



2014  
CRITICAL LEGAL DEVELOPMENTS

VisTaTech Center, Livonia, Michigan

October 20, 2014

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# 2014 CRITICAL LEGAL DEVELOPMENTS

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**SPLIT DOLLAR ARRANGEMENTS - SHIFTING TO  
COLLATERAL ASSIGNMENTS**

**JACK S. COUZENS, II**

## SPLIT DOLLAR ARRANGEMENTS - SHIFTING TO COLLATERAL ASSIGNMENTS

### I. TYPES OF SPLIT DOLLAR ARRANGEMENTS

#### A. Endorsement Method.

The owner (typically a corporation) of the life insurance policy pays the premiums and endorses the excess death benefit (the benefit exceeding either the actual premiums paid or the greater of the premiums paid or cash value) to a designated beneficiary of the insured.

#### B. Collateral Assignment Method.

A third party (typically a corporation) pays the premiums and the owner (which may be an Irrevocable Life Insurance Trust ("ILIT")) assigns the greater of the premiums paid or cash value as collateral to the third party as repayment of the premiums.

### II. CORPORATE SPLIT DOLLAR

A. In the business context, an employee or the employee's ILIT owns the insurance policy. The employee designates a beneficiary of the death benefit. The employer pays the premiums and is granted an assignment of the greater of the premiums paid or cash value of the policy to ensure repayment upon termination of the plan or the insured's death. In a collateral assignment, a Trust owns the policy and collaterally assigns the death benefit to the corporation.

B. Corporate split dollar agreements are subject to certain ERISA requirements, however split dollar agreements that qualify as "top hat" plans are exempt from ERISA's participation, vesting, funding and certain fiduciary requirements.

C. Taxation. In a corporate setting, the premiums paid by the corporation are not deductible and the employee will either pay income tax on the economic benefit granted or if the plan isn't structured to grant the corporation back the greater of cash value or premiums, then under final regulations, the person receiving the benefit will be required to pay interest on premium payments which will be characterized as loans from the corporation to the recipient.

### III. PRIVATE SPLIT DOLLAR

A. Definition.

A private split dollar agreement is an arrangement whereby one party (donor) pays that portion of the premium attributable to the economic benefit on the life insurance policy on the insured. The death benefit is owned by the ILIT and the cash value is assigned to an LLC or a third party.

B. Because the donor is not the owner of the life insurance policy, there is no estate tax inclusion of the net death benefit in the donor's estate.

C. Additionally, the beneficiary under the policy receives the death benefits tax-free.

D. Gift taxes may be minimized due to low economic benefit rates used to measure the gift tax value of premium payments. (US38 Table is extremely low but caution, after one spouse dies, PS58 applies).

E. However, upon the first to die of a married couple, an exit strategy should be utilized due to the increased costs that will occur as a result of the economic benefit increasing each year. (N.B. while the gift tax exemption is currently at \$5,340,000, this may be an excellent time to make a sick policy well).

F. In a private split dollar arena, an LLC is often formed by the donor and owned primarily by the donor, with investments deposited into the LLC. The donor controls the investments, while making a small portion of the premium payment to an ILIT, equal to the measured economic benefit. The LLC pays the balance (or the bulk of the premium) and is entitled to receive its premium back or the cash value whichever is greater upon the death of the insured(s) at the termination of the split dollar arrangement. This procedure should exempt the "at risk" portion of the death proceeds from the estate of the insured for federal estate tax purposes.

IV. FUNDING CROSS-PURCHASE BUY-SELL AGREEMENTS

A. Members or shareholders of a company may use a non-equity collateral assignment split dollar arrangement to fund a buy-sell obligation.

B. Each shareholder/member owns a life insurance policy on the other shareholder(s)/member(s), and collaterally assigns the greater of the premiums paid or cash value to the company. (It is possible for the insured to be the owner of his or her policy and accomplish the same result. The parties can retain their own permanent life insurance policies after the buy-sell ends).

- C. The company typically pays the entire premium on each policy, however the respective insureds pay tax on the policy benefiting them for the premium paid by the corporation.
- D. The death benefit of a life insurance policy can be used for buy-out of a shareholder's or member's interest and it may be possible under IRC §303 to use the cash value returned to the corporation to assist in the purchase of the stock.
- E. This arrangement may equalize premium payments so that the younger shareholder/member is not forced to pay higher premiums.

V. UNWINDING A SPLIT DOLLAR

- A. Reasons for terminating a split dollar agreement
  - 1. Upon the death of the first spouse to avoid a sharp rise in economic benefit rates and actual or imputed taxable gifts.
  - 2. The situation of the parties has changed such that the split dollar arrangement is no longer needed.
  - 3. To limit the portion of the death benefit included in the donor/insured's estate.
- B. Exit Strategies
  - 1. Trust/third party owner uses the policy to repay the donor's interest by borrowing against the policy or making partial withdrawals from or surrendering the policy.
  - 2. Change from an economic benefit arrangement to a loan arrangement.
  - 3. If owned by a third party, third party uses own funds to repay the donor's interest. Repayment options include (i) gifting up to the annual gift exclusion amount, (ii) gifting up to the federal estate tax exclusion amount, (iii) if the third party is an ILIT utilizing a Grantor Retained Annuity Trust ("GRAT"), Qualified Personal Residence Trust ("QPRT"), or Charitable Lead Annuity Trust ("CLAT"), or (iv) utilizing an Intentionally Defective Grantor Trust ("IDGT") to hold the policy.
  - 4. Provide for repayment of the split dollar obligation in the owner's will or trust.

5. Purchase/use an existing additional life insurance policy on each spouse for which the death proceeds of the policy of the first to die could be used to repay the split dollar obligation.
6. Transfer ownership of policy to the insured.

VI. COMBINING WITH SECTION 409A PLAN

- A. A split dollar agreement with life insurance may be used to partially or fully fund an employer's obligations under a nonqualified deferred compensation (IRC §409A) agreement with an employee to provide retirement benefits.
- B. 409A plans require the following:
  1. A written agreement between the employee and employer;
  2. Compliance with IRC §409A;
  3. Only permissible pay triggers, which include: upon a certain time or fixed schedule, death, change of control, separation from service, disability or unforeseeable emergency, (but not because of a change in the financial health of the employer); and
  4. An alternative compliance statement to be filed with the Department of Labor within 120 days of the plan's inception to avoid being subject to ERISA's participation, vesting, funding and certain fiduciary requirements.
- C. The split dollar agreement and 409A plan should be two separate written agreements.
- D. The cash value of the life insurance policy could be used to pay the employee compensation at a later point (for example: upon retirement or after a number of years of service).
- E. If the employee terminates employment or in the event of the employee's death during employment, the employer would receive the greater of the premiums paid or cash value of the policy.
- F. The employee may designate a beneficiary to receive the remainder of the policy proceeds upon the employee's death.
- G. The employer may only take a tax deduction in the same tax year that benefit is reported on the employee's income tax return.



**ESTATE PLANNING FOR SAME-SEX COUPLES**

**ALAN C. ROEDER  
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## ESTATE PLANNING FOR SAME-SEX COUPLES

### I. HISTORY

#### A. Federal Defense of Marriage Act

1. IRC § 3 defined marriage as "the legal union between one man and one woman as husband and wife".
2. Essentially invalidated by the U.S. Supreme Court in *United States v. Windsor*, June 26, 2013.
  - a. Therefore, lawfully married same-sex couples now have the same benefits as heterosexual couples at the federal level and at the state level in those states that recognize such marriages.
  - b. In Rev. Rul. 2013-17, August 29, 2013, the IRS ruled that same-sex couples legally married in any domestic or foreign jurisdiction will be treated as married for federal tax purposes, regardless of their state of domicile (the "celebration rule").

#### B. Michigan Constitution.

1. By popular vote in 2004, Article 1, §25 was added to provide: "To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.
2. Therefore, same-sex marriages are not recognized in Michigan.
  - a. On March 21, 2014, the U.S. District Court for the Eastern District of Michigan invalidated §25 of Article 1 of the Michigan Constitution.
  - b. On the following day, the U.S. 6<sup>th</sup> Circuit Court of Appeals stayed enforcement of the District Court's decision.
  - c. Meanwhile, approximately 300 same-sex couples were married in Michigan.

- d. The case, *DeBoer v Snyder*, was argued in August, 2014, but as of the date this outline was prepared, the Court had not issued its decision.
- C. U.S. Supreme Court - October 6, 2014.
1. The Court decided to not take cases involving the status of same-sex marriages in five states.
  2. That action effectively authorized same-sex marriages in those states.
- D. States that recognize same-sex marriages.
1. As of today, approximately \_\_\_\_ states recognize same-sex marriages (On the date this outline was prepared that number was 30).
  2. There are numerous cases in various stages of trial and appeal with respect to the status of same-sex marriages in the remaining states.

## II. INCOME TAX

- A. Federal.
1. Same-sex married couples must file either as:
    - a. Married filing jointly.
    - b. Married filing separately.
    - c. Head of Household, if applicable.
  2. Notify the IRS and Social Security regarding change of status.
  3. Update withholding elections by filing new form W-4.
- B. States.
1. In states that recognize same-sex marriages, the same-sex married couple will file in the same manner as heterosexual married couples.

2. Some states that do not recognize same-sex marriages, such as Wisconsin prior to October 6, 2014, offered a newly provided state schedule to divide the income on the joint federal return between the two taxpayers for the state return.
3. Michigan issued an undated notice providing:
  - a. While the same-sex married couple must file their federal return as set forth above,
  - b. Each member of a same-sex married couple must recalculate their federal adjusted gross income as if they had filed a single federal return.

### III. ESTATE TAX

- A. Federal - Treat same-sex married couple as any other married couple
  1. Marital Deduction.
  2. Reduce to zero.
- B. Michigan.
  1. MCLA §205.232.
    - a. Transfer tax imposed upon death equal to the maximum allowable federal credit for estate taxes.
    - b. Reduced by amounts paid to other states due to apportionment.
  2. IRC §2011.
    - a. Tax due pursuant to §2001 shall be credited with amount ... paid to any State ...
    - b. Ranges from .8% for adjusted taxable estates not over \$90,000 to \$1,082,800 plus 16% for adjusted taxable estates over \$10,040,000.
    - c. Upon the first death, this is the amount due Michigan:

- (1) Zero because the Federal adjusted taxable estate was zero?
- (2) Up to \$1,082,800 + 16% over \$10,040,000 because an additional pro forma 709 would need to be prepared as if the decedent was not married under the rationale of the undated notice with respect to income taxes?

d. Solution?

- (1) Balance the estates of the individuals in the relationship.
  - (a) Federal - IRC §2523: Gift Tax: Marital Deduction.
  - (b) Michigan - no gift tax.
- (2) Move to a state that recognizes same-sex marriages.
- (3) Gamble on the 6<sup>th</sup> Circuit making a decision favorable to an individual's tax situation prior to their death.

IV. ESTATE PLANNING

A. Will.

1. Guardian of minor children.
2. Beneficiary(ies).
3. Personal Representative(s).

B. Trust.

1. Marital/Residuary trusts and alternatives.
2. Disposition of assets.
  - a. Spouse/Partner.

- b. Children.
    - c. "Final takers".
- C. Patient Advocate Designation and HIPAA.
  - 1. Designate advocate.
  - 2. Provide advance directives.
- D. Durable Power of Attorney.
  - 1. Designate Attorney/Agent(s).
  - 2. Current or springing.
- E. Ownership of Assets.
  - 1. Joint.
    - a. Spouses - tenants by the entirety.
    - b. Partners - joint tenants with rights of survivorship.
  - 2. Benefits.
  - 3. Creditor Protection.
- F. Current 6 month Power of Attorney for care of minor children.

**KEY ISSUES FOR FINANCIAL ADVISORS IN  
BUSINESS ACQUISITIONS**

**CHRISTOPHER M. WILLIAMS**

# KEY ISSUES FOR FINANCIAL ADVISORS IN BUSINESS ACQUISITIONS

## I. SESSION OBJECTIVES AND DEFINITIONS

### A. Objectives.

1. To provide a general overview of Michigan business acquisition transactions from both the Seller's perspective and the Buyer's perspective with a focus on asset and equity acquisitions.
2. To identify areas where financial advisors add value to their clients in Michigan business sales transactions.

### B. Definitions.

1. Business Acquisition: The transfer of business assets or equity.
2. Financial Advisor: Anyone that provides financial advice to a client (e.g. accountant, financial planner, tax preparer, investment advisor, etc.).
3. Target company: A company being acquired, which may include a corporation, limited liability company, partnership, business trust, or other entity.

## II. PRELIMINARY CONSIDERATIONS

### A. Who do you represent?

1. Identifying your "client" is important so that:
  - a. You can provide appropriate advice.
  - b. You avoid unintended conflicts of interest.
2. Define the relationship and determine whether other steps are necessary. Consider the following:
  - a. Disclosures.
  - b. Consents.
  - c. Withdrawal.



B. Team of Advisors.

Parties to a business sale should have access to the following advisors:

1. Attorneys: Legal and tax advice and document preparation.
2. Accountants: Tax and accounting advice.
3. Insurance Agents: Insurance analysis and advice.
4. Bankers: Financing options.
5. Financial Planners: Short and long term planning considerations.

C. Confidentiality Agreements.

1. The Seller should have a confidentiality agreement in place before disclosing sensitive information to the Buyer including, but not limited to, corporate finances, customers, business prospects, and trade secrets.
2. From the Seller's perspective, the confidentiality agreement should be comprehensive, but not so unreasonably restrictive that it discourages negotiations.
3. The objective is to permit the Buyer to investigate the business while protecting the Seller's business interest.

D. Letter of Intent.

1. A Letter of Intent is also known as a memorandum of understanding, agreement in principle, or commitment letter. It is similar to a term sheet which uses bullet points rather than a letter format.
2. Using a Letter of Intent is not mandatory in a business acquisition, and may be helpful or harmful depending on the circumstances.
3. Advantages to using a Letter of Intent:
  - a. Provide assurance that the parties possess a legitimate interest in seeing the deal through to closing.
  - b. Set the ground rules for negotiation.

- c. Provide the framework for the final agreement.
    - d. Save time and money by evaluating major issues before negotiating finer points of a deal.
    - e. Avoid ambiguity of verbal communication.
  - 4. Disadvantages to using a Letter of Intent:
    - a. Can waste time and money if too much time is put into negotiating the Letter of Intent rather than the final agreement.
    - b. If the parties become wrapped up in minute issues rather than focusing on universal issues, they may prematurely shut down negotiations.
    - c. May promote confusion and ambiguity which could be exploited by one of the parties to a transaction.
    - d. May be determined by a court to be binding even though one of the parties believed the letter to be nonbinding.
  - 5. Letters of Intent should be prepared and/or reviewed by an attorney prior to signing.
- E. Structure of Transaction.
  - 1. Major Considerations.
    - a. Assets.
    - b. Liabilities.
    - c. Financing.
    - d. Security.
    - e. Taxes.
  - 2. Basic Types of Business Acquisitions.
    - a. Sale of Assets.

- (1) The most common form of business acquisition where the Seller sells and the Buyer buys some or all of the assets of a company.
- (2) The Buyer does not acquire the Seller's liabilities, except in limited circumstances. The Buyer should consider the following potential liabilities:
  - i. Those expressly assumed in the purchase agreement.
  - ii. Product liability. Consider the continuation of business exception.
  - iii. State Taxes.
  - iv. Unemployment Taxes.
  - v. Employment-related liabilities.
  - vi. Pension matters.
  - vii. Environmental matters.
  - viii. Contract matters.
  - ix. Government regulation obligations.
- (3) Required approvals needed to approve a sale of assets.
  - i. Buyer corporations should obtain approval from its Board of Directors unless a high ranking officer has the authority to acquire assets on the corporation's behalf without Board approval.
  - ii. Seller corporations must obtain approval from its Board of Directors and its shareholders if the sale involves substantially all of the assets of the corporation and is out of the ordinary course of business.
  - iii. A limited liability company should obtain approval from its members and/or managers as required by

its operating agreement. Other selling entities have comparable requirements.

iv. Be aware of dissenter/appraisal rights.

b. Sale of Equity.

- (1) An entity or individual purchases stock or membership interests for cash or upon terms.
- (2) Fewer legal complications typically are encountered, since the Buyer is dealing directly with the selling shareholder or member.
- (3) No appraisal rights or corporate formalities need to be observed.
- (4) Restrictions on the sale of equity (e.g. buy-sell agreements) must be considered.
- (5) The Buyer assumes the liabilities of the target company.

c. Tax-Free Reorganizations of C Corporations:

- (1) Type "A": Mergers - The surviving corporation assumes the identity of the other corporations to the merger and all of their assets and liabilities.
- (2) Type "B": Stock for Stock - One corporation acquires all of the outstanding shares of another corporation from its shareholders in exchange for the acquiring corporation's shares.
- (3) Type "C": Stock for Assets - An acquired corporation transfers all (or substantially all) of its assets to the acquiring corporation in exchange for stock in the acquiring corporation. The acquired corporation is then liquidated, and the stock of the acquiring corporation is distributed to the acquired corporation's shareholders.

III. PRE-CLOSING MATTERS

A. Due Diligence: Investigation and Analysis.

1. Purpose of due diligence from the Buyer's perspective:
  - a. To determine the legal status of the target company.
  - b. To determine the financial condition of the target company.
  - c. To determine the existence and value of assets and liabilities of the target company.
  - d. To determine the steps to be taken before closing the transaction.
  - e. To determine the rationality of a proposed transaction.
2. Purpose of due diligence from the Seller's perspective:
  - a. To determine the legal status of the Buyer.
  - b. To determine the financial ability of the Buyer to complete the transaction.
3. Due diligence should be completed as soon as possible to save the parties time and money.
4. Due diligence should be planned and coordinated among the parties' advisors to save time and money.
5. Due diligence generally occurs after a letter of intent has been signed, but before a definitive purchase agreement is signed. However, it may occur before the signing of the letter of intent and after the signing of a definitive purchase agreement.
6. The scope of due diligence will depend on the assets being acquired and the liabilities being assumed.
7. Key categories of due diligence:
  - a. Organizational documents.
  - b. Corporate Minute Books.
  - c. Capital Stock.

d. Financial Statements.

- (1) Review audited financial statements for the past five years and the most recent unaudited financial statements. Pay special attention to notes to the financial statements.
- (2) Review auditor's reports for the past five years, including letters to management, and the auditor's work papers, notes, inquiries, and any responses to the auditor's inquiries.
- (3) Identify if any auditor's reports are qualified, how the target company's accounting practices vary from the Buyer's accounting practices, and any accounting practices that are not in accordance with generally accepted accounting principles.
- (4) Review accounts receivable and payable reports and identify any special payment arrangements.

e. Tax matters.

- (1) Review the target company's federal and state income (or business) tax returns for the last five years and identify any extensions of statutes of limitation or time for filing.
- (2) Identify the tax basis of assets, favorable tax attributes (such as net operating loss carryforwards and credits), and tax liabilities or problems.
- (3) Identify ongoing tax audits and the results of any audits done within the last five years.
- (4) Review evidence that all payroll, withholding, and real and personal property taxes have been paid and review sales and use tax returns for the last five years.
- (5) Review tax elections and status of such elections.
- (6) If the target company is part of a larger group, review any tax-sharing or indemnity agreements.

- (7) Determine the availability of any state or federal tax credits, abatements, and other economic development incentives.
  - (8) Review the status of any tax credits or abatements and whether they would be subject to any recapture or clawback.
  - (9) Review tax matters in any other jurisdiction where the target company conducts business.
  - (10) Comply with escrow and tax clearance procedures to avoid and/or limit successor state tax liability.
- f. Title to, liens upon and condition of assets.
  - g. Real Property, including title, encumbrances, zoning and condition.
  - h. Uniform Commercial Code (UCC) Searches.
  - i. Personal Property.
  - j. Intellectual Property (including any trademark rights in names to be sold).
  - k. Contracts, commitments, permits, and licenses. Review should include change of control and assignment provisions.
  - l. Products and Services (Warranties).
  - m. Insurance.
  - n. Environmental Matters.
  - o. Litigation and Claims.
  - p. Labor and Employment Matters.
  - q. Benefit plans and arrangements.
  - r. Export Control Violations.

s. Sarbanes-Oxley Act of 2002.

B. Pre-Closing Notices, Filings, and Forms.

1. Form UIA 1027 – Business Transferor's Notice to Transferee of Unemployment Tax Liability and Rate.
  - a. The purpose of this Unemployment Insurance Agency ("UIA") form is to notify the Buyer of the target company's unemployment tax rate and payment history as, generally, a Buyer who acquires 75% or more of the assets of a business is liable for unpaid unemployment taxes and interest owed as of the date of transfer, up to the reasonable value of the organization, trade, business, or assets acquired less the Buyer's security interest in the assets.
  - b. The Seller must provide the Buyer with the form at least two calendar days (not counting Saturdays, Sundays, or legal holidays) before the Buyer accepts the Seller's offer to transfer the business.
  - c. Failure to provide accurate information is a misdemeanor that may result in imprisonment of up to 90 days, a fine of up to \$2,500, and a consequential damages award.
  - d. Obtain Form UIA 1346 – Disclosure of Transferor Account – to complete Form UIA 1027.
2. Form UIA 1395 – Clearance of Account.
  - a. This form certifies the status of tax liability (taxes owing UIA) of the Seller.
  - b. The Seller or the Buyer should request the tax clearance prior to the sale, in writing not less than 10 days before the transfer of business, as to any amounts owing to the UIA.
  - c. When the UIA provides the clearance of account which certifies the tax liability as of the request date, the Buyer will not be liable for any amount due from the Seller in excess of the amount certified by the UIA.



3. Michigan Department of Treasury Form 5156 - Request for tax clearance application.
  - a. The Buyer is required to escrow funds to cover the Seller's unpaid taxes, interest, and penalties until the Seller produces a receipt that the taxes have been paid or a certificate that no taxes are due and owing.
  - b. Upon the Seller's written waiver of confidentiality, the Michigan Department of Treasury, shall within 60 days of receipt of the request, release to a Buyer a business's known or estimated tax liability for the purposes of establishing an escrow account for the payment of taxes.
  - c. If the Buyer complies with these provisions, it will not be liable for more than the amount escrowed, and if the Department fails to produce the known or estimated tax liability then the Buyer shall have no liability for the Seller's unpaid taxes.
4. Worker Adjustment and Retraining Notification (WARN) Act notices.

Generally, employers with more than 100 full-time employees or 100 employees working an aggregate of at least 400 hours per week, not counting overtime, must provide 60 days prior notice of a plant closing or mass layoff.
5. Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. 94-435, 11 USC § 18a.
  - a. Certain acquisition transactions that exceed high dollar threshold amounts must make required pre-transaction filings with the Federal Trade Commission and Assistant Attorney General in charge of the Antitrust Division of the Department of Justice.
  - b. As the thresholds periodically adjust, multi-million dollar transactions should be analyzed to determine if the filing requirements apply.
6. Notices to shareholders and members where applicable.
7. Notices to unions or employees.
8. COBRA notices.

9. Notices to customers (as agreed by the Buyer and the Seller).
10. Notices to suppliers (as agreed by the Buyer and the Seller).

C. Other Considerations

1. Security law matters should be considered when equity interests are to be acquired.
2. The Exon-Florio provisions of the Defense Production Act of 1950, Pub. L. 81-774, 50 USC § 2061 et seq., provides for national security review when certain transactions could result in foreign investment in the United States.
3. Insurance
  - a. Health insurance and COBRA issues (e.g. Post-closing health insurance for selling equity holders).
  - b. Administration of self-insured programs (Health Insurance and Worker's Compensation).

IV. TRANSACTION DOCUMENTS

A. Purchase Agreement.

1. Key provisions for purchase agreements.
  - a. Draft date and parties.
  - b. Background.
  - c. Purchase price, payment, and adjustments.
  - d. Related agreements.
  - e. Pre-closing actions.
  - f. Conditions precedent to the Buyer's obligations.
    - (1) Accuracy of Representations and Warranties.

- (2) Performance of Covenants.
  - (3) Satisfactory due diligence review.
  - (4) Permits.
  - (5) No casualty.
  - (6) Opinion of counsel.
  - (7) Certificates regarding conditions precedent.
  - (8) No litigation.
  - (9) Lien search.
  - (10) Consents.
  - (11) Environmental Investigation.
  - (12) Other documents and instruments.
  - (13) Approvals by the Buyer's counsel.
- g. Conditions precedent to the Seller's obligations.
- h. Closing matters.
- (1) Deferred-closing transaction.
  - (2) Simultaneous-closing transaction.
- i. The Seller's representations and warranties.
- (1) Organization and Standing.
  - (2) Authorization.
  - (3) Existing Agreements and Governmental Approvals.
  - (4) No Subsidiaries.
  - (5) No insolvency.

- (6) Permits and Licenses.
- (7) Financial Statements.
- (8) No undisclosed liabilities.
- (9) Conduct of business.
- (10) No adverse changes.
- (11) Employees.
- (12) Employee benefit plans.
- (13) Certain Employees.
- (14) Receivables.
- (15) Taxes.
- (16) Litigation.
- (17) Product Liability.
- (18) Environmental matters.
- (19) Compliance with Laws.
- (20) Suppliers and Customers.
- (21) No brokers.
- (22) Insider transactions.
- (23) Bank accounts.
- (24) Intellectual property.
- (25) Insurance.
- (26) Investment intent.

- j. The Buyer's representations and warranties.
    - (1) Organization and Standing.
    - (2) Authorization.
    - (3) Existing Agreements and Governmental Approvals.
    - (4) Investment Intent.
  - k. Indemnification.
  - l. Expenses.
  - m. Termination.
  - n. Miscellaneous provisions.
    - (1) Notices.
    - (2) Assignment.
    - (3) Parties in interest.
    - (4) Choice of Law.
    - (5) Counterparts.
    - (6) Entire Agreement.
    - (7) Dispute resolution (e.g. Arbitration).
  - o. Severability.
  - p. Execution.
2. Additional key provisions for an asset purchase agreement.
- a. Assets purchased and excluded assets.
  - b. Liabilities assumed and excluded liabilities.
  - c. Allocation of purchase price.

- d. Delivery of assets free of encumbrances.
  - e. Conditions precedent to the Buyer's obligations.
    - (1) Minimum Net Asset Value.
    - (2) Instruments of Transfer.
    - (3) Obtain known or estimated tax liability.  
Michigan Department of Treasury Form 5156.
    - (4) Unemployment Insurance Contribution Liability.  
Form UIA 1395.
    - (5) Name change documents.
  - f. The Seller's representations and warranties.
    - (1) Material contracts.
    - (2) Title to purchased assets.
    - (3) Condition of purchased assets.
    - (4) Sufficiency of Purchased assets.
    - (5) Progress payments.
  - g. Employees.
  - h. Post-closing receipts.
  - i. Risk of Loss.
  - j. The Seller's name.
3. Additional key provisions for a stock or membership interest purchase agreement.
- a. Agreement to purchase equity interests.

- b. Conditions precedent to the Buyer's obligations.
  - (1) Company's minimum net worth.
  - (2) Equity interest certificates.
  - (3) Waivers.
  - (4) Resignations of Officers.
  
- c. The Seller's representations and warranties.
  - (1) Articles and Bylaws or Operating Agreement.
  - (2) Capitalization.
  - (3) The Seller's Equity Interests.
  - (4) Contracts and Commitments.
  - (5) Title to Assets.
  - (6) Condition of Assets.
  - (7) Sufficiency of Assets.
  - (8) Materiality.
  
- d. Tax Matters.
  - (1) Indemnification.
  - (2) Preparation of Tax Returns.

B. Disclosure Schedules.

- 1. Part of the purchase agreement.
- 2. Provides qualifications and exceptions to representations and warranties made in the purchase agreement.

3. It is critical for the Seller to be accurate and complete to avoid liability to the Buyer.
- C. Other Transaction Documents.
1. Bill of Sale (for asset sale).
  2. Escrow Agreements.
    - a. Stock/Membership interests (for equity sale).
    - b. Post-closing adjustments.
    - c. Representations and warranties.
    - d. State tax escrow provisions.
  3. Assignment and Assumption Agreement (for asset sale).
    - a. Third-party warranties.
    - b. Intellectual property.
    - c. Contracts.
  4. Personal Service Agreements.
    - a. Employment agreement.
    - b. Covenant-not-to compete agreement.
    - c. Consulting agreement.
    - d. Deferred compensation agreement.
    - e. Equity compensation arrangements.
  5. Financing and Security Documents.
    - a. Promissory Note.
    - b. Security Agreement.



