Spotlight on NAHB Litigation

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David Jaffe
Vice President, Construction Liability
202-266-8317 or 800-368-5242,
ext. 8317

Thomas Ward
Vice President, Litigation
202-266-8230 or 800-368-5242,
ext. 8230

Amy Chai
Assistant Vice President, Legal Advocacy
202-266-8232 or 800-368-5242,
ext. 8232

Felicia Watson
Assistant Vice President, Construction Liability & Research
202-266-8229 or 800-368-5242,
ext. 8229

Jeffrey Augello
Assistant Vice President, Association Counsel
202-266-8490 or 800-368-5242,
ext. 8490

Devala Janardan
Senior Counsel
202-266-8335 or 800-368-5242,
ext. 8335

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On Sept. 4, 2020, the U.S. Centers for Disease Control and Prevention (CDC) issued a nationwide order that keeps millions of U.S. renters from being evicted through Dec. 31, 2020. NAHB members are deeply concerned that the CDC Order will result in negative economic consequences without dedicated funding for rental assistance.

To be eligible for the eviction moratorium, a tenant must sign a declaration under penalty of perjury and provide it to their landlord. By signing the form, the tenant is indicating he or she satisfy the following five factors:

1) The individual has used best efforts to obtain all available government assistance for rent or housing;

2) The individual either:

- Expects to earn no more than $99,000 in annual income for calendar year 2020 (or no more than $198,000 if filing a joint tax return);
- Was not required to report any income in 2019 to the U.S. Internal Revenue Service; or
- Received an Economic Impact Payment (stimulus check) pursuant to Section 2201 of the CARES Act;

3) The individual is unable to pay the full rent or make a full housing payment due to substantial loss of household income, loss of compensable hours of work or wages, a lay-off, or extraordinary out-of-pocket medical expenses;

4) The individual is using best efforts to make timely partial payments that are as close to the full payment as the individual's circumstances may permit, taking into account other nondiscretionary expenses;

and

5) Eviction would likely render the individual homeless — or force the individual to move into and live in close quarters in a new congregate or shared living setting — because the individual has no other available housing options.

The CDC Order does not relieve any individual of any obligation to pay rent and allows the landlord to collect fees, penalties and interest at the end of the moratorium.

To date, two lawsuits have been filed challenging the CDC's Order. In federal court in Georgia a group of small landlords and the National Apartment Association filed suit claiming, among other things, the CDC acted beyond its authority and its order is arbitrary and capricious. Furthermore, the plaintiffs claim the CDC Order unconstitutionally denied them access to the courts and violates the Tenth Amendment.

In Tennessee, a group of larger businesses has also filed suit in federal district court. The Tennessee plaintiffs make mainly constitutional claims. They claim, among others, a violation of the Takings Clause, due process, the Tenth Amendment and the right to access the courts.

NAHB Staff is following these cases, and others that may be filed around the country.

CLEAN WATER ACT

The Clean Water Act provides the federal government with two main avenues to regulate builders – when builders discharge dredge or fill material into waterbodies (including wetlands) and/or when builders discharge other pollutants (including stormwater) into waterbodies. Home builders and developers are impacted whenever the government expands its jurisdiction over waterbodies, or makes it more difficult to legally discharge into them.

In 2015, the Environmental Protection Agency ("EPA") and U.S. Army Corps of Engineers ("Corps") developed the "Clean Water Rule" that defined the Clean Water Act term "waters of the United States." Numerous lawsuits ensued and several courts found that rule was procedurally deficient. In addition, the District Court in South Carolina found that EPA had exceeded its Clean Water Act authority in developing the rule.

Then in January 2020, the EPA issued the new "Navigable Waters Protection Rule" (NWPR) which redefines the term "waters of the United States." Numerous lawsuits ensued. These lawsuits were filed by states and environmental groups.

NAHB, as part of a coalition, has tried to intervene in four lawsuits to defend the NWPR. The Association has been granted intervention in two of the cases, denied intervention in one, and the fourth court has not ruled on our intervention. Furthermore, the Northern District of California has denied the plaintiffs motion to preliminarily halt the NWPR, while the Colorado District Court has stopped the application of the rule in the state of Colorado. The Colorado District Court's decision has been appealed to the Tenth Circuit Court of Appeals and NAHB's coalition is participating in that appeal.

Over the next few months, the various courts will accept the parties briefs and hear oral arguments concerning the legality of the NWPR.

IMMIGRATION

On occasion, there are legal issues that fall outside of our traditional focus areas.

This high-profile case concerning the Deferred Action for Childhood Arrivals enforcement policy involves important administrative law principles, as well as the substantive immigration issue and impact to the current construction industry labor shortage.

DACA recipients work in the construction industry - an industry with a significant immigrant workforce - and provide much-needed labor for our industry.

The Court must decide whether this case is judicially reviewable, or whether it falls under an Administrative Procedure Act exception that does not allow a court to consider actions "committed to agency discretion."

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NAHB's position is that all government actions should be reviewable in the courts, and that any exceptions to this rule must be very narrow.

NAHB developed and led a coalition with the Real Estate Roundtable and the Essential Worker Immigration Coalition to file a brief in support of the respondents, and filed a brief on Oct. 4, 2019. The NAHB coalition brief provided the Court with information on the important role that immigrants, and in particular DACA recipients, play in supplying labor to the construction industry at a time when labor is in very tight supply.

