No. SC87061

IN THE
SUPREME COURT OF MISSOURI

CONSECO FINANCE SERVICING CORPORATION
f/k/a GREEN TREE FINANCIAL SERVICING CORPORATION,
JOHN C. WREN, JR. AND SHANNON WREN

Respondents,

v.

MISSOURI DEPARTMENT OF REVENUE,

Appellant.

RESPONDENTS' BRIEF

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ATTORNEYS FOR RESPONDENTS

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II. The trial court correctly declared AMHTD unconstitutional because the statutory scheme violates the due process requirements of the United States and Missouri Constitutions in that the property interests of owners and lienholders are extinguished with no provision for a meaningful hearing and notice, and the statutory scheme requires rentals be redeemed as a precondition to stopping the issuance of the abandoned title.

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IV. The trial court properly ruled the actions of the Department of Revenue violated 42 U.S.C. § 1983 because the Department of Revenue deprived the Wrens and Conseco of rights secured by the Constitution in that the Department did not provide the Wrens or Conseco with due process or equal protection.

Arkansas Med. Soc'y, Inc. v. Reynolds, 6 F.3d 519 (8th Cir. 1993)

Maine v. Thiboutot, 448 U.S. 1 (1980)

Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n,

453 U.S. 1 (1981)

STATEMENT OF FACTS

A. Stipulated Facts

The following statement of facts are part of an Agreed Stipulation of Facts entered into by the parties. L.F. 00170 to 00180.

Conseco is a company that has loaned money to individuals to purchase manufactured homes. L.F. 00170. Conseco is the successor in interest to Green Tree Financial Servicing Corporation. L.F. 00170.

A lien on a manufactured home is noted on both the application for the title and on the title itself. § 700.350, RSMo 2000. L.F. 00170. Sections 700.525 through 700.541, R.S.Mo. 2000, allow the Missouri Department of Revenue to issue title to abandoned manufactured homes to landowners. L.F. 00171. Sections 700.525 through 700.541 do not require a hearing to determine if an abandoned manufactured home title should be issued, nor do they set up a procedure for a hearing. L.F. 00171.

The Department of Revenue sends notices of a pending application for an abandoned title by certified mail. L.F. 00171. The statute requires the notices be sent to the owner(s) and lienholder(s) of record. L.F. 00171. The notices to owners are sent to the address listed on the Certificate of Title. L.F. 00171. The notices to the lienholders are sent to the address listed on the Certificate of Title. L.F. 00171.

The notices sent by the Department of Revenue do not state the amount of rent allegedly due and owing. L.F. 00171. The notices sent by the Department of Revenue do

not state that a hearing may be requested, nor do they mention any procedure for a hearing. L.F. 00172.

The Department of Revenue has issued titles to manufactured homes free and clear of interest of the owner and lienholder. L.F. 00172. For example, the Missouri Department of Revenue received an application for title to a manufactured home owned by John Wren and Shannon Wren f/k/a Shannon Alley from Lakehurst Investments. L.F. 00172. Conseco had a security interest in the home and was listed as the lienholder on the Certificate of Title. L.F. 00172. The Department of Revenue sent the Wrens a notice to the address at which the manufactured home was located, and sent notice to Green Tree Financial. L.F. 00172.

The landowner is not required to provide the amount of rent due and owing on the Application. L.F. 00172. Therefore, the Department of Revenue does not know the amount of any rental owed for any alleged abandoned home, except in circumstances where the landlord sends such information to the Department when seeking an abandoned manufactured home title. L.F. 00172. The notice to the Wrens did not state the amount of rentals allegedly due and owing. L.F. 00172.

The notice to the Wrens did not state that a hearing may be requested, nor did it mention any procedure for a hearing. L.F. 00172. The Department of Revenue issued a certificate of title free and clear of any interest of the Wrens or Conseco to the landowner, Lakehurst Investments. L.F. 00173. The Department of Revenue does not know if Lakehurst Investments was permitted to sell the manufactured home and to retain

proceeds from the sale of the manufactured home including proceeds over and above payments due in rents and related expenses. L.F. 00173.