- c. Guarantees.
  - d. UCC financing statements.
  - e. Pledge agreement (for equity sale).
  - f. Subordination agreement.
  - g. Collateral assignment of life insurance.
6. Bring-down certificate for conditions precedent.
  7. General releases.
  8. Opinion of counsel.
  9. Letter to terminate the Seller's employees at closing (for asset sale).
  10. Shareholder and director authorizations approving the transaction with secretary's certificate (for corporate parties).
  11. Member and manager authorizations approving the transaction with member/manager certificate (for LLC parties).
  12. Certificate of Good Standing / Certified articles.
  13. Amendment to articles to change name (if acquired by the Buyer).
  14. Termination of Assumed Names / Certificate of Assumed Names.
  15. Resignations (officers, directors, managers, employees, and retirement plan trustees).
  16. Stock certificates, endorsed for transfer, with assignment separate from certificate and stock transfer records (for stock sales).
  17. Membership interest certificates (if any), endorsed for transfer with assignment of membership interests (for membership interest sales).
  18. Vehicle titles endorsed for transfer (for asset sale).
  19. Agreement and plan of merger / certificate of merger (in a merger transaction).

20. Transition services agreement.
  21. Earnout agreements.
  22. Closing statements.
- D. Real Estate transaction documents.
- E. Formation documents for any new entities.

V. CLOSING AND POST-CLOSING MATTERS

- A. Closing.
1. Ensure conditions precedent are satisfied.
  2. Ensure all transaction documents are drafted and agreed to.
  3. Ensure all authorizations and approvals (including third-party approvals) have been obtained.
    - a. Change of control/assignment provisions in contracts, permits, licenses, and leases.
    - b. Owner approvals (directors, shareholders, managers, members, etc.).
  4. Ensure all bank/third-party financing and loan documents are in place.
  5. Address any Broker commissions.
  6. Ensure insurance is in place (property and casualty, health, worker's compensation, life insurance, environmental, representation and warranty coverage, etc.).
  7. Transfer keys, codes, combinations, garage-door openers, company record books, warranties, owner's manuals, and service records.
  8. Set up bank accounts and obtain new bank signature cards.
  9. Ensure payroll procedures are in place.

10. Coordinate transfer of utilities.
  11. Appoint new directors and officers/managers for acquired entities.
- B. Post-Closing.
1. Post-closing adjustments to the purchase price.
    - a. Time frame for adjustments.
    - b. Define key terms (e.g. accounts receivable, inventory, earnout triggers, working capital).
    - c. Provide access to books and records.
    - d. Inventory adjustments.
    - e. Accounts receivable adjustments.
    - f. Earnouts.
    - g. Accounts payable.
    - h. Dispute mechanism.
  2. IRS Form 8594 - Asset Acquisition Statement Under IRC § 1060 - (regarding tax allocations).
  3. Employee benefit distributions, COBRA elections, and COBRA notices, if applicable.
  4. Dissolution and liquidation of entity if applicable with required state and federal filings.
  5. Michigan Department of Treasury Filings and UIA Filings (examples):
    - a. Michigan Department of Treasury Form 163 – Notice of Change or Discontinuance (to be completed by the Seller to discontinue or change tax types).
    - b. Michigan Department of Treasury Form 5156 - Request for tax clearance application (to be completed by the Seller).

- c. UIA Schedule B - Successorship Questionnaire (to be completed by the Buyer to fulfill successorship reporting requirement when acquiring the assets, trade, or business of another employer).
- d. Form UIA 1772 – Discontinuance or Transfer of Payroll or Assets in Whole or Part (to be completed by the Seller).

**BANKRUPTCY PREFERENCE CLAIMS**

**JERRY M. ELLIS**

## BANKRUPTCY PREFERENCE CLAIMS

### I. BACKGROUND

- A. Bankruptcy policy is to provide equality of treatment between creditors.
1. The bankruptcy preference laws are intended to further that policy by forcing the return of payments made to creditors within the "preference period" (generally 90 days, or one year if the creditor was an "insider") for distribution to all creditors on a pro rata basis in accordance with the priorities set forth in the Bankruptcy Code.
  2. The Bankruptcy Code grants certain "avoidance powers" to a trustee to avoid or claw back payments made to creditors by the debtor. The most common use of the trustee's avoidance powers is avoiding a payment as a "preference" under Section 547 of the Bankruptcy Code.
  3. A bankruptcy trustee (or debtor in possession) can sue a creditor for payments that the creditor received within the preference period prior to the filing of the bankruptcy. The adversary proceeding must be brought within two years after the filing of the bankruptcy. See 11 USC §546(a)(1).
- B. 11 USC §547(b) of the Bankruptcy Code states, in part, as follows:
- "(b) Except as provided in subsections (c) and (i) of this section, the trustee may avoid any transfer of an interest of the debtor in property -
- (1) to or for the benefit of a creditor;
  - (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
  - (3) made while the debtor was insolvent;
  - (4) made -
    - (A) on or within 90 days before the date of the filing of the petition; or
    - (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if -

- (A) the case were a case under chapter 7 of this title;
- (B) the transfer had not been made; and
- (C) such creditor received payment of such debt to the extent provided by the provisions of this title." (Emphasis added.)

C. Once the trustee proves the foregoing elements of the preference, the burden of proof shifts to the creditor to defeat the preference claim.

## II. SUMMARY OF STATUTORY DEFENSES

The statutory defenses to a preference claim are set forth in 11 USC §547(c). They are summarized as follows:

- A. the transfer was a contemporaneous exchange for new value;
- B. the transfer was a payment in the ordinary course of business;
- C. the transfer was the granting of a purchase money security interest;
- D. the transfer was followed by subsequent new value given by the creditor to the debtor;
- E. the transfer was the granting of a security interest in inventory or a receivable or proceeds, and did not improve the creditor's position vis a vis his or her security interest prior to the preference period;
- F. the transfer is pursuant to a statutory lien not avoidable under § 545;
- G. the transfer was in payment of a debt for a domestic support obligation;
- H. the aggregate amount of the transfers from a consumer debtor did not exceed \$600;
- I. the aggregate amount of the transfers from a non-consumer debtor did not exceed \$5,475.

## III. CONTEMPORANEOUS EXCHANGE DEFENSE

- A. 11 USC §547(c)(1) provides that a trustee may not avoid a transfer

"(1) to the extent that such transfer was--

- (A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and
- (B) in fact a substantially contemporaneous exchange."

- B. This defense protects "COD" payments to creditors who simultaneously deliver product or services to the debtor at time of the payment.
- C. This defense does not protect the creditor who accepts a post-dated check for the current delivery of goods or services because it is not a contemporaneous exchange for new value. See In Re New York City Shoes, 880 F2d 679 (3<sup>rd</sup> Cir. 1989).

#### IV. ORDINARY COURSE OF BUSINESS DEFENSE

- A. 11 USC §547(c)(2) provides that a trustee may not avoid a transfer

"(2) to the extent that such transfer was in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee, and such transfer was--

- (A) made in the ordinary course of business or financial affairs of the debtor and the transferee; or
- (B) made according to ordinary business terms."

- B. A payment of a debt incurred by the debtor in the ordinary course of business is not difficult to prove, as the payment is generally for goods or services used in the business.
- C. A payment according to ordinary business terms is often complicated.
  - 1. If a seller delivers goods to a debtor and invoices the debtor net 30 days, if the invoice is paid by the debtor within 30 days and the check clears the debtor's bank within 30 days, that transaction will be deemed a payment according to ordinary business terms.
  - 2. What if the payment is not within the terms of the invoice?



- a. If the parties have a history of doing business -- then you need a report of all transactions between the creditor and the debtor for the 24 months prior to the filing of the bankruptcy. The report should show the dates of all shipments, invoices and payments. Then determine the mean number of days from shipment to payment over the 24 month period and calculate the standard deviation from the mean.

e.g., If the debtor paid on an average of 45 days after shipment, and the standard deviation is an average of 7 days, then the range will be from 38 to 52 days.

If the alleged preference payment was within 38 to 52 days, the creditor can argue it was according to ordinary business terms between the parties.

- b. If the payment is outside the range (as set forth above), you will need evidence to establish the ordinary business terms for companies in the relevant industry.

e.g., A company in the automobile industry may argue that a payment received within 90 days of delivery of the goods was a payment within the ordinary business terms in the automobile industry.

This is often a difficult defense because the parties must be within an identifiable industry, and the defense requires expert testimony as to the norms for payment within the industry.

## V. NEW VALUE DEFENSE

- A. 11 USC §547(c)(4) provides that a trustee may not avoid a transfer

"(4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor--

- (A) not secured by an otherwise unavoidable security interest; and
- (B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor."

- B. The new value defense, in its simplest form, applies where after the alleged preference payment is made by the debtor to the creditor, the creditor ships additional goods to the debtor.

e.g., On 7/1/14, debtor pays creditor \$20,000 for goods received on 4/15/14; then on 7/15/14, creditor delivers \$15,000 of goods to the debtor; then on 8/29/14, debtor files bankruptcy. The new value is \$15,000 and the preference is reduced to \$5,000.

- C. In most cases, however, there are a series of payments and deliveries, and it must be determined if each delivery of goods is subsequent new value for the previous payments received. See In Re Fulghum Construction Corp., 706 F2d 171 (6<sup>th</sup> Cir. 1983); In Re Wadsworth Building Components, Inc., 711 F2d 122 (9<sup>th</sup> Cir. 1983).

Note: Some Circuits (not the 6<sup>th</sup> Circuit, which includes Michigan) have adopted the "net result rule" in the context of a running line of credit. The "net result rule" looks at the entire 90 day preference period and calculates the difference between total preferences and total advances, provided each advance is used to offset only prior preferences. In other words, preferences can be carried forward until exhausted. See In Re Meredith Manor, Inc., 902 F2d 257 (4<sup>th</sup> Cir. 1990).

- D. What if the creditor was paid for the new value given to the debtor? The Federal Circuit Courts are split on this issue. Some require that the new value must remain unpaid. See Roberds, Inc. v. Broyhill Furniture, 315 BR 443 (Bankr. SD Ohio 2004) for a full discussion of the issue.

## VI. OTHER POSSIBLE DEFENSES

- A. The Michigan Construction Lien Act, MCL § 570.1101, *et seq.*, grants to a contractor, subcontractor, supplier or laborer the right to place a lien for improvements to real estate on the real estate - generally within 90 days of completing the work.

1. In the event the debtor/owner of the real estate pays the contractor within the preference period to discharge the construction lien, the contractor can argue that the discharge of the construction lien was to pay a statutory lien not avoidable under Section 545 of the Bankruptcy Code. See 11 USC §547(c)(6).
2. What if the contractor had not filed the construction lien prior to the filing of the bankruptcy? If the payment by the owner to the contractor was within 90 days of the improvements to the property being

completed, but no construction lien had been filed, the contractor can still argue that because the contractor still had the right to file the lien at time of payment, it was not a preference.

B. The Michigan Building Contract Fund Act, MCL § 570.151. This Act, commonly known as the Builders Trust Fund Act, provides in the building construction industry that the building contract fund paid by any person to a contractor, subcontractor, etc. is considered a trust fund for the benefit of the payor and the payees.

1. Anyone paying construction funds to someone who they are obligated to pay for construction work is considered a "trustee" of all funds paid to him for building construction purposes. See National Bank of Detroit v. Eames & Brown, 396 Mich 611 (1976).
2. Builders Trust can be used to defend a preference claim by arguing that the funds paid by the debtor to the contractor did not belong to the debtor, who was holding the funds in trust for the contractor.

C. The Michigan Special Tools Lien Act, MCL §570.541 provides to a "special tool builder" a lien on "special tools" (i.e., tools, dies, jigs, gauges, fixtures, etc.) for use in the fabrication of metal parts if the builder has (1) permanently recorded on the tools he made his name and address; and (2) files a financing statement pursuant to the UCC §9-502. MCL § 440.9502.

1. The lien is for the amount that the debtor/customer owes the special tool builder for making the tool.
2. This Act can be used to defeat a preference claim by arguing the payment was to discharge the lien on the tools. The payment was to discharge a statutory lien, and is not avoidable by the trustee.

## VII. CONCLUSION

Many preference claims are resolved prior to litigation. Most are settled prior to a trial. The attorney for the debtor or trustee, particularly in a large bankruptcy case, has hundreds of these claims to pursue and resolve. Therefore, if the creditor is able to advance a knowledgeable defense, there is the real possibility of negotiating a favorable settlement.

In negotiating a preference settlement, be aware that the debtor/trustee will often demand that the creditor waive its claim in the bankruptcy to share in the bankruptcy proceeds. If there is little chance for a dividend to unsecured creditors, this may not be an issue. However, if there is an expected dividend to unsecured creditors, the creditor

should not waive its claim and in fact should file an amended claim in the bankruptcy to add the amount it had to return as a preference to its previously filed unsecured claim.

**THE BASICS OF PROPERTY TAX FORECLOSURE**

**PHILLIP J. NEUMAN**

## THE BASICS OF PROPERTY TAX FORECLOSURE

### I. OVERVIEW

- A. The Michigan Legislature adopted a new foreclosure process in 1999.
  - 1. The old system was slow and ponderous -- it took a minimum of four years to transfer title to a property.
    - a. The tax lien was sold after the third year of delinquency.
    - b. The owner or mortgagee had a minimum of one year to redeem the property after the sale of the tax lien.
  - 2. Challenges to the process made tax title uncertain -- very difficult to obtain title insurance.
- B. The new process speeds up the time between the first delinquency and the transfer of title.
  - 1. Delinquent tax liens are forfeited to the county treasurer in March of the second year of delinquency.
  - 2. Forfeited tax liens are subsequently foreclosed the following February at the end of the third year of delinquency by the foreclosing governmental unit ("FGU") (either the County Treasurer or the State Treasurer).
  - 3. The final redemption period ends on March 31 of the third year of delinquency.
- C. Specific time-line.
  - 1. Summer taxes became due on July 1, 2011; Winter taxes became due on December 1, 2011.
  - 2. If the summer taxes are not paid by August 31, 2011, they are delinquent; If the winter taxes are not paid by February 14, 2012, they are also delinquent.
  - 3. On March 1, 2012, unpaid taxes for 2011 are returned to the County Treasurer as delinquent.
  - 4. At least two notices are sent to delinquent taxpayers over the remainder of 2012.
  - 5. On March 1, 2013, the delinquent property forfeits to the county treasurer.

6. By June 15, 2013, the FGU must file a petition for foreclosure in the Circuit Court.
  7. An administrative show cause hearing and judicial foreclosure hearing are held in January and February, 2014.
  8. March 31, 2014 is the last day to redeem the foreclosed property. If the taxes and costs are not paid by this date, the property is lost.
- D. Legislature's Goals.
1. Shorten the process;
  2. Provide for more local control over the process;
  3. Provide for appropriate funding for the process;
  4. Make title to foreclosed property more insurable.

## II. FORFEITURE PROCESS

- A. Property taxes become delinquent on March 1 of the year following the due date of the taxes ("Year +1"), and are turned over by the local governmental units to the County.
- B. When delinquent taxes are turned over to the County, a 4% administration fee is added, and interest is computed at 1% per month from March 1 of Year +1.
- C. On June 1 of Year +1, the County Treasurer must send a notice by first class mail to taxpayers of record and anyone else who has an interest in the property and has paid a fee to obtain the notice.
- D. On September 1 of Year +1, the County Treasurer must send a second notice by first class mail with essentially the same information as the first notice to taxpayers of record and anyone else who has paid the fee.
- E. By February 1 of the second year following the due date of the taxes ("Year +2"), the County Treasurer must send a third notice by certified mail with the same information as the first two notices to the taxpayer of record, the owner of the property (if different from the taxpayer), any other interest holders identified in the offices of the local assessor, local treasurer or County Treasurer, and by first class mail to the occupant of the property.
- F. On March 1 of Year +2, if the delinquent taxes remain unpaid, the property forfeits to the County Treasurer.

1. Forfeiture does not affect title to the property.
  2. Forfeiture does not give the County Treasurer any right, title or interest in the property.
  3. There are several technical reasons why the County Treasurer can withhold parcels from forfeiture, including bankruptcy, governmental ownership, a pending appeal of an assessment to the Michigan Tax Tribunal or a pending appeal of a homestead exemption.
  4. Upon forfeiture, there is a \$175 title search fee added to the redemption amount, and interest is recalculated at 1.5% per month from March 1 of Year +1, and continues to accrue at 1.5% per month going forward.
- G. By April 15 of Year +2, the County Treasurer must record a notice of forfeiture with the County Register of Deeds -- this is the first recorded notice of forfeiture.
- H. Anyone with a legal interest in the property can redeem the property from the forfeiture, by paying the total amount of delinquent taxes, interest, penalties and fees from the original unpaid assessment, plus the 4% administration fee, accrued interest and recording, service of process and notice fees -- the Year +1 and Year +2 unpaid taxes (if any) do not need to be paid at this point.
1. A stranger to title cannot obtain an interest in tax delinquent property by paying the taxes.
  2. A person with a legal interest in the property, other than the owner, who redeems the property from forfeiture is entitled to a lien for the redemption amount, but there is no mechanism for enforcing that lien.
  3. A redemption certificate is issued by the County Treasurer and recorded with the County Register of Deeds.

### III. FORECLOSURE PROCESS

- A. By May 1 of Year +2, the FGU must initiate a title search of the property to determine all of the interested parties that are entitled to further notices.
- B. By June 15 of Year +2, the FGU must file a petition for foreclosure in the Circuit Court for the county in which the property is located.
1. The petition requests the entry of a Judgment of Foreclosure that vests absolute title to the property in the FGU without any further right of redemption.
  2. The FGU may withhold property from a foreclosure petition if:



- a. The property is held by minor heirs or persons who are incompetent, persons who are without means of support or persons unable to manage their affairs due to age or infirmity;
  - b. The property is held by a person undergoing "substantial financial hardship" as determined under a written policy adopted by the FGU.
- C. A Show Cause hearing and Judicial hearing must be held in January or February of the third year following the due date of the taxes ("Year +3").
  - 1. The Show Cause hearing must be held at least seven days before the Judicial hearing, and is an informal hearing that gives the parties the opportunity to address legal defense to foreclosure, such as bankruptcy, exempt property, taxes that have been paid or erroneous legal descriptions, or to seek a hardship deferral from the FGU.
  - 2. The Judicial foreclosure hearing must be held in the Circuit Court within 30 days prior to March 1 of Year +3, and is a formal hearing where the taxpayer or a person with an interest in the property can also obtain a hardship deferral or raise certain defenses to the payment of the taxes:
    - a. No law authorized the tax;
    - b. The taxing authority acted without jurisdiction or did not impose the tax in question;
    - c. The person or property assessed was exempt from the tax in question, or was not legally assessed;
    - d. The tax has been paid;
    - e. The tax was assessed fraudulently.
- D. The FGU must send notice of the Show Cause hearing and Judicial hearing by certified mail, return receipt requested, to any holder of an interest in the property, at least thirty days in advance of the Show Cause hearing.
  - 1. The notice must include a significant amount of information, including the legal description or parcel number of the property, and if possible, the street address, the total taxes, interest, penalties and fees due, the date and time of the Show Cause hearing and Judicial hearing, and an explanation of the person's redemption rights (see Form 4264).
  - 2. The owner of an interest in the property (such as a mortgagee or lien holder) is only entitled to notice if his/her interest can be identified from the records of the Register of Deeds or certain other governmental

agencies before the date the notice of forfeiture is recorded (i.e. by April 15 of Year +2).

- E. The FGU must determine if the property is occupied, and if so, must make a personal visit to the forfeited property to advise the occupants of the two hearings and give them information on their rights or post a notice on the property if it is not possible to personally meet with the occupants.
- F. If the FGU can't determine the address of a person entitled to notice or if the notice can't be served, then the FGU must publish the notice of the two hearings once a week for three weeks.
- G. For uncontested cases, the Judgment of Foreclosure is entered following the Judicial hearing, but in any event no later than March 30 of Year +3, and the redemption period expires on March 31 of Year +3.
- H. In contested cases, the Judgment of Foreclosure must be entered within ten days after the conclusion of the hearing, and the redemption period expires 21 days after the entry of the Judgment.
- I. A Notice of Judgment of Foreclosure is recorded with the County Register of Deeds upon the expiration of the redemption period without redemption being made.

IV. EFFECT OF THE EXPIRATION OF THE REDEMPTION PERIOD

- A. Once the redemption period has expired (usually March 31 of Year +3), fee simple title to the property vests in the FGU without any further redemption rights.
- B. All liens and interest in the foreclosed property are extinguished with certain limited exceptions:
  - 1. Future special assessments installments;
  - 2. Liens filed by governmental agencies for environmental issues;
  - 3. Severed or leased oil and gas interests;
  - 4. Visible or recorded easements;
  - 5. Private deed restrictions.
- C. This means that all mortgages, homeowners or condo liens and land contract interests are wiped out by the Judgment of Foreclosure and expiration of the redemption period.

- D. IRS liens are also extinguished so long as the FGU provided proper notice to the IRS.
  - 1. Tax foreclosures are considered nonjudicial sales under IRC §7425(b) and the date of the sale is deemed to be March 31 of Year +3, because that is the date that title vests in the FGU.
  - 2. A notice of a nonjudicial sale must be given by registered or certified mail or personal service not less than 25 days prior to the date of sale to the appropriate IRS office.
  - 3. The IRS has an additional 120 days after expiration of the final redemption period in which to redeem the property to protect its lien. See IRC §7425(d).

V. EFFORTS TO SET ASIDE THE FORECLOSURE

- A. The Legislature attempted to eliminate the power of the Circuit Court to modify the judgment of foreclosure once it had been entered and limit disgruntled owners to a claim for money damages if they did not receive adequate notice, in order to provide more stability and certainty to tax titles.
- B. The Michigan Supreme Court rejected this provision of the new act in Wayne County Treasurer v. Perfecting Church, 478 Mich 1, 732 NW2d 458 (2007), holding that a property owner is entitled to constitutionally adequate notice of the foreclosure action, and the General Property Tax Act is unconstitutional to the extent it purports to limit the circuit court's jurisdiction to modify judgments of foreclosure where there has been constitutionally inadequate notice.
- C. As a result of the Supreme Court's holding, property owners and others with an interest in the property are still able to challenge the foreclosure in Circuit Court and through an appeal in the event of an unfavorable ruling.

VI. DISPOSITION OF FORECLOSED PROPERTIES

- A. Properties acquired through the foreclosure process are offered for sale at auction by the FGU.
  - 1. At least two auctions at least 28 days apart must be held between the third Tuesday in July and the first Tuesday in November of Year +3.
  - 2. At the first auction, the minimum bid is the sum of all delinquent taxes, interest, penalties and fees due, plus the expenses of sale.

3. If the property is not sold at the first auction, there is no statutory minimum bid at the second auction, although the FGU can establish a reasonable opening bid.
- B. The buyer acquires fee simple title to the property, free and clear of virtually all interests except those noted in Paragraph IV (B) above.
  - C. The state has a right of first refusal on all properties that expires on the first Tuesday in July of Year +3. The purchase price is the greater of fair market value or the minimum bid.
  - D. If the state doesn't exercise its right of first refusal, the city, village or township where the property is located may purchase the property prior to the first auction for the minimum bid so long as it is for a "public purpose."

## THE BASICS OF PROPERTY TAX FORECLOSURE

### INDEX OF EXHIBITS

- 1) MCL §211.78, et seq (The General Property Tax Act - Delinquent Taxes)
- 2) Real Property Tax Foreclosure Timeline
- 3) Mich. Dept. of Treasury Form 4264 (Notice of Show Cause Hearing and Judicial Foreclosure Hearing)
- 4) IRC §7425 (26 USC § 7425 - Discharge of Liens)
- 5) Treas. Reg. § 301.7425 (26 CFR § 301.7425 - Discharge of Liens)
- 6) Wayne County Treasurer v. Perfecting Church, 478 Mich 1, 732 NW2d 458 (2007)

**THE GENERAL PROPERTY TAX ACT (EXCERPT)**  
**Act 206 of 1893**

**211.78 Delinquent taxes; return, forfeiture, and foreclosure of property; construction of act; election to have state foreclose property forfeited to county; resolution; rescission of prior resolution; foreclosure as voluntary; agreement for collection of taxes or enforcement and consolidation of tax liens; definitions.**

Sec. 78. (1) The legislature finds that there exists in this state a continuing need to strengthen and revitalize the economy of this state and its municipalities by encouraging the efficient and expeditious return to productive use of property returned for delinquent taxes. Therefore, the powers granted in this act relating to the return of property for delinquent taxes constitute the performance by this state or a political subdivision of this state of essential public purposes and functions.

(2) It is the intent of the legislature that the provisions of this act relating to the return, forfeiture, and foreclosure of property for delinquent taxes satisfy the minimum requirements of due process required under the constitution of this state and the constitution of the United States but that those provisions do not create new rights beyond those required under the state constitution of 1963 or the constitution of the United States. The failure of this state or a political subdivision of this state to follow a requirement of this act relating to the return, forfeiture, or foreclosure of property for delinquent taxes shall not be construed to create a claim or cause of action against this state or a political subdivision of this state unless the minimum requirements of due process accorded under the state constitution of 1963 or the constitution of the United States are violated.

(3) Not later than December 1, 1999, the county board of commissioners of a county, by a resolution adopted at a meeting held pursuant to the open meetings act, 1976 PA 267, MCL 15.261 to 15.275, and with the written concurrence of the county treasurer and the county executive, if any, may elect to have this state foreclose property under this act forfeited to the county treasurer under section 78g. At any time during December 2004, the county board of commissioners of a county, by a resolution adopted at a meeting held pursuant to the open meetings act, 1976 PA 267, MCL 15.261 to 15.275, and with the written concurrence of the county treasurer and county executive, if any, may do either of the following:

(a) Elect to have this state foreclose property under this act forfeited to the county treasurer under section 78g.

(b) Rescind its prior resolution by which it elected to have this state foreclose property under this act forfeited to the county treasurer under section 78g.

(4) Beginning January 1, 2009 through March 1, 2009, the county board of commissioners of a county in which is located an eligible city, as that term is defined in section 89d, may, by a resolution adopted at a meeting held pursuant to the open meetings act, 1976 PA 267, MCL 15.261 to 15.275, and with the written concurrence of the county treasurer and county executive, if any, rescind its prior resolution by which it elected to have this state foreclose property under this act forfeited to the county treasurer under section 78g.

(5) The county board of commissioners of a county that has elected to have property forfeited under section 78g foreclosed by this state under this act may, by a resolution adopted at a meeting held pursuant to the open meetings act, 1976 PA 267, MCL 15.261 to 15.275, and with the written concurrence of the county treasurer and county executive, if any, rescind its prior resolution by which it elected to have this state foreclose property under this act forfeited to the county treasurer under section 78g. A county board of commissioners shall forward a copy of the resolution and any concurrence to the department of treasury not later than November 30 in the year in which the resolution is adopted. A county that rescinds its prior election under this subsection shall act as the foreclosing governmental unit under this act for all property forfeited to the county treasurer under section 78g after February 1 in the year immediately following the year in which the resolution is adopted.

(6) The foreclosure of forfeited property by a county is voluntary and is not an activity or service required of units of local government for purposes of section 29 of article IX of the state constitution of 1963.

(7) A county and a local governmental unit within that county may enter into an agreement for the collection of property taxes or the enforcement and consolidation of tax liens within that local governmental unit. A local governmental unit shall not establish a delinquent tax revolving fund under section 87b.

(8) As used in this section and sections 78a through 155 for purposes of the collection of taxes returned as delinquent:

(a) "Foreclosing governmental unit" means 1 of the following:

(i) The treasurer of a county.

(ii) This state if the county has elected under subsection (3) to have this state foreclose property under this act forfeited to the county treasurer under section 78g.

(b) "Forfeited" or "forfeiture" means a foreclosing governmental unit may seek a judgment of foreclosure

under section 78k if the property is not redeemed as provided under this act, but does not acquire a right to possession or any other interest in the property.

**History:** Add. 1999, Act 123, Eff. Oct. 1, 1999;—Am. 2008, Act 512, Imd. Eff. Jan. 13, 2009;—Am. 2014, Act 132, Imd. Eff. May 27, 2014.

