

PROPERTY TAX FORECLOSURE UNDER THE NEW PROPERTY TAX LAW AMENDMENT IN MICHIGAN- A STUDY

PRESENTED BY:

HON: MARIA OXHOLM- UNITED STATES BANKRUPTCY COURT

- EASTERN DISTRICT OF MICHIGAN

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Major Statutory Differences Between the Former Tax Foreclosure Law and the Present Law

The biggest change between the former foreclosure law and the present law were made in light of the case of Rafaeli, LLC v. Oakland Cty., 515 Mich. 429, 952 N.W.2d 434 (2020) where the Supreme Court of Michigan found that property tax foreclosures that didn't provide for a vehicle for prior owners to receive any excess proceeds related to the sale of their property was a violation of the *takings* clause of the state constitution and held that these owners were entitled to the excess proceeds.

The modified law changed provisions of MCL § 211.78m to provide for tax sales of all properties foreclosed on and added a section (MCL § 211.78t) to provide a vehicle for the claim of the excess proceeds from the sale of foreclosed property.

Essentially, the change in § 211.78m provides that property tax sales on the foreclosed properties from that year will occur between the third Tuesday in July immediately succeeding the entry of the tax foreclosure judgment and the first Tuesday in November of that year. In order to purchase the property a bidder must pay the "minimum bid" which is defined by the statute as follows:

"Minimum bid" is the minimum amount established by the foreclosing governmental unit for which property may be sold or transferred under subsections (1) to (3). The minimum bid must include all of the delinquent taxes, interest, penalties, and fees due on the property, and may include any additional expenses incurred by the foreclosing governmental unit in connection with the forfeiture, foreclosure, maintenance, repair, or remediation of the property or the administration of this act for the property, including, but not limited to, foreclosure avoidance, mailing,

publication, personal service, legal, personnel, outside contractor, and auction expenses.

MCL § 211.78m(16)(c). However, as in the old statute, the governmental units (city, village, township, or area of the city authority included in the judgment) have the ability to purchase these properties prior to the sale for the greater of the minimum bid or the fair market value of the property. Now, the “fair market value” of the property is not defined by the statute and there is no current case law defining that term as used in the statute. I have been informed that in the absence of any other definition, the Michigan Association of Treasurers has adopted a policy that the fair market value equals two times (2x) the SEV value of the property.

The addition of MCL § 211.78t to the statute provides for claimants to file a claim of interest in proceeds from sale of foreclosed property. It is very important that any and all claimants must file by July 1st immediately following the foreclosure judgment a notice of the intent to claim excess proceeds from the sale using a form prescribed by the department of treasury (form attached). See MCL § 211.787t(2).

PROPERTY TAX FORECLOSURES AND BANKRUPTCY

I. The New Property Tax Foreclosure Statute: The General Property Tax Act, as Last Amended

The General Property Tax Act, M.C.L. § 211.1 *et seq.* (“GPTA”), “permits the recovery of unpaid real-property taxes, penalties, interest, and fees through the foreclose and sale of the property on which there is a tax delinquency.” *Rafaeli, LLC v. Oakland Cty.*, 505 Mich. 429, 441-42; 952 N.W.2d 434 (Mich. 2020). Previously, the GPTA allowed for the foreclosing governmental unit to retain any surplus proceeds without providing for any disbursement to a former property owner. M.C.L. § 211.78m(8)(h). In other words, a property could sell at a tax foreclosure auction for substantially more than the taxes owed and the previous property owner would be unable to receive or make claim to the surplus proceeds. *Rafaeli*, 505 Mich. at 447.

In *Rafaeli*, a former property owner owed \$8.41 in unpaid property taxes (which grew to \$285.81 after interest, penalties, and fees), the property sold to a third party for \$24,500 at an auction, and the foreclosing governmental unit retained the surplus proceeds. *Rafaeli*, 505 Mich. at 438-40. As a result, the Michigan Supreme Court held this retention of the surplus proceeds under the GPTA was an unconstitutional taking without just compensation under Article 10, section 2 of the Michigan 1963 Constitution. *Id.* at 437. Specifically, the Michigan Supreme Court opined that:

To the extent the GPTA permits defendants to retain these surplus proceeds and transfer them into the county general fund, the GPTA is unconstitutional as applied to former property owners whose properties were sold at a tax-foreclosure sale for more than the amount owed in unpaid taxes, interest, penalties, and fees related to the forfeiture, foreclosure, and sale of their properties.