Oral argument was held Nov. 12, 2019, and the Supreme Court issued its opinion on June 18. The Court held that the Trump Administration's action to rescind DACA is judicially reviewable and that the action was arbitrary and capricious and therefore invalid. DACA therefore stays in place pending further litigation or changes by the administration in line with the Court's opinion.

PAYCHECK PROTECTION PROGRAM (PPP)

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Congress established the Paycheck Protection Program (PPP) through the CARES Act to quickly extend funds to small businesses to retain their employees during the economic crisis brought on by the COVID-19 pandemic. While Congress amended an existing loan program in the Small Business Act, the CARES Act expressly expanded the eligibility of the program to "any business concern." Nonetheless, the SBA issued an interim final rule that imposed a pre-existing regulation and guidance document that limited eligibility for certain businesses, including "passive businesses owned by developers and landlords that do not actively use or occupy the assets acquired or improved with the loan proceeds,: and "speculative businesses" that include "building homes for future sale." 13 C.F.R. § 120.110 and the SBA Standard Operating Procedure.

To address the problem, NAHB has pursued a multipronged approach: appeal to Congress to include legislative text in its next relief package that assures the eligibility of all NAHB members; urge the Administration to cease applying SBA's eligibility guidelines; and initiate litigation to apply pressure to both branches and/or achieve a favorable opinion in the courts.

Other industries have also been excluded from PPP consideration because of the SBA's imposition of these rules, including the gaming industry and businesses that "present live performances of a prurient sexual nature" (adult entertainment clubs). However, the gaming industry was able to secure an exception from the SBA's rule. The adult entertainment clubs litigated and in May were granted a preliminary injunction preventing SBA from imposing its regulations on the PPP program for its

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industry. *DV Diamond Club of Flint, et al. v. U.S. Small Business Administration, et al*. No. 20-cv-10899 (E.D. Mich. May 11, 2020). The court granted the preliminary injunction on the grounds that the SBA likely violated the Administrative Procedure Act (APA) by applying its regulation in contravention of the plain language of the statute - exactly the same arguments NAHB is raising in its litigation.

It was the success of the adult entertainment clubs in achieving a preliminary injunction that impelled NAHB to seek similar relief in the same forum. By filling the lawsuit, NAHB hopes to capitalize on the club's success, either through settlement or through full litigation to a court decision if necessary. Despite the district court's clear statement that SBA's application of its eligibility rules is unlawful, the agencies have not given up. They have appealed the district court's decision to the U.S. Court of Appeals for the Sixth Circuit, which denied the government's request for a stay of the district court's order.

NAHB, joined by the HBA of Michigan and the HBA of Southeastern Michigan, filed a complaint on June 30, 2020. The government filed a motion to dismiss on September 18, and a hearing is set for the end of January 2021.

SOFTWOOD LUMBER

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In October 2015, a nine-year softwood lumber agreement between the United States and Canada, which imposed punitive tariffs and volume restraints against imported wood from Canada expired. Under the U.S.-Canada Softwood Lumber Agreement, the parties included a one-year "cooling off" period after the agreement's expiration in which no new trade disputes could be filed. That period ended in October 2016.

Negotiations on a new agreement were unsuccessful and currently, no agreement is in place. In November 2016, the U.S. Lumber Coalition filed a petition with U.S. International Trade Commission ("ITC") requesting the Commission conduct an investigation regarding allegations that Canada has dumped certain Softwood Lumber products into the U.S. market at less than fair market value and that Canada has provided illegal subsidies to the detriment of U.S. producers. The petition also requested that antidumping ("AD") and countervailing ("CVD") duties (i.e. penalties in the form of tariffs) be imposed on certain Softwood Lumber products from Canada.

The Commerce Department and ITC ultimately found in favor of the Coalition and issued a final determination that imports of softwood lumber injured U.S. lumber producers and imposed final CVD and AD duties against Canada averaging about 20%.

Canada appealed on two fronts, first with a request for review under Chapter 19 of the North American Free Trade Agreement ("NAFTA"), and second with a formal request with the World Trade Organization ("WTO") seeking consultations with the U.S. NAHB submitted an amicus brief in support of Canada's NAFTA challenge to the AD and CVD duties, and the NAFTA Panel accepted NAHB's amicus brief.

In September 2019, the NAFTA Panel issued an interim decision and order sending two key issues back to the ITC for further explanation. The Panel questioned the ITC's analysis of the business cycles of

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the lumber industry and the sustainability of Canadian and U.S. lumber. On that basis, the Panel also directed the ITC to relook at its volume determination. The ITC reconsidered its original findings but declined to change its position. The WTO Dispute Settlement Body issued a decision mostly in favor of the US on the AD challenge and issued a decision in favor of Canada on the CVD challenge. Both of these decisions have been appealed but are not likely to be resolved due to disagreements on appointments to the WTO's Appellate Body.

The U.S. has an administrative review process in which the ITC periodically reviews all AD and CVD cases. Softwood lumber was scheduled to go through a review in April, and in its initial notice, the ITC proposed reducing the duties to about 8%. However, the ITC postponed most of the scheduled administrative reviews until late November 2020.