In their respective petitions, Conseco and another lender GreenPoint have responded to some of the notices sent by the Department of Revenue concerning abandoned titles. L.F. 00173. They requested that title not be issued for the following manufactured homes: 1995 TRIL, VIN # CH1AL10611 (Conseco); 1998 Gates, VIN # 11980532245 (Green Tree/Conseco); 1995 SNRG, VIN # SSDAL303742 (GreenPoint); 1999 Wast, VN # 17L04521 (GreenPoint); and a 1996 Holly Park, VIN # 01NHP96389AB (Conseco). L.F. 00173.

Upon receipt of the responses, the Department of Revenue notified Conseco and GreenPoint that they needed to get a "stay order," i.e., a restraining order, within seven (7) days or that title would be issued. L.F. 00173. The Department of Revenue did not know, and still does not know, the amounts of rentals due and owing relating to the manufactured homes. L.F. 00173. The Department has enacted no specific regulations in the Code of State Regulations, nor does it have any special internal rules or policies, as to hearings on applications for an abandoned manufactured home title. L.F. 00173.

B. The underlying proceeding

Conseco Finance filed suit against the Department of Revenue after the Department notified counsel for Conseco that it needed to get a "stay order," i.e., a restraining order, to prevent the issuance of titles under the statutory scheme. L.F. 00009 - 00014.

The Circuit Court of St. Louis County, Missouri entered a temporary restraining order, which enjoined the issuance of the titles and eventually declared the statutory scheme unconstitutional and entered a permanent injunction. L.F. 00016 - 00017, L.F. 00245 - 00246 . The permanent injunction was entered on the same day that leave was granted to file a second amended petition. L.F. 00083 - 00084.

The Department of Revenue appealed the ruling to the Missouri Supreme Court. L.F. 00131 - 00145 (Conseco Finance Servicing Corp. v. Mo. Dept of Rev., 98 S.W.3d 540 (Mo banc 2003)). This Court remanded the case with the directions to permit the director of revenue an opportunity to respond to and conduct discovery as to the allegations of the second amended petition. L.F. 00131 - 00145.

The parties then engaged in discovery and eventually entered an Agreed Stipulation of Facts. L.F. 00170 - 00180. Cross motions for summary judgment were filed. L.F. 00199 - 00244. The trial court granted the Wrens and Conseco's motion for summary judgment, declaring the statutory scheme unconstitutional on its face and as applied. L.F. 00245 - 00246.

ARGUMENT

I. The trial court correctly declared the AMHTD unconstitutionally vague because it does not give a person fair notice or sufficient warning of the confiscation of their property in that the definition of "abandoned," and the remedies of owners and lienholders are so ambiguous that a person is not able to determine their meaning by common understanding and practices.

In its earlier Opinion, this Honorable Court stated:

> This Court agrees that serious constitutional issues would be raised were this Court to construe AMHTD [abandoned manufactured home title disposition] to permit a landlord to retain proceeds of sale of a manufactured home, over and above the amounts due in rents and related expenses, and should it permit a finding of abandonment without constitutionally adequate notice and opportunity to be heard.

Conseco Finance Servicing Corp. v. Mo. Dept of Rev., 98 S.W.3d 540, 543 (Mo banc 2003).

In a footnote, this Court further noted:

> Ironically, the department sent the Wrens' notice to the address at which the manufactured home was located, a location that it had just been told was abandoned. Nothing in this record suggests that the department attempted another form of notice better calculated to give actual notice to the homeowner. Additional questions are raised as to

> the adequacy of the timing and content of the pre-deprivation notice and lack of, or lack of notice of, judicial review of the department's determination to find the home abandoned and issue a new title to the landlord.

Conseco Finance Servicing Corp. v. Mo. Dept of Rev., 98 S.W.3d 540, 543, fn 4 (Mo banc 2003).

This Court's concerns and observations in its earlier opinion were appropriate. Simply put, the Department of Revenue has been unable to apply or interpret the statute, because of the inherent vagueness and ambiguities in the statute. Out of frustration, the Department of Revenue finally instructed counsel for Conseco to get an injunction or "stay order" to prohibit the issuance of any titles. L.F. 00173.

