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*Constitutional Issues Relating to Proposals for Foreclosure
Moratorium Legislation That Affects Existing Mortgages*

David H. Carpenter, American Law Division

June 10, 2008

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CRS Report for Congress

Constitutional Issues Relating to Proposals for Foreclosure Moratorium Legislation That Affects Existing Mortgages

Updated June 10, 2008

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Prepared for Members and
Committees of Congress

Constitutional Issues Relating to Proposals for Foreclosure Moratorium Legislation That Affects Existing Mortgages

Summary

The U.S. housing market began to slow in early 2006. This downturn has likely played a role in the rise of late mortgage payments and foreclosures occurring across the country over the past year. Many believe that the problem will get worse. The Joint Economic Committee estimates that around 2 million foreclosures of subprime mortgages will occur from the beginning of 2007 to the end of 2009.

As a way to slow the decline, some in Congress have suggested passing legislation that would impose a temporary, nationwide moratorium on foreclosures in order to give mortgage market participants, such as borrowers, servicers, lenders, and investors, time to refinance, or otherwise adjust the mortgage terms of borrowers who would not likely be able to keep up with their scheduled payments. Such a measure would modify existing contracts, which would result in the loss of property rights of some individuals in the mortgage market. For this reason, a foreclosure moratorium raises some constitutional issues.

This report addresses the possible constitutional implications, most notably regarding the Fifth Amendment's Takings Clause, of a temporary foreclosure moratorium as it would relate to investors in mortgage-backed securities (MBSs) which may aid the crafting of moratoria proposals. This report does not seek to address a specific legislative proposal; rather, it merely analyzes foreclosure moratoria, generally. MBS investors are chosen for analysis in this report because they likely would be impacted more by a foreclosure moratorium than other potential claimants. However, this is not to suggest that other mortgage market participants could not or would not raise legal challenges because of a foreclosure moratorium.

This report begins with an overview of Congress's authority pursuant to the Commerce and Bankruptcy Clauses to pass laws pertaining to foreclosures, and a review of Contract Clause, Substantive Due Process, and Takings Clause jurisprudence. After explaining why Contract Clause and Substantive Due Process claims appear less relevant to the question, the report considers the test a court would likely use in assessing whether a federal foreclosure moratorium would offend the Takings Clause, while pointing out that courts could apply a different test in this situation. It also suggests that courts' analyses could vary according to whether they focus on the impact that a foreclosure moratorium has on whole MBS trusts or specific investment tranches of those trusts. Where the focus is on tranches of mortgage-backed securitized trusts, a federal foreclosure moratorium, in a minority of cases, potentially could be considered a "taking" requiring just compensation for the purpose of the Fifth Amendment. Such a finding would be even less likely where the focus is on the impact to whole trusts. The number of likely successful claims and the overall potential liability of the federal government for those claims (and the litigation costs of unsuccessful claims) are not possible to assess, at least within the scope of this report.

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Constitutional Issues Relating to Proposals for Foreclosure Moratorium Legislation That Affects Existing Mortgages

Introduction and Background

The U.S. housing market began to slow in early 2006. This downturn has likely played a role in the rise of late mortgage payments and foreclosures occurring across the country over the past year.¹ Many believe that the problem will get worse. The Joint Economic Committee estimates that around 2 million foreclosures of subprime mortgages will occur from the beginning of 2007 to the end of 2009.²

As a way to slow the decline, some in Congress have suggested passing legislation that would impose a temporary, nationwide moratorium on foreclosures in order to give mortgage market participants, such as borrowers, servicers, lenders, and investors, time to refinance, or otherwise adjust the mortgage terms of borrowers who would not likely be able to keep up with their scheduled payments. Such a measure would modify existing contracts, which would result in the loss of property rights of some individuals in the mortgage market. For this reason, a foreclosure moratorium raises some constitutional issues.

This report addresses the possible constitutional implications, most notably regarding the Fifth Amendment's Takings Clause, of a temporary foreclosure moratorium as it would relate to investors in mortgage-backed securities (MBSs) which may aid the crafting of moratoria proposals. This report does not seek to address a specific legislative proposal; rather, it merely analyzes foreclosure moratoria, generally. MBS investors are chosen for analysis in this report because they likely would be impacted more by a foreclosure moratorium than other potential claimants. However, this is not to suggest that other mortgage market participants could not or would not raise legal challenges because of a foreclosure moratorium.

¹ See CRS Report RL33930, *Subprime Mortgages: Primer on Current Lending and Foreclosure Issues*, by Edward Vincent Murphy, and CRS Report RS22511, *Preliminary Observations on the Impact of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (P.L. 109-8)*, by Brian Cashell, Mark Jickling, and Heather D. Negley. See also, Joint Economic Committee, "Mortgage Woes Weigh on Financial Markets," September 11, 2007, available at [<http://www.house.gov/jec/Economic%20Update/RED%20September%2011.pdf>].

² Joint Economic Committee, "The Subprime Lending Crisis: The Economic Impact on Wealth, Property Values and Tax Revenues, and How We Got Here," October 2007, available at [<http://jec.senate.gov/Documents/Reports/10.25.07OctoberSubprimeReport.pdf>].

