

Major Victory won in case challenging the constitutionality of PA436

On November 6, 2013, Judge Rhodes of the Federal Bankruptcy Court granted the Plaintiffs' Motion to lift the Stay in the Phillips v Snyder case, which challenges the constitutionality of PA436. Consequently, the Plaintiffs will soon have the opportunity to argue in Federal Court that PA436 is a violation of the U.S. Constitution.

The Basis for the Litigation

It is our contention that The *Local Financial Stability and Choice Act*, Act No. 436, Public Acts of 2012, MCL §§ 141.1541 *et seq.* (Public Act 436) is a violation of the United States Constitution. It effectively establishes a new form of government within the State of Michigan. The new form of government allows Michigan cities and other forms of municipal corporations to be ruled by one unelected official, who is vested with broad legislative power and whose orders, appointments, expenditures, and other decisions are not reviewable by local voters.

The rights of the citizens of Michigan under the United States Constitution, include a due process right to an elected, republican form of government, a right to procedural due process during the passage and repeal of local laws, or removal of elected officials, a right to freedom of speech, a right to petition their local government, and a right to equal protection of laws granting Michigan citizens the right to vote in local elections. Each of these rights is violated by provisions of Public Act 436. Additionally, Public Act 436 violates the Voting Rights Act of 1965 which protects the citizens of Michigan from discriminatory laws that disenfranchise voters.

On its face, as applied, and in practice, Public Act 436 violates the United States Constitution through provisions of the statute that permit emergency managers to:

- a. Be selected and appointed solely at the discretion of the Governor; See provisions including but not limited to MCL §141.1549;
- b. Act for and in the place and stead of the local governing body of cities and villages and to assume all the powers and authority of the local governing body and local elected officials. See provisions including but not limited to MCL §141.1549, §141.1550, and §141.1552;
- c. Rule by decree over cities and villages through powers that permit the emergency manager to contravene and thereby implicitly repeal local laws such as city and village charters and ordinances; See provisions including but not limited to MCL §141.1552; and
- d. Explicitly repeal, amend, and enact local laws such as city and village ordinances. See provisions including but not limited to MCL §141.1549 and §141.1552.
- e. Ratify the legislative acts taken by emergency managers acting under Public Act 4. See provisions including but not limited to MCL §141.1570.

Through its provisions, Public Act 436 establishes a new form of local government, previously unknown within the United States or the State of Michigan, where the people within local municipalities may be governed by an unelected official who establishes local law by decree.

*Legislative Background of
Municipal Financial Distress in Michigan*

During the Great Depression in the 1930s, 4,770 cities defaulted on their debt. Among all states, Michigan had the fourth highest number of defaulting municipalities throughout the depression years. During the depression, creditors of defaulting cities were commonly required to file a mandamus action in state courts seeking to compel the municipality to raise taxes to pay debt obligations. Courts commonly appointed receivers to oversee the finances of municipal debtors. To improve procedures for creditors and municipal debtors, the federal government adopted Chapter 9 of the federal bankruptcy code in 1937. Chapter 9 permits the use of federal bankruptcy procedures for debt-ridden municipalities. Under Chapter 9, elected officials remain in office and retain significant autonomy while bankruptcy procedures oversee the development of a plan to adjust debts and pay creditors. Before a Chapter 9 petition may be filed however, the state must authorize the municipality to file for bankruptcy.

Since 1937, two Michigan cities have defaulted on bond payments or been placed under a court imposed receivership due to insolvency. Muskegon Township defaulted on revenue bond payments in the early 1960s and the City of Ecorse was placed in receivership by a Wayne County Circuit Court in 1986. Neither municipality sought the protections of Chapter 9 bankruptcy. Muskegon Township entered into a settlement agreement with its creditors that resolved their defaults. Ecorse remained under court receivership through 1990 and was subject to further state oversight until the late 1990s.