A statute is unconstitutionally vague if it does not give a person or ordinary intelligence sufficient warning at to the prohibited behavior. State of Missouri v. Self, 155 S.W.3d 756, 760 (Mo. banc 2005). A statute is unconstitutionally vague if it fails to "speak with sufficient specificity and provide sufficient standards to prevent arbitrary and discriminatory enforcement." State v. Allen, 905 S.W.2d 874, 877 (Mo. banc 1995) (citing Papachristou v. City of Jacksonville, 405 U.S. 156 (1972)). The "vagueness doctrine assures that guidance, through explicit standards, will be afforded to those who must apply the statute, avoiding possible arbitrary and discriminatory application." State v. Young, 695 S.W.2d 882, 884 (Mo. banc 1985).

In civil cases involving "void for vagueness" arguments, however, courts have recognized that the precision and specificity that is required in criminal statutes is not required in civil statutes. See, *e.g.*, Village of Hoffman Estates, Inc. v. Flipside, 455 U.S. 489, 498 (1982); Doe v. Mo. Dep't of Soc. Servs., 71 S.W.3d 648, 651 (Mo. App. 2002); Hampton Foods, Inc. v. Weterrau Fin. Co., 831 S.W.2d 699, 701 (Mo. App. 1992); and Fitzgerald v. City of Maryland Heights, 796 S.W.2d 52, 55 (Mo. App. 1990).

The test in enforcing the doctrine is whether the language conveys to a person of ordinary intelligence a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. Cocktail Fortune, Inc. v. Supervisor of Liquor Control, 994 SW2d 955, 957 (Mo. banc 1999). However, neither absolute certainty nor impossible standards of specificity are required in determining whether terms are impermissibly vague. Id. Moreover, it is well established that "if the law is susceptible of any reasonable and practical construction which will support it, it will be held valid, and ... the courts must endeavor, by every rule of construction, to give it effect." Id. Finally, courts employ greater tolerance of enactments with civil rather than criminal penalties because of the consequences of imprecision are qualitatively less severe. Id.

In this case, the statutory scheme is not susceptible of any reasonable or practical construction, because it does not adequately define "abandoned" and has conflicting provisions relating to the interests of owners and lienholders.

Section 700.525 R.S.Mo. (2000) of the statute defines "abandoned" as:

a physical absence from the property, and either:

> (a) Failure by a renter of real property to pay any required rent for fifteen consecutive days, along with the discontinuation of utility service to the rented property for such period; or
>
> (b) Indication of or notice of abandonment of real property rented from a landlord.

Arguably, if an owner of a manufactured home leaves on a three-week vacation, this may constitute an abandonment under the statute. Clearly, this definition is so ambiguous that a person is not able to determine the proscribed conduct when measured by common understanding and practices.

Similarly, the statutory scheme has conflicting provisions relating to the interests of owners and lienholders. Section 700.527, which is the core of the statutory scheme, provides:

> 1. If a person abandons a manufactured home on any real property owned by another who is renting such real property to the owner of the manufactured home, and such abandonment is without the consent of the owner of the real property, the owner of the real property may seek possession of and title to the manufactured home in accordance with the provisions of sections 700.525 to 700.541 subject to the interest of any party with a security interest in the manufactured home.

The phrase "subject to the interest of any party with a security interest in the manufactured home" was added to the statutory scheme in 1995. Other parts of the statute confirm that the interests of a secured party are not affected. For example, Section 700.530 provides:

> The provisions of sections 700.525 to 700.539 shall not affect the right of a secured party to take possession of, and title to, a manufactured home pursuant to section 400.9-503 R.S.Mo., section 700.386 or otherwise as allowed by contract or law.

Other provisions of the statutory scheme, however, conflict with 700.527 and 700.530. For example, Section 700.533 provides:

> The owner of such manufactured home or the holder of a valid security interest therein which is in default may claim title to it from the landlord seeking possession of the manufactured home upon proof of ownership or valid security interest which is in default and payment of all reasonable rents due and owing to the landlord.