**Compiler's note:** Former section 78 was not compiled.

**Popular name:** Act 206

**THE GENERAL PROPERTY TAX ACT (EXCERPT)**  
**Act 206 of 1893**

**211.78a Property returned as delinquent subject to forfeiture, foreclosure, and sale; unpaid taxes from previous year; county property tax administration fee and interest; notice of return of delinquent taxes; annual fee; procedures and schedules established by ordinance.**

Sec. 78a. (1) For taxes levied after December 31, 1998, all property returned for delinquent taxes, and upon which taxes, interest, penalties, and fees remain unpaid after the property is returned as delinquent to the county treasurers of this state under this act, is subject to forfeiture, foreclosure, and sale for the enforcement and collection of the delinquent taxes as provided in section 78, this section, and sections 78b to 79a. As used in section 78, this section, and sections 78b to 79a, "taxes" includes interest, penalties, and fees imposed before the taxes become delinquent and unpaid special assessments or other assessments that are due and payable up to and including the date of the foreclosure hearing under section 78k.

(2) On March 1 in each year, taxes levied in the immediately preceding year that remain unpaid shall be returned as delinquent for collection. However, if the last day in a year that taxes are due and payable before being returned as delinquent is on a Saturday, Sunday, or legal holiday, the last day taxes are due and payable before being returned as delinquent is on the next business day and taxes levied in the immediately preceding year that remain unpaid shall be returned as delinquent on the immediately succeeding business day. Except as otherwise provided in section 79 for certified abandoned property, property delinquent for taxes levied in the second year preceding the forfeiture under section 78g or in a prior year to which this section applies shall be forfeited to the county treasurer for the total of the unpaid taxes, interest, penalties, and fees for those years as provided under section 78g.

(3) A county property tax administration fee of 4% and interest computed at a noncompounded rate of 1% per month or fraction of a month on the taxes that were originally returned as delinquent, computed from the date that the taxes originally became delinquent, shall be added to property returned as delinquent under this section. A county property tax administration fee provided for under this subsection shall not be less than \$1.00.

(4) Any person with an unrecorded property interest or any other person who wishes at any time to receive notice of the return of delinquent taxes on a parcel of property may pay an annual fee not to exceed \$5.00 by February 1 to the county treasurer and specify the parcel identification number, the address of the property, and the address to which the notice shall be sent. Holders of any undischarged mortgages wishing to receive notice of the return of delinquent taxes on a parcel or parcels of property may provide a list of such parcels in a form prescribed by the county treasurer and pay an annual fee not to exceed \$1.00 per parcel to the county treasurer and specify for each parcel the parcel identification number, the address of the property, and the address to which the notice should be sent. The county treasurer shall notify the person or holders of undischarged mortgages if delinquent taxes on the property or properties are returned within that year.

(5) Notwithstanding any charter provision to the contrary, the governing body of a local governmental unit that collects delinquent taxes may establish for any property, by ordinance, procedures for the collection of delinquent taxes and the enforcement of tax liens and the schedule for the forfeiture or foreclosure of delinquent tax liens. The procedures and schedule established by ordinance shall conform at a minimum to those procedures and schedules established under sections 78a to 78l, except that those taxes subject to a payment plan approved by the treasurer of the local governmental unit as of July 1, 1999 shall not be considered delinquent if payments are not delinquent under that payment plan.

*History:* Add. 1999, Act 123, Eff. Oct. 1, 1999;—Am. 2008, Act 352, Imd. Eff. Dec. 23, 2008.

**Popular name:** Act 206



**THE GENERAL PROPERTY TAX ACT (EXCERPT)**  
**Act 206 of 1893**

**211.78b Notice provisions; June 1.**

Sec. 78b. Except as otherwise provided in section 79 for certified abandoned property, on the June 1 immediately succeeding the date that unpaid taxes are returned to the county treasurer for forfeiture, foreclosure, and sale under section 60a(1) or (2) or returned to the county treasurer as delinquent under section 78a, the county treasurer shall send notice of all the following by first-class mail, address correction requested, to the person to whom a tax bill for property returned for delinquent taxes was last sent or to the person identified as the owner of property returned for delinquent taxes, to a person entitled to notice of the return of delinquent taxes under section 78a(4), and to a person to whom a tax certificate for property returned for delinquent taxes was issued pursuant to section 71, as shown on the current records of the county treasurer:

(a) The date property on which unpaid taxes were returned as delinquent will be forfeited to the county treasurer for those unpaid delinquent taxes, interest, penalties, and fees.

(b) A statement that a person who holds a legal interest in the property may lose that interest as a result of the forfeiture and subsequent foreclosure proceeding.

(c) A legal description or parcel number of the property and the street address of the property, if available.

(d) The person or persons to whom the notice is addressed.

(e) The unpaid delinquent taxes, interest, penalties, and fees due on the property.

(f) A statement that unless those unpaid delinquent taxes, interest, penalties, and fees are paid on or before the March 31 immediately succeeding the entry in an uncontested case of a judgment foreclosing the property under section 78k, absolute title to the property shall vest in the foreclosing governmental unit.

(g) A statement of the person's rights of redemption and notice that the rights of redemption will expire on the March 31 immediately succeeding the entry in an uncontested case of a judgment foreclosing the property under section 78k.

**History:** Add. 1999, Act 123, Eff. Oct. 1, 1999;—Am. 2003, Act 263, Imd. Eff. Jan. 5, 2004.

**Compiler's note:** Enacting section 3 of Act 263 of 2003 provides:

"Enacting section 3. This amendatory act is not intended to and shall not be construed to modify or alter the ruling of the Michigan supreme court in Smith v Cliffs on the Bay Condominium Association, docket no. 111587."

**Popular name:** Act 206

**THE GENERAL PROPERTY TAX ACT (EXCERPT)**  
**Act 206 of 1893**

**211.78c Notice provisions; September 1.**

Sec. 78c. Except as otherwise provided in section 79 for certified abandoned property, on the September 1 immediately succeeding the date that unpaid taxes are returned to the county treasurer for forfeiture, foreclosure, and sale under section 60a(1) or (2) or returned to the county treasurer as delinquent under section 78a, the county treasurer shall send notice of all the following by first-class mail, address correction requested, to the person to whom a tax bill for property returned for delinquent taxes was last sent or to the person identified as the owner of property returned for delinquent taxes, to a person entitled to notice of the return of delinquent taxes under section 78a(4), and to a person to whom a tax certificate for property returned for delinquent taxes was issued pursuant to section 71, as shown on the current records of the county treasurer:

(a) The date property on which unpaid taxes were returned as delinquent will be forfeited to the county treasurer for those unpaid delinquent taxes, interest, penalties, and fees.

(b) A statement that a person who holds a legal interest in the property may lose that interest as a result of the forfeiture and subsequent foreclosure proceeding.

(c) A legal description or parcel number of the property and the street address of the property, if available.

(d) The person or persons to whom the notice is addressed.

(e) The unpaid delinquent taxes, interest, penalties, and fees due on the property.

(f) A schedule of the additional fees that will accrue on the immediately succeeding October 1 pursuant to section 78d if the unpaid delinquent taxes, interest, penalties, and fees due on the property are not paid.

(g) A statement that unless those unpaid delinquent taxes, interest, penalties, and fees are paid on or before the March 31 immediately succeeding the entry in an uncontested case of a judgment foreclosing the property under section 78k, absolute title to the property shall vest in the foreclosing governmental unit.

(h) A statement of the person's rights of redemption and notice that the rights of redemption will expire on the March 31 immediately succeeding the entry in an uncontested case of a judgment foreclosing the property under section 78k.

**History:** Add. 1999, Act 123, Eff. Oct. 1, 1999;—Am. 2003, Act 263, Imd. Eff. Jan. 5, 2004.

**Compiler's note:** Enacting section 3 of Act 263 of 2003 provides:  
"Enacting section 3. This amendatory act is not intended to and shall not be construed to modify or alter the ruling of the Michigan supreme court in Smith v Cliffs on the Bay Condominium Association, docket no. 111587."

**Popular name:** Act 206

**THE GENERAL PROPERTY TAX ACT (EXCERPT)**  
**Act 206 of 1893**

**211.78d Additional fee; October 1.**

Sec. 78d. Except as otherwise provided in section 79 for certified abandoned property, on the October 1 immediately succeeding the date that unpaid taxes are returned to the county treasurer for forfeiture, foreclosure, and sale under section 60a(1) or (2) or returned to the county treasurer as delinquent under section 78a, the county treasurer shall add a \$15.00 fee on each parcel of property for which the delinquent taxes, interest, penalties, and fees remain unpaid.

**History:** Add. 1999, Act 123, Eff. Oct. 1, 1999;—Am. 2003, Act 263, Imd. Eff. Jan. 5, 2004.

**Compiler's note:** Enacting section 3 of Act 263 of 2003 provides:

"Enacting section 3. This amendatory act is not intended to and shall not be construed to modify or alter the ruling of the Michigan supreme court in Smith v Cliffs on the Bay Condominium Association, docket no. 111587."

**Popular name:** Act 206

**THE GENERAL PROPERTY TAX ACT (EXCERPT)**  
**Act 206 of 1893**

**211.78e List of property subject to forfeiture for delinquent taxes; determinations.**

Sec. 78e. (1) Except as otherwise provided in section 79 for certified abandoned property, on November 1 of each tax year, the county treasurer shall prepare a list of all property subject to forfeiture for delinquent taxes on the immediately succeeding March 1. The list shall include all property on which delinquent taxes, interest, penalties, and fees are unpaid on the November 1 immediately succeeding the date that taxes levied on the property were returned to the county treasurer for forfeiture, foreclosure, and sale under section 60a(1) or (2) or returned to the county treasurer as delinquent under section 78a. The list shall indicate for each parcel the total amount of delinquent taxes, interest, penalties, and fees, computed to the day preceding the forfeiture under section 78g.

(2) Not later than December 1 in each tax year, the county treasurer shall determine, to the extent possible, all of the following based exclusively on the records contained in the office of the local assessor, local treasurer, and county treasurer for property subject to forfeiture for delinquent taxes under section 78g on the immediately succeeding March 1:

- (a) The street address of the property.
- (b) The name and address of all of the following:
  - (i) The owners.
  - (ii) The holder of any undischarged mortgage, tax certificate issued under section 71, or other legal interest.
  - (iii) A subsequent purchaser under any land contract.
  - (iv) A person entitled to notice of the return of delinquent taxes under section 78a(5).

**History:** Add. 1999, Act 123, Eff. Oct. 1, 1999.

**Popular name:** Act 206

**THE GENERAL PROPERTY TAX ACT (EXCERPT)**  
Act 206 of 1893

**211.78f Notice provisions; February 1; additional notices.**

Sec. 78f. (1) Except as otherwise provided in section 79 for certified abandoned property, not later than the February 1 immediately succeeding the date that unpaid taxes were returned to the county treasurer for forfeiture, foreclosure, and sale under section 60a(1) or (2) or returned to the county treasurer as delinquent under section 78a, the county treasurer shall send a notice by certified mail, return receipt requested, to the person to whom a tax bill for property returned for delinquent taxes was last sent and, if different, to the person identified as the owner of property returned for delinquent taxes as shown on the current records of the county treasurer and to those persons identified under section 78c(2). The notice required under this subsection shall include all of the following:

(a) The date property on which those unpaid taxes were returned as delinquent will be forfeited to the county treasurer for the unpaid delinquent taxes, interest, penalties, and fees.

(b) A statement that a person who holds a legal interest in the property may lose that interest as a result of the forfeiture and subsequent foreclosure proceeding.

(c) A legal description or parcel number of the property and the street address of the property, if available.

(d) The person to whom the notice is addressed.

(e) The unpaid delinquent taxes, interest, penalties, and fees due on the property.

(f) A schedule of the additional interest, penalties, and fees that will accrue on the immediately succeeding March 1 pursuant to section 78g if those unpaid delinquent taxes, interest, penalties, and fees due on the property are not paid.

(g) A statement that unless those unpaid delinquent taxes, interest, penalties, and fees are paid on or before the March 31 immediately succeeding the entry in an uncontested case of a judgment foreclosing the property under section 78k, absolute title to the property shall vest in the foreclosing governmental unit.

(h) A statement of the person's rights of redemption and notice that the rights of redemption will expire on the March 31 immediately succeeding the entry in an uncontested case of a judgment foreclosing the property under section 78k.

(2) The notice required under subsection (1) shall also be mailed to the property by first-class mail, addressed to "occupant", if the notice was not sent to the occupant of the property pursuant to subsection (1).

(3) A county treasurer may insert 1 or more additional notices in a newspaper published and circulated in the county in which the property is located, if there is one. If no newspaper is published in that county, publication may be made in a newspaper published and circulated in an adjoining county.

(4) The county treasurer may publish the street address, if available, of property subject to forfeiture under section 78g on the immediately succeeding March 1 for delinquent taxes or the street address, if available, of property subject to forfeiture under section 78g on the immediately succeeding March 1 for delinquent taxes and the name of the person to whom a tax bill for property returned for delinquent taxes was last sent and, if different, the name of the person identified as the owner of the property returned for delinquent taxes as shown on the current records of the county treasurer in a newspaper published and circulated in the county in which the property is located, if there is one. If no newspaper is published in that county, publication may be made in a newspaper published and circulated in an adjoining county.

**History:** Add. 1999, Act 123, Eff. Oct. 1, 1999;—Am. 2001, Act 95, Imd. Eff. July 30, 2001;—Am. 2003, Act 263, Imd. Eff. Jan. 5, 2004.

**Compiler's note:** Enacting section 3 of Act 263 of 2003 provides:  
"Enacting section 3. This amendatory act is not intended to and shall not be construed to modify or alter the ruling of the Michigan supreme court in Smith v Cliffs on the Bay Condominium Association, docket no. 111587."

**Popular name:** Act 206

**THE GENERAL PROPERTY TAX ACT (EXCERPT)**  
Act 206 of 1893

**211.78g Property delinquent for preceding 12 months or forfeited for total amount; right to possession by foreclosing governmental unit; limitation; recording certificate with county register of deeds; redemption.**

Sec. 78g. (1) Except as otherwise provided in this subsection, on March 1 in each tax year, certified abandoned property and property that is delinquent for taxes, interest, penalties, and fees for the immediately preceding 12 months or more is forfeited to the county treasurer for the total amount of those unpaid delinquent taxes, interest, penalties, and fees. If property is forfeited to a county treasurer under this subsection, the foreclosing governmental unit does not have a right to possession of the property until the April 1 immediately succeeding the entry of a judgment foreclosing the property under section 78k or in a contested case until 22 days after the entry of a judgment foreclosing the property under section 78k. If property is forfeited to a county treasurer under this subsection, the county treasurer shall add a \$175.00 fee to each parcel of property for which those delinquent taxes, interest, penalties, and fees remain unpaid. A county treasurer shall withhold a parcel of property from forfeiture for any reason determined by the state tax commission. The procedure for withholding a parcel of property from forfeiture under this subsection shall be determined by the state tax commission.

(2) Not more than 45 days after property is forfeited under subsection (1), the county treasurer shall record with the county register of deeds a certificate in a form determined by the department of treasury for each parcel of property forfeited to the county treasurer, specifying that the property has been forfeited to the county treasurer and not redeemed and that absolute title to the property shall vest in the county treasurer on the March 31 immediately succeeding the entry of a judgment foreclosing the property under section 78k or in a contested case 21 days after the entry of a judgment foreclosing the property under section 78k. If a certificate of forfeiture is recorded in error, the county treasurer shall record with the county register of deeds a certificate of error in a form prescribed by the department of treasury. A certificate submitted to the county register of deeds for recording under this subsection need not be notarized and may be authenticated by a digital signature of the county treasurer or by other electronic means. If the county has elected under section 78 to have this state foreclose property under this act forfeited to the county treasurer under this section, the county treasurer shall immediately transmit to the department of treasury a copy of each certificate recorded under this subsection. The county treasurer shall upon collection transmit to the department of treasury within 30 days the fee added to each parcel under subsection (1), which may be paid from the county's delinquent tax revolving fund and shall be deposited in the land reutilization fund created under section 78n.

(3) Property forfeited to the county treasurer under subsection (1) may be redeemed at any time on or before the March 31 immediately succeeding the entry of a judgment foreclosing the property under section 78k or in a contested case within 21 days of the entry of a judgment foreclosing the property under section 78k upon payment to the county treasurer of all of the following:

(a) The total amount of unpaid delinquent taxes, interest, penalties, and fees for which the property was forfeited.

(b) In addition to the interest calculated under sections 60a(1) or (2) and 78a(3), additional interest computed at a noncompounded rate of 1/2% per month or fraction of a month on the taxes that were originally returned as delinquent, computed from the March 1 preceding the forfeiture.

(c) All recording fees and all fees for service of process or notice.

(4) If property is redeemed by a person with a legal interest as provided under subsection (3), any unpaid taxes not returned as delinquent to the county treasurer under section 78a are not extinguished.

(5) If property is redeemed by a person with a legal interest as provided under subsection (3), the person redeeming does not acquire a title or interest in the property greater than that person would have had if the property had not been forfeited to the county treasurer, but the person redeeming, other than the owner, is entitled to a lien for the amount paid to redeem the property in addition to any other lien or interest the person may have, which shall be recorded within 30 days with the register of deeds by the person entitled to the lien. The lien acquired shall have the same priority as the existing lien, title, or interest.

(6) If property is redeemed as provided under subsection (3), the county treasurer shall issue a redemption certificate in quadruplicate in a form prescribed by the department of treasury. One of the quadruplicate certificates shall be delivered to the person making the redemption payment, 1 shall be filed in the office of the county treasurer, 1 shall be recorded in the office of the county register of deeds, and 1 shall be immediately transmitted to the department of treasury if this state is the foreclosing governmental unit. The county treasurer shall also make a note of the redemption certificate in the tax record kept in his or her office, with the name of the person making the final redemption payment, the date of the payment, and the amount

paid. If the county treasurer accepts partial redemption payments, the county treasurer shall include in the tax record kept in his or her office the name of the person or persons making each partial redemption payment, the date of each partial redemption payment, the amount of each partial redemption payment, and the total amount of all redemption payments. A certificate and the entry of the certificate in the tax record by the county treasurer is prima facie evidence of a redemption payment in the courts of this state. A certificate submitted to the county register of deeds for recording under this subsection need not be notarized and may be authenticated by a digital signature of the county treasurer or by other electronic means. If a redemption certificate is recorded in error, the county treasurer shall record with the county register of deeds a certificate of error in a form prescribed by the department of treasury. A copy of a certificate of error recorded under this section shall be immediately transmitted to the department of treasury if this state is the foreclosing governmental unit.

(7) If a foreclosing governmental unit has reason to believe that a property forfeited under this section may be the site of environmental contamination, the foreclosing governmental unit shall provide the department of environmental quality with any information in the possession of the foreclosing governmental unit that suggests the property may be the site of environmental contamination.

**History:** Add. 1999, Act 123, Eff. Oct. 1, 1999;—Am. 2001, Act 94, Imd. Eff. July 30, 2001;—Am. 2003, Act 263, Imd. Eff. Jan. 5, 2004.

**Compiler's note:** Enacting section 3 of Act 263 of 2003 provides:

'Enacting section 3. This amendatory act is not intended to and shall not be construed to modify or alter the ruling of the Michigan supreme court in Smith v Cliffs on the Bay Condominium Association, docket no. 111587.'

For transfer of powers and duties of department of environmental quality to department of natural resources and environment, see E.R.O. No. 2009-31, compiled at MCL 324.99919.

**THE GENERAL PROPERTY TAX ACT (EXCERPT)**  
**Act 206 of 1893**

**211.78h Petition for foreclosure; filing in circuit court; withholding property by foreclosing governmental unit; hearing date.**

Sec. 78h. (1) Not later than June 15 in each tax year, the foreclosing governmental unit shall file a single petition with the clerk of the circuit court of that county listing all property forfeited and not redeemed to the county treasurer under section 78g to be foreclosed under section 78k for the total of the forfeited unpaid delinquent taxes, interest, penalties, and fees. If available to the foreclosing governmental unit, the petition shall include the street address of each parcel of property set forth in the petition. The petition shall seek a judgment in favor of the foreclosing governmental unit for the forfeited unpaid delinquent taxes, interest, penalties, and fees listed against each parcel of property. The petition shall request that a judgment be entered vesting absolute title to each parcel of property in the foreclosing governmental unit, without right of redemption.

(2) If property is redeemed after the petition for foreclosure is filed under this section, the foreclosing governmental unit shall request that the circuit court remove that property from the petition for foreclosure before entry of judgment foreclosing the property under section 78k.

(3) The foreclosing governmental unit may withhold the following property from the petition for foreclosure filed under this section:

(a) Property the title to which is held by minor heirs or persons who are incompetent, persons without means of support, or persons unable to manage their affairs due to age or infirmity, until a guardian is appointed to protect that person's rights and interests.

(b) Property the title to which is held by a person undergoing substantial financial hardship, as determined under a written policy developed and adopted by the foreclosing governmental unit. The foreclosing governmental unit shall make available to the public the written policy adopted under this subdivision. The written policy adopted under this subdivision shall include, but is not limited to, all of the following:

(i) The person requesting that the property be withheld from the petition for foreclosure holds the title to the property.

(ii) The household income of the person requesting that the property be withheld from the petition for foreclosure meets the federal poverty income standards as defined and determined annually by the United States office of management and budget or alternative guidelines adopted by the foreclosing governmental unit, provided that the alternative guidelines include all persons who would otherwise meet the federal poverty income standards under this subparagraph. As used in this subparagraph, "household income" means that term as defined in section 508 of the income tax act of 1967, 1967 PA 281, MCL 206.508.

(4) If a foreclosing governmental unit withholds property from the petition for foreclosure under subsection (3), a taxing unit's lien for taxes due or the foreclosing governmental unit's right to include the property in a subsequent petition for foreclosure is not prejudiced.

(5) The clerk of the circuit court in which the petition is filed shall immediately set the date, time, and place for a hearing on the petition for foreclosure, which hearing shall be held not more than 30 days before the March 1 immediately succeeding the date the petition for foreclosure is filed.

History: Add. 1999, Act 123, Eff. Oct. 1, 1999;—Am. 2001, Act 96, Imd. Eff. July 30, 2001.

Popular name: Act 206



**THE GENERAL PROPERTY TAX ACT (EXCERPT)**  
Act 206 of 1893

**211.78i Identification of owners of property interest; title search; personal visit to determine occupancy; publication of notice; sources of identification; notice provisions; prohibited assertions if failure to redeem property; noncompliance; "authorized representative" defined; applicability of other requirements.**

Sec. 78i. (1) Not later than May 1 immediately succeeding the forfeiture of property to the county treasurer under section 78g, the foreclosing governmental unit shall initiate a search of records identified in subsection (6) to identify the owners of a property interest in the property who are entitled to notice under this section of the show cause hearing under section 78j and the foreclosure hearing under section 78k. The foreclosing governmental unit may enter into a contract with 1 or more authorized representatives to perform a title search or may request from 1 or more authorized representatives another title search product to identify the owners of a property interest in the property as required under this subsection or to perform other functions required for the collection of delinquent taxes under this act.

(2) After conducting the search of records under subsection (1), the foreclosing governmental unit or its authorized representative shall determine the address reasonably calculated to apprise those owners of a property interest of the show cause hearing under section 78j and the foreclosure hearing under section 78k and shall send notice of the show cause hearing under section 78j and the foreclosure hearing under section 78k to those owners, and to a person entitled to notice of the return of delinquent taxes under section 78a(4), by certified mail, return receipt requested, not less than 30 days before the show cause hearing. If after conducting the search of records under subsection (1) the foreclosing governmental unit is unable to determine an address reasonably calculated to inform a person with an interest in a forfeited property, or if the foreclosing governmental unit discovers a deficiency in notice under subsection (4), the following shall be considered reasonable steps by the foreclosing governmental unit or its authorized representative to ascertain the address of a person entitled to notice under this section or to ascertain an address necessary to correct the deficiency in notice under subsection (4):

(a) For an individual, a search of the records of the probate court for the county in which the property is located.

(b) For an individual, a search of the qualified voter file established under section 509o of the Michigan election law, 1954 PA 116, MCL 168.509o, which is authorized by this subdivision.

(c) For a partnership, a search of partnership records filed with the county clerk.

(d) For a business entity other than a partnership, a search of business entity records filed with the department of labor and economic growth.

(3) The foreclosing governmental unit or its authorized representative or authorized agent shall make a personal visit to each parcel of property forfeited to the county treasurer under section 78g to ascertain whether or not the property is occupied. If the property appears to be occupied, the foreclosing governmental unit or its authorized representative shall do all of the following:

(a) Attempt to personally serve upon a person occupying the property notice of the show cause hearing under section 78j and the foreclosure hearing under section 78k.

(b) If a person occupying the property is personally served, orally inform the occupant that the property will be foreclosed and the occupants will be required to vacate unless all forfeited unpaid delinquent taxes, interest, penalties, and fees are paid, of the time within which all forfeited unpaid delinquent taxes, interest, penalties, and fees must be paid, and of agencies or other resources that may be available to assist the owner to avoid loss of the property.

(c) If the occupant appears to lack the ability to understand the advice given, notify the department of human services or provide the occupant with the names and telephone numbers of the agencies that may be able to assist the occupant.

(d) If the foreclosing governmental unit or its authorized representative is not able to personally meet with the occupant, the foreclosing governmental unit or its authorized representative shall place the notice in a conspicuous manner on the property and shall also place in a conspicuous manner on the property a notice that explains, in plain English, that the property will be foreclosed unless forfeited unpaid delinquent taxes, interest, penalties, and fees are paid, the time within which forfeited unpaid delinquent taxes, interest, penalties, and fees must be paid, and the names, addresses, and telephone numbers of agencies or other resources that may be available to assist the occupant to avoid loss of the property. If this state is the foreclosing governmental unit within a county, the department of treasury shall perform the personal visit to each parcel of property under this subsection on behalf of this state.

(4) If the foreclosing governmental unit or its authorized representative discovers any deficiency in the

provision of notice, the foreclosing governmental unit shall take reasonable steps in good faith to correct that deficiency not later than 30 days before the show cause hearing under section 78j, if possible.

(5) If the foreclosing governmental unit or its authorized representative is unable to ascertain the address reasonably calculated to apprise the owners of a property interest entitled to notice under this section, or is unable to notify the owner of a property interest under subsection (2), the notice shall be made by publication. A notice shall be published for 3 successive weeks, once each week, in a newspaper published and circulated in the county in which the property is located, if there is one. If no paper is published in that county, publication shall be made in a newspaper published and circulated in an adjoining county. This publication shall be instead of notice under subsection (2).

(6) The owner of a property interest is entitled to notice under this section of the show cause hearing under section 78j and the foreclosure hearing under section 78k if that owner's interest was identifiable by reference to any of the following sources before the date that the county treasurer records the certificate required under section 78g(2):

(a) Land title records in the office of the county register of deeds.

(b) Tax records in the office of the county treasurer.

(c) Tax records in the office of the local assessor.

(d) Tax records in the office of the local treasurer.

(7) The notice required under subsections (2) and (3) shall include all of the following:

(a) The date on which the property was forfeited to the county treasurer.

(b) A statement that the person notified may lose his or her interest in the property as a result of the foreclosure proceeding under section 78k.

(c) A legal description or parcel number of the property and the street address of the property, if available.

(d) The person to whom the notice is addressed.

(e) The total taxes, interest, penalties, and fees due on the property.

(f) The date and time of the show cause hearing under section 78j.

(g) The date and time of the hearing on the petition for foreclosure under section 78k, and a statement that unless the forfeited unpaid delinquent taxes, interest, penalties, and fees are paid on or before the March 31 immediately succeeding the entry of a judgment foreclosing the property under section 78k, or in a contested case within 21 days of the entry of a judgment foreclosing the property under section 78k, the title to the property shall vest absolutely in the foreclosing governmental unit and that all existing interests in oil or gas in that property shall be extinguished except the following:

(i) The interests of a lessee or an assignee of an interest of a lessee under an oil or gas lease in effect as to that property or any part of that property if the lease was recorded in the office of the register of deeds in the county in which the property is located before the date of filing the petition for foreclosure under section 78h.

(ii) Interests preserved as provided in section 1(3) of 1963 PA 42, MCL 554.291.

(h) An explanation of the person's rights of redemption and notice that the rights of redemption will expire on the March 31 immediately succeeding the entry of a judgment foreclosing the property under section 78k, or in a contested case 21 days after the entry of a judgment foreclosing the property under section 78k.

