RPTL Article 11 and the implications of Tyler v. Hennepin County

Joseph K. Gerberg, Esq.

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The Implications of *Tyler v Hennepin County, Minnesota* for Real Property Tax Enforcement in New York State

Prepared by Joseph K. Gerberg, Esq., of the New York State Dept. of Taxation and Finance, for a CLE presentation to the County Attorneys' Association of the State of New York (CAASNY) on December 4, 2023 in Cooperstown, New York

1. Current RPTL Article 11
    a. Background
        i. Enacted by L.1993, c.602, effective Jan 1, 1995
            1. Repealed Article 10 (Administrative tax sales)
            2. Substantially revised Article 11 (Foreclosure by action in rem)
        ii. Generally applicable to all tax districts
            1. Subject to a brief opt out window for tax districts that were not already operating under RPTL Arts 10 or 11
            2. Counties that opted out:
                a. Erie, Monroe, Nassau, Onondaga, Oneida, Suffolk
            3. All others are subject to Article 11
            4. For a complete list, including cities and villages: https://www.tax.ny.gov/research/property/legal/localop/1104.htm
    b. Current RPTL 1136(3)
        i. In order of foreclosure, court judgment awards "possession" to the county
            1. Or another type of "tax district" (e.g. a city) if applicable
        ii. Also directs the County Treasurer to execute a deed
            1. Conveys "full and complete title" to the county
            2. Deed gives the county "estate in fee simple absolute"
            3. It also extinguishes anyone else's "right, title interest, claim, lien or equity of redemption" in the property
    c. Then RPTL § 1166 allows the county to sell the property
        i. May be sold either by private sale or public auction
        ii. If private sale, county legislature must approve
        iii. If sold at public auction to highest bidder, no approval requirement
        iv. Nothing in the RPTL requires the county to return surplus to owner
        v. In fact, until recently it was generally understood that there was no such requirement
            1. Sheehan v. County of Suffolk, 67 N.Y.2d 52, 499 N.Y.S.2d 656,490 N.E.2d 523 (1986), *rearg. denied* 67 N.Y.2d 918, *cert denied sub nom.* *MacKechnie v. County of Sullivan*, 478 U.S. 1006 (1986): "There is no unfairness, much less a deprivation of due process, in the county's retention of any surplus. …. A three-year redemption period, as set forth in the challenged statutes, gives sufficient opportunity for a taxpayer to reclaim the property. [Once that period has expired], the former owner can no longer claim any just compensation upon its resale." 67 N.Y.2d at 59.
            2. Hoge v. Chautauqua County, 173 A.D.3d 1731, 104 N.Y.S.3d 813 (2019): "Where the tax district obtains a valid default judgment of foreclosure, … the former property owners are not 'entitled to any compensation upon the resale of the property' (*Citation omitted*),

and the tax district may 'retain ... the entire proceeds from [the re]sale' (*Ellipsis and bracketing in original*)."

3. *See also* NYS Const. Art XIII, § 1 ("the Gifts and Loans clause"): "No county, city, town, village or school district shall give or loan any money or property to or in aid of any individual, or private corporation or association…."

d. *Tyler* decision turned that understanding on its head

2. *Tyler v Hennepin County*
   a. Handed down May 25, 2023, Slip Opinion No. 22-122
   b. Unanimous decision written by Chief Justice Roberts
   c. Generally requires surplus from a property tax foreclosure to be paid to the former owner
   d. Holding was based on the "Takings Clause" of the 5th Amendment of the US Constitution, which states that "private property [shall not] be taken for public use, without just compensation."
   e. Essential facts:
      i. Ms. Tyler's condo was subject to a tax debt of $15,000.
      ii. Hennepin County foreclosed and sold it for $40,000.
      iii. The county retained the resulting $25,000 surplus per MN law.
   f. The Court stated that while the county had the power to sell her home for the delinquent taxes, under the Takings Clause it could not keep more than was due
   g. The Court observed that taxpayers' rights to surplus in other contexts are clearly established, and saw no rationale for declining to recognize it here
      i. "The taxpayer must render unto Caesar what is Caesar's, but no more."
   h. Concurring opinion by Justice Gorsuch, joined by Justice Jackson
      i. Would have also required surplus to be returned based on the "Excessive Fines" clause of the 8th Amendment of the US Constitution
         1. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."
      ii. Majority opinion declined to reach the Excessive Fines issue
   i. Clearly, the Court's decision takes precedence over any contrary State law
      i. That would include the New York State RPTL and any local tax acts to the extent they deny the prior owner any right to surplus
   j. The question now is how the State's foreclosure process should be modified to comply with *Tyler* going forward
   k. Challenges presented by Court's decision:
      i. No discussion of adequacy of sales process
      ii. No discussion of adequacy of sales price
      iii. Minimal discussion of what administrative expenses are recoverable
         1. Only a statement that "the costs of collecting" the past due taxes may be considered when determining the amount of the surplus (Slip Opinion p.4)
      iv. No discussion of how owners should be identified and notified of surplus
      v. Minimal discussion of what when and how owners should be allowed to claim the surplus
         1. Only addressed in passing, when explaining why Nelson v City of New York, 352 U.S. 103 (1956) was distinguishable (Slip Opinion pp.10-11)
            a. Ordinance therein gave owners "20 days to ask for the surplus from any tax sale"

            b. So it did not “absolutely preclud[e]” former owners from claiming surplus; it merely “defined the process” through which they could make such claims
            c. By contrast, MN law lacked a similar process; instead, it precluded former owners from making such claims
        vi. No discussion of county’s responsibilities if the property is not sold
        vii. Minimal discussion of rights of mortgagees or other lienors
            1. No such parties had appeared
            2. County had raised the issue to show the former owner had no equity in the property
            3. The Court rejected this argument, reasoning that even if her equity had been offset by other liens, she still could have used the surplus to reduce her personal liability, if any, to the lienors (Slip Opinion pp. 3-4)
        viii. No discussion of retroactivity
            1. Does the court’s holding extend to owners whose properties were foreclosed upon and sold prior to 5/25/2023?
            2. For some possibly relevant SCOTUS decisions, see # 6 below
3. Bankruptcy implications
    a. 11 U.S.C. § 548 and “reasonably equivalent value”
    b. BFP v. Resolution Trust Corp., 511 U.S. 531 (1994),
    c. Gunsalus v. County of Ontario, 37 F.4th 859 (2d Cir. 2022), *cert. denied*, 143 S. Ct. 447 (2022)
    d. DuVall v. County of Ontario, _ F.4th _ (2nd Cir 9/29/2023), Docket No. 21-2917-bk
4. Legislative Proposals
    a. Moratorium bill – S.7549a (Thomas) & A.7663 (Hunter)
        i. Passed both Houses, still awaiting delivery to Governor as of 11/9/2023
        ii. If signed, would generally preclude the sale of properties acquired through *in rem* foreclosure
        iii. Would expire June 30, 2024
    b. No other foreclosure reform bill has passed both Houses as of 11/9/2023, but several bear mention
    c. 2023 Executive Budget Proposal – S.4009a & A.3009a, Part M
        i. Introduced in January, before Tyler decision had been handed down
        ii. Was not included in the final budget that was passed in early May
        iii. Would have expressly allowed county to retain “interest, penalties and other charges … including the administrative costs associated with the foreclosure process”
        iv. Would have provided for surplus to be distributed in same manner as set forth in RPAPL Article 13 for mortgage foreclosures
            1. Implicitly incorporating RPAPL §§ 1351-1562
            2. So any surplus would be distributed to mortgagees and lienors, if any, and only the residue, if any, would go to the former owner
        v. Otherwise, minimal discussion of process to be followed
    d. Ryan-Williams bill – S.7514 & A.5607
        i. Same structure as Budget Proposal, with an additional notice requirement
        ii. Reported out of Assembly RPT Committee, which M. of A. Williams chairs
        iii. No other movement
    e. NYSAC Team Working Draft – Work in progress, not introduced as of 11/9/2023
        i. Similar in structure to Budget Proposal, but content deviates significantly

ii. Would expressly allow county to retain "interest, penalties and other charges … including the administrative, auction and reasonable legal fees and/or costs associated with the foreclosure process."
iii. All surplus would be paid to former owner, none to mortgagees/lienors
iv. Former owner would have to claim within 30 days of notice of foreclosure
v. Former owner would be estopped from certain actions in bankruptcy
vi. Former owner would be obliged to indemnify county for losses resulting from third party claims

f. Harckham-Hunter bill – S.5383 & A.786
   i. Would create right to surplus for former owners of residential, farm or commercial property
      1. No such right would be created for mortgagees/lienors
   ii. Imposes notice requirements
   iii. No movement in either house
g. Kavanagh-O'Donnell bill – S.2082 & A.2305
   i. Directs court with jurisdiction over foreclosure proceeding to require that former owners be notified of their right to file a claim for any surplus
   ii. This bill predates the Tyler decision
   iii. No movement in either House
h. Thomas-Weinstein bill – S.5213 & A.4935
   i. Would establish a Homeowner Bill of Rights
   ii. Pre-foreclosure notices, mandatory settlement conferences
   iii. No movement in either House

5. Merckx Litigation
   a. Class Action Complaint against two counties, one city, and New York State
      i. The counties are Rensselaer and Cattaraugus
      ii. Both are Article 11 counties
      iii. The city is Port Jervis
   b. Filed 10/31/23 in US District Court, Northern District of New York
   c. Seeks relief from allegedly unconstitutional practice of retaining surplus
   d. Counts against local governments:
      i. Federal takings clause
      ii. NYS takings clause
      iii. Federal excessive fines clause
      iv. NYS excessive fines clause
      v. Unjust enrichment
      vi. Money had and received
      vii. Equitable accounting
      viii. Inverse condemnation
   e. Count against NYS:
      i. Declaratory Judgment that RPTL §1136[2](D) violates federal constitution
6. Retroactivity in State Tax Cases
   a. Chevron Oil Co. v. Huson, 404 U.S. 97 (1971)

      "In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied [*Citation omitted*], or by deciding an issue of first impression whose resolution was not clearly foreshadowed [*Citation omitted*]. Second, it has been stressed that 'we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective

operation will further or retard its operation.' [*Citation omitted*]. Finally, we have weighed the inequity imposed by retroactive application, for '[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardship by a holding of nonretroactivity.' [*Citation and internal quotation marks omitted*]." 404 U.S. at 106 (Opinion of Stewart, J.)

b. American Trucking Associations Inc. v. Smith, 496 U.S. 167 (1990)
   "In sum, we conclude that applying [a prior decision that invalidated a similar tax] retroactively would 'produce substantial inequitable results.' *Chevron Oil*, 404 U.S. at 107. The invalidation of the [tax at issue herein] has the potential for severely burdening the State's operations. That burden may be largely irrelevant when a State violates constitutional norms well established under existing precedent. [*Citation omitted*]. But we think it unjust to impose this burden when the State relied on valid existing precedent in enacting and implementing its tax." 498 U.S. at 183 (Plurality Opinion of O'Connor, J.)

c. James B. Beam Distilling Co. v. Georgia, 501 U.S. 529 (1991)
   "The grounds for our decision today are narrow. They are confined entirely to an issue of choice of law: when the Court has applied a rule of law to the litigants in one case, it must do so with respect to all others not barred by procedural requirements or *res judicata*." 501 U.S. at 544 (Opn. of Souter, J.)

d. Harper v. Virginia Department of Taxation, 509 U.S. 86 (1993)
   "When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." 509 U.S. at 97 (Opinion of Thomas, J.)

7. Bonus materials
   a. Selected county tax acts that allow for distribution of surplus
      i. Erie County Tax Act § 11-26.0: "In the event that such a sale shall result in a surplus as to any piece or parcel of land offered at such sale, such commissioner of finance as referee shall report the fact of such surplus to the court which shall direct the commissioner of finance as referee to deposit such surplus in trust with the commissioner of finance for the benefit of whomsoever may be justly entitled thereto."
      ii. Monroe County Tax Foreclosure Act § 10: "Distribution of proceeds of sale. After the payment of all lawful costs, allowances and disbursements, the plaintiff and the defendants in said action who are the owners or holders or any liens on or interests in the lands, evidenced by certificates of sale, or otherwise, shall be paid from the proceeds of the sale the several amounts of their respective liens and interests to which they may be entitled, so far as the said proceeds shall suffice to pay the same, in the order of the lawful priority of such liens and interests of the respective parties on or in the lands, as the same may be determined in such action."
   b. Selected NYS Court of Appeals decisions on unjust enrichment
      i. Mandarin Trading Ltd. v Wildenstein, 16 NY3d 173, 182 (2011): The key elements of a claim for unjust enrichment are that "(1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered."

ii. Georgia Malone & Co., Inc. v Rieder, 19 N.Y.3d 511 (2012): A claim for unjust enrichment could not be maintained absent a "nexus" between the parties; their relationship was "too attenuated because they simply had no dealings with each other."

§ 1136. Final judgment. 1. Generally. The court shall have full power to determine and enforce in all respects the priorities, rights, claims and demands of the several parties to the proceeding, as the same exist according to law, including the priorities, rights, claims and demands of the respondents as between themselves. The court shall further determine upon proof and shall make findings upon such proof whether there has been due compliance by the tax district with the provisions of this article.

2. When an answer has been interposed. (a) When an answer has been interposed by a party other than a tax district as to any parcel of real property included in the petition described in section eleven hundred twenty-three of this chapter and the court determines that the answer is meritorious, the court shall dismiss the petition of foreclosure, with or without prejudice, as to the affected parcel or parcels, unless an agreement is executed pursuant to subdivision two of section eleven hundred fifty of this article. If the court determines that the answer is not meritorious, the court shall make a final judgment awarding to such tax district the possession of the affected parcel or parcels in the same manner as provided by subdivision three of this section.

(b) When an answer has been interposed by another tax district as to any parcel and the court shall determine that such other tax district has an interest in such parcel, then and in that event the tax districts having an interest in such parcel may by agreement between themselves pursuant to subdivision one of section eleven hundred fifty of this article provide (i) for a conveyance without sale of any such parcel to one of such tax districts free and clear of any right, title or interest in or lien upon such parcel or such other tax district or districts or (ii) for a conveyance without sale of any such parcel to one of such tax districts subject to any right, title or interest in or lien upon such parcel of such other tax district or districts. In either of such events, the court shall in its judgment expressly dispense with the sale and direct the making and execution of a conveyance by the enforcing officer in accordance with such agreement. In the absence of such an agreement, the court shall make a final judgment directing the sale of such parcel.

(c) Any sale directed by the court pursuant to this subdivision shall be at public auction by the enforcing officer. Public notice thereof shall be given once a week for at least three successive weeks in a newspaper published in the tax district, if any, or if none, in a newspaper published in the county in which such tax district is situated. The enforcing officer shall receive no additional fee or compensation for such service. The description of the parcel offered for sale in such notice shall be that contained in the petition with such other description, if any, as the court may direct.

(d) In directing any conveyance pursuant to this subdivision, the judgment shall direct the enforcing officer of the tax district to prepare and execute a deed conveying title to the parcel or parcels of real property concerned. Such title shall be full and complete in the absence of an agreement between tax districts as herein provided that it shall be subject to the tax liens of one or more tax districts. Upon the execution of such deed, the grantee shall be seized of an estate in fee simple absolute in such parcel unless the conveyance is expressly made subject to tax liens of a tax district as herein provided, and all persons, including the state, infants, incompetents, absentees and

non-residents, who may have had any right, title, interest, claim, lien or equity of redemption in or upon such parcel, shall be barred and forever foreclosed of all such right, title, interest, claim, lien or equity of redemption.

3. When no answer has been interposed. The court shall make a final judgment awarding to such tax district the possession of any parcel of real property described in the petition of foreclosure not redeemed as provided in this title and as to which no answer is interposed as provided herein. In addition thereto such judgment shall contain a direction to the enforcing officer of the tax district to prepare, execute and cause to be recorded a deed conveying to such tax district full and complete title to such parcel. Upon the execution of such deed, the tax district shall be seized of an estate in fee simple absolute in such parcel and all persons, including the state, infants, incompetents, absentees and non-residents who may have had any right, title, interest, claim, lien or equity of redemption in or upon such parcel shall be barred and forever foreclosed of all such right, title, interest, claim, lien or equity of redemption.

Real Property Tax

§ 1166. Real property acquired by tax district; right of sale. 1. Whenever any tax district shall become vested with the title to real property by virtue of a foreclosure proceeding brought pursuant to the provisions of this article, such tax district is hereby authorized to sell and convey the real property so acquired, which shall include any and all gas, oil or mineral rights associated with such real property, either with or without advertising for bids, notwithstanding the provisions of any general, special or local law.

2. No such sale shall be effective unless and until such sale shall have been approved and confirmed by a majority vote of the governing body of the tax district, except that no such approval shall be required when the property is sold at public auction to the highest bidder.

Sheehan v. County of Suffolk

67 N.Y.2d 52,499 N.Y.S.2d 656,490 N.E.2d 523 (1986)

Opinion

Argued January 9, 1986

Decided February 13, 1986

Appeal from the Supreme Court, Suffolk County, Paul T. D'Amaro, J.

Appeal from the Supreme Court, Sullivan County, Vincent G. Bradley, J.

Irwin Popkin and *David N. Brainin* for appellants in the first above-entitled action. *Martin Bradley Ashare, County Attorney (John C. Bivona* of counsel), for respondent in the first above-entitled action.

Edward J. Meyer for appellants in the second above-entitled action.

James G. Sweeney, County Attorney, for County of Orange, respondent in the second above-entitled action.

Robert Abrams, Attorney-General (Michael S. Buskus, Robert Hermann and *Peter H. Schiff* of counsel), for State of New York, respondent in the second above-entitled action and in his statutory capacity under Executive Law § 71 in both the first and second above-entitled actions.

TITONE, J.

The question presented is whether a real property tax scheme which requires notice to a taxpayer of taxes due, notice of delinquent taxes, notice of a tax lien sale, a tax sale without competitive bidding, a redemption period and notice of the impending expiration of the redemption period before the resale of the property at public auction and retention of any surplus by the county, deprives a taxpayer of property without due process of law or constitutes a taking without just compensation. We hold that it does not.

I A

In *Sheehan v County of Suffolk,* the named plaintiffs are former resident owners of real property in Suffolk County. It is undisputed that both plaintiffs failed to pay real property taxes due. Pursuant to Suffolk County Tax Act (SCTA) § 26 (2) (L 1920, ch 311, as amended), the

county mailed the following notice to each plaintiff: "The records of this office indicate that you have neglected to pay the taxes levied against real property assessed to you for the current tax year. You are hereby notified that pursuant to the law the tax rolls have been returned to the county treasurer and that unless the unpaid taxes, plus interest and penalties, are paid prior to the publication of the tax sale lists which will occur soon after September 1st next, the tax lien against your real property will be advertised for sale in the following newspapers designated to publish tax sale lists this year to wit: [names of newspapers] and such tax lien will be sold pursuant to such advertisement. For further information you must communicate with the county treasurer at Riverhead, New York, giving him your name and address and a brief description of your real property including map and lot number". Subsequently, Suffolk County purchased the tax liens at a sale at which it was the only bidder allowed (Suffolk County Legislature Resolution No. 829-1971).

At least three months prior to the end of the 36-month redemption period, a notice of unredeemed real estate was both published (SCTA § 52) and mailed to the plaintiffs (Real Property Tax Law § 1014). After the redemption period expired, the county automatically obtained deeds to the properties from the county treasurer. Following the conveyance of the deeds, the taxpayers were allowed nine additional months within which to redeem the properties. Neither taxpayer made any timely effort to redeem. Several years later, the county sold the properties at public auctions and retained the substantial differences between the lien amounts and the sale prices.

Plaintiffs then commenced this action for a determination of claims to the real property and for a judgment declaring the County's tax scheme unconstitutional. Special Term dismissed the complaint upon cross motions for summary judgment. Plaintiffs appeal directly to this court, pursuant to CPLR 5601 (b) (2), challenging only the constitutionality of the statutory scheme, having waived all other nonconstitutional claims (Cohen and Karger, Powers of the New York Court of Appeals § 58, at 262-263 [rev ed]).

