

# COVID-19: MORATORIUM MADNESS: WILL CHALLENGES TO THE EVICTION ORDER FORCE THE CDC'S HAND?

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## U.S. Litigation and Dispute Resolution Alert

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As detailed in a recent alert,<sup>1</sup> U.S. District Judge Dabney L. Friedrich, in *Alabama Association of Realtors v. U.S. Department Of Health And Human Services*,<sup>2</sup> found that the Centers for Disease Control and Prevention (CDC) did not have authority to impose a nationwide eviction moratorium (CDC Order) under the Public Health Service Act (PHSA). Since the decision, there has been a spate of activity in that case and throughout the country regarding the CDC Order and its enforceability. With the CDC Order set to expire on 30 June 2021 and increasingly encouraging national COVID-19 data, it seems less likely that the CDC Order will remain in place for an extended period. Individual states, however, may ultimately keep certain pandemic protection measures in place in order to protect residential tenants. While landlords and tenants await an official decision from the CDC about a further extension of the moratorium, courts will continue to rule on the enforceability of the CDC Order.

## A STAY, AN APPEAL, AND A POSSIBLE SCOTUS INTERVENTION?

In *Alabama Association of Realtors*, Judge Friedrich determined that while COVID-19 created a serious public health crisis with unprecedented challenges for public health officials, the PHSA did not grant the CDC with the legal authority to impose a nationwide eviction moratorium.<sup>3</sup>

As expected, the U.S. Department of Health and Human Services (DHHS) immediately appealed to the D.C. Circuit Court of Appeals.<sup>4</sup> In addition, DHHS asked Judge Friedrich, on an emergency basis, to stay her order pending appeal.<sup>5</sup> Given its immediate appeal and emergency motion, DHHS confirmed that, despite the improved public health outlook, it remains resolute in its defense of the nationwide eviction moratorium.

On 14 May 2021, after full briefing, the trial court granted DHHS's emergency motion to stay pending appeal. While Judge Friedrich found that DHHS had little chance of success, she nonetheless granted the motion after determining that there was sufficient risk of irreparable harm if the CDC Order does not remain in place.<sup>6</sup>

Following the decision, both parties filed briefs in the trial court and the D.C. Circuit. The plaintiffs filed a notice of their intention to not only file a motion in the D.C. Circuit, but also that they "intend to file an application to vacate the stay in the Supreme Court of the United States,"<sup>7</sup> while DHHS filed its opposition in both courts arguing that the plaintiffs' challenge to the CDC Order is meritless and that the balance of equities favors the government.<sup>8</sup>

On 2 June 2021, the D.C. Circuit declined to lift the stay, finding that the government made a sufficient showing that it is likely to succeed on the merits.<sup>9</sup> In response, the plaintiffs asked the U.S. Supreme Court to stay enforcement of the policy during a further appeal. Submitting an application to Chief Justice John Roberts, who handles emergency appeals from the D.C. Circuit on the court's so-called "shadow docket," the plaintiffs urged the

justices to intervene and lift the stay of the CDC Order because the “stay will prolong the severe financial burdens borne by landlords under the moratorium” and “[the] government’s sweeping position is contrary to the text and structure of the statute.”<sup>10</sup> The “shadow docket” includes cases that do not proceed via the Supreme Court’s normal briefing and argument process. The speed with which the Supreme Court and D.C. Circuit handles the cases could impact any further extension to the CDC Order. Also, with the CDC Order set to expire on 30 June 2021, there is a chance that the pending appeal could conceivably become moot before there are any further rulings from any court.

## TENNESSEE COURT CONFIRMS CDC ORDER NOT APPLICABLE IN SIXTH CIRCUIT

Another court addressed the CDC Order as impacted by a new Consumer Financial Protection Bureau (CFPB) rule. In April 2021, the CFPB introduced a new interim rule to, among other things, help residential tenants facing eviction, requiring debt collectors to provide written notice to delinquent tenants informing tenants that they may be eligible for relief under the CDC Order. The rule states that the disclosure of the CDC Order must be made in any jurisdictions where the CDC Order applies. A group of property managers filed suit in the Middle District of Tennessee challenging this rule as violative of their First Amendment rights where it compelled “false speech” and sought a temporary restraining order to block it.

In *The Property Management Connection, LLC v. The Consumer Financial Protection Bureau*,<sup>11</sup> the court first noted that several federal courts, including the 6th Circuit,<sup>12</sup> have determined that the CDC exceeded its authority in issuing the CDC Order, thus making the CDC Order inapplicable. The court then addressed the CFPB rule, determining that “by its own terms” it only applies “during the effective period of the CDC Order, only to tenants to whom the CDC Order reasonably might apply, and only in jurisdictions in which the CDC Order applies.”<sup>13</sup> The court further highlighted that the CFPB itself “opined” that the rule does not apply where the CDC Order is inapplicable. Thus, the court concluded that since binding 6th Circuit precedent invalidates the CDC Order, the CFPB rule, by its own terms, does not apply. Because the CDC Order did not apply, the plaintiffs’ claimed First Amendment violation was not viable, according to the court, because the inapplicable rule compels no speech. Therefore, the court found that the plaintiffs could not demonstrate a likelihood of success on the merits, and it denied the requested relief.

