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Has the CDC Overstepped its Authority on Evictions?

June 4, 2021 | by

It has been over a year since the beginning of the COVID-19 pandemic and although many restrictions are beginning to lift, one that has not is the eviction moratorium. In August of 2020, (after the CARES Act eviction moratorium expired in July 2020^[1]) an executive order^[2] was issued by the President directing the Secretary of Health and Human Services ("HHS") and the Director of the CDC to "consider whether any measures temporarily halting residential evictions of any tenants for failure to pay rent are reasonably necessary to prevent the further spread of COVID-19 from one State or possession into any other State or possession."^[3]

Since then, the CDC has continually taken the stance that an eviction moratorium is essential to prevent further spread of COVID-19. The CDC's decision to extend the eviction moratorium, which is currently set to expire on June 30, 2021, has become a highly debated and rather controversial topic.

The most recent case contesting the CDC's authority is *Alabama Association of Realtors, et al. v. United States Department of Health and Human Services, et al.* ^[4] (hereinafter "AAR") in which a U.S. District Court ruled against HHS and the CDC stating they lack the statutory authority to impose a nationwide eviction moratorium. Although this decision is a big victory for landlords, the Department of Justice ("DOJ") has since made a public statement respectfully disagreeing with the decision. In its official press release^[5] the DOJ stated; "[i]n the department's view, th[e] decision conflicts with the text of the statute, Congress's ratification of the moratorium, and the rulings of other courts."

Even though the DOJ made it clear that it intends to appeal the decision, the rationale used in the AAR court is important. The decision may very well change how other courts view the CDC's eviction moratorium should it be challenged in the future. In reaching its conclusion that the CDC overstepped its authority, the AAR Court had to decide whether the Secretary of HHS delegated a proper agency power to the CDC in the first place. Section 264(a) of Title 42 provides that the Secretary of HHS has the power to "make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases" both between states and internationally. However, the Secretary of HHS can only delegate powers that he himself

inherently has.

To determine whether the power to impose an eviction moratorium was a power that could be properly delegated to the CDC, the Court had to apply the *Chevron*^[6] deference test, which requires asking two questions. First has Congress directly spoken to the precise question at issue; and second, if it has not, is the agency's answer to the question at issue based on a permissible construction of the statute?

In its *Chevron* analysis, the Court first determined whether the relevant language of the statute (42 U.S.C. § 264(a)) addressed the "precise question at issue"^[7]. The "precise question at issue"^[8] is: does the Public Health Service Act provide HHS the power to impose an eviction moratorium? It is clear on the face of the statute that Congress has not specifically addressed this issue as there is no clear language related to evictions. So, because Congress has not spoken directly to this question, the Court then had to determine whether the CDC's interpretation, i.e. the authority to impose an eviction moratorium, was a valid interpretation of the statute.

To answer this question, the Court entered into a detailed legislative and statutory analysis of 42 U.S.C. § 264(a). Through this, it found that although the Secretary of HHS may provide for "other measures"^[9] as in his judgment may be necessary to prevent the spread of disease, those other measures are only "controlled and defined by reference to the enumerated categories before it."^[10] "The other measures are limited in two significant respects: first they must be directed towards 'animals or articles' and second those 'animals or articles' must be 'found to be so infected or contaminated as to be sources of dangerous infection to human beings.'"^[11]

The Court stated rather succinctly that the "national eviction moratorium satisfies none of these textual limitations."^[12] This was all the Court needed to rule against the CDC. If an agency's interpretation is beyond the scope of the statute, it cannot impose such a regulation. As a result, the *AAR* Court concluded that because HHS does not possess the power to impose an eviction moratorium under 42 U.S.C. § 264(a), it could not have delegated such power to the CDC. Therefore, the CDC exceeded its statutory authority.

In its final words, the Court posed one final question: Does the Public Health Service Act grant the legal authority to impose a nationwide eviction moratorium. This Court's answer: No, it does not. Although this decision was a major win for landlords, the DOJ is actively pursuing an appeal and a stay of the *AAR* decision has already been imposed.^[13]

The eviction moratorium is going to be a highly debated topic in the coming months and there is no guarantee that the moratorium will be lifted on June 30, 2021. The appeal of the *AAR* decision by the DOJ will likely be important in determining how future courts apply 42 U.S.C. § 264(a) and whether the eviction moratorium is removed.

^[1] Pub. L. No. 116-136, 134 Stat. 281 (2020)

[2] Executive Order 13,945, 85 Fed. Reg. 49,935, 49,936 (Aug. 8, 2020)

[3] *Id.*

[4] *Alabama Association of Realtors, et al. v. United States Department of Health and Human Services, et al.*, No. 1:20-cv-03377-DLF (D.D.C. May 5, 2021). (hereinafter “AAR”)

[5] Press Release, U.S. Dep’t of Justice, Justice Department Issues Statement Announcing Decision to Appeal Alabama Association of Realtors v. HHS (May 5, 2021), <https://www.justice.gov/opa/pr/justice-department-issues-statement-announcing-decision-appeal-alabama-association-realtors-v>

[6] *Chevron, U.S.A., Inc. v. Nat’l Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984)

[7] *Id.*

[8] *Id.*

[9] 42 U.S.C. § 264(a)

[10] AAR (citing *Tiger Lily, LLC v. United States Dep’t of Hous. & Urb. Dev.*, 992 F.3d 518 (6th Circ. 2021))

[11] AAR, Doc. No. 54., p. 11.

[12] AAR, Doc. No. 54., p. 12.

[13] On June 2, 2021 a three-judge panel ruled the eviction moratorium can continue while the Biden administration appeals the AAR decision. In making its decision, the panel stated that the government “has made a strong showing that it is likely to succeed on the merits.”

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