B

In *MacKechnie v County of Sullivan* each of the named plaintiffs failed to pay real property taxes after each received notice by mail of the tax obligation (Real Property Tax Law § 922). Proper advance notice of an impending tax sale was given (Real Property Tax Law § 1002). Pursuant to Real Property Tax Law § 1008 (3) and resolutions passed by the defendant counties, the counties purchased the properties at tax sales without competitive bidding.
The plaintiffs were permitted to redeem their properties during a three-year period (Real Property Tax Law §§ 1010, 1022, 1024). Within six months of the expiration of the redemption period, each plaintiff received notice by mail of the upcoming expiration. None of the plaintiffs redeemed. The counties took deeds to the properties pursuant to Real Property Tax Law § 1018.

The counties sold most of the properties at public auctions and retained the proceeds in excess of the taxes and penalties due. Orange County still retains the deed to one property upon which it refuses to allow redemption.

Plaintiffs' action for a judgment declaring the statutory tax scheme unconstitutional, for damages and for injunctive relief was dismissed by Special Term for failure to state a cause of action. They have taken a direct appeal from the judgment to this court (CPLR 5601 [b] [2]).

II

Plaintiffs urge that the counties' failure to inform them that the tax liens would not be sold at a competitive bidding and that they would not receive any surplus from the ultimate public auctions of the properties violated the due process clauses of the State and Federal Constitutions. They also contend that permitting the counties to purchase tax liens without competitive bidding and then ultimately to sell the properties without turning over the surplus to the owners amounts to a taking without just compensation. We disagree, and affirm both judgments.

Analysis should begin with the well-settled proposition that an owner of property is charged with knowledge of statutory provisions affecting the control or disposition of his or her property *(Texaco, Inc. v Short,* 454 U.S. 516, 531; *Congregation Yetev Lev D'Satmar v County of Sullivan,* 59 N.Y.2d 418, 423). So viewed, it was the plaintiffs' failure to inform themselves of the relevant competitive bidding and forfeiture statutes that worked the arguably harsh consequences, not the statutory provisions *(United States v Locke,* 471 U.S. 84, ___, 105 S Ct 1785, 1799).

Due process does not require that every taxpayer be advised of the possible consequences attaching to a default in payment *(United States v Locke, supra; Texaco, Inc. v Short, supra; North Laramie Land Co. v Hoffman,* 268 U.S. 276; *Congregation Yetev Lev D'Satmar v County of Sullivan, supra; Lily Dale Assembly v County of Chautauqua,* 52 N.Y.2d 943, *affg* 72 A.D.2d 950, *cert denied* 454 U.S. 823). Once taxpayers are provided with notice and an opportunity to be heard on the adjudicative facts concerning the valuation of properties subject to tax, as was done here, they have received all the process that is due *(Mennonite Bd. of Missions v Adams,* 462 U.S. 791, 798-800; *Mullane v Central Hanover Trust Co.,* 339 U.S. 306; *Botens v Aronauer,* 32 N.Y.2d 243, *appeal dismissed* 414 U.S. 1059; 3 Davis, Administrative Law § 15:9 [2d ed 1980]). At this juncture, summary remedies for the collection of taxes may be invoked *(Botens v Aronauer, supra).*

There is no unfairness, much less a deprivation of due process, in the county's retention of any surplus. The taxpayers in each of the statutory schemes under review are given a three-year period of redemption. During this period, plaintiffs had the opportunity to either pay the taxes and penalties due or sell the property subject to the lien and retain the surplus. This redemption period affords the taxpayer an opportunity to avoid a full forfeiture *(see, Chapman v Zobelein,* 237 U.S. 135). Statutes which allow a State to retain the excess collected upon the

public sale of property have been sustained where they provide for a lengthy redemption period *(Chapman v Zobelein, supra; Turner v New York,* 168 U.S. 90, 94; *Balthazar v Mari Ltd.,* 301 F. Supp. 103, *affd* 396 U.S. 114).

A three-year redemption period, as set forth in the challenged statutes, gives sufficient opportunity for a taxpayer to reclaim the property. It is not unjust for a legislative body to declare that once a taxpayer has abandoned rights in property after such a period has expired, the taxing authority may take a deed in fee. At that point, the former owner can no longer claim any just compensation upon its resale *(Texaco, Inc. v Short,* 454 U.S. 516, 530, *supra).* Full forfeiture has already occurred upon the taxpayer's failure to redeem the property before it has been resold.

There is no constitutional prohibition against such a full forfeiture *(Balthazar v Mari Ltd.,* 301 F. Supp. 103, *affd* 396 U.S. 114, *supra; see also, Nelson v City of New York,* 352 U.S. 103; *Chapman v Zobelein, supra). United States v Lawton* (110 U.S. 146) did not hold to the contrary. In *Lawton,* the Federal statute under which the property was sold required return of any surplus. Obviously, in the face of such a statute, payment of any excess to the former owner was required and *Nelson v City of New York (supra,* at pp 109-110) expressly distinguished *Lawton* on that basis.

Finally, there is no constitutional requirement that tax liens be sold only through competitive bidding *(Saranac Land Timber Co. v Comptroller of N.Y.,* 177 U.S. 318, 326-328). Finding abuses engaged in by land speculators, the State Legislature has permitted localities to restrict tax lien sales to governmental bodies *(see, Matter of Elinor Homes Co. v St. Lawrence,* 113 A.D.2d 25). The localities here exercised that option, and we cannot say that in doing so they have engaged in impermissible objectives or have deprived the plaintiffs of any constitutionally protected rights.

Accordingly, the judgments of the Supreme Court in *Sheehan v County of Suffolk* and *MacKechnie v County of Sullivan,* dismissing plaintiffs' actions should be affirmed, with costs.

Chief Judge WACHTLER and Judges MEYER, SIMONS, KAYE, ALEXANDER and HANCOCK, JR., concur.

In each case: Judgment affirmed, with costs.

ARTICLE VIII

Local Finances

Section 1. No county, city, town, village or school district shall give or loan any money or property to or in aid of any individual, or private corporation or association * * *

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

TYLER *v.* HENNEPIN COUNTY, MINNESOTA, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 22–166. Argued April 26, 2023—Decided May 25, 2023

Geraldine Tyler owned a condominium in Hennepin County, Minnesota, that accumulated about $15,000 in unpaid real estate taxes along with interest and penalties. The County seized the condo and sold it for $40,000, keeping the $25,000 excess over Tyler's tax debt for itself. Minn. Stat. §§281.18, 282.07, 282.08. Tyler filed suit, alleging that the County had unconstitutionally retained the excess value of her home above her tax debt in violation of the Takings Clause of the Fifth Amendment and the Excessive Fines Clause of the Eighth Amendment. The District Court dismissed the suit for failure to state a claim, and the Eighth Circuit affirmed.

Held: Tyler plausibly alleges that Hennepin County's retention of the excess value of her home above her tax debt violated the Takings Clause. Pp. 3–14.

(a) Tyler's claim that the County illegally appropriated the $25,000 surplus constitutes a classic pocketbook injury sufficient to give her standing. *TransUnion LLC* v. *Ramirez*, 594 U. S. ___, ___. Even if there are debts on her home, as the County claims, Tyler still plausibly alleges a financial harm, for the County has kept $25,000 that she could have used to reduce her personal liability for those debts. Pp. 3–4.

(b) Tyler has stated a claim under the Takings Clause, which provides that "private property [shall not] be taken for public use, without just compensation." Whether remaining value from a tax sale is property protected under the Takings Clause depends on state law, "traditional property law principles," historical practice, and the Court's precedents. *Phillips* v. *Washington Legal Foundation*, 524 U. S. 156, 165–168. Though state law is an important source of property rights, it cannot be the only one because otherwise a State could "sidestep the

Takings Clause by disavowing traditional property interests" in assets it wishes to appropriate. *Id.*, at 167. History and precedent dictate that, while the County had the power to sell Tyler's home to recover the unpaid property taxes, it could not use the tax debt to confiscate more property than was due. Doing so effected a "classic taking in which the government directly appropriates private property for its own use." *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency*, 535 U. S. 302, 324 (internal quotation marks omitted).

The principle that a government may not take from a taxpayer more than she owes is rooted in English law and can trace its origins at least as far back as the Magna Carta. From the founding, the new Government of the United States could seize and sell only "so much of [a] tract of land . . . as may be necessary to satisfy the taxes due thereon." Act of July 14, 1798, §13, 1 Stat. 601. Ten States adopted similar statutes around the same time, and the consensus that a government could not take more property than it was owed held true through the ratification of the Fourteenth Amendment. Today, most States and the Federal Government require excess value to be returned to the taxpayer whose property is sold to satisfy outstanding tax debt.

The Court's precedents have long recognized the principle that a taxpayer is entitled to the surplus in excess of the debt owed. See *United States* v. *Taylor*, 104 U. S. 216; *United States* v. *Lawton,* 110 U. S. 146. *Nelson* v. *City of New York*, 352 U. S. 103, did not change that. The ordinance challenged there did not "absolutely preclud[e] an owner from obtaining the surplus proceeds of a judicial sale," but instead simply defined the process through which the owner could claim the surplus. *Id.,* at 110. Minnesota's scheme, in comparison, provides no opportunity for the taxpayer to recover the excess value from the State.

Significantly, Minnesota law itself recognizes in many other contexts that a property owner is entitled to the surplus in excess of her debt. If a bank forecloses on a mortgaged property, state law entitles the homeowner to the surplus from the sale. And in collecting past due taxes on income or personal property, Minnesota protects the taxpayer's right to surplus. Minnesota may not extinguish a property interest that it recognizes everywhere else to avoid paying just compensation when the State does the taking. *Phillips*, 524 U. S., at 167. Pp. 4–12.

(c) The Court rejects the County's argument that Tyler has no property interest in the surplus because she constructively abandoned her home by failing to pay her taxes. Abandonment requires the "surrender or relinquishment or disclaimer of" all rights in the property, *Rowe* v. *Minneapolis*, 51 N. W. 907, 908. Minnesota's forfeiture law is not concerned about the taxpayer's use or abandonment of the property, only her failure to pay taxes. The County cannot frame that failure as

abandonment to avoid the demands of the Takings Clause. Pp. 12–14.

26 F. 4th 789, reversed.

ROBERTS, C. J., delivered the opinion for a unanimous Court. GORSUCH, J., filed a concurring opinion, in which JACKSON, J., joined.

NOTICE: This opinion is subject to formal revision before publication in the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, pio@supremecourt.gov, of any typographical or other formal errors.

SUPREME COURT OF THE UNITED STATES

No. 22–166

GERALDINE TYLER, PETITIONER *v.* HENNEPIN COUNTY, MINNESOTA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[May 25, 2023]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Hennepin County, Minnesota, sold Geraldine Tyler's home for $40,000 to satisfy a $15,000 tax bill. Instead of returning the remaining $25,000, the County kept it for itself. The question presented is whether this constituted a taking of property without just compensation, in violation of the Fifth Amendment.

I

Hennepin County imposes an annual tax on real property. Minn. Stat. §273.01 (2022). The taxpayer has one year to pay before the taxes become delinquent. §279.02. If she does not timely pay, the tax accrues interest and penalties, and the County obtains a judgment against the property, transferring limited title to the State. See §§279.03, 279.18, 280.01. The delinquent taxpayer then has three years to redeem the property and regain title by paying all the taxes and late fees. §§281.17(a), 281.18. During this time, the taxpayer remains the beneficial owner of the property and can continue to live in her home. See §281.70. But

if at the end of three years the bill has not been paid, absolute title vests in the State, and the tax debt is extinguished. §§281.18, 282.07. The State may keep the property for public use or sell it to a private party. §282.01 subds. 1a, 3. If the property is sold, any proceeds in excess of the tax debt and the costs of the sale remain with the County, to be split between it, the town, and the school district. §282.08. The former owner has no opportunity to recover this surplus.

Geraldine Tyler is 94 years old. In 1999, she bought a one-bedroom condominium in Minneapolis and lived alone there for more than a decade. But as Tyler aged, she and her family decided that she would be safer in a senior community, so they moved her to one in 2010. Nobody paid the property taxes on the condo in Tyler's absence and, by 2015, it had accumulated about $2300 in unpaid taxes and $13,000 in interest and penalties. Acting under Minnesota's forfeiture procedures, Hennepin County seized the condo and sold it for $40,000, extinguishing the $15,000 debt. App. 5. The County kept the remaining $25,000 for its own use.

Tyler filed a putative class action against Hennepin County and its officials, asserting that the County had unconstitutionally retained the excess value of her home above her tax debt. As relevant, she brought claims under the Takings Clause of the Fifth Amendment and the Excessive Fines Clause of the Eighth Amendment.

The District Court dismissed the suit for failure to state a claim. 505 F. Supp. 3d 879, 883 (Minn. 2020). The Eighth Circuit affirmed. 26 F. 4th 789, 790 (2022). It held that "[w]here state law recognizes no property interest in surplus proceeds from a tax-foreclosure sale conducted after adequate notice to the owner, there is no unconstitutional taking." *Id.*, at 793. The court also rejected Tyler's claim under the Excessive Fines Clause, adopting the District Court's reasoning that the forfeiture was not a fine because

it was intended to remedy the State's tax losses, not to punish delinquent property owners. *Id.*, at 794 (citing 505 F. Supp. 3d, at 895–899).

We granted certiorari. 598 U. S. ___ (2023).

II

The County asserts that Tyler does not have standing to bring her takings claim. To bring suit, a plaintiff must plead an injury in fact attributable to the defendant's conduct and redressable by the court. *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560–561 (1992). This case comes to us on a motion to dismiss for failure to state a claim. At this initial stage, we take the facts in the complaint as true. *Warth* v. *Seldin*, 422 U. S. 490, 501 (1975). Tyler claims that the County has illegally appropriated the $25,000 surplus beyond her $15,000 tax debt. App. 5. This is a classic pocketbook injury sufficient to give her standing. *TransUnion LLC* v. *Ramirez*, 594 U. S. ___, ___ (2021) (slip op., at 9).

The County objects that Tyler does not have standing because she did not affirmatively "disclaim the existence of other debts or encumbrances" on her home worth more than the $25,000 surplus. Brief for Respondents 12–13, and n. 5. According to the County, public records suggest that the condo may be subject to a $49,000 mortgage and a $12,000 lien for unpaid homeowners' association fees. See *ibid.* The County argues that these potential encumbrances exceed the value of any interest Tyler has in the home above her $15,000 tax debt, and that she therefore ultimately suffered no financial harm from the sale of her home. Without such harm she would have no standing.

But the County never entered these records below, nor has it submitted them to this Court. Even if there were encumbrances on the home worth more than the surplus, Tyler still plausibly alleges a financial harm: The County has kept $25,000 that belongs to her. In Minnesota, a tax sale extinguishes all other liens on a property. See Minn.

Stat. §281.18; *County of Blue Earth* v. *Turtle*, 593 N. W. 2d 258, 261 (Minn. App. 1999). That sale does not extinguish the taxpayer's debts. Instead, the borrower remains personally liable. See *St. Paul* v. *St. Anthony Flats Ltd. Partnership*, 517 N. W. 2d 58, 62 (Minn. App. 1994). Had Tyler received the surplus from the tax sale, she could have at the very least used it to reduce any such liability.

At this initial stage of the case, Tyler need not definitively prove her injury or disprove the County's defenses. She has plausibly pleaded on the face of her complaint that she suffered financial harm from the County's action, and that is enough for now. See *Lujan*, 504 U. S., at 561.

III

A

The Takings Clause, applicable to the States through the Fourteenth Amendment, provides that "private property [shall not] be taken for public use, without just compensation." U. S. Const., Amdt. 5. States have long imposed taxes on property. Such taxes are not themselves a taking, but are a mandated "contribution from individuals . . . for the support of the government . . . for which they receive compensation in the protection which government affords." *County of Mobile* v. *Kimball*, 102 U. S. 691, 703 (1881). In collecting these taxes, the State may impose interest and late fees. It may also seize and sell property, including land, to recover the amount owed. See *Jones* v. *Flowers*, 547 U. S. 220, 234 (2006). Here there was money remaining after Tyler's home was seized and sold by the County to satisfy her past due taxes, along with the costs of collecting them. The question is whether that remaining value is property under the Takings Clause, protected from uncompensated appropriation by the State.

The Takings Clause does not itself define property. *Phillips* v. *Washington Legal Foundation*, 524 U. S. 156, 164

(1998). For that, the Court draws on "existing rules or understandings" about property rights. *Ibid.* (internal quotation marks omitted). State law is one important source. *Ibid.*; see also *Stop the Beach Renourishment, Inc.* v. *Florida Dept. of Environmental Protection*, 560 U. S. 702, 707 (2010). But state law cannot be the only source. Otherwise, a State could "sidestep the Takings Clause by disavowing traditional property interests" in assets it wishes to appropriate. *Phillips*, 524 U. S., at 167; see also *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U. S. 155, 164 (1980); *Hall* v. *Meisner*, 51 F. 4th 185, 190 (CA6 2022) (Kethledge, J., for the Court) ("[T]he Takings Clause would be a dead letter if a state could simply exclude from its definition of property any interest that the state wished to take."). So we also look to "traditional property law principles," plus historical practice and this Court's precedents. *Phillips*, 524 U. S., at 165–168; see, *e.g.*, *United States* v. *Causby*, 328 U. S. 256, 260–267 (1946); *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986, 1001–1004 (1984).

Minnesota recognizes a homeowner's right to real property, like a house, and to financial interests in that property, like home equity. Cf. *Armstrong* v. *United States*, 364 U. S. 40, 44 (1960) (lien on boats); *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555, 590 (1935) (mortgage on farm). Historically, Minnesota also recognized that a homeowner whose property has been sold to satisfy delinquent property taxes had an interest in the excess value of her home above the debt owed. See *Farnham* v. *Jones*, 32 Minn. 7, 11, 19 N. W. 83, 85 (1884). But in 1935, the State purported to extinguish that property interest by enacting a law providing that an owner forfeits her interest in her home when she falls behind on her property taxes. See 1935 Minn. Laws pp. 713–714, §8. This means, the County reasons, that Tyler has no property interest protected by the Takings Clause.

History and precedent say otherwise. 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." *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency*, 535 U. S. 302, 324 (2002) (internal quotation marks and alteration omitted). Tyler has stated a claim under the Takings Clause and is entitled to just compensation.

B

The principle that a government may not take more from a taxpayer than she owes can trace its origins at least as far back as Runnymeade in 1215, where King John swore in the Magna Carta that when his sheriff or bailiff came to collect any debts owed him from a dead man, they could remove property "until the debt which is evident shall be fully paid to us; and the residue shall be left to the executors to fulfil the will of the deceased." W. McKechnie, Magna Carta, A Commentary on the Great of King John, ch. 26, p. 322 (rev. 2d ed. 1914) (footnote omitted).

That doctrine became rooted in English law. Parliament gave the Crown the power to seize and sell a taxpayer's property to recover a tax debt, but dictated that any "Overplus" from the sale "be immediately restored to the Owner." 4 W. & M., ch. 1, §12, in 3 Eng. Stat. at Large 488–489 (1692). As Blackstone explained, the common law demanded the same: If a tax collector seized a taxpayer's property, he was "bound by an implied contract in law to restore [the property] on payment of the debt, duty, and expenses, before the time of sale; or, when sold, to render back the overplus." 2 Commentaries on the Laws of England 453 (1771).

This principle made its way across the Atlantic. In collecting taxes, the new Government of the United States could seize and sell only "so much of [a] tract of land . . . as

may be necessary to satisfy the taxes due thereon." Act of July 14, 1798, §13, 1 Stat. 601. Ten States adopted similar statutes shortly after the founding.[1] For example, Maryland required that only so much land be sold "as may be sufficient to discharge the taxes thereon due," and provided that if the sale produced more than needed for the taxes, "such overplus of money" shall be paid to the owner. 1797 Md. Laws ch. 90, §§4–5. This Court enforced one such state statute against a Georgia tax collector, reasoning that "if a whole tract of land was sold when a small part of it would have been sufficient for the taxes, which at present appears to be the case, the collector unquestionably exceeded his authority." *Stead's Executors* v. *Course*, 4 Cranch 403, 414 (1808) (Marshall, C. J., for the Court).

