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CDC doubles down — New eviction moratorium seeks to meet urgent health needs and tough judicial limits

By Harry J. Kelly

The Centers for Disease Control and Prevention (“CDC”) issued an order on Tuesday that—after a short interruption—seeks to extend its prior eviction moratoriums, originally imposed in September 2020. The newest moratorium, set to expire on October 3, 2021, seeks to bridge the gap between urgent issues of public health and judicial opinions that question whether the CDC—and the federal government in general—have the legal authority to take those dramatic measures by replacing a nation-wide moratorium with a more focused restriction applicable to jurisdictions with “substantial” or “high” levels of transmission of the COVID-19 virus. Given the surging transmission of the Delta variant of the virus, that may be a distinction with little substantive difference.

To recap, the CDC first issued an eviction moratorium in September 2020. The legal rationale for that action was the CDC’s authority to take action to interdict the interstate transmission of infectious materials. Essentially, the CDC premised its original moratorium on the fact that tenant evictions in the middle of a pandemic would accelerate the spread of COVID-19, as tenants moved across interstate lines to seek housing in shelters or with family members or other persons. During a period when social distancing was still the primary public health response to the pandemic, the CDC’s moratorium recognized a basic reality—to the extent people stayed in their homes, the chances of spreading the virus was (hopefully) reduced.

In intervening months, courts have been unkind to the CDC’s best intentions. Some courts objected that the CDC’s authority to restrict transmission of infectious materials was too limited to support a nationwide moratorium on tenant evictions. Other courts took a more radical approach, arguing that the federal government lacked authority under the US Constitution to interrupt issues of landlord-tenant law that are traditionally within the scope of state law. Most recently, when housing providers pressed for review of an order by an appellate court that left the moratorium in place, the Supreme Court split, with four justices voting to take up the review petition, four opposing review and one—Justice Kavanaugh—voting against review, but solely because the prior moratorium was set to expire on July 31, 2021, by which time (he supposed) billions of dollars of

emergency rental assistance would be available that would prevent a wave of evictions from occurring. That assistance is flowing but apparently not fast enough to prevent those evictions.

Optimism is a wonderful thing but perhaps not a sufficient basis for either public policy or jurisprudence. To deflect attacks, the newest CDC order tries to stitch together several arguments that may deter otherwise skeptical judges, by documenting the threat posed by the Delta variant and the utility of an eviction moratorium to slow the spread of that variant. At some point, a Supreme Court justice probably will have to decide whether the US Constitution empowers the federal government to take urgent action to stop a pandemic. Whether that power includes the ability to order an eviction moratorium is still an open question. In the meanwhile, getting that emergency rental assistance into the hands of renters and landlords as quickly as possibly seems like an even better idea.

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