Why the Takings Clause is not a Problem for the Blind Trustee Servicing Plan—A Quick Explanation

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As Oliver Wendell Holmes explained over a century ago, government could “hardly go on” if every change in value of every property interest had to be compensated when the government implemented new regulation affecting market values. Indeed, the Takings Clause guarantee of just compensation has been largely limited to intrusions on core indicia of land ownership—notably the right to be free from permanent physical occupations. In the realm of commercial or economic regulation of personal property, as the United States Supreme Court has explained, private individuals and entities have no reasonable basis for expecting constancy in regulatory treatment. It is against that background—and not the background of cases involving zoning of land—that a plan for mandatory transfer of mortgage servicing to blind trustees must be assessed. Moreover, even if we apply the land use cases regarding Takings to the blind trustee servicing plan (“servicing plan”), it is doubtful any investors could succeed on any Takings claims.

The starting point in any Takings Clause analysis is the identification of the relevant "property" that it is at issue. The Supreme Court has adamantly rejected “conceptual severance” – the severing of an investment into discrete elements, so as to isolate some element that has been wiped out by new government regulation. Instead, the Court has held that the economic investment as a whole must be considered in evaluating how much new government regulation has resulted in a loss in fair market value. Viewed from this vantage, the relevant property that could be affected by the servicing plan is a given investor’s financial interest in a pool of mortgages. If the servicing plan were to result in an investor receiving nothing from an investment in a pool when it otherwise would have received a significant sum of money, we could characterize the plan as resulting in the elimination or cancellation of an interest in property. But the servicing plan is likely to instead result in investors sometimes receiving more from their investment in the pool, and perhaps sometimes receiving less than they otherwise would have. But investors could not establish—and under clear doctrine it would be their burden to establish—that their financial interest in a pool was “wiped out” by the servicing plan. Indeed, it seems unlikely they would be able to carry their burden of proof of quantifying any financial losses they incurred at all as a result of the servicing plan.

Even if the investors could indeed show some partial losses or reduction in the value of their property as investment in the mortgage pool, that would decidedly not mean that a Taking had occurred. Under the applicable Penn Central Transportation v City of New York framework, partial reductions in value of a property have generally not been found compensable. In deciding whether such partial losses are compensable, key factors for the court to consider are: (1) the extent to which the character of the government regulation infringes on a traditional core aspect of property ownership, such as the right to physically exclude, (2) the property owner’s “reasonable expectations”, (3) the degree of “average reciprocity of advantage” – that is, the extent to which the affected property owner may benefit from as well as be burdened by the new regulation, and (4) the breadth or narrowness of the class of persons or entities affected by the new regulation, with the idea being that narrowly applied regulation warrants more concern because of the possibility of unfair discrimination against a vulnerable small minority. All of these Penn Central factors argue against a finding of any Taking as a result of the servicing plan. The servicing agreements underlying the pool investments generally allow for reworking of mortgages by the servicer, so investors in mortgage pools could not have any firm, reasonable expectation mortgages would not be reworked. Moreover, the residential housing market and mortgages in particular as a historical matter been the subject of intensive regulation and often massive new

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1 Pennsylvania Coal v. Mahon, 260 US 393 (1922).
regulation during housing market downturns, and investors in mortgage pools reasonably would have known as much. The servicing plan does not affect at all traditional indicia of property ownership, such as the right to physically exclude. There is clear average reciprocity of advantage, because investors will benefit from the overall stabilization of the housing market and hence the economy (and may indeed benefit from some share of the mortgage restructurings). Finally this plan would apply to a broad range of property owners, and would apply “blindly,” so the equal protection concerns that are expressed in the Takings Clause jurisprudence would not be implicated. Like the adoption of a more progressive tax to raise revenue to decrease a federal deficit that threatens economic stability, the servicing plan would be broad-based, public-need-driven economic regulation of the sort the courts have held is a matter best left to democratic politics and not properly the subject of claims for just compensation under the Takings Clause.