(8) The published notice required under subsection (5) shall include all of the following:

(a) A legal description or parcel number of each property.

(b) The street address of each property, if available.

(c) The name of any person or entity entitled to notice under this section who has not been notified under subsection (2) or (3).

(d) The date and time of the show cause hearing under section 78j.

(e) The date and time of the hearing on the petition for foreclosure under section 78k.

(f) A statement that unless all forfeited unpaid delinquent taxes, interest, penalties, and fees are paid on or before the March 31 immediately succeeding the entry of a judgment foreclosing the property under section 78k, or in a contested case within 21 days of the entry of a judgment foreclosing the property under section 78k, the title to the property shall vest absolutely in the foreclosing governmental unit and that all existing interests in oil or gas in that property shall be extinguished except the following:

(i) The interests of a lessee or an assignee of an interest of a lessee under an oil or gas lease in effect as to that property or any part of that property if the lease was recorded in the office of the register of deeds in the county in which the property is located before the date of filing the petition for foreclosure under section 78h.

(ii) Interests preserved as provided in section 1(3) of 1963 PA 42, MCL 554.291.

(g) A statement that a person with an interest in the property may lose his or her interest in the property as a result of the foreclosure proceeding under section 78k and that all existing interests in oil or gas in that property shall be extinguished except the following:

(i) The interests of a lessee or an assignee of an interest of a lessee under an oil or gas lease in effect as to

that property or any part of that property if the lease was recorded in the office of the register of deeds in the county in which the property is located before the date of filing the petition for foreclosure under section 78h.

(ii) Interests preserved as provided in section 1(3) of 1963 PA 42, MCL 554.291.

(9) The owner of a property interest who has been properly served with a notice of the show cause hearing under section 78j and the foreclosure hearing under section 78k and who failed to redeem the property as provided under this act shall not assert any of the following:

(a) That notice was insufficient or inadequate on the grounds that some other owner of a property interest was not also served.

(b) That the redemption period provided under this act was extended in any way on the grounds that some other owner of a property interest was not also served.

(10) The failure of the foreclosing governmental unit to comply with any provision of this section shall not invalidate any proceeding under this act if the owner of a property interest or a person to whom a tax deed was issued is accorded the minimum due process required under the state constitution of 1963 and the constitution of the United States.

(11) As used in this section, "authorized representative" includes all of the following:

(a) A title insurance company or agent licensed to conduct business in this state.

(b) An attorney licensed to practice law in this state.

(c) A person accredited in land title search procedures by a nationally recognized organization in the field of land title searching.

(d) A person with demonstrated experience searching land title records, as determined by the foreclosing governmental unit.

(12) The provisions of this section relating to notice of the show cause hearing under section 78j and the foreclosure hearing under section 78k are exclusive and exhaustive. Other requirements relating to notice or proof of service under other law, rule, or legal requirement are not applicable to notice and proof of service under this section.

**History:** Add. 1999, Act 123, Eff. Oct. 1, 1999;—Am. 2001, Act 101, Imd. Eff. July 30, 2001;—Am. 2003, Act 263, Imd. Eff. Jan. 5, 2004;—Am. 2006, Act 611, Imd. Eff. Jan. 3, 2007.

**Compiler's note:** Enacting sections 1 and 3 of Act 263 of 2003 provide:

"Enacting section 1. Section 78i(12) of the general property tax act, 1893 PA 206, MCL 211.78i, as added by this amendatory act and section 78k(5) of the general property tax act, 1893 PA 206, MCL 211.78k, as amended by this amendatory act are curative and are intended to express the original intent of the legislature concerning the application of 1999 PA 123, section 78i of the general property tax act, 1893 PA 206, MCL 211.78i, as amended by 2001 PA 101 and section 78k of the general property tax act, 1893 PA 206, MCL 211.78k, as amended by 2001 PA 94.

"Enacting section 3. This amendatory act is not intended to and shall not be construed to modify or alter the ruling of the Michigan supreme court in Smith v Cliffs on the Bay Condominium Association, docket no. 111587."

For transfer of certain powers and duties relating to collection of delinquent taxes and forfeiture, foreclosure, and disposition of tax-delinquent or tax-reverted property from department of natural resources to department of treasury by type II transfer, see E.R.O. No. 2004-1, compiled at MCL 211.281.

Enacting section 1 of Act 611 of 2006 provides:

"Enacting section 1. Sections 78i and 78k of the general property tax act, 1893 PA 206, MCL 211.78i and 211.78k, as amended by this amendatory act apply only to property foreclosed by a judgment of foreclosure entered pursuant to section 78k(5) of the general property tax act, 1893 PA 206, MCL 211.78k, after the effective date of this amendatory act."

Enacting section 5 of Act 611 of 2006 provides:

"Enacting section 5. This amendatory act is not intended to and shall not be construed to modify or alter the ruling of the Michigan supreme court in Smith v Cliffs on the Bay Condominium Association, docket no. 111587."

**Popular name:** Act 206

**THE GENERAL PROPERTY TAX ACT (EXCERPT)**  
**Act 206 of 1893**

**211.78j Schedule of show cause hearing by foreclosing governmental unit.**

Sec. 78j. (1) If a petition for foreclosure is filed under section 78h, the foreclosing governmental unit shall schedule a hearing not later than 7 days immediately preceding the date of the foreclosure hearing under section 78k to show cause why absolute title to the property forfeited to the county treasurer under section 78g should not vest in the foreclosing governmental unit. The foreclosing governmental unit may hold combined or separate hearings for different owners or persons with a property interest in the property forfeited to the county treasurer.

(2) The owner and any person with a property interest in the property forfeited to the county treasurer may appear at the hearing held pursuant to this section and redeem that property or show cause why absolute title to that property should not vest in the foreclosing governmental unit for any of the reasons set forth in section 78k(2).

(3) If the owner or any person with a property interest in the property forfeited to the county treasurer prevails in a hearing under subsection (1), the foreclosing governmental unit shall notify the county treasurer and the county treasurer shall correct the tax roll to reflect that determination.

**History:** Add. 1999, Act 123, Eff. Oct. 1, 1999.

**Popular name:** Act 206

**THE GENERAL PROPERTY TAX ACT (EXCERPT)**  
Act 206 of 1893

**211.78k Proof of service of notice; filing with circuit court; contesting validity or correctness by person claiming property interest; filing objections; order extending redemption period; entry of judgment; specifications; failure to pay delinquent taxes, interest, penalties, and fees after entry of judgment; appeal to court of appeals; recording judgment or notice of judgment; cancellation; submission of certificate of error.**

Sec. 78k. (1) If a petition for foreclosure is filed under section 78h, not later than the date of the hearing, the foreclosing governmental unit shall file with the clerk of the circuit court proof of service of the notice of the show cause hearing under section 78j, proof of service of the notice of the foreclosure hearing under this section, and proof of the personal visit to the property and publication under section 78i.

(2) A person claiming an interest in a parcel of property set forth in the petition for foreclosure may contest the validity or correctness of the forfeited unpaid delinquent taxes, interest, penalties, and fees for 1 or more of the following reasons:

- (a) No law authorizes the tax.
- (b) The person appointed to decide whether a tax shall be levied under a law of this state acted without jurisdiction, or did not impose the tax in question.
- (c) The property was exempt from the tax in question, or the tax was not legally levied.
- (d) The tax has been paid within the time limited by law for payment or redemption.
- (e) The tax was assessed fraudulently.
- (f) The description of the property used in the assessment was so indefinite or erroneous that the forfeiture was void.

(3) A person claiming an interest in a parcel of property set forth in the petition for foreclosure who desires to contest that petition shall file written objections with the clerk of the circuit court and serve those objections on the foreclosing governmental unit prior to the date of the hearing required under this section.

(4) If the court determines that the owner of property subject to foreclosure is a minor heir, is incompetent, is without means of support, or is undergoing a substantial financial hardship, the court may withhold that property from foreclosure for 1 year or may enter an order extending the redemption period as the court determines to be equitable. If the court withholds property from foreclosure under this subsection, a taxing unit's lien for taxes due is not prejudiced and that property shall be included in the immediately succeeding year's tax foreclosure proceeding.

(5) The circuit court shall enter final judgment on a petition for foreclosure filed under section 78h at any time after the hearing under this section but not later than the March 30 immediately succeeding the hearing with the judgment effective on the March 31 immediately succeeding the hearing for uncontested cases or 10 days after the conclusion of the hearing for contested cases. All redemption rights to the property expire on the March 31 immediately succeeding the entry of a judgment foreclosing the property under this section, or in a contested case 21 days after the entry of a judgment foreclosing the property under this section. The circuit court's judgment shall specify all of the following:

(a) The legal description and, if known, the street address of the property foreclosed and the forfeited unpaid delinquent taxes, interest, penalties, and fees due on each parcel of property.

(b) That fee simple title to property foreclosed by the judgment will vest absolutely in the foreclosing governmental unit, except as otherwise provided in subdivisions (c) and (e), without any further rights of redemption, if all forfeited delinquent taxes, interest, penalties, and fees are not paid on or before the March 31 immediately succeeding the entry of a judgment foreclosing the property under this section, or in a contested case within 21 days of the entry of a judgment foreclosing the property under this section.

(c) That all liens against the property, including any lien for unpaid taxes or special assessments, except future installments of special assessments and liens recorded by this state or the foreclosing governmental unit pursuant to the natural resources and environmental protection act, 1994 PA 451, MCL 324.101 to 324.90106, are extinguished, if all forfeited delinquent taxes, interest, penalties, and fees are not paid on or before the March 31 immediately succeeding the entry of a judgment foreclosing the property under this section, or in a contested case within 21 days of the entry of a judgment foreclosing the property under this section.

(d) That, except as otherwise provided in subdivisions (c) and (e), the foreclosing governmental unit has good and marketable fee simple title to the property, if all forfeited delinquent taxes, interest, penalties, and fees are not paid on or before the March 31 immediately succeeding the entry of a judgment foreclosing the property under this section, or in a contested case within 21 days of the entry of a judgment foreclosing the property under this section.

(e) That all existing recorded and unrecorded interests in that property are extinguished, except a visible or

recorded easement or right-of-way, private deed restrictions, interests of a lessee or an assignee of an interest of a lessee under a recorded oil or gas lease, interests in oil or gas in that property that are owned by a person other than the owner of the surface that have been preserved as provided in section 1(3) of 1963 PA 42, MCL 554.291, or restrictions or other governmental interests imposed pursuant to the natural resources and environmental protection act, 1994 PA 451, MCL 324.101 to 324.90106, if all forfeited delinquent taxes, interest, penalties, and fees are not paid on or before the March 31 immediately succeeding the entry of a judgment foreclosing the property under this section, or in a contested case within 21 days of the entry of a judgment foreclosing the property under this section.

(f) A finding that all persons entitled to notice and an opportunity to be heard have been provided that notice and opportunity. A person shall be deemed to have been provided notice and an opportunity to be heard if the foreclosing governmental unit followed the procedures for provision of notice by mail, for visits to the forfeited property, and for publication under section 78i, or if 1 or more of the following apply:

(i) The person had constructive notice of the hearing under this section by acquiring an interest in the property after the date the notice of forfeiture is recorded under section 78g.

(ii) The person appeared at the hearing under this section or filed written objections with the clerk of the circuit court under subsection (3) prior to the hearing.

(iii) Prior to the hearing under this section, the person had actual notice of the hearing.

(g) A judgment entered under this section is a final order with respect to the property affected by the judgment and except as provided in subsection (7) shall not be modified, stayed, or held invalid after the March 31 immediately succeeding the entry of a judgment foreclosing the property under this section, or for contested cases 21 days after the entry of a judgment foreclosing the property under this section.

(6) Except as otherwise provided in subsection (5)(c) and (e), fee simple title to property set forth in a petition for foreclosure filed under section 78h on which forfeited delinquent taxes, interest, penalties, and fees are not paid on or before the March 31 immediately succeeding the entry of a judgment foreclosing the property under this section, or in a contested case within 21 days of the entry of a judgment foreclosing the property under this section, shall vest absolutely in the foreclosing governmental unit, and the foreclosing governmental unit shall have absolute title to the property, including all interests in oil or gas in that property except the interests of a lessee or an assignee of an interest of a lessee under an oil or gas lease in effect as to that property or any part of that property if the lease was recorded in the office of the register of deeds in the county in which the property is located before the date of filing the petition for foreclosure under section 78h, and interests preserved as provided in section 1(3) of 1963 PA 42, MCL 554.291. The foreclosing governmental unit's title is not subject to any recorded or unrecorded lien and shall not be stayed or held invalid except as provided in subsection (7) or (9).

(7) The foreclosing governmental unit or a person claiming to have a property interest under section 78i in property foreclosed under this section may appeal the circuit court's order or the circuit court's judgment foreclosing property to the court of appeals. An appeal under this subsection is limited to the record of the proceedings in the circuit court under this section and shall not be de novo. The circuit court's judgment foreclosing property shall be stayed until the court of appeals has reversed, modified, or affirmed that judgment. If an appeal under this subsection stays the circuit court's judgment foreclosing property, the circuit court's judgment is stayed only as to the property that is the subject of that appeal and the circuit court's judgment foreclosing other property that is not the subject of that appeal is not stayed. To appeal the circuit court's judgment foreclosing property, a person appealing the judgment shall pay to the county treasurer the amount determined to be due to the county treasurer under the judgment on or before the March 31 immediately succeeding the entry of a judgment foreclosing the property under this section, or in a contested case within 21 days of the entry of a judgment foreclosing the property under this section, together with a notice of appeal. If the circuit court's judgment foreclosing the property is affirmed on appeal, the amount determined to be due shall be refunded to the person who appealed the judgment. If the circuit court's judgment foreclosing the property is reversed or modified on appeal, the county treasurer shall refund the amount determined to be due to the person who appealed the judgment, if any, and retain the balance in accordance with the order of the court of appeals.

(8) The foreclosing governmental unit shall record a notice of judgment for each parcel of foreclosed property in the office of the register of deeds for the county in which the foreclosed property is located in a form prescribed by the department of treasury.

(9) After the entry of a judgment foreclosing the property under this section, if the property has not been transferred under section 78m to a person other than the foreclosing governmental unit, a foreclosing governmental unit may cancel the foreclosure by recording with the register of deeds for the county in which the property is located a certificate of error in a form prescribed by the department of treasury, if the foreclosing governmental unit discovers any of the following:

(a) The foreclosed property was not subject to taxation on the date of the assessment of the unpaid taxes for which the property was foreclosed.

(b) The description of the property used in the assessment of the unpaid taxes for which the property was foreclosed was so indefinite or erroneous that the forfeiture of the property was void.

(c) The taxes for which the property was foreclosed had been paid to the proper officer within the time provided under this act for the payment of the taxes or the redemption of the property.

(d) A certificate, including a certificate issued under section 135, or other written verification authorized by law was issued by the proper officer within the time provided under this act for the payment of the taxes for which the property was foreclosed or for the redemption of the property.

(e) An owner of an interest in the property entitled to notice under section 78i was not provided notice sufficient to satisfy the minimum requirements of due process required under the state constitution of 1963 and the constitution of the United States.

(f) A judgment of foreclosure was entered under this section in violation of an order issued by a United States bankruptcy court.

(10) A certificate of error submitted to the county register of deeds for recording under subsection (9) need not be notarized and may be authenticated by a digital signature of the foreclosing governmental unit or by other electronic means.

**History:** Add. 1999, Act 123, Eff. Oct. 1, 1999;—Am. 2001, Act 94, Imd. Eff. July 30, 2001;—Am. 2003, Act 263, Imd. Eff. Jan. 5, 2004;—Am. 2006, Act 611, Imd. Eff. Jan. 3, 2007.

**Compiler's note:** Enacting sections 1 and 3 of Act 263 of 2003 provide:

"Enacting section 1. Section 78i(12) of the general property tax act, 1893 PA 206, MCL 211.78i, as added by this amendatory act and section 78k(5) of the general property tax act, 1893 PA 206, MCL 211.78k, as amended by this amendatory act are curative and are intended to express the original intent of the legislature concerning the application of 1999 PA 123, section 78i of the general property tax act, 1893 PA 206, MCL 211.78i, as amended by 2001 PA 101 and section 78k of the general property tax act, 1893 PA 206, MCL 211.78k, as amended by 2001 PA 94.

"Enacting section 3. This amendatory act is not intended to and shall not be construed to modify or alter the ruling of the Michigan supreme court in Smith v Cliffs on the Bay Condominium Association, docket no. 111587."

Enacting section 1 of Act 611 of 2006 provides:

"Enacting section 1. Sections 78i and 78k of the general property tax act, 1893 PA 206, MCL 211.78i and 211.78k, as amended by this amendatory act apply only to property foreclosed by a judgment of foreclosure entered pursuant to section 78k(5) of the general property tax act, 1893 PA 206, MCL 211.78k, after the effective date of this amendatory act."

Enacting section 5 of Act 611 of 2006 provides:

"Enacting section 5. This amendatory act is not intended to and shall not be construed to modify or alter the ruling of the Michigan supreme court in Smith v Cliffs on the Bay Condominium Association, docket no. 111587."

**Popular name:** Act 206

**THE GENERAL PROPERTY TAX ACT (EXCERPT)**  
**Act 206 of 1893**

**211.78/ Owner of extinguished recorded or unrecorded property interest; claim of failure to receive notice; action to recover monetary damages; right to sue not transferable.**

Sec. 78l. (1) If a judgment for foreclosure is entered under section 78k and all existing recorded and unrecorded interests in a parcel of property are extinguished as provided in section 78k, the owner of any extinguished recorded or unrecorded interest in that property who claims that he or she did not receive any notice required under this act shall not bring an action for possession of the property against any subsequent owner, but may only bring an action to recover monetary damages as provided in this section.

(2) The court of claims has original and exclusive jurisdiction in any action to recover monetary damages under this section.

(3) An action to recover monetary damages under this section shall not be brought more than 2 years after a judgment for foreclosure is entered under section 78k.

(4) Any monetary damages recoverable under this section shall be determined as of the date a judgment for foreclosure is entered under section 78k and shall not exceed the fair market value of the interest in the property held by the person bringing the action under this section on that date, less any taxes, interest, penalties, and fees owed on the property as of that date.

(5) The right to sue for monetary damages under this section is not transferable except by testate or intestate succession.

**History:** Add. 1999, Act 123, Eff. Oct. 1, 1999;—Am. 2003, Act 263, Imd. Eff. Jan. 5, 2004.

**Compiler's note:** Enacting section 3 of Act 263 of 2003 provides:  
"Enacting section 3. This amendatory act is not intended to and shall not be construed to modify or alter the ruling of the Michigan supreme court in Smith v Cliffs on the Bay Condominium Association, docket no. 111587."

**Popular name:** Act 206



**THE GENERAL PROPERTY TAX ACT (EXCERPT)**  
**Act 206 of 1893**

**211.78m Granting state right of first refusal; election by state not to purchase property; purchase of property by city, village, township, or county; property sale at auction; notice of time and location; procedure; property not previously sold; disposition of sale proceeds; joint sale by 2 or more county treasurers; deed recording; "minimum bid" defined; cancellation of taxes upon transfer or retention of property; foreclosed property defined as facility.**

Sec. 78m. (1) Not later than the first Tuesday in July, immediately succeeding the entry of judgment under section 78k vesting absolute title to tax delinquent property in the foreclosing governmental unit, this state is granted the right of first refusal to purchase property at the greater of the minimum bid or its fair market value by paying that amount to the foreclosing governmental unit if the foreclosing governmental unit is not this state. If this state elects not to purchase the property under its right of first refusal, a city, village, or township may purchase for a public purpose any property located within that city, village, or township set forth in the judgment and subject to sale under this section by payment to the foreclosing governmental unit of the minimum bid. If a city, village, or township does not purchase that property, the county in which that property is located may purchase that property under this section by payment to the foreclosing governmental unit of the minimum bid. If property is purchased by a city, village, township, or county under this subsection, the foreclosing governmental unit shall convey the property to the purchasing city, village, township, or county within 30 days. If property purchased by a city, village, township, or county under this subsection is subsequently sold for an amount in excess of the minimum bid and all costs incurred relating to demolition, renovation, improvements, or infrastructure development, the excess amount shall be returned to the delinquent tax property sales proceeds account for the year in which the property was purchased by the city, village, township, or county or, if this state is the foreclosing governmental unit within a county, to the land reutilization fund created under section 78n. Upon the request of the foreclosing governmental unit, a city, village, township, or county that purchased property under this subsection shall provide to the foreclosing governmental unit without cost information regarding any subsequent sale or transfer of the property. This subsection applies to the purchase of property by this state, a city, village, or township, or a county prior to a sale held under subsection (2).

(2) Subject to subsection (1), beginning on the third Tuesday in July immediately succeeding the entry of the judgment under section 78k vesting absolute title to tax delinquent property in the foreclosing governmental unit and ending on the immediately succeeding first Tuesday in November, the foreclosing governmental unit, or its authorized agent, at the option of the foreclosing governmental unit, shall hold at least 2 property sales at 1 or more convenient locations at which property foreclosed by the judgment entered under section 78k shall be sold by auction sale, which may include an auction sale conducted via an internet website. Notice of the time and location of the sales shall be published not less than 30 days before each sale in a newspaper published and circulated in the county in which the property is located, if there is one. If no newspaper is published in that county, publication shall be made in a newspaper published and circulated in an adjoining county. Each sale shall be completed before the first Tuesday in November immediately succeeding the entry of judgment under section 78k vesting absolute title to the tax delinquent property in the foreclosing governmental unit. Except as provided in subsection (5), property shall be sold to the person bidding the highest amount above the minimum bid. The foreclosing governmental unit may sell parcels individually or may offer 2 or more parcels for sale as a group. The minimum bid for a group of parcels shall equal the sum of the minimum bid for each parcel included in the group. The foreclosing governmental unit may adopt procedures governing the conduct of the sale and may cancel the sale prior to the issuance of a deed under this subsection if authorized under the procedures. The foreclosing governmental unit may require full payment by cash, certified check, or money order at the close of each day's bidding. Not more than 30 days after the date of a sale under this subsection, the foreclosing governmental unit shall convey the property by deed to the person bidding the highest amount above the minimum bid. The deed shall vest fee simple title to the property in the person bidding the highest amount above the minimum bid, unless the foreclosing governmental unit discovers a defect in the foreclosure of the property under sections 78 to 78l. If this state is the foreclosing governmental unit within a county, the department of natural resources shall conduct the sale of property under this subsection and subsections (4) and (5) on behalf of this state.

(3) For sales held under subsection (2), after the conclusion of that sale, and prior to any additional sale held under subsection (2), a city, village, or township may purchase any property not previously sold under subsection (1) or (2) by paying the minimum bid to the foreclosing governmental unit. If a city, village, or

township does not purchase that property, the county in which that property is located may purchase that property under this section by payment to the foreclosing governmental unit of the minimum bid.

(4) If property is purchased by a city, village, township, or county under subsection (3), the foreclosing governmental unit shall convey the property to the purchasing city, village, or township within 30 days.

(5) All property subject to sale under subsection (2) shall be offered for sale at not less than 2 sales conducted as required by subsection (2). The final sale held under subsection (2) shall be held not less than 28 days after the previous sale under subsection (2). At the final sale held under subsection (2), the sale is subject to the requirements of subsection (2), except that the minimum bid shall not be required. However, the foreclosing governmental unit may establish a reasonable opening bid at the sale to recover the cost of the sale of the parcel or parcels.

(6) On or before December 1 immediately succeeding the date of the sale under subsection (5), a list of all property not previously sold by the foreclosing governmental unit under this section shall be transferred to the clerk of the city, village, or township in which the property is located. The city, village, or township may object in writing to the transfer of 1 or more parcels of property set forth on that list. On or before December 30 immediately succeeding the date of the sale under subsection (5), all property not previously sold by the foreclosing governmental unit under this section shall be transferred to the city, village, or township in which the property is located, except those parcels of property to which the city, village, or township has objected. Property located in both a village and a township may be transferred under this subsection only to a village. The city, village, or township may make the property available under the urban homestead act, 1999 PA 127, MCL 125.2701 to 125.2709, or for any other lawful purpose.

(7) If property not previously sold is not transferred to the city, village, or township in which the property is located under subsection (6), the foreclosing governmental unit shall retain possession of that property. If the foreclosing governmental unit retains possession of the property and the foreclosing governmental unit is this state, title to the property shall vest in the land bank fast track authority created under section 15 of the land bank fast track act, 2003 PA 258, MCL 124.765.

(8) A foreclosing governmental unit shall deposit the proceeds from the sale of property under this section into a restricted account designated as the "delinquent tax property sales proceeds for the year \_\_\_\_". The foreclosing governmental unit shall direct the investment of the account. The foreclosing governmental unit shall credit to the account interest and earnings from account investments. Proceeds in that account shall only be used by the foreclosing governmental unit for the following purposes in the following order of priority:

(a) The delinquent tax revolving fund shall be reimbursed for all taxes, interest, and fees on all of the property, whether or not all of the property was sold.

(b) All costs of the sale of property for the year shall be paid.

(c) Any costs of the foreclosure proceedings for the year, including, but not limited to, costs of mailing, publication, personal service, and outside contractors shall be paid.

(d) Any costs for the sale of property or foreclosure proceedings for any prior year that have not been paid or reimbursed from that prior year's delinquent tax property sales proceeds shall be paid.

(e) Any costs incurred by the foreclosing governmental unit in maintaining property foreclosed under section 78k before the sale under this section shall be paid, including costs of any environmental remediation.

(f) If the foreclosing governmental unit is not this state, any of the following:

(i) Any costs for the sale of property or foreclosure proceedings for any subsequent year that are not paid or reimbursed from that subsequent year's delinquent tax property sales proceeds shall be paid from any remaining balance in any prior year's delinquent tax property sales proceeds account.

(ii) Any costs for the defense of title actions.

(iii) Any costs incurred in administering the foreclosure and disposition of property forfeited for delinquent taxes under this act.

(g) If the foreclosing governmental unit is this state, any remaining balance shall be transferred to the land reutilization fund created under section 78n.

(h) In 2008 and each year after 2008, if the foreclosing governmental unit is not this state, not later than June 30 of the second calendar year after foreclosure, the foreclosing governmental unit shall submit a written report to its board of commissioners identifying any remaining balance and any contingent costs of title or other legal claims described in subdivisions (a) through (f). All or a portion of any remaining balance, less any contingent costs of title or other legal claims described in subdivisions (a) through (f), may subsequently be transferred into the general fund of the county by the board of commissioners.

(9) Two or more county treasurers of adjacent counties may elect to hold a joint sale of property as provided in this section. If 2 or more county treasurers elect to hold a joint sale, property may be sold under this section at a location outside of the county in which the property is located. The sale may be conducted by any county treasurer participating in the joint sale. A joint sale held under this subsection may include or be

an auction sale conducted via an internet website.

(10) The foreclosing governmental unit shall record a deed for any property transferred under this section with the county register of deeds. The foreclosing governmental unit may charge a fee in excess of the minimum bid and any sale proceeds for the cost of recording a deed under this subsection.

(11) As used in this section, "minimum bid" is the minimum amount established by the foreclosing governmental unit for which property may be sold under this section. The minimum bid shall include all of the following:

(a) All delinquent taxes, interest, penalties, and fees due on the property. If a city, village, or township purchases the property, the minimum bid shall not include any taxes levied by that city, village, or township and any interest, penalties, or fees due on those taxes.

(b) The expenses of administering the sale, including all preparations for the sale. The foreclosing governmental unit shall estimate the cost of preparing for and administering the annual sale for purposes of prorating the cost for each property included in the sale.

(12) For property transferred to this state under subsection (1), a city, village, or township under subsection (6) or retained by a foreclosing governmental unit under subsection (7), all taxes due on the property as of the December 31 following the transfer or retention of the property are canceled effective on that December 31.

(13) For property sold under this section, transferred to this state under subsection (1), a city, village, or township under subsection (6), or retained by a foreclosing governmental unit under subsection (7), all liens for costs of demolition, safety repairs, debris removal, or sewer or water charges due on the property as of the December 31 immediately succeeding the sale, transfer, or retention of the property are canceled effective on that December 31. This subsection does not apply to liens recorded by the department of environmental quality under this act or the land bank fast track act, 2003 PA 258, MCL 124.751 to 124.774.

