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Opinion No. 08-18

Requiring Realtors and Landlords to Ascertain Immigrant Status

QUESTIONS

1. May the State require realtors and landlords to screen potential tenants for legal immigration status in Tennessee or the United States?

2. May the State penalize realtors or landlords for knowingly renting or selling property to illegal aliens?

3. May the State revoke a realtor's or landlord's license for knowingly renting, selling, or leasing to an illegal alien?

4. If illegal aliens are breaking both state and federal law and the work they are performing would be an illegal activity, may the State confiscate their earnings or their property that came from the illegal activity?

OPINIONS

1., 2. and 3. Federal law does not expressly preempt the State's authority to take the actions listed in the first three questions. Because, however, federal law prohibits transporting and harboring illegal aliens and prescribes specific penalties and imprisonment for transporting and harboring, federal and state law might conflict to the extent that state laws might be preempted.

4. Whether the State may confiscate earnings or property that come from any illegal activity by an illegal alien will depend heavily on the definition of "illegal activity." If the definition were based solely upon the alien's immigration status, it would likely be preempted by federal law.

ANALYSIS

This Office has recently discussed the relationship between state and federal law on the subject of immigration. Op. Tenn. Att'y Gen. 07-64 (May 10, 2007) and Op. Tenn. Att'y Gen. 07-69 (May 15, 2007). These opinions point out that the United States Supreme Court, while recognizing that the "[p]ower to regulate immigration is unquestionably exclusively a federal power," has found

that there is no *per se* preemption of state statutes where aliens are a subject matter of the legislation. "[S]tanding alone, the fact that aliens are a subject of a state statute does not render it a regulation of immigration, which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." *DeCanas v. Bica*, 424 U.S. 351, 355 (1976).[1]

1. Federal Primacy in Immigration Law

The central question is whether federal law on immigration would preempt Tennessee statutes regulating the landlord/tenant and realtor/buyer relationship. Preemption may be either express or implied. *Olde Discount Corp. v. Tupman*, 1 F.3d 202, 216 (3d Cir. 1993). If no express preemption provision is included in the federal law, the state statute may still be preempted. "[T]he Supremacy clause of the United States Constitution invalidates state laws that 'interfere with or are contrary to' federal law." *New Jersey Payphone Ass'n, Inc. v. Town of West New York*, 299 F.3d 235, 241-42 (3d Cir. 2002) (quoting *Gibbons v. Ogden*, 22 U.S. 1, 211 (1824)).

The Tenth Circuit Court of Appeals summarized the constitutional doctrine of preemption in the following words:

> Congress' power to preempt state law arises from the Supremacy Clause, which provides that the Laws of the United States shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, cl.2. Congressional intent is paramount in preemption analysis. *See Mount Olivet Cemetery Ass'n v. Salt Lake City*, 164 F.3d 480, 486 (10th Cir. 1998). Preemption may be either (1) expressed or (2) implied from a statute's structure and purpose. *See Jones v. Rath Packing Co*., 430 U.S. 519, 525, 97 S. Ct. 1305, 51 L.Ed.2d 604 (1977). Nevertheless, "[c]onsideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725, 746, 101 S. Ct. 2114, 68 L.Ed.2d 576 (1981). Accordingly, in the absence of express preemptive language, federal courts should be "reluctant to infer pre-emption." *Building & Constr. Trades Council of Metro. Dist. v. Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 224, 113 S. Ct. 1190, 122 L. Ed. 2d 565 (1993).

United States v. Vasquez-Alvarez, 176 F.3d 1294, 1297 (10th Cir. 1999) (footnote omitted).

Because Congress has passed extensive legislation on the subject of immigration, we must examine the federal law to determine whether the regulation your questions suggest would be expressly or impliedly preempted by federal law. We are not aware of a federal immigration law regulating the landlord-tenant or the realtor-buyer business relationship. Federal law, however, does

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[1]As one federal district court has cautioned in a recent case, however, additional federal immigration laws passed by Congress after the Supreme Court decided *DeCanas v. Bica* have further narrowed the states' authority to legislate on certain immigration matters. *Lozano v. City of Hazelton,* 496 F. Supp. 2d 477, 524 (M.D. Pa. 2007).

address and penalize "harboring of illegal aliens." 8 U.S.C. § 1324.[2] As noted in a previous opinion, 8 U.S.C. § 1324 does not include language expressing a clear intent to preempt state or local laws on the same subject, in contrast to the language found in 8 U.S.C. 1324a. Op. Tenn. Att'y Gen. 07-69. Thus, 8 U.S.C. § 1324 would not expressly preempt state legislation on the same subject. There remains the possibility, however, that state regulation might conflict with the federal law to the extent that the state statute would not survive a constitutional challenge based upon preemption. As the discussion below demonstrates, a trend in recent cases is to find preemption.