This report begins with an overview of Congress’s authority pursuant to the Commerce and Bankruptcy Clauses to pass laws pertaining to foreclosures, and a review of Contract Clause, Substantive Due Process, and Takings Clause jurisprudence. After explaining why Contract Clause and Substantive Due Process claims appear less relevant to the question, the report considers the test a court would likely use in assessing whether a federal foreclosure moratorium would offend the Takings Clause, while pointing out that courts could apply a different test in this situation. It also suggests that courts’ analyses could vary according to whether they focus on the impact that a foreclosure moratorium has on whole MBS trusts or specific investment tranches of those trusts. Where the focus is on tranches of mortgage-backed securitized trusts, a federal foreclosure moratorium, in a minority of cases, potentially could be considered a “taking” requiring just compensation for the purpose of the Fifth Amendment. Such a finding would be even less likely where the focus is on the impact to whole trusts. The number of likely successful claims and the overall potential liability of the federal government for those claims (and the litigation costs of unsuccessful claims) are not possible to assess, at least within the scope of this report.³

Legislative Authority to Pass a Foreclosure Moratorium

The constitutionality of legislation that imposes a foreclosure moratorium may be affected by the context in which it is raised, and by extension the authority by which Congress passes such a statute. For example, a piece of legislation providing general, regulatory reform of the housing finance market is more likely to fall under Congress's Commerce Clause authority. Whereas, legislation that is more tailored to asset allocation between a debtor and her creditors is more likely to be considered an extension of Congress's Bankruptcy Clause authority. The parameters of Congress's authority pursuant to these two clauses are addressed in turn.

The Constitution grants Congress vast authority to enact laws involving interstate commerce. Article I, § 8, clause 3 of the U.S. Constitution states: “Congress shall have the Power To ... regulate Commerce with foreign Nations and among the several States....” Commerce “among the several states” must, by “necessity” include commerce “between the states.”⁴ The power extends beyond the borders of individual states because it would not be possible for Congress to regulate commerce that takes place exclusively on states’ borders.

While there was a time when the courts interpreted the Commerce Clause more restrictively, the melding of 50 different economies into a single national economy

³ Quantifying the potential liability would require details of all, or a representative subsection of, the tranches of mortgage-backed securitized trusts. Because investors of these securities are largely unregulated, this information may not exist at all. If it does exist, the information is likely proprietary.

⁴ *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824); *Stoutenburgh v. Hennick*, 129 U.S. 141 (1889); *Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427 (1932); *In re Bryant*, 4 Fed. Cas. 514 (No. 2067) (D. Oreg. 1865); *Hanley v. Kansas City Southern Ry. Co.*, 187 U.S. 617 (1903); *Western Union Tel. Co. v. Speight*, 254 U.S. 17 (1920).

has played a significant role in its expansion.⁵ Indeed, the U.S. Supreme Court has only twice since the 1930s invalidated federal legislation because Congress had exceeded its Commerce Clause power. In both of those cases, the Court held that the statute being challenged was not economic in nature, and therefore, did not have a substantial effect on interstate commerce.⁶

The Court has said that statutes that regulate one of three categories of commercial activities are within congressional authority:

First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce.⁷

The last of these categories allows courts to examine the cumulative effect of a commercial activity on the economy as a whole. This is the category within which a foreclosure moratorium likely would fall.

While foreclosure law generally has been left to the states, a foreclosure moratorium designed to reduce the effects of a slowing national housing market seems to pertain to financial transactions that, "viewed in the aggregate, substantially affect interstate commerce."⁸ Even if viewed as entirely intrastate, such a law also would likely be considered "part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated," due to the fact that the secondary market links local real property into a national market.⁹ Although not beyond debate, it seems likely that a court would find a statute imposing a foreclosure moratorium to be within Congress Commerce Clause authority.

⁵ *New York v. United States*, 505 U.S. 144, 158 (1992) ("The volume of interstate commerce and the range of commonly accepted objects of government regulation have ... expanded considerably in the last 200 years, and the regulatory authority of Congress has expanded along with them. As interstate commerce has become ubiquitous, activities once considered purely local have come to have effects on the national economy, and have accordingly come within the scope of Congress' commerce power.").

⁶ *United States v. Morrison*, 529 U.S. 598, 617 (2000); *United States v. Lopez*, 514 U.S. 549, 561 (1995) ("[the] criminal statute [] by its own terms has nothing to do with 'commerce' or any sort of economic enterprise ... [and] is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affect interstate commerce.").

⁷ *Id.* at 558-59 (citations omitted).

⁸ *Id.* at 561.

⁹ *Quoting id.* at 549.

Congress also has broad authority, concurrent with its authority under the Commerce Clause, to enact “uniform laws on the subject of Bankruptcies.”¹⁰ The Supreme Court has approved of Congress’s use of this authority to impair contracts and even to avoid liens.¹¹ In fact, the modification of contract rights is one of the main purposes of bankruptcy. For these reasons, if a court finds such legislation to be a valid extension of Congress’s bankruptcy power, then that court may provide Congress greater deference under a takings analysis than it would for legislation passed pursuant to the Commerce Clause.¹²

Whether or not a foreclosure moratorium would fall within the Bankruptcy Clause likely would depend on the scope and nature of a specific proposal, as well as Congress’s intent for its passage. The more limited the application of a moratorium is to debtors who meet the qualifications to file for bankruptcy, probably the more likely a court would find the legislation to be a valid extension of bankruptcy power. Such a determination also may be contingent upon a court’s interpretation of the breadth of Congress’s power under the Bankruptcy Clause, which cannot be predicted.¹³ As is discussed below in the “Overview of Takings

¹⁰ U.S. CONST art. I, § 8, cl. 4. One important difference between the Commerce Clause and the Bankruptcy Clause, is that laws passed under by the Bankruptcy Clause must be uniform. *Railway Labor Executives’ Assn. v. Gibbons*, 455 U.S. 457, 465 (1981). The Court in *Gibbons* held that a bankruptcy statute that applied to only one debtor was not uniform. *Id.* at 471. The court also explained the difficulty in:

[d]istinguishing a congressional exercise of power under the Commerce Clause from an exercise under the Bankruptcy clause ... Although we have noted that the subject of bankruptcies is incapable of final definition, we have previously defined “bankruptcy” as the subject of the relations between an insolvent or nonpaying or fraudulent debtor and his creditors, extending to his and their relief. Congress’ power under the Bankruptcy Clause contemplates an adjustment of a failing debtor’s obligations This power extends to all cases where the law causes to be distributed, the property of the debtors among his creditors. It includes the power to discharge the debtor from his contracts and legal liabilities, as well as to distribute this property. The grant to Congress involves the power to impair the obligation of contracts, and this the States were forbidden to do.