Id. at 474-75.

In response to *Rafaeli*, the GPTA was amended, effective as of January 1, 2021, and now provides a procedure allowing former property owners to recover surplus proceeds. See M.C.L. § 211.78m.

II. Are Property Tax Foreclosures Avoidable in Bankruptcy under the New Statute?

Under the Bankruptcy Code, a transfer can be avoided as a fraudulent conveyance if a debtor received less than the reasonably equivalent value in exchange for the transfer and the debtor was insolvent when the transfer occurred (or became insolvent as a result of the transfer). 11 U.S.C § 548(a). Likewise, a transfer can be avoided as a preferential transfer if the transfer benefits a creditor for an antecedent debt, made while the debtor was insolvent and within 90 days of the petition date, and the creditor received more than if a bankruptcy liquidation occurred. 11 U.S.C § 548(a). As a result, a colorable argument can be made that a property tax foreclosure may be avoided if the debtor did not receive the “reasonably equivalent value” in exchange for the property and/or the foreclosing governmental unit received more than the amount of taxes owed on the property.

Note, the *Rooker-Feldman* doctrine precludes federal district courts from reviewing cases adjudicated in state court. *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 n. 16 (1980); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16 (1923). As a result, foreclosing governmental units generally argue that an avoidance action is barred by the *Rooker-Feldman* doctrine since a state trial court already adjudicated the property tax foreclosure.

Unfortunately for the foreclosing governmental units, courts have consistently held that an avoidance action “does not involve a review of the merits of a state court judgment”, so the *Rooker-Feldman* doctrine does not apply. *Lowry v. Southfield Neighborhood Revitalization Initiative*, unpub. case no. 20-1712, 2021 WL 6112972 (6th Cir. Dec. 27, 2021). In other words, a debtor-plaintiff is not challenging the foreclosure judgment; rather the avoidance action seeks to avoid the judgment as a fraudulent transfer under the Bankruptcy Code.

Yet, surviving a *Rooker-Feldman* defense does not necessarily mean an avoidance action involving the new GPTA prevails. To date, only one court has fully adjudicated the avoidance issue under the new GPTA.

In *West v. State of Michigan*, unpub. Adv. Pro. 21-03039 (Bankr. E.D. Mich. May 2, 2022), Hon. Joel D. Applebaum held a fraudulent conveyance theory failed under the new GPTA since the new tax foreclosure process provides for “competitive bidding” (such as when a public tax foreclosure auction is held); and, therefore, a reasonably equivalent value is provided for the property under the U.S. Supreme Court’s holding in *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994) and the debtor-plaintiff had the “right and opportunity to claim surplus proceeds under Michigan’s amended GPTA.”

However, the ruling in *West* is not binding on other bankruptcy cases as a matter of *stare decisis*. See *First of America Bank v. Gaylor (In re Gaylor)*, 123 B.R. 236, 241–243 (Bankr. E.D. Mich. 1991). Furthermore, the holding is arguably limited to cases in which a public auction occurred.

Additionally, the Hon. Daniel S. Opperman recently held a preferential avoidance theory survived summary judgment due to several factual issues (such as the bundling of parcels at a foreclosure sale resulting in less sale proceeds for the subject property, the possibility of the FGU collecting fees and expenses that are not related to the sold property, the treasurer receiving more in sale proceeds than what would be received in a Chapter 7 bankruptcy, and a Chapter 7 trustee’s ability to make a claim under the GPTA since the statute does not provide a specific right to do so, along with various public policies in treating parties fairly in bankruptcy while giving certainty to the tax foreclosure process). *Reinhardt v. Prince*, unpub. Adv. Pro. 22-02017 (Bankr. E.D. Mich. Aug. 25, 2022).

As a result, whether property taxes are avoidable in bankruptcy under the new GPTA is still an open question. Stay tuned.

III. Best Practices: A General Overview on How to Proceed with a Property Tax Foreclosure Issue

As debtor's counsel will freely share, consumer bankruptcy debtors generally put their "head in the sand" to avoid dealing with financial situations. Often time, the debtor waits until the "11th hour" or after a deadline has passed before calling bankruptcy counsel for advice. So, what should you do when a prospective new client calls with a property tax foreclosure issue? Well, it depends on where the property is "at" in the foreclosure process.