In 1990, the legislature passed the *Local Government Fiscal Responsibility Act*, Act No. 72, Public Acts of 1990 (PA 72). Public Act 72 authorizes state officials to intervene when local governments face a financial emergency. Pursuant to PA 72, Michigan's local financial emergency review board can appoint an emergency financial manager (EFM) only after the Governor declares a financial emergency within the local government. Under PA 72, local elected officials are not removed from office and the emergency financial manager's powers are understood to only extend over municipal finances and do not extend to purely administrative or policy matters. Furthermore, emergency financial managers have the power to renegotiate, but not unilaterally break contracts.

In the late 1990s, legislation was passed to revise municipal revenue sharing laws. The legislative revisions severely reduced the amount of funds shared by the state with local government. Local governments saw further revenue reductions when income and property tax revenues sharply declined during the recession of 2000-2003. As a result, municipalities experienced significant financial stress during the late 1990s and early 2000s.

During this time period, the state local financial emergency review board appointed PA 72 emergency financial managers in the cities of Hamtramck, Highland Park, and Flint. These original Public Act 72 emergency financial managers remained in place as follows:

- a. Hamtramck from 2000 until 2007 (7 years) ;
- b. Highland Park from 2001 until 2010 (9 years); and
- c. Flint from 2002 until 2004 (2 years)².

With the onset of the historic global recession that began in 2007 and resulted in record foreclosures and steep unemployment, cities and municipal corporations saw further sharp reductions to income and property tax revenue. State revenue sharing laws were further amended in recent years to

reduce revenue sharing with local governments and thereby balance state budgets. As a result, Michigan municipalities again faced widespread financial stress. Once again, the state local financial emergency review board appointed PA 72 emergency financial managers in various cities, including Pontiac, Ecorse, and Benton Harbor. Public Act 72 emergency financial managers were also appointed over the Village of Three Oaks (2008) and the Detroit Public Schools and the review board entered into a PA 72 consent agreement with the city of River Rouge. The second wave of Public Act 72 emergency financial managers were appointed as follows:

- a. Pontiac from 2009 until the present (4+ years);
- b. Ecorse from 2009 until the present (4+ years);
- c. Benton Harbor from 2010 through the present (3+ years);
- d. Village of Three Oaks from 2008 until 2009 (1 year); and
- e. Detroit Public Schools from 2009 until the present (4+ years).

The state's consent agreement with the city of River Rouge has also remained in place from 2009 to the present. Notably, since the onset of the global recession in 2007, the Village of Three Oaks is the only municipality that has emerged from a financial emergency following the appointment of an emergency manager or the entering of a consent agreement.

Following elections in November of 2010 and the turnover of state offices in January, the Michigan legislature introduced House Bill 4214 (2011) on February 9, 2011. The bill is widely seen as a response to a court ruling finding that the Detroit Public Schools' School Board and not the emergency manager possessed the power under state law to determine curriculum, and which text books would be used in the city's public schools. The decision enraged conservative elements of the state legislature who then sought greater control over the content of the curriculum taught in Detroit's schools. Additionally, the new bill would be used as a vehicle to terminate public union contracts.

House Bill 4214 was rushed through the legislature and quickly presented to the Governor for signature. Governor Richard D. Snyder signed the *Local Government and School District Fiscal Accountability Act*, Act No. 4, Public Acts of 2011 (PA 4) into law on March 16, 2011. Public Act 4 repealed Public Act 72 and was given immediate effect. By its terms, Public Act 4 automatically converted all existing emergency financial managers to Public Act 4 emergency managers and brought all existing consent agreements under the new law.

Public Act 4's Radical Revision of State Law

Public Act 4 radically revised state law governing the appointment of emergency managers over cities and school districts during times of financial stress. Public Act 4 provided that once the Governor had declared a financial emergency, the Governor could then appoint an individual to be the municipality's emergency manager. The Governor was granted broad discretion to declare a financial emergency and, in fact, a municipality was not actually required to be in a fiscal crisis before an emergency manager could be appointed. Tellingly, the Act changed the title of municipal "emergency financial managers" to "emergency managers" and expanded the scope of their powers to cover all the

conduct of local government.