Like its sister States, Virginia originally provided that the Commonwealth could seize and sell "so much" of the delinquent tracts "as shall be sufficient to discharge the said taxes." 1781 Va. Acts p. 153, §4. But about a decade later, Virginia enacted a new scheme, which provided for the forfeiture of any delinquent land to the Commonwealth. Virginia passed this harsh forfeiture regime in response to the "loose, cheap and unguarded system of disposing of her public lands" that the Commonwealth had adopted immediately following statehood. *McClure* v. *Maitland*, 24 W. Va. 561, 564 (1884). To encourage settlement, Virginia permitted "any person [to] acquire title to so much . . . unappropriated lands as he or she shall desire to purchase" at the price of 40 pounds per 100 acres. 1779 Va. Acts p. 95, §2. Within two decades, nearly all of Virginia's land had been claimed,

[1] 1796 Conn. Acts p. 356–357, §§32, 36; 1797 Del. Laws p. 1260, §26; 1791 Ga. Laws p. 14; 1801 Ky. Acts pp. 78–79, §4; 1797 Md. Laws ch. 90, §§4–5; 1786 Mass. Acts pp. 360–361; 1792 N. H. Laws p. 194; 1792 N. C. Sess. Laws p. 23, §5; 1801 N. Y. Laws pp. 498–499, §17; 1787 Vt. Acts & Resolves p. 126. Kentucky made an exception for unregistered land, or land that the owner had "fail[ed] to list . . . for taxation," with such land forfeiting to the State. 1801 Ky. Acts p. 80, §5.

much of it by nonresidents who did not live on or farm the land but instead hoped to sell it for a profit. *McClure*, 24 W. Va., at 564. Many of these nonresidents "wholly neglected to pay the taxes" on the land, *id.*, at 565, so Virginia provided that title to any taxpayer's land was completely "lost, forfeited and vested in the Commonwealth" if the taxpayer failed to pay taxes within a set period, 1790 Va. Acts p. 5, §5. This solution was short lived, however; the Commonwealth repealed the forfeiture scheme in 1814 and once again sold "so much only of each tract of land . . . as will be sufficient to discharge the" debt. 1813 Va. Acts p. 21, §27. Virginia's "exceptional" and temporary forfeiture scheme carries little weight against the overwhelming consensus of its sister States. See *Martin* v. *Snowden*, 59 Va. 100, 138 (1868).

The consensus that a government could not take more property than it was owed held true through the passage of the Fourteenth Amendment. States, including Minnesota, continued to require that no more than the minimum amount of land be sold to satisfy the outstanding tax debt.[2] The County identifies just three States that deemed delinquent property entirely forfeited for failure to pay taxes. See 1836 Me. Laws p. 325, §4; 1869 La. Acts p. 159, §63; 1850 Miss. Laws p. 52, §4.[3] Two of these laws did not last.

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[2] Many of these new States required that the land be sold to whichever buyer would "pay [the tax debt] for the least number of acres" and provided that the land forfeited to the State only if it failed to sell "for want of bidders" because the land was worth less than the taxes owed. 1821 Ohio pp. 27–28, §§7, 10; see also 1837 Ark. Acts pp. 14–17, §§83, 100; 1844 Ill. Laws pp. 13, 18, §§51, 77; 1859 Minn. Laws pp. 58, 61, §§23, 38; 1859 Wis. Laws Ch. 22, pp. 22–23, §§7, 9; cf. Iowa Code pp. 120–121, §§766, 773 (1860) (requiring that property be offered for sale "until all the taxes shall have been paid"); see also *O'Brien* v. *Coulter*, 2 Blackf. 421, 425 (Ind. 1831) (*per curiam*) ("[S]o much only of the defendant's property shall be sold at one time, as a sound judgment would dictate to be sufficient to pay the debt.").

[3] North Carolina amended its laws in 1842 to permit the forfeiture of

Maine amended its law a decade later to permit the former owner to recover the surplus. 1848 Me. Laws p. 56, §4. And Mississippi's highest court promptly struck down its law for violating the Due Process and Takings Clauses of the Mississippi Constitution. See *Griffin* v. *Mixon*, 38 Miss. 424, 439, 451–452 (Ct. Err. & App. 1860). Louisiana's statute remained on the books, but the County cites no case showing that the statute was actually enforced against a taxpayer to take his entire property.

The minority rule then remains the minority rule today: Thirty-six States and the Federal Government require that the excess value be returned to the taxpayer.

C

Our precedents have also recognized the principle that a taxpayer is entitled to the surplus in excess of the debt owed. In *United States* v. *Taylor*, 104 U. S. 216 (1881), an Arkansas taxpayer whose property had been sold to satisfy a tax debt sought to recover the surplus from the sale. A nationwide tax had been imposed by Congress in 1861 to raise funds for the Civil War. Under that statute, if a taxpayer did not pay, his property would be sold and "the surplus of the proceeds of the sale [would] be paid to the owner." Act of Aug. 5, 1861, §36, 12 Stat. 304. The next year, Congress added a 50 percent penalty in the rebelling States, but made no mention of the owner's right to surplus after a tax sale. See Act of June 7, 1862, §1, 12 Stat. 422. Taylor's property had been sold for failure to pay taxes under the 1862 Act, but he sought to recover the surplus under the 1861 Act. Though the 1862 Act "ma[de] no mention of the right of the owner of the lands to receive the surplus proceeds of their sale," we held that the taxpayer was entitled to the surplus because nothing in the 1862 Act took

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unregistered "swamp lands," 1842 N. C. Sess. Laws p. 64, §1, but otherwise continued to follow the majority rule, see 1792 N. C. Sess. Laws p. 23, §5.

"from the owner the right accorded him by the act of 1861, of applying for and receiving from the treasury the surplus proceeds of the sale of his lands." *Taylor*, 104 U. S., at 218–219.

We extended a taxpayer's right to surplus even further in *United States* v. *Lawton,* 110 U. S. 146 (1884). The property owner had an unpaid tax bill under the 1862 Act for $170.50. *Id.*, at 148. The Federal Government seized the taxpayer's property and, instead of selling it to a private buyer, kept the property for itself at a value of $1100. *Ibid.* The property owner sought to recover the excess value from the Government, but the Government refused. *Ibid.* The 1861 Act explicitly provided that any surplus from tax sales to private parties had to be returned to the owner, but it did not mention paying the property owner the excess value where the Government *kept* the property for its own use instead of selling it. See 12 Stat. 304. We held that the taxpayer was still entitled to the surplus under the statute, just as if the Government had sold the property. *Lawton*, 110 U. S., at 149–150. Though the 1861 statute did not explicitly provide the right to the surplus under such circumstances, "[t]o withhold the surplus from the owner would be to violate the Fifth Amendment to the Constitution and to deprive him of his property without due process of law, or to take his property for public use without just compensation." *Id.*, at 150.

The County argues that *Taylor* and *Lawton* were superseded by *Nelson* v. *City of New York*, 352 U. S. 103 (1956), but that case is readily distinguished. There New York City foreclosed on properties for unpaid water bills. Under the governing ordinance, a property owner had almost two months after the city filed for foreclosure to pay off the tax debt, and an additional 20 days to ask for the surplus from any tax sale. *Id.*, at 104–105, n. 1. No property owner requested his surplus within the required time. The owners later sued the city, claiming that it had denied them due

process and equal protection of the laws. *Id.*, at 109. In their reply brief before this Court, the owners also argued for the first time that they had been denied just compensation under the Takings Clause. *Ibid.*

We rejected this belated argument. *Lawton* had suggested that withholding the surplus from a property owner always violated the Fifth Amendment, but there was no specific procedure there for recovering the surplus. *Nelson*, 352 U. S., at 110. New York City's ordinance, in comparison, permitted the owner to recover the surplus but required that the owner have "filed a timely answer in [the] foreclosure proceeding, asserting his property had a value substantially exceeding the tax due." *Ibid.* (citing *New York* v. *Chapman Docks Co.*, 1 App. Div. 2d 895, 149 N. Y. S. 2d 679 (1956)). Had the owners challenging the ordinance done so, "a separate sale" could have taken place "so that [they] might receive the surplus." 352 U. S., at 110. The owners did not take advantage of this procedure, so they forfeited their right to the surplus. Because the New York City ordinance did not "absolutely preclud[e] an owner from obtaining the surplus proceeds of a judicial sale," but instead simply defined the process through which the owner could claim the surplus, we found no Takings Clause violation. *Ibid.*

Unlike in *Nelson*, Minnesota's scheme provides no opportunity for the taxpayer to recover the excess value; once absolute title has transferred to the State, any excess value always remains with the State. The County argues that the delinquent taxpayer could sell her house to pay her tax debt before the County itself seizes and sells the house. But requiring a taxpayer to sell her house to avoid a taking is not the same as providing her an opportunity to recover the excess value of her house once the State has sold it.

D

Finally, Minnesota law itself recognizes that in other contexts a property owner is entitled to the surplus in excess of her debt. Under state law, a private creditor may enforce a judgment against a debtor by selling her real property, but "[n]o more shall be sold than is sufficient to satisfy" the debt, and the creditor may receive only "so much [of the proceeds] as will satisfy" the debt. Minn. Stat. §§550.20, 550.08 (2022). Likewise, if a bank forecloses on a home because the homeowner fails to pay the mortgage, the homeowner is entitled to the surplus from the sale. §580.10.

In collecting all other taxes, Minnesota protects the taxpayer's right to surplus. If a taxpayer falls behind on her income tax and the State seizes and sells her property, "[a]ny surplus proceeds . . . shall . . . be credited or refunded" to the owner. §§270C.7101, 270C.7108, subd. 2. So too if a taxpayer does not pay taxes on her personal property, like a car. §277.21, subd. 13. Until 1935, Minnesota followed the same rule for the sale of real property. The State could sell only the "least quantity" of land sufficient to satisfy the debt, 1859 Minn. Laws p. 58, §23, and "any surplus realized from the sale must revert to the owner," *Farnham*, 32 Minn., at 11, 19 N. W., at 85.

The State now makes an exception only for itself, and only for taxes on real property. But "property rights cannot be so easily manipulated." *Cedar Point Nursery* v. *Hassid*, 594 U. S. ___, ___ (2021) (slip op., at 13) (internal quotation marks omitted). Minnesota may not extinguish a property interest that it recognizes everywhere else to avoid paying just compensation when it is the one doing the taking. *Phillips*, 524 U. S., at 167.

IV

The County argues that Tyler has no interest in the surplus because she constructively abandoned her home by

failing to pay her taxes. States and localities have long imposed "reasonable conditions" on property ownership. *Texaco, Inc.* v. *Short*, 454 U. S. 516, 526 (1982). In Minnesota, one of those conditions is paying property taxes. By neglecting this reasonable condition, the County argues, the owner can be considered to have abandoned her property and is therefore not entitled to any compensation for its taking. See Minn. Stat. §282.08.

The County portrays this as just another example in the long tradition of States taking title to abandoned property. We upheld one such statutory scheme in *Texaco*. There, Indiana law dictated that a mineral interest automatically reverted to the owner of the land if not used for 20 years. 454 U. S., at 518. Use included excavating minerals, renting out the right to excavate, paying taxes, or simply filing a "statement of claim with the local recorder of deeds." *Id.*, at 519. Owners who lost their mineral interests challenged the statute as unconstitutional. We held that the statute did not violate the Takings Clause because the State "has the power to condition the permanent retention of [a] property right on the performance of reasonable conditions that indicate a *present intention to retain the interest*." *Id.*, at 526 (emphasis added). Indiana reasonably "treat[ed] a mineral interest that ha[d] not been used for 20 years and for which no statement of claim ha[d] been filed as abandoned." *Id.*, at 530. There was thus no taking, for "after abandonment, the former owner retain[ed] no interest for which he may claim compensation." *Ibid.*

The County suggests that here, too, Tyler constructively abandoned her property by failing to comply with a reasonable condition imposed by the State. But the County cites no case suggesting that failing to pay property taxes is itself sufficient for abandonment. Cf. *Krueger* v. *Market*, 124 Minn. 393, 397, 145 N. W. 30, 32 (1914) (owner did not abandon property despite failing to pay taxes for 30 years). Abandonment requires the "surrender or relinquishment or

disclaimer of" all rights in the property. *Rowe* v. *Minneapolis*, 49 Minn. 148, 157, 51 N. W. 907, 908 (1892). "It is the owner's failure to make *any* use of the property"—and for a lengthy period of time—"that causes the lapse of the property right." *Texaco*, 454 U. S., at 530 (emphasis added). In *Texaco*, the owners lost their property because they made *no* use of their interest for 20 years and then failed to take the simple step of filing paperwork indicating that they still claimed ownership over the interest. In comparison, Minnesota's forfeiture scheme is not about abandonment at all. It gives no weight to the taxpayer's use of the property. Indeed, the delinquent taxpayer can continue to live in her house for years after falling behind in taxes, up until the government sells it. See §281.70. Minnesota cares only about the taxpayer's failure to contribute her share to the public fisc. The County cannot frame that failure as abandonment to avoid the demands of the Takings Clause.

* * *

The Takings Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong*, 364 U. S., at 49. 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.

Because we find that Tyler has plausibly alleged a taking under the Fifth Amendment, and she agrees that relief under "the Takings Clause would fully remedy [her] harm," we need not decide whether she has also alleged an excessive fine under the Eighth Amendment. Tr. of Oral Arg. 27. The judgment of the Court of Appeals for the Eighth Circuit is reversed.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 22–166

GERALDINE TYLER, PETITIONER *v.* HENNEPIN COUNTY, MINNESOTA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[May 25, 2023]

JUSTICE GORSUCH, with whom JUSTICE JACKSON joins, concurring.

The Court reverses the Eighth Circuit's dismissal of Geraldine Tyler's suit and holds that she has plausibly alleged a violation of the Fifth Amendment's Takings Clause. I agree. Given its Takings Clause holding, the Court understandably declines to pass on the question whether the Eighth Circuit committed a further error when it dismissed Ms. Tyler's claim under the Eighth Amendment's Excessive Fines Clause. *Ante*, at 14. But even a cursory review of the District Court's excessive-fines analysis—which the Eighth Circuit adopted as "well-reasoned," 26 F. 4th 789, 794 (2022)—reveals that it too contains mistakes future lower courts should not be quick to emulate.

First, the District Court concluded that the Minnesota tax-forfeiture scheme is not punitive because "its primary purpose" is "remedial"—aimed, in other words, at "compensat[ing] the government for lost revenues due to the nonpayment of taxes." 505 F. Supp. 3d 879, 896 (Minn. 2020). That primary-purpose test finds no support in our law. Because "sanctions frequently serve more than one purpose," this Court has said that the Excessive Fines Clause applies to *any* statutory scheme that "serv[es] *in part* to punish." *Austin* v. *United States*, 509 U. S. 602, 610 (1993) (emphasis added). It matters not whether the scheme has a remedial

purpose, even a predominantly remedial purpose. So long as the law "cannot fairly be said *solely* to serve a remedial purpose," the Excessive Fines Clause applies. *Ibid.* (emphasis added; internal quotation marks omitted). Nor, this Court has held, is it appropriate to label sanctions as "remedial" when (as here) they bear "'no correlation to any damages sustained by society or to the cost of enforcing the law,'" and "any relationship between the Government's actual costs and the amount of the sanction is merely coincidental." *Id.*, at 621–622, and n. 14.

Second, the District Court asserted that the Minnesota tax-forfeiture scheme cannot "be punitive because it actually confers a windfall on the delinquent taxpayer when the value of the property that is forfeited is less than the amount of taxes owed." 505 F. Supp. 3d, at 896. That observation may be factually true, but it is legally irrelevant. Some prisoners better themselves behind bars; some addicts credit court-ordered rehabilitation with saving their lives. But punishment remains punishment all the same. See Tr. of Oral Arg. 61. Of course, no one thinks that an individual who profits from an economic penalty has a *winning* excessive-fines claim. But nor has this Court ever held that a scheme producing fines that punishes some individuals can escape constitutional scrutiny merely because it does not punish others.

Third, the District Court appears to have inferred that the Minnesota scheme is not "punitive" because it does not turn on the "culpability" of the individual property owner. 505 F. Supp. 3d, at 897. But while a focus on "culpability" can sometimes make a provision "look more like punishment," this Court has never endorsed the converse view. *Austin*, 509 U. S., at 619. Even without emphasizing culpability, this Court has said a statutory scheme may still be punitive where it serves another "goal of punishment," such as "[d]eterrence." *United States* v. *Bajakajian*, 524 U. S. 321, 329 (1998). And the District Court expressly approved

the Minnesota tax-forfeiture scheme in this case in large part because "'the ultimate possibility of loss of property serves as a *deterrent* to those taxpayers considering tax delinquency.'" 505 F. Supp. 3d, at 899 (emphasis added). Economic penalties imposed to deter willful noncompliance with the law are fines by any other name. And the Constitution has something to say about them: They cannot be excessive.

UNITED STATES v. LAWTON.

- Supreme Court

110 U.S. 146

3 S.Ct. 545

28 L.Ed. 100

UNITED STATES
v.
LAWTON.

January 21, 1884.

The appellee recovered a judgment in the court of claims against the United States for $929.50. That court found the following facts: In 1827 James Stoney, of South Carolina, died, leaving a will, which was duly proved, and contained the following provision:

'The other equal part or share of my personal property, charged and chargeable with the payment of half of the said annuity to my beloved wife, Elizabeth, together with all the lands I possess on the south side of Broad creek, on the island of Hilton Head, I give and devise unto such person or persons as I shall hereafter appoint my executor or executors, to and to the use of them or him, my executor or executors, their heirs, executors, and assigns, upon the trust nevertheless, and to and for the intent and purpose hereinafter expressed and declared of and concerning the same; that is to say, upon trust for the sole benefit of my beloved daughter, Martha S. Barksdale, for and during her natural life, free from the debts, contracts, and engagements of any husband to whom she may be allied, or the claims of his creditors; and upon the death of my said daughter, Martha S. Barksdale, it is my will, in tention, and desire that the trusteeship above created in my executor or executors over the said part of my real estate and personal property shall immediately dissolve and expire; and if my said daughter, Martha S. Barksdale, shall have any lawful issue living at the time of her death, then I give and devise the said part of my real and personal property to such issue, him, her, or them, and their heirs foreover.'

A tract of land known as the Hill Place, in St. Luke's parish, South Carolina, was a part of the estate so devised. Martha S. Barksdale, named in the will, entered into possession of the Hill Place, under the devise, and continued in possession until dispossessed, in consequence of the tax sale hereinafter mentioned. After the making of the will she became the lawful wife of Joseph A. Lawton. The appellee is her lawful and only living issue. In November,

1862, the direct tax commissioners of the United States assessed a direct tax on the Hill Place, amounting to $88, and in December, 1873, (a mistake, probably, for 1863,) it was sold for non-payment of the tax. The amount of the tax, penalty, interest, and costs, was $170.50. The property was 'struck off for the United States by the tax commissioners,' for the sum of $1,100, and a tax certificate, which is now on file in the office of the commissioner of interna revenue, was issued therefor, but no money was paid, 'the tax commissioners having bid in the property for the United States.' The board of tax commissioners took possession of the land in the name of the United States, and from time to time leased the same. The amount realized from the leasing does not appear. The United States are still in possession of 50 acres. The remainder was sold at public sale in December, 1875, for $130, under the provisions of the act of June 8, 1872, c. 337, (17 St. 330.) No application under that act and the acts supplementary thereto, for redemption of the property, was ever made. It does not appear that the appellee ever parted with his interest in the remainder of the tract, except as dispossessed by the tax sale, or that he ever assigned his right to receive the surplus remaining from the purchase money. Mrs. Lawton died in April, 1880. It does not appear that during her life-time any demand was made upon the treasury for the surplus. In May, 1882, the appellee applied to the secretary of treasury for any surplus proceeds of the sale which might be in the treasury. No action was taken thereon, and nothing has been paid to the appellee on such application.

Sol. Gen. Phillips and *John S. Blair*, for appellant.

Wm. E. Earle and *J. J. Darlington*, for appellee.

BLATCHFORD, J.

1
We think that this case is governed by the rulings of this court in *U. S.* v. *Taylor*, 104 U. S. 216. In that case the land sold for the non-payment of the tax was sold to a person who paid the purchase money to the United States, and the surplus proceeds were in the treasury. It was held that the provision of section 36 of the act of August 5, 1861, *c.* 46, (12 St. 292,) in regard to the surplus of the proceeds of sale, was not repealed by anything in section 12 or any other section of act of June 7, 1862, c. 98, (12 St. 422.) It was also held that the court of claims had jurisdiction of a suit for such proceeds when the application to the secretary of the treasury and the bringing of the suit therefor, both of them, occurred more than six years after the sale for the non-payment of the tax.