(14) If property foreclosed under section 78k and held by or under the control of a foreclosing governmental unit is a facility as defined under section 20101(1)(o) of the natural resources and environmental protection act, 1994 PA 451, MCL 324.20101, prior to the sale or transfer of the property under this section, the property is subject to all of the following:

(a) Upon reasonable written notice from the department of environmental quality, the foreclosing governmental unit shall provide access to the department of environmental quality, its employees, contractors, and any other person expressly authorized by the department of environmental quality to conduct response activities at the foreclosed property. Reasonable written notice under this subdivision may include, but is not limited to, notice by electronic mail or facsimile, if the foreclosing governmental unit consents to notice by electronic mail or facsimile prior to the provision of notice by the department of environmental quality.

(b) If requested by the department of environmental quality to protect public health, safety, and welfare or the environment, the foreclosing governmental unit shall grant an easement for access to conduct response activities on the foreclosed property as authorized under chapter 7 of the natural resources and environmental protection act, 1994 PA 451, MCL 324.20101 to 324.20519.

(c) If requested by the department of environmental quality to protect public health, safety, and welfare or the environment, the foreclosing governmental unit shall place and record deed restrictions on the foreclosed property as authorized under chapter 7 of the natural resources and environmental protection act, 1994 PA 451, MCL 324.20101 to 324.20519.

(d) The department of environmental quality may place an environmental lien on the foreclosed property as authorized under section 20138 of the natural resources and environmental protection act, 1994 PA 451, MCL 324.20138.

(15) If property foreclosed under section 78k and held by or under the control of a foreclosing governmental unit is a facility as defined under section 20101(1)(o) of the natural resources and environmental protection act, 1994 PA 451, MCL 324.20101, prior to the sale or transfer of the property under this section, the department of environmental quality shall request and the foreclosing governmental unit shall transfer the property to the state land bank fast track authority created under section 15 of the land bank fast track act, 2003 PA 258, MCL 124.765, if all of the following apply:

(a) The department of environmental quality determines that conditions at a foreclosed property are an acute threat to the public health, safety, and welfare, to the environment, or to other property.

(b) The department of environmental quality proposes to undertake or is undertaking state-funded response activities at the property.

(c) The department of environmental quality determines that the sale, retention, or transfer of the property other than under this subsection would interfere with response activities by the department of environmental quality.

History: Add. 1999, Act 123, Eff. Oct. 1, 1999;—Am. 2001, Act 99, Imd. Eff. July 30, 2001;—Am. 2003, Act 263, Imd. Eff. Jan. 5,

2004;—Am. 2006, Act 498, Imd. Eff. Dec. 29, 2006.

**Compiler's note:** Enacting section 3 of Act 263 of 2003 provides:

"Enacting section 3. This amendatory act is not intended to and shall not be construed to modify or alter the ruling of the Michigan supreme court in Smith v Cliffs on the Bay Condominium Association, docket no. 111587."

For transfer of certain powers and duties relating to collection of delinquent taxes and forfeiture, foreclosure, and disposition of tax-delinquent or tax-reverted property from department of natural resources to department of treasury by type II transfer, see E.R.O. No. 2004-1, compiled at MCL 211.281.

For transfer of powers and duties of department of environmental quality to department of natural resources and environment, see E.R.O. No. 2009-31, compiled at MCL 324.99919.

## REAL PROPERTY TAX FORECLOSURE TIMELINE

Date	Statute	Action
<b>Tax Year + 3</b>		
January	211.78h(2)	FGU files Amended Petition removing redeemed parcels.
January - February	211.78k(1)	Not later than the hearing date the FGU files with court proof of certified mail service of show cause and foreclosure hearings, proof of personal visit to property, and proof of publication.
At least 7 days prior to judicial hearing	211.78j(1)	FGU holds administrative show cause hearing.
<b>January 30 - February 28</b>	<b>211.78h(5), .78k</b>	<b>Judicial foreclosure hearing held.</b>
<b>March 30</b>	<b>211.78k(5)</b>	<b>Deadline for circuit court to enter judgment of foreclosure.</b>
March 31	211.78k	Effective date of Judgment. Last day to redeem foreclosed property. Title vests in the FGU. Liens and interests other than future special assessments installments, liens filed by governmental agencies for environmental issues, severed or leased oil and gas interests, visible or recorded easements, and private deed restrictions are extinguished.
July (first Tuesday)	211.78m(1)	Deadline to exercise governmental agency first right of refusal.
July (third Tuesday)	211.78m(2), (5)	First opportunity to offer property at auction. At least two auctions must be conducted with the last one at least 28 days after the previous one, with newspaper publication at least 30 days prior.
July – November	211.78m(3)	Second governmental right of refusal purchase opportunity between the 2 public auctions.
November (first Tuesday)	211.78m(2)	Deadline for completion of all auctions.
December 1	211.78m(6)	Deadline for FGU to transfer list of unsold parcels to the city, township or village clerk.
December 30	211.78m(6)	Deadline for city, township or village to reject property transfer. Date title transfers to the local unit or, in the case of objection, to the FGU or the Land Bank Fast Track Authority if the State is the FGU.
December 31	211.78m(12)	All taxes for the year of foreclosure are canceled for parcels purchased by the State, transferred to the local unit or fast track land bank authority after not selling at auction, or retained by the FGU.
December 31	211.78m(12)	All liens for costs of demolition, safety repairs, debris removal, or sewer or water charges due on the property as of the December 31 immediately succeeding the sale, transfer, or retention of the property are canceled.

State Treasury-prescribed forms and additional information can be found on their County Treasurer Resources web page at [http://www.michigan.gov/taxes/0,1607,7-238-43535\\_55601\\_55603---,00.html](http://www.michigan.gov/taxes/0,1607,7-238-43535_55601_55603---,00.html).

**REAL PROPERTY TAX FORECLOSURE TIMELINE**

<b>Date</b>	<b>Statute</b>	<b>Action</b>
<b>Tax Year + 1</b>		
March 1	211.78a(2)	Unpaid taxes levied in the immediately preceding year are returned to county treasurer as delinquent for collection.
March 1	211.78a(3)	4% administration fee and interest computed at a non-compounded rate of 1% per month or fraction of a month added to delinquent parcel.
June 1	211.78b	County treasurer sends notice by first-class mail to taxpayer or owner.
September 1	211.78c	County treasurer sends second notice by first-class mail to taxpayer or owner.
October 1	211.78d	County treasurer adds a \$15.00 fee.
November 1	211.78e(1)	County treasurer prepares a list of all property subject to forfeiture for delinquent taxes.
December 1	211.78e(2)	County treasurer updates taxpayer address based on current local unit records.
<b>Tax Year + 2</b>		
February 1	211.78f(1), (2)	The county treasurer sends a notice by certified mail to taxpayer and, if different, the owner AND by first-class mail to occupant.
February 1	211.78f(3), (4)	County treasurer may publish notices in a newspaper. (none do)
<b>March 1</b>	<b>211.78g(1)</b>	<b>Delinquent property forfeits to the county treasurer.</b>
March 1	211.78g(1)	County treasurer adds \$175 title fee to the parcel.
March 1	211.78g(3)(b)	Redemption requires additional interest computed at a non-compounded rate of 1/2% per month from March 1 preceding forfeiture.
March 1	211.78g(3)(c)	Redemption requires payment of all recording fees and all fees for service of process or notice.
<b>April 15</b>	<b>211.78g(2)</b>	<b>Deadline for county treasurer to record a certificate of forfeiture.</b>
May 1	211.78i(1), (3)	FGU initiates title search and personal visit to forfeited property.
<b>June 15</b>	<b>211.78h(1)</b>	<b>Deadline for FGU to file petition for foreclosure with listing of forfeited property with the circuit court clerk AND the clerk shall immediately set the date, time and place for hearing the petition for foreclosure.</b>
December - January	211.78i(2)	FGU sends certified mail notice of show cause hearing (scheduled not less than 7 days prior to judicial hearing), no less than 30 days before the show cause hearing, to owners of interest.
December - January	211.78i(5)	FGU publishes notice when unable to ascertain the address of owners of interest (as practical matter, all interests in all unredeemed parcels are published).

Michigan Department of Treasury  
4264 (Rev. 9-11)

**NOTICE OF SHOW CAUSE HEARING AND JUDICIAL FORECLOSURE HEARING**  
Issued under the authority of Public Act 206 of 1893; MCL 211.78j.

To: **INTEREST HOLDER**

Property ID Number: **LPN**  
Legal Description: **Legal Description**  
Street Address (from the tax roll, if available): **Property Address**

You are notified of the pending **FORECLOSURE** of your interest in real estate due to **UNPAID Tax Year and/or prior years' property taxes** due to associated recorded document: **RECORDED DOCUMENT TYPE & DATE**. Other parties with a recorded interest in this property include: **ADDITIONAL INTEREST HOLDERS**. Before the foreclosure is final, there will be two hearings at which you may appear.

**A SHOW CAUSE HEARING WILL BE HELD DATE AND TIME AT LOCATION WITH ADDRESS. You may appear in person, through an agent, in writing or call FGU Phone Number. Appearance at the Show Cause Hearing is not required to protect your rights at the Judicial Foreclosure Hearing.**

The purpose of this hearing is to allow persons with a property interest to show cause why absolute title to the property forfeited by the county treasurer under 211.78g should not vest in the foreclosing governmental unit. A person claiming an interest in a parcel of property may contest the validity or correctness of the forfeited unpaid delinquent taxes, interest, penalties and fees for 1 or more of the following reasons:

- a) No law authorized the tax.
- b) The person appointed to decide whether a tax shall be levied under a law of this state acted without jurisdiction, or did not impose the tax in question.
- c) The property was exempt from the tax in question, or was not legally assessed.
- d) The tax has been paid within the time limited by law for payment or redemption.
- e) The tax was assessed fraudulently.
- f) The description of the property used is indefinite or erroneous.

**THE CIRCUIT COURT FORECLOSURE HEARING IS SCHEDULED FOR DATE AND TIME AT LOCATION WITH ADDRESS MICHIGAN. The court docket number is CC #. If you wish to contest the petition, you must file written objections with the Circuit Court Clerk and serve those objections onto the FGU at the address below.**

On March 01, Forf Yr, this real property was forfeited to the County Name County Treasurer for nonpayment of property taxes. **UNLESS THE FORFEITED DELINQUENT TAXES, PENALTIES, INTEREST AND FEES ARE PAID ON OR BEFORE March 31 (unless weekend), Forecl Yr, YOU WILL LOSE YOUR INTEREST IN THE PROPERTY AND TITLE TO THE PROPERTY WILL VEST ABSOLUTELY IN THE FGU WITH ADDRESS** and all existing interests in the property shall be extinguished except for: (i) the interests of a lessee or an assignee of an interest of a lessee under an oil or gas lease in effect as to the property or any part of the property if the lease was recorded in the office of the register of deeds in the county in which the property is located before the date of filing the petition for foreclosure under MCL 211.78h or (ii) oil and gas interests preserved as provided in section 1(3) of the dormant minerals act, MCL 554.291(3).

The total amount to redeem this parcel as of March 01, Forf Yr was \$Forf Amnt. **CONTACT THE COUNTY NAME COUNTY TREASURER AT ADDRESS AND PHONE for the current payoff amount. Taxpayers may receive MULTIPLE certified notices if taxes are due for both Foreclosure Tax Year and Forfeiture Tax Year. Foreclosure Tax Year taxes must be paid in full by March 31 (unless weekend), Forecl Yr in order to prevent foreclosure.**

This notice was served by Agency. You may contact us with questions at Agency Address, Phone, Fax, Email. Please refer to reference number Reference # or property ID number LPN in any correspondence.

County Name

Reference #

# 26 U.S. Code § 7425 - Discharge of liens

## **(a) Judicial proceedings**

If the United States is not joined as a party, a judgment in any civil action or suit described in subsection (a) of section 2410 of title 28 of the United States Code, or a judicial sale pursuant to such a judgment, with respect to property on which the United States has or claims a lien under the provisions of this title—

(1) shall be made subject to and without disturbing the lien of the United States, if notice of such lien has been filed in the place provided by law for such filing at the time such action or suit is commenced, or

(2) shall have the same effect with respect to the discharge or divestment of such lien of the United States as may be provided with respect to such matters by the local law of the place where such property is situated, if no notice of such lien has been filed in the place provided by law for such filing at the time such action or suit is commenced or if the law makes no provision for such filing.

If a judicial sale of property pursuant to a judgment in any civil action or suit to which the United States is not a party discharges a lien of the United States arising under the provisions of this title, the United States may claim, with the same priority as its lien had against the property sold, the proceeds (exclusive of costs) of such sale at any time before the distribution of such proceeds is ordered.

## **(b) Other sales**

Notwithstanding subsection (a) sale of property on which the United States has or claims a lien, or a title derived from enforcement of a lien, under the provisions of this title, made pursuant to an instrument creating a lien on such property, pursuant to a confession of judgment on the obligation secured by such an instrument, or pursuant to a nonjudicial sale under a statutory lien on such property—

(1) shall, except as otherwise provided, be made subject to and without disturbing such lien or title, if notice of such lien was filed or such title recorded in the place provided by law for such filing or recording more than 30 days before such sale and the United States is not given notice of such sale in the manner prescribed in subsection (c)(1); or

(2) shall have the same effect with respect to the discharge or divestment of such lien or such title of the United States, as may be provided with respect to such matters by the local law of the place where such property is situated, if—

(A) notice of such lien or such title was not filed or recorded in the place provided by law for such filing more than 30 days before such sale,

(B) the law makes no provision for such filing, or

(C) notice of such sale is given in the manner prescribed in subsection (c)(1).

## **(c) Special rules**

### **(1) Notice of sale**

Notice of a sale to which subsection (b) applies shall be given (in accordance with regulations prescribed by the Secretary) in writing, by registered or certified mail or by personal service, not less than 25 days prior to such sale, to the Secretary.

### **(2) Consent to sale**

Notwithstanding the notice requirement of subsection (b)(2)(C), a sale described in subsection (b) of property shall discharge or divest such property of the lien or title of the United States if the United States consents to the sale of such property free of such lien or title.

### **(3) Sale of perishable goods**



Notwithstanding the notice requirement of subsection (b)(2)(C), a sale described in subsection (b) of property liable to perish or become greatly reduced in price or value by keeping, or which cannot be kept without great expense, shall discharge or divest such property of the lien or title of the United States if notice of such sale is given (in accordance with regulations prescribed by the Secretary) in writing, by registered or certified mail or by personal service, to the Secretary before such sale. The proceeds (exclusive of costs) of such sale shall be held as a fund subject to the liens and claims of the United States, in the same manner and with the same priority as such liens and claims had with respect to the property sold, for not less than 30 days after the date of such sale.

**(4) Forfeitures of land sales contracts**

For purposes of subsection (b), a sale of property includes any forfeiture of a land sales contract.

**(d) Redemption by United States**

**(1) Right to redeem**

In the case of a sale of real property to which subsection (b) applies to satisfy a lien prior to that of the United States, the Secretary may redeem such property within the period of 120 days from the date of such sale or the period allowable for redemption under local law, whichever is longer.

**(2) Amount to be paid**

In any case in which the United States redeems real property pursuant to paragraph (1), the amount to be paid for such property shall be the amount prescribed by subsection (d) of section 2410 of title 28 of the United States Code.

**(3) Certificate of redemption**

**(A) In general**

In any case in which real property is redeemed by the United States pursuant to this subsection, the Secretary shall apply to the officer designated by local law, if any, for the documents necessary to evidence the fact of redemption and to record title to such property in the name of the United States. If no such officer is designated by local law or if such officer fails to issue such documents, the Secretary shall execute a certificate of redemption therefor.

**(B) Filing**

The Secretary shall, without delay, cause such documents or certificate to be duly recorded in the proper registry of deeds. If the State in which the real property redeemed by the United States is situated has not by law designated an office in which such certificate may be recorded, the Secretary shall file such certificate in the office of the clerk of the United States district court for the judicial district in which such property is situated.

**(C) Effect**

A certificate of redemption executed by the Secretary shall constitute prima facie evidence of the regularity of such redemption and shall, when recorded, transfer to the United States all the rights, title, and interest in and to such property acquired by the person from whom the United States redeems such property by virtue of the sale of such property.

## 26 CFR 301.7425-1 - Discharge of liens; scope and application; judicial proceedings.

§ 301.7425-1 Discharge of liens; scope and application; judicial proceedings.

**(a) In general.** A tax lien of the United States, or a title derived from the enforcement of a tax lien of the United States, may be discharged or divested under local law only in the manner prescribed in section 2410 of title 28 of the United States Code or in the manner prescribed in section 7425 of the Internal Revenue Code. Section 7425 (a) contains provisions relating to the discharge of a lien when the United States is not joined as a party in the judicial proceedings described in subsection (a) of section 2410 of title 28 of the United States Code. These judicial proceedings are plenary in nature and proceed on formal pleadings. Section 7425(b) contains provisions relating to the discharge of a lien or a title derived from the enforcement of a lien in the event of a nonjudicial sale with respect to the property involved. Section 7425 (c) contains special rules relating to the notice of sale requirements contained in section 7425(b). Section 301.7425-2 contains rules with respect to the nonjudicial sales described in section 7425(b). Paragraph (a) of § 301.7425-3 contains rules with respect to the notice of sale provisions of section 7425(c)(1). Paragraph (b) of § 301.7425-3 contains rules relating to the consent to sale provisions of section 7425(c)(2). Paragraph (c) of § 301.7425-3 contains rules relating to the sale of perishable goods provisions of section 7425(c)(3). Paragraph (d) of § 301.7425-3 contains the requirements with respect to the contents of a notice of sale. Section 301.7425-4 prescribes rules with respect to the redemption of real property by the United States.

**(b) Effective date.** The provisions of section 7425, as added by the Federal Tax Lien Act of 1966, are effective with respect to sales described in section 7425 occurring after November 2, 1966. The notice of sale provisions of section 7425 (c) (1) or (3) do not apply to sales occurring after November 2, 1966, if the seller of the property performed an act before November 3, 1966, which act at the time of performance was required and effective under local law with respect to the sale. An example of such an act is publication of a notice of the sale in a local newspaper before November 3, 1966, if local law requires such publication before a sale and the publication is effective under local law. Accordingly, in such a case, it is not necessary to notify the Internal Revenue Service pursuant to the provisions of section 7425 (c) (1) or (3). With respect to a notice of sale required under section 7425 (c) (1) or (3)—

- (1) Any notice of sale given to an office of the Internal Revenue Service or the Treasury Department during the period November 3, 1966, through December 21, 1966, shall be considered as adequate;
- (2) Any notice of sale given during the period December 22, 1966, through January 31, 1968, which complies with the provisions of either—
  - (i) Revenue Procedure 67-25, 1967-1 C.B. 626 (based on Technical Information Release 873, dated December 22, 1966), or
  - (ii) Section 301.7425-3, shall be considered as adequate; and
- (3) Any notice of sale given after January 31, 1968, which complies with the provisions of § 301.7425-3 shall be considered as adequate.

**(c) Judicial proceedings—**

- (1) **In general.** Section 7425 (a) provides rules, where the United States is not joined as a party, to determine the effect of a judgment in any civil action or suit described in subsection (a) of section 2410 of title 28 of the United States Code (relating to joinder of the United States in certain proceedings), or a judicial sale pursuant to such a judgment, with respect to property on which the United States has or claims a lien under the provisions of this title. If the United States is improperly named as a party to a judicial proceeding, the effect is the same as if the United States were not joined.

**(2) Notice of lien filed when the proceeding is commenced.** Where the United States is not properly joined as a party in the court proceeding and a notice of lien has been filed in accordance with section 6323 (f) or (g) in the place provided by law for such filing at the time the action or suit is commenced, a judgment or judicial sale pursuant to such a judgment shall be made subject to and without disturbing the lien of the United States.

**(3) Notice of lien not filed when the proceeding is commenced—**

**(i) General rule.** Where the United States is not joined as a party in the court proceeding and either a notice of lien has not been filed in accordance with section 6323 (f) or (g) in the place provided by law for such filing at the time the action or suit is commenced, or the law makes no provision for that filing, a judgment or judicial sale pursuant to such a judgment shall have the same effect with respect to the discharge or divestment of the lien of the United States as may be provided with respect to these matters by the local law of the place where the property is situated.

**(ii) Examples.** The provisions of subparagraph (3) may be illustrated by the following examples:

**Example 1.**

A, the first mortgagee of an apartment building located in State Y, commenced a foreclosure action on the mortgage prior to the time that a notice of a Federal tax lien, on that building, had been filed. Under the law of Y, junior liens on real property are discharged by a judicial sale pursuant to a judgment in a foreclosure action. Therefore, the Federal tax lien on the building will be discharged by the judicial sale. This result is the same whether the tax lien arose before or after the date of commencement of the foreclosure action and whether notice of the tax lien was filed at any time after commencement of the foreclosure action.

**Example 2.**

On January 10, 1969, B dies testate and devises Blackacre to C. At B's death, Blackacre is subject to a first mortgage held by D. Realty is subject to administration as part of a decedent's estate under the laws of State X. However, C takes possession of Blackacre with the assent of E, the executor of B's estate. On January 5, 1970, D commences a foreclosure action on the mortgage. Under the law of X, junior liens on real property are discharged by a judicial sale pursuant to a judgment in a foreclosure action. After commencement of the proceedings, an assessment for estate taxes is made and, thereafter, a notice of lien is filed in accordance with section 6323. The special lien on Blackacre, arising at the date of B's death, for estate taxes under section 6324(a) will be discharged by the judicial sale because there are no provisions for filing a notice thereof under law and junior liens are discharged by the sale under local law. The lien is discharged even though the executor failed to obtain a discharge of his personal liability under section 2204. Furthermore, the general lien on Blackacre under section 6321 will be discharged by the judicial sale because the foreclosure action was commenced prior to the time that a notice of lien was filed.

**(4) Proceeds of a judicial sale.** If a judicial sale of property pursuant to a judgment in any civil action or suit to which the United States is not a party discharges a lien of the United States arising under the provisions of the Internal Revenue Code of 1954, the United States may claim the proceeds of the sale (exclusive of costs) prior to the time that distribution of the proceeds is ordered. The claim of the United States in such a case is treated as having the same priority with respect to the proceeds as the lien had with respect to the property which was discharged from the lien by the judicial sale.

## 26 CFR 301.7425-2 - Discharge of liens; nonjudicial sales.

§ 301.7425-2 Discharge of liens; nonjudicial sales.

**(a) In general.** Section 7425(b) contains provisions with respect to the effect on the interest of the United States in property in which the United States has or claims a lien, or a title derived from the enforcement of a lien, of a sale made pursuant to—

- (1) An instrument creating a lien on the property sold,
- (2) A confession of judgment on the obligation secured by an instrument creating a lien on the property sold, or
- (3) A statutory lien on the property sold.

For purposes of this section, such a sale is referred to as a “nonjudicial sale.” The term “nonjudicial sale” includes, but is not limited to, the divestment of the taxpayer's interest in property which occurs by operation of law, by public or private sale, by forfeiture, or by termination under provisions contained in a contract for a deed or a conditional sales contract. Under section 7425(b)(1), if a notice of lien is filed in accordance with section 6323 (f) or (g), or the title derived from the enforcement of a lien is recorded as provided by local law, more than 30 days before the date of sale, and the appropriate district director is not given notice of the sale (in the manner prescribed in § 301.7425-3), the sale shall be made subject to and without disturbing the lien or title of the United States. Under section 7425(b)(2)(C), in any case in which notice of the sale is given to the district director not less than 25 days prior to the date of sale (in the manner prescribed in section 7425(c)(1)), the sale shall have the same effect with respect to the discharge or divestment of the lien or title as may be provided by local law with respect to other junior liens or other titles derived from the enforcement of junior liens. A nonjudicial sale pursuant to a lien which is junior to a tax lien does not divest the tax lien, even though notice of the nonjudicial sale is given to the appropriate district director. However, under the provisions of section 6325(b) and § 301.6325-1, a district director may discharge the property from a tax lien, including a tax lien which is senior to another lien upon the property.

**(b) Date of sale.** In the case of a nonjudicial sale subject to the provisions of section 7425(b), in order to compute any period of time determined with reference to the date of sale, the date of sale shall be determined in accordance with the following rules:

- (1) In the case of divestment of junior liens on property resulting directly from a public sale, the date of sale is deemed to be the date the public sale is held, regardless of the date under local law on which junior liens on the property are divested or the title to the property is transferred,
- (2) In the case of divestment of junior liens on property resulting directly from a private sale, the date of sale is deemed to be the date title to the property is transferred, regardless of the date junior liens on the property are divested under local law, and
- (3) In the case of divestment of junior liens on property not resulting directly from a public or private sale, the date of sale is deemed to be the date on which junior liens on the property are divested under local law.

For provisions relating to the right of redemption of the United States, see section 7425(d) and § 301.7425-4.

**(c) Examples.** The provisions of this section may be illustrated by the following examples:  
**Example 1.**

(i) Under the law of State M, upon entry of judgment, the judgment creditor obtains a statutory lien upon the real property of the judgment debtor, and certain procedures are provided by which the judgment creditor may execute by public sale upon such real property. These procedures provide, among other things, for notification by personal service or registered or certified mail to other lien creditors, if any, and publication of a notice of the sale in a local newspaper. After the expiration of a

prescribed period of time after such notification and publication, the sheriff of the county where the real property is located may sell the property at public sale. After payment of the amount bid at the public sale, the sheriff issues to the purchaser a deed to the real property, and the interests of junior lienors in the property are divested.

(ii) For purposes of this section, such an execution sale is a nonjudicial sale described in section 7425(b) because the sale is made pursuant to a statutory lien on the property sold. The date of sale, for purposes of computing a period of time determined with reference to the date of sale, is the date on which the public sale is held because junior liens on the real property are divested directly as a result of the public sale. This result obtains even though the junior liens are legally divested on a later date when the sheriff issues the deed.

**Example 2.**

(i) Under the law of State N, mortgages on real property may contain a power of sale which authorizes the mortgagee, upon breach by the mortgagor of one of the conditions of the mortgage, to have the mortgaged property sold at public sale. This public sale must be preceded by notice by advertisement in a local newspaper, and the time, place, description of the property, and other terms of the sale must be specified. The purchaser at such a public sale obtains a title to the real property which is not subject to a right of redemption by the mortgagor and which divests the interests of the junior lienors in the property.

(ii) For purposes of this section, a sale pursuant to such a power of sale is a nonjudicial sale described in section 7425(b) because the sale is made pursuant to the mortgage instrument which created a lien on the property sold. The date of the sale, for purposes of computing a period of time determined with reference to the date of sale, is the date of the public sale because junior liens on the property are divested directly as a result of the public sale.

**Example 3.**

Assume the same facts as in example 2 except that the purchaser at the public sale obtains a title which is defeasible by the exercise of a right of redemption in the mortgagor. The purchaser's title divests the interests of junior lienors in the property as of the time of public sale. The interests of junior lienors in the property revive if the mortgagor exercises his right of redemption. The date of the sale, for purposes of computing a period of time determined with reference to the date of sale, is the date of the public sale because junior liens on the property are divested directly as a result of the public sale although such junior liens may be revived by a subsequent redemption by the mortgagor.

**Example 4.**

(i) Under the law of State O, upon breach by a mortgagor of one of the conditions of the mortgage, the mortgagee may foreclose the mortgage by securing possession of the property by one of several procedures provided by statute. These procedures are generally referred to as "strict foreclosure." In order for a foreclosure to be effective under these procedures, a certificate attesting the fact of entry must be recorded with the proper registrar of deeds within 30 days after the mortgagee enters the property. During the one-year period following the date on which the certificate of entry is recorded, the mortgagor or a junior lienor may redeem the property by paying the mortgagee the amount of the mortgage obligation. If, during such one-year period the property is not redeemed and the mortgagee's possession is continued, the interests of the mortgagor and the junior lienors in the property are divested as of the date such one-year period expires.

(ii) For purposes of this section, such a foreclosure procedure is a nonjudicial sale described in section 7425(b) because it results in the divestment of the mortgagor's interest in the property by operation of law pursuant to the mortgage which created a lien on the property. In addition, because there is no public or private sale which directly results in the divestment of junior liens on the property, the date of sale, for purposes of computing a period of time determined with reference to the date of sale, is the date on which the one-year period following the recording of the certificate of entry expires.