Prior to a judgment of foreclosure being entered, a property owner should participate in the tax foreclosure lawsuit. Upon information and belief, the foreclosing governmental unit may offer a repayment (such as under the Pay As You Stay, Interest Reduction Stipulated Payment Agreement, and/or Stipulated Payment Agreement programs).¹ Additionally, the property owner has the right to challenge the foreclosure process (such as if the foreclosing governmental unit failed to provide proper notice of the foreclosure under the GPTA).

Under the GPTA, March 31st is the last day to redeem foreclosed properties and title vests in the foreclosing governmental unit. M.C.L. § 211.78k. As a result, a property owner's options are rather limited after March 31st. The most cost-effective option is to obtain enough liquid funds to pay all outstanding taxes on the property and request the foreclosing governmental unit to set aside the judgement by accepting the funds. However, nothing "forces" the foreclosing governmental unit to accept the funds.

Another option is following the recently adopted procedure for obtaining surplus proceeds under the GPTA after a tax foreclosure sale. See M.C.L. § 211.78t. The procedure is referenced in the *West* opinion as follows:

Beginning with the 2021 foreclosures, in accordance with MCL 211.78t, those who hold title or equity interest in property at the time of foreclosure, may file to claim leftover proceeds, if any are available, associated to those parcels which sell for more than the owing delinquency. Claiming potential proceeds begins with filing the [] form 5743 Notice of Intention to Claim Interest in Foreclosure Sales

¹ More information about these programs can be found at the Wayne County Treasurer's website:

Proceeds with the Foreclosing Governmental Unit (FGU) by the July 1 immediately following the effective date of the foreclosure. The FGU will respond by January 31 following the foreclosure auctions, with a form 5744 Notice to Claimant to File Motion with the Circuit Court. Provided there actually are surplus proceeds remaining for the property, the claimant may then file a motion with the circuit court between February 1 and May 15, following the notice from the FGU. The courts will then set a hearing date and time to determine claim payments.

West v. State of Michigan, unpub. Adv. Pro. 21-03039 (Bankr. E.D. Mich. May 2, 2022) (quoting the State of Michigan's website: <https://www.michigan.gov/taxes/property/forfeiture-foreclosure/auctions-and-claimants>).

In other words, a former property owner would need to fill out and properly serve a Notice of Intention to Claim Interest in Foreclosure Sale Proceeds form by July 1st, before the property tax auction even occurs. If there are surplus proceeds after the sale and the form is timely and properly served, the former property owner would then need to file a motion with the Circuit Court in an attempt to receive any surplus proceeds. The form is available on the State of Michigan's website:

Generally, property tax auctions are conducted in August, September, or October. Under the GPTA, auctions must complete by the first Tuesday in November. M.C.L. § 211.78m(2). However, there are various reasons a person cannot purchase property at a tax auction. For example, the GPTA prohibits the sale to anyone with delinquent property taxes in the same county as the property. M.C.L. § 211.78m(2)(a). As a result, a former property owner is generally prohibited from bidding at the auction and risks losing the purchase money or property if a "straw purchaser" bids on their behalf (especially if the "straw purchaser" absconds with the purchase money or refuses to deed the property to the previous owner).

A different option is filing a bankruptcy case. Depending on when the bankruptcy is filed, the Bankruptcy Code may either stop the foreclosure judgment from entering, extend the redemption period, or extend the deadline to

serve the surplus notice by 60 days after a bankruptcy is filed. See 11 U.S.C § 362(a) (staying all collection efforts, lawsuits, and foreclosure actions upon the filing of bankruptcy); *In re Glenn*, 760 F.2d 1428 (6th Cir. 1985) (holding the bankruptcy stay does not toll state foreclosure redemption periods); and 11 U.S.C § 108(b)(2) (tolling the deadline to cure defaults 60 days after the order for relief).

The foreclosing governmental unit would have discretion to participate in a Chapter 13 bankruptcy and/or the debtor may attempt to avoid the foreclosure in an adversary proceeding under preferential and/or fraudulent transfer theories in either Chapter 7 or Chapter 13. However, litigation is expensive and while not binding precedent, the *West* opinion may constitute persuasive authority to dismiss the adversary complaint. *West v. State of Michigan*, unpub. Adv. Pro. 21-03039 (Bankr. E.D. Mich. May 2, 2022). On the other hand, the *Reinhardt* opinion suggests the court's ability to condition confirmation of a Chapter 13 plan on timely payment of the property taxes and allow for the property's sale if timely payments are not made, thereby allowing the debtor to retain the property while paying the taxes owed. *Reinhardt v. Prince*, unpub. Adv. Pro. 22-02017 (Bankr. E.D. Mich. Aug. 25, 2022).

