



**MEMORANDUM OF LAW**

**TO:** Sheriff Warren C. Evans

**FROM:** Kate Ben-Ami, Legal Counsel

**RE:** Federal law, commonly known as TARP Act, preempts state law governing foreclosure sales.

**DATE:** January 30, 2009

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You have asked if state law authorizing local county sheriffs to conduct mortgage foreclosure sale is preempted by the "Emergency Economic Stabilization Act of 2008".

**A. STATE LAW**

M.C.L.A. Section 600.3216 states that "the sale shall be at public sale, between the hour of 9 o'clock in the forenoon and 4 o'clock in the afternoon, at the place of holding the circuit court within the county in which the premises to be sold, or some part of them, are situated, and shall be made by the person appointed for that purpose in the mortgage, or by the sheriff, undersheriff, or a deputy sheriff of the county, to the highest bidder."

M.C.L.A. Section 600.3204 states that:

- (1) A party may foreclose a mortgage by advertisement if all of the following circumstances exist:
  - (a) A default in a condition of the mortgage has occurred, by which the power to sell became operative.
  - (b) An action or proceeding has not been instituted, at law, to recover the debt secured by the mortgage or any part of the mortgage; or, if an action or proceeding has been instituted, the action or proceeding has been discontinued; or an execution on a judgment rendered in an action or proceeding has been returned unsatisfied, in whole or in part.
  - (c) The mortgage containing the power of sale has been properly recorded.
  - (d) The party foreclosing the mortgage is either the owner of the indebtedness or of an interest in the indebtedness secured by the mortgage or the servicing agent of the mortgage.

(2) If a mortgage is given to secure the payment of money by installments, each of the installments mentioned in the mortgage after the first shall be treated as a separate and independent mortgage. The mortgage for each of the installments may be foreclosed in the same manner and with the same effect as if a separate mortgage were given for each subsequent installment. A redemption of a sale by the mortgagor has the same effect as if the sale for the installment had been made upon an independent prior mortgage.

(3) If the party foreclosing a mortgage by advertisement is not the original mortgagee, a record chain of title shall exist prior to the date of sale under section 3216 evidencing the assignment of the mortgage to the party foreclosing the mortgage.

These two sections of the Revised Judicature Act of 1961 govern the Sheriff's conduct of mortgage foreclosure sales.

## B. FEDERAL LAW

On October 3, 2008, the U.S. Congress enacted the "Emergency Economic Stabilization Act of 2008" into law. Its purpose is to provide authority to the Treasury Secretary to restore liquidity to the U.S. Financial system and to **ensure the economic well being of Americans**. (Emphasis supplied) 12 U.S.C.A. 5219 et. seq.

Title I of the Act authorizes the Secretary to establish a Troubled Asset Relief Program (T.A. R. P.) to purchase troubled assets from financial institutions.

Section 109 addresses foreclosure mitigation efforts. It states that for mortgages and mortgage-backed securities acquired through TARP, the Secretary **must implement a plan** to mitigate foreclosures and to encourage servicers of mortgages to modify loans through Hope for Homeowners and other programs. Additionally, the Secretary may use loan guarantees and credit enhancements to avoid foreclosures.

The Secretary is **required** to coordinate with federal entities that hold troubled assets in an effort to identify opportunities to modify loans, especially where the anticipated recovery on the principal outstanding obligation of the mortgage under the modification is likely to be greater than, on a net present value basis, the anticipated recovery on the principal outstanding obligation of the mortgage through foreclosure.

Clearly, in a City and County where 18% of all homes are abandoned due to foreclosure, the TARP's federal mandate to mitigate foreclosures is welcomed with open arms.