**Example 5.**

The law of State P contains a procedure which permits a county to collect a delinquent tax assessment with respect to real property by the means of a tax sale of the property. First, a notice of a public auction with respect to the tax assessment on the real property is published in a local newspaper. At the public auction, the purchaser, upon payment of the delinquent taxes and interest, obtains from the county tax collector a tax certificate with respect to the real property. Because the obtaining of this tax certificate does not directly result in the divestment of either the owner's title or

junior liens with respect to the property, the public auction is not a nonjudicial sale described in section 7425(b). At any time before a tax deed with respect to the property is issued by the clerk of the county court, the owner or any holder of a lien or other interest with respect to the property may obtain the tax certificate by paying the holder of the tax certificate the amount of the taxes, interest, and costs. After a date which is two years after the date on which the tax assessment became delinquent, the holder of the tax certificate may request the clerk of the county court to have the property advertised for sale. After advertisement of the sale, the clerk of the county court conducts a public sale of the real property and the purchaser obtains a tax deed. The interests of all junior lienors in the property are divested and the property is not subject to a right of redemption under the law of State P. For purposes of this section, this public sale is considered to be a nonjudicial sale described in section 7425(b) because the sale is made pursuant to a statutory lien on the property sold. The date of the sale, for purposes of computing a period of time determined with reference to the date of sale, is the date on which the public sale is held at which the purchaser obtains a tax deed as this sale directly results in the divestment of junior liens on the property.

**Example 6.**

The law of State Q contains a provision which permits a county to collect a delinquent tax assessment with respect to real property by the means of a tax sale of the property. After public notice is given, a "tax sale" of the real property is conducted. Upon payment of the delinquent taxes and interest, a purchaser obtains a tax certificate with respect to the real property. If there is no purchaser at the tax sale, the property is deemed to be bid in by the State. Because the obtaining of this tax certificate by a purchaser or State Q does not directly result in the divestment of either the owner's title or junior liens with respect to the property, the tax sale is not a nonjudicial sale described in section 7425(b). Following the tax sale, there is a three-year period during which any person having an interest in the property may redeem the property by paying the holder of the tax certificate the amount of taxes, interest, and costs. Unless redeemed, the holder of the tax certificate may obtain an absolute title at the expiration of the period of redemption provided he serves a notice of the expiration of the redemption period upon the owner at least 60 days prior to the date of expiration. Because there is no public or private sale which directly results in the divestment of junior liens on the property, the date of sale, for purposes of computing a period of time determined with reference to the date of sale, is the date on which the holder of the tax certificate obtains absolute title.

## 26 CFR 301.7425-3 - Discharge of liens; special rules.

### § 301.7425-3 Discharge of liens; special rules.

#### (a) *Notice of sale requirements*—

(1) *In general.* Except in the case of the sale of perishable goods described in paragraph (c) of this section, a notice (as described in paragraph (d) of this section) of a nonjudicial sale shall be given, in writing by registered or certified mail or by personal service, not less than 25 days prior to the date of sale (determined under the provisions of § 301.7425-2(b)), to the Internal Revenue Service (IRS) official, office and address specified in IRS Publication 786, "Instructions for Preparing a Notice of Nonjudicial Sale of Property and Application for Consent to Sale," or any successor publication. The relevant IRS publications may be downloaded from the IRS Internet site at <http://www.irs.gov>. Under this section, a notice of sale is not effective if it is given to an office other than the office listed in the relevant publication. The provisions of sections 7502 (relating to timely mailing treated as timely filing) and 7503 (relating to time for performance of acts where the last day falls on Saturday, Sunday, or a legal holiday) apply in the case of notices required to be made under this paragraph.

#### (2) *Postponement of scheduled sale*—

(i) *Where notice of sale is given.* In the event that notice of a sale is given in accordance with subparagraph (1) of this paragraph (a), with respect to a scheduled sale which is postponed to a later time or date, the seller of the property is required

to give notice of the postponement to the IRS in the same manner as is required under local law with respect to other secured creditors. For example, assume that in State M local law requires that in the event of a postponement of a scheduled foreclosure sale of real property, an oral announcement of the postponement at the place and time of the scheduled sale constitutes sufficient notice to secured creditors of the postponement. Accordingly, if at the place and time of a scheduled sale in State M an oral announcement of the postponement is made, the Internal Revenue Service is considered to have notice of the postponement for the purpose of this subparagraph.

(ii) **Where notice of sale is not given.** In the event that—

(A) Notice of a nonjudicial sale would not be required under subparagraph (1) of this paragraph (a), if the sale were held on the originally scheduled date,

(B) Because of a postponement of the scheduled sale, more than 30 days elapse between the originally scheduled date of the sale and the date of the sale, and

(C) A notice of lien with respect to the property to be sold is filed more than 30 days before the date of the sale, notice of the sale is required to be given to the IRS in accordance with the provisions of paragraph (a)(1) of this section. In any case in which notice of sale is required to be given with respect to a scheduled sale, and notice of the sale is not given, any postponement of the scheduled sale does not affect the rights of the United States under section 7425(b).

(iii) **Examples.** The provisions of subdivision (ii) of this subparagraph may be illustrated by the following examples:

**Example 1.**

A nonjudicial sale of Blackacre, belonging to A, a delinquent taxpayer, is scheduled for December 2, 1968. As no notice of lien is filed applicable to Blackacre more than 30 days before December 2, 1968, no notice of sale is given to the IRS. On December 2, 1968, the sale of Blackacre is postponed until January 15, 1969. A notice of lien with respect to Blackacre is properly filed on January 2, 1969. The sale of blackacre is held on January 15, 1969. Even though more than 30 days elapsed between the originally scheduled date of the sale (December 2, 1968) and the date of the sale (January 15, 1969), no notice of sale is required to be given to the IRS because the notice of lien was not filed more than 30 days before the date of the sale.

**Example 2.**

Assume the same facts as in example 1 except that a notice of lien is filed on November 29, 1968, in accordance with section 6323. Because more than 30 days elapsed between the originally scheduled date of the sale and the date of the sale, and the notice of lien is filed (on November 29, 1968) more than 30 days before the date of the sale (January 15, 1969), notice of the sale, in accordance with the provisions of subparagraph (1) of this paragraph, is required to be given to the district director.

**Example 3.**

A nonjudicial sale of Whiteacre, belonging to B, a delinquent taxpayer, is scheduled for December 2, 1968. A notice of lien applicable to Whiteacre is filed on November 12, 1968, in accordance with section 6323. As the notice of lien was not filed more than 30 days before December 2, 1968, no notice of sale is given to the IRS. On December 2, 1968, the sale of Whiteacre is postponed until December 20, 1968. The sale of Whiteacre is held on December 20, 1968. Even though more than 30 days elapsed between the date notice of lien was filed (November 12, 1968) and the date of the sale (December 20, 1968), no notice of sale is required to be given to the IRS because not more than 30 days elapsed between the date of the originally scheduled sale (December 2, 1968) and the date the sale was actually held (December 20, 1968).

**(b) Consent to sale—**

**(1) In general.** Notwithstanding the notice of sale provisions of paragraph (a) of this section, a nonjudicial sale of property shall discharge or divest the property of the lien and title of the United States if the IRS consents to the sale of the property free of the lien or title. Pursuant to section 7425(c)(2), where adequate protection is afforded the lien or title of the United States, the IRS may, in its discretion, consent with respect to the sale of property in appropriate cases. Such consent shall be effective only if given in writing and shall be subject to such limitations and conditions as the IRS may require. However, the IRS may not consent to a sale of property under this section after the date of sale, as determined under § 301.7425-2(b). For provisions relating to the authority of the IRS to release a lien or discharge property subject to a tax lien, see section 6325 and the section 6325 regulations.

**(2) Application for consent.** Any person desiring the IRS's consent to sell property free of a tax lien or a title derived from the enforcement of a tax lien of the United States in the property shall submit to the IRS, at the office and address specified in the relevant IRS publications, a written application, in triplicate, declaring that it is made under penalties of perjury, and requesting that such consent be given. The application shall contain the information required in the case of a notice of sale, as set forth in paragraph (d)(1) of this section, and, in addition, shall contain a statement of the reasons why the consent is desired.

**(c) Sale of perishable goods—**

**(1) In general.** A notice (as described in paragraph (d) of this section) of a nonjudicial sale of perishable goods (as defined in paragraph (c)(2) of this section) shall be given in writing, by registered or certified mail or delivered by personal service, at any time before the sale, to the IRS official and office specified in the relevant IRS publications, at the address specified in such publications. Under this section, a notice of sale is not effective if it is given to an office other than the office listed in the relevant publication. If a notice of a nonjudicial sale is timely given in the manner described in this paragraph, the nonjudicial sale shall discharge or divest the tax lien, or a title derived from the enforcement of a tax lien, of the United States in the property. The provisions of sections 7502 (relating to timely mailing treated as timely filing) and 7503 (relating to time for performance of acts where the last day falls on Saturday, Sunday, or a legal holiday) apply in the case of notices required to be made under this paragraph. The seller of the perishable goods shall hold the proceeds (exclusive of costs) of the sale as a fund, for not less than 30 days after the date of the sale, subject to the liens and claims of the United States, in the same manner and with the same priority as the liens and claims of the United States had with respect to the property sold. If the seller fails to hold the proceeds of the sale in accordance with the provisions of this paragraph and if the IRS asserts a claim to the proceeds within 30 days after the date of sale, the seller shall be personally liable to the United States for an amount equal to the value of the interest of the United States in the fund. However, even if the proceeds of the sale are not so held by the seller, but all the other provisions of this paragraph are satisfied, the buyer of the property at the sale takes the property free of the liens and claims of the United States. In the event of a postponement of the scheduled sale of perishable goods, the seller is not required to notify the IRS of the postponement. For provisions relating to the authority of the IRS to release a lien or discharge property subject to a tax lien, see section 6325 and the regulations.

**(2) Definition of perishable goods.** For the purpose of this paragraph, the term "perishable goods" means any tangible personal property which, in the reasonable view of the person selling the property, is liable to perish or become greatly reduced in price or value by keeping, or cannot be kept without great expense.

**(d) Content of notice of sale—**

**(1) In general.** With respect to a notice of sale described in paragraph (a) or (c) of this section, the notice will be considered adequate if it contains the information described in paragraph (d)(1) (i), (ii), (iii), and (iv) of this section.

- (i) The name and address of the person submitting the notice of sale;



(ii) A copy of each notice of Federal Tax Lien (Form 668) affecting the property to be sold, or the following information as shown on each such Notice of Federal Tax Lien—

- (A) The IRS office named thereon,
- (B) The name and address of the taxpayer, and
- (C) The date and place of filing of the notice;

(iii) With respect to the property to be sold, the following information—

- (A) A detailed description, including location, of the property affected by the notice (in the case of real property, the street address, city, and State and the legal description contained in the title or deed to the property and, if available, a copy of the abstract of title),
- (B) The date, time, place, and terms of the proposed sale of the property, and
- (C) In the case of a sale of perishable property described in paragraph (c) of this section, a statement of the reasons why the property is believed to be perishable; and

(iv) The approximate amount of the principal obligation, including interest, secured by the lien sought to be enforced and a description of the other expenses (such as legal expenses, selling costs, etc.) which may be charged against the sale proceeds.

**(2) *Inadequate notice.*** Except as otherwise provided in this paragraph, a notice of sale described in paragraph (a) of this section that does not contain the information described in paragraph (d)(1) of this section shall be considered inadequate by the IRS. If the IRS determines that the notice is inadequate, the IRS will give written notification of the items of information which are inadequate to the person who submitted the notice. A notice of sale that does not contain the name and address of the person submitting such notice shall be considered to be inadequate for all purposes without notification of any specific inadequacy. In any case where a notice of sale does not contain the information required under paragraph (d)(1)(ii) of this section with respect to a Notice of Federal Tax Lien, the IRS may give written notification of such omission without specification of any other inadequacy and such notice of sale shall be considered inadequate for all purposes. In the event the IRS gives notification that the notice of sale is inadequate, a notice complying with the provisions of this section (including the requirement that the notice be given not less than 25 days prior to the sale in the case of a notice described in paragraph (a) of this section) must be given. However, in accordance with the provisions of paragraph (b)(1) of this section, in such a case the IRS may, in its discretion, consent to the sale of the property free of the lien or title of the United States even though notice of the sale is given less than 25 days prior to the sale. In any case where the person who submitted a timely notice, which indicates his name and address, does not receive more than 5 days prior to the date of sale written notification from the IRS that the notice is inadequate, the notice shall be considered adequate for purposes of this section.

**(3) *Acknowledgment of notice.*** If a notice of sale described in paragraph (a) or (c) of this section is submitted in duplicate to the IRS with a written request that receipt of the notice be acknowledged and returned to the person giving the notice, this request will be honored by the IRS. The acknowledgment by the IRS will indicate the date and time of the receipt of the notice.

**(4) *Disclosure of adequacy of notice.*** The IRS is authorized to disclose, to any person who has a proper interest, whether an adequate notice of sale was given under paragraph (d)(1) of this section. Any person desiring this information should submit to the IRS a written request that clearly describes the property sold or to be sold, identifies the applicable notice of lien, gives the reasons for requesting the information, and states the name and address of the person making the request. The request should be submitted to the IRS official, office and address specified in IRS Publication 4235, "Technical Services (Advisory) Group Addresses," or any successor publication. The relevant IRS publications may be downloaded from the IRS Internet site at <http://www.irs.gov>.

**(e) *Effective/applicability date.*** These regulations are effective on July 8, 2008.



IN RE PETITION BY TREASURER OF WAYNE COUNTY FOR  
FORECLOSURE; WAYNE COUNTY TREASURER, Petitioner, and MATTHEW  
TATARIAN and MICHAEL KELLY, Intervening Parties-Appellants, v  
PERFECTING CHURCH, Respondent-Appellee.

No. 129341

SUPREME COURT OF MICHIGAN

478 Mich. 1; 732 N.W.2d 458; 2007 Mich. LEXIS 1002

October 5, 2006, Argued

May 23, 2007, Decided

May 23, 2007, Filed

**SUBSEQUENT HISTORY:** Application denied by *Wayne County Treasurer v. Precision Materials & Servs.* (In re Petition for Foreclosure), 479 Mich. 859; 735 N.W.2d 286 (Mich., July 30, 2007)

**PRIOR HISTORY:** [\*\*\*1] Wayne Circuit Court, Mary Beth Kelly, J. The Court of Appeals, FORT HOOD, P.J., and TALBOT and MURRAY, JJ., denied the intervening parties' delayed application for leave to appeal. Unpublished order of the Court of Appeals, entered July 11, 2005 (Docket No. 261074). *Wayne County Treasurer v. Perfecting Church* (In re Treasurer of Wayne County for Foreclosure), 474 Mich. 1059, 711 N.W.2d 297, 2006 Mich. LEXIS 246 (2006)

**COUNSEL:** Howard & Howard Attorneys, P.C. (by Jason D. Killips, Sara K. MacWilliams, Robert J. Curtis, and James Geary), for Perfecting Church. Bloomfield Hills.

Aldrich Legal Services, PLLC (by Brad B. Aldrich), for Matthew Tatarian and Michael Kelly. Plymouth.

Amici Curiae:

Michael A. Cox, Attorney General, Thomas L. Casey, Solicitor General, and Kevin T. Smith, Assistant Attorney

General, for the Department of Treasury. Lansing.

Michael A. Cox, Attorney General, Thomas F. Schimpf, Division Chief, and Kevin L. Francart, Assistant Attorney General, for the Michigan Land Bank Fast Track Authority. Lansing.

Michael A. Cox, Attorney General, Terrence Grady, Division Chief, and Matthew H. Rick, Assistant Attorney General, for the Michigan State Housing Development Authority. Lansing.

Dykema Gossett PLLC (by Jill M. Wheaton, Theodore W. Seitz, and Stacy R. Owen), for the Michigan Association of County [\*\*\*2] Treasurers. Lansing.

Simon, Galasso & Frantz, PLC (by Kenneth G. Frantz), for High Praise Cathedral of Faith Ministries. Troy.

Loomis, Ewert, Parsley, Davis & Gotting, P.C. (by Kevin J. Roragen and Michael H. Rhodes), for Westhaven Manor LDHA LP. Lansing.

John E. Johnson, Jr., Corporation Counsel, and Joanne D. Stafford and James Nosedao, Assistant Corporation Counsels, for the city of Detroit. Detroit.

**JUDGES:** Chief Justice: Clifford W. Taylor. Justices: Michael F. Cavanagh, Elizabeth A. Weaver, Marilyn

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Kelly, Maura D. Corrigan, Robert P. Young, Jr., Stephen J. Markman, Cavanagh, J. (concurring in the result only). WEAVER, J. (concurring in the result only).

OPINION BY: Robert P. Young, Jr.

## OPINION

[\*\*459] [\*4] BEFORE THE ENTIRE BENCH

YOUNG, J.

This case concerns the jurisdiction of circuit courts to modify judgments of foreclosure when the foreclosing governmental unit deprives the property owner of due process. Generally, the provision of the General Property Tax Act (GPTA),<sup>1</sup> at issue in this case, as well as recent amendments of the GPTA, reflect a legislative effort to provide finality to foreclosure judgments and to quickly return property to the tax rolls. However, this legislative [\*\*\*3] regime is problematic when the property owner is not provided with constitutionally adequate notice of the foreclosure. This is because *MCL 211.78k(6)* serves to insulate violations of the *Due Process Clause of the United States Constitution* and of the *Michigan Constitution* from judicial review and redress, thereby completely denying the property owner procedural due process. As applied to the limited class of property owners who have been denied due process in this statutory foreclosure scheme, this provision of the GPTA is unconstitutional. Therefore, for the reasons stated herein, we affirm the Wayne Circuit Court's order vacating the judgment of [\*\*460] foreclosure and restoring the church's title to the property in question.

<sup>1</sup> *MCL 211.1 et seq.*

## FACTS AND PROCEDURAL HISTORY

The property owner in this case, Perfecting Church, purchased two parcels for use as parking lots during its church services. Both parcels were transferred by a single deed that the church [\*\*\*4] properly recorded. Nevertheless, after the church purchased and recorded a *single deed* for both the parcels, the Wayne County Treasurer listed one parcel on the Wayne County foreclosure listing. The church paid the outstanding taxes on that parcel and the treasurer assured the church [\*5] that there were no further outstanding taxes on either parcel. Despite those assurances, the treasurer initiated foreclosure proceedings against the other parcel.

However, the church never received notice of the pending foreclosure because the treasurer did not comply with the notice provisions of the GPTA. Specifically, the treasurer sent the statutorily required notice to the *previous* owner and did not post a notice on either of the parcels.<sup>2</sup> Thus, the church had no notice of the foreclosure proceedings. The Wayne Circuit Court entered a judgment of foreclosure. After the redemption period passed, Wayne County sold the property to the intervening parties, Matthew Tatarian and Michael Kelly.

<sup>2</sup> *MCL 211.78i* requires the foreclosing entity to notify the property owner by certified mail. Additionally, *MCL 211.78i* requires the foreclosing governmental unit to visit the property, determine whether it is occupied, and either inform the occupant of the foreclosure or post notice in a conspicuous place.

[\*\*\*5] Subsequent to the sale, the church learned of the foreclosure and sale, and it filed a motion for relief from the foreclosure judgment in the Wayne Circuit Court. That court granted the church's motion and the Court of Appeals denied the intervening parties' delayed application for leave to appeal.<sup>3</sup> This Court granted their application for leave, directing the parties to address two issues:

(1) whether the trial court retained jurisdiction to grant relief from the judgment of foreclosure pursuant to *MCR 2.612(C)*, notwithstanding the provisions of *MCL 211.78[f](1)* and (2); and (2) whether *MCL 211.78[f]* permits a person to be deprived of property without being afforded due process. [4]

<sup>3</sup> Unpublished order of the Court of Appeals, entered July 11, 2005 (Docket No. 261074).

<sup>4</sup> *474 Mich. 1059, 711 N.W.2d 297 (2006)*.

## [\*6] STANDARD OF REVIEW

This Court reviews questions of law, such as issues of constitutional and statutory [\*\*\*6] construction, *de novo*.<sup>5</sup>

<sup>5</sup> *Wayne Co v Hathcock, 471 Mich. 445, 455; 684 N.W.2d 765 (2004)*.

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#### ANALYSIS

Under the GPTA, a "foreclosing governmental unit shall file a single petition with the clerk of the circuit court of that county listing all property forfeited and not redeemed to the county treasurer under [MCL 211.78g] to be foreclosed under [MCL 211.78k] . . . ." <sup>6</sup> Before the hearing on the petition, the foreclosing governmental unit must provide proof of service of the notices required under the statute, as well as proof of the personal visit to the property and publication. <sup>7</sup> The circuit court then must make a series of factual determinations to complete the foreclosure process. <sup>8</sup> At the time the county foreclosed [\*\*461] the church's property, the GPTA provided:

Except as otherwise provided in subsection (5)(c) and (e), [<sup>9</sup>] fee simple title to property set forth in a petition for foreclosure filed under [\*\*\*7] section 78h on which forfeited delinquent taxes, interest, penalties, and fees are not paid within 21 days after the entry of judgment shall vest absolutely in the foreclosing governmental unit, and the foreclosing governmental unit shall have absolute title to the property. The foreclosing governmental unit's title is not subject to any recorded or unrecorded lien and shall not [\*7] be stayed or held invalid except as provided in subsection (7). [<sup>10</sup>]

The statute also provides for an appeal to the Court of Appeals within 21 days of the judgment of foreclosure. <sup>11</sup> Finally, the GPTA provides property owners who claim they did not receive any notice an action for monetary damages in the Court of Claims. <sup>12</sup>

<sup>6</sup> MCL 211.78h(1).

<sup>7</sup> MCL 211.78k(1).

<sup>8</sup> MCL 211.78k(5).

<sup>9</sup> MCL 211.78k(5)(c) and (e) provided exceptions for future installments of special assessments and liens recorded by the state or the foreclosing governmental unit under MCL 324.101 et seq., and certain easements and deed restrictions.

[\*\*\*8]

<sup>10</sup> MCL 211.78k(6). This subsection has since been amended by 2006 PA 611 and now provides:

Except as otherwise provided in subsection (5)(c) and (e), fee simple title to property set forth in a petition for foreclosure filed under section 78h on which forfeited delinquent taxes, interest, penalties, and fees are not paid on or before the March 31 immediately succeeding the entry of a judgment foreclosing the property under this section, or in a contested case within 21 days of the entry of a judgment foreclosing the property under this section, shall vest absolutely in the foreclosing governmental unit, and the foreclosing governmental unit shall have absolute title to the property, including all interests in oil or gas in that property except the interests of a lessee or an assignee of an interest of a lessee under an oil or gas lease in effect as to that property or any part of that property if the lease was recorded in the office of the register of deeds in the county in which the property is located before the date of filing the petition for foreclosure under section 78h, and interests preserved as provided in section 1(3) of 1963 PA 42, MCL 554.291. The foreclosing governmental unit's title is not subject to any recorded or unrecorded lien and shall not be stayed or held invalid except as provided in subsection (7) or (9).

[\*\*\*9]

<sup>11</sup> MCL 211.78k(7).

<sup>12</sup> MCL 211.78l(1) states:

If a judgment for foreclosure is entered under [MCL 211.78k] and all existing recorded and unrecorded interests in a parcel of property are extinguished as provided in [MCL 211.78k], the

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owner of any extinguished recorded or unrecorded interest in that property who claims that he or she did not receive any notice required under this act shall not bring an action for possession of the property against any subsequent owner, but may only bring an action to recover monetary damages as provided in this section.

[\*8] The intervening parties challenge the propriety of the grant of relief from judgment obtained by the church. They argue that *MCL 211.78k(6)* precludes the circuit court from staying or holding the governmental unit's title invalid. Furthermore, because the church did not avail itself of the redemption or appeal provision contained in *subsections 6* and *7*, it is limited to an action for monetary [\*\*\*10] damages under *MCL 211.78l*.

The intervening parties accurately construe these provisions of the GPTA. If a property owner does not redeem the property or appeal the judgment of foreclosure within 21 days, then *MCL 211.78k(6)* deprives the circuit court of jurisdiction to alter the judgment of foreclosure. *MCL 211.78k(6)* vests *absolute title* in the foreclosing governmental unit, and if [\*\*462] the taxpayer does not redeem the property or avail itself of the appeal process in *subsection 7*, then title "*shall not be stayed or held invalid . . .*" This language reflects a clear effort to limit the jurisdiction of courts so that judgments of foreclosure may not be modified other than through the limited procedures provided in the GPTA.<sup>13</sup> The only possible remedy for such a property owner would be an action for monetary damages based on a claim that the property owner did not receive any notice. In the majority of cases, this regime provides an appropriate procedure for foreclosing property because the statute requires notices that are consistent with minimum due process standards.

13 The recent amendments of the GPTA add further support to this conclusion. See *MCL 211.78k(5)(g)*.

[\*\*\*11] However, the church argues that because the county denied it due process when taking its property, the church can avoid the limitations of the statute. The intervening parties respond that regardless of the property

owner's claim, the statute only provides for one [\*9] remedy once the redemption and appeals period has passed--a claim for monetary damages under *MCL 211.78l*.

As stated, we believe that the intervening parties' interpretation of the GPTA is correct. The act does not provide an exception for property owners who are denied due process. Thus, the intervening parties correctly assert that the GPTA does not provide relief for the church or other property owners who are denied due process.

The question then becomes whether such a regime is constitutional when it operates to deprive a property owner of its property without due process. This Court must presume a statute is constitutional and construe it as such, unless the only proper construction renders the statute unconstitutional.<sup>14</sup> The United States Supreme Court recently has held that "due process requires the government to provide 'notice reasonably calculated, under all the circumstances, [\*\*\*12] to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'"<sup>15</sup> Furthermore, "when notice is a person's due . . . [t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."<sup>16</sup> However, "[d]ue process does not require that a property owner receive *actual notice* before the government may take his property."<sup>17</sup>

14 *Caterpillar, Inc v Dep't of Treasury*, 440 Mich. 400, 413; 488 N.W.2d 182 (1992), quoting *People v McQuillan*, 392 Mich. 511, 536; 221 N.W.2d 569 (1974).

15 *Jones v Flowers*, 547 U.S. 220, 226; 126 S. Ct. 1708, 1713-1714; 164 L. Ed. 2d 415, 425 (2006), quoting *Mullane v Central Hanover Bank & Trust Co*, 339 U.S. 306, 314; 70 S. Ct. 652; 94 L. Ed. 865 (1950).

16 *Jones, supra*, 547 U.S. at 229; 126 S. Ct. at 1715; 164 L. Ed. 2d at 427, quoting *Mullane, supra* at 315.

[\*\*\*13]

17 *Jones, supra*, 547 U.S. at 226; 126 S. Ct. at 1713; 164 L. Ed. 2d at 425 (emphasis added).

[\*10] As noted above, the statute permits a foreclosing governmental unit to ignore completely the mandatory notice provisions of the GPTA, seize absolute title to a taxpayer's property, and sell the property, leaving the circuit court impotent to provide a remedy for

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the blatant deprivation of due process. That interpretation, allowing for the deprivation of due process without any redress would be patently unconstitutional. 18 Unfortunately, as noted [\*\*463] above, the plain language of the statute simply does not permit a construction that renders the statute constitutional because the statute's jurisdictional limitation encompasses all foreclosures, including those where there has been a failure to satisfy minimum due process requirements, as well as those situations in which constitutional notice is provided, but the property owner does not receive actual notice. In cases where the foreclosing governmental unit complies with the GPTA notice provisions, *MCL 211.78k* [\*\*\*14] is not problematic. 19 Indeed, *MCL 211.78l* provides in such cases a damages remedy that is not constitutionally required. However, in cases where the foreclosing entity fails to provide *constitutionally adequate* notice, *MCL 211.78k* permits a property owner to be deprived of the property without due process of law. Because the Legislature cannot create a statutory regime that allows for constitutional violations with no recourse, that portion of the statute purporting to limit the circuit [\*11] court's jurisdiction to modify judgments of foreclosure is unconstitutional and unenforceable as applied to property owners who are denied due process.

18 The United States Supreme Court "consistently has held that some form of hearing is required *before* an individual is finally deprived of a property interest." *Mathews v Eldridge*, 424 U.S. 319, 333; 96 S. Ct. 893; 47 L. Ed. 2d 18 (1976) (emphasis added), citing *Wolff v McDonnell*, 418 U.S. 539, 557-558; 94 S. Ct. 2963; 41 L. Ed. 2d 935 (1974).

[\*\*\*15]

19 Even when the foreclosing governmental unit only partially complies with the GPTA notice provisions, *MCL 211.78k* is sound as long as there is constitutionally adequate notice. Because the notice provisions provide more notice than is required to satisfy due process, the constitution does not require strict compliance with all the statutory notice requirements.