2
The present case differs from the *Taylor Case* only in this, that the land was in this case bought in by the tax commissioners for the United States, and

no money was paid on the sale. It was so bought in for a sum which exceeded by $929.50 the tax, penalty, interest, and costs. This was done under the authority of section 7 of the act of June 7, 1862, as amended by the act of February 6, 1863, *c.* 21, (12 St. 640,) which authorized the commissioners to bid off for the United States land sold for the tax, at a sum not exceeding two-thirds of its assessed value, unless some person should bid a higher sum, and also provided that at a sale any land which might be selected, under the direction of the president, for government use, might be bid in by the commissioners, under the direction of the president, for and struck off to the United States. The land in the present case having been 'struck off for' and 'bid in' for the United States at the sum of $1,100, we are of opinion that the surplus of that sum, beyond the $170.50 tax, penalty, interest, and costs, must be regarded as being in the treasury of the United States, under the provisions of section 36 of the act of 1861, for the use of the owner, in like manner as if it were the surplus of purchase money received by the United States from a third person on a sale of the land to such person for the non-payment of the tax. It was unnecessary to go through any form of paying money out of the treasury to any officer and then paying it in again to be held for the owner of the land. But, so far as such owner is concerned, the surplus money is set aside as his as fully as if it had come from a third person. If a third person had bid $1,099 in this case, there would have been a surplus of $928.50 paid into the treasury and held for the owner. It can make no difference that the United States acquired the property by bidding one dollar more. To withhold the surplus from the owner would be to violate the fifth amendmen to the constitution, and deprive him of his property without due process of law or take his property for public use without just compensation. If he affirms the propriety of selling or taking more than enough of his land to pay the tax and penalty and interest and costs, and applies for the surplus money, he must receive at least that.

3

The appellants rely very much on the provisions of section 12 of the act of 1862, which require that one-half of the proceeds of subsequent leases and sales of land struck off to the United States at a sale for the non-payment of the tax, shall be, under certain circumstances, paid to the state in which the land lies; and contend that those provisions apply to the land in this case bought in under the act of 1863. The view urged is that if the United States pays to the appellee the $929.50, and to the state one-half of the proceeds of subsequent leases and sales of the land, they will pay out more than the surplus of the proceeds of the original sale. It is not necessary to determine whether section 12 of the act of 1862 applies to the land in this case, even if it would be proper to do so in a case where the state in not represented, as a claimant to the proceeds of leases and sales. No question as to the

disposition of such proceeds can properly affect the right of the appellee to this surplus money. His claim is to the surplus money arising on the original sale and not to any proceeds of any dealing with the land by the United States afterwards.

4
The application made to the secretary of the treasury for the surplus not having been complied with, the appellee was entitled to bring this suit, as on an implied contract to pay over the surplus. It not having been paid to the trustees under the will, or to the life-tenant, the appellee, as remainder-man, is clearly entitled to it.

5
The judgment of the court of claims is affirmed.

NELSON v. CITY OF NEW YORK, 352 U.S. 103 (1956)

United States Supreme Court

NELSON v. NEW YORK CITY(1956)

No. 30

Argued: November 07, 1956 Decided: December 10, 1956

Under Title D, Chapter 17, of the New York City Administrative Code, the City proceeded to foreclose liens for unpaid water charges on two parcels of land held in trust by appellants. In accordance with the statute, notice was given by posting, publication and mailing notices to the trust estate. Because of the derelictions of a bookkeeper, these notices were not brought to the attention of appellants, and they claimed to have had no knowledge of the foreclosure proceedings until after judgments of foreclosure had been entered by default and the City had acquired title to the property. The City sold one parcel for an amount many times that of the unpaid water charges and retained all the proceeds. The value of the other parcel was many times the amount of the unpaid water charges, and the City retained title to it. Appellants moved to have the defaults opened, the deed to one parcel set aside and to recover the surplus proceeds from the sale of the other parcel. Such relief was denied. Held:

> 1. The City having taken steps to notify appellants of the arrearages and the foreclosure proceedings, and appellants' agent having received such notices, application of the statute did not deprive appellants of procedural due process. Pp. 107-109.
> (a) The City cannot be charged with responsibility for the misconduct of the appellants' bookkeeper nor for the carelessness of the managing trustee in overlooking notices of arrearages given on tax bills. P. 108.
> (b) In view of the fact that there are 834,000 tax parcels, the City cannot be held to a duty to determine why appellants neglected water charges while paying much larger real estate taxes. Covey v. Town of Somers, 351 U.S. 141 , distinguished. P. 108.
> 2. Since the statute requires that, when the strict foreclosure provisions of Title D, Chapter 17, are invoked, they must be used against all parcels in a section of the City on which charges have been outstanding for four years, appellants were not denied equal protection of the laws by failure of the City officials to resort to other remedies which would not necessarily have resulted in forfeiture of the entire value of their property. P. 109. [352 U.S. 103, 104]
> 3. Appellants not having taken timely action to secure the relief available under the statute although adequate steps were taken to notify them of the charges due and the foreclosure proceedings, they were not deprived of property without due process of law nor was their property taken without just compensation by reason of the City's

retention of property, in one instance, and retention of the proceeds of sale, in the other instance, far exceeding in value the amounts due. Pp. 109-111.

(a) United States v. Lawton, 110 U.S. 146 , distinguished. Pp. 109-110.

(b) Relief from the hardship imposed by a state statute is the responsibility of the state legislature and not of the courts, unless some constitutional guarantee is infringed. Pp. 110-111.

309 N. Y. 94, 801, 127 N. E. 2d 827, 130 N. E. 2d 602, affirmed.

William P. Jones argued the cause for appellants. With him on the brief was Watson Washburn.

Seymour B. Quel argued the cause for appellee. With him on the brief were Peter Campbell Brown, Harry E. O'Donnell, Benjamin Offner and Joseph Brandwen.

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

Appellants challenge as violative of the Fourteenth Amendment the application of Title D, Chapter 17, of the New York City Administrative Code to two improved parcels of land owned by them as trustees. The statute is the counterpart, operative in the City of New York, of the state tax lien foreclosure statute that was before us last Term in Covey v. Town of Somers, 351 U.S. 141 . 1 [352 U.S. 103, 105]

In 1950, the City proceeded to foreclose its lien on the first of these parcels, referred to as the 45th Avenue property, for water charges that had been unpaid for four years. These charges, for the years 1945 and 1946, amounted to $65; 2 the property was assessed at $6,000. The action was begun on May 20 with the filing of a list of 294 liened parcels, including the 45th Avenue property, in two sections of the Borough of Queens. Under the statute, this constituted the filing of a complaint. 3 The statute requires that notice of such a foreclosure proceeding be posted and published and a copy of the published notice mailed to the last known address of the owner of property sought to be foreclosed. 4 It is undisputed that the statutory notice requirements were satisfied in this case; a copy of the published notice was mailed to the address of the trust estate. However, appellants took no [352 U.S. 103, 106] action during the 7 weeks allowed for redeeming the property through payment of back charges nor during the 20 additional days allowed for answering the City's complaint. Judgments of foreclosure were entered by default, and on August 22 the City acquired title to the parcel. The property was later sold to a private party for $7,000, the City retaining all the proceeds.

On December 17, 1951, a similar in rem foreclosure action was commenced against 1,704 parcels in four sections of the Borough of Brooklyn, including appellants' second parcel, referred to as the Powell Street property. The four-year-old water charges on this parcel amounted to $814.50; 5 the property was assessed at $46,000. Again the statutory notice requirements were satisfied, and again judgment of foreclosure was entered by default. The City acquired title to the Powell Street property on May 19, 1952, and still retains it.

In November 1952, the appellants offered to pay with interest and penalties all amounts owing to the City on the two parcels. The offer was refused, and the appellants instituted a plenary action to set aside the City's deed to the Powell Street property and to recover the surplus proceeds from the sale of the 45th Avenue property. The Appellate Division of the New York Supreme Court affirmed the denial of the requested relief without prejudice to appellants' seeking to open their default by motions in the foreclosure proceedings. The appellants filed such motions, requesting the same relief they had sought in the plenary action. The case was submitted to the Supreme Court, Special Term, on opposing affidavits, and the motions were denied. The Special Term's orders were affirmed by the Appellate Division 284 App. Div. 894, 134 N. Y. S. 2d 597, and the Court of [352 U.S. 103, 107] Appeals, 309 N. Y. 94. 127 N. E. 2d 827. The Court of Appeals amended its remittitur to show that the federal questions here presented were decided adversely to appellants. 309 N. Y. 801, 130 N. E. 2d 602.

1. Appellants contend they received no actual notice of the foreclosure proceedings. The reason they assign is that the mailed notices were concealed by their trusted bookkeeper, who is also alleged to have concealed from them the nonpayment of the water charges. There is no claim that the bills for the water charges were not mailed to the estate. They assert that it was not until November 1952, when the judgments of foreclosure had long since become final, that they discovered the bookkeeper's derelictions, and thus were made aware of their loss. However, as we have said, it is not disputed that the notices were mailed to the proper address. Nor is this all. Appellants themselves placed in evidence as exhibits 1950-1951 and 1951-1952 real estate tax bills for the 45th Avenue property. These were concededly brought to the attention of appellant Gerald D. Nelson, the "active" or "managing" trustee. On the face of the bills appears the word "ARREARS," with a prominent black arrow pointing to it and beneath the arrow the statement, "The word ARREARS if it appears in the space indicated by the ARROW, means that, as of JUNE 30, 1950, previous TAXES, ASSESSMENTS or WATER CHARGES HAVE NOT BEEN RECORDED AS PAID. If these have not been paid since June 30, 1950, payment should be made IMMEDIATELY." 6 Furthermore, the [352 U.S. 103, 108] City's assistant corporation counsel stated in his affidavit that the tax bills for the Powell Street property each year from 1946 to 1953 contained a notice that the property was in arrears. Appellant Nelson stated that the bookkeeper "had been regularly presenting to deponent for payment all of the bills for real estate taxes which were paid through the first half of 1951-52 . . . ." 7 It is clear that the City cannot be charged with responsibility for the misconduct of the bookkeeper in whom appellants misplaced their confidence nor for the carelessness of the managing trustee in overlooking notices of arrearages.

Appellants make the further contention that the City officials should have known from the state of the records of the two parcels that mailed notice would probably be ineffective. That is, the fact that water charges were not paid while the much larger real estate taxes were paid should have indicated to the officials that something was amiss. They rely on Covey v. Town of Somers, supra. We cannot so hold. In the Covey case, there were uncontroverted allegations that the taxpayer, who lived on the foreclosed property, was known by the officials of a small community to be an incompetent, unable to understand the meaning of any notice served upon her; no attempt was made to have a committee appointed for her person or property until

after entry of judgment of foreclosure in an in rem proceeding. The affidavit of the assistant corporation counsel here states that there are more than 834,000 tax parcels in the City, and on the facts of this case the City cannot be held to a duty to determine why a taxpayer neglects some taxes while paying others.

We conclude, therefore, that the City having taken steps to notify appellants of the arrearages and the foreclosure [352 U.S. 103, 109] proceedings and their agent having received such notices, its application of the statute did not deprive appellants of procedural due process.

2. Appellants also claim a denial of the equal protection of the laws in that the City officials had available to them other remedies for collecting taxes, which would not necessarily have resulted in forfeiture of the entire value of their property. Their theory is that the choice to proceed against their property under Title D, Chapter 17, was arbitrary. We find the contention without merit. The statute is explicit that when the strict foreclosure provisions of Title D, Chapter 17, are invoked, they must be used against all parcels in a section of the City on which charges have been outstanding for four years. 8 It is clear that the aim is to prevent precisely the kind of discrimination of which appellants complain. Appellants do not assert that the statute was not complied with in this regard.

3. In their reply brief, appellants urged that by reasons of the City's retention of property, in one instance, and proceeds of sale in the other, far exceeding in value the amounts due, they are deprived of property without due process of law or have suffered a taking without just compensation. They called our attention to United States v. Lawton, 110 U.S. 146 . In affirming a judgment in favor of a foreclosed landowner for the surplus proceeds from the sale of his land, the Court there said: "To withhold the [352 U.S. 103, 110] surplus from the owner would be to violate the Fifth Amendment to the Constitution and to deprive him of his property without due process of law, or to take his property for public use without just compensation." 110 U.S., at 150 . However, the statute involved in that case had been construed in United States v. Taylor, 104 U.S. 216 , to require that the surplus be paid to the owner, and there the problem was treated as purely one of statutory construction without constitutional overtones. 9 But we do not have here a statute which absolutely precludes an owner from obtaining the surplus proceeds of a judicial sale. In City of New York v. Chapman Docks Co., 1 App. Div. 2d 895, 149 N. Y. S. 2d 679, an owner filed a timely answer in a foreclosure proceeding, asserting his property had a value substantially exceeding the tax due. The Appellate Division construed D17-12.0 of the statute 10 to mean that upon proof of this allegation a separate sale should be directed so that the owner might receive the surplus. What the City of New York has done is to foreclose real property for charges four years delinquent and, in the absence of timely action to redeem or to recover any surplus, retain the property or the entire proceeds of its sale. We hold that nothing in the Federal Constitution prevents this where the record shows adequate steps were taken to notify the owners of the charges due and the foreclosure proceedings.

It is contended that this is a harsh statute. The New York Court of Appeals took cognizance of this claim and [352 U.S. 103, 111] spoke of the "extreme hardships" resulting from the application of the statute in this case. But it held, as we must, that relief from the hardship imposed by a

state statute is the responsibility of the state legislature and not of the courts, unless some constitutional guarantee is infringed. In this connection, we note that the New York Legislature this year has ameliorated to some extent the severity of Title D, Chapter 17. Section D17-25.0 was added to the statute, permitting the reconveyance of property acquired and still held by the City upon payment of arrears, interest and the costs of foreclosure. The City concedes this amendment applies to the Powell Street property. Appellants have applied for a reconveyance of that property, and action has been held in abeyance pending the disposition of this appeal.

Affirmed.

Footnotes

[Footnote 1] The statute, D17-1.0 et seq., enacted in 1948, provides for the judicial foreclosure of tax liens on real property. The city treasurer files in the appropriate county clerk's office a list of all parcels in a section or ward of the City on which tax liens have been unpaid for at least four years. Tax liens include unpaid taxes, assessments or water rents, interest and penalties. This filing constitutes the [352 U.S. 103, 105] filing of a complaint and commences an action against the property. Provision is made for notice by posting, publication and mail. The notice must be mailed to the property owner at his last known address. The prescribed notice is to the effect that, unless the amount of unpaid tax liens, together with interest and penalties, are paid within 7 weeks or an answer interposed within 20 days thereafter, any person having the right to redeem or answer shall be foreclosed of all his right, title and interest and equity in and to the delinquent property. Provision is made for entry of a judgment of foreclosure awarding possession of the property to the City and directing execution of a deed conveying an estate in fee simple absolute to the City. The City may retain the property or sell it and retain the entire proceeds.

[Footnote 2] Appellants and the New York Court of Appeals used the figure $72.50. But the figures given in the affidavit of appellant Gerald D. Nelson (R. 68) yield a total of $65. Altogether, back charges, including those less than four years old, totaled $320.20. This includes $91.20 representing the second half of the 1948-1949 real estate taxes. No water charges were paid from 1945 on. All real estate taxes, with the exception noted, were paid.

[Footnote 3] D17-5.0.

[Footnote 4] D17-6.0.

[Footnote 5] For the years 1945 through 1947. No water charges had been paid since 1945, and the second half 1948-1949 real estate tax was not paid. The total delinquency was $2,681. R. 13-14.

[Footnote 6] The date on the other bill was June 30, 1951. Appellants introduced the tax bills as a basis for an argument that the City's error in continuing to bill them after the City had acquired title to the 45th Avenue property lulled them into thinking that all was well, so that

they took no steps to protect the Powell Street property. The effect of the notice of arrears should, it seems, have been quite the opposite.

[Footnote 7] In addition, a deputy city collector annexed to his affidavit copies of letters sent to the trust estate on June 5 and July 9, 1951, advising that there had been double payments of the taxes on the 45th Avenue property.

[Footnote 8] D17-5.0, which provides for the filing of lists of delinquent property, provides further, "Each such list shall comprise all such parcels within a particular section or ward designated on the tax maps of the city, except those parcels excluded from such lists as hereinafter provided." The grounds for exclusion are (1) question raised as to the validity of the tax lien on the parcel, (2) and (3) accepted agreement to pay delinquent taxes in installments, and (4) tax lien on the property sold within two years and enforcement of the lien not completed.

[Footnote 9] See also Chapman v. Zobelein, 237 U.S. 135 .

[Footnote 10] Section D17-12.0 (a) provides in pertinent part, "The court shall have full power . . . in a proper case to direct a sale of . . . lands and the distribution or other disposition of the proceeds of the sale." By D17-6.0 it is provided, "Every person having any right, title or interest in or lien upon any parcel . . . may serve a duly verified answer . . . setting forth in detail the nature and amount of his interest or lien and any defense or objection to the foreclosure." [352 U.S. 103, 112]

11 United States Code - Bankruptcy

§548. Fraudulent transfers and obligations

(a)(1) The trustee may avoid any transfer (including any transfer to or for the benefit of an insider under an employment contract) of an interest of the debtor in property, or any obligation (including any obligation to or for the benefit of an insider under an employment contract) incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily-

(A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or

(B)(i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(ii)(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital;

(III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured; or

(IV) made such transfer to or for the benefit of an insider, or incurred such obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business.

(2) A transfer of a charitable contribution to a qualified religious or charitable entity or organization shall not be considered to be a transfer covered under paragraph (1)(B) in any case in which-

(A) the amount of that contribution does not exceed 15 percent of the gross annual income of the debtor for the year in which the transfer of the contribution is made; or

(B) the contribution made by a debtor exceeded the percentage amount of gross annual income specified in subparagraph (A), if the transfer was consistent with the practices of the debtor in making charitable contributions.

(b) The trustee of a partnership debtor may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, to a general partner in the debtor, if the debtor was insolvent on the date such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation.

(c) Except to the extent that a transfer or obligation voidable under this section is voidable under section 544, 545, or 547 of this title, a transferee or obligee of such a transfer or obligation that takes for value and in good faith has a lien on or may retain any interest transferred or may enforce any obligation incurred, as the case may be, to the extent that such transferee or obligee gave value to the debtor in exchange for such transfer or obligation.

(d)(1) For the purposes of this section, a transfer is made when such transfer is so perfected that a bona fide purchaser from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest

in such property of the transferee, but if such transfer is not so perfected before the commencement of the case, such transfer is made immediately before the date of the filing of the petition.

(2) In this section-

(A) "value" means property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor;

(B) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency that receives a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, takes for value to the extent of such payment;

(C) a repo participant or financial participant that receives a margin payment, as defined in section 741 or 761 of this title, or settlement payment, as defined in section 741 of this title, in connection with a repurchase agreement, takes for value to the extent of such payment;

(D) a swap participant or financial participant that receives a transfer in connection with a swap agreement takes for value to the extent of such transfer; and

(E) a master netting agreement participant that receives a transfer in connection with a master netting agreement or any individual contract covered thereby takes for value to the extent of such transfer, except that, with respect to a transfer under any individual contract covered thereby, to the extent that such master netting agreement participant otherwise did not take (or is otherwise not deemed to have taken) such transfer for value.

(3) In this section, the term "charitable contribution" means a charitable contribution, as that term is defined in section 170(c) of the Internal Revenue Code of 1986, if that contribution-

(A) is made by a natural person; and

(B) consists of-

(i) a financial instrument (as that term is defined in section 731(c)(2)(C) of the Internal Revenue Code of 1986); or

(ii) cash.

(4) In this section, the term "qualified religious or charitable entity or organization" means-

(A) an entity described in section 170(c)(1) of the Internal Revenue Code of 1986; or

(B) an entity or organization described in section 170(c)(2) of the Internal Revenue Code of 1986.

(e)(1) In addition to any transfer that the trustee may otherwise avoid, the trustee may avoid any transfer of an interest of the debtor in property that was made on or within 10 years before the date of the filing of the petition, if-

(A) such transfer was made to a self-settled trust or similar device;

(B) such transfer was by the debtor;

(C) the debtor is a beneficiary of such trust or similar device; and

(D) the debtor made such transfer with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made, indebted.