Id. at 466 (internal citations and quotations omitted).

¹¹ *Hanover Nat’l Bank v. Moyses*, 186 U.S. 181 (1938); *In re Klein*, 42 U.S. (1 How) 277 (1843).

¹² This deference probably would increase the foreseeability of a foreclosure moratorium, which is important to an analysis under the “impairment of investment-backed expectations” prong of the takings test that a court is likely to apply to the legislation in question. For more information on this prong, *see* the “Impairment of Investment-Backed Expectations” subsection of the “Application of *Penn Central* to a Foreclosure Moratorium” section of this report.

¹³ Measures such as H.R. 3609 (the Emergency Home Ownership and Mortgage Equity Protection Act, as it was ordered to be reported favorably by the House Judiciary Committee) likely would be a valid extension of Congress’s authority to pass uniform laws on bankruptcies because those bills seek to amend how certain debts secured by the debtor’s

(continued...)

Clause Jurisprudence” section of this report, there is precedent for the passage of federal foreclosure moratoria legislation pursuant to the Bankruptcy Clause, which was deemed compliant with the Fifth Amendment.

Regardless of which of these two sources of authority are applied, the legislative proposal in question would still be subject to certain constitutional protections such as those provided by the Fifth Amendment’s Due Process and Takings Clauses.

Contract Clause and Substantive Due Process

Before discussing the relevant portions of the Fifth Amendment, some common misconceptions regarding the Contract Clause should be addressed. Article I, § 10, clause 1 of the U.S. Constitution states: “No State shall ... pass any ... Law impairing the Obligation of Contracts....” This clause prohibits a state from passing legislation that makes certain changes to the terms of existing contracts. In fact, the Supreme Court, in *Home Building and Loan Assoc. v. Blaisdell*,¹⁴ assessed whether a state foreclosure moratorium law violated the Contract Clause. The language of the Contract Clause is expressly limited to the states. Additionally, the Court has held that the principles of the Contract Clause are not incorporated against the federal government by the Fifth Amendment’s Due Process Cause.¹⁵ The Court explained:

We have never held ... that the principles embodied in the Fifth Amendment’s Due Process Clause are coextensive with provisions existing against state impairments of pre-existing contracts.... [Rather,] we have contrasted the limitations imposed on States by the Contract Clause with the less searching standards imposed on economic legislation by the Due Process Clauses.¹⁶

Therefore, the Contract Clause, and by extension *Blaisdell*, do not apply to federal legislation.

Federal legislation, on the other hand, is subject to the protections of substantive due process. Substantive due process “prevents government power from being used for purposes of oppression, or abuse of government power that shocks the conscience, or action that is legally irrational in that it is not sufficiently keyed to any

¹³ (...continued)

primary residence are dealt with in a Chapter 13 bankruptcy reorganization plan. It is less clear if a piece of legislation that places a foreclosure moratorium on all mortgages originated nationwide or a certain group of mortgages that are not in default or delinquent could be passed pursuant to Congress’s bankruptcy authority. For more information on H.R. 3609 and similar bills, see CRS Report RL34301, *The Primary Residence Exception: Legislative Proposals in the 110th Congress to Amend Section 1322(b)(2) of the Bankruptcy Code*, by David H. Carpenter.

¹⁴ 290 U.S. 398 (1934).

¹⁵ *PBGC v. R.A. Gray & Co.*, 467 U.S. 717, 733 (1984). *Accord*, *United States v. Winstar Corp.*, 518 U.S. 839, 875-76 (1996).

¹⁶ *PBGC*, 467 U.S. at 733.

legitimate government purpose.”¹⁷ A foreclosure moratorium that is implemented for the purpose of providing lenders and servicers time to initiate loan modifications and loss mitigation in order to strengthen an ailing market would not likely be violative of substantive due process in light of the vast deference courts provide the government in the context of economic regulation.¹⁸ Consequently, this report focuses on takings law analysis.¹⁹

Overview of Takings Clause Jurisprudence

The Fifth Amendment concludes with the words “nor shall private property be taken for public use, without just compensation.” The Takings Clause requires striking a balance between the government’s public goals and the burdens suffered by private property owners as the government takes measures to meet its goals. The courts have recognized relatively few governmental infringements of private citizens’ property as constitutional “takings” where no outright seizure or permanent physical occupation of the property occurs. The infringement must rise to a certain severity or be of a particular kind before courts will say a “taking” has occurred. Only then must the government provide “just compensation” to the property owner.²⁰ The courts have developed an array of tests, rules, and factors to determine what does and does not constitute a “taking.”

