

CDC Cannot Halt Evictions As A Public Health Measure

By **Steven Gordon** (March 16, 2021)

Does the Centers for Disease Control and Prevention have authority to order a nationwide moratorium on residential evictions to combat the COVID-19 epidemic? Federal district courts have reached divergent conclusions on this issue.

In late 2020, the U.S. District Court for the Northern District of Georgia and the U.S. District Court for the Western District of Louisiana upheld the moratorium and rejected arguments that it exceeds the agency's statutory authority in *Brown v. Azar* and *Chambless Enterprises LLC v. Redfield*, respectively.[1]



Steven Gordon

However, this month, the U.S. District Court for the Northern District of Ohio reached the contrary conclusion in *Skyworks Ltd. v. Centers for Disease Control and Prevention*.[2]

And last month, the U.S. District Court for the Eastern District of Texas ruled in *Terkel v. CDC* that the moratorium exceeds federal authority under the Constitution.[3]

Several of these decisions are now headed for review by the federal appellate courts. The constitutional issue is very interesting but courts typically avoid deciding such an issue if a case can be resolved on another basis.

Here it is unnecessary to reach the constitutional issue because, under well-established principles, the eviction moratorium exceeds the authority Congress has delegated to the CDC.

Background

When Congress enacted the Coronavirus Aid, Relief and Economic Security Act in March 2020 in response to the COVID-19 epidemic, it included a 120-day prohibition on initiating eviction proceedings for properties that participate in specified federal programs or with specified federally backed loans.

This eviction moratorium lapsed on July 27, 2020. Then, in September 2020, the CDC issued a sweeping moratorium that makes it a crime for any landlord or property owner to evict a covered person from a residence.

To qualify as a covered person, a tenant must provide a sworn declaration to the landlord that he or she satisfies certain income requirements, is unable to pay the full rent because of a job loss or cutback or extraordinary medical expenses, and that eviction would likely render the tenant homeless or force the tenant to live in close quarters in a congregate or shared living setting.[4]

This moratorium was originally set to expire on Dec. 31, 2020, but was extended by Congress to Jan. 31, 2021.[5] The CDC then extended it through the end of March 2021.[6]

The rationale for the CDC order is that:

In the context of a pandemic, eviction moratoria — like quarantine, isolation, and social distancing — can be an effective public health measure utilized to prevent the spread of communicable disease ... [because] homelessness increases the likelihood of individuals moving into close quarters in congregate settings, such as homeless shelters, which then puts individuals at higher risk to COVID-19.[7]

The government defends the constitutionality of the order under the commerce clause, although the rationale for the order says nothing about an impact on interstate commerce and the government has never before invoked its commerce power to impose a nationwide eviction moratorium.[8]

The Asserted Authority for the Moratorium

According to the U.S. Supreme Court in *Bowen v. Georgetown University Hospital* in 1988, "It is axiomatic that an administrative agency's power ... is limited to the authority delegated by Congress." [9]

The purported authority for the CDC eviction moratorium is Title 42 of U.S. Code, Section 264, titled "Regulations to control communicable diseases," which was enacted in 1944 as part of the Public Health Service Act. Subsection (a) of that statute provides:

The Surgeon General, with the approval of the Secretary, 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.

Analysis

A statute is to be interpreted "as a symmetrical and coherent regulatory scheme," [10] and its words must be construed "with reference to the statutory context, structure, history, and purpose." [11]

Here, the quoted subsection of the statute is followed by three subsections which authorize the apprehension, detention and conditional release of individuals who are reasonably believed to be infected.

Read as a whole, the first subsection grants regulatory authority and addresses enforcement measures with respect to animals or articles that may transmit communicable diseases. The following subsections address enforcement measures with respect to humans who are reasonably believed to be infected. The statute authorizes traditional public health measures to prevent disease carriers from transmitting the disease.

Although the first sentence of subsection (a) gives the agency broad authority to make and enforce regulations, it is limited by the second sentence which defines what steps the agency may take to carry out or enforce those regulations. [12]

Congress authorized inspection, fumigation, disinfection, sanitation, pest extermination,

destruction of infected animals or articles, and "other measures, as in [the Surgeon General's] judgment may be necessary."

Clearly, this list of authorized measures is not exclusive. But it "calls for the application of the maxim *eiusdem generis*, the statutory canon that '[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.'"[13]

Thus, the other measures authorized by the statute are steps akin to inspection, fumigation, disinfection, sanitation, pest extermination and destruction of infected animals or articles.

The statutory language "links the agency's power to specific, tangible things [i.e., animals or articles] on which the agency may act." [14] And "the common meaning of the word 'article' does not extend the agency's reach to an action such as evictions." [15]

Why, then, did the Northern District of Georgia and the Western District of Louisiana conclude that the statute does authorize the eviction moratorium? They focused on the broad grant of regulatory authority to the agency.