(2) For the purposes of this subsection, a transfer includes a transfer made in anticipation of any money judgment, settlement, civil penalty, equitable order, or criminal fine incurred by, or which the debtor believed would be incurred by-

(A) any violation of the securities laws (as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47))), any State securities laws, or any regulation or order issued under Federal securities laws or State securities laws; or

(B) fraud, deceit, or manipulation in a fiduciary capacity or in connection with the purchase or sale of any security registered under section 12 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78l and 78o(d)) or under section 6 of the Securities Act of 1933 (15 U.S.C. 77f).

BFP *v.* RESOLUTION TRUST CORPORATION, AS RECEIVER OF IMPERIAL FEDERAL SAVINGS ASSOCIATION, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 92–1370. Argued December 7, 1993—Decided May 23, 1994

Petitioner BFP took title to a California home subject to, *inter alia,* a deed of trust in favor of Imperial Savings Association. After Imperial entered a notice of default because its loan was not being serviced, the home was purchased by respondent Osborne for $433,000 at a properly noticed foreclosure sale. BFP soon petitioned for bankruptcy and, acting as a debtor in possession, filed a complaint to set aside the sale to Osborne as a fraudulent transfer, claiming that the home was worth over $725,000 when sold and thus was not exchanged for a "reasonably equivalent value" under 11 U. S. C. § 548(a)(2). The Bankruptcy Court granted summary judgment to Imperial. The District Court affirmed the dismissal, and a bankruptcy appellate panel affirmed the judgment, holding that consideration received in a noncollusive and regularly conducted nonjudicial foreclosure sale establishes "reasonably equivalent value" as a matter of law. The Court of Appeals affirmed.

Held: A "reasonably equivalent value" for foreclosed real property is the price in fact received at the foreclosure sale, so long as all the requirements of the State's foreclosure law have been complied with. Pp. 535–549.

(a) Contrary to the positions taken by some Courts of Appeals, fair market value is not necessarily the benchmark against which determination of reasonably equivalent value is to be measured. It may be presumed that Congress acted intentionally when it used the term "fair market value" elsewhere in the Bankruptcy Code but not in § 548, particularly when the omission entails replacing standard legal terminology with a neologism. Moreover, fair market value presumes market conditions that, by definition, do not obtain in the forced-sale context, since property sold within the time and manner strictures of state-prescribed foreclosure is simply worth less than property sold without such restrictions. "Reasonably equivalent value" also cannot be read to mean a "reasonable" or "fair" forced-sale price, such as a percentage of fair market value. To specify a federal minimum sale price beyond what state foreclosure law requires would extend bankruptcy law well beyond the traditional field of fraudulent transfers and upset the coexistence that

fraudulent transfer law and foreclosure law have enjoyed for over 400 years. While, under fraudulent transfer law, a "grossly inadequate price" raises a rebuttable presumption of actual fraudulent intent, it is black letter foreclosure law that, when a State's procedures are followed, the mere inadequacy of a foreclosure sale price is no basis for setting the sale aside. Absent clearer textual guidance than the phrase "reasonably equivalent value"—a phrase entirely compatible with preexisting practice—the Court will not presume that Congress intended to displace traditional state regulation with an interpretation that would profoundly affect the important state interest in the security and stability of title to real property. Pp. 535–545.

(b) The conclusion reached here does not render § 548(a)(2) superfluous. The "reasonably equivalent value" criterion will continue to have independent meaning outside the foreclosure context, and § 548(a)(2) will continue to be an exclusive means of invalidating foreclosure sales that, while not intentionally fraudulent, nevertheless fail to comply with all governing state laws. Pp. 545–546.

974 F. 2d 1144, affirmed.

Scalia, J., delivered the opinion of the Court, in which Rehnquist, C. J., and O'Connor, Kennedy, and Thomas, JJ., joined. Souter, J., filed a dissenting opinion, in which Blackmun, Stevens, and Ginsburg, JJ., joined, *post,* p. 549.

Roy B. Woolsey argued the cause for petitioner. With him on the briefs was *Ronald B. Coulombe.*

Ronald J. Mann argued the cause for respondent Resolution Trust Corporation. With him on the brief were *Solicitor General Days, Assistant Attorney General Hunger, Jeffrey P. Minear, Joseph Patchan, Jeffrey Ehrlich,* and *Janice Lynn Green.*

Michael R. Sment argued the cause and filed a brief for respondent Osborne et al.*

**Marian C. Nowell, Henry J. Sommer, Gary Klein, Neil Fogarty,* and *Philip Shuchman* filed a brief for Frank Allen et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the American Council of Life Insurance et al. by *Christopher F. Graham, James L. Cunningham,* and *Richard E. Barnsback;* for the California Trustee's Association et al. by *Phillip M. Adleson, Patric J. Kelly,* and *Duane W. Shewaga;*

JUSTICE SCALIA delivered the opinion of the Court.

This case presents the question whether the consideration received from a noncollusive, real estate mortgage foreclosure sale conducted in conformance with applicable state law conclusively satisfies the Bankruptcy Code's requirement that transfers of property by insolvent debtors within one year prior to the filing of a bankruptcy petition be in exchange for "a reasonably equivalent value." 11 U. S. C. § 548(a)(2).

I

Petitioner BFP is a partnership, formed by Wayne and Marlene Pedersen and Russell Barton in 1987, for the purpose of buying a home in Newport Beach, California, from Sheldon and Ann Foreman. Petitioner took title subject to a first deed of trust in favor of Imperial Savings Association (Imperial)[1] to secure payment of a loan of $356,250 made to the Pedersens in connection with petitioner's acquisition of the home. Petitioner granted a second deed of trust to the Foremans as security for a $200,000 promissory note. Subsequently, Imperial, whose loan was not being serviced, entered a notice of default under the first deed of trust and scheduled a properly noticed foreclosure sale. The foreclosure proceedings were temporarily delayed by the filing of an involuntary bankruptcy petition on behalf of petitioner. After the dismissal of that petition in June 1989, Imperial's

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for the Council of State Governments et al. by *Richard Ruda;* for the Federal Home Loan Mortgage Corporation et al. by *Dean S. Cooper, Roger M. Whelan, David F. B. Smith,* and *William E. Cumberland;* and for Jim Walter Homes, Inc., by *Lawrence A. G. Johnson.*

[1] Respondent Resolution Trust Corporation (RTC) acts in this case as receiver of Imperial Federal Savings Association (Imperial Federal), which was organized pursuant to a June 22, 1990, order of the Director of the Office of Thrift Supervision, and into which RTC transferred certain assets and liabilities of Imperial. The Director previously had appointed RTC as receiver of Imperial. For convenience we refer to all respondents other than RTC and Imperial as the private respondents.

foreclosure proceeding was completed at a foreclosure sale on July 12, 1989. The home was purchased by respondent Paul Osborne for $433,000.

In October 1989, petitioner filed for bankruptcy under Chapter 11 of the Bankruptcy Code, 11 U. S. C. §§ 1101–1174. Acting as a debtor in possession, petitioner filed a complaint in Bankruptcy Court seeking to set aside the conveyance of the home to respondent Osborne on the grounds that the foreclosure sale constituted a fraudulent transfer under § 548 of the Code, 11 U. S. C. § 548. Petitioner alleged that the home was actually worth over $725,000 at the time of the sale to Osborne. Acting on separate motions, the Bankruptcy Court dismissed the complaint as to the private respondents and granted summary judgment in favor of Imperial. The Bankruptcy Court found, *inter alia,* that the foreclosure sale had been conducted in compliance with California law and was neither collusive nor fraudulent. In an unpublished opinion, the District Court affirmed the Bankruptcy Court's granting of the private respondents' motion to dismiss. A divided bankruptcy appellate panel affirmed the Bankruptcy Court's entry of summary judgment for Imperial. 132 B. R. 748 (1991). Applying the analysis set forth in *In re Madrid,* 21 B. R. 424 (Bkrtcy. App. Pan. CA9 1982), affirmed on other grounds, 725 F. 2d 1197 (CA9), cert. denied, 469 U. S. 833 (1984), the panel majority held that a "non-collusive and regularly conducted nonjudicial foreclosure sale . . . cannot be challenged as a fraudulent conveyance because the consideration received in such a sale establishes 'reasonably equivalent value' as a matter of law." 132 B. R., at 750.

Petitioner sought review of both decisions in the Court of Appeals for the Ninth Circuit, which consolidated the appeals. The Court of Appeals affirmed. *In re BFP,* 974 F. 2d 1144 (1992). BFP filed a petition for certiorari, which we granted. 508 U. S. 938 (1993).

II

Section 548 of the Bankruptcy Code, 11 U. S. C. § 548, sets forth the powers of a trustee in bankruptcy (or, in a Chapter 11 case, a debtor in possession) to avoid fraudulent transfers.[2] It permits to be set aside not only transfers infected by actual fraud but certain other transfers as well—so-called constructively fraudulent transfers. The constructive fraud provision at issue in this case applies to transfers by insolvent debtors. It permits avoidance if the trustee can establish (1) that the debtor had an interest in property; (2) that a transfer of that interest occurred within one year of the filing of the bankruptcy petition; (3) that the debtor was insolvent at the time of the transfer or became insolvent as a result thereof; and (4) that the debtor received "less than a reasonably equivalent value in exchange for such transfer." 11 U. S. C. § 548(a)(2)(A). It is the last of these four elements that presents the issue in the case before us.

Section 548 applies to any "transfer," which includes "foreclosure of the debtor's equity of redemption." 11 U. S. C. § 101(54) (1988 ed., Supp. IV). Of the three critical terms "reasonably equivalent value," only the last is defined: "value" means, for purposes of § 548, "property, or satisfaction or securing of a . . . debt of the debtor," 11 U. S. C.

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[2] Title 11 U. S. C. § 548 provides in relevant part:

"(a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily—

"(1) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or

"(2)(A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

"(B)(i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation . . . ."

§ 548(d)(2)(A). The question presented here, therefore, is whether the amount of debt (to the first and second lienholders) satisfied at the foreclosure sale (viz., a total of $433,000) is "reasonably equivalent" to the worth of the real estate conveyed. The Courts of Appeals have divided on the meaning of those undefined terms. In *Durrett* v. *Washington Nat. Ins. Co.*, 621 F. 2d 201 (1980), the Fifth Circuit, interpreting a provision of the old Bankruptcy Act analogous to § 548(a)(2), held that a foreclosure sale that yielded 57% of the property's fair market value could be set aside, and indicated in dicta that any such sale for less than 70% of fair market value should be invalidated. *Id.*, at 203–204. This "*Durrett* rule" has continued to be applied by some courts under § 548 of the new Bankruptcy Code. See *In re Littleton*, 888 F. 2d 90, 92, n. 5 (CA11 1989). In *In re Bundles*, 856 F. 2d 815, 820 (1988), the Seventh Circuit rejected the *Durrett* rule in favor of a case-by-case, "all facts and circumstances" approach to the question of reasonably equivalent value, with a *rebuttable* presumption that the foreclosure sale price is sufficient to withstand attack under § 548(a)(2). 856 F. 2d, at 824–825; see also *In re Grissom*, 955 F. 2d 1440, 1445–1446 (CA11 1992). In this case the Ninth Circuit, agreeing with the Sixth Circuit, see *In re Winshall Settler's Trust*, 758 F. 2d 1136, 1139 (CA6 1985), adopted the position first put forward in *In re Madrid*, 21 B. R. 424 (Bkrtcy. App. Pan. CA9 1982), affirmed on other grounds, 725 F. 2d 1197 (CA9), cert. denied, 469 U. S. 833 (1984), that the consideration received at a noncollusive, regularly conducted real estate foreclosure sale constitutes a reasonably equivalent value under § 548(a)(2)(A). The Court of Appeals acknowledged that it "necessarily part[ed] from the positions taken by the Fifth Circuit in *Durrett* . . . and the Seventh Circuit in *Bundles*." 974 F. 2d, at 1148.

In contrast to the approach adopted by the Ninth Circuit in the present case, both *Durrett* and *Bundles* refer to fair market value as the benchmark against which determination

of reasonably equivalent value is to be measured. In the context of an otherwise lawful mortgage foreclosure sale of real estate,[3] such reference is in our opinion not consistent with the text of the Bankruptcy Code. The term "fair market value," though it is a well-established concept, does not appear in § 548. In contrast, § 522, dealing with a debtor's exemptions, specifically provides that, for purposes of that section, " 'value' means fair market value as of the date of the filing of the petition." 11 U. S. C. § 522(a)(2). "Fair market value" also appears in the Code provision that defines the extent to which indebtedness with respect to an equity security is not forgiven for the purpose of determining whether the debtor's estate has realized taxable income. § 346(j)(7)(B). Section 548, on the other hand, seemingly goes out of its way to avoid that standard term. It might readily have said "received less than fair market value in exchange for such transfer or obligation," or perhaps "less than a reasonable equivalent of fair market value." Instead, it used the (as far as we are aware) entirely novel phrase "reasonably equivalent value." "[I]t is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another," *Chicago* v. *Environmental Defense Fund*, *ante*, at 338 (internal quotation marks omitted), and that presumption is even stronger when the omission entails the replacement of standard legal terminology with a neologism. One must suspect the language means that fair market value cannot—or at least cannot *always*—be the benchmark.

That suspicion becomes a certitude when one considers that market value, as it is commonly understood, has no applicability in the forced-sale context; indeed, it is the very *antithesis* of forced-sale value. "The market value of . . . a

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[3] We emphasize that our opinion today covers only mortgage foreclosures of real estate. The considerations bearing upon other foreclosures and forced sales (to satisfy tax liens, for example) may be different.

piece of property is the price which it might be expected to bring if offered for sale in a fair market; not the price which might be obtained on a sale at public auction or a sale forced by the necessities of the owner, but such a price as would be fixed by negotiation and mutual agreement, after ample time to find a purchaser, as between a vendor who is willing (but not compelled) to sell and a purchaser who desires to buy but is not compelled to take the particular . . . piece of property." Black's Law Dictionary 971 (6th ed. 1990). In short, "fair market value" presumes market conditions that, by definition, simply do not obtain in the context of a forced sale. See, *e. g., East Bay Municipal Utility District* v. *Kieffer*, 99 Cal. App. 240, 255, 278 P. 476, 482 (1929), overruled on other grounds by *County of San Diego* v. *Miller*, 13 Cal. 3d 684, 532 P. 2d 139 (1975) (in bank); *Nevada Nat. Leasing Co.* v. *Hereford*, 36 Cal. 3d 146, 152, 680 P. 2d 1077, 1080 (1984) (in bank); *Guardian Loan Co.* v. *Early*, 47 N. Y. 2d 515, 521, 392 N. E. 2d 1240, 1244 (1979).

Neither petitioner, petitioner's *amici*, nor any federal court adopting the *Durrett* or the *Bundles* analysis has come to grips with this glaring discrepancy between the factors relevant to an appraisal of a property's market value, on the one hand, and the strictures of the foreclosure process on the other. Market value cannot be the criterion of equivalence in the foreclosure-sale context.[4] The language of § 548(a)(2)(A) ("received less than a reasonably equivalent

[4] Our discussion assumes that the phrase "reasonably equivalent" means "approximately equivalent," or "roughly equivalent." One could, we suppose, torture it into meaning "as close to equivalent as can reasonably be expected"—in which event even a vast divergence from equivalent value would be permissible so long as there is good reason for it. On such an analysis, fair market value *could* be the criterion of equivalence, even in a forced-sale context; the forced sale would be the reason why gross inequivalence is nonetheless reasonable equivalence. Such word-gaming would deprive the criterion of all meaning. If "reasonably equivalent value" means only "as close to equivalent value as is reasonable," the statute might as well have said "reasonably infinite value."

value in exchange") requires judicial inquiry into whether the foreclosed property was sold for a price that approximated its worth at the time of sale. An appraiser's reconstruction of "fair market value" could show what similar property would be worth if it did not have to be sold within the time and manner strictures of state-prescribed foreclosure. But property that *must* be sold within those strictures is simply *worth less.* No one would pay as much to own such property as he would pay to own real estate that could be sold at leisure and pursuant to normal marketing techniques. And it is no more realistic to ignore that characteristic of the property (the fact that state foreclosure law permits the mortgagee to sell it at forced sale) than it is to ignore other price-affecting characteristics (such as the fact that state zoning law permits the owner of the neighboring lot to open a gas station).[5] Absent a clear statutory requirement to the contrary, we must assume the validity of this state-law regulatory background and take due account of its effect. "The existence and force and function of established

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[5] We are baffled by the dissent's perception of a "patent" difference between zoning and foreclosure laws insofar as impact upon property value is concerned, *post,* at 557–558, n. 10. The only distinction we perceive is that the former constitute permanent restrictions upon use of the subject property, while the latter apply for a brief period of time and restrict only the manner of its sale. This difference says nothing about how significantly the respective regimes affect the property's value when they are operative. The dissent characterizes foreclosure rules as "merely procedural," and asserts that this renders them, unlike "substantive" zoning regulations, irrelevant in bankruptcy. We are not sure we agree with the characterization. But in any event, the cases relied on for this distinction all address creditors' attempts to claim the benefit of state rules of law (whether procedural or substantive) as property rights, in a bankruptcy proceeding. See *United Sav. Assn. of Tex.* v. *Timbers of Inwood Forest Associates, Ltd.,* 484 U. S. 365, 370–371 (1988); *Owen* v. *Owen,* 500 U. S. 305, 313 (1991); *United States* v. *Whiting Pools, Inc.,* 462 U. S. 198, 206–207, and nn. 14, 15 (1983). None of them declares or even intimates that state laws, procedural or otherwise, are irrelevant to prebankruptcy valuation questions such as that presented by § 548(a)(2)(A).

institutions of local government are always in the consciousness of lawmakers and, while their weight may vary, they may never be completely overlooked in the task of interpretation." *Davies Warehouse Co.* v. *Bowles,* 321 U. S. 144, 154 (1944). Cf. *Gregory* v. *Ashcroft,* 501 U. S. 452, 460–462 (1991).

There is another artificially constructed criterion we might look to instead of "fair market price." One might judge there to be such a thing as a "reasonable" or "fair" forced-sale price. Such a conviction must lie behind the *Bundles* inquiry into whether the state foreclosure proceedings "were calculated . . . to return to the debtor-mortgagor his equity in the property." 856 F. 2d, at 824. And perhaps that is what the courts that follow the *Durrett* rule have in mind when they select 70% of fair market value as the outer limit of "reasonably equivalent value" for forecloseable property (we have no idea where else such an arbitrary percentage could have come from). The problem is that such judgments represent policy determinations that the Bankruptcy Code gives us no apparent authority to make. How closely the price received in a forced sale is likely to approximate fair market value depends upon the terms of the forced sale—how quickly it may be made, what sort of public notice must be given, etc. But the terms for foreclosure sale are not *standard.* They vary considerably from State to State, depending upon, among other things, how the particular State values the divergent interests of debtor and creditor. To specify a federal "reasonable" foreclosure-sale price is to extend federal bankruptcy law well beyond the traditional field of fraudulent transfers, into realms of policy where it has not ventured before. Some sense of history is needed to appreciate this.

The modern law of fraudulent transfers had its origin in the Statute of 13 Elizabeth, which invalidated "covinous and fraudulent" transfers designed "to delay, hinder or defraud creditors and others." 13 Eliz., ch. 5 (1570). English courts

soon developed the doctrine of "badges of fraud": proof by a creditor of certain objective facts (for example, a transfer to a close relative, a secret transfer, a transfer of title without transfer of possession, or grossly inadequate consideration) would raise a rebuttable presumption of actual fraudulent intent. See *Twyne's Case*, 3 Coke Rep. 80b, 76 Eng. Rep. 809 (K. B. 1601); O. Bump, Fraudulent Conveyances: A Treatise upon Conveyances Made by Debtors to Defraud Creditors 31–60 (3d ed. 1882). Every American bankruptcy law has incorporated a fraudulent transfer provision; the 1898 Act specifically adopted the language of the Statute of 13 Elizabeth. Bankruptcy Act of July 1, 1898, ch. 541, § 67(e), 30 Stat. 564–565.