Four Types of Takings. The proper test to apply depends on the type of governmental action involved. There are four broad categories of takings recognized by the Supreme Court.²¹ Two of these tests are clearly not applicable to a foreclosure moratorium. One is a land-use exaction taking, such as a mandatory set aside for a certain portion of a new housing development to be green space.²² The other is a type of regulatory taking, as described in *Lucas v. South Carolina Coastal Council*,²³ where the government “deprive[s] an owner of all economically beneficial use of her property.” This type of infringement is considered a per se taking and is commonly

¹⁷ *Torromeo v. Town of Fremont, N.H.*, 438 F.3d 113, 118 (1st Cir. 2006). Prior to 2005, there was a great deal of confusion among courts in how to properly delineate between takings law and substantive due process analysis, which was partially alleviated by the Supreme Court’s 2005 *Lingle v. Chevron U.S.A. Inc.* decision. 544 U.S. 528 (2005). *See, e.g.*, *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Kavanau v. Santa Monica Rent Control Bd.*, 941 P.2d 851 (Cal. 1997). While some confusion remains, the Court has clarified that substantive due process and takings law address unique concerns.

¹⁸ *See, e.g.*, *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998).

¹⁹ It also is possible for one to claim an Equal Protection Clause violation, especially if the claimant believes that she was treated unequally. *See, e.g.*, *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000). An Equal Protection Clause violation is not likely to result from a generally applicable foreclosure moratorium.

²⁰ Mortgages and the contract rights to mortgage-backed securities investments are private property for the purpose of Fifth Amendment protections.

²¹ *Lingle*, 544 U.S. at 538.

²² *Id.*

²³ 506 U.S. 1003 (1992).

referred to as a *Lucas* “total taking.”²⁴ Most courts agree that *Lucas* total takings only apply to land, not personal property such as contract rights.²⁵ A foreclosure moratorium could be assessed pursuant to one of the other two tests. One is a “physical taking” or “appropriation” where the “government requires an owner to suffer permanent physical invasion of her property.”²⁶ The final test is for all regulatory takings other than total takings, which are analyzed pursuant to the test originally set out in *Penn Central Transp. Co. v. City of New York*.²⁷

Physical Taking/Appropriation vs. Regulatory Taking. Plaintiffs would likely argue that a foreclosure moratorium resulted in a “permanent physical occupation” of their property, as these are considered per se takings, warranting just compensation. While on the contrary, the government would likely argue that a foreclosure moratorium should be analyzed under *Penn Central*, where the government usually wins. One takings law commentator explains:

The Court’s decisions using per se physical taking analysis ... typically involve physical invasions in the literal sense — invasions by aircraft, flood waters, the boating public, government personnel, cable boxes, and mobile-home-park tenants. But in some factual contexts ... physical and regulatory takings have proved difficult to keep separate.

The tendency to blur the two is enhanced by the powerful incentives plaintiffs have to urge a physical, versus regulatory, theory in a case. First, there is the lesser showing needed for plaintiff to win on a permanent physical occupation claim.... Second, ... [is] the extremely narrow range of application for the ... total taking test, leaving the physical occupation rule as the only per se rule left to plaintiff in many cases.... [One example of where this line is blurred is where a] government program causes no physical invasion, but affects the property owner in a way more or less akin to an appropriation. Here, the takings analysis may go either way — regulatory or physical. The issue played out at length in cases involving state demands that small interest amounts on lawyers’ trust accounts be paid to a state-run program funding legal services for the poor, and was ultimately resolved as a physical-type taking.²⁸

²⁴ *Lingle*, 544 U.S. at 538.

²⁵ *See, e.g.*, *Hawkeye Commodity Promotions, Inc. v. Vilsack*, 486 F.3d 430, 441 (8th Cir. 2007) (“it appears that *Lucas* [‘total takings test] protects real property only”); *Unity Real Estate v. Hudson*, 178 F.3d 649, 674 (3rd Cir. 1999) (“To date, the categorical approach has only been used in real property cases such as *Lucas v. South Carolina*”). However, at least one Federal Circuit case has applied total takings analysis to personal property, though it did not find a taking had occurred. *Maritrans v. United States*, 342 F.3d 1344 (Fed. Cir. 2003).

²⁶ *Lingle*, 544 U.S. at 538.

²⁷ 438 U.S. 104 (1978) (the Court found no taking where New York City, pursuant to a historic preservation ordinance, prevented a property owner from developing the air rights over a historic landmark). *See also, Lingle*, 544 U.S. at 538-39.

²⁸ Robert Meltz, *Takings Law Today: A Primer for the Perplexed*, 34 *Ecology L.Q.* 307, 364-65 (2007).

It is possible that a court would consider a foreclosure moratorium a physical taking or an appropriation of a MBS investor's rights to the income stream lost due to the moratorium, and therefore, a per se taking. A more probable scenario, especially in light of the fact that the income lost as a result of a foreclosure moratorium would not directly accrue to the government, as was the case with the interest from the lawyer's trust accounts, is that a court would consider such a moratorium as a possible regulatory taking, to be analyzed pursuant to *Penn Central*.

Historical Precedent: *Vinton Branch* and *Radford*.