The TARP's purpose to **mitigate foreclosures** is highlighted in many sections of the law:

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- ❖ Section 2. PURPOSES: **The purposes of this Act are ...to protect home values and preserve homeownership...**

- ❖ Section 103. CONSIDERATIONS (3): **In exercising the authorities granted in this Act, the Secretary shall take into consideration the need to help families keep their homes and to stabilize communities....**
- ❖ Section 104. FINANCIAL STABILITY OVERSIGHT BOARD: **There is established the Financial Stability Oversight Board, which shall be responsible for (B) reviewing the effect that programs developed under this Act have in assisting Americans families in preserving home ownership....**
- ❖ Section 116. OVERSIGHT AND AUDITS (a): **The Comptroller General of the United States, shall upon establishment of the TARP, commence ongoing oversight of the ... (A) performance of the TARP in meeting the purposes of this Act, particularly (i) foreclosure mitigation... and**
- ❖ Section 125. CONGRESSIONAL OVERSIGHT PANEL (a): **The Oversight Panel shall submit regular reports to the Congress, to include...(iv) the effectiveness of the foreclosure mitigation efforts....**

### C. FEDERAL PREEMPTION

The United States Supreme Court has set forth three tests that it uses to determine if a state statute has been pre-empted or superseded:

- Whether the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it; **Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 111 S. Ct. 2476, 115 L. Ed. 2d 532, 33 Env't. Rep. Cas. (BNA) 1265, 21 Env'tl. L. Rep. 21127 (1991); Siegel v. American Sav. & Loan Ass'n, 210 Cal. App. 3d 953, 258 Cal. Rptr. 746 (1st Dist. 1989)**
- Whether the federal statutes touch a field in which the federal interest is so dominant that the federal system must be assumed to preclude enforcement of state laws on the same subject; **Com. of Pa. v. Nelson, 350 U.S. 497, 76 S. Ct. 477, 100 L. Ed. 640 (1956), reh'g denied, 351 U.S. 934, 76 S. Ct. 785, 100 L. Ed. 1462 (1956) (involving the question whether the federal Smith Act superseded a state sedition statute, which question was answered in the affirmative) and**
- Whether enforcement of the state statute presents a serious danger of conflict with the administration of the federal program; **Com. of Pa. v. Nelson, 350 U.S. 497, 76 S. Ct. 477, 100 L. Ed. 640 (1956), reh'g denied, 351 U.S. 934, 76 S. Ct. 785, 100 L. Ed. 1462 (1956); People v. Giese, 95 Misc. 2d 792, 408 N.Y.S.2d 693 (Sup. Ct. 1978), order aff'd, 68 A.D.2d 1019, 414 N.Y.S.2d 947 (2d Dep't 1979).**

In Commonwealth of Pennsylvania v. Nelson, 350 U.S. 497, 76 s. Ct. 477, 100 L. Ed. 1462 (1956), Steve Nelson, an acknowledged member of the Communist Party, was convicted in the Court of Quarter Sessions of Allegheny County, Pennsylvania, of a violation of the Pennsylvania Sedition Act and sentenced to imprisonment for twenty years and to a fine of \$10,000 and to costs of prosecution in the sum of \$13,000. The Superior Court affirmed the conviction. 172 Pa.Super. 125, 92 A.2d 431. The Supreme Court of Pennsylvania, recognizing but not reaching many alleged serious trial errors and conduct of the trial court infringing upon respondents' right to due process of law, decided the case on the narrow issue of supersession of the state law by the Federal Smith Act.

In its opinion, the court stated:

'(t)his Court, in considering the validity of state laws in the light of federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference. But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula.' Hines v. Davidowitz, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581

The precise holding of the court, and all that was before it for review, is that the Smith Act of 1940, as amended in 1948, which prohibits the knowing advocacy of the overthrow of the Government of the United States by force and violence, supersedes the enforceability of the Pennsylvania Sedition Act which proscribes the same conduct.

It should be said at the outset that the decision in this case does not affect the right of States to enforce their sedition laws at times when the Federal Government has not occupied the field and is not protecting the entire country from seditious conduct. The distinction between the two situations was clearly recognized by the court below. Nor does it limit the jurisdiction of the States where the Constitution and Congress have specifically given them concurrent jurisdiction, as was done under the Eighteenth Amendment and the Volstead Act, 27 U.S.C.A., United States v. Lanza, 260 U.S. 377, 43 S.Ct. 141, 67 L.Ed. 314.

