S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

March 6, 2009

Opinion No. 09-24

Lengthening Notice Period for Foreclosures

QUESTION

May the legislature constitutionally amend the foreclosure laws to extend publication of notice of foreclosure from twenty to ninety days?

OPINION

Assuming the change applies to foreclosures to enforce a mortgage entered into before the effective day of the law, this extension is subject to challenge under the Contract Clauses of the United States and Tennessee Constitutions. The most authoritative case on this issue is *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398, 54 S.Ct. 231, 78 L.Ed. 413 (1934). In that case, the United States Supreme Court upheld a Minnesota law authorizing courts to delay foreclosures for up to two years from its effective date. Ideally, to be defensible under *Blaisdell*, a law extending the advertisement period before foreclosure should articulate the emergency to which it responds. A retroactive extension of the notice period would clearly be defensible under *Blaisdell* if it is drafted to last only as long as the emergency to which it responds. On the other hand, we think it can be argued that fundamental changes in the mortgage industry, particularly the practice of selling rights under mortgages soon after they are executed, justify a permanent extension of the advertisement period. Further, a seventy-day extension is far less burdensome than the delay authorized under the Minnesota law in *Blaisdell*, and it does not interfere with the underlying terms of the contract. For all these reasons, we think a court would conclude that the General Assembly may permanently extend the advertisement period for seventy days in response to current economic conditions, even though that extension impairs a lender's contract rights.

ANALYSIS

This opinion addresses the constitutionality of legislation extending the minimum period a lender must advertise before it may foreclose on mortgaged property. The requestor does not ask about a specific bill but indicates that the question concerns pending legislation. House Bill 99 would extend the advertising period before foreclosure. Current law provides as follows:

> (a) In any sale of land to foreclose a deed of trust, mortgage or other lien securing the payment of money or other thing of value or under judicial orders or process, advertisement of the sale shall be made at least three (3) different times in some newspaper published in the county where the sale is to be made.
>
> (b) The first publication shall be at least twenty (20) days previous to the sale.

Tenn. Code Ann. § 35-5-101(a) and (b). House Bill 99 would delete subsection (b) and substitute the following:

> (b) The first publication shall be at least ***ninety (90)*** days previous to the sale.

House Bill 99, Section 1 (emphasis added). If passed, the legislation would take effect upon becoming law. *Id.* at § 2.

As the bill is written, it would apply only to foreclosures made under a loan entered into after the effective date of the bill. Tenn. Code Ann. § 35-5-101(d) provides:

> ***Nothing in this section shall be construed as applying to any notice published in accordance with any contract entered into heretofore, and expressed in a mortgage, deed of trust or other legal instruments.***

(Emphasis added). The bill does not amend this section. As written, therefore, the bill would operate only on mortgages entered into after the effective date of the bill. No constitutional provision would prevent the General Assembly from extending the notice period prospectively in this manner.

We assume, however, that the request refers to a bill that would apply to any foreclosure initiated after the effective date of the bill, including those enforcing contracts made before the effective date of the bill. That change would affect remedies under mortgage loan agreements entered into before its effective date.

There is a strong presumption in favor of the constitutionality of acts passed by the legislature. *State v. Pickett*, 211 S.W.3d 696, 700 (Tenn. 2007), *cert. denied*, __ U.S. __, 128 S.Ct. 436, 169 L.Ed.2d 305 (2007). The party attacking the constitutionality of a statute must bear a heavy burden in establishing some constitutional infirmity of the act in question. *Gallaher v. Elam*, 104 S.W.3d 455 (Tenn. 2003). Article I, Section 20, of the Tennessee Constitution states "[t]hat no retrospective law, or law impairing the obligations of contracts, shall be made." Similarly, Article I, Section 10, of the United States Constitution provides that "[n]o state shall . . . pass any . . . law impairing the obligation of contracts[.]" The Tennessee Supreme Court has stated that the meaning of the federal and state constitutional provisions is identical. *First Utility District of Carter County v. Clark*, 834 S.W.2d 283, 287 (Tenn. 1992); *Paine v. Fox*, 172 Tenn. 290, 112 S.W.2d 1 (Tenn. 1938).

Article I, Section 20, of the Tennessee Constitution prohibits laws "which take away or impair vested rights acquired under existing laws or create a new obligation, impose a new duty,

or attach a new disability in respect of transactions or considerations already passed." *Doe v. Sundquist*, 2 S.W.3d 919, 923 (Tenn. 1999) (quoting *Morris v. Gross*, 572 S.W.2d 902 (Tenn. 1978)). Among the main tests as to whether the obligation of a contract has been impaired are whether the value of the contract or security has been lessened, *Lake County v. Morris*, 160 Tenn. 619, 28 S.W.2d 351 (1930), or whether the right in full existing at the time the contract was executed has been diminished. *Hannum v. McInturf*, 65 Tenn. 225 (1873). The laws affecting enforcement of a contract, and existing at the time and place of its execution, enter into and form a part of that contract. *Kee v. Shelter Insurance*, 852 S.W.2d 226, 228 (Tenn. 1993). In that case, the Tennessee Supreme Court found that an extension in the statute of limitations could not constitutionally apply to a claim that had already accrued under an insurance contract before the extension was passed.