While it seems most likely in light of recent jurisprudence that courts would address a takings claim raised in response to a foreclosure moratorium under the parameters set out in *Penn Central*, it is possible that a court might be influenced by the similar fact patterns of two Supreme Court cases from the 1930s, *Wright v. Vinton Branch*²⁹ and *Louisville Joint Stock Land Bank v. Radford*.³⁰

Congress enacted the Frazier-Lemke Act of 1934, which amended the Bankruptcy Act to provide farmers a five-year mortgage foreclosure moratorium, allow farmers to keep possession of real property for a reasonable rent, and allow them to pay a judicially appraised purchase value at the end of the five years for the purpose of preventing widespread farm foreclosures.³¹ The Supreme Court in *Radford* held the Frazier-Lemke Act to be in violation of the Fifth Amendment, and thus unconstitutional.³²

The decision in the *Radford* case did not question the power of Congress to offer to distressed farmers the aid of a means of rehabilitation under the bankruptcy clause [*sic*]. The original Frazier-Lemke Act was there held invalid solely on the ground that the bankruptcy power of Congress, like its other great powers, is subject to the Fifth Amendment; and that, as applied to the mortgages given before its enactment, the statute violated that Amendment, since it effected a substantial impairment of the mortgagee's security. The opinion enumerates five important substantive rights in specific property which had been taken. It was not held that the deprivation of any one of these rights would have rendered the Act invalid, but that the effect of the statute in its entirety was to deprive the mortgagee of his property without due process of law. The rights enumerated were:

1. The right to retain the lien until the indebtedness thereby secured is paid.
2. The right to realize upon the security by a judicial public sale.
3. The right to determine when such sale shall be held, subject only to the discretion of the court.

²⁹ 300 U.S. 440 (1937).

³⁰ 295 U.S. 555 (1934).

³¹ *See id.* at 598-99.

³² *Id.* at 589-90.

4. The right to protect its interest in the property by bidding at such sale whenever held, and thus to assure having the mortgaged property devoted primarily to the satisfaction of the debt, either through receipt of the proceeds of a fair competitive sale or by taking the property itself.
5. The right to control meanwhile the property during the period of default, subject only to the discretion of the court, and to have the rents and profits collected by a receiver for the satisfaction of the debt.³³

However, the *Radford* decision was called into question by the *Vinton Branch* court just three years later in which a slightly modified version of the Frazier-Lemke Act, which was found to no longer deprive three of the five above listed substantive rights, was deemed in accordance with the Fifth Amendment.³⁴ The Court stated:

The power here exerted by Congress is the broad power “To establish ... uniform Laws on the subject of Bankruptcies throughout the United States.” The question which the objections raise is not whether the Act does more than modify remedial rights. It is whether the legislation modifies the secured creditor’s rights, remedial or substantive, to such an extent as to deny the due process of law guaranteed by the Fifth Amendment.... For the reasons stated, we are of opinion that the provisions of subsection (s) [of the Frazier-Lemke Act] make no unreasonable modification of the mortgagee’s rights; and hence are valid.³⁵

While it is possible that a current court would look to *Vinton Branch* as authoritative on the question of a takings claim raised as a result of a federal foreclosure moratorium because it pertains to similar facts as those addressed in this report and because it has not been expressly overruled, it seems more likely that a court would analyze such a takings claim under the test outlined in *Penn Central*.

First of all, the *Vinton Branch* decision came down more than 40 years prior to *Penn Central*. In those 40 years and the subsequent 30, much has changed in takings jurisprudence.³⁶ Most notably, *Vinton Branch* was delivered at a time in which the courts did not delineate between the Fifth Amendment’s Due Process Clause and the Fifth Amendment’s Takings Clause. This point is emphasized by the varying language used in the *Radford* and *Vinton Branch* cases. The *Radford* decision states that the ultimate question to be addressed is “whether the Frazier-Lemke Act as applied has *taken from the Bank without compensation*, and given to Radford, rights in specific property which are of substantial value.”³⁷ Whereas the *Vinton Branch* opinion characterizes the ultimate question as whether the act “modifies the secured

³³ *Vinton Branch*, 300 U.S. at 456-57 (internal citations ommited).

³⁴ *Id.* at 470.

³⁵ *Id.*

³⁶ As one court explained, “whether or not *Louisville Joint Stock Land Bank v. Radford* has any current value as precedent is subject to reasonable doubt. Times have changed, and a review of its progeny discloses a constant and steady erosion of its vitality.” In re Pommerer, 10 B.R. 935, 945 (Bankr. Ct. D. Minn. 1981). However, neither case has been formally overruled, and some lower courts have cited both within the last 20 years.

³⁷ *Radford*, 555 U.S. at 601 (emphasis added).

creditor's rights ... to such an extent as to *deny the due process of law* guaranteed by the Fifth Amendment."³⁸ It was not until the 2005 Supreme Court decision, *Lingle v. Chevron U.S.A. Inc.*, that the High Court made it clear that the tests to be applied under takings claims are distinct from those analyzing potential due process violations.³⁹ The *Lingle* Court confirmed that:

a plaintiff seeking to challenge a government regulation as an uncompensated taking of private property may proceed under one of the other theories discussed above — by alleging a “physical” taking, a *Lucas*-type “total regulatory taking,” a *Penn Central* taking, or a land-use exaction violating the standards set forth in *Nollan* and *Dolan*.⁴⁰

While *Penn Central* is likely to govern, this does not mean that a piece of legislation crafted to meet the test set out in *Vinton Branch* could not also pass the three balancing factors of *Penn Central*. These three factors are analyzed in great detail below, but as an example, a foreclosure moratorium statute that lasts for a relatively short period of time and that requires borrowers to make reasonable monthly payments in order to qualify for the moratorium will reduce the economic impact of the legislation on MBSs (mortgage-backed securities) investors' property rights, thus diminishing the strength of their takings arguments.

Application of *Penn Central* to a Foreclosure Moratorium

***Penn Central* Overview.** Before beginning any analysis, it should be noted that Takings Clause jurisprudence is a highly amorphous and an ever-evolving area of the law. Additionally, the *Penn Central* test is, as the Supreme Court has stated, an “essentially ad hoc and factual inquir[y].”⁴¹ Finally, the mortgage-backed securities industry is a highly complex, yet largely unregulated industry, which makes

³⁸ *Vinton Branch*, 300 U.S. at 470 (emphasis added).

