Disposition of Tax Foreclosed Property

In the Board Room

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What are we going to cover?

1. Pre Act 216
2. Act 216
3. *Tyler v. Hennepin County*
4. Act 207
5. *Pung v. Isabella County*
6. Future Discussion
7. Public Comment

Pre Act 216

Background

- If someone does not pay their property taxes, counties may foreclose on and take ownership of the property.

- What happens when a county subsequently resells the property for a price that exceeds the tax debt?

Early On: Wild West

- Wisconsin Courts generally refused to recognize a common law right on the part of a former property owner to any surplus proceeds left over after a local government takes ownership of the property for unpaid taxes and then sells it.

- In the late 1980s, the Legislature granted homestead property owners certain statutory rights regarding surplus proceeds generated after the subsequent sale of a tax-foreclosed property

Act 216

Act 216

- In 2022, the Wisconsin Legislature enacted new legislation (2021 Wisconsin Act 216) which required counties to send any surplus proceeds from a subsequent sale of a tax-foreclosed property to the former property owner, regardless of whether the property was a homestead property.

Tyler v. Hennepin County

Tyler v. Hennepin County

- In 2023, the U.S. Supreme Court decided *Tyler v. Hennepin County.*

- The Court held that a homeowner stated a claim under the U.S. Constitution’s Takings Clause when a Minnesota county foreclosed on a property to satisfy a $15,000 tax debt, sold the property for $40,000, and retained all proceeds.

Tyler v. Hennepin County (cont'd)

- "The County had the power to sell Tyler's home to recover the unpaid property taxes. But it could not use the toehold of the tax debt to confiscate more property than was due. By doing so, it effected a 'classic taking in which the government directly appropriates private property for its own use.' Tyler has stated a claim under the Takings Clause and is entitled to just compensation."

- "A taxpayer who loses her $40,000 house to the State to fulfill a $15,000 tax debt has made a far greater contribution to the public fisc than she owed. The taxpayer must render unto Caesar what is Caesar's, but no more."

Tyler v. Hennepin County (cont'd)

- The Court's decision in *Tyler* did not address a number of issues related to the implementation of its holding:

- When does the "taking" occur? When the deed is acquired? When the property is sold?

- How is the property valued for purposes of determining when "just compensation" is owed? Is it the surplus generated? Or just fair-market value of the property at the time of foreclosure?

- Does Tyler mandate the sale of property?

Tyler v. Hennepin County (cont'd)

- After *Tyler*, Wisconsin legislators were anxious to codify in statute an obligation to sell tax-deeded properties and a requirement that any excess proceeds be returned to the former owner.
- This desire resulted in 2023 Wisconsin Act 207, which made several changes to state law that are notable regarding disposition of tax-foreclosed properties:
  - Requirement to sell?
  - Right of former owner to repurchase
  - Treatment of surplus proceeds

Act 207

Act 207

- Act 207 provides (at Section 15) that within 240 days and, beginning in 2026, within 180 days, of a county acquiring a tax deed, the county must advertise the property for sale by publishing on the county's website and either (a) providing a class 1 notice; or (b) advertising on a multiple listing service.

- The publication requirement (and all of the provisions within the Act) apply to tax deeds a county acquired or will acquire from April 1, 2022, and after. However, the 240 day publication requirement deadline does not start until the effective date of Act 207 for deeds acquired before the effective date of Act 207.

Act 207 cont'd:
Right of Former Owner to Repurchase

- Section 7 of Act 207 ***requires*** counties – with respect to single-family, owner-occupied properties – to have an ordinance or resolution that gives former owners, their beneficiaries, or their heirs the right to repurchase tax-foreclosed properties by paying the county for its costs and expenses incurred plus the amount of property taxes that would have been owed on the property for the year during which the purchase occurs if the county had not acquired the property plus amounts to satisfy any other liens at the time of the foreclosure including the county's costs associated with the repurchase.

Act 207 cont'd: Right of Former Owner to Repurchase

- Such repurchases are excluded from the notice requirements the county must follow when selling tax-foreclosed properties.

- Such an ordinance ***may*** apply to all other properties in the county as well.