In determining whether a particular state regulatory measure is constitutionally valid under the federal Contract Clause, federal courts generally apply a three-pronged test. *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 410-13, 103 S.Ct. 697, 704-05, 74 L.Ed.2d 569, 580-81 (1983). The threshold inquiry is "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship." *Allied Structural Steel Co. v. Spannaus*, 428 U.S. 234, 244, 98 S.Ct. 2716, 2722, 57 L.Ed.2d 727 (1978). In determining the extent of the impairment, the courts are to consider whether the industry the complaining party has entered into has been regulated in the past. *Id*. at 242 n. 13, 98 S.Ct. at 2721 n. 13. Where, in light of all facts and circumstances, including past regulation and the terms of the agreement, a change in state law is foreseeable, the change does not impair the parties' reasonable expectations. *Energy Reserves Group*, 103 S.Ct. at 707. The Tennessee Supreme Court relied on similar factors to determine whether a change in the process of accessing adoption records impaired a "vested right" in violation of Article I, Section 20, of the Tennessee Constitution. *Doe v. Sundquist*, 2 S.W.3d 919, 924 (Tenn.1999). The Court inquired, first, whether the public interest is advanced or retarded; second, whether the retroactive provision gives effect to or defeats the *bona fide* intentions or reasonable expectations of the affected persons; third, whether the statute surprises persons who have long relied on a contrary state of the law; and finally, the extent to which a statute appears to be procedural or remedial.

The first question, then, is whether, in light of all the facts and circumstances, the change in the law would be a substantial impairment of a contractual relationship between the lender and the borrower. The law is procedural in nature, affecting a statutory remedy rather than underlying contractual obligations. Further, to the extent that the change protects owners, it can be argued that it advances the public interest. Nevertheless, we think a court would conclude that the extension would substantially affect the value of the contract to the lender. Under the current law, a lender may complete a foreclosure and recover its security in about three weeks. The extension would add another ten weeks to this period, with no corresponding benefit to the lender. Further, we think a court would conclude that lenders in Tennessee could not foresee such a retroactive change in the law. Of course, foreclosures have long been subject to statutory regulation in Tennessee. But the current law applies only to mortgages entered into after its effective date. Tenn. Code Ann. § 35-5-101(d). Thus, recent changes in the law have applied prospectively. Further, research indicates that the advertisement period has been "at least twenty days" for at least seventy-five years. Annotated Code of Tennessee 1934, § 7793. For these

reasons, we think a court would conclude that extending the term would retroactively impair mortgage contracts entered into before the effective date of the change.

Under the federal Contract Clause, if the challenged regulatory measure does impair a contract, then the second inquiry is whether the regulatory measure came into being pursuant to a significant and legitimate public purpose, *United States Trust Co. v. New Jersey*, 431 U.S. 1, 22, 97 S.Ct. 1505, 1517, 52 L.Ed.2d 92 (1977), *rehearing denied,* 431 U.S. 975, 97 S.Ct. 2492, 53 L.Ed.2d 1073 (1977), such as the remedying of a broad and general social or economic problem. *Allied Structural Steel Co.,* 428 U.S. at 247, 249, 98 S.Ct. at 2723-2725. Once a legitimate public purpose has been identified, the next inquiry is whether the adjustment of "the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purposes justifying [the legislation's] adoption." *United States Trust Co.*, 431 U.S. at 22, 97 S.Ct. at 1518. Furthermore, "as is customary in reviewing economic and social regulation, . . . courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." *Energy Reserves Group, Inc*., 459 U.S. at 412-13, 103 S.Ct. at 704-05, 74 L.Ed.2d at 581.

The next question, therefore, is whether the seventy-day extension comes into being pursuant to a significant and legitimate public purpose such as the remedying of a broad and general social or economic problem. Presumably, the purpose of the measure would be to protect borrowers by giving them additional time to renegotiate or refinance a mortgage. We assume the measure is in response to a widespread drop in housing prices, the difficulty of renegotiating a mortgage no longer owned by the original lender, and the difficulty of procuring refinancing in the current credit markets. We think a court would conclude that this is a significant and legitimate public purpose. The question then becomes whether the adjustment of the rights and responsibilities of the lender and the borrower is based upon reasonable conditions and is of a character appropriate to the public purposes justifying the extension.