The history of foreclosure law also begins in England, where courts of chancery developed the "equity of redemption"—the equitable right of a borrower to buy back, or redeem, property conveyed as security by paying the secured debt on a later date than "law day," the original due date. The courts' continued expansion of the period of redemption left lenders in a quandary, since title to forfeited property could remain clouded for years after law day. To meet this problem, courts created the equitable remedy of foreclosure: after a certain date the borrower would be forever foreclosed from exercising his equity of redemption. This remedy was called strict foreclosure because the borrower's entire interest in the property was forfeited, regardless of any accumulated equity. See G. Glenn, 1 Mortgages 3–18, 358–362, 395–406 (1943); G. Osborne, Mortgages 144 (2d ed. 1970). The next major change took place in 19th-century America, with the development of foreclosure by sale (with the surplus over the debt refunded to the debtor) as a means of avoiding the draconian consequences of strict foreclosure. *Id.,* at 661–663; Glenn, *supra,* at 460–462, 622. Since then, the States have created diverse networks of judicially and legislatively crafted rules governing the foreclosure process, to achieve what each of them considers the proper balance between the

needs of lenders and borrowers. All States permit judicial foreclosure, conducted under direct judicial oversight; about half of the States also permit foreclosure by exercising a private power of sale provided in the mortgage documents. See Zinman, Houle, & Weiss, Fraudulent Transfers According to Alden, Gross and Borowitz: A Tale of Two Circuits, 39 Bus. Law. 977, 1004–1005 (1984). Foreclosure laws typically require notice to the defaulting borrower, a substantial lead time before the commencement of foreclosure proceedings, publication of a notice of sale, and strict adherence to prescribed bidding rules and auction procedures. Many States require that the auction be conducted by a government official, and some forbid the property to be sold for less than a specified fraction of a mandatory presale fair-market-value appraisal. See *id.*, at 1002, 1004–1005; Osborne, *supra,* at 683, 733–735; G. Osborne, G. Nelson, & D. Whitman, Real Estate Finance Law 9, 446–447, 475–477 (1979). When these procedures have been followed, however, it is "black letter" law that mere inadequacy of the foreclosure sale price is no basis for setting the sale aside, though it may be set aside (*under state foreclosure law,* rather than fraudulent transfer law) if the price is so low as to "shock the conscience or raise a presumption of fraud or unfairness." Osborne, Nelson, & Whitman, *supra,* at 469; see also *Gelfert* v. *National City Bank of N. Y.,* 313 U. S. 221, 232 (1941); *Ballentyne* v. *Smith,* 205 U. S. 285, 290 (1907).

Fraudulent transfer law and foreclosure law enjoyed over 400 years of peaceful coexistence in Anglo-American jurisprudence until the Fifth Circuit's unprecedented 1980 decision in *Durrett.* To our knowledge no prior decision had ever applied the "grossly inadequate price" badge of fraud under fraudulent transfer law to set aside a foreclosure sale.[6] To say that the "reasonably equivalent value" language in

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[6] The only case cited by *Durrett* in support of its extension of fraudulent transfer doctrine, *Schafer* v. *Hammond,* 456 F. 2d 15 (CA10 1972), involved a direct sale, not a foreclosure.

the fraudulent transfer provision of the Bankruptcy Code requires a foreclosure sale to yield a certain minimum price beyond what state foreclosure law requires, is to say, in essence, that the Code has adopted *Durrett* or *Bundles.* Surely Congress has the power pursuant to its constitutional grant of authority over bankruptcy, U. S. Const., Art. I, § 8, cl. 4, to disrupt the ancient harmony that foreclosure law and fraudulent conveyance law, those two pillars of debtor-creditor jurisprudence, have heretofore enjoyed. But absent clearer textual guidance than the phrase "reasonably equivalent value"—a phrase entirely compatible with preexisting practice—we will not presume such a radical departure. See *United Sav. Assn. of Tex.* v. *Timbers of Inwood Forest Associates, Ltd.*, 484 U. S. 365, 380 (1988); *Midlantic Nat. Bank* v. *New Jersey Dept. of Environmental Protection*, 474 U. S. 494, 501 (1986); cf. *United States* v. *Texas*, 507 U. S. 529, 534 (1993) (statutes that invade common law must be read with presumption favoring retention of long-established principles absent evident statutory purpose to the contrary).[7]

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[7] We are unpersuaded by petitioner's argument that the 1984 amendments to the Bankruptcy Code codified the *Durrett* rule. Those amendments expanded the definition of "transfer" to include "foreclosure of the debtor's equity of redemption," 11 U. S. C. § 101(54) (1988 ed., Supp. IV), and added the words "voluntarily or involuntarily" as modifiers of the term "transfer" in § 548(a). The first of these provisions establishes that foreclosure sales fall within the general definition of "transfers" that may be avoided under several statutory provisions, including (but not limited to) § 548. See § 522(h) (transfers of exempt property), § 544 (transfers voidable under state law), § 547 (preferential transfers), § 549 (postpetition transfers). The second of them establishes that a transfer may be avoided as fraudulent even if it was against the debtor's will. See *In re Madrid,* 725 F. 2d 1197, 1199 (CA9 1984) (preamendment decision holding that a foreclosure sale is not a "transfer" under § 548). Neither of these consequences has any bearing upon the meaning of "reasonably equivalent value" in the context of a foreclosure sale.

Nor does our reading render these amendments "superfluous," as the dissent contends, *post,* at 555. Prior to 1984, it was at least open to ques-

Federal statutes impinging upon important state interests "cannot . . . be construed without regard to the implications of our dual system of government. . . . [W]hen the Federal Government takes over . . . local radiations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, those charged with the duty of legislating [must be] reasonably explicit." Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 539–540 (1947), quoted in *Kelly* v. *Robinson,* 479 U. S. 36, 49–50, n. 11 (1986). It is beyond question that an essential state interest is at issue here: We have said that "the general welfare of society is involved in the security of the titles to real estate" and the power to ensure that security "inheres in the very nature of [state] government." *American Land Co.* v. *Zeiss,* 219 U. S. 47, 60 (1911). Nor is there any doubt that the interpretation urged by petitioner would have a profound effect upon that interest: The title of every piece of realty purchased at foreclosure would be under a federally created cloud. (Already, title insurers have reacted to the *Durrett* rule by including specially crafted exceptions from coverage in many policies issued for properties purchased at foreclosure sales. See, *e. g.,* L. Cherkis & L. King, Collier Real Estate Transactions and the Bankruptcy Code, pp. 5–18 to 5–19 (1992).) To displace traditional state regulation in such a manner, the federal statutory purpose must be "clear and manifest," *English* v. *General Elec. Co.,* 496 U. S. 72, 79 (1990). Cf. *Gregory* v. *Ashcroft,* 501 U. S., at 460–461.[8] Otherwise, the Bankruptcy

tion whether § 548 could be used to invalidate even a *collusive* foreclosure sale, see *Madrid, supra,* at 1204 (Farris, J., concurring). It is no superfluity for Congress to clarify what had been at best unclear, which is what it did here by making the provision apply to involuntary as well as voluntary transfers and by including foreclosures within the definition of "transfer." See *infra,* at 545–546.

[8] The dissent criticizes our partial reliance on *Gregory* because the States' authority to "defin[e] and adjus[t] the relations between debtors and creditors . . . [cannot] fairly be called essential to their indepen-

Code will be construed to adopt, rather than to displace, pre-existing state law. See *Kelly*, *supra*, at 49; *Butner* v. *United States*, 440 U. S. 48, 54–55 (1979); *Vanston Bondholders Protective Comm.* v. *Green*, 329 U. S. 156, 171 (1946) (Frankfurter, J., concurring).

For the reasons described, we decline to read the phrase "reasonably equivalent value" in § 548(a)(2) to mean, in its application to mortgage foreclosure sales, either "fair market value" or "fair foreclosure price" (whether calculated as a percentage of fair market value or otherwise). We deem, as the law has always deemed, that a fair and proper price, or a "reasonably equivalent value," for foreclosed property, is the price in fact received at the foreclosure sale, so long as all the requirements of the State's foreclosure law have been complied with.

This conclusion does not render § 548(a)(2) superfluous, since the "reasonably equivalent value" criterion will continue to have independent meaning (ordinarily a meaning similar to fair market value) outside the foreclosure context. Indeed, § 548(a)(2) will even continue to be an exclusive means of invalidating some foreclosure sales. Although *collusive* foreclosure sales are likely subject to attack under § 548(a)(1), which authorizes the trustee to avoid transfers "made . . . with actual intent to hinder, delay, or defraud" creditors, that provision may not reach foreclosure sales that, while not intentionally fraudulent, nevertheless fail to comply with all governing state laws. Cf. 4 L. King, Collier on Bankruptcy ¶ 548.02, p. 548–35 (15th ed. 1993) (contrasting subsections (a)(1) and (a)(2)(A) of § 548). Any irregularity in the conduct of the sale that would permit judicial invalidation of the sale under applicable state law deprives the sale

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dence." *Post*, at 565, n. 17 (internal quotation marks omitted). This ignores the fact that it is not state authority over debtor-creditor law *in general* that is at stake in this case, but the essential sovereign interest in the security and stability of title to land. See *American Land Co.* v. *Zeiss*, 219 U. S. 47, 60 (1911).

price of its conclusive force under § 548(a)(2)(A), and the transfer may be avoided if the price received was not reasonably equivalent to the property's actual value at the time of the sale (which we think would be the price that would have been received if the foreclosure sale had proceeded according to law).

III

A few words may be added in general response to the dissent. We have no quarrel with the dissent's assertion that where the "meaning of the Bankruptcy Code's text is itself clear," *post,* at 566, its operation is unimpeded by contrary state law or prior practice. Nor do we contend that Congress must override historical state practice "expressly or not at all." *Post,* at 565. The Bankruptcy Code can of course override by implication when the implication is unambiguous. But where the intent to override is doubtful, our federal system demands deference to long-established traditions of state regulation.

The dissent's insistence that here no doubt exists—that our reading of the statute is "in derogation of the *straightforward language* used by Congress," *post,* at 549 (emphasis added)—does not withstand scrutiny. The problem is not that we disagree with the dissent's proffered "plain meaning" of § 548(a)(2)(A) ("[T]he bankruptcy court must compare the price received by the insolvent debtor and the worth of the item when sold and set aside the transfer if the former was substantially ('[un]reasonabl[y]') 'less than' the latter," *post,* at 552)—which indeed echoes our own framing of the question presented ("whether the amount of debt . . . satisfied at the foreclosure sale . . . is 'reasonably equivalent' to the worth of the real estate conveyed," *supra,* at 536). There is no doubt that this provision directs an inquiry into the relationship of the value received by the debtor to the worth of the property transferred. The problem, however, as any "ordinary speaker of English would have no difficulty grasping," *post,* at 552, is that this highly generalized re-

formulation of the "plain meaning" of "reasonably equivalent value" continues to leave unanswered the one question central to this case, wherein the ambiguity lies: *What is a foreclosed property worth?* Obviously, until that is determined, we cannot know whether the value received in exchange for foreclosed property is "reasonably equivalent." We have considered three (not, as the dissent insists, only two, see *post,* at 549) possible answers to this question—fair market value, *supra,* at 536–540, reasonable forced-sale price, *supra,* at 540, and the foreclosure-sale price itself—and have settled on the last. We would have expected the dissent to opt for one of the other two, or perhaps even to concoct a fourth; but one searches JUSTICE SOUTER's opinion in vain for any alternative response to the question of the transferred property's worth. Instead, the dissent simply reiterates the "single meaning" of "reasonably equivalent value" (with which we entirely agree): "[A] court should discern the 'value' of the property transferred and determine whether the price paid was, under the circumstances, 'less than reasonabl[e].'" *Post,* at 559. Well and good. But what *is* the "value"? The dissent has no response, evidently thinking that, in order to establish that the law is clear, it suffices to show that "the eminent sense of the natural reading," *post,* at 565, provides an unanswered question.

Instead of answering the question, the dissent gives us hope that someone else will answer it, exhorting us "to believe that [bankruptcy courts], familiar with these cases (and with local conditions) as we are not, will give ["reasonably equivalent value"] sensible content in evaluating particular transfers on foreclosure." *Post,* at 560. While we share the dissent's confidence in the capabilities of the United States Bankruptcy Courts, it is the proper function of *this* Court to give "sensible content" to the provisions of the United States Code. It is surely the case that bankruptcy "courts regularly make . . . determinations about the 'reasonably equivalent value' of assets transferred through other

means than foreclosure sales." *Post,* at 560. But in the vast majority of those cases, they can refer to the traditional common-law notion of fair market value as the benchmark. As we have demonstrated, this generally useful concept simply has no application in the foreclosure-sale context, *supra,* at 536–540.

Although the dissent's conception of what constitutes a property's "value" is unclear, it does *seem* to take account of the fact that the property is subject to forced sale. The dissent refers, for example, to a reasonable price "under the circumstances," *post,* at 559, and to the "worth of the item *when sold,*" *post,* at 552 (emphasis added). But just as we are never told how the broader question of a property's "worth" is to be answered, neither are we informed how the lesser included inquiry into the impact of forced sale is to be conducted. Once again, we are called upon to have faith that bankruptcy courts will be able to determine whether a property's foreclosure-sale price falls unreasonably short of its "optimal value," *post,* at 559, whatever that may be. This, the dissent tells us, is the statute's plain meaning.

We take issue with the dissent's characterization of our interpretation as carving out an "exception" for foreclosure sales, *post,* at 549, or as giving "two different and inconsistent meanings," *post,* at 557, to "reasonably equivalent value." As we have emphasized, the inquiry under § 548(a)(2)(A)—whether the debtor has received value that is substantially comparable to the worth of the transferred property—is the same for all transfers. But as we have also explained, the fact that a piece of property is legally subject to forced sale, like any other fact bearing upon the property's use or alienability, necessarily affects its worth. *Unlike* most other legal restrictions, however, foreclosure has the effect of completely redefining the market in which the property is offered for sale; normal free-market rules of exchange are replaced by the far more restrictive rules governing forced sales. Given this altered reality, and the concomitant inutil-

ity of the normal tool for determining what property is worth (fair market value), the only legitimate evidence of the property's value at the time it is sold is the foreclosure-sale price itself.

* * *

For the foregoing reasons, the judgment of the Court of Appeals for the Ninth Circuit is

Affirmed.

Justice Souter, with whom Justice Blackmun, Justice Stevens, and Justice Ginsburg join, dissenting.

The Court today holds that by the terms of the Bankruptcy Code Congress intended a peppercorn paid at a noncollusive and procedurally regular foreclosure sale to be treated as the "reasonabl[e] equivalent" of the value of a California beachfront estate. Because the Court's reasoning fails both to overcome the implausibility of that proposition and to justify engrafting a foreclosure-sale exception onto 11 U. S. C. § 548(a)(2)(A), in derogation of the straightforward language used by Congress, I respectfully dissent.

I

A

The majority presents our task of giving meaning to § 548(a)(2)(A) in this case as essentially entailing a choice between two provisions that Congress might have enacted, but did not. One would allow a bankruptcy trustee to avoid a recent foreclosure-sale transfer from an insolvent debtor whenever anything less than fair market value was obtained, while the second would limit the avoidance power to cases where the foreclosure sale was collusive or had failed to comply with state-prescribed procedures. The Court then argues that, given the unexceptionable proposition that forced sales rarely yield as high a price as sales held under ideal, "market" conditions, Congress's "omission" from

§ 548(a)(2)(A) of the phrase "fair market value" means that the latter, narrowly procedural reading of § 548(a)(2)(A) is the preferable one.

If those in fact were the interpretive alternatives, the majority's choice might be a defensible one.[1] The first, equating "reasonably equivalent value" at a foreclosure sale with "fair market value" has little to recommend it. Forced-sale prices may not be (as the majority calls them) the "very *antithesis*" of market value, see *ante,* at 537, but they fail to bring in what voluntary sales realize, and rejecting such a

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[1] I note, however, two preliminary embarrassments: first, the gloss on § 548(a)(2)(A) the Court embraces is less than entirely hypothetical. In the course of amending the Bankruptcy Code in 1984, see *infra,* at 554, Congress considered, but did not enact, an amendment that said precisely what the majority now says the current provision means, *i. e.,* that the avoidance power is confined to foreclosures involving collusion or procedural irregularity. See S. 445, 98th Cong., 1st Sess., § 360 (1983). Even if one is careful not to attach too much significance to such a legislative nonoccurrence, it surely cautions against undue reliance on a different, entirely speculative congressional "omission." See *ante,* at 537 (the statute "seemingly goes out of its way to avoid" using "fair market value"); but cf. *ante,* at 545 (reasonably equivalent value will "continue" to have a meaning "similar to fair market value" outside the foreclosure-sale context).

In this case, such caution would be rewarded. While the assertedly "standard," *ante,* at 537, phrase "fair market value" appears in more than 150 distinct provisions of the Tax Code, it figures in only two Bankruptcy Code provisions, one of which is entitled, suggestively, "Special tax provisions." See 11 U. S. C. § 346. The term of choice in the bankruptcy setting seems to be "value," unadorned and undefined, which appears in more than 30 sections of the Bankruptcy Code, but which is, with respect to many of them, read to mean "fair market value." See also § 549(c) ("present fair equivalent value"); § 506(a) ("value [is to] be determined in light of the purpose of the valuation and of the proposed disposition or use of such property"); S. Rep. No. 95–989, p. 54 (1978) ("[M]atters [of valuation under § 361] are left to case-by-case interpretation and development. . . . Value [does not] mean, in every case, forced sale liquidation value or full going concern value. There is wide latitude between those two extremes . . ."). To the extent, therefore, that this negative implication supplies ground to "suspect," see *ante,* at 537, that Congress could not have meant what the statute says, such suspicion is misplaced.

reading of the statute is as easy as statutory interpretation is likely to get. On the majority's view, laying waste to this straw man necessitates accepting as adequate value whatever results from noncollusive adherence to state foreclosure requirements. Because properties are "simply *worth less*," *ante*, at 539, on foreclosure sale, the Court posits, they must have been "worth" whatever price was paid. That, however, is neither a plausible interpretation of the statute, nor its only remaining alternative reading.[2]

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[2] The majority's statutory argument depends similarly heavily on the success of its effort to relegate "fair market value" to complete pariah status. But it is no short leap from the (entirely correct) observation that a property's fair market value will not be dispositive of whether "less than a reasonably equivalent value" was obtained on foreclosure to the assertion that market value has "no applicability," *ante*, at 537, or *is not "legitimate evidence*," *ante*, at 549 (emphasis added), of whether the statutory standard was met. As is explored more fully *infra*, the assessed value of a parcel of real estate at the time of foreclosure sale is not to be ignored. On the contrary, that figure plainly is relevant to the Bankruptcy Code determination, both because it provides a proper measure of the rights received by the transferee and because it is indicative of the extent of the debtor's equity in the property, an asset which, but for the prebankruptcy transfer under review, would have been available to the bankruptcy estate, see *infra*, at 562–565.

It is also somewhat misleading, similarly, to suggest that "[n]o one would pay as much," *ante*, at 539, for a foreclosed property as he would for the same real estate purchased under leisurely, market conditions. Buyers no doubt hope for bargains at foreclosure sales, but an investor with a million dollars cash in his pocket might be ready to pay "as much" for a desired parcel of property on forced sale, at least if a rival, equally determined millionaire were to appear at the same auction. The principal reason such sales yield low prices is not so much that the properties become momentarily "*worth less*," *ibid.* (on the contrary, foreclosure-sale purchasers receive a bundle of rights essentially similar to what they get when they buy on the market) or that foreclosing mortgagees are under the compulsion of state law to make no more than the most desultory efforts to encourage higher bidding, but rather that such free-spending millionaires are in short supply, and those who do exist are unlikely to read the fine print which fills the "legal notice" columns of their morning newspaper. Nor, similarly, is market value justly known as the "antithesis" of

The question before the Court is whether the price received at a foreclosure sale after compliance with state procedural rules in a noncollusive sale must be treated conclusively as the "reasonably equivalent value" of the mortaged property and in answering that question, the words and meaning of § 548(a)(2)(A) are plain. See *Patterson* v. *Shumate,* 504 U. S. 753, 760 (1992) (party seeking to defeat plain meaning of Bankruptcy Code text bears an "exceptionally heavy burden") (internal quotation marks omitted); *Perrin* v. *United States,* 444 U. S. 37, 42 (1979) (statutory words should be given their ordinary meaning). A trustee is authorized to avoid certain recent prebankruptcy transfers, including those on foreclosure sales, that a bankruptcy court determines were not made in exchange for "a reasonably equivalent value." Although this formulation makes no pretense to mathematical precision, an ordinary speaker of English would have no difficulty grasping its basic thrust: the bankruptcy court must compare the price received by the insolvent debtor and the worth of the item when sold and set aside the transfer if the former was substantially ("[un]-reasonabl[y]") "less than" the latter.[3] Nor would any ordinary English speaker, concerned to determine whether a foreclosure sale was collusive or procedurally irregular (an enquiry going exclusively to the process by which a transaction was consummated), direct an adjudicator, as the Court now holds Congress did, to ascertain whether the sale had realized "less than a reasonably equivalent value" (an enquiry described in quintessentially substantive terms).[4]

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foreclosure-sale price, for the important (if intuitive) reason that properties with higher market values can be expected to sell for more on foreclosure.