Another possible option is prosecuting a takings claim by arguing that a foreclosure under the GPTA, as last amended, is an unconstitutional taking without just compensation under Article 10, section 2 of the Michigan 1963 Constitution, despite a former property owner's right and opportunity to claim the surplus proceeds under the GPTA.

Several takings cases under the previous GPTA are pending at the trial court level, but are stayed while the Sixth Circuit Court of Appeals determines whether a foreclosing governmental unit is entitled to sovereign immunity to such actions in *Wayside Church v. Van Buren County*, No. 21-1272 (6th Cir. Mar. 18, 2021). See *Wayside Church v. Van Buren County*, No. 1:14-cv-1274 (W.D. Mich.); *Grainger v. Ottawa County*, 1:19-cv-501 (W.D. Mich.); *Calkins v. Kent County*, 1:21-sv-62 (W.D. Mich.). As of the drafting of this article, the briefing schedule in *Wayside Church* was extended with the Appellee's brief due September 26, 2022.

Likewise, upon information and belief, at least one law firm in the Grand Rapids area is collecting a "pool" of potential plaintiffs for a possible class action takings claim under the amended GPTA. The same firm recently brought a class

action takings claim lawsuit under the previous GPTA. *Collins v. Oakland County*, No. 22-cv-11647 (E.D. Mich. July 18, 2022).

IV. Valuation and Exemption Issues Regarding Foreclosed Properties and Potential Surplus

“The filing of a bankruptcy petition creates a bankruptcy ‘estate’ generally comprising all of the debtor’s property [including legal rights and equitable interests under 11 U.S.C. § 541(a)(1)], a list of which the debtor must file with the bankruptcy court along with or shortly after filing the bankruptcy petition.” *Ellmann v. Baker (Baker II)*, 791 F.3d 677, 680 (6th Cir. 2015) (citations omitted). As a result, the debtor needs to disclose and exempt any redemption or surplus rights in the property, even if the right to surplus proceeds is contingent on prevailing in the Circuit Court claims allowance process.

Pursuant to 11 U.S.C § 554(d), “property of the estate that is not abandoned under this section and that is not administered in the case remains property of the estate”, unless otherwise ordered by the court. As a result, it is important for a debtor to schedule and exempt the property and/or surplus claim, or the asset(s) remains property of the estate upon the case’s closing subject to the trustee’s later administration. In other words, if the property and/or surplus claim is not scheduled by the debtor remains property of the estate and is not the debtor’s property, unless otherwise ordered by the court. *In re Medley*, 29 B.R. 84, 86-87 (Bankr. M.D. Tenn. 1983). Thus, the failure to properly schedule and exempt property may result in the loss of property rights and/or right to claim surplus proceeds under the GPTA.

Valuation of the property and/or surplus can be difficult to quantify. After all, the debtor’s right to surplus proceeds is contingent on properly claiming the surplus under the GPTA (provided there is even a surplus to be claimed) and foreclosure sales do “not necessarily result in fair market value” *Lowry v. Southfield Neighborhood Revitalization Initiative*, 2021 WL 6112972 at *4 (6th Cir. Dec. 27, 2021). In other words, “[a]pplying the dictates of *BFP* and *Lowry* to the amended GPTA, . . . the price paid . . . at the auction [is] reasonably equivalent value for purposes [under the Bankruptcy Code].” *West v. State of Michigan*, unpub. Adv. Pro. 21-03039 (Bankr. E.D. Mich. May 2, 2022).

The valuation amount is the same under either Chapter 7 or Chapter 13 as Section 1325(a)(4)'s "best interest of creditors test" requires Chapter 13 debtors to propose payment on each allowed, unsecured claim in "the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 . . ." 11 U.S.C. § 1325(a)(4).

As a practical matter, the Chapter 7 trustee would likely keep the bankruptcy case open to determine the actual value of the property and amount of surplus proceeds while a Chapter 13 trustee would demand a provision in the proposed confirmation order requiring the debtor to provide documentation of any sale, purchase, surplus proceeds, an adjudication of the Circuit Court claims allowance process to resolve any contingent valuation issues.