Section 700.535 further provides:

> If the manufactured home is titled in Missouri, the valid owner of the manufactured home or the holder of a valid security interest therein may voluntarily relinquish any claim to the manufactured home by affirmatively declaring such relinquishment or by failing to respond to the notice

required by section 700.531 within thirty days of the mailing or delivery of such notice by the director of revenue.

Yet, Section 700.537 addresses the rights of a lienholder in a different fashion, as it provides:

> The lienholder of an abandoned manufactured home may repossess an abandoned manufactured home by notifying by registered mail, postage prepaid, the owner if known, and any lienholders or record, at their last know addresses, that application for a certificate of title will be made unless the owner or lienholder of record makes satisfactory arrangements with the owner of real property upon which such abandoned manufactured home is situated within thirty days of the mailing of the notice. This notice shall be supplied by the use of a form designed and provided by the director of revenue.

Under the statutory scheme, an owner and lienholder is unable to determine its rights and duties under the statute.

The Department of Revenue contends the Wrens and Conseco are challenging the vagueness of the statute on some hypothetical application. Contrary to this assertion, the Department of Revenue did not provide the trial court with any evidence that the Wrens' manufactured home had been "abandoned".

In fact, the statute is so ambiguous the Department of Revenue, and Conseco, could not even figure out the proscribed conduct when measured by common

understanding and practices. When contacted about the statute, the Department eventually informed Conseco that it had to obtain a "stay order", i.e., temporary restraining order to prohibit any issuance of titles, because the statute is so ambiguous. L.F. 00173. Clearly, this is not a hypothetical, but rather consist of real facts which reflect AMHTD is impermissibly vague.

II. The trial court correctly declared AMHTD unconstitutional because the statutory scheme violates the due process requirements of the United States and Missouri Constitutions in that the property interests of owners and lienholders are extinguished with no provision for a meaningful hearing and notice, and the statutory scheme requires rentals be redeemed as a precondition to stopping the issuance of the abandoned title.

The Due Process Clause of the Fourteenth Amendment of the United States Constitution guarantees that "[n]o person shall ... be deprived of life, liberty, or property, without due process of law."[1] The general rule is that individuals must receive notice and an opportunity to be heard before the Government deprives them of property. United States v. James Daniel Good Real Property, 510 U.S. 43, 48 (1993).

The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decisionmaking when it acts to deprive a person of his

[1] Similarly, Article I, Section 4, of the Missouri Constitution provides "[t]hat no person shall be deprived of life, liberty, or property without due process of law."

possessions. Fuentes v. Shevin, 407 U.S. 67, 80-81 (1972). The purpose of this requirement is not only to ensure abstract fair play to the individual. Id. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment – to minimize substantively unfair or mistaken deprivations of property, a danger that is especially great when the State seizes goods simply upon the application of and for the benefit of a private party. Id. So viewed, the prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference. Id.

The United States Supreme Court has consistently held that some kind of hearing is required at some time before a person is finally deprived of his property interests. Memphis Light, Gas and Water Division v. Craft, 436 U.S. 1, 19 (1978). A hearing, in its very essence, demands that he who is entitled to it shall have the right to support his allegations by argument, however brief, and, if need be, by proof, however informal. Id. at 18.

If the right to notice and a hearing is to serve its full purpose, then it is clear that it must be granted at a time when the deprivation can still be prevented. Fuentes v. Shevin, 407 U.S. 67, 81-82 (1972). At a later hearing, an individual's possessions can be returned to him if they were unfairly or mistakenly taken in the first place. Id. Damages may even be awarded to him for the wrongful deprivation. Id. But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right

of procedural due process has occurred. Id. The United States Supreme Court has not embraced the general proposition that a wrong may be done if it can be undone. Id.

Although the United States Supreme Court has held that due process tolerates variances in the form of a hearing "appropriate to the nature of the case" and "depending upon the importance of the interests involved and the nature of the subsequent proceedings (if any)," the Supreme Court has traditionally insisted that, whatever its form, opportunity for hearing must be provided before the deprivation at issue takes effect. Id. That the hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing before he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event. Id.