The PA 4 emergency manager's powers extend not only to financial practices and fiscal policy, but rather permitted such managers to fully act "for and in the place of the municipality's governing body. The grant of powers also includes a general grant of legislative power (the power to unilaterally adopt local laws and resolutions) to PA 4 emergency managers. The Act further granted a state financial review team the power to enter into a consent agreement with local government, again without a finding that a financial emergency existed.

After passage of PA 4, the existing emergency financial managers in the cities of Benton Harbor, Ecorse and Pontiac and over the Detroit Public Schools were converted to emergency managers and vested with PA 4 powers. The state's consent agreement with the city of River Rouge was also converted to a PA 4 agreement. With the continuing global economic recession and no forthcoming state aid to distressed municipalities, PA 4 emergency managers were newly appointed as follows:

- a. Flint from 2011 until the present (2+ years);
- b. Highland Park Public Schools from 2012 until the present (1+ year); and
- c. Muskegon Heights Public Schools until the present (1+ year).

Additionally, the state entered in to PA 4 consent agreements with the cities of Detroit³ and Inkster.

After becoming vested with PA 4 powers, emergency managers in Benton Harbor, Ecorse, Flint, and Pontiac have all exercised general legislative power to enact, repeal and suspend local laws and resolutions. The Emergency Manager for the Detroit Public Schools terminated the union contracts that had been negotiated by the previous Emergency Financial Manager. Additionally, per PA 4, emergency managers were further granted powers to act in disregard of city charters, local law, school district bylaws, etc.

***Michigan Citizen's Repeal of Public Act 4
and the State's Resurrection of Public Act 72***

In opposition to PA 4, citizens began circulating petitions in May 2011. The petitions were to place a referendum on the ballot that would repeal the law. The petitions were submitted to the Secretary of State in February 2012, however were challenged by a lobbying group.

The petitions were challenged on the basis that the title of the petitions were allegedly not printed in 14 point font but rather were printed in slightly smaller font of approximately 13.75 or larger. Alternatively, challengers argued that while the petition titles where in 14 point Calibri font, only font types existing before approximately 1965 were properly used on public referendums.

Along party-line votes, the members of the state Board of Canvassers deadlocked and as a result, the petitions were not certified for the ballot. The matter was then appealed to the Michigan Court of Appeals. A panel of the Court of Appeals recognized and found that existing law required the referendum to be placed on the ballot. However, the panel sought to overturn existing law, and thereby keep the referendum off the ballot. The panel requested that the full Court of Appeals be polled to convene a special panel to reconsider existing law. The full Court of Appeals however declined to

convene the special panel.

Thereafter, an appeal was taken to state Supreme Court. While the absurdity of the challengers' arguments is self-evident, the Michigan Attorney General and Governor joined the challengers as amici at the state Supreme Court. Notably, the Secretary of State — the office charged with determining the acceptability of candidate and referendum petitions under state law — briefed the issue and found no objections to the petitions under state law. After oral argument, the Michigan Supreme Court ordered that the state Board of Canvassers certify the petitions and place the referendum on the ballot.

On August 6, 2012, the state Attorney General issued a formal opinion stating that once the petitions were certified⁴, PA 72 would spring back into effect and would remain in effect if voters repealed PA 4. PA 72 had been expressly repealed by PA 4. The state Board of Canvassers certified the petitions on August 8, 2012. As a result, state officials reappointed all existing PA 4 emergency managers as PA 72 emergency managers and claims that all existing consent agreements would continue in place as PA 72 consent agreements.

After certification of the referendum, existing PA 4 emergency managers in the cities of Benton Harbor, Ecorse, Flint, and Pontiac and over the Detroit Public Schools, Highland Park Public Schools, and Muskegon Heights Public Schools were reappointed as PA 72 emergency financial managers. Additionally, a new PA 72 emergency manager was appointed in the city of Allen Park. Finally, the state's consent agreements with the cities of Detroit, Inkster and River Rouge were also argued to be converted to PA 72 agreements.

