finding that the CDC did not have a substantial likelihood of success on the merits, the court stayed its opinion pending appeal. *Alabama Association of Realtors v. U.S. Department of Health and Human Services*, Case No. 20-cv-3377 (D.D.C. May 5, 2021) (stay granted May 14, 2021).

The CDC promulgated this order in response to the COVID-19 pandemic. In theory, people need a personal residence in which to isolate and thereby limit the spread of the SARS CoV-2 virus. To achieve this goal, the CDC order temporarily prohibited residential evictions. But was the CDC permitted to take this action?

The CDC defended the order by arguing that its Secretary had broad purview to "make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases" internationally and between states. 42 U.S.C. § 264(a). The CDC promulgated the order consistent with that authority; therefore, it argued, the order should be upheld.

The court applied the two-step analysis known as the *Chevron* test. *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). Simply put, this framework requires (1) deferring to Congress if it has spoken; and (2) if not, deferring to the agency's interpretation of the law if the agency's interpretation is permissible. Although this standard is deferential to an agency's rulemaking authority, the court found that the CDC's reliance on 42 U.S.C. § 264(a) was misplaced because the statute only authorized the CDC to take such measures as were necessary to prevent disease being spread through "animals or articles." The CDC's order did not target specific infected animals or articles; therefore, the order exceeded the CDC's permissible authority.

That still left open the possibility that Congress had ratified the CDC's order. The CDC argued that Congress did just that when Congress extended the Order's sunset date through Section 502 of the Consolidated Appropriations Act. The court found that Congress only *extended* the order. Congress, however, did not *ratify* the order, *approve* of the CDC's interpretation of 42 U.S.C. § 264(a), or *provide* the CDC with additional authority. Thus, Congress's action did not cure the infirmity with the CDC's order.

Finally, the court considered whether only the aggrieved plaintiffs should be exempted from the order's application – as was true in other cases where the CDC's order had been found invalid – or if the order should be vacated across the board. On this point, the court followed existing precedent in the D.C. Circuit in determining that when "regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioner is proscribed." *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (internal quotation marks omitted).

When the CDC requested that the court stay its opinion, the court found that the CDC had not shown a substantial likelihood of success on the merits. Courts commonly deny stay requests on this basis alone. See *M.M.V. v. Barr*, 459 F. Supp.3d 1, 4 (D.D.C. 2020) (citation omitted). Here, however, because some other courts had upheld the CDC's order, the court determined that the CDC had raised a "serious legal question on the merits" and so could obtain a stay if its

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showing on the other relevant factors were sufficiently strong. And the court found that the CDC made such a showing. Given the scope of the opinion's impact and the continuing threat posed by COVID-19, the court found that the CDC would suffer irreparable injury, the financial risk to the plaintiffs could be mitigated, and the public interest favored measures that protect public health. Accordingly, the court stayed its opinion pending appeal.

Critically, even if this decision is upheld on appeal, it does not affect any other moratoria that may be in effect (including state and local moratoria) or any practical limitations on the exercise of remedies, such as the inability to hold a public sale to effect a foreclosure in certain jurisdictions. Although the court's decision to stay its opinion required evaluating the scope of its decision's impact, neither opinion examined whether a residential eviction moratorium is contrary to public policy or otherwise invalid. Rather, the court only held that the CDC exceeded its authority when it issued its moratorium.

If you have questions, or would like further information, please do not hesitate to call one of the authors.