

# Federal Circuit Denies Rehearing in Takings Case on Eviction Moratorium

## Client Alerts

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In a win for landlords, on June 6th, 2025, the Federal Circuit denied the government's petition for panel rehearing and rehearing en banc in *Darby Development Company, Inc. v. United States*.

*Darby* arose out of a nationwide eviction moratorium imposed by the Centers of Disease Control and Prevention (CDC) during the pandemic. The moratorium, which prevented landlords from evicting tenants, was struck down by the Supreme Court on the grounds that it exceeded the CDC's statutory authority. Following that decision, a group of landlords who owned residential rental properties sued the United States under the Takings Clause seeking just compensation. As a claim for money damages against the federal government, the claim was initially heard in the Court of Federal Claims, where it was dismissed on the grounds that the unlawful moratorium was unauthorized and therefore could not be considered a taking. On August 7, 2024, the Federal Circuit, in an opinion by Judge Sharon Prost, joined by Judge Kara Stoll, reversed, concluding that the plaintiffs stated a claim for a physical taking.

For the landlords to proceed on that claim, they were required to show that the CDC's action was "authorized." The Federal Circuit held that although *unlawful*, the CDC's action was *authorized*. In the court's view, the government's action in issuing the eviction moratorium was a "good faith implementation of" the governing law and accordingly the act was chargeable to the government such that it could be considered to be authorized. The Federal Circuit further held that, accepting the plaintiffs' allegations as true, the moratorium constituted a physical taking because it denied the landlords' right to exclude unwanted tenants from their properties.

The success of the plaintiffs in this case has far reaching implications. It gives landlords an avenue to reclaim months' worth of lost rent, and the government could be forced to pay billions in claims. The financial consequences also might deter governments and government agencies from enacting similar regulations in the future. For an earlier discussion of the majority's decision, see Client Alert: Federal Circuit Issues Important Takings Decision on Eviction Moratorium.

The consequences of that prior decision became more real for the government with the Federal Circuit's denial of rehearing on the case. Three judges dissented from the denial of rehearing. The primary dissent, authored by Judge Dyk, joined by Judge Cunningham, concluded that the majority's

decision “is contrary to more than 100 years of Supreme Court precedent that holds that a government agent’s actions do not subject the government to takings liability unless they were made with actual authority under the statute.” In Judge Dyk’s view, the panel majority erred in importing tort-law standards of vicarious liability into takings law. Judge Stark wrote a separate dissent arguing that the case warranted en banc review in view of its exceptional importance.

This case may not be over. In an opinion concurring with the order denying rehearing, Judge Chen stated, “the issue in this case, which goes to the scope of the Takings Clause, would benefit from Supreme Court guidance.” In view of the high financial stakes, the government may well file a petition for certiorari seeking review of the Federal Circuit’s decision. Any petition for certiorari would be due, at latest, 150 days from the Federal Circuit’s rehearing order. If the Supreme Court agrees to hear the case, the hearing would occur either late in the 2025-26 term or early in the 2026-27 term.

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