Act 207 cont'd:
Right of Former Owner to Repurchase

- If the ordinance applies only to owner-occupied properties, how are you policing whether a property is owner-occupied?
- The former owner's right to repurchase must apply "prior to the sale of tax-deeded lands" – when does the right expire?
  - When a sale is closed?
  - When the property is noticed for sale?
  - Some other time?
  - Can you cut off repurchase rights at a certain point?

Act 207 cont'd:
Right of Former Owner to Repurchase

- How do you handle repurchases by heirs or beneficiaries?
- What are the county's "costs and expenses?"
- Is the county required to pay off any liens or is verification enough?
- How are lien payoffs verified?
- Can the county require pre-payment of title costs?

Act 207: Treatment of Surplus Proceeds

- Prior to Act 207, if the county was unable to locate the former owner within five (5) years following the mailing of the notice of the existence of the proceeds, the former owner forfeited the proceeds.
- Act 207 eliminates the "locate" requirement and instead requires a county to transmit any unclaimed surplus proceeds to unclaimed funds under Wis. Stat § 59.66(2) if the payment mailing is returned or otherwise not claimed within one (1) year of the sale.

Act 207: Treatment of Surplus Proceeds

- Prior to Act 207, a county was required to use any excess sale proceeds from the sale of a tax-deeded property to “pay off any lien placed on the property at the time of the foreclosure sale in accordance with the contract or law giving rise to the lien.”
- Act 207 repeals this requirement and removes lien repayment from the calculation of the proceeds due to the former owner.

Act 207: Right to Petition for Relief from Deadlines

- Act 207 creates the ability of a county to petition the circuit court that handled the initial tax foreclosure for relief from any provisions in Chapter 75, including the notice deadlines for sales of tax-deeded properties, for cause, so long as the petition is filed no later than the applicable deadline for publishing notice.

Statutory Defense

75.35 (7) Liability Precluded. Absent fraud, no county is liable for acts or omissions associated with the sale of property under this section, <u>including the process by which the property is sold.</u>

However: Compliance with Act 207. secs. 75.35, 75.36 and 75.69 do not automatically result in compliance with *Tyler*.

Disposing of Tax-Foreclosed Properties

Disposing of Tax-Foreclosed Properties

1. Upon acquisition of tax deed, provide notice to former owner of right to potential surplus proceeds
2. Follow local ordinance for ensuring the right of a former owner to repurchase the property.
3. Provide notice to taxing jurisdictions of unsettled special assessments or special charges.
4. Unless former owner exercises right to repurchase, advertise the sale and appraised value of the property.

Disposing of Tax-Foreclosed Properties

5. On first attempt to sell, advertise the sale and appraised value by (1) publishing on county's website and (2) either publishing a class 1 notice or advertising on MLS.
6. On the first attempt to sell, must reject bids less than appraised value. Otherwise, must accept highest bid exceeding appraised value unless the county board or a designated committee prepares a written statement, available for public inspection, explaining the reasons for accepting a bid less than the highest bid.

