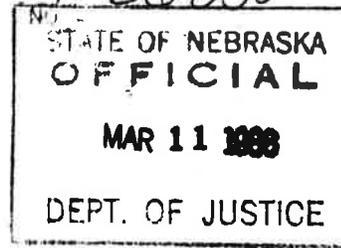


DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

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DATE: March 7, 1986

SUBJECT: LB 999. Homestead exemption, partial exemption of real estate subject to foreclosure, receivers.

REQUESTED BY: Senator Rod Johnson, Nebraska State Legislature.

WRITTEN BY: Robert M. Spire, Attorney General,
Ruth Anne Evans, Assistant Attorney General.

This is in response to your opinion request concerning the retrospective application of LB 999, pertaining to real estate foreclosures. LB 999 amends several Nebraska statutes and provides a new mechanism for partial redemption. Additionally, it increases the maximum period for a stay of execution and provides that a farmer-debtor be appointed receiver in the event of foreclosure. One of your main concerns is whether not these provisions will, or can be, applied to current mortgages and/or deeds of trust.

The Supreme Court of Nebraska has consistently held for a number of years that a legislative act will operate only prospectively and not retrospectively unless the legislative intent and purpose that it should act retrospectively is clearly disclosed. Moore v. Peterson, 218 Neb. 615, 358 N.W.2d 193 (1984); Wheelock v. Heath, 201 Neb. 835, 272 N.W.2d 768 (1978); Travelers Insurance Company v. Ohler, 119 Neb. 121, 227 N.W. 449 (1929). We find no wording in LB 999 which would indicate a clear and specific intention of the Legislature that it operate retrospectively. However, if that intent were disclosed, the application of the foregoing provisions would be an unconstitutional impairment of the obligations of contract.

It is well established that the laws in force at the time a contract is entered into form a part of it and enter into its

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obligation and, accordingly, the legislative act will not be permitted to operate retrospectively where it will have the effect of invalidating or impairing the obligation of contracts or interfering with vested rights. Dell v. City of Lincoln, 170 Neb. 176, 102 N.W.2d 62 (1960); Article I, Section 16, Constitution of Nebraska. In Norris v. Tower, 102 Neb. 434, 167 N.W. 728 (1918), the Supreme Court acknowledged that "generally speaking, the laws in force when a contract is entered into form a part of it and enter into its obligation. But there is a consensus of opinion that the laws giving a remedy for its breach may be modified or changed without impairing its obligation, provided an adequate remedy is left." Id. The Court further indicated that it is within the authority of the Legislature to change the form of a remedy, provided that it does not affect injuriously the rights of either party to the contract.

This distinction between contractual rights and a remedy for a breach thereof, was subsequently treated in Davis v. Brittell, 103 Neb. 703, 286 N.W. 284 (1919). The Court reiterated the proposition that the Legislature may not withdraw all remedies, but that modes of procedure in the courts of the state are within its control so that a particular remedy existing at the time of the making of a contract, may be abrogated altogether without impairing the obligation of the contract "if another and equally adequate remedy for the enforcement of that obligation remains or is substituted for the one taken away." However, the Court recognized that there is conflict concerning this proposition and stated that:

The difficulties in the way of stating a rule render it imperative that every case be determined on its own particular circumstances; and the question whether a change of remedy impairs a substantial right in the last analysis is ordinarily one as to reasonableness.

Id.

One of the specific features of LB 999 is that it increases the maximum period for a stay of execution from nine to twelve months. Neb.Rev.Stat. §25-1506. This precise issue has been treated by the United States Supreme Court. Bradley v. Lightcap, 195 U.S. 1 (1904); Barnitz v. Beverly, 163 U.S. 118 (1896). The Supreme Court specifically held that a "state statute which authorized redemption of property sold in foreclosure of a mortgage, where no such right previously existed, or extended the period of redemption beyond the time previously allowed, could not apply to a sale under a mortgage executed before its passage . . ." See, also, State ex rel. Cleveringa v. Klein, 249 N.W. 118 (N.D. 1933).

In an earlier case, the North Dakota Supreme Court noted that:

[T]he Legislature may not, under the guise of a statute relating to the remedy, change the substantial rights of the parties. . . . (cites omitted). Under the constitutional inhibition against legislation impairing the obligation of contracts, it is immaterial whether the obligation of a contract is impaired by acting on the remedy or directly upon the contract. Impairment in either case is prohibited.

Citing, Story, Constitution (5th Edition), Section 1385, the court continued as follows:

It is perfectly clear that any law which enlarges, abridges, or in any manner changes the intention of the parties, resulting from the stipulations in the contract, necessarily impairs it. The manner or degree in which this change is effected can in no respect influence the conclusion; for whether the law affect the validity, the construction, the duration, the discharge, or the evidence of the contract, it impairs its obligation, through it may not do so to the same extent in all the supposed cases. Any deviation from its terms by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are a part of the contract, however minute or apparently immaterial to their effect upon it, impairs its obligation.

E. J. Lander & Co. v. Deemy, 176 N.W. 922 (N.D. 1920).

The provisions of LB 999 not only extend the period of time in which a stay of execution is granted, but also provide for a partial redemption and a right to cure a default. Additionally, the new provisions of §25-1530 substantially increase the definition of a homestead exemption. These changes and provisions lead us to the conclusion that substantial vested rights of the parties would be interfered with if such provisions were to be applied retrospectively.

It may be conceded that, ordinarily, the rules of the court procedure alone may at any time be changed by legislative enactment, but if a legislative enactment does, in fact, impair or affect a vested right it is unenforceable or inapplicable as against the enforcement of rights so impaired. What belongs merely to the remedy may be altered, provided that the alteration does not impair the obligation of the contract or interfere with the vested right. If it does the

latter, then it is invalid and contrary to the Fourteenth Amendment of the federal Constitution.

Travelers Ins. Co. v. Ohler, supra, at 125-26.

You have also asked whether or not the additional requirement concerning the receivership provisions in Neb.Rev.Stat. §25-1084, is in conflict with the general statutes concerning individuals who may be appointed receivers. We would point out that Neb.Rev.Stat. §25-1086, provides in part that "no person shall be appointed receiver who is party, solicitor, counsel, or in any manner interested in the suit." The proposed language in §25-1084, is as follows:

If a receiver is appointed in an action for the foreclosure of a farm mortgage, the farmer-debtor shall be appointed receiver unless a preponderance of the evidence indicates that the farmer-debtor would be unable to preserve the property. The farmer-debtor, if appointed receiver, shall be exempt from the bond requirements of section 25-1084.

We find this provision to be inconsistent with the general proposition that a receiver should be impartial and disinterested. When there are adversary rights to be determined, a person who is appointed receiver should be indifferent as to claims between the parties. 75 C.J.S. Receivers, §71. See also, Veith v. Ress, 60 Neb. 52, 82 N.W. 116 (1958).

Very truly yours,

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RAE:pjs
cc: Patrick O'Donnell
Clerk of the Legislature

APPROVED:



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