## FLORIDA COURT SET TO WEIGH IN ON EVICTION MORATORIUM

In the Middle District of Florida, a group of realtors with more than 200,000 members and a real estate business filed their own federal lawsuit challenging the CDC Order on 17 May 2021. Like earlier suits, the plaintiffs in *Florida Association of Realtors, Inc. v. Centers for Disease Control and Prevention*<sup>14</sup> contend that the CDC overstepped its authority in issuing a national eviction moratorium. The plaintiffs allege that the CDC does not have the authority to be the “landlord-in-chief” and that estimated losses from the CDC Order may “exceed tens of millions of dollars.”<sup>15</sup> At this stage, it is unclear whether the CDC will respond to the complaint before deciding whether to extend the moratorium.

## WHAT WILL HAPPEN NEXT?

Given the DHHS’s aggressive defense of the CDC Order in *Alabama Association of Realtors*, it seems likely that the CDC may be planning to further extend the moratorium even where numerous courts have determined that it

does not have the authority to do so. In any event, landlords and tenants alike will be paying close attention to the CDC's decision, as cases addressing the CDC Order will likely take center stage. Regardless of its prospects for longevity, the CDC Order remains in place in most jurisdictions, but its days seemed numbered. Also, no matter the fate of the CDC Order, landlords and tenants will need to monitor state-by-state restrictions. Stay tuned for further updates.

## FOOTNOTES

<sup>1</sup> See Sean R. Higgins, Edward J. Mikolinski, & Scott G. Ofrias, [COVID-19: Federal Judge Rules CDC Not Authorized To Issue Nationwide Eviction Moratorium](#), K&L GATES HUB (May 10, 2021).

<sup>2</sup> Memorandum and Order on Plaintiffs' Motion for Expedited Summary Judgment, Defendants' Motion for Summary Judgment and Partial Motion to Dismiss, *Ala. Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs.*, 1:20-cv-03377 (D.D.C. May 5, 2021).

<sup>3</sup> *Id.*

<sup>4</sup> Notice of Appeal, *Ala. Ass'n of Realtors*, 1:20-cv-03377. Although the emergency motion appears to have been filed on behalf of all defendants, the memorandum opinion only addresses DHHS.

<sup>5</sup> Emergency Motion to Stay, *Ala. Ass'n of Realtors*, 1:20-cv-03377.

<sup>6</sup> Judge Friedrich analyzed the four factors necessary to grant a stay: (1) whether the stay applicant has made a strong showing that he or she is likely to succeed on the merits, (2) whether the applicant will be irreparably injured absent a stay, (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding, and (4) where the public interest lies. Judge Friedrich found that while DHHS did not make a strong showing it was likely to succeed, the court determined that DHHS made a sufficient showing as to the other three factors, and the "magnitude of these additional financial losses [if a stay is imposed] is outweighed by DHHS's weighty interest in protecting the public." Memorandum Opinion regarding Defendants' Emergency Motion to Stay, *Ala. Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs.*, 1:20-cv-03377 (D.D.C. May 14, 2021) at 9.

<sup>7</sup> Notice, *Ala. Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs.*, 1:20-cv-03377 (D.D.C. May 17, 2021).

<sup>8</sup> Response in Opposition, *Ala. Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs.*, No. 21-5093 (D.C. Cir. May 24, 2021).

<sup>9</sup> Order, *Ala. Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs.*, No. 21-5093 (D.C. Cir. June 2, 2021).

<sup>10</sup> Application (20A169) to vacate stay, *Ala. Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs.*, No. 20A-\_\_\_\_ (U.S. June 3, 2021).

<sup>11</sup> 3:21-cv-00359 (M.D. Tenn. 2021).

<sup>12</sup> *Tiger Lily, LLC v. U.S. Dep't of Hous. & Urb. Dev.*, 992 F.3d 518 (6th Cir. 2021). In this case, the court also found that defendants had little chance of success on appeal, which was enough to deny the stay. That case remains pending.

<sup>13</sup> Memorandum Opinion of the Court, *The Prop. Mgmt. Connection, LLC v. The Consumer Fin. Prot. Bureau*, 3:21-cv-00359 (M.D. Tenn. May 14, 2021) at 6.

<sup>14</sup> 8:21-cv-01196-WFJ-SPF (M.D. Fla. 2021).

<sup>15</sup> *Id.*

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