³⁹ *Lingle*, 544 U.S. at 542-43 (“The ‘substantially advances’ formula suggests a means-ends test: It asks, in essence, whether a regulation of private property is *effective* in achieving some legitimate public purpose. An inquiry of this nature has some logic in the context of a due process challenge, for a regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause. But such a test is not a valid method of discerning whether private property has been ‘taken’ for purposes of the Fifth Amendment.... A test that tells us nothing about the actual burden imposed on property rights, or how that burden is allocated, cannot tell us when justice might require that the burden be spread among taxpayers through the payment of compensation. The owner of a property subject to a regulation that *effectively* serves a legitimate state interest may be just as singled out and just as burdened as the owner of a property subject to an *ineffective* regulation. It would make little sense to say that the second owner has suffered a taking while the first has not. Likewise, an ineffective regulation may not significantly burden property rights at all, and it may distribute any burden broadly and evenly among property owners. The notion that such a regulation nevertheless ‘takes’ private property for public use merely by virtue of its ineffectiveness or foolishness is untenable.” (emphasis original) (internal citations omitted)).

⁴⁰ *Id.* at 548 (citing *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1997), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994)).

⁴¹ *Penn Central*, 438 U.S. at 124.

garnering specific information about the tranches of each mortgage-backed securitized trust very difficult. All of these factors make analysis of how a court might rule on a takings issue quite difficult even where all facts are known. With those caveats in mind, the following analysis informs on how courts have assessed each of the three *Penn Central* factors and highlights certain contexts or facts that courts emphasize as triggering Takings Clause protection that may be implicated by a foreclosure moratorium.

Legislation targeting private contracts usually survives takings attacks under *Penn Central* analysis.⁴² However, this does not mean that a court could not find a takings under certain circumstances, nor does it mean that secondary market investors would not bring suits claiming takings had occurred, which comes with its own costs to the government. It seems plausible, as discussed in greater detail below, that a statute imposing a foreclosure moratorium could have a significant enough effect on a minority of MBS tranches as to rise to the level of a taking.

The *Penn Central* test consists of three factors that are designed to determine whether the government regulatory action has resulted in the deprivation of a property right sufficient to violate the Takings Clause. The three factors are: (1) the economic impact of the government action; (2) the “extent to which the regulation has interfered with distinct investment-backed expectations”; and (3) the character of the government action.⁴³ The Supreme Court has shed little light on the content of these three factors or on how to balance them, and each factor raises “vexing subsidiary questions.”⁴⁴

Economic Impact. The *Penn Central* inquiry “turns in large part, albeit not exclusively” on the economic impact factor.⁴⁵ In assessing the economic impact, courts evaluate the proportion of the loss caused by the regulation to the “parcel as a whole.”⁴⁶ This means that, in weighing the economic impact, the courts look at

⁴² It should be noted that the Supreme Court has indicated that government actions that are implemented for a public benefit and only incidentally interfere with the performance of private contracts constitute only a frustration, not a taking, of contract rights. *Omnia Commercial Co. v. United States*, 261 U.S. 502 (1923). The legislative issue this report is addressing, on the other hand, would *directly target* private mortgage contracts, as opposed to incidentally interfering with the contracts. When legislation specifically targets an existing contract or a class of contracts, the courts have found that *Omnia* does not apply, and instead have applied *Penn Central*'s balancing test. See *Cienega Gardens v. United States*, 331 F.3d. 1319, 1335 (Fed. Cir. 2003) (“*Omnia* ... refers to legislation targeted at some public benefit, which incidentally affects contract rights, not ... legislation aimed at the contract rights themselves in order to nullify them.”).

⁴³ *Penn Central*, 438 U.S. at 124-28; *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922); *Nollan*, 483 U.S. at 834.

⁴⁴ *Lingle*, 544 U.S. at 539.

⁴⁵ *Lingle*, 544 U.S. at 540.

⁴⁶ The parcel as a whole concept was originally established, as was most of Takings Clause jurisprudence, for land-use takings claims. The courts have extended the parcel as a whole concept to contexts other than land-use, such as employee pension plans, *Concrete Pipe &* (continued...)

entire property, rather than exclusively at the portion of the property affected by the legislation in isolation. The Supreme Court explained it this way:

a claimant’s parcel of property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable. To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of, the parcel in question.⁴⁷

The “parcel as a whole” concept has three different dimensions: physical/spatial, functional, and temporal. In the context of a takings claim raised by investors of MBSs, compelling arguments could be made to define the physical “parcel” as either the tranches of each trust or the securitized trust as a whole. This report focuses on the tranches as the physical parcel interpretation because such a definition would result in the strongest arguments for a taking, thus emphasizing potential legal issues that foreclosure moratoria legislation may raise, which is the purpose of this report. The other option would make a successful takings claim less likely because the impact of a moratorium would be spread out over the hundreds or thousands of other mortgages within each trust.

To address the functional dimension, courts would look to how the governmental interference affects the entire “bundle of rights,” as opposed to a single right within the bundle.⁴⁸ In the MBS context, an investor’s bundle of rights would include everything provided in the governing PSA, including rights to a certain income stream and contract claims for violations of the PSA. The temporal dimension requires an assessment of the physical parcel for the entire time period during which the plaintiff has an interest in that property.⁴⁹ For example, if an investor owned a tranche that consisted of the 12-month income stream of a group of mortgages, and a 90-day foreclosure moratorium was imposed in the middle of that period, the court would analyze the economic impact to that investor in relation to the whole 12 months, not just the 90-days during the moratorium.