#### CONCLUSION

Because there is no construction of the GPTA that renders the statute constitutional in cases where the taxing authority has denied the taxpayer due process, the statute is unconstitutional as applied to those individuals.

In the present case, the county completely failed to comply with the notice provisions in the GPTA. As such, the county deprived the church of its property without providing due process. Therefore, for the reasons stated, we affirm the order of the Wayne Circuit Court that restored the church's title to the property in question.

Robert P. YOUNG, Jr.

Clifford W. TAYLOR

Maura D. CORRIGAN

Stephen J. MARKMAN

CONCUR BY: Michael F. Cavanagh; Elizabeth A. Weaver

#### CONCUR

CAVANAGH, J. [\*\*\*16] (*concurring in the result only*).

I concur with the result reached by the majority. I write separately, however, to note that I do not agree that the notice procedures in the General Property Tax Act, *MCL 211.1 et seq.*, necessarily satisfy due process. See *Smith v Cliffs on the Bay Condo Ass'n*, 463 Mich. 420, 432, 434; 617 N.W.2d 536 (2000) (Kelly, J., dissenting). Despite being in compliance with the statute, an agency's action may still fail to give a property owner constitutionally required reasonable notice.

Michael F. CAVANAGH

Marilyn KELLY

WEAVER, J. (*concurring in the result only*).

Recent amendments of Michigan's General Property Tax Act [\*12] (GPTA), *MCL 211.1 et seq.*, streamlined and expedited the real property tax foreclosure process. <sup>1</sup> The purpose articulated was to "strengthen and revitalize the economy of this state and its municipalities by encouraging the efficient and expeditious return to productive [\*\*464] use of property returned for delinquent taxes." <sup>2</sup> The question before this Court is whether a party that is deprived of property without the notice of foreclosure required [\*\*\*17] under the GPTA is limited to monetary damages as a remedy. Specifically, does the GPTA deprive a circuit court of jurisdiction to grant relief under *MCR 2.612(C)* from its prior

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foreclosure judgment?

- 1 See 1999 PA 123 and 2001 PA 101.
- 2 *MCL 211.78(1)*.

I would hold that the relevant provisions of *MCL 211.78 et seq.*<sup>3</sup> in effect at the time the petition for foreclosure was filed in this matter did not deprive the circuit court of jurisdiction to grant respondent Perfecting Church relief from the circuit court's foreclosure judgment. I therefore concur in the result reached by the majority affirming the circuit court's order granting Perfecting Church's motion for relief from the judgment of foreclosure.

- 3 *MCL 211.78i(2)*, now *MCL 211.78i(10)*; *MCL 211.78k(6)*; *MCL 211.78l*.

[\*\*\*18] 1. FACTS

On July 1, 1999, respondent Perfecting Church purchased two vacant Wayne County properties for \$ 100,000 and used both properties as parking lots for church service attendees.<sup>4</sup> On June 14, 2002, the Wayne County Treasurer filed a petition for foreclosure listing several thousand properties with unpaid taxes for the [\*13] year 2000. The properties at issue here, the second lot and the first lot, were included in those foreclosure proceedings. On March 10, 2003, the Wayne Circuit Court entered a judgment of foreclosure regarding both of the vacant properties owned by Perfecting Church.

- 4 The two properties commonly known as 17833 Van Dyke (first lot) and 17843 Van Dyke (second lot) were both listed under one deed.

Pursuant to *MCL 211.78i*, the treasurer's office had a duty to mail notice of the pending foreclosure to the current owner, Perfecting Church. However, because of a recording error in the treasurer's office, the properties were not listed on the tax rolls as being owned [\*\*\*19] by Perfecting Church, and so the treasurer's office sent the foreclosure notice to the *former* owner, *not* to Perfecting Church. In addition, the posted notice of foreclosure was incorrectly placed on a neighbor's adjacent lot, rather than on either the first lot or the second lot owned by Perfecting Church.

Consequently, Perfecting Church never received notice of the pending foreclosure. It was not until October 2003, seven months after the circuit court entered the

foreclosure judgment, that Perfecting Church became aware of the tax delinquency pertaining to the first lot when the church's general manager saw it listed in the Wayne County forfeiture listing. After contacting the Wayne County Treasurer's office, Perfecting Church obtained and paid the tax bill for the first lot on October 14, 2003.

At that time, Perfecting Church also inquired about the tax status of the second lot and was advised by the treasurer's office that payment of taxes on the first lot would cover the second lot as well, because both properties were listed on the same deed. Apparently, this assertion by the treasurer's office was incorrect, and Wayne County subsequently sold the second lot at auction. [\*\*\*20] On November 4, 2003, the treasurer conveyed the second lot by quitclaim deed to the purchasers at [\*14] the auction, intervening appellants Matthew Tatarian and Michael Kelly (appellants).

On May 14, 2004, pursuant to *MCR 2.612(C)(1)(d)* and (f), Perfecting Church filed a motion for relief from the judgment [\*\*465] of foreclosure in the Wayne Circuit Court, alleging that it never received notice of the property foreclosure, which constitutes a violation of *MCL 211.78i*, *MCL 211.78j*, and *MCL 211.78k*; *Const 1963, art 1, § 17*; and *US Const, Am XIV, § 1*. On July 7, 2004, the circuit court granted Perfecting Church's motion and vacated the foreclosure judgment. Appellants filed a delayed application for leave to appeal in the Court of Appeals, asserting that *MCL 211.78l(1)* and (2) barred Perfecting Church from pursuing a motion for relief from the judgment of foreclosure, and that Perfecting Church was required to settle the matter in the Court of Claims. The Court of Appeals denied leave to appeal on the basis of lack of merit in the grounds presented.<sup>5</sup>

- 5 *In re Petition by Treasurer of Wayne Co for Foreclosure*, unpublished order of the Court of Appeals, entered July 11, 2005 (Docket No. 261074).

[\*\*\*21] Appellants sought leave to appeal in this Court. This Court granted the application and directed the parties to include among the issues to be briefed: (1) whether the trial court retained jurisdiction to grant relief from the judgment of foreclosure pursuant to *MCR 2.612(C)*, notwithstanding the provisions of *MCL 211.78l(1)* and (2); and (2) whether *MCL 211.78l* permits a person to be deprived of property without being

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afforded due process.<sup>6</sup>

<sup>6</sup> *In re Petition by Treasurer of Wayne Co for Foreclosure (Wayne Co Treasurer v Perfecting Church)*, 474 Mich. 1059; 711 N.W.2d 297 (2006).

## II. STANDARD OF REVIEW

Whether a court has subject-matter jurisdiction is a question of law that this Court reviews de novo. *Lapeer [ \*15 ] Co Clerks v Lapeer Circuit Judges*, 465 Mich. 559, 566; 640 N.W.2d 567(2002). Questions of statutory construction are also reviewed de novo. [\*\*\*22] *Grimes v. Mich. DOT*, 475 Mich. 72, 76; 715 N.W.2d 275 (2006). Finally, questions concerning the constitutionality of a statutory provision are subject to review de novo. *City of Taylor v Detroit Edison Co*, 475 Mich. 109, 115; 715 N.W.2d 28 (2006).

## III. ANALYSIS

The GPTA authorizes county treasurers to foreclose on tax-delinquent property and to sell the property at auction to satisfy tax delinquencies. *Republic Bank v Genesee Co Treasurer*, 471 Mich. 732, 737; 690 N.W.2d 917 (2005). However, a person may not be deprived of property without due process of law. *Const 1963, art 1, § 17; US Const, Am XIV, § 1*. In *Dow v Michigan*, 396 Mich. 192, 210; 240 N.W.2d 450 (1976), this Court held that due process requires that before the government takes a person's property by foreclosure, the person must be afforded notice and the right to contest the foreclosure. Following our decision in *Dow*, the Legislature added additional notice provisions to the GPTA to satisfy the constitutional due process requirements set forth in *Dow*. See, e.g., *Smith v Cliffs on the Bay Condo Ass'n*, 463 Mich. 420, 428-429; 617 N.W.2d 536 (2000). [\*\*\*23] As a result, the GPTA sets forth an extensive set of procedures to provide a property owner with notice in the tax foreclosure and sale process. *Id. at 428*.

This Court must presume that *MCL 211.78 et seq.* are constitutional. *People v McQuillan*, 392 Mich. 511, 536; 221 N.W.2d 569 (1974). A presumption exists that the Legislature would not violate the constitution. *Id.* If a statute can be interpreted as being either constitutional [ \*16 ] or unconstitutional, this Court must choose the constitutional interpretation of the statute. *Id.*

[\*\*466] Among the foreclosure provisions of the

GPTA, three are relevant to the disposition of this case: *MCL 211.78i(10)*, *MCL 211.78k(6)*, and *MCL 211.78l(1)* and (2).<sup>7</sup> *MCL 211.78(2)* affirms that "[i]t is the intent of the legislature that the provisions of this act relating to the return, forfeiture, and foreclosure of property for delinquent taxes satisfy the minimum requirements of due process . . ." The reference to "the minimum requirements of due process" is substantially repeated in [\*\*\*24] *MCL 211.78i(10)*, which defines the notice required of governmental entities before foreclosure.

<sup>7</sup> Petitioner Wayne County Treasurer asserts that an additional provision is applicable to this case: *MCL 211.78k(5)(g)*, enacted by 2003 PA 263 and effective January 5, 2004. Petitioner's argument is that this 2003 amendment is applicable because respondent Perfecting Church did not file its motion for relief from the judgment of foreclosure until May 2004, *after* the 2003 amendment took effect. I am satisfied that *MCL 211.78k(5)(g)* is inapplicable because petitioner Wayne County filed its petition for foreclosure on June 14, 2002, and the Wayne Circuit Court entered the judgment of foreclosure on March 10, 2003, *before* the January 5, 2004, effective date of *MCL 211.78k(5)(g)*.

*Section 78i(10)*<sup>8</sup> states:

The failure of the foreclosing governmental unit to comply with any provision of this [\*\*\*25] section shall not invalidate any proceeding under this act if the owner of a property interest or a person to whom a tax deed was issued is accorded the minimum due process required under the state constitution of 1963 and the constitution of the United States.

Essentially, § 78i(10) provides that as long as the property owner against whom foreclosure is sought is accorded notice satisfying minimum due process, the failure of the governmental entity to comply with other [ \*17 ] provisions in this section does not invalidate the proceeding. The linchpin of a valid foreclosure then is that a property owner must be "accorded the minimum due process required under the state constitution of 1963 and the constitution of the United States."<sup>9</sup>



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8 The 1999 provision was found at *MCL 211.78i(2)*.  
9 *MCL 211.78i(10)*.

The next relevant provision is *MCL 211.78k(6)*, which defines the state of the title to the foreclosed property. The version [\*\*\*26] of § 78k(6) in effect at the time of this foreclosure stated:

Fee simple title to property set forth in a petition for foreclosure filed under section 78h on which forfeited delinquent taxes, interest, penalties, and fees are not paid within 21 days after the entry of judgment shall vest absolutely in the foreclosing governmental unit, and the foreclosing governmental unit shall have absolute title to the property. The foreclosing governmental unit's title is not subject to any recorded or unrecorded lien and shall not be stayed or held invalid except as provided in subsection (7). [10]

[\*\*467] In other words, once a valid judgment of foreclosure is entered, *MCL 211.78k(6)* establishes that the fee simple title to the foreclosed property "shall vest absolutely in [\*18] the foreclosing governmental unit, and the foreclosing governmental unit shall have absolute title to the property."

10 *MCL 211.78k(6)* was amended by 2003 PA 263 and presently states:

Except as otherwise provided in subsection (5)(c) and (e), fee simple title to property set forth in a petition for foreclosure filed under section 78h on which forfeited delinquent taxes, interest, penalties, and fees are not paid on or before the March 31 immediately succeeding the entry of a judgment foreclosing the property under this section, or in a contested case within 21 days of the entry of a judgment foreclosing the property under this section, shall vest absolutely in the foreclosing governmental unit, and the foreclosing governmental unit

shall have absolute title to the property. The foreclosing governmental unit's title is not subject to any recorded or unrecorded lien and shall not be stayed or held invalid except as provided in subsection (7) or (9).

[\*\*\*27] After title vests in the foreclosing governmental entity pursuant to § 78k(6), *MCL 211.78l* establishes what remedy is available to the owner of the extinguished property interest. It states, in pertinent part:

(1) If a judgment for foreclosure is entered under section 78k and all existing recorded and unrecorded interests in a parcel of property are extinguished as provided in section 78k, the owner of any extinguished recorded or unrecorded interest in that property who claims that he or she did not receive any notice required under this act shall not bring an action for possession of the property against any subsequent owner, but may only bring an action to recover monetary damages as provided in this section.

(2) The court of claims has original and exclusive jurisdiction in any action to recover monetary damages under this section.

*MCL 211.78l* thus provides that once the prior owner's interest in a foreclosed property has been extinguished, the prior owner "shall not bring an action for possession of the property against any subsequent owner, but may only bring an action to recover monetary damages as provided [\*\*\*28] in this section." Moreover, *MCL 211.78l(2)* states that the Court of Claims has exclusive jurisdiction over "any action to recover monetary damages under this section."

Here, respondent Perfecting Church did not bring an action for possession against appellant subsequent owners. Instead, Perfecting Church sought relief from the foreclosure judgment on the basis that the judgment was void because Perfecting Church never received notice of the foreclosure action. Appellants do not contest that Perfecting Church was deprived of notice, [\*19] but

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argue that, despite this fact, *MCL 211.78l* precludes Perfecting Church from challenging the foreclosure. Appellants argue that *MCL 211.78l* limits Perfecting Church to seeking recovery for monetary damages, and establishes that the Court of Claims has exclusive jurisdiction over such an action. I disagree.

As a preliminary matter, I note that a circuit court has power to grant relief from a judgment under *MCR 2.612(C)*. *MCR 2.612(C)(1)* states:

(1) On motion and on just terms, the court may relieve a party or the legal representative [\*\*\*29] of a party from a final judgment, order, or proceeding on the following grounds:

(a) Mistake, inadvertence, surprise, or excusable neglect.

(b) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under *MCR 2.611(B)*.

(c) Fraud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.

(d) The judgment is void.

(e) The judgment has been satisfied, released, or discharged; a prior judgment on which it is based has been reversed or otherwise vacated; or it is no longer equitable that the judgment should have prospective application.

(f) Any other reason justifying relief from the operation of the judgment.

Contrary to appellants' assertion, *MCL 211.78l* does not *divest* the circuit court of its power to grant relief from a judgment as specified by *MCR 2.612(C)(1)*. Indeed, nothing in either *MCL 211.78l* or *MCL 211.78k(6)* removes the circuit court's power [\*\*468] to grant relief from a judgment of foreclosure under *MCR 2.612(C)*. *MCL 211.78l* [\*\*\*30] (1) only prohibits a displaced property owner from bringing a new *action* for possession. An "action" is a proceeding in court. Black's

Law [\*20] Dictionary (7th ed). A motion for relief from a judgment of foreclosure under *MCR 2.612(C)* is a *motion* to set aside an existing judgment. A "motion" is an application requesting a court to make a specified ruling or order. Black's Law Dictionary (7th ed). It does not constitute a separate action. Therefore, *MCL 211.78l* does not apply to situations where a property owner files a motion for relief from a judgment under *MCR 2.612(C)*.

Further, *MCL 211.78k(6)* only addresses the state of the title that the government receives. Although *MCL 211.78k(6)* states that the government's title shall not be "stayed or held invalid," the government can only receive fee title to the property through a *valid foreclosure proceeding*. In situations where the property owner did not receive "the minimum due process required under the state constitution of 1963 and the constitution of the United States," the foreclosure proceeding is [\*\*\*31] invalid under *MCL 211.78i(10)*. *In re Petition by Wayne Co Treasurer for Foreclosure of Certain Lands for Unpaid Prop Taxes*, 265 Mich. App. 285, 293; 698 N.W.2d 879 (2005).

It follows that a foreclosing governmental unit cannot receive fee title to property when the property owner was not provided with minimum due process notice of an impending foreclosure. Therefore, *MCL 211.78k(6)* does not preclude a circuit court from modifying its judgment pursuant to *MCR 2.612(C)* when a property owner has not been provided constitutionally adequate notice of the foreclosure. The majority and I disagree on this point. While the majority holds that the language of *MCL 211.78k(6)* vesting absolute title in the foreclosing governmental unit limits a court's ability to modify judgments, I believe the correct, and constitutional, interpretation of the GPTA is that *MCL 211.78i(10)* [\*21] invalidates any foreclosure proceeding when a foreclosing governmental unit's failure to provide adequate notice results in the property owner not being "accorded the minimum [\*\*\*32] due process required under the state constitution of 1963 and the constitution of the United States."

Thus, it is necessary to determine whether the foreclosure on Perfecting Church's property met the minimum due process notice requirements. Both the Michigan and United States constitutions guarantee that a person shall not be deprived "of life, liberty or property, without due process of law." *Const 1963, art 1, § 17; US Const, Am XIV, § 1*. Due process of law entitles a person

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whose interest is at stake to "notice and an opportunity to be heard." *Dusenbery v United States*, 534 U.S. 161, 167; 122 S. Ct. 694; 151 L. Ed. 2d 597 (2002), quoting *United States v James Daniel Good Real Prop*, 510 U.S. 43, 48; 114 S. Ct. 492; 126 L. Ed. 2d 490 (1993). Due process protects a real estate owner's interest in property. *Dow*, *supra* at 204. "People must pay their taxes, and the government may hold citizens accountable for tax delinquency by taking their property. But before forcing a citizen to satisfy his debt by forfeiting his property, due process requires the government to provide adequate [\*\*\*33] notice of the impending taking." *Jones v Flowers*, 547 U.S. 220, 234; 126 S. Ct. 1708, 1718; 164 L. Ed. 2d 415, 430 (2006).

For the first component of due process--notice of an impending taking--to be constitutionally adequate, the notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and [\*\*469] afford them an opportunity to present their objections." *Mullane v Central Hanover Bank & Trust Co*, 339 U.S. 306, 314; 70 S. Ct. 652; 94 L. Ed. 865 (1950); *Smith*, *supra* at 429. This Court previously [\*22] held that the notice procedures contained within the GPTA satisfy the notice component of due process. *Smith*, *supra* at 428-429. However, in this case, the treasurer failed to follow the notice procedures of the GPTA.

The GPTA requires the foreclosing governmental unit to mail notice to the property owner as identified by the property's deed filed with the county register of deeds. *MCL 211.78i(6)*. Here, however, the treasurer mailed notice to the *previous owner*; consequently, [\*\*\*34] Perfecting Church never received the mailed notice to which it was entitled under *MCL 211.78i(6)*. The GPTA also requires the foreclosing governmental unit to post notice at the property in question. *MCL 211.78i(3)(d)*. But here, the treasurer posted the foreclosure notice on a lot *neighboring the property in question*. Thus, a foreclosure notice was never posted at Perfecting Church's property. There was an absolute failure to provide notice under the GPTA. Although actual notice is not a requirement of due process, the foreclosing governmental unit must make a reasonable effort to provide notice. *Dow*, *supra* at 211. When the government utterly fails to comply with any of the notice procedures provided in a foreclosure statute, the government has not made a reasonable effort to provide notice.

For the second component of due process--an "opportunity to be heard"--to be constitutionally adequate, the hearing must be "at a meaningful time and in a meaningful manner." *Armstrong v Manzo*, 380 U.S. 545, 552; 85 S. Ct. 1187; 14 L. Ed. 2d 62 (1965); *Van Slooten v Larsen*, 410 Mich. 21, 53; [\*\*\*35] 299 N.W.2d 704 (1980). "A hearing would not be 'at a meaningful time' unless the owner of a significant interest in the property had an opportunity to cure any delinquency determined [\*23] upon the hearing and avoid foreclosure and the taking of his property by the state." *Dow*, *supra* at 206 n 21. The property owner must be able to contest the government's right to foreclose. *Id. at 210*. If the only hearing available to a property owner is a hearing in the Court of Claims for money damages, the property owner is deprived of an opportunity to contest the foreclosure and to defend his or her land. "The opportunity to defend one's property before it is finally taken is so basic that it hardly bears repeating." *Id. at 205 n 20*, quoting *Arnett v Kennedy*, 416 U.S. 134, 180; 94 S. Ct. 1633; 40 L. Ed. 2d 15 (1974) (White, J., concurring in part and dissenting in part).

The United States Supreme Court has held that the government does not always have to provide a hearing before the deprivation of a right. *Parratt v Taylor*, 451 U.S. 527, 540-541; 101 S. Ct. 1908; [\*\*\*36] 68 L. Ed. 2d 420 (1981). But the situations in which a postdeprivation hearing passes constitutional scrutiny are limited to those in which a predeprivation hearing would be unworkable. *Id. at 541*. The United States Supreme Court has held that the *Due Process Clause* is not implicated when the government negligently causes the loss of property. *Daniels v Williams*, 474 U.S. 327, 328; 106 S. Ct. 662; 88 L. Ed. 2d 662 (1986). "Historically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property." *Id. at 331*. Appellants argue that the treasurer's negligence in providing notice means that a due process analysis does not apply. But the treasurer *deliberately* [\*\*470] foreclosed on Perfecting Church's property. Therefore, the negligent-actor rule from *Parratt* and *Daniels* does not apply to this case.

Appellants also argue that the purpose behind the GPTA should prevail over the *Due Process Clause*. They [\*24] argue that the Legislature's express intention to streamline the foreclosure process should take precedence over a person's constitutional [\*\*\*37] right to defend the person's property against a taking. It is true that, in

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enacting the GPTA, the Legislature intended to create a faster system in which purchasers of foreclosed property could receive clear title to put the land into productive use. Nevertheless, the United States Constitution requires that a person be provided with notice and a hearing before property can be taken. In *Dow, supra* at 209, the Court quoted *Stanley v Illinois*, 405 U.S. 645, 656; 92 S. Ct. 1208; 31 L. Ed. 2d 551 (1972), in which the United States Supreme Court stated:

"The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the *Bill of Rights* in general, and the *Due Process Clause* in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre [\*\*\*38] ones."

The government "exert[s] extraordinary power against a property owner" when it takes and sells an owner's property. *Jones, supra*, 547 U.S. at 239; 126 S. Ct. at 1721; 164 L. Ed. 2d at 433. The *Due Process Clause* is designed to protect citizens against that use of power. The Legislature cannot circumvent the constitutional obligation of due process in order to speed up the foreclosure process and convey clear title to land it acquired through foreclosure.

I note that the Legislature amended the GPTA in 2003 by enacting 2003 PA 263, which added a new [\*25] subsection, *MCL 211.78k(5)(g)*, describing the finality of the circuit court's judgment of foreclosure. <sup>11</sup> *MCL 211.78k(5)(g)* states:

A judgment entered under this section is a final order with respect to the property affected by the judgment and except as provided in subsection (7) shall not be modified, stayed, or held invalid after the March 31 immediately succeeding the entry of a judgment foreclosing the

property under this section, or for contested cases 21 days after the entry of a judgment foreclosing [\*\*\*39] the property under this section.

That subsection effectively prohibits a circuit court from using *MCR 2.612(C)* to grant relief from the judgment of foreclosure for any reason because it states that the circuit court's judgment "shall not be modified, stayed, or held invalid . . . ." By prohibiting the circuit court from granting relief from judgment, *MCL 211.78k(5)(g)* leaves a displaced property owner deprived of notice, without the minimum due process accorded under the statute, only with the option of bringing a separate action. This result initiates *MCL 211.78i(1)*, which in turn establishes that the property owner may only bring an action for monetary damages. Despite the fact that the property owner was deprived of property without notice, the owner is precluded [\*\*471] from bringing an action to recover the property. <sup>12</sup> As such, I [\*26] seriously question the constitutionality of *MCL 211.78k(5)(g)* because it deprives a person of his or her constitutionally protected right to due process before a deprivation of a property interest by the foreclosing government.

11 Although any discussion of this amendment is dicta because it was not in effect at the time of the foreclosure filing in this case, I note that this amendment appears to be a further attempt by the Legislature to speed up the foreclosure process.

[\*\*\*40]

12 I believe that *MCL 211.78k(5)(g)* takes an unconstitutional step further than *MCL 211.78k(6)* by making the *judgment* of the circuit court final. The language of *MCL 211.78k(6)* can be constitutionally reconciled with the language of *MCL 211.78i(10)* because *MCL 211.78k(6)* applies only to the *title* received by the government after a judgment of foreclosure is entered; it does not apply to the *judgment* of the court. *MCL 211.78k(5)(g)*, on the other hand, conflicts with *MCL 211.78i(10)* because it explicitly makes a judgment final, regardless of any due process concerns that may arise from the foreclosing government's failure to provide notice.

Unlike the majority, I am satisfied that the 1999 amendments of the GPTA can be construed so as not to violate the constitutional guarantee of due process when

478 Mich. 1, \*26; 732 N.W.2d 458, \*\*471;  
2007 Mich. LEXIS 1002, \*\*\*40

the government fails to provide notice before foreclosing on property. *MCL 211.78* [\*\*\*41] does not prohibit the circuit court from using *MCR 2.612(C)* to grant relief from a judgment of foreclosure. Therefore, a property owner can file a motion for relief from a judgment of foreclosure to defend against an unconstitutional governmental taking of property. A property owner deprived of notice still receives a meaningful opportunity to be heard by bringing a motion pursuant to *MCR 2.612(C)* for relief from the judgment. By using *MCR 2.612(C)*, the property owner can still defend the property interest inasmuch as the circuit court still has the authority to set aside the foreclosure. In doing so, the circuit court preserves the property owner's interest in the land.

The circuit court correctly applied *MCR 2.612(C)* to grant Perfecting Church's motion for relief from the judgment of foreclosure. Perfecting Church is not limited to a suit for monetary damages under the 1999 amendments of the GPTA, which were in effect when the treasurer filed the foreclosure petition. Perfecting Church did not receive adequate notice to protect its property from the government's taking. Because the [\*27] 1999 amendments [\*\*\*42] did not prohibit the circuit court from modifying its judgment, the circuit court properly retained jurisdiction to modify its judgment of

foreclosure pursuant to *MCR 2.612(C)*, thereby affording Perfecting Church the opportunity to defend its ownership interest in the parking lot.

#### IV. CONCLUSION

I would hold that under the relevant provisions of *MCL 211.78 et seq.* in effect at the time the petition for foreclosure was filed in this matter, the circuit court was not deprived of jurisdiction to grant relief to Perfecting Church pursuant to *MCR 2.612(C)*. Perfecting Church was not limited to a recovery of monetary damages because Perfecting Church was completely deprived of adequate notice of the pending foreclosure. Because the absence of notice was a denial of the minimum due process required under both the Michigan Constitution, *Const 1963, art 1, § 17*, and the United States Constitution, *US Const, Am XIV, § 1*, Perfecting Church was entitled to relief from the circuit court's foreclosure judgment.

I would affirm the circuit court's order granting Perfecting Church's motion for relief from the judgment of foreclosure.

[\*\*\*43] Elizabeth A. Weaver

**MICHIGAN OFFER IN COMPROMISE PROGRAM**

**GARY SCHWARCZ**

## MICHIGAN OFFER IN COMPROMISE PROGRAM

### I. MICHIGAN PUBLIC LAW 240 CREATES NEW MICHIGAN OFFER IN COMPROMISE PROGRAM

- A. Michigan has never previously had an offer in compromise program. Michigan is one of the last states to establish such a program. As many practitioners are aware, Michigan can be difficult to work with when a client owes taxes to the State.
- B. The program will allow taxpayers a fresh start and will allow taxpayers to become in compliance.
- C. Governor Snyder signed Public Law 240 effective June 27, 2014.

### II. DESCRIPTION

- A. Beginning on January 1, 2015, the State of Michigan may compromise all or any part of a Michigan tax liability, including any related penalties and interests, if one or more of the following grounds exist:
  - 1. A doubt exists as to liability if the Department of Treasury concludes, based on evidence provided by the taxpayer, that the taxpayer would have prevailed in a contested case if the taxpayer's appeal rights had not expired.
  - 2. A doubt exists as to collectability if the taxpayer establishes both of the following:
    - a. The amount offered in payment is the most that can be expected to be paid or collected from the taxpayer's present assets or income, and
    - b. The taxpayer does not have reasonable prospects of acquiring increased income or assets that would enable the taxpayer to satisfy a greater amount of the liability than the amount offered, within a reasonable period of time.
  - 3. A federal compromise of tax under IRC § 7122 has been granted for the same tax years. The State Treasurer may compromise the outstanding balance of the liability for each year by applying the same percentage as the federal liability compromised to the total federal liability.