V. Conclusion

In closing, the GPTA, as last amended, became effective in January of 2021 and the first claims allowance process at the trial court level has not concluded as of the drafting of this article. Whether bankruptcy provides a useful "tool" in recovering a foreclosed property or retaining surplus sale proceeds remains to be seen and a property owner may have other options outside of the bankruptcy arena to accomplish his or her goals.

As a practical matter, the various "tools" and options available to a (former) property owner both in and out of bankruptcy are costly, time consuming, and not guaranteed to provide the desired result. Ultimately, the best practice is for the property owner to timely pay the levied taxes to the local tax authority before the taxes are returned as delinquent to the County for collection. However, if property owners or (potential) clients listened to their attorney's advice or timely made payments, a lot of bankruptcy attorneys would be unemployed.

Questions and Potential Answers :
Michigan Tax Foreclosure Statute and Bankruptcy.

A. Is a Tax Foreclosure an avoidable transfer in a Chapter 13?

The answer depends on whether the sale took place under the old law or the current law. The Lowry Case held that a taxpayer in bankruptcy could challenge a Michigan Tax foreclosure sale under federal bankruptcy fraudulent transfer law. However, if under the new statute where the taxpayer has the right to claim the surplus and the property is sold at public auction, the transfer is not voidable. See In Re West.

B. Does a Chapter 7 or 13 Trustee have 6 years to look at a fraudulent transfer issue?

Under the new statute, if the taxpayer has the right to claim the surplus and the property is sold at public auction then the Trustee has no rights. Under the old statute, arguably the Trustee has the 6 year period of time pursuant to the Michigan Fraudulent Transfer act to potentially go after a the alleged fraudulent transfer.

C. If so, what happens to the owners' right to surpluses?

- a. Old statute: The owners right to the surplus remains an asset of the estate and can be exempted or the Trustee can pursue same if not exempt.
- b. New statute: The right to the surplus depends on if the owner filled out the correct paperwork in a timely manner or if they filed the bankruptcy timely. It is possible that section 108 could apply and extend the right to request the surplus by up to 60 days.

D. Are such interests contingent assets?

- a. Yes, as there is no knowledge at the time the debtor must elect to retain the surplus as to what the surplus might be.

E. How do you value the contingent asset and how do you address the administrative expense considerations?

- a. Disclose the potential surplus as an asset on schedule B, exempt the unknown amount to the extent available and leave it to the Trustee to assert rights over the excess if any.

F. Is value of the claim different under 7 or 13?

- a. The value would be the same in both cases- unknown. In a Chapter 13, the Trustee would likely require any excess surplus over the exemptions to be turned over to the trustee for distribution under the terms of the plan. They may even request all the proceeds deeming them a windfall which is an issue that can be fought by debtor's counsel.
- b. A chapter 7 Trustee would simply own the surplus and have to pay the debtor his/her exemption unless the exemption is denied by the court.

G. What is the impact of 1325(a)(4) which requires that the value, as of the effective date of the plan, of the property to be distributed under the plan must be no less than the amount that creditors would receive in a Chapter 7 liquidation, and the Trustee's rights/responsibilities in connect with contingency claims?

- a. Pragmatically, this will be dealt with by requiring the claim, once liquidated to be turned over to the Trustee, or the plan will have to be amended to adjust for the result.

H. Rooker-Feldman doctrine (Lowry decision).

- a. As to the new statute, the Rooker-Feldman doctrine, which effectively says federal courts other than the Supreme Court—should not sit in direct review of state court decisions unless Congress has specifically authorized such relief. In short, federal courts below the Supreme Court must not become a court of appeals for state court decisions, does not apply. The state court appellant has to find a state court remedy, or obtain relief from the U.S. Supreme Court.
- b. In the Lowry decision, Rooker-Feldman was determined not to apply.

I. How does 11 USC 108 impact in Chapter 7 and Chapter 13?

- a. 11 USC 108 could possibly give the debtor up to 60 additional days to request the surplus, 60 additional days to redeem the property if filed timely. 108 could cause the whole sale process by the taxing authority to be terminated, thus allowing the debtor an additional year in the property for free even if the right of redemption has expired.

J. How to treat the potential claim in a Chapter 13?

- a. Liquidation analysis issues:

- i. Value is unknown if filed before the sale- therefore after applying exemptions, debtor will likely be required to turn over surplus to the Chapter 13 Trustee to be disbursed under the plan.