[3] Indeed, it is striking that this is what the Court says the statute (probably) does mean, with respect to almost every transfer other than a sale of property upon foreclosure. See *ante,* at 545.

[4] The Court protests, *ante,* at 546, that its formulation, see *ante,* at 536, deviates only subtly from the reading advanced here and purports not to disagree that the statute compels an enquiry "into the relationship of the

Closer familiarity with the text, structure, and history of the disputed provision (and relevant amendments) confirms the soundness of the plain reading. Before 1984, the question whether foreclosure sales fell within bankruptcy courts' power to set aside transfers for "too little in return" was, potentially, a difficult one. Then, it might plausibly have been contended that § 548 was most concerned with "fraudulent" conduct by debtors on the brink of bankruptcy, misbehavior unlikely to be afoot when an insolvent debtor's property is sold, against his wishes, at foreclosure.[5] Indeed, it could further have been argued, again consonantly with the text of the earlier version of the Bankruptcy Code, that Congress had not understood foreclosure to involve a "transfer" within the ambit of § 548, see, *e. g.*, *Abramson* v. *Lakewood Bank & Trust Co.*, 647 F. 2d 547, 549 (CA5 1981) (Clark, J.,

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value received and the worth of the property transferred," *ante*, at 546. Reassuring as such carefully chosen words may sound, they cannot obscure the fact that the "comparison" the majority envisions is an empty ritual. See n. 10, *infra*.

[5] The Court notes correctly that fraudulent conveyance laws were directed first against insolvent debtors' passing assets to friends or relatives, in order to keep them beyond their creditors' reach (the proverbial "Elizabethan deadbeat who sells his sheep to his brother for a pittance," see Baird & Jackson, Fraudulent Conveyance Law and Its Proper Domain, 38 Vand. L. Rev. 829, 852 (1985)), and then later against conduct said to carry the "badges" of such misconduct, but bankruptcy law had, well before 1984, turned decisively away from the notion that the debtor's state of mind, and not the objective effects on creditors, should determine the scope of the avoidance power. Thus, the 1938 Chandler Act, Bankruptcy Revision, provided that a transfer could be set aside without proving any intent to "hinder, delay, or defraud," provided that the insolvent debtor obtained less than "fair consideration" in return, see 11 U. S. C. § 107(d)(2) (1976), and the 1978 Bankruptcy Code eliminated scrutiny of the transacting parties' "good faith." Cf. 11 U. S. C. § 107(d)(1)(e) (1976). At the time when bankruptcy law was more narrowly concerned with debtors' turpitude, moreover, the available "remedies" were strikingly different, as well. See, *e. g.*, 21 Jac. I., ch. 19, § 6 (1623), 4 Statutes of the Realm 1228 (insolvent debtor who fraudulently conceals assets is subject to have his ear nailed to pillory and cut off).

dissenting) (Bankruptcy Act case), cert. denied, 454 U. S. 1164 (1982), on the theory that the "transfer" from mortgagor to mortgagee occurs, once and for all, when the security interest is first created. See generally *In re Madrid,* 725 F. 2d 1197 (CA9), cert. denied, 469 U. S. 833 (1984).

In 1984, however, Congress pulled the rug out from under these previously serious arguments, by amending the Code in two relevant respects. See Bankruptcy Amendments and Federal Judgeship Act of 1984, §§ 401(1), 463(a), 98 Stat. 366, 378. One amendment provided expressly that "involuntar[y]" transfers are no less within the trustee's § 548 avoidance powers than "voluntar[y]" ones, and another provided that the "foreclosure of the debtor's equity of redemption" itself is a "transfer" for purposes of bankruptcy law. See 11 U. S. C. § 101(54) (1988 ed., Supp. IV).[6] Thus, whether or not one believes (as the majority seemingly does not) that foreclosure sales rightfully belong within the historic domain of "fraudulent conveyance" law, that is exactly where Congress has now put them, cf. *In re Ehring,* 900 F. 2d 184, 187 (CA9 1990), and our duty is to give effect to these new amendments, along with every other clause of the Bankruptcy Code. See, *e. g., United States* v. *Nordic Village, Inc.,* 503 U. S. 30, 36 (1992); *United Sav. Assn. of Tex.* v. *Timbers of Inwood Forest Associates, Ltd.,* 484 U. S. 365, 374–375 (1988); see also *Dewsnup* v. *Timm,* 502 U. S. 410, 426 (1992) (Scalia, J., dissenting). The Court's attempt to escape the

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[6] As noted at n. 1, *supra,* an earlier version of the Senate bill contained a provision that would have added to § 548 the conclusive presumption the Court implies here. See S. 445, 98th Cong., 1st Sess., § 360 (1983) ("A secured party or third party purchaser who obtains title to an interest of the debtor in property pursuant to a good faith prepetition foreclosure, power of sale, or other proceeding or provision of nonbankruptcy law permitting or providing for the realization of security upon default of the borrower under a mortgage, deed of trust, or other security agreement takes for reasonably equivalent value within the meaning of this section"). The provision was deleted from the legislation enacted by Congress.

plain effect of § 548(a)(2)(A) opens it to some equally plain objections.

The first and most obvious of these objections is the very enigma of the Court's reading. If a property's "value" is conclusively presumed to be whatever it sold for, the "less than reasonabl[e] equivalen[ce]" question will never be worth asking, and the bankruptcy avoidance power will apparently be a dead letter in reviewing real estate foreclosures. Cf. 11 U. S. C. § 361(3) ("indubitable equivalent").[7] The Court answers that the section is not totally moribund: it still furnishes a way to attack collusive or procedurally deficient real property foreclosures, and it enjoys a vital role in authorizing challenges to other transfers than those occurring on real estate foreclosure. The first answer, however, just runs up against a new objection. If indeed the statute fails to reach noncollusive, procedurally correct real estate foreclosures, then the recent amendments discussed above were probably superfluous. There is a persuasive case that collusive or seriously irregular real estate sales were already subject to avoidance in bankruptcy, see, *e. g., In re Worcester*, 811 F. 2d 1224, 1228, 1232 (CA9 1987) (interpreting § 541(a)), and neither the Court nor the respondents and their *amici* identify any specific case in which a court pronounced itself powerless to avoid a collusive foreclosure sale. But cf. *Madrid, supra*, at 1204 (Farris, J., concurring). It would seem peculiar,

[7] Evidently, many States take a less Panglossian view than does the majority about the prices paid at sales conducted in accordance with their prescribed procedures. If foreclosure-sale prices truly represented what properties are "worth," *ante*, at 539, or their "fair and proper price," *ante*, at 545, it would stand to reason that deficiency judgments would be awarded simply by calculating the difference between the debt owed and the "value," as established by the sale. Instead, in those jurisdictions permitting creditors to seek deficiency judgments it is quite common to require them to show that the foreclosure price roughly approximated the property's (appraised) value. See, *e. g.*, Tex. Prop. Code Ann. §§ 51.003–51.005 (Supp. 1992); see generally *Gelfert* v. *National City Bank of N. Y.*, 313 U. S. 221 (1941); cf. *id.*, at 233 ("[T]he price which property commands at a forced sale may be hardly even a rough measure of its value").

then, that for no sound reason, Congress would have tinkered with these closely watched sections of the Bankruptcy Code, for the sole purpose of endowing bankruptcy courts with authority that had not been found wanting in the first place.[8]

The Court's second answer to the objection that it renders the statute a dead letter is to remind us that the statute applies to all sorts of transfers, not just to real estate foreclosures, and as to all the others, the provision enjoys great vitality, calling for true comparison between value received for the property and its "reasonably equivalent value." (Indeed, the Court has no trouble acknowledging that something "similar to" fair market value may supply the benchmark of reasonable equivalence when such a sale is not initiated by a mortgagee, *ante,* at 545.) This answer, however, is less tenable than the first. A common rule of con-

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[8] That is not the only aspect of the majority's approach that is hard to square with the amended text. By redefining "transfer" in § 101, Congress authorized the trustee to avoid any "foreclosure of the equity of redemption" for "less than a reasonably equivalent value." In light of the fact, see, *e. g.,* Lifton, Real Estate in Trouble: Lender's Remedies Need an Overhaul, 31 Bus. Law 1927, 1937 (1976), that most foreclosure properties are sold (at noncollusive and procedurally unassailable sales, we may presume) for the precise amount of the outstanding indebtedness, when some (but by no means all) are worth more, see generally Wechsler, Through the Looking Glass: Foreclosure by Sale as *De Facto* Strict Foreclosure—An Empirical Study of Mortgage Foreclosure and Subsequent Resale, 70 Cornell L. Rev. 850 (1985), it seems particularly curious that Congress would amend a statute to recognize that a debtor "transfers" an "interest in property," when the equity of redemption is foreclosed, fully intending that the "reasonably equivalent value" of that interest would, in the majority of cases, be presumed conclusively to be zero.

To the extent that the Court believes the amended § 548(a)(2)(A) to be addressed to "collusive" sales, meanwhile, a surprisingly indirect means was chosen. Cf. 11 U. S. C. § 363(n) (authorizing trustee avoidance of postpetition sale, or, in the alternative, recovery of the difference between the "value" of the property and the "sale price," when the "sale price was controlled by an agreement"). Cf. *ante,* at 537 (citing *Chicago* v. *Environmental Defense Fund, ante,* at 338).

struction calls for a single definition of a common term occurring in several places within a statute, see *Bray* v. *Alexandria Women's Health Clinic*, 506 U. S. 263, 283 (1993); *Dewsnup* v. *Timm*, 502 U. S., at 422 (SCALIA, J., dissenting) ("'[N]ormal rule[s] of statutory construction'" require that "identical words *[used] in the same section of the same enactment*" must be given the same effect) (emphasis in original), and the case for different definitions within a single text is difficult to make, cf. *Bray, supra*, at 292 (SOUTER, J., concurring in part). But to give a single term two different and inconsistent meanings (one procedural, one substantive) for a single occurrence is an offense so unlikely that no common prohibition has ever been thought necessary to guard against it.[9] Cf. *Owen* v. *Owen*, 500 U. S. 305, 313 (1991) (declining to "create a distinction [between state and federal exemptions] that the words of the statute do not contain"); *Union Bank* v. *Wolas*, 502 U. S. 151, 162 (1991) (the "statutory text . . . makes no distinction between short-term debt and long-term debt"). Unless whimsy is attributed to Congress, the term in question cannot be exclusively procedural in one class of cases and entirely substantive in all others. To be sure, there are real differences between sales on mortgage foreclosures and other transfers, as Congress no doubt understood, but these differences may be addressed simply and consistently with the statute's plain meaning.[10]

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[9] Indeed, the Court candidly acknowledges that the proliferation of meanings may not stop at two: not only does "reasonably equivalent value" mean one thing for foreclosure sales and another for other transfers, but tax sales and other transactions may require still other, unspecified "benchmark[s]." See *ante*, at 537, and n. 3.

[10] The Court's somewhat mischievous efforts to dress its narrowly procedural gloss in respectable, substantive garb, see *ante*, at 537–538, 546–547, make little sense. The majority suggests that even if the statute must be read to require a comparison, the one it compels dooms the trustee always to come up short. A property's "value," the Court would have us believe, should be determined with reference to a State's rules governing creditors' enforcement of their rights, in the same fashion that it might encom-

The "neologism," *ante*, at 537, "reasonably equivalent value" (read in light of the amendments confirming that foreclosures are to be judged under the same standard as are

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pass a zoning rule governing (as a matter of state law) a neighboring landowner's entitlement to build a gas station. But the analogy proposed ignores the patent difference between these two aspects of the "regulatory background," *ante*, at 539: while the zoning ordinance would reduce the value of the property "to the world," foreclosure rules affect not the price any purchaser "would pay," *ibid.*, but rather the means by which the mortgagee is permitted to extract its entitlement from the entire "value" of the property.

Such distinctions are a mainstay of bankruptcy law, where it is commonly said that creditors' "substantive" state-law rights "survive" in bankruptcy, while their "procedural" or "remedial" rights under state debtor-creditor law give way, see, *e. g., United Sav. Assn. of Tex.* v. *Timbers of Inwood Forest Associates, Ltd.*, 484 U. S. 365, 370–371 (1988) (refusing to treat "right to immediate foreclosure" as an "interest in property" under applicable nonbankruptcy law); *Owen* v. *Owen*, 500 U. S. 305 (1991) (bankruptcy exemption does not incorporate state law with respect to liens); *United States* v. *Whiting Pools, Inc.*, 462 U. S. 198, 206–207 (1983); see also *Gelfert* v. *National City Bank of N. Y.*, 313 U. S., at 234 ("[T]he advantages of a forced sale" are not "a . . . property right" under the Constitution). And while state foreclosure rules reflect, *inter alia*, an understandable judgment that creditors should not be forced to wait indefinitely as their defaulting debtors waste the value of loan collateral, bankruptcy law affords mortgagees distinct and presumably adequate protections for their interest, see 11 U. S. C. §§ 548(c), 550(d)(1), 362(d); *Wright* v. *Union Central Life Ins. Co.*, 311 U. S. 273, 278–279 (1940), along with the general promise that the debtor's estate will, effectively, be maximized in the interest of creditors.

The majority professes to be "baffled," *ante*, at 539, n. 5, by this commonsense distinction between state zoning laws and state foreclosure procedures. But a zoning rule is not merely "price-affecting," *ante*, at 539: it affects the property's value (*i. e.*, the price for which any transferee can expect to resell). State-mandated foreclosure procedures, by contrast, might be called "price-affecting," in the sense that adherence solely to their minimal requirements will no doubt keep sale prices low. But state rules hardly forbid mortgagees to make efforts to encourage more robust bidding at foreclosure sales; they simply fail to furnish sellers any reason to do so, see *infra*.

other transfers) has a single meaning in the one provision in which it figures: a court should discern the "value" of the property transferred and determine whether the price paid was, under the circumstances, "less than reasonabl[e]." There is thus no reason to rebuke the Courts of Appeals for having failed to "come to grips," *ante,* at 538, with the implications of the fact that foreclosure sales cannot be expected to yield fair market value. The statute has done so for them. As courts considering nonforeclosure transfers often acknowledge, the qualification "reasonably equivalent" itself embodies both an awareness that the assets of insolvent debtors are commonly transferred under conditions that will yield less than their optimal value and a judgment that avoidance in bankruptcy (unsettling as it does the expectations of parties who may have dealt with the debtor in good faith) should only occur when it is clear that the bankruptcy estate will be substantially augmented. See, *e. g., In re Southmark Corp.,* 138 B. R. 820, 829–830 (Bkrtcy. Ct. ND Tex. 1992) (court must compare "the value of what went out with the value of what came in," but the equivalence need not be "dollar for dollar") (citation omitted); *In re Countdown of Conn., Inc.,* 115 B. R. 18, 21 (Bkrtcy. Ct. Conn. 1990) ("[S]ome disparity between the value of the collateral and the value of debt does not necessarily lead to a finding of lack of reasonably equivalent value").[11]

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[11] Indeed, it is not clear from its opinion that the Court has "come to grips," *ante,* at 538, with the reality that "involuntary" transfers occur outside the real property setting, that legally voluntary transfers can be involuntary in fact, and that, where insolvent debtors on the threshold of bankruptcy are concerned, transfers for full, "fair market" price are more likely the exception than the rule. On the Court's reading, for example, nothing would prevent a debtor who deeded property to a mortgagee "in lieu of foreclosure" prior to bankruptcy from having the transaction set aside, under the "ordinar[y]," *ante,* at 545, substantive standard.

B

I do not share in my colleagues' apparently extreme discomfort at the prospect of vesting bankruptcy courts with responsibility for determining whether "reasonably equivalent value" was received in cases like this one, nor is the suggestion well taken that doing so is an improper abdication. Those courts regularly make comparably difficult (and contestable) determinations about the "reasonably equivalent value" of assets transferred through other means than foreclosure sales, see, *e. g., Covey* v. *Commercial Nat. Bank,* 960 F. 2d 657, 661–662 (CA7 1992) (rejecting creditor's claim that resale price may be presumed to be "reasonably equivalent value" when that creditor "seiz[es] an asset and sell[s] it for just enough to cover its loan (even if it would have been worth substantially more as part of an ongoing enterprise)"); *In re Morris Communications NC, Inc.,* 914 F. 2d 458 (CA4 1990) (for "reasonably equivalent value" purposes, worth of entry in cellular phone license "lottery" should be discounted to reflect probability of winning); cf. *In re Royal Coach Country, Inc.,* 125 B. R. 668, 673–674 (Bkrtcy. Ct. MD Fla. 1991) (avoiding exchange of 1984 truck valued at $2,800 for 1981 car valued at $500), and there is every reason to believe that they, familiar with these cases (and with local conditions) as we are not, will give the term sensible content in evaluating particular transfers on foreclosure, cf. *United States* v. *Energy Resources Co.,* 495 U. S. 545, 549 (1990); *NLRB* v. *Bildisco & Bildisco,* 465 U. S. 513, 527 (1984); *Rosen* v. *Barclays Bank of N. Y.,* 115 B. R. 433 (EDNY 1990).[12] As in other § 548(a)(2) cases, a trustee seeking

[12] It is only by renewing, see *ante,* at 548, its extreme claim, but see n. 2, *supra,* that market value is wholly irrelevant to the analysis of foreclosure-sale transfer (and that bankruptcy courts are debarred from even "referring" to it) that the Court is able to support its assertion that evaluations of such transactions are somehow uniquely beyond their ken.

The majority, as part of its last-ditch effort to salvage some vitality for the provision, itself would require bankruptcy judges to speculate as to the

avoidance of a foreclosure-sale transfer must persuade the bankruptcy court that the price obtained on prebankruptcy transfer was "unreasonabl[y]" low, and as in other cases under the provision, the gravamen of such a claim will be that the challenged transfer significantly and needlessly diminished the bankruptcy estate, *i. e.*, that it extinguished a substantial equity interest of the debtor and that the foreclosing mortgagee failed to take measures which (consistently with state law, if not required by it) would have augmented the price realized.[13]

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price "that would have been received if the foreclosure sale had proceeded according to [state] law." *Ante*, at 546; cf. *ante*, at 540 (expressing skepticism about judicial competence to determine "such a thing" as a "fair" forced-sale price).

[13] In this regard and in its professions of deference to the processes of local self-government, the Court wrongly elides any distinction between what state law commands and what the States permit. While foreclosure sales "under state law" may typically be sparsely attended and yield low prices, see *infra*, at 564, these are perhaps less the result of state law "strictures," *ante*, at 538, than of what state law fails to supply, incentives for foreclosing lenders to seek higher prices (by availing themselves of advertising or brokerage services, for example). Thus, in judging the reasonableness of an apparently low price, it will surely make sense to take into account (as the Court holds a bankruptcy court is forbidden to) whether a mortgagee who promptly resold the property at a large profit answers, "I did the most that could be expected of me" or "I did the least I was allowed to."