Courts vary in how they determine the economic loss caused by regulations. Most courts look to either the property’s “diminution in value” or “diminution in return” caused by the regulation.⁵⁰ Under both, courts are in agreement that the loss

⁴⁶ (...continued)

Products, Inc. v. Construction Laborers Pension Trust, 508 U.S. 602, 644 (1993), and mortgage restrictions on low-income housing projects, *Cienega Gardens v. United States*, 503 F.3d 1266 (Fed. Cir. 2007).

⁴⁷ *Concrete Pipe*, 508 U.S. at 644.

⁴⁸ *Andrus v. Allard*, 444 U.S. 51, 66 (1979), *cited in* *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 327 (2002).

⁴⁹ *Tahoe-Sierra*, 535 U.S. at 331-32.

⁵⁰ *Rose Acre Farm, Inc. v. United States*, 75 Fed. Cl. 527, 532 (2007). Other courts have looked to whether only a small number of many contractual rights are affected by the regulation. *See* *McAndrews v. Fleet Bank of Massachusetts*, 989 F.2d 13, 18-19 (1st Cir. 1993). However, this type of analysis would not fit well in the context of a takings claim (continued...)

must be significant. The Supreme Court has in past cases found diminutions in property upwards of 75% to not, by themselves, be enough to be considered a taking.⁵¹ Determining the severity of the lost value or return caused by the legislation in question would be an entirely fact-specific inquiry.

The complexity of the secondary market coupled with its lack of governmental oversight, hamper the ability to fully assess how many, and to what extent, tranches of mortgage-backed securitized trusts would be affected by a foreclosure moratorium. When mortgages are sold in the secondary market, they are often lumped in trust and then separated into tranches on the basis of certain common characteristics. Mortgages can be left intact or they can be diced into pieces. For example, a tranche could consist entirely of 30-year, fixed, prime rate mortgages that do not include prepayment penalties. Or, a tranche could consist of only the income stream of certain subprime mortgages during the six months prior to the end of a prepayment penalty period. Or, a tranche could be comprised of 25% of the first group and 75% of the second group. There are virtually no limits to what can comprise a tranche.

It is conceivable that there are or would be tranches that represent, in whole or in part, the income of mortgages sold at foreclosure during the period of time in which a federal foreclosure moratorium is imposed. Even more likely are tranches that invest in a group of mortgages' income stream exclusively during the period which coincides with a foreclosure moratorium. In these cases, a moratorium could result in up to a 100% diminution in value or diminution in return of the tranches. Where a tranche loses its entire value due to a foreclosure moratorium, a taking likely has occurred. It is unclear where a court would draw the line in cases where some, but less than a 100% loss results, though almost certainly, the percentage would be quite high. For intermediate percentages, the other two prongs of the *Penn Central* test likely are to be of importance.

Impairment of Investment-Backed Expectations. When examining whether congressional impairment of private contracts interferes with investment-backed expectations, courts typically have focused on whether it was reasonable for the harmed party to assume that the impairment would not occur.⁵² “The critical question is whether extension of existing law could be foreseen as reasonably possible.”⁵³ To do so, courts generally look to the type and level of regulation the claimant faced prior to implementation of the regulation in question. If, for instance, the subject of the regulation was part of a “heavily regulated field” prior to the additional legislative impairment, then additional regulation is more likely to have been “foreseeable” to the harmed party. The courts have concluded, for example, that

⁵⁰ (...continued)
raised by an investor of MBSs.

⁵¹ See *Concrete Pipe*, 508 U.S. at 645.

⁵² See, e.g., *Appolo Fuels, Inc. v. United States*, 381 F.3d 1338 (Fed. Cir. 2004). For this purpose, the courts examine the regulations in place before the plaintiff acquired the property in question.

⁵³ *Cienega Gardens*, 503 F.3d at 1289.

national banks⁵⁴ and employee pension plans⁵⁵ are in heavily regulated fields.⁵⁶ However, low-income housing is not.⁵⁷

The proposals for legislation addressed in this report, while potentially affecting the largely unregulated securities industry, would directly regulate mortgages and foreclosures. The mortgage lending industry would likely be considered “heavily regulated.” Mortgage lenders understand that each mortgage they provide could end up in foreclosure, which is also highly regulated. However, even in a highly regulated area, one might have a reasonable expectation that new laws will not significantly depart from the norm.

A federal foreclosure moratorium arguably would be a departure from previous mortgage and foreclosure regulations in part because, historically, foreclosure law has almost exclusively been governed by the state. Because of this, investors in MBSs that are heavily invested in income streams related to foreclosures would be more likely to account for possible changes in state laws that might affect their investment, such as by ensuring that mortgages represented in their tranches come from multiple states, than they would for a more unusual federal change in foreclosure law. On the other hand, there is some history of similar types of regulation that cuts against this argument. One example, which is described in more detail in the “Historical Precedent: *Vinton Branch* and *Radford*” subsection of this report, is the Frazier-Lemke Act that amended the Bankruptcy Code to impose a foreclosure moratorium on farms. Another example is when the Department of Housing and Urban Development (HUD), in the wake of Hurricane Katrina, imposed a temporary foreclosure moratorium on some homes owned by those living or working in the disaster area whose mortgages were insured by the Federal Housing Administration (FHA).⁵⁸

Another factor that may strengthen a foreseeability argument, and thus augment the government’s defense against a takings claim, is if the legislation in question is considered to be a valid extension of Congress’s authority to pass laws on bankruptcies. Because the modification of contract rights is such an integral part of bankruptcy and because MBS investors should be aware that all mortgages could end up in bankruptcy, these investors arguably should be less surprised by a change to the bankruptcy laws that impose some form of moratorium on foreclosures, than a more

⁵⁴ *Branch v. United States*, 69 F.3d 1571, 1581 (Fed. Cir. 1995).