In Graff v. Nicholl, 370 F.Supp. 974 (D.C. Ill 1974), the court addressed these hearing requirements relating to "abandoned" motor vehicles. In that case, an action was brought to challenge the validity of certain Illinois statutory provisions and related ordinances authorizing law enforcement agencies to seize and dispose of "abandoned" motor vehicles. In declaring the statute unconstitutional, the court noted:

> State and local governments have valid interests in the economic and expeditious resolution of questions involving the disposition of apparently abandoned motor vehicles. Nevertheless, where official action seriously interferes with property rights and the validity and reasonableness of that action may be open to question,

> and there is no need for immediate action, due process requires a prior hearing at which the vehicle owner may contest the planned action. The Supreme Court has emphatically rejected the argument that the cost, in time, effort, and expense, of holding a prior hearing constitutes a legitimate justification for ignoring this aspect of Fourteenth Amendment protections. See, e.g., Fuentes v. Shevin, *supra*, 407 U.S. at 90-91 n. 22, 92 S.Ct. 1983, 32 L.Ed.2d 556.

Graff at 984-85.

The court further stated:

> The statute and ordinance also run afoul of the Constitution in their requirement that towing and storage charges be paid as a precondition to the release of an abandoned title, regardless of whether the owner had been charged with the misdemeanor of abandonment, or charged but acquitted. As demonstrated by this case, fees ... may have to be paid without an opportunity, either judicial or administrative, to challenge the validity of the abandonment presumption. Such a scheme breaches fundamental fairness and further deprives vehicle owners of their property without due process of law.

Graff at 985.

Similarly, in Nolt v. Isadore, 590 F.Supp 518 (Alaska 1984), a vessel owner brought action against a city and others, including the harbor master that was owed moorage fees, relating to the city's seizure and impoundment of a vessel that allegedly

had been abandoned. The court held that the impoundment statute challenged was constitutionally defective because there was "no provision for a meaningful hearing even after seizure." Nolt at 522. The court noted that the ordinance provided no procedure to assure reliability that the determination that impoundment was justified. Id. The only procedure to recover the vessel was to "redeem the boat by cash payment of all charges." Id. The court held that this remedy was insufficient as the government interest at stake simply appeared "to avoid the inconvenience and expense of a prompt hearing to establish probable cause for the impoundment of the vehicle." Id.

In this case, the statutory scheme has no provision for a hearing to determine the most fundamental of issues, such as whether the manufactured home was abandoned, whether rentals are owed, etc. Section 700.525 R.S.Mo. of the statutory scheme defines "abandoned" as:

> a physical absence from the property, and either:
>
> (a) Failure by a renter of real property to pay any required rent for fifteen consecutive days, along with the discontinuation of utility service to the rented property for such period; or
>
> (b) Indication of or notice of abandonment of real property rented from landlord.

In the Wrens' case, the Department of Revenue sent out a notice to the Wrens and Conseco, requiring:

> THE OWNER OR LIENHOLDER MUST REDEEM THE MANUFACTURED HOME WITHIN THIRTY DAYS OF THIS NOTICE TO PROTECT THEIR INTEREST
>
> ....
>
> The lienholder may redeem the manufactured home, if titled in Missouri, by presenting a valid security agreement to the landowner and paying all rent owed to the landowner.
>
> The owner or lienholder must notify this department within 30 days of this notice that the manufactured home was redeemed and submit a receipt issued by the landowner showing all rent was paid. Failure to redeem the manufactured home and notify this department will cause the Director to issue title in the name of the landowner.

L.F. 00177

The notice does not allow for nor provide for any hearing to dispute such rudimentary issues as to whether the home has been "abandoned," whether the rent is even owed, etc. Instead, the Department of Revenue requires the rentals be paid within thirty days of the notice. If the homeowner or lienholder fails to pay the rentals, the owner of the manufactured home loses his residence and remains liable on loan payments for the purchase of the manufactured home. The Wrens lost their home; and Conseco lost its collateral, without an opportunity for a hearing. Clearly, this is inequitable and an unconstitutional taking of property.