- b. Must the actual entire surplus be turned over to the Trustee?

- i. Maybe, however, I would argue that you must only pay over the amount the creditors would otherwise get in a Chapter 7 case, but that will be argued by the Trustee.

K. Do exemptions apply to contingent claim?

- i. Yes, as the asset is owned at the time of filing, value may be unknown, but you can always amend the schedules and exemptions- Law v. Siegel.

L. Is the foreclosure a voidable preference?

- i. The final answer as to that question is unknown at this time, however, in the case Reinhardt v. Prince, Judge Opperman recently ruled that a preference theory survive both a MTD and summary judgment (and subtly suggested the parties working in the underlying Chapter 13 case to potentially propose payment in full by a date certain or allow the sale at a later auction date.

Real life application:

- a. How/when to apply for the surplus?

- i. Per the example timeline in the materials, July 1 of the same year that the property ownership is transferred to the

county after the foreclosure order has been entered and the limited right of redemption expires

- ii. Beginning with the 2021 foreclosure sales and transfers, the Michigan Department of Treasury form 5743 which is the Notice of Intention to claim interest in foreclosure sales proceeds must be timely filed by July 1 in the year of the foreclosure. See the attached form in the materials

b. Are you out of luck if you miss the timeline? Can 11 USC section 108 help a debtor?

- a. It appears that 11 USC 108 may give you additional time to apply for the surplus if case is filed before the expiration of initial time to file. 11 USC 108 in part provides the following:

(b) Except as provided in subsection (a) of this section, if applicable non-bankruptcy law, an order entered in a non-bankruptcy proceeding, or an agreement fixes a period within which the debtor or an individual protected under section 1201 or 1301 of this title may file any pleading, demand, notice, or proof of claim or loss, cure a default, or perform any other similar act, and such period has not expired before the date of the filing of the petition, the trustee may only file, cure, or perform, as the case may be, before the later of— (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or (2) 60 days after the order for relief. Thus giving a timely debtor (Chapter 13)/Trustee up to an additional 60 days to file the needed form to request surplus proceeds.

- c. What other relief does a potential debtor have?
 - a. Seek a State Court Injunction by challenging the foreclosure process- lack of due process is best bet or failing to follow proper foreclosure procedures.
 - b. Beg the county (this may work in a smaller county)
 - c. Have a friend/friendly buy the property back at the tax sale.

- d. Is it malpractice to not file the form after filing the bankruptcy?

Failure to request the proceeds and complete the required forms may be malpractice by the debtor's counsel or even the Trustee as the asset is an asset of the estate owned by the Trustee. The issue is whether it is compensable?

 - a. What are the damages?
 - b. Filing it during the 60 days of 108 will screw up the sale and possibly require the sale to be adjourned for over a year. It will NOT create a new right to ownership for the debtor but will possibly allow occupancy for the additional time- a valuable asset to the debtor.

Cases:

In Re Reinhardt: 22-20558-DOB, Adversary Proceeding 22-02017 issued 8/25/22- Judge Opperman.

In Re Lowry: Case No. 20-1712, 2021 WL 6112972 (6th Cir. Dec. 27, 2021).

In Re West: Case No. 21-03039, 2022 WL 1309939 (Bankr. E.D. Mich. May 2, 2022).

Rafaeli v Oakland County, 505 Mich. 429 (2020).

Law v. Siegel, 571 U.S. 415 (2014)

SUPPLEMENT: PROPERTY TAX FORECLOSURES AND BANKRUPTCY

After the initial article was prepared, the Sixth Circuit Court of Appeals issued *Hall v. Meisner*, Case 22a0226 (6th Cir. Oct. 13, 2022), a constitutional takings case under the previous General Property Tax, Act M.C.L. § 211.1 *et seq.* (“GPTA”). This article supplement discusses the opinion and potential effect of *Hall*.

VI. The Lay of the Land under the GPTA

Various property owners have prosecuted takings claims against the Foreclosing Governmental Units (“FGU”) by arguing that a foreclosure under the GPTA, as last amended, is an unconstitutional taking without just compensation under Article 10, section 2 of the Michigan 1963 Constitution, despite a former property owner’s right and opportunity to claim the surplus proceeds under the GPTA.

