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April 28, 2014

The Honorable Martin O'Malley
Governor of Maryland
State House
100 State Circle
Annapolis, Maryland 21401-1991

RE: House Bill 274 and Senate Bill 708, "Residential Property – Statute of Limitations for Certain Specialties and Motion for Certain Deficiency Judgments"

Dear Governor O'Malley:

We have reviewed and hereby approve for constitutionality House Bill 274 and Senate Bill 708, identical bills entitled "Residential Property – Statute of Limitations for Certain Specialties and Motion for Certain Deficiency Judgments." In approving the bills, we have considered whether the application of the new statute of limitations and the limitation of post-ratification remedies to causes of action that have already accrued would violate due process or constitute a taking of property and we have concluded that it would not.

House Bill 274 and Senate Bill 708 amend Courts and Judicial Proceedings Article, § 5-102, which sets a twelve year statute of limitations for specialties to exclude an action on a "deed of trust, mortgage, or promissory note that has been signed under seal and secures or is secured by owner-occupied residential property." The effect of this change is to make the default statute of limitations of three years applicable in these cases. The bills also specify that a motion for a deficiency judgment after a foreclosure on owner-occupied residential property must be filed within three years after the ratification of the auditor's report, as is now stated in Maryland Rule 14-216, and further provide that the filing of a motion for deficiency judgment "shall constitute the sole post-ratification remedy available to a secured party or party in interest for breach of a covenant contained in a deed of trust, mortgage, or promissory note that secures, or is secured by owner-occupied residential property."

The bills contain four uncodified sections governing the application of the new limits to accrued, pending, and future cases. Section 3 provides that the change in the statute of limitations on certain types of specialties that secure or are secured by owner-occupied residential property from twelve years to three years applies prospectively to any cause of action that arises on or after the effective date of the bills, which is July 1, 2014. Section 4 provides that, with respect to a cause of action that arose before July 1, 2014 and is not already barred by that date, the twelve year statute of limitations will apply if the twelve years will expire before July 1, 2017, and if the twelve years would expire after July 1, 2017 the case must be filed by that date. Thus, cases that have already accrued must be filed within their original statute of limitations or three years from the effective date of the bill, whichever is shorter.

Section 5 of the bills provides that the establishment of a motion for deficiency judgment as the sole post-ratification remedy applies prospectively to any motion for that is filed on or after the effective date of the bills. Section 6 specifies that a motion for a deficiency on a deed of trust, mortgage, or promissory note that secures or is secured by residential property that was owner-occupied residential property at the time the order to docket or complaint to foreclose was filed and for which an auditor's report has final ratification before July 1, 2014, and that is not barred by the three year statute of limitations under Maryland Rule 14-216, must be filed within three years of final ratification or by July 1, 2017 whichever is earlier. Because the three year statute of limitation was retained for these actions, Section 6 has no effect at all.

The Court of Appeals has long held that the shortening of a statute of limitations may not be applied so as to preclude any opportunity to bring suit. *Allen v. Dovell*, 193 Md. 363, 364 (1949); *Kelch v. Keehn*, 183 Md. 140, 145 (1944); *Manning v. Carruthers*, 83 Md. 1, 8 (1896); *Garrison v. Hill*, 81 Md. 551, 557 (1895); *State v. Jones*, 21 Md. 432, 437 (1864). As a result, the Court has refused to construe alterations to the statute of limitations to have this effect. *Taggart v. Mills*, 180 Md. 302, 306 (1942); *Ireland v. Shipley*, 165 Md. 90, 99 (1933); *Frye v. Kirk*, 4 G&J 509, 521 (1832). Recognizing, however, that a statute of limitations that does not act to completely preclude the opportunity to file suit is procedural, *Allen v. Dovell*, 193 Md. at 363; *Kelch v. Keehn*, 183 Md. at 147; *Ireland v. Shipley*, 165 Md. at 99, the Court has recognized that the General Assembly has the power to alter the length of the period so long as there is a reasonable period following the effective date of the legislation within which to assert pre-existing claims, *Geisz v. Greater Baltimore Medical Center*, 313 Md. 301, 320 (1988); *Allen v. Dovell*, 193 Md. at 364; *Garrison v. Hill*, 81 Md. at 557; *State v. Jones*, 21 Md. at 437. Where the General Assembly has not made specific provision for the application of a

shortened statute of limitations to existing cases, the Court has interpreted statutes to require the new time period to run from the effective date of the law. *Allen v. Dovell*, 193 Md. 359; *Kelch v. Keehn*, 183 Md. at 145; *Ireland v. Shipley*, 165 Md. at 99; *Manning v. Carruthers*, 83 Md. at 8; *Garrison v. Hill*, 81 Md. at 557. These cases uniformly describe this interpretation as prospective. *Id.*

The application of the new limitations period in House Bill 274 and Senate Bill 708 does not eliminate any cause of action, but gives the claimant, in each case, either the full benefit of the previous twelve year period, or the full three years of the new three year limitations period running from the effective date of the bills, which is precisely how the Court would likely interpret and apply the bills if they were silent. For that reason, it is my view that the application of the new limitations period to accrued cases, as prescribed in the bills, is not unconstitutional.

House Bill 274 and Senate Bill 708 also make a motion for deficiency judgment in the foreclosure action the sole post-ratification action available for recovery of a deficiency, effectively eliminating the ability to bring a contract action for breach of the promise to repay in the promissory note after foreclosure after July 1, 2014. The two remedies are similar, however, in terms of what must be shown—that the person entered into a contract to pay the money and did not pay it—and in terms of what can be recovered—the amount owed, less any that was recovered as a result of the foreclosure.