In addition to the lack of a hearing, the statutory provisions as to notice are clearly inadequate and do not comport with due process requirements of the Fourteenth Amendment. Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must be notified. Fuentes v. Shevin, 407 U.S. at 80. The right to a hearing is meaningless without notice. Walker v. Hutchinson, 352 U.S. 112, 115 (1956). Notice is required before property interests are disturbed, before assessments are made, and before penalties are assessed. Id. Notice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act. Lambert v. California, 355 U.S. 225, 228 (1957), mod. and rehearing denied, 355 U.S. 937 (1958).

The prevailing standard regarding the constitutional adequacy of notice was stated in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950):

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information and it must afford a reasonable time for interested to make their appearance. But if with regard for the practicalities and peculiarities of the case these conditions are reasonably met the constitutional requirements are satisfied. The criterion is not the possibility of conceivable injury, but the

just and reasonable character of the requirements, having reference to the subject with which the statute deals.

In this case, the notice requirements required under the Fourteenth Amendment clearly are not met. The notice being sent to the owner and lienholder is clearly defective for a number of reasons, including the following:

1. The notice does not notify either the owner or lienholder of an administrative procedure to contest the allegations in the notice. The failure to provide notice reasonably calculated to apprise a party of the availability of an administrative procedure to consider their complaint, and the failure to afford the party an opportunity to present a complaint to a designated person empowered to review such disputes deprives the parties of an interest in property without due process of law. See Memphis Light, Gas and Water Division v. Craft, 436 U.S. 1, 21 (1978); see also Fell v. Armour, 355 F. Supp. 1319, 1329 (M.D. Tenn 1972) (as to forfeiture "the notice must afford the owner seeking recovery of his vehicle an opportunity to present his objections to the forfeiture, the notice must necessarily state the reasons for the seizure and the procedure by which he may seek recovery of his vehicle, including the time period in which he must present his claim for recovery, and the penalty for failure to file within the time period.")

2. The statute and notice also run afoul of the Constitution in their requirement that rental charges be redeemed as a precondition to stopping the issuance of the abandoned title. Neither the owner or lienholder is allowed to contest the most fundamental of issues, e.g., whether the manufactured home is in fact "abandoned"

before making these payments. Such a scheme breaches fundamental fairness and further deprives vehicle owners of their property without due process of law.

3. The notices sent by the Department of Revenue do not even state the amount of the rentals required to redeem the manufactured home. It simply requires "paying all rent owed to the landowner."

4. The notices are also defective in that the Department of Revenue is sending the notice to the address of the manufactured home owner that has been allegedly abandoned, knowing that the owner of the manufactured home will not receive the notice. When the state knows that notice by mail will be ineffective, more extensive forms of notice may be required. See, e.g., Robinson v. Hanrahan, 409 U.S. 38 (1972) (notice of forfeiture procedure was defective because mailed to an address known by the state to be inaccurate as appellant was in county jail); Covey v. Town of Somers, 351 U.S. 141 (1956) (mailed notice to a taxpayer known to be incompetent and incapable of understanding such notices was insufficient to afford her notice of a foreclosure sale.)

In its earlier decision Conseco Finance Servicing Corp. v. Mo. Dept of Rev., 98 S.W.3d 540, 543 (Mo banc 2003), this Court raised concerns about the form and manner of notice, stating:

> Ironically, the department sent the Wrens' notice to the address at which the manufactured home was located, a location that it had just been told was abandoned. Nothing in this record suggests that the department attempted another form of notice better calculated to give actual notice to the homeowner.

> Additional questions are raised as to the adequacy of the timing and content of the pre-deprivation notice and lack of, or lack of notice of, judicial review of the department's determination to find the home abandoned and issue a new title to the landlord.

Conseco Finance Servicing Corp. v. Mo. Dept of Rev., 98 S.W.3d 540, 543 fn 4 (Mo banc 2003).

In fact, the record reflects the Department did not send any notices other than to the address which presumably was "abandoned", which obviously would not reach the owner. Thus, the statutory scheme and the actions of the Department of Revenue are unconstitutional, because the notice and lack of opportunity for hearing are not adequate and in fact are nonexistent.