The most authoritative case is *Home Building & Loan Association v. Blaisdell,* 290 U.S. 398, 54 S.Ct. 231, 78 L.Ed. 413 (1934). In that case, the United States Supreme Court upheld the Minnesota Mortgage Moratorium Law against Contract Clause and Due Process challenges. The law declared an emergency to exist because of economic conditions and allowed property owners whose property had been sold at foreclosure to petition a court to extend the statutory period during which the owners could redeem the property. The law was passed in 1933, and by its terms continued "only during the continuance of the emergency and in no event beyond May 1, 1935." The law required owners to pay lenders the rental value of the property while they remained in possession. The law also stayed any action for a deficiency judgment until the extended redemption period had expired.

The United States Supreme Court affirmed the Minnesota Supreme Court's ruling that upheld the law. The Court stated that the Contract Clause is not absolute, citing a series of cases allowing changes in contractual remedies. The Court also stated that private contracts are subject to the state's sovereign authority to "safeguard the vital interests of its people." 54 S.Ct. at 238-39. The Court concluded that an emergency existed in Minnesota that furnished a "proper occasion for the exercise of the reserved power of the state to protect the vital interests of the community." 54 S.Ct. at 242. The Court found that the legislation was for the protection of a

basic interest of society, and that the relief afforded did not "appear to be unreasonable." *Id.* The Court noted that, under the law, the lender maintained the right to obtain possession and obtain a deficiency judgment if the owner failed to redeem within the extended period. The Court also pointed out that the owner was required to pay the rental value of the property during the extended period and that the lender, therefore, was not "left without compensation for the withholding of possession." *Id.* at 243. Finally, the Court noted that the legislation was temporary in operation and that the relief the statute authorized "could not validly outlast the emergency or be so extended as virtually to destroy the contracts." *Id.* The Court briefly noted that, for the same reasons, the law did not violate lenders' Due Process rights. *Id.*

Under *Blaisdell*, a law extending the advertisement period before foreclosure must be in response to an emergency. The law itself should describe the emergency. Like the United States Supreme Court in *Blaisdell*, we think a court would defer to the General Assembly's findings that present economic conditions constitute an emergency justifying some legislative impairment of mortgage remedies. In *Blaisdell*, the Court also relied on the temporary nature of the remedy. A retroactive extension of the notice period would clearly be defensible under *Blaisdell* if it is drafted to last only as long as the emergency to which it responds. At the same time, the United States Supreme Court has upheld a federal law permanently regulating withdrawals of shares from building and loan associations. *Veix v. Sixth Ward Building & Loan Ass'n of Newark, N.J.*, 310 U.S. 32, 60 S.Ct. 792, 84 L.Ed. 1061 (1940). The Court cited *Blaisdell* but found the fact that the withdrawal regulation was permanent to be insignificant to its Contract Clause analysis. The Court noted that the legislation was passed in response to withdrawals in 1932, but that the weakness in the financial system brought to light by the emergency remained. The Court found that, while the 1932 legislation was in response to an emergency, it did not need to be temporary. Similarly, we think it can be argued that fundamental changes in the mortgage industry, particularly the practice of selling rights under mortgages soon after they are executed, justify a permanent extension of the advertisement period.

Further, a seventy-day extension is far less burdensome than the delays authorized under the Minnesota law in *Blaisdell*. *See, e.g.*, *Sinclair v. Sinclair*, 654 A.2d 438 (Me. 1995) (new statutory notice of foreclosure requirement, even if it added thirty days to grace period in mortgage executed before the statute's effective date, did not substantially impair the lenders' rights); *State ex rel Lichtscheidl v. Moeller,* 189 Minn. 412, 249 N.W. 330 (1933) (statute authorizing a sheriff to adjourn mortgage foreclosure sales for up to ninety days was valid against a Contract Clause challenge; there was no showing that the statute substantially obstructed or retarded enforcement or diminished the value of the mortgage contracts); *State v. All Property and Casualty Insurance Carriers Authorized and Licensed to do Business in the State of Louisiana,* 937 So.2d 313 (La. 2006) (statute retroactively extending one-year statute of limitations on insurance claims arising from Hurricanes Katrina and Rita valid against Contract Clause challenge). At the end of the advertisement period, the lender may proceed with the foreclosure and will be entitled to the remedies provided under the contract. Presumably, the lender's remedies under the contract will include interest payments that accrue during the advertisement period. It can be argued, then, that the lender is entitled to compensation for the delay. For all these reasons, we think a court would conclude that the General Assembly may permanently extend the advertisement period for seventy days in response to current economic conditions, even though that extension impairs a lender's contract rights.

ROBERT E. COOPER, JR.
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

ANN LOUISE VIX
Senior Counsel

Requested by:

Honorable Gary Moore
State Representative
35 Legislative Plaza
Nashville, TN 37243