2. Recent Challenges to Municipal Ordinances Regulating an Illegal Alien's Access to Housing and a Realtor's or Landowner's Ability to Rent, Lease or Sell Property

Nationwide, several cities have passed ordinances to control landlords and realtors who rent or sell to illegal aliens and to control those tenants who allow illegal aliens to reside with them. Several ordinances characterize the housing of illegal aliens as "harboring," a term used in federal law. Realtors, landlords and tenants have challenged the ordinances, asserting that they are unconstitutional under the United States Constitution. Some lawsuits allege that the ordinances in question violate the United States Constitution under the Supremacy Clause, the Equal Protection Clause, constitutional procedural and substantive due process requirements and the constitutional right to privacy. In other cases, the challenges are asserted under state law, *e.g.*, that a municipality's adoption of such an ordinance is outside its authority.

Requiring realtors and landlords to ascertain a prospective buyer or tenant's legal right to reside in the United States is the subject of housing ordinances in at least six states - California, Georgia, Missouri, New Jersey, Pennsylvania and Texas. Lawsuits are pending in each of these states challenging the ordinances in state and federal courts. The lawsuits are at various stages.

a. *Garrett v. City of Escondido*, 465 F. Supp.2d 1043 (S.D. Cal. 2006). On December 15, 2006, the court approved an agreed order permanently enjoining the City of Escondido from enforcing "An Ordinance of the City of Escondido, California Establishing Penalties for the Harboring of Illegal Aliens in the City of Escondido."

b. *Lozano v. City of Hazleton*, 496 F.Supp. 2d 477 (M.D., Pa.). On July 25, 2007, the court issued its decision declaring the City of Hazelton's ordinance regulating the housing and employment of illegal aliens unconstitutional and permanently enjoining its enforcement.

c. *Reynolds v. City of Valley Park*, MO, 06-CC-3802 (St. Louis County Circuit Court, filed ___________). On March 12, 2007, the court issued its opinion finding that the City of Valley Park's ordinance penalizing property owners or others from leasing or renting property to an illegal alien and setting penalties for those who commit such acts is void. The court permanently enjoined enforcement of this and like ordinances.

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[2]The term "harbor," as used in 8 U.S.C.§ 1324(a)(3), means affording shelter to such aliens and is not limited to clandestine sheltering only. *United States v. Acosta De Evans*, 531 F.2d 428, 429 (9th Cir. 1976), *cert. denied*, 429 U.S. 836 (1976).

d. *Riverside Coalition of Business Persons and Landlords v. Township of Riverside*, No. 1:06-cv-03842-RMB-AMD (N.J. Super. Ct. Law Div., filed October 18, 2006). Plaintiffs seek declaratory and injunctive relief to invalidate and enjoin the Riverside Township Illegal Immigration Relief Act (Riverside Ordinance) making it unlawful for any property owner to rent, lease or allow their property to be used by an illegal immigrant.

e. *Stewart, Inc. v. Cherokee County Georgia*, No. 1:07-cv-00015 (N.D. Ga., filed January 4, 2007). On January 4, 2007, the court approved the "Consent Order Granting Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction and For Stay." The order prohibits the enforcement of a Cherokee County ordinance whose stated purpose was to establish penalties for the harboring of [selling, renting or leasing property to] illegal aliens in Cherokee County.

f. *Villas at Parkside Partners v. City of Farmers Branch*, No. 3:06-cv-2371-L, 2007 WL 1774660 (N.D. Tex.). On June 19, 2007, the court issued its order enjoining the enforcement of Farmers Branch City's ordinance adopting citizenship and immigration certification requirements for apartment complexes.

Lozano demonstrates the difficulties of constructing a statute that will not be deemed preempted by federal law. *Lozano* deals with ordinances promulgated by the town of Hazleton, Pennsylvania. The Hazleton ordinance contained "two sets of provisions affecting tenancy in the city. The 'harboring' provision prohibited the housing of certain aliens. Another provision required all occupants of rental units to obtain an 'occupancy' permit." *Lozano*, 496 F.Supp.2d at 530. To obtain an occupancy permit, the applicant would have had to provide the City's Code Enforcement Office with "proof of legal citizenship and/or residency." *Id.* Landlords could not lease or rent to someone who did not have an "occupancy permit." *Id*. The landlord and the tenant would have faced possible fines for noncompliance and, in the case of the landlord, suspension of his rental license. *Id*.[3]

The court found that Hazleton did not have the authority to pass the ordinances and that the ordinance's tenancy provisions violated the Supremacy Clause and were preempted by federal law. *Lozano*, 496 F.Supp.2d at 554. In addition, the court found that the ordinances were a violation of constitutional substantive and procedural due process requirements. *Id.*

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[3]Referring to and quoting from the relevant ordinances, the court in *Lozano* stated:

> If a landlord allows a tenant who does not have an occupancy permit to occupy a rental unit he faces a $1000.00 fine 'for each Occupant that does not have an occupancy permit and $100 per Occupant per day for each day that the Owner or Agent continues to allow each such Occupant to occupy the Rental Unit without an occupancy permit after Owner or Agent is given notice of such violation.' . . . If a tenant has an occupancy permit, but he allows other occupants to reside at the premises who do not have permits, he is in violation of the ordinance and faces the same $1000.00/$100 per occupant per day fine.