III. The trial court properly ruled the AMHTD is unconstitutional because it violates the equal protection clause of the United States Constitution in that the poor are unable to obtain the same judicial review as others because rentals are required to be paid as a precondition to the issuance of an abandoned title.

The Fourteenth Amendment to the United States Constitution prohibits a state from denying "any person within its jurisdiction the equal protection of the laws."[2]

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[2] Similarly, Article I, Section 2, of the Missouri Constitution provides "that all persons are created equal and are entitled to equal rights and opportunities under the law."

Equal protection of the law does not exist if the kind of appeal a man enjoys depends on the amount of money he has. See, e.g Douglas v. California, 372 U.S. 353 (1963). On numerous occasions, the United States Supreme Court has struck down financial limitations on the ability to obtain judicial review. Williams v. Shaffer, 385 U.S. 1037, 1039 (1967). The Supreme Court has recognized that the promise of equal justice for all would be an empty phrase for the poor, if the ability to obtain judicial relief were made to turn on the length of a person's purse. Id. The Equal Protection Clause of the Fourteenth Amendment is not limited to criminal prosecutions. Id. Its protections extend as well to civil matters. Id.

In this case, the statute requires that all persons pay the rentals owed as a precondition to stopping the issuance of an abandoned title. More affluent persons may be able to pay the charges, and regain their residences, but indigents may be deprived permanently of their property. This is a particularly large concern in this setting because manufactured homes

typically are purchased by less affluent people. Accordingly, the statute also violates the Equal Protection Clause of the United States Constitution.

IV. The trial court properly ruled the actions of the Department of Revenue violated 42 U.S.C. § 1983 because the Department of Revenue deprived the Wrens and Conseco of rights secured by the Constitution in that the Department did not provide the Wrens or Conseco with due process or equal protection.

Appellant erroneously contends the circuit court erred in holding the actions of the Department of Revenue violated 42 U.S.C. § 1983, because that section does not create a separate cause of action. Contrary to Appellant's assertion, section 1983 specifically provides a federal cause of action for plaintiffs to sue officials acting under color of state law for alleged deprivations of "rights, privileges, or immunities secured by the Constitution and laws" of the United States. See 42 U.S.C. § 1983.

It is well recognized that a plaintiff may use section 1983 to enforce not only rights contained in the Constitution, but also rights that are defined by federal statutes. See Maine v. Thiboutot, 448 U.S. 1, 4-8 (1980); Arkansas Med. Soc'y, Inc. v. Reynolds, 6 F.3d 519, 523 (8th Cir. 1993). An exception to this general rule exists when a comprehensive remedial scheme evidences a congressional intent to foreclose resort to section 1983 for remedy of statutory violations. See Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 19-2 (1981).

In this case, there is no comprehensive remedial scheme to foreclose a section 1983 remedy. Therefore, the trial court properly granted Plaintiffs' claims for declaratory and injunctive relief under that section.

CONCLUSION

The AMHTD has no provision for a meaningful hearing and notice for obtaining titles to "abandoned" manufactured homes, and it is so ambiguous that a person is not able to determine its meaning by common understanding and practices. In addition, it improperly requires rentals be redeemed as a precondition to the issuance of the abandoned title, which does not allow for the poor to obtain the same judicial review as others. Thus, the trial court correctly held the statutes are unconstitutional, and the judgment of the trial court should be affirmed.

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CERTIFICATE OF SERVICE

I hereby certify that two copies and a diskette of the foregoing was sent via U.S. Mail, postage prepaid, this 2nd day of February, 2006 to:

Mr. Mark E. Long, Assistant Attorney General
Supreme Court Building
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P.O. Box 899
Jefferson City, Missouri 65102

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Respondents' Brief:

* complies with the type-volume limitation;

* contains 6485 words and 710 lines of proportional-spaced type;

* the word processing software used to prepare the Brief was Word 13.0; and

* the 3" computer diskette of the Respondents' Brief being filed herewith has been scanned for viruses and is virus-free.

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APPENDIX

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