*Example: Samantha owes the Internal Revenue Service \$1,000,000 and the State of Michigan \$500,000. Samantha's federal offer in compromise has been accepted and she now owes the IRS \$200,000. Since Samantha's offer in*

*compromise was accepted by the Internal Revenue Service for 20% of the tax owed, her Michigan offer may be accepted for 20% of the \$500,000 tax owed to the State of Michigan.*

- B. An offer in compromise accepted by the State is subject to continuing review by the State. The State may revoke any compromise, may reestablish all compromised liabilities without regard to any statute of limitations that may otherwise be applicable, if either of the following occurs:
  - 1. The State Treasurer determines that the person receiving the compromise concealed from the State any property belonging to the taxpayer, the estate of a taxpayer, or any other person liable for the tax or, with the intent to mislead, withheld, destroyed, mutilated, or falsified any book, document, or record or made any false statement, relating to the estate or financial condition of the taxpayer or other person liable for the tax to induce the compromise, or
  - 2. The taxpayer fails to comply with any of the terms and conditions relative to the offer or to file subsequent required returns and pay subsequent final tax liabilities within twenty (20) days after the Department issues a notice and demand to the person stating that the continued failure to file or pay the tax may result in the revocation of the compromise.
- C. The State Treasurer was instructed to establish guidelines for the offer in compromise program within one hundred eighty (180) days after the effective date (June 27, 2014). Additionally, the State Treasurer is to establish procedures for an independent administrator review within the department of any rejection of a proposed offer in compromise made by a taxpayer. In order to initiate a review, the taxpayer has to make a written request on a form prescribed by the Department within thirty (30) days after the Department issues the rejection.
- D. Except for a revocation provided under paragraph B. above, a tax that was compromised is not subject to additional assessment or collection unless the compromised tax is modified or adjusted as a result of information received from the Internal Revenue Service or as a result of an audit performed by the State of Michigan.
- E. The State will not levy against property to collect a liability while an offer to compromise is pending unless the State Treasurer determines that the taxpayer's offer to compromise was intended to delay collection or a jeopardy assessment has been issued.



- F. A taxpayer who submits an offer to compromise a tax, penalty, or interest must remit with its offer \$100 or 20% of the offer, whichever is greater, to the Department. The amount remitted will be applied to the outstanding balance and is not refunded if the offer to compromise is rejected or reduced.
  
- G. Except for the independent administrative review provided by the law, a rejection of an offer to compromise, in whole or in part, is final and is not subject to further challenge or appeal.

**TAX CREDITS FOR INDIVIDUALS UNDER  
THE AFFORDABLE CARE ACT**

**STACEY DIDOMENICO**

## TAX CREDITS FOR INDIVIDUALS UNDER THE AFFORDABLE CARE ACT

### I. ELIGIBILITY TO RECEIVE THE TAX CREDIT

- A. Individuals who obtain coverage through the Health Insurance Marketplace ("Marketplace") may be eligible for the Premium Tax Credit ("Tax Credit").
- B. The following requirements must be met in order for an individual to qualify for the Tax Credit:
  - 1. Purchase coverage through the Marketplace;
  - 2. Have a household income between 100% to 400% of the federal poverty line depending on family size;
  - 3. Not be able to obtain affordable coverage through an eligible employer plan;
  - 4. Not be eligible for coverage through a governmental program (Medicaid, Medicare, CHIP or TRICARE);
  - 5. Do not file a Married Filing Separately tax return (unless domestic abuse or abandonment exception applies); and
  - 6. Cannot be claimed as a dependent by another person.
- C. The next open enrollment period to purchase health insurance through the Marketplace begins November 15, 2014 and ends February 15, 2015.

### II. RECEIVING THE CREDIT (NOW OR LATER)

- A. The amount of the Tax Credit is based upon family size and projected household income. Household income includes salary, tips, net income from self-employment or business income, unemployment compensation, social security payments, disability payments, alimony, retirement income, investment income, and generally any other taxable income.
- B. An individual eligible to receive the Tax Credit may receive the credit in one of two ways:
  - 1. Have the Tax Credit paid directly to the insurance company to lower the monthly payment; or

2. Claim the Tax Credit when he or she files the following year's federal income tax return.
- C. For the 2014 tax year, the Marketplace will issue a statement by January 31, 2015, which should be used to reconcile advance credit payments made to the insurance company, or to compute the Tax Credit, as applicable.
  - D. An individual that chooses to have the credit paid in advance directly to the insurance company may be required to repay any funds previously paid that exceed the amount of the Tax Credit as calculated on the 2014 Marketplace statement, which could result in a lower refund amount or balance owed to the IRS. However, repayment may be capped, depending on annual household income and family size.
  - E. On the other hand, if an individual was entitled to a greater Tax Credit than was actually paid, the individual is entitled to deduct that additional amount on their return.
  - F. An individual must file a tax return in order to be eligible to receive the Tax Credit, whether they choose to have it prepaid or as a credit on their tax return.

### III. REPORTING CHANGES IN CIRCUMSTANCES

- A. Individuals should notify the Marketplace if circumstances surrounding their family size or household income change, including:
  1. Increase or decrease in household income;
  2. Marriage or divorce;
  3. Birth or adoption of child;
  4. Other changes to household composition;
  5. Moving to a different state; or
  6. Gaining or losing eligibility for government sponsored or employer sponsored health care coverage.
- B. Changes should be reported as soon as possible as these events may cause a change in the calculation of the amount of the Tax Credit.

#### IV. RECENT REVENUE PROCEDURES

A. REV. PROC. 2014-37, 2014-33 I.R.B. 363

Adjusts the affordability percentage from 8% to 8.05% of household income for an exemption from the individual mandate for those who lack affordable minimum essential coverage for plan years beginning in 2015.

B. REV. PROC. 2014-41, 2014-33 I.R.B. 364

Provides guidance for self-employed individuals to compute the deduction under IRC §162 for health care insurance costs and the amount of the Tax Credit.

C. REV. PROC. 2014-46, 2014-33 I.R.B. 367

Provides the 2014 monthly national average premium for qualified health plans that have a bronze level of coverage for taxpayers to use in determining their maximum individual shared responsibility payment under the IRC.

1. The monthly national average premium for qualified health plans in 2014 is \$204 per individual.
2. The maximum monthly national average premium for qualified health plans in 2014 is \$1,020 for a shared responsibility family with five or more members.
3. Beginning in 2014, if a taxpayer (or an individual for whom the taxpayer is liable) is not covered under minimum essential coverage for one or more months, then the taxpayer is liable for the individual shared responsibility payment when filing his or her federal tax return (unless an exemption applies).
4. The individual shared responsibility payment is calculated as the lesser of (1) the sum of the monthly penalty amounts, or (2) the sum of the monthly national average bronze plan premiums for the shared responsibility family, per tax year.

V. RECENT FEDERAL APPEALS COURT DECISIONS

- A. On July 22, 2014, two separate federal appeals courts issued conflicting rulings on the validity of Tax Credits received as a result of purchasing insurance through the Federal Marketplace.
- B. In a 2-1 decision, Halbig v. Burwell, No. 14-5018 (D.C. Cir., July 22, 2014), a panel of the United States Court of Appeals for the District of Columbia Circuit limited the availability of Tax Credits to individuals who purchased health insurance through state-established health care exchanges. The full Circuit Court vacated the July 22 decision in September, and it is anticipated that the full Circuit Court will issue an opinion in the spring of 2015.
- C. The United States Court of Appeals for the Fourth Circuit, in King v. Burwell, No. 14-1158 (4<sup>th</sup> Cir., July 22, 2014), held that the IRS could grant Tax Credits to individuals who purchased health insurance through the Federal Marketplace or through state-run exchanges. The plaintiffs have filed a petition of certiorari to have the U.S. Supreme Court review the decision.
- D. The IRS has stated that the recent court rulings do not affect individuals receiving Tax Credits, whether the individuals obtain their insurance coverage through the Federal Marketplace or state-run exchanges.
- E. Currently, over half of the states, including Michigan, use the Federal Marketplace instead of a state-run marketplace.

# **ASSET TRANSFER TECHNIQUES**

**JEFFREY A. LEVINE**

## ASSET TRANSFER TECHNIQUES

### I. SELF-CANCELING INSTALLMENT NOTES

#### A. Description.

1. A Self-Canceling Installment Note ("SCIN") is an obligation given in connection with an installment sale, with a provision that all future amounts due will be canceled upon the transferor's death. Unlike a regular promissory note, the remaining balance of the SCIN at the obligor's death is not included in the decedent's gross estate.
2. Besides direct gifting, no other planning strategy provides the immediate removal of an asset from an estate as does the SCIN.
3. If stock of a family business or interests in a Family Limited Partnership ("FLP") are sold pursuant to a SCIN, gain recognition to the seller is generally deferred under the installment sale rules.
4. If the client has a capital loss available, it may be advantageous to elect out of installment sale treatment to use up the capital loss currently.
5. If the seller dies before the note is paid off, depending on one's view of the law in this area:
  - a. The seller's estate has to recognize the balance of the forgiven gain in the estate's initial 1041 income tax return as income in respect of a decedent (§691). See *Estate of Frane*, 998 F.2d 567 (8<sup>th</sup> Cir., 1993); or
  - b. If the decedent does not live in the 8<sup>th</sup> Circuit, it may be possible to argue that the gain should be reportable on the last income tax return of the decedent pursuant to Code §453B.
6. The term of the SCIN cannot be greater than the seller's life expectancy.
7. The SCIN needs to include either an interest premium or a principal premium in order to provide the seller with an enhanced price due to the risk that death will occur before the end of the stated term of the note.
8. The IRS may scrutinize an interest-only SCIN, with a back-end balloon payment, more closely than a principal premium SCIN. See the *Estate of William Davidson* (U.S. Tax Court No. 013748-13 (filed June 14, 2013)).

#### B. Advantages.

1. From the buyer's perspective, the buyer gets a stepped up basis equal to the purchase price, and the buyer should also be able to deduct the interest on the note payments (subject to the "type" of interest being paid).



2. Unlike FLPs and Grantor Retained Annuity Trusts ("GRATs"), if the SCIN valuation is properly set (with an interest premium or principal premium), there is no use of the seller's annual gift exclusions or lifetime gift-giving ability.
3. In Chief Counsel Advice ("CCA") 201330033, the IRS took the position, relating to the *Estate of William Davidson*, that the usual valuation methodology under Code § 7520 did not apply and that the "willing buyer-willing seller" standard applied, and required that the life expectancy of the seller be taken into account. Section 7520, the Service said, applies to annuities, interests for life or a term of years, remainders and reversions, but not to debt instruments (the SCIN note).
4. Even with a premium, the sale of assets on a SCIN basis freezes the value for purposes of the client's estate. Future appreciation is not going to be subject to estate tax on the client's death.
5. The SCIN gets the assets to the client's designated recipient(s) and without any transfer taxes on the transaction because it is a sale and not a gift.
6. The buyer gets to use the acquired assets at the time of sale; there is no delay in gaining access to those assets.
7. Potentially, payments owing under the SCIN may be made with loans secured by the acquired assets.
8. Interest payments may be deductible to the buyer [but investment interest and other rules need to be taken into account].
9. Gain on the sale is likely deferred on the installment method and will not be recognized until and to the extent that the purchasers make payments.

C. Disadvantages.

1. The buyer needs current cash to pay the SCIN note payments.
2. The proceeds received, including the premium paid for the SCIN, will be part of the seller's estate at death, unlike a successful FLP or GRAT.
  - a. As noted above, there is income tax to pay on the forgiven debt if the seller dies before the full SCIN note term ends. If Frane is respected, the income tax is payable by the estate. If Frane is not followed, the income tax is payable on the seller/decedent's final income tax return (thus reducing the size of the estate further). However, if there is no estate tax at that time, there will be an income tax due, where no estate tax would have been due had no transaction occurred.
  - b. Just as with FLPs, the SCIN terms need to be followed carefully. Like the FLP, there must be a bona fide sale for adequate and full consideration. See *Costanza v. Commissioner*, 320 F.3d 595 (6<sup>th</sup>

Cir., 2003), with some "bad facts", which the taxpayer won anyway and where the SCIN was respected.

3. If the seller outlives the SCIN term, the seller loses out on the cash flow which he/she was receiving, and may be without sufficient assets to live.
4. The purchaser will have paid more than the asset value, due to the premium feature of the SCIN.
5. If valuation is not properly set, there may be a gift tax to pay. For example, in the recent Tax Court case of *William Cavallaro* (TCM 2014-189), (which is not a SCIN case but still illustrates the importance of proper valuation), the Tax Court found that there was a gift of \$29.6 million.

## II. GRANTOR RETAINED ANNUITY TRUST (GRAT)

- A. Grantor Retained Income Trusts ("GRIT"), Grantor Retained Annuity Trusts ("GRAT") and Grantor Retained Unitrusts ("GRUT"), are trusts in which the grantor retains a right to an income amount, an annuity amount, or a percentage of the fair market value of the trust each year, for life or a term of years. The value of the remainder is a gift to the ultimate beneficiaries, typically children or grandchildren.
- B. The goal of a GRIT, GRAT or GRUT is to transfer assets to children or grandchildren at less than face value. The value of the interest kept by the donor is determined under IRS regulations, depending upon the amount retained, the length of the payout term to the donor, the donor's age and the IRS interest rate for the month in question. If the trust gets more income than the applicable IRS interest rate used to determine the value of the donor's interest, the excess will accumulate for eventual distribution to heirs and a "discount" results.
- C. The Trust property passes to a family member at the end of the trust term, which is designed to occur during the grantor's lifetime.
- D. However, if the grantor dies during the trust's term, the trust property will be included in the grantor's gross estate under Code § 2036.
- E. GRITs, GRATs and GRUTs are typically treated as grantor trusts, meaning the seller/grantor is taxed on the trust's income and gains, as though the trust does not exist.

## III. AFR LOANS

- A. As noted above, the SCIN has many advantages, but clients may be able to use the short, mid-term or even long-term applicable federal rate (AFR) for intra-family sales structured with a loan, to avoid the SCIN mortality risk premium.
- B. Refinance notes previously issued at the applicable federal rate. If a promissory note provides a right of prepayment, consider issuance of a new note at lower current AFR.

- C. No cancellation of debt income to borrower since principal balance due remains the same.
- D. No gift as the value of the note equals the unpaid principal which does not change.
- E. The IRS has taken the position in certain cases that the sale to a GRAT using the AFR as the interest rate may have a zero value, resulting in an immediate gift of the entire asset transferred.

**U.S. INTERNAL REVENUE CODE § 1031  
TAX DEFERRED LIKE KIND EXCHANGES**

**GREGG A. NATHANSON**

**U.S. INTERNAL REVENUE CODE § 1031**  
**TAX DEFERRED LIKE KIND EXCHANGES**

I. CODE § 1031 LIKE KIND EXCHANGE

- A. What is a 1031 tax deferred like kind exchange?
1. Transaction where property owner (the "Taxpayer") exchanges one property for another without incurring income tax on the gain.
  2. Must structure transaction as "exchange" of one property for another, as opposed to the sale of one property and the purchase of another.
  3. Tax on the transaction is *deferred* until some future date (i.e., when the newly acquired property is sold).
- B. Why is the exchange "tax deferred"?
1. The IRC § 1031 authorizes tax deferred exchanges.
  2. Because the IRS says so.
- C. What are advantages of a 1031 exchange?
1. Dispose of property without incurring immediate tax liability.
  2. Use tax deferred dollars in another investment.
  3. Interest free "loan" from the IRS.
  4. Tax deferred exchange becomes tax free exchange upon Taxpayer's death, since, at death, Taxpayer's heirs receive property with basis "stepped up" to fair market value at time of death.
- D. Are there any disadvantages of tax deferred exchanges?
1. Reduced basis in newly acquired property will result in more taxable gain when that property is sold.
  2. Increased transactional costs, such as attorney fees, escrow fees and intermediary fees.
  3. Taxpayer must apply proceeds from disposition of old property to acquisition of new property.

4. The IRC and IRS Regulations must be followed or the transaction will be subject to tax.
- E. What are the elements of a tax deferred exchange?
1. Both the "Relinquished Property" (the old property being disposed of) and the "Replacement Property" (the new property being acquired) must be either:
    - a. Held for productive use in a trade or business, or
    - b. Held for investment; and
  2. The Relinquished Property and Replacement Property must be of "like kind"; and
  3. The exchange must be a reciprocal transfer of properties as opposed to a sale and purchase.
- F. Must both properties be held either for productive use in a trade or business, or for investment?
1. Yes.
  2. Consider the use of each property by the Taxpayer, not other parties to transaction.
  3. Apply test at time of exchange (prior motives not controlling).
  4. Note: 1031 is not available for property held "primarily for sale" by a Taxpayer who is a "dealer" in real estate. Whether property is held by that Taxpayer primarily for sale is a question of fact.
- G. How long must Taxpayer hold Replacement Property?
1. The answer here, too, is a question of fact: did the Taxpayer intend to hold the Replacement Property for use in a trade or business or for investment, or merely resell it?
  2. Two (2) years is generally a safe holding period.
  3. Shorter holding periods may be acceptable, depending upon the Taxpayer's true intent at the time of the exchange.
  4. Be careful on transfers to limited liability companies or S corporations after the exchange if Relinquished Property was not held in that entity.

- H. What is "like kind"?
1. All real estate.
  2. May trade improved real estate for unimproved real estate.
  3. Personal property of the same kind or class.
  4. May not trade real estate for personal property, or personal property for a different kind of personal property.
- I. Must exchange occur at the same time?
1. No.
  2. Delayed exchanges are acceptable if all IRS requirements are satisfied.
- J. What are the basic 1031 delayed exchange requirements?
1. Use of qualified (exchange) intermediary.
  2. 45 day identification period.
  3. 180 day completion period.
  4. Appropriate identification of properties.
  5. Appropriate documentation and implementation of exchange.
- K. What is a Qualified Intermediary?
1. Facilitates deferred exchange by contracting with Taxpayer to do the following:
    - a. Acquire Relinquished Property from Taxpayer.
    - b. Transfer Relinquished Property to Purchaser (IRC and IRS Regulations permit Taxpayer to deed property directly to Purchaser).
    - c. Receive and hold "sale" proceeds from Purchaser.
    - d. Acquire Replacement Property from Seller.
    - e. Disburse "purchase" proceeds to Seller.
    - f. Transfer Replacement Property to Taxpayer.

2. Taxpayer does not receive proceeds from the disposition of Relinquished Property; proceeds are paid directly to Qualified Intermediary, which uses proceeds to acquire Replacement Property.
3. Most title companies have affiliates who act as exchange intermediaries, for a fee.

L. What is the 45 day identification period?

1. Taxpayer has 45 days from disposition of Relinquished Property to identify Replacement Property.
2. May identify up to three (potential) Replacement Properties without regard to fair market value ("Three-Property Rule"), or any number of (potential) Replacement Properties as long as their aggregate fair market value does not exceed 200% of the fair market value of the Relinquished Property ("200% Rule").
3. Notice must be signed by Taxpayer and hand delivered, sent by certified mail, faxed or emailed to, and received by, Qualified Intermediary before end of 45 day period.

M. What is 180 day completion period?

1. Taxpayer must receive Replacement Property within 180 days of surrendering control of Relinquished Property, or the date (including extensions) Taxpayer's tax return is due, whichever occurs first.
2. If exchange begins (i.e. Taxpayer surrenders Relinquished Property) after October 17, Taxpayer must extend tax return filing date beyond April 15 to avoid shortening 180 day period to complete exchange.

N. Generally, what type of documentation is required to satisfy 1031 requirements?

1. Purchase Agreement for Relinquished Property should reference the parties' intent to make transaction part of 1031 exchange.
2. Purchase Agreement for Replacement Property should reference the parties' intent to make transaction part of 1031 exchange.
3. For deferred exchange, need Exchange Agreement with Qualified Intermediary.
4. Assignment of Purchase Agreement, whereby Taxpayer assigns interest in Relinquished Property Purchase Agreement to Qualified Intermediary, and Purchaser of that property must consent to assignment.



5. Assignment of Purchase Agreement, whereby Taxpayer assigns interest in Replacement Property Purchase Agreement to same Qualified Intermediary, and Seller of that property must consent to assignment.
  6. Other documentation may be required, depending upon the specifics of the particular transaction.
- O. Could exchange result in immediate recognition of gain?
1. Yes.
  2. To avoid gain, Taxpayer must "trade even or up in equity and even or up in value."
  3. To the extent Taxpayer receives money or other property, Taxpayer will have "recognized gain" or "boot".
  4. Any errors in structuring, documenting or implementing the exchange could also cause the Taxpayer to recognize gain.

## II. NEW CONSTRUCTION EXCHANGE

### A. What is a New Construction Exchange?

A new construction exchange is when a Taxpayer uses an intermediary to acquire title to Replacement Property, and the Replacement Property is improved before the Taxpayer takes title.

### B. What is an example of a New Construction Exchange?

1. Taxpayer disposes of Relinquished Property for \$1,000,000.
2. At closing, funds paid to Qualified Intermediary.
3. Taxpayer identifies and uses Qualified Intermediary or Exchange Accommodation Titleholder (EAT) to acquire title to pre-improved Replacement Property, using \$600,000 of the \$1,000,000 of exchange proceeds.
4. IRS Rev. Proc. 2000-37, 2000-40 I.R.B. 308, and related rules permit EAT to acquire and hold title to Replacement Property, lease Replacement Property to Taxpayer and hire Taxpayer to manage construction of improvements.

5. Taxpayer, as construction manager, supervises improvement of Replacement Property. All \$400,000 of exchange proceeds are used to pay contractors to make improvements.
  6. EAT deeds improved Replacement Property to Taxpayer within 180 days after Taxpayer closes on disposition of Relinquished Property.
  7. If EAT takes title to Replaced Property using single member limited liability company, Taxpayer can acquire title to the Replacement Property indirectly, by acquiring 100% of the membership interests of EAT.
- C. The 45 day notice should identify the Replacement Property together with all anticipated newly constructed improvements.
- D. The key date is when the Taxpayer takes title to improved Replacement Property. Therefore, look to the value in place on the date the Taxpayer acquires title to improved Replacement Property.

### III. REVERSE EXCHANGE

- A. What is a 1031 "Reverse" Exchange?
1. Transaction where property owner (Taxpayer), in effect, acquires "replacement" property before disposing of "relinquished" property.
  2. In other words, the Taxpayer can buy first, then sell.
- B. How Does Taxpayer Do a Reverse Exchange?
1. IRS Rev. Proc. 2000-37 provides a safe harbor for reverse exchanges to qualify under Section 1031. Taxpayer must comply with its technical requirements.
  2. Taxpayer must contract with an Exchange Accommodation Titleholder ("EAT") by entering into a Qualified Exchange Accommodation Arrangement ("QEAA") for purposes of holding the property and meeting other requirements of Rev. Proc. 2000-37.
- C. What Are the Requirements of a QEAA?
1. The EAT must hold qualified indicia of ownership of the property at all times from the date of acquisition by the EAT until the property is transferred to the Taxpayer. Qualified indicia of ownership means legal title to the property, or other indicia of ownership so that the EAT is treated as beneficial owner of the property for legal and tax purposes.

2. When the EAT acquires title, it must be the Taxpayer's bona fide intent that the property be held by the EAT as either replacement property or relinquished property in a transaction intended to qualify as a Section 1031 exchange.
3. Within 5 business days after the EAT acquires the property, the Taxpayer and the EAT must enter into a written agreement (QEAA) confirming that the EAT is holding the property for the benefit of the Taxpayer in order to facilitate a Section 1031 exchange under Rev. Proc. 2000-37 and that the Taxpayer and EAT will report the acquisition, holding and disposition of the property accordingly.
4. The Taxpayer must identify the relinquished property within 45 days after the EAT acquires the replacement property. The Taxpayer may identify alternative and multiple properties, just like with a "straight" Section 1031 exchange.
5. Within 180 days after the EAT acquires the property:
  - a. The property must be transferred to the Taxpayer as replacement property; or
  - b. The property must be transferred to an unrelated person as the relinquished property.

D. What Permissible Arrangements Fall Within the Safe Harbor?

1. Rev. Proc. 2000-37 provides for a number of permissible agreements which will not, in and of themselves, defeat the exchange.
2. The EAT may enter into an exchange agreement with the Taxpayer and serve as the qualified intermediary in a simultaneous or tax-deferred exchange.
3. The Taxpayer may guarantee some or all of the obligations of the EAT, including secured or unsecured debt incurred to acquire the property.
4. The Taxpayer may indemnify the EAT against costs and expenses.
5. The Taxpayer may loan funds to the EAT.
6. The Taxpayer may guarantee repayment of a third party loan to the EAT.
7. The Taxpayer may lease the property from the EAT.

8. The Taxpayer may manage the property, supervise improvements of the property, act as a contractor, or otherwise provide services to the EAT with respect to the property.
  9. The Taxpayer and the EAT may enter into agreements relating to the purchase or sale of the property, including puts and calls at fixed or formula prices, for a period not exceeding 180 days from the date the EAT acquires the property.
- E. Can there ever be a reverse, new construction exchange?

Yes, with proper planning.

#### IV. SECOND OR VACATION HOMES

Can a second or vacation home ever qualify for 1031 treatment?

- A. IRS Rev. Proc. 2008-16, 2008-10 I.R.B. 547, provides a safe harbor for determining when a second or vacation home qualifies as property held for productive use in a trade or business or for investment, for purposes of a Section 1031 exchange.
1. Section 1031 provides that no gain or loss is recognized on the exchange of property held for productive use in a trade or business or for investment (Relinquished Property), if the property is exchanged solely for property of like kind that is to be held either for productive use in a trade or business or for investment (Replacement Property).
  2. The IRS has made clear that a “personal residence” is not property held for productive use in a trade or business or for investment and, therefore, cannot qualify as part of a Section 1031 Exchange. Rev. Proc. 2005-14; 2005-7 I.R.B. 528; Starker v. United States, 602 F.2d 1341, 1350 (9th Cir. 1979); and Moore v Commission, T.C. Memo. 2007-134. Compare IRC § 121.
  3. Rev. Proc. 2008-16 provides Taxpayers with a safe harbor under which a dwelling unit will qualify as property held for productive use in a trade or business or for investment under Section 1031 even though a Taxpayer occasionally uses the dwelling for personal purposes.
- B. What are Qualifying Use Standards for “Relinquished Property”?
1. The dwelling unit is owned by the Taxpayer at least 24 months immediately before the exchange (the “qualifying use period”); and

2. Within the qualifying use period, in each of the two 12-month periods immediately preceding the exchange:
    - a. The Taxpayer rents the dwelling unit to another person(s) at a “fair rental” for 14 days or more, and
    - b. The period of the Taxpayer’s personal use of the dwelling does not exceed the greater of 14 days or 10% of the number of days during the 12-month period that the dwelling unit is rented at a fair rental.
- C. What are Qualifying Use Standards for “Replacement Property”?
1. The dwelling unit is owned by the Taxpayer for at least 24 months immediately after the exchange (the “qualifying use period”); and
  2. Within the qualifying use period, in each of the two 12-month periods immediately after the exchange:
    - a. The Taxpayer rents the dwelling unit to another person(s) at a fair rental for 14 days or more, and
    - b. The period of the Taxpayer’s personal use of the dwelling does not exceed the greater of 14 days or 10% of the number of days during the 12-month period that the dwelling unit is rented at a fair rental.
- D. How is Personal Use Defined?
- Personal use is defined in IRC § 280A(d)(2) and includes use by the Taxpayer, the Taxpayer’s family or a co-owner. Family includes Taxpayer’s spouse, brothers, sisters, ancestors and lineal descendants. There is an exception if a family member rents the property at fair market value *and* the family member uses the property as his or her principal residence.
- E. How is Fair Rental Value Determined?
- Fair rental is determined based on all the facts and circumstances that exist when the rental agreement is entered into.
- F. Any Other Considerations?
- A Taxpayer utilizing this safe harbor must also satisfy all other requirements for a Section 1031 like-kind exchange.

- G. Even if a vacation property does not fall squarely within the safe harbor provided by Rev. Proc. 2008-16, it is still possible for a Taxpayer to establish that the property qualifies under Section 1031 as property held for productive use in a trade or business or for an investment.