

## Fed. Circ.'s Eviction Ban Ruling A Big Win For Landlords

By Georgia Kromrei

Law360 (August 9, 2024, 9:02 PM EDT) -- Attorneys believe the Federal Circuit's decision Wednesday to reverse a ruling on the COVID-19 federal eviction moratorium is part of a growing trend to consider whether landlord-tenant regulations are a physical taking, and it could change the way federal agencies weigh new programs.



Demonstrators call for an extension to New York's pandemic-era eviction ban at a protest in Brooklyn on Aug. 19, 2021. A recent Federal Circuit ruling could be a meaningful deterrent to eviction moratorium policies and rent control, attorneys say. (NDZ/STAR MAX/IPx)

The idea that the ruling might deter agencies from enacting programs was first posed by U.S. Circuit Judge Timothy B. Dyk, who wrote in his 32-page dissenting opinion in *Darby Development Company Inc. v. U.S.* that the "specter of takings liability" would change how government agencies weigh their actions.

Attorneys who focus on property rights not only agree but applaud that outcome. Real estate attorneys say the decision should make agencies think twice about implementing policies that would amount to a taking under the Fifth Amendment.

There are many such policies on the table to regulate property owners' assets. The multifamily market has in recent years seen a resurgence of **rent control** policies. Apartments were also subject to federal,

state and local limits on evictions during the pandemic. The Federal Housing Finance Agency recently made tenant protections a **condition** of federally-backed financing. In July, President Joe Biden **proposed** revoking federal tax breaks if large landlords do not adhere to a 5% cap on annual rent increases.

The decision in Darby could be a meaningful deterrent for all of those policies, to which Mike Berger, senior counsel in Manatt Phelps & Phillips LLP real estate and appellate practice, said, "Bravo."

"All federal programs should be viewed in that light," Berger said. "That's the way it ought to be."

Groups that lobby on behalf of the housing industry, such as the National Association of Homebuilders, which filed an amicus brief in Darby, were also pleased with the appellate court's reasoning. Tom Ward, vice president for litigation and legal services at NAHB, said the decision could help to guard against federal rent control.

"We clearly would think, if you're going to try and do something like [federal rent control], why would you not have in the back of your mind, 'We have to make sure we don't violate the takings clause,'" Ward said.

While Darby pertains to an eviction moratorium, not rent control policy, several attorneys said the decision makes other takings cases, including those challenging rent control, more likely to succeed.

"For anyone representing property owners in a takings claim, the Darby decision is a helpful, favorable decision," said Andrew Vail, co-chair of the real estate and hospitality litigation practice at Jenner & Block LLP.

Key to the legal landscape going forward is the appellate court's opinion that *Yee v. City of Escondido* is not the only road map for cases involving takings claims.

In many decisions involving multifamily property rights, courts have conducted a balancing test under *Yee v. City of Escondido*, a 1992 U.S. Supreme Court decision that found a rent control policy applied to a mobile home park was not a physical taking. In Darby, the majority decided that *Yee* was "distinguishable and does not control" because the rent control policies in that case allowed for eviction for nonpayment of rent.

The court's analysis is part of a larger trend, according to Daniel Weiss, co-chair of Jenner & Block's real estate and hospitality practice. Weiss said that he has noticed that courts are recently more willing to analyze restrictions on property use as physical takings.

"In a lot of judicial decisions in the field of apartments and rent ... there had been a very reflexive response that everything was covered by the *Yee* case, and by and large those didn't come out on the property owners' side," Weiss said. "Darby is part of a growing willingness on the part of courts to view this as physical takings."

That means some pending lawsuits challenging rent control — a topic the U.S. Supreme Court has yet to take up directly — may have a better shot if they are **granted certiorari**. The ruling in Darby may also make it more likely that more such lawsuits will be filed.

Those cases are "certainly not going away," said Berger, who has argued four cases before the Supreme Court. According to Berger, the Supreme Court in property rights cases routinely refers to the concept of the "bundle of sticks," the components that, when taken together, create the legal framework for property ownership.

"The right to exclude is the most important of the sticks in the bundle. If you take that away, there's a price attached to it," Berger said. "For people on the regulatory side who are aghast at decisions like [Darby], and think they'll have adverse impact, they haven't been paying attention."

--Editing by Haylee Pearl and Drashti Mehta.