⁵⁵ *Concrete Pipe*, 508 U.S. at 645-46.

⁵⁶ Other “heavily regulated fields include: railroad labor disputes (*Burlington N.R.R. Co. v. United Transp. Union*, 822 F. Supp. 797, 802 (D.D.C. 1991)); coal mining (*Appollo Fuels*, 381 F.3d, at 1349); liquor stores (*People’s Super Liquor Stores, Inc. v. Jenkins*, 432 F. Supp.2d 200, 215 (D. Mass. 2006)); gambling (*Hawkeye Commodity Promotions*, 486 F.3d at 440); and adult entertainment establishments (*McCrothers Corp. v. City of Mandan*, 728 N.W.2d 124, 141 (N.D. 2007)).

⁵⁷ *Cienega Gardens*, 503 F.3d, at 1289.

⁵⁸ HUD News Release, No. 05-161, November 23, 2005, available at [<http://www.hud.gov/news/release.cfm?content=pr05-161.cfm>].

broadly applicable statute passed pursuant to the Commerce Clause.⁵⁹ For these reasons, it is unclear how a court would view the impairment of reasonable investment-backed expectations caused by a foreclosure moratorium.

Character of the Government Action. The third factor, the character of the government action, is arguably of diminished importance in light of the Supreme Court’s *Lingle v. Chevron USA Inc.* decision, where the Court stated that inquiry into whether a regulation advances some public purpose is not relevant to the question of whether a taking occurred for Fifth Amendment purposes.⁶⁰ The effect *Lingle* will have on how future courts will apply the “nature of the government action” factor is presently unclear. Historically, courts used this factor to assess whether a regulation that impaired private contracts directly benefited the government; disproportionately imposed the costs of a public benefit on a small class; or was somehow the result of governmental bad faith.⁶¹ It is doubtful that a foreclosure moratorium would take rights from investors and appropriate them to the government or would be enacted as a result of bad faith. Rather, such legislation likely would be an attempt to help stem the current economic downturn that is affecting the entire housing market. In the absence of specific legislative language to delineate which mortgages would be covered by a moratorium, it is unclear if such legislation would impose a disproportionate amount of liability on a small number of investors. The nature of the government action authorized by these legislative proposals would not appear to greatly augment a takings claim, but more information would be needed to know for sure.

Conclusion

In sum, it is unlikely, but possible that a court would assess a foreclosure moratorium pursuant to the test outlined in the 1937 Supreme Court decision, *Vinton Branch*. Courts would be more likely to assess a foreclosure moratorium as a regulatory taking under the *Penn Central* formula. If analyzed as a regulatory taking, it is unclear how a court would decide an as-applied takings claim, especially without specific facts that would allow an assessment of the severity of the regulation’s economic impact on an individual investor’s property rights, which seems to be the most important *Penn Central* factor.⁶² In such an analysis, a court could define the

⁵⁹ For more information on Congress’s powers pursuant to the Bankruptcy Clause, see the “Legislative Authority to Pass a Foreclosure Moratorium” section of this report.

⁶⁰ 544 U.S. at 542 (“The ‘substantially advances’ formula suggests a means-ends test: It suggests, in essence, whether a regulation of private property is *effective* in achieving some legitimate public purpose. An inquiry of this nature has some logic in the context of a due process challenge.... But such a test is not a valid method of discerning whether private property has been “taken” for purposes of the Fifth Amendment.”(emphasis original)).

⁶¹ See, e.g., *Tahoe-Sierra*, 535 U.S. at 333 (were it not for findings that the agency acted in good faith, the Court “might have concluded the agency was stalling” and found a taking).

⁶² A facial challenge would not succeed under *Penn Central* because the particular facts of plaintiffs’ property would be pivotal to a regulatory takings analysis. A facial challenge would be possible if the court found the foreclosure moratorium resulted in an appropriation. See the “Physical Taking/Appropriation vs. Regulatory Taking” section of (continued...)

physical parcel as either the securitized trust in its entirety or the investment tranches of each trust. If a court adopts the tranche as the parcel interpretation, it is not difficult to envision some tranches being significantly, if not entirely, diminished in value by a foreclosure moratorium, due to the great diversity of investments in the mortgage securities market. The economic impact in some of these situations could be substantial enough to be considered a regulatory taking. Finding a taking would be far less likely if a court accepts the argument that the physical parcel should be defined as an entire trust.

It is impossible to predict at what level of economic impact a court would hold that a taking has occurred, though in the past, it has almost always been quite high. The impairment of investment-backed expectations, as well as the nature of the government action, do not appear to warrant takings concerns on their own, especially if a court determines the legislation to be passed pursuant to Congress's bankruptcy powers. However, because arguments can be made on both fronts that would strengthen a takings argument, it is possible that these two prongs could push a court to find a taking where the economic impact is strong.

If a taking were found, then the legislation would stand but the government would be required to provide claimants just compensation for their losses. There is no way to predict how much, if any, the government would be liable for in just compensation claims, but in an industry valued at more than \$1 trillion in 2006, the potential liability could be large.⁶³ Investors who lost large sums of money due to a foreclosure moratorium could sue the government, and regardless of the outcome of these cases, the litigation itself would likely be costly.

⁶² (...continued)
this report.

⁶³ The value of securitized mortgages was around \$2 trillion in 2006. *See* CRS Report RS22722, *Securitization and Federal Regulation of Mortgages for Safety and Soundness*, by Edward Vincent Murphy.