As previously indicated, several takings cases under the previous GPTA are pending at the trial court level, but were stayed while the Sixth Circuit Court of Appeals determines whether a foreclosing governmental unit is entitled to sovereign immunity to such actions in *Wayside Church v. Van Buren County*, No. 21-1272 (6th Cir. Mar. 18, 2021). *See Wayside Church v. Van Buren County*, No. 1:14-cv-1274 (W.D. Mich.); *Grainger v. Ottawa County*, 1:19-cv-501 (W.D. Mich.); *Calkins v. Kent County*, 1:21-sv-62 (W.D. Mich.). As of the drafting of this supplement, the briefing schedule in *Wayside Church* was extended with the Appellee’s brief due December 29, 2022.

However, on October 13, 2022, the Sixth Circuit Court of Appeals issued *Hall v. Meisner*, Case 22a0226 (6th Cir. Oct. 13, 2022) and recommend the opinion for publication. The *Hall* opinion may result in the “bottleneck” of stayed cases at the trial court level and result in the filing of more takings claims under 42 U.S.C. § 1983.

VII. The GPTA under *Hall v. Meisner*

“The Fifth Amendment’s Taking Clause provides that ‘private property’ shall not ‘be taken for public used, without just compensation.” *Hall v. Meisner*, Case 22a0226 (6th Cir. Oct. 13, 2022) (quoting U.S. Const. amend. V).

In *Hall*, the named Plaintiff’s property was foreclosed over a \$22,262 property tax debt. *Id.* The property was worth close to \$300,000 and the FGU retained the surplus. *Id.* “The plaintiffs asserted claims under the Takings Clause of the Fifth Amendment (as applied to the states pursuant to the Fourteenth), along with various other federal and state claims.” *Id.* The trial court dismissed the complaint for failure to state a claim and the present appeal followed. *Id.*

In citing more than 300 years of English and American case law and references dating to the 12th century, the Sixth Circuit determined the previous GPTA “is not only self-dealing: it is also an aberration from some 300 years of [common law], which barred precisely the action that [the FGU] took here.” *Id.* The Sixth Circuit opined “the Takings Clause would be a dead letter if s state could simply exclude from its definition of property any interest that the state wished to take.” *Id.* In other words, the GPTA “disavowed traditional property interest merely by defining them away” *Id.*

Boiled down to its essence, a security interest in personal property “did not entitle the creditor to recover more than the amount owed.” *Id.* The shortfall in the GPTA is that a tax foreclosure without a public sale and landowner’s right to surplus sale proceeds amounts to a “‘strict foreclosure’ – a practice that English courts had steadfastly prevented as far back as the 1600s and American courts (not least Michigan ones) effectively eradicated as ‘unconscionable’ and ‘draconian’ some 200 years ago.” *Id.*

As a result, the trial court’s dismissal of the Plaintiff’s takings claim under the U.S. Constitution was reversed and the case remanded for further proceedings.

VIII. The Future of the GPTA under *Hall v. Meisner*

No different than when the Michigan Supreme Court determined the GPTA resulted in an unconstitutional taking without just compensation under Article 10,

section 2 of the Michigan 1963 Constitution in *Rafaeli, LLC v. Oakland Cty.*, 505 Mich. 429, 441-42; 952 N.W.2d 434 (Mich. 2020), the *Hall* decision may result in a flood of litigation to recover surplus sale proceeds under the old GPTA.

Note, the GPTA was amended on the “heels” of *Rafaeli*, effective as of January 1, 2021, and now provides a procedure allowing former property owners to recover surplus proceeds. See M.C.L. § 211.78m. Therefore, it can be argued that *Hall* does not apply under the new GPTA and the Act could withstand a takings claim lawsuit. As recognized in *West v. State of Michigan*, unpub. Adv. Pro. 21-03039 (Bankr. E.D. Mich. May 2, 2022), the new GPTA provides a landowner with an ability to potentially recover surplus sale proceeds and failure to avail oneself to the opportunity may preclude the landowner from asserting the property was either “transferred for less than reasonably equivalent value.” *Id.* (c.f. *Nelson v. City of New York*, 352 U.S. 103 (1956) (holding procedural due process is not deprived when given notice of the arrearage and foreclosure proceedings where the owner is not absolutely precluded from obtaining surplus proceeds)).

As with *Rafaeli*, Michigan’s Legislature may be quick to amend the GPTA yet again in “face” of any adverse ruling under the new Act. Stay tuned.