In *Chambless*, the Western District of Louisiana found that "the plain text of the statute is unambiguous and evinces a legislative determination to defer to the 'judgment' of public health authorities about what measures they deem 'necessary' to prevent contagion." [16]

Both the Georgia and Louisiana federal courts dismissed the importance of the list of authorized enforcement measures. The Louisiana court commented that "the examples Congress gave of specific measures the Secretary may take to control infectious disease ... are illustrative, not exhaustive." [17]

Both courts found the principle of *eiusdem generis* inapplicable because they perceived no ambiguity in the statute. [18]

Finally, both courts relied on the Western District of Louisiana's 2010 decision in *Independent Turtle Farmers of Louisiana v. U.S.*, opining that "the list [of measures in Section 264(a)] does not act as a limitation upon the types of regulations that may be enacted under [the statute]." [19]

The flaw in these courts' reasoning is that it effectively reads the list of authorized enforcement measures out of the statute. Consider that in *U.S. v. Butler* in 1936, the Supreme Court wrote that "These words cannot be meaningless, else they would not have been used." [20]

A fundamental rule of statutory construction is that, if possible, every word and every provision is to be given effect. But these courts construe the residual phrase at the end of the provision in a way that "fails to give independent effect to the statute's enumeration [of authorized enforcement measures]... which precedes it," as the Supreme Court wrote in *Circuit City Stores Inc. v. Adams* in 2001. [21]

Additionally, in *Begay v. U.S.* in 2008, the Supreme Court held that "If Congress ... meant the statute to be all encompassing, it is hard to see why it would have needed to include the examples at all." [22]

The precedent on which both courts relied in construing the statute also employed faulty reasoning, although its outcome is defensible. The issue in that case was whether the

statute authorizes a ban on the sale of viable turtle eggs and live turtles with a shell of less than four inches in length, in order to curb the spread of salmonellosis.

The court upheld the turtle ban, asserting that "the list [of authorized measures] does not act as a limitation upon the types of regulations that may be enacted." [23] The court did not address the ejusdem generis canon, which leads to the contrary conclusion, i.e., that the list is a limitation that must be considered in construing the statute.

The court should, instead, have framed the issue as whether the class of explicitly authorized enforcement measures — inspection, fumigation, disinfection and destruction of infected animals — also encompasses a ban on the sale of animals or eggs based on the risk of disease transmission they pose, without any finding that they are infected.

The answer depends on how broadly or narrowly the class of authorized measures is defined. The doctrine of ejusdem generis often gives rise to such questions and a court has "latitude in determining how much or how little is embraced by the general term," according to "Reading Law: The Interpretation of Legal Texts." [24]

It is at least debatable that the turtle ban fits within a broad construction of the enumerated class of enforcement measures, especially since a companion statute authorizes the surgeon general to suspend the entry of persons and goods from disease-ridden countries. [25]

There is no room for reasonable debate, however, about whether the class of authorized enforcement measures encompasses the completely dissimilar step of a moratorium on residential evictions.

As the Supreme Court held in *Epic Systems Corp. v. Lewis* in 2018, "there is no textually sound reason to suppose the final catchall term should bear such a radically different object than all its predecessors." [26] Consequently, the CDC lacks authority to impose such a moratorium.

This conclusion is not altered by the fact that Congress extended the expiring CDC moratorium for one month at the end of 2020. [27] Arguably this legislation may have ratified the unauthorized moratorium during the preceding months, but Congress did not authorize any continuation of the moratorium after January 2021.

It is important to clarify the limits on the CDC's authority even though the moratorium — and the epidemic, itself — may end in the near future. Communicable diseases are a recurring problem that can, as the past year has shown, up-end the entire nation.

The allocation of authority, as between the CDC and the Congress, for taking various steps to address a public health crisis should be understood at the outset rather than being litigated during the midst of the crisis.

Steven Gordon is a partner at Holland & Knight LLP.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] *Brown v. Azar*, No. 1:20-CV-03702, --- F.Supp.3d ----, 2020 WL 6364310 (N.D. Ga. Oct. 29, 2020); *Chambless Enterprises, LLC v. Redfield*, No. 3:20-cv-01455, --- F.Supp.3d ---, 2020 WL 7588849 (W.D. La. Dec. 22, 2020).

[2] *Skyworks, Ltd. v. Centers for Disease Control and Prevention*, No. 5:20-cv-2407, 2021 WL 911720 (N.D. Ohio Mar. 10, 2021).

[3] *Terkel v. Centers for Disease Control and Prevention*, No. 6:20-cv-00564, --- F.Supp.3d ----, 2021 WL 742877 (E.D. Tex. Feb. 25, 2021)

[4] Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292 (Sept. 4, 2020).

[5] Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, § 502, 134 Stat. 1182, 2078-79 (2020).

[6] Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 8,020 (Feb. 3, 2021).

[7] 85 Fed. Reg. at 55,294.

[8] See *Terkel v. Centers for Disease Control and Prevention*, 2021 WL 742877, at *4, *8-9.

[9] *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

[10] *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

[11] *Abramski v. United States*, 573 U.S.169, 179 (2014).

[12] See *Skyworks, Ltd. v. Centers for Disease Control and Prevention*, 2021 WL 911720, at *9.

[13] *Circuit City Stores Inc. v. Adams*, 532 U.S. 105, 114-15 (2001) (citation omitted).

[14] *Skyworks, Ltd. v. Centers for Disease Control and Prevention*, 2021 WL 911720, at *9.

[15] *Id.* at 10.

[16] *Chambless Enterprises, LLC v. Redfield*, 2020 WL 7588849, at *5.

[17] *Id.*

[18] See *Brown v. Azar*, 2020 WL 6364310, at *9; *Chambless Enterprises, LLC v. Redfield*, 2020 WL 7588849, at *8.

[19] *Indep. Turtle Farmers of La. v. United States*, 703 F.Supp.2d 604, 620 (W.D. La. 2010).

[20] *United States v. Butler*, 297 U.S. 1, 65 (1936).

[21] *Circuit City Stores Inc. v. Adams*, 532 U.S. at 114.

[22] *Begay v. United States*, 553 U.S. 137, 142 (2008).

[23] *Indep. Turtle Farmers of La. v. United States*, 703 F.Supp.2d at 620.

[24] Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012) at 207.

[25] 42 U.S.C. § 265.

[26] *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612, 1625 (2018).

[27] See *Skyworks, Ltd. v. Centers for Disease Control and Prevention*, 2021 WL 911720, at *12.