The Court of Appeals has recognized that a person has no vested right in a particular remedy. *Baltimore & O. R. Co. v. Maughlin*, 153 Md. 367, 376 (1927); *Wilson v. Simon*, 91 Md. 1, 6 (1900). As a result, "the Legislature may retroactively abrogate a remedy for the enforcement of a property or contract right when an alternative remedy is open to the plaintiff." *Dua v. Comcast*, 370 Md. 604, 638 (2002). It is our view that a motion for a deficiency judgment is a sufficient alternate remedy and therefore, the elimination of the contract action does not deprive any person of a vested right. The fact that the remedies are sufficiently similar that elimination of one does not substantially impair and lessen the value of the contract also means that the change does not impair contracts in violation of the Contract Clause of the United States Constitution. *Pittsburg Steel Company v. Baltimore Equitable Society*, 113 Md. 77, 80 (1910), *affirmed* 226 U.S. 455 (1913); *Bronson v. Kinzie*, 42 U.S. (1 How.) 311, 315 (1843). "[T]he new remedy may be deemed less convenient than the old one, and may in some degree render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional." *Wilson v. Simon*, 91 Md. 1, (1900), *citing Bronson v. Kinzie*, 42 U.S. (1 How.) 311, 316 (1843). This is true whether the remedy is expressly included in the

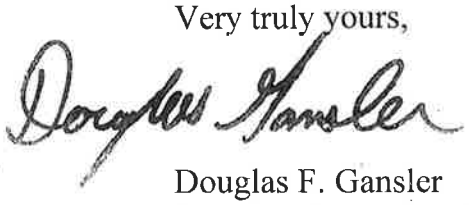
contact, *Wilson v. Simon*, 91 Md. 1, 6 (1900); *Van Rensselaer v. Snyder*, 13 N.Y. 299, 1855 WL 6888 (N.Y. 1855), or included under the general rule that remedies existing at the time of the formation of the contract become part of the contract. *Pittsburg Steel Company v. Baltimore Equitable Society*, 113 Md. 77, 80 (1910), *affirmed* 226 U.S. 455 (1913). This is because "[n]ot only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order." *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 435 (1934); *Gelfert v. National City Bank of New York*, 313 U.S. 221, 231 (1941), *see also*, *Van Rensselaer v. Snyder*, 13 N.Y. 299, 1855 WL 6888 (N.Y. 1855) ("[T]he parties to the grant must be presumed to have contracted in reference to the power and right of the legislature to modify or annul that remedy in common with others."). Furthermore, not even the inclusion of specific remedies in the contract can "bind the hands of the State" and prevent its abolition. *Wilson v. Simon*, 91 Md. 1, 6 (1900).

Neither *Muskin v. State Department of Assessments and Taxation*, 422 Md. 544 (2011) nor *Maryland v. Goldberg*, 437 Md. 191 (2014) is to the contrary. In *Muskin*, the Court of Appeals found that the portion of Chapter 290 of 2007 that provided for the extinguishment of a residential ground lease if it was not registered be September 30, 2010 as required by the bill, abrogated vested rights and thus was invalid under Article 24 of the Maryland Declaration of Rights and Article III, § 40 of the Maryland Constitution. Specifically, the Court found that while the three years for registration provided by the bill provided fair notice, the law impermissibly impacted the reasonable reliance and settled expectations of ground rent owners. The Court in *Muskin* expressly recognized that the Legislature has the power to alter the rules of evidence and remedies including the shortening of a statute of limitations or substitution of another remedy, but found that the statute in question neither established a remedy or a rule of evidence, but rather, "when applied to vested rights in existence at the time the statute was enacted, . . . eliminated all remedies." That is simply not the case with respect to House Bill 274 and Senate Bill 708, which leave a remedy in place that is equivalent to the one that is eliminated.

In *Goldberg*, the Court of Appeals held that Chapter 286 of 2007, which eliminated the remedy of re-entry through ejectment in residential ground rent cases and substituted lien and foreclosure as a means of reclaiming the property retrospectively abrogated vested rights and was invalid. Specifically, the Court, relying on *Muskin*, held that the right to re-enter and take possession of a property in the event of a default on the ground lease was a vested right that could not be taken away. The Court further found

that the foreclosure and lien remedy provided by Chapter 286 did not provide the same safeguards for leaseholders as the ejectment remedy did. The ejectment remedy returned the right of present possession to the ground leaseholder, terminating the ground lease so that the holder owned the property in fee simple, and also permitted the recovery of rents due prior to the termination of the lease. The foreclosure and lien remedy, on the other hand, did not provide any judicial remedy to terminate the lease and return the right of present possession to the ground leaseholder. Thus, it was not an effective replacement for ejectment. This conclusion, however, was based on the "unique nature of the right of re-entry." It did not alter the law with respect to the authority of the General Assembly to amend or substitute remedies. Moreover, nothing about the contract remedy for breach of promise to repay is comparable to the status of ejectment as a property right. In fact, the elements of a contract action and a motion for a deficiency judgment are very similar, as is the relief available. Thus, it is our view that the changes made by House Bill 274 and Senate Bill 708 do not abrogate vested rights.

Very truly yours,



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cc: The Honorable John P. McDonough
Jeanne D. Hitchcock
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