We examine these Acts only to determine the congressional plan. Looking to all of them in the aggregate, the conclusion is inescapable that Congress has intended to occupy the field of sedition. Taken as a whole, they evince a congressional plan, which makes it reasonable to determine that no room has been left for the States to supplement it. Therefore, a state sedition statute is superseded regardless of whether it purports to supplement the federal law. As was said by Mr. Justice Holmes in Charleston & Western Carolina R. Co. v. Varnville Furniture Co., 237 U.S. 597, 604, 35 S.Ct. 715, 717, 59 L.Ed. 1137:

'When Congress has taken the particular subject-matter in hand, coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go.'

I assert that the inescapable conclusion found in Commonwealth of Pennsylvania v. Nelson that Congress intended to occupy the field of sedition applies equally well in our current situation. Both the Smith Act and the TARP Act, taken as a whole, evince a congressional plan, which makes it reasonable to determine that no room has been left for the States to supplement it. The TARP Act occupies the field of mitigating foreclosures.

The Sheriff's continued performance of mortgage foreclosure sales, under the applicable statute, presents a serious danger of conflict with the administration of the federal TARP program

**D. PREEMPTION BY THE EMERGENCY AND ECONOMIC STABILIZATION ACT OF 2008, COMMONLY KNOWN AS THE "TROUBLED ASSET RELIEF PROGRAM" (TARP) ACT**

By enacting TARP, the Congress has pre-empted the Michigan statute governing mortgage foreclosures.

The Sheriff would violate the TARP Act by conducting mortgage foreclosure sales. It is likely that many of the assets involved in the foreclosure sales that the Sheriff is to conduct each Wednesday and Thursday afternoon are **troubled assets** that the Secretary has bought through the TARP framework. 12 U.S.C.A. Section 5219

On Wednesday and Thursday at 1:00 pm, the Sheriff is presented with 200-300 individual packets which each contain several sheets of paper. Each individual packet, containing several sheets of paper, is an individual homeowner's almost final disposition of his/her American Dream.

The Sheriff conducts the foreclosure sale of each homeowner's (whose name appears on the sheets) mortgage by reading off the property address, the starting bid and rarely, sells the foreclosed mortgage to a person or company who has no interest in the bank, mortgage company or homeowner. After all of the individual packets have been through the sale process, the homeowners' mortgages are considered foreclosed, by virtue of the Sheriff sale, and are returned to the foreclosing mortgagees, assignees and servicing pools. MCLA Section 600.3216

It is clear that the Sheriff has absolutely no way of knowing which assets in the usually long list of mortgagees, assignees and servicing pools have been bought by the Treasury Secretary under the TARP Act. The Sheriff does not receive any statement(s) from mortgagees, assignees, servicing pools; employees of mortgagees, assignees, servicing pools; attorney(s) for the mortgagees, assignees, servicing pools; employees or agents of the attorney(s) for the mortgagees, assignees, servicing pools or any other possible representative of the mortgagees, assignees, servicing pools. MCLA Section 600.3204

The Sheriff opens himself up to liability by foreclosing mortgages, or assets as they are defined in the TARP Act, that have been bought by the Secretary. Under Section 109, the Secretary was ordered to create a plan to mitigate foreclosures through loan modification and restructuring.

The potential liability would arise if the Sheriff, in his individual and official capacity as the constitutionally elected Sheriff of Wayne County and Wayne County, a duly constituted governmental corporation, forecloses a mortgage containing "troubled asset(s)", thereby violating a homeowner's right to loan modification, especially where the anticipated recovery on the principal outstanding obligation of the mortgage under the modification is likely to be greater than, on a net present value basis, the anticipated recovery on the principal outstanding obligation of the mortgage through foreclosure. 12 U.S.C.A. Section 5229

In Wayne County, almost all homeowners' facing foreclosure "anticipated recovery" on the principal outstanding obligation of their mortgage under the modification is likely to be **greater than**, on a net present value basis, the anticipated recovery on the principal outstanding obligation of the mortgage through foreclosure.

For all of the foregoing reasons, I opine that the local county Sheriff is preempted from holding mortgage foreclosure sales countywide, effective Wednesday, February 4, 2009.