**Supplement Questions and Potential Answers :
Michigan Tax Foreclosure Statute and Bankruptcy.**

Does the result of Hall v. Meisner lead to recoverable assets in a in a chapter 7 case? What about in the chapter 13? Can a chapter 7 trustee go back and re-open the case to recover from the county or state?

Sec. 554(d) states property of the estate that is not abandoned and administered remains property of the estate. So if the right to potential surplus was not scheduled, it is arguably lost to the debtor.

As a practical matter, would a Chapter 7 trustee attempt to re-open a case to administer the asset? In this day and age... with cases being down, It is my supposition that they would.

If so, can a debtor can amend exemptions in a re-opened case?

The argument is Rule 1009(a) only permits amendments in a case that has not been closed. The counter-argument is the deadline to amend exemptions is enlarged under Rule 9006(b) (looking at *Pioneer* factors in allowing amended exemptions, which generally does not favor the debtor).

It is possible that a court would allow the exemption given the circumstances, which would allow the debtor to pursue the proceeds in another court. *See In re Colquitt*, unpub. case no. 11-80275 (Bankr. S.D. Tex., Aug. 8, 2012) (failing to list insurance claim excusable when the debtor was unaware a lawsuit was filed on his behalf and debtor notified the trustee upon becoming aware; *In re Dunn*, unpub. case. No. 05-09708 (Bankr. E.D. N.C., July 7, 2010) (failing to list a personal injury claim excusable based on inept counsel and debtor's belief the claim was a "lost cause").

Ultimately, if the right to surplus is not disclosed (or the exemption is disallowed), the “other” court may judicially estop the debtor from seeking surplus based on *Stanley v. FCA US, LCC* opinion, which was issued today (and attached for review). As a result, the case needs to be re-opened if either the debtor or trustee attempts to pursue the potential claim for surplus

Notice of Intention to Claim Interest in Foreclosure Sales Proceeds

Issued under authority of Public Act 206 of 1893; Section 211.78t.

Beginning with 2021 foreclosure sales and transfers, a person that intends to make a claim for excess sales proceeds must complete and return this notarized notice to the Foreclosing Governmental Unit by July 1 in the year of foreclosure. This notice must be delivered via certified mail, return receipt requested, or by personal service. Completing and returning this form evidences an intent to make a future claim but is not itself a claim for sales proceeds.

PART 1: APPLICANT INFORMATION		
Claimant Last Name or Business Name	Claimant First Name	Middle Initial
Claimant's Address to be used for Service (Street Number, City, State, ZIP Code)		
Claimant's Telephone Number	Claimant's E-mail Address	
PART 2: PROPERTY IDENTIFICATION		
County	Local Taxing Municipality	Foreclosure Year
Parcel Address (Street Number, City, State, ZIP Code)		Local Parcel Number
PART 3: EXPLANATION OF INTEREST		
I hereby claim an interest in the above parcel, as of the foreclosure date, due to the reason(s) selected below:		
<input type="checkbox"/> Warranty Deed Dated: _____ Recorded in Liber/Page: _____		
<input type="checkbox"/> Quit Claim Deed Dated: _____ Recorded in Liber/Page: _____		
<input type="checkbox"/> Mortgage Dated: _____ Amount: _____ Recorded in Liber/Page: _____		
<input type="checkbox"/> Other Lien Dated: _____ Amount: _____ Nature of Lien: _____ Recored in Liber/Page: _____		
I know of the following other interests in this property, which were in effect immediately prior to foreclosure:		
<div style="border: 1px solid black; height: 80px;"></div>		
PART 4: CERTIFICATION AND NOTARY		
<i>I hereby swear that the above information is true and correct in relation to the subject property</i>		
Claimant's Signature	Date	
<i>Subscribed and sworn to before me by Applicant on the following date:</i>		
Notary's Signature	Commission Expiration	
Notary State of Authorization	Notary County of Authorization	Notary Acting in County
FORECLOSING GOVERNMENTAL UNIT RECEIPT ACKNOWLEDGMENT		
FGU Staff Signature of Receipt	FGU Staff Printed Name	Date of Receipt



Delinquent Property Tax Timeline for 2021 Taxes

The property tax foreclosure process can be confusing. We'd like to answer any questions you might have. We can also help you develop a payment strategy. Please call us at (248) 858-0611 or send an e-mail to treasurer@oakgov.com