Lozano, 496 F. Supp. 2d at 530.

3. Identification of Legal Status of an Illegal Alien

Even without a federal law specifically on the subject or specifically preempting state laws on the subject, federal law could still preempt state statutes with provisions such as those found in Hazelton's ordinances. One significant conflict between state and federal law would be the identification of an illegal alien. The court in *Lozano* pointed out that classification of an alien's status was entirely the prerogative of the federal government and that even individuals who were found to be in the United States illegally might have a legal right to remain. *Lozano*, 496 F.Supp.2d at 530-31.[4]

4. Application of State Forfeiture Laws

Though the State has several forfeiture statutes, only Tenn. Code Ann. §§ 39-11-701, *et seq*. is relevant to this opinion.[5] Tenn. Code Ann. § 39-11-703 specifies what criminal proceeds are subject to forfeiture and states, in part, as follows:

> Any property, real or personal, directly or indirectly acquired by or received in violation of *any statute* or as an inducement to violate any statute, or any property traceable to the proceeds from the violation, is subject to judicial forfeiture, and all right, title and interest in any such property shall vest in the state upon commission of the act giving rise to forfeiture.

Tenn. Code Ann. § 39-11-703(a) (emphasis added).[6] The plain language of the statute provides that property acquired by or received in violation of any statute is subject to forfeiture, and there is

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[4]The court in *Lozano* emphasized this point by describing several categories of persons who might not be technically lawfully present in the United States but still have permission to live and work in the United States. The court stated:

> [T]he following can receive permission from the federal government to work in the United States: 1) aliens who have completed an application for asylum or withholding of removal; 2) aliens who have filed an application for adjustment of status to lawful permanent resident; 3) aliens who have filed an application for suspension of deportation; 4) aliens paroled into the United States temporarily for emergency reasons or reasons deemed strictly in the public interest; 5) aliens who are granted deferred action. . . . Additionally, aliens who have a final order of deportation against them but are released on an order of supervision may obtain permission to work. . . . In addition, aliens who have final orders of removal against them may be ordered released from detention by the courts if there is no likelihood of their removal in the foreseeable future. . . . A person who is proceeding through the procedure to adjust his immigration status but who currently lacks immigration status frequently will not have any documents to indicate where he has a valid claim to remain in the country.

Lozano, 496 F. Supp. 2d at 530-31.

[5]Other forfeiture statutes include Tenn. Code Ann. § 39-17-420 (drug forfeitures); § 39-17-505 (gambling devices); and § 39-12-206 (racketeering).

[6]The subsequent statutory provision designates what property is exempt from forfeiture. Tenn. Code Ann. § 39-11-704.

nothing within the statutory scheme to suggest a legislative intent to exclude illegal aliens from its application.

Your question assumes that the illegal alien is in violation of both state and federal law and that the work they are doing is an "illegal activity." Thus, as a general matter, the State could pursue forfeiture of the illegal alien's earnings depending on the nature of the "illegal activity." For instance, if the work they are doing is engaging in illegal gambling or selling controlled substances, then the earnings derived therefrom would be subject to forfeiture.[7] If the work they are doing is only illegal because of their immigration status, however, it is possible that the State would be preempted by federal law from pursuing forfeiture of the earnings. While not all state laws related to immigrants are preempted by federal law, state laws attempting to regulate the employment of immigrants might be subject to a preemption challenge as Congress has passed extensive legislation regulating the area. *See* 8 U.S.C. § 1324a (regulating the employment of unlawful aliens); *see also* Op. Tenn. Att'y Gen. 07-64 (May 10, 2007) (noting that legislation which would prohibit the knowing employment of illegal aliens would be preempted by 8 U.S.C. § 1324a). Ultimately, determining whether the forfeiture would be preempted is not possible without a specific statute to analyze.

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[7]It should be noted that if the property is already subject to a forfeiture proceeding in a federal action, the federal court will maintain exclusive jurisdiction over the property. *Penn Gen. Cas. Co. v. Pennsylvania ex rel. Schnader,* 294 U.S. 189, 195 (1935).

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