Disposing of Tax-Foreclosed Properties

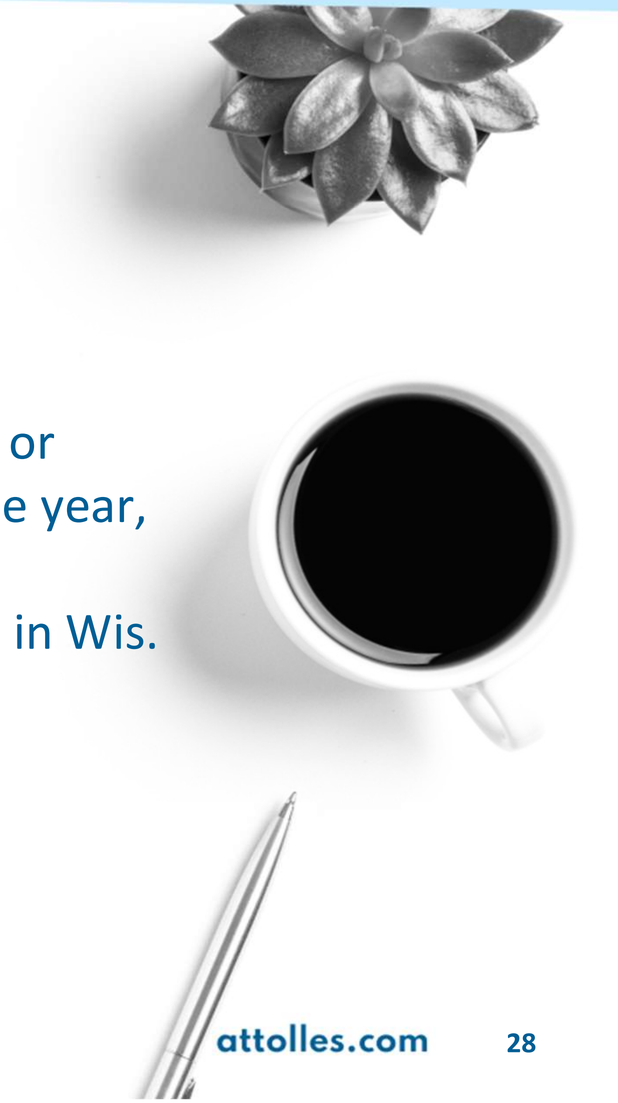
7. Subsequent attempts to sell property may be advertised through publication of Class 1 notice.
8. On subsequent attempts, property may be sold for less than appraised value if county board or designated committee reviews and approves sale. Highest bid must still be accepted unless county board or designated committee provides written explanation.
9. In all cases, notice of sale must be mailed to municipal clerk where real estate is located at least 3 weeks prior to sale.

Disposing of Tax-Foreclosed Properties

10. Determine net proceeds of sale by subtracting costs of sale.
11. Pay any MFL withdrawal taxes or fees due DNR and any special assessments.
12. Send remainder to the former owner minus: (1) delinquent taxes, interest, and penalties owed by former owner to the count on other property and (2) the property taxes that would have been owed on the property for the year during which the sales occurs if the county had not acquired property.

Disposing of Tax-Foreclosed Properties

13. If payment to former owner is returned to the county or otherwise not claimed by the former owner within one year, the payment is considered unclaimed funds.
14. County Treasurer should dispose of funds as provided in Wis. Stat § 59.66(2).



Pung v. Isabella County, Michigan

Pung v. Isabella County, Michigan

- The U.S. Supreme Court recently decided another case addressing tax-foreclosed properties.
- County took title to a home for unpaid tax bills, penalties, and interest totaling $2,242.
- Former property owner claimed the home had an assessed fair market value of $194,400, but the county subsequently sold the home for $76,008.
- The purchaser at the tax sale allegedly then resold the property for $195,000, which the former property owner asserted confirms the actual value.

Pung v. Isabella County, Michigan (cont'd)

- Lower courts concluded Pung is only entitled to the surplus proceeds generated by the auction price.
- Pung asserted that "just compensation" must be measured by the "fair market value" of the property and not what Pung calls "the depressed proceeds of an inadequate auction conducted by the taker."
- This case presented the question of whether the U.S Constitution requires that a county foreclosing on a property compensate the former owner for the difference between the "fair market value" of the property and the tax debt (rather than any surplus proceeds from a subsequent sale).

Pung v. Isabella County, Michigan (cont'd)

- The Supreme Court of the United States held that "just compensation" in tax sales is based on the price obtained in the sale, not the property's fair market value so long as the sale was conducted fairly

- The Court did not address what it means for a tax sale to be conducted fairly, nor whether the sale at issue here was conducted fairly (the lower courts will likely address this in the future).

What next?

What next?

Palmer 67 Revocable Trust v. Walworth County, Wisconsin

- Pending Eastern District case in which Walworth County allegedly sold a tax foreclosed property valued at $382,000 to the City of Elkhorn without auction for $23,312.02; exactly the amount of the tax debt
- The Trust alleges the County violated the takings clause by selling the property for only $23,312.02 and not taking it to auction, effectively taking property worth far more than the tax debt but not compensating the Trust for surplus proceeds (because none existed)
- The County argues that Wis. Stat. 75.69(2) provides that "the sale or exchange of lands to or between municipalities" are exempt from usual statutory procedures for the sale of tax delinquent real estate.

What next?

- Is an exchange under 75.69(2) a fair disposal of the tax foreclosed property?
- What else is fair / unfair?
- Await further court decisions and legislative guidance

ATTOLLES
LAW, S.C.

QUESTIONS?

Thank You!

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