JENNER & BLOCK

Federal Circuit Issues Important Takings Decision on Eviction Moratorium

Client Alerts

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In a significant Takings Clause opinion, *Darby Development Company, Inc. v. United States*, the Federal Circuit sided with landlords who argued that the CDC's eviction moratorium constituted a physical taking of their property.

During the pandemic, the Centers of Disease Control and Prevention (CDC) imposed a nationwide moratorium that prevented landlords from evicting tenants, which the Supreme Court later struck down on the ground that it exceeded the CDC's statutory authority. After that decision, a group of landlords who owned residential rental properties sued the United States under the Takings Clause seeking just compensation. The government moved to dismiss for failure to state a claim, arguing, first, that a takings claim cannot be based on an unlawful government action and, second, that the eviction moratorium simply regulated the landlord-tenant relationship. The Court of Federal Claims granted the motion to dismiss. It agreed with the government's first argument—without reaching the second argument—and reasoned, in part, that the landlords' position was contrary to the Supreme Court's own decision striking down the moratorium.

The plaintiffs appealed. A divided panel of the Federal Circuit rejected both of the government's arguments and reversed. Judge Sharon Prost wrote the majority, joined by Judge Kara Stoll.

To give rise to just compensation, the action must be an (a) authorized (b) taking. The panel began with the question of whether the action was "authorized." It is well-established that a takings claim only arises if a government action is "authorized." An "authorized" action—such as the use of eminent domain to condemn property—requires just compensation. An "unauthorized" action—such as when the government destroys a piece of property—does not give rise to just compensation. The term "authorized" is not the same as "lawful" or "done with legal authority." To determine whether a government action is "authorized," the relevant inquiry asks "whether the alleged invasion of property rights is chargeable to the government." Importantly then, a taking can be "authorized" under the Takings Clause even if that act is later deemed illegal.

The panel concluded that the eviction moratorium was "authorized" in the sense relevant to the Takings Clause—that is, it was chargeable to the United States. The panel reasoned that the CDC explicitly issued the order pursuant to its statutory authority, and that its order represented a "good

faith implementation of" the governing law. As the panel further explained, the government defended that action in court for months. Hence, in the panel's view, the eviction moratorium was an "authorized" government action—akin to eminent domain—even though the ultimate outcome of the litigation was that the moratorium was held to be unlawful.

Next, the panel turned to whether the eviction moratorium was a "taking." There are two types of "takings": physical takings and regulatory takings. In arguing that the moratorium was a physical taking, the landlords relied on the Supreme Court's decision in *Cedar Point Nursery v. Hassid*, which held that a California law affording labor organizations access to agricultural employer's property to lobby for unionization support was a per se physical taking. In opposition, the government relied on *Yee v. City of Escondido*, which held that a mobile-home rent ordinance did not constitute a per se physical taking.

The panel agreed with the landlords that the eviction moratorium was a physical "taking." Absent the order, the plaintiffs could have excluded tenants from their property. And there was no meaningful difference between this case and *Cedar Point Nursery v. Hassid*. If occasionally letting union organizers onto a property was a taking, "forcing" landlords to house non-paying tenants was too.

In arriving at its conclusion, the panel found *Yee* to be distinguishable. *Yee* "was fundamentally a rent-control case." Unlike the moratorium, the mobile-home ordinance explicitly permitted eviction. The Supreme Court "simply was not presented with something akin to … an outright prohibition on evictions for non-payment of rent." *Yee* also did not suggest that government actions regulating the landlord-tenant relationship could never be a physical taking. That logic would "immunize[]" all landlord-tenant regulations from "being treated as a physical taking." And the government's reliance on *Yee* ignores the opinion's express caveat that it would be a "different case" if a landlord were forced "to rent his property or to refrain in perpetuity from terminating a tenancy."

The panel also disagreed with the notion that just because the tenants were "invited" on the land, there was no taking. Inviting someone onto a property does not mean that the person can stay forever. That position would also render all landlord-tenant regulations "categorically immune from being treated as a physical taking."

Judge Timothy Dyk dissented. He believed that the eviction moratorium was unauthorized, foreclosing the plaintiffs' Takings Clause claim. He reasoned that when a "government agent exceeds the authority conferred by the statute which grants it the power to act," that action is unauthorized. In his view, the CDC, by the Supreme Court's own decision, exceeded the authority conferred by the relevant statute, and therefore, the plaintiffs did not have a takings claim.

The decision is a significant win for property owners. As Dan Weiss of Jenner & Block recently explained to *Law360*, the court's analysis is "part of a growing willingness" to analyze property-use restrictions as physical takings. "For anyone representing property owners in a takings claim," Andrew Vail, also of Jenner & Block, added, "the *Darby* decision is a helpful, favorable decision."

If this ruling stands, the consequences for both parties will likely be far-reaching: landlords could reclaim months' worth of lost rent, and the government could be forced to pay billions in claims. That possibility might deter agencies from enacting other regulations in the future. Considering the far-reaching implications, the United States may petition the full circuit to weigh in, or ask the Supreme Court to take up the case.

At Jenner & Block, we are prepared for any outcome. Our Real Estate Litigation Practice, led by Andrew Vail and Dan Weiss, is litigating to protect unlawful government intrusions on property owners' rights, continuing the firm's long history of successfully litigating these important legal issues. We will discuss this case and more with leading experts in the field at the Jenner & Block "Realty Rendezvous" on October 9, 2024.

Attachments

Decision of the Court of Appeals for the Federal Circuit (REVERSED AND REMANDED)

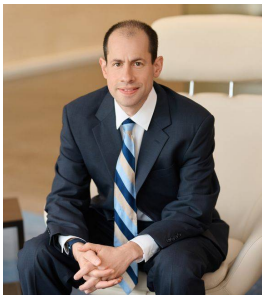
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