Subsequently, at the general election on November 6, 2012, Michigan voters overwhelmingly elected to repeal PA 4.

Michigan Legislature's Attempt to Overturn Citizen's Vote to Repeal Public Act 4 by Enacting Public Act 436

In response to the decision of Michigan voters to repeal PA 4, incensed state legislative officials quickly moved to reenact a new law with emergency manager provisions that are substantially identical to the repealed law. During the lame-duck session of the state legislature, a pending bill that had been dead in committee was substantially amended to reenact the emergency manager provisions of Public Act 4. The new bill passed the state House and Senate on December 13, 2012 and was signed into law as the *Local Financial Stability and Choice Act*, Act No. 436, Public Acts of 2012, on December 26, 2012.

Public Act 436 again changes the title of existing PA 72 "emergency financial managers" to "emergency managers" and again expands the scope of their powers to cover all the conduct of local government. The PA 436 emergency manager's powers are substantially identical to the powers that had been granted under PA 4. Public Act 436 emergency managers are empowered to fully act "for and in the place of" the municipality's governing body. The grant of powers again includes a general grant of legislative power to emergency managers.

When PA 436 took effect on March 28, 2013, emergency managers were in place over the cities of Allen Park, Benton Harbor, Ecorse, Flint, and Pontiac and over the Detroit Public Schools, Highland Park Public Schools, and Muskegon Heights Public Schools. Additionally, the City of Detroit is now under an emergency manager. Finally, the state's consent agreements with the cities of Inkster and River Rouge will again be converted — now to PA 436 agreements.

There is no question that Michigan's emergency manager laws have grossly disproportionately impacted the state's population of citizens from African-American descent. The African-American population of each of the cities where an emergency manager or consent decree will be in place when PA 436 takes effect, is as follows:

- a. City of Benton Harbor: 8,952 persons comprising 89.2% of the city's population;
- b. City of Ecorse: 4,315 persons comprising 46.4% of the city's population;
- c. City of Pontiac: 30,988 persons comprising 52.1% of the city's population;
- d. City of Flint: 57,939 persons comprising 56.6% of the city's population;
- e. City of Inkster: 18,569 persons comprising 73.2% of the city's population;
- f. City of River Rouge: 3,994 persons comprising 50.5% of the city's population;
- g. City of Detroit: 590,226 persons comprising 82.7% of the city's population;
- h. City of Highland Park: 10,906 persons comprising 93.5% of the city's population;
- i. City of Muskegon Heights: 8,501 persons comprising 78.3% of the city's population; and
- j. City of Allen Park: 587 persons comprising 2.1% of the city's population.

The African-American population of these cities totals 734,947 persons. As a result of the Defendants' actions Public Act 436, fifty two (52%) of the state's African-American population will come under the governance of an emergency manager or consent agreement. **In each of these communities, citizens will have either lost or seen severe restrictions imposed on their right to vote and to participate in public affairs.**

In Michigan cities where emergency managers or consent decrees are in place, there is no question that these are economically poor communities where significant household wealth has been lost since the onset of the current recession. In these communities, the percentage of persons living below the poverty level is: Benton Harbor — 48.7%; Ecorse — 32.7%; Flint — 36.6%; Pontiac- 32%; Detroit — 34.5%; Highland Park — 43.7%; and Muskegon Heights — 45.6%; Inkster — 33.2%; and River Rouge — 40.1%. The Michigan average is 15.7%. The City of Allen Park (7.8%) will thus be the only city with an emergency manager where the poverty level is not at least double the state average.

Like the Act it was modeled after — PA 4, Michigan's PA 436 reestablishes a new form of local government that is repugnant to the constitutional liberties of all Americans. Under this law, the people become subject to government that is composed of one unelected official who wields absolute power over all aspects of local government and whose decisions are without review by either local elected officials or local voters. Public Act 436 clearly violates the Constitutional rights and voting rights of Michigan citizens.