I also do not join my colleagues in their special scorn for the "70% rule" associated with *Durrett* v. *Washington Nat. Ins. Co.*, 621 F. 2d 201 (CA5 1980), which they decry, *ante*, at 540, as less an exercise in statutory interpretation than one of "policy determinatio[n]." Such, of course, it may be, in the limited sense that the statute's text no more mentions the 70% figure than it singles out procedurally regular foreclosure sales for the special treatment the Court accords them. But the *Durrett* "rule," as its expositor has long made clear, claims only to be a description of what foreclosure prices have, in practice, been found "reasonabl[e]," and as such, it is consistent (as the majority's "policy determination" is not), with the textual directive that one value be compared to another, the transfer being set aside when one is unreasonably "less than" the other. To the extent, moreover, that *Durrett* is said to have announced a "rule," it is better

Whether that enquiry is described as a search for a benchmark " 'fair' forced-sale price," *ante,* at 540, or for the price that was reasonable under the circumstances, cf. *ante,* at 538, n. 4, is ultimately, as the Court itself seems to acknowledge, see *ante,* at 540, of no greater moment than whether the rule the Court discerns in the provision is styled an "exception," an "irrebuttable presumption," or a rule of *per se* validity. The majority seems to invoke these largely synonymous terms in service of its thesis that the provision's text is "ambiguous" (and therefore ripe for application of policy-based construction rules), but the question presented here, whether the term "less than reasonably equivalent value" may be read to forestall all enquiry beyond whether state-law foreclosure procedures were adhered to, admits only two answers, and only one of these, in the negative, is within the "apparent authority," *ibid.,* conferred on courts by the text of the Bankruptcy Code.[14]

C

What plain meaning requires and courts can provide, indeed, the policies underlying a national bankruptcy law fully

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understood as recognizing a "safe harbor" or affirmative defense for bidding mortgagees or other transferees who paid 70% or more of a property's appraised value at the time of sale.

[14] The Court's criticism, *ante,* at 546–548, deftly conflates two distinct questions: is the price on procedurally correct and noncollusive sale presumed irrebuttably to be reasonably equivalent value (the question before us) and, if not, what are the criteria (a question not raised here but explored by courts that have rejected the irrebuttable presumption)? What is "plain" is the answer to the first question, thanks to the plain language, whose meaning is confirmed by policy and statutory history. The answer to the second may not be plain in the sense that the criteria might be self-evident, see n. 13, *supra,* but want of self-evidence hardly justifies retreat from the obvious answer to the first question. Courts routinely derive criteria, unexpressed in a statute, to implement standards that are statutorily expressed, and in a proper case this Court could (but for the majority's decision) weigh the relative merits of the subtly different approaches taken by courts that have rejected the irrebuttable presumption.

support. This case is a far cry from the rare one where the effect of implementing the ordinary meaning of the statutory text would be "patent absurdity," see *INS* v. *Cardoza-Fonseca*, 480 U. S. 421, 452 (1987) (SCALIA, J., concurring in judgment), or "demonstrably at odds with the intentions of its drafters," *United States* v. *Ron Pair Enterprises, Inc.*, 489 U. S. 235, 244 (1989) (internal quotation marks omitted).[15] Permitting avoidance of procedurally regular foreclosure sales for low prices (and thereby returning a valuable asset to the bankruptcy estate) is plainly consistent with those policies of obtaining a maximum and equitable distribution for creditors and ensuring a "fresh start" for individual debtors, which the Court has often said are at the core of federal bankruptcy law. See *Stellwagen* v. *Clum*, 245 U. S. 605, 617 (1918); *Williams* v. *United States Fidelity & Guaranty Co.*, 236 U. S. 549, 554–555 (1915). They are not, of course, any less the policies of federal bankruptcy law simply because state courts will not, for a mortgagor's benefit, set aside a foreclosure sale for "price inadequacy" alone.[16] The unwill-

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[15] Tellingly, while the Court's opinion celebrates fraudulent conveyance law and state foreclosure law as the "twin pillars" of creditor-debtor regulation, it evinces no special appreciation of the fact that this case arises under the Bankruptcy Code, which, in maintaining the national system of credit and commerce, embodies policies distinct from those of state debtor-creditor law, see generally *Stellwagen* v. *Clum*, 245 U. S. 605, 617 (1918), and which accordingly endows trustees with avoidance power beyond what state law provides, see *Board of Trade of Chicago* v. *Johnson*, 264 U. S. 1, 10 (1924); *Stellwagen*, *supra*, at 617; 11 U. S. C. §§ 541(a), 544(a).

[16] Although the majority accurately states this " 'black letter' " law, it also acknowledges that courts will avoid a foreclosure sale for a price that "shock[s] the conscience," see *ante*, at 542 (internal quotation marks omitted), a standard that has been invoked to justify setting aside sales yielding as much as 87% of appraised value. See generally Washburn, The Judicial and Legislative Response to Price Inadequacy in Mortgage Foreclosure Sales, 53 S. Cal. L. Rev. 843, 862–870 (1980). Moreover, while price inadequacy "alone" may not be enough to set aside a sale, such inadequacy will often induce a court to undertake a sort of "strict scrutiny" of a sale's compliance with state procedures. See, *e. g.*, *id.*, at 861.

ingness of the state courts to upset a foreclosure sale for that reason does not address the question of what "reasonably equivalent value" means in bankruptcy law, any more than the refusal of those same courts to set aside a contract for "mere inadequacy of consideration," see Restatement (Second) of Contracts § 79 (1981), would define the scope of the trustee's power to reject executory contracts. See 11 U. S. C. § 365 (1988 ed. and Supp. IV). On the contrary, a central premise of the bankruptcy avoidance powers is that what state law plainly allows as acceptable or "fair," as between a debtor and a particular creditor, may be set aside because of its impact on other creditors or on the debtor's chances for a fresh start.

When the prospect of such avoidance is absent, indeed, the economic interests of a foreclosing mortgagee often stand in stark opposition to those of the debtor himself and of his other creditors. At a typical foreclosure sale, a mortgagee has no incentive to bid any more than the amount of the indebtedness, since any "surplus" would be turned over to the debtor (or junior lienholder), and, in some States, it can even be advantageous for the creditor to bid less and seek a deficiency judgment. See generally Washburn, The Judicial and Legislative Response to Price Inadequacy in Mortgage Foreclosure Sales, 53 S. Cal. L. Rev. 843, 847–851 (1980); Ehrlich, Avoidance of Foreclosure Sales as Fraudulent Conveyances: Accommodating State and Federal Objectives, 71 Va. L. Rev. 933, 959–962 (1985); G. Osborne, G. Nelson, & D. Whitman, Real Estate Finance Law § 8.3, p. 528 (1979). And where a property is obviously worth more than the amount of the indebtedness, the lending mortgagee's interests are served best if the foreclosure sale is poorly attended; then, the lender is more likely to take the property by bidding the amount of indebtedness, retaining for itself any profits from resale. While state foreclosure procedures may somewhat mitigate the potential for this sort of opportunism (by requiring for publication of notice, for example), it surely

is plausible that Congress, in drafting the Bankruptcy Code, would find it intolerable that a debtor's assets be wasted and the bankruptcy estate diminished, solely to speed a mortgagee's recovery.

II

Confronted with the eminent sense of the natural reading, the Court seeks finally to place this case in a line of decisions, *e. g., Gregory* v. *Ashcroft,* 501 U. S. 452 (1991), in which we have held that something more than mere plain language is required.[17] Because the stability of title in real property may be said to be an "important" state interest, the Court suggests, see *ante,* at 544, the statute must be presumed to contain an implicit foreclosure-sale exception, which Congress must override expressly or not at all. Our cases impose no such burden on Congress, however. To be sure, they do offer support for the proposition that when the Bankruptcy Code is truly silent or ambiguous, it should not be

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[17] The Court dangles the possibility that *Gregory* itself is somehow pertinent to this case, but that cannot be so. There, invoking principles of constitutional avoidance, we recognized a "plain statement" rule, whereby Congress could supplant state powers "reserved under the Tenth Amendment" and "at the heart of representative government," only by making its intent to do so unmistakably clear. Unlike the States' authority to "determine the qualifications of their most important government officials," 501 U. S., at 463 (*e. g.,* to enforce a retirement age for state judges mandated by the State Constitution, at issue in *Gregory*), the authority of the States in defining and adjusting the relations between debtors and creditors has never been plenary, nor could it fairly be called "essential to their independence." In making the improbable contrary assertion, the Court converts a stray phrase in *American Land Co.* v. *Zeiss,* 219 U. S. 47 (1911), which upheld against substantive due process challenge the power of a State to legislate with respect to land titles (California's effort to restore order after title records had been destroyed in the calamitous 1906 San Francisco earthquake) into a pronouncement about the allocation of responsibility between the National Government and the States. Cf. *Cipollone* v. *Liggett Group, Inc.,* 505 U. S. 504, 546 (1992) (SCALIA, J., concurring in judgment in part and dissenting in part) (emphasizing the inapplicability of "clear-statement" rules to ordinary pre-emption cases).

read as departing from previous practice, see, *e. g., Dewsnup* v. *Timm,* 502 U. S. 410 (1992); *Butner* v. *United States,* 440 U. S. 48, 54 (1979). But we have never required Congress to supply "clearer textual guidance" when the apparent meaning of the Bankruptcy Code's text is itself clear, as it is here. See *Ron Pair,* 489 U. S., at 240 ("[I]t is not appropriate or realistic to expect Congress to have explained with particularity each step it took. Rather, as long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute"); cf. *Dewsnup, supra,* at 434 (SCALIA, J., dissenting) (Court should not "venerat[e] 'pre-Code law' " at the expense of plain statutory meaning).[18]

We have, on many prior occasions, refused to depart from plain Code meaning in spite of arguments that doing that would vindicate similar, and presumably equally "important," state interests. In *Owen* v. *Owen,* 500 U. S. 305 (1991), for example, the Court refused to hold that the state "opt-out" policy embodied in § 522(b)(1) required immunity from avoidance under § 522(f) for a lien binding under Florida's exemption rules. We emphasized that "[n]othing in the text of § 522(f) remotely justifies treating the [state and federal] exemptions differently." 500 U. S., at 313. And in *Johnson* v. *Home State Bank,* 501 U. S. 78 (1991), we relied on plain Code language to allow a debtor who had "stripped" himself of personal mortgage liability under Chapter 7 to reschedule the remaining indebtedness under Chapter 13, notwithstanding a plausible contrary argument based on Code structure and a complete dearth of precedent for the manoeuver under state law and prior bankruptcy practice.

[18] Even if plain language is insufficiently "clear guidance" for the Court, further guidance is at hand here. The provision at hand was amended in the face of judicial decisions driven by the same policy concerns that animate the Court, to make plain that foreclosure sales and other "involuntary" transfers are within the sweep of the avoidance power.

The Court has indeed given full effect to Bankruptcy Code terms even in cases where the Code would appear to have cut closer to the heart of state power than it does here. No "clearer textual guidance" than a general definitional provision was required, for example, to hold that criminal restitution could be a "debt" dischargeable under Chapter 13, see *Davenport*, 495 U. S., at 563–564 (declining to "carve out a broad judicial exception" from statutory term, even to avoid "hamper[ing] the flexibility of state criminal judges"). Nor, in *Perez* v. *Campbell*, 402 U. S. 637 (1971), did we require an express reference to state highway safety laws before construing the generally worded discharge provision of the Bankruptcy Act to bar application of a state statute suspending the driver's licenses of uninsured tortfeasors.[19]

Rather than allow state practice to trump the plain meaning of federal statutes, cf. *Adams Fruit Co.* v. *Barrett*, 494 U. S. 638, 648 (1990), our cases describe a contrary rule: whether or not Congress has used any special "pre-emptive" language, state regulation must yield to the extent it actually conflicts with federal law. This is no less true of laws enacted under Congress's power to "establish . . . uniform Laws on the subject of Bankruptcies," U. S. Const., Art. I, § 8, cl. 4, than of those passed under its Commerce Clause power. See generally *Perez* v. *Campbell*, *supra;* cf. *id.*, at

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[19] Only over vigorous dissent did the Court read the trustee's generally worded abandonment power, 11 U. S. C. § 554, as not authorizing abandonment "in contravention of a state statute or regulation that is reasonably designed to protect the public health or safety from identified hazards." *Midlantic Nat. Bank* v. *New Jersey Dept. of Environmental Protection*, 474 U. S. 494, 505 (1986); cf. *id.*, at 513 (REHNQUIST, J., dissenting) ("Congress knew how to draft an exception covering the exercise of 'certain' police powers when it wanted to"); cf. also L. Cherkis & L. King, Collier Real Estate Transactions and the Bankruptcy Code, p. 6–24 (1992) (post-*Midlantic* cases suggest that "if the hazardous substances on the property do not pose immediate danger to the public, and if the trustee has promptly notified local environmental authorities of the contamination and cooperated with them, abandonment may be permitted").

651–652 (rejecting the "aberrational doctrine . . . that state law may frustrate the operation of federal law as long as the state legislature in passing its law had some purpose in mind other than one of frustration"); *Cipollone* v. *Liggett Group, Inc.*, 505 U. S. 504, 545, 546 (1992) (SCALIA, J., concurring in judgment in part and dissenting in part) (arguing against a "presumption against . . . pre-emption" of "historic police powers") (internal quotation marks omitted).

Nor, finally, is it appropriate for the Court to look to "field pre-emption" cases, see *ante*, at 544, to support the higher duty of clarity it seeks to impose on Congress. As written and as applied by the majority of Courts of Appeals to construe it, the disputed Code provision comes nowhere near working the fundamental displacement of the state law of foreclosure procedure that the majority's rhetoric conjures.[20]

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[20] Talk of " 'radica[l] adjust[ments to] the balance of state and national authority,' " *ante*, at 544, notwithstanding, the Court's submission with respect to "displacement" consists solely of the fact that some private companies in *Durrett* jurisdictions have required purchasers of title insurance to accept policies with "specially crafted exceptions from coverage in many policies issued for properties purchased at foreclosure sales." *Ante*, at 544 (citing Cherkis & King, *supra*, at 5–18 to 5–19). The source cited by the Court reports that these exceptions have been demanded when mortgagees are the purchasers, but have not been required in policies issued to third-party purchasers or their transferees, Cherkis & King, *supra*, at 5–18 to 5–19, and that such clauses have neither been limited to *Durrett* jurisdictions, nor confined to avoidance under federal bankruptcy law. See Cherkis & King, *supra*, at 5–10 (noting one standard exclusion from coverage for "[a]ny claim, which arises . . . by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws"). Nothing in the Bankruptcy Code, moreover, deprives the States of their broad powers to regulate directly the terms and conditions of title insurance policies.

The "federally created cloud" on title seems hardly to be the Damoclean specter that the Court makes it out to be. In the nearly 14 years since the *Durrett* decision, the bankruptcy reports have included a relative handful of decisions actually setting aside foreclosure sales, nor do the States, either inside or outside *Durrett* jurisdictions, seem to have ven-

To the contrary, construing § 548(a)(2)(A) as authorizing avoidance of an insolvent's recent foreclosure-sale transfer in which "less than a reasonably equivalent value" was obtained is no more pre-emptive of state foreclosure procedures than the trustee's power to set aside transfers by marital dissolution decree, see *Britt* v. *Damson*, 334 F. 2d 896 (CA9 1964), cert. denied, 379 U. S. 966 (1965); *In re Lange*, 35 B. R. 579 (Bkrtcy. Ct. ED Mo. 1983), "pre-empts" state domestic relations law,[21] or the power to reject executory contracts, see 11 U. S. C. § 365, "displaces" the state law of voluntary obligation. While it is surely true that if the provision were accorded its plain meaning, some States (and many mortgagees) would take steps to diminish the risk that particular transactions would be set aside, such voluntary action should not be cause for dismay: it would advance core Bankruptcy Code purposes of augmenting the bankruptcy estate and improving the debtor's prospects for a "fresh start," without compromising lenders' state-law rights to move expeditiously against the property for the money owed. To the extent, in any event, that the respondents and their numerous *amici* are correct that the "important" policy favoring security of title should count more and the "important" bankruptcy policies should count less, Congress, and not this Court, is the appropriate body to provide a foreclosure-sale exception. See *Wolas*, 502 U. S., at 162. See also S. 1358, 100th Cong., 1st Sess. (1987) (proposed amendment creating foreclosure-sale exception).

III

Like the Court, I understand this case to involve a choice between two possible statutory provisions: one authorizing

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tured major changes in the "diverse networks of . . . rules governing the foreclosure process." See *ante*, at 541.

[21] But cf. *Wetmore* v. *Markoe*, 196 U. S. 68 (1904) (alimony is not a "debt" subject to discharge under the Bankruptcy Act).

the trustee to avoid "involuntar[y] . . . transfers [including foreclosure sales] . . . [for] less than a reasonably equivalent value," see 11 U. S. C. § 548(a), and another precluding such avoidance when "[a] secured party or third party purchaser . . . obtains title to an interest of the debtor in property pursuant to a good faith prepetition foreclosure . . . proceeding . . . permitting . . . the realization of security upon default of the borrower," see S. 445, 98th Cong., 1st Sess., § 360 (1983). But that choice is not ours to make, for Congress made it in 1984, by enacting the former alternative into law and not the latter. Without some indication that doing so would frustrate Congress's clear intention or yield patent absurdity, our obligation is to apply the statute as Congress wrote it. Doing that in this case would produce no frustration or absurdity, but quite the opposite.

1 In the
2 # United States Court of Appeals
3 ## For the Second Circuit
4
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6 August Term, 2021
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8 (Argued December 16, 2021; Decided June 27, 2022)
9
10
11 No. 20-3865-bk
12
13 BRIAN L. GUNSALUS, GLIEE V. GUNSALUS,
14
15 *Plaintiffs-Appellees,*
16
17 v.
18
19 COUNTY OF ONTARIO, NEW YORK
20
21 *Defendant-Appellant.*[*]
22
23
24
25 Appeal from the United States District Court
26 for the Western District of New York
27 No. 20-cv-6134
28 Frank P. Geraci, Jr., Chief Judge, Presiding.
29
30 Before: CABRANES, PARKER, and LEE, *Circuit Judges*.

[*] The Clerk of Court is respectfully directed to amend the official caption as set forth above.

Defendant-Appellant, County of Ontario, appeals from a judgment of the United States District Court for the Western District of New York (Geraci, J.). Plaintiffs-Appellees sought to set aside the loss of their home to the County as a result of a tax lien foreclosure. The Bankruptcy Court set aside the transfer as a fraudulent conveyance on the grounds that it was not for "reasonably equivalent value." We **AFFIRM**.

KARI A. TALBOTT (Mark Wattenberg, *on the brief*), Legal Assistance of Western New York, Inc., *for Plaintiffs-Appellees.*

JASON S. DIPONZIO, Jason S. DiPonzio, P.C., *for Defendant-Appellant.*

BARRINGTON D. PARKER, *Circuit Judge*:

BACKGROUND

This case arises from the foreclosure of a tax lien on a home in Ontario County, New York, owned by a married couple, Brian and Gliee Gunsalus, which resulted in the loss of title to their home. Following the foreclosure, the couple filed for protection under Chapter 13 of the Bankruptcy Code and filed a complaint seeking to avoid the loss of their home on the grounds that it was a fraudulent

conveyance. The Bankruptcy Court set aside the transfer, and the County appeals, raising two questions. The first is whether the Gunsaluses had standing to bring the avoidance proceeding. The second is whether the transfer effected by Ontario County in foreclosing on the lien was entitled to the presumption of having yielded "reasonably equivalent value" under Section 548 of the Bankruptcy Code. We answer yes and no, respectively.

The property in question is a modest family home. Mrs. Gunsalus has lived there her entire life and for the past fifteen years she and Mr. Gunsalus have lived there with their disabled adult son. They owned the home free and clear of mortgages. Due to a temporary reduction in Mr. Gunsalus' wages, the couple was unable to pay their real estate taxes, and the property became subject to a tax lien in the amount of unpaid taxes, $1,290.

After the lien remained unpaid for a number of months, the County instituted proceedings pursuant to Article 11 of New York's Real Property Tax Law ("RPTL") to enforce the lien. *See* RPTL §§ 1120 *et seq*. The County first included the property on the "List of Delinquent Taxes" filed in the County Clerk's Office. *See id.* § 1122. The County then filed a petition that commenced an *in rem* tax foreclosure action.

The Gunsaluses answered the petition and the County, in turn, moved for summary judgment. The Gunsaluses opposed that motion and cross-moved for an extension of time to pay the overdue taxes. The Ontario County Supreme Court denied the cross-motion and granted the County's motion. In June 2016, the Ontario County Supreme Court entered a final judgment of foreclosure awarding the County possession of, and title to, the home. The Gunsaluses were permitted to continue residing in the property pending the outcome of this litigation.

In May 2017, the County scheduled an auction of the property, which was sold to a third party for $22,000. The unpaid taxes, as noted, had amounted to $1,290. Pursuant to Article 11, the County pocketed the difference ($20,710), which meant that the Gunsaluses were required to forfeit to the County all of their accumulated equity.

These procedures, authorized by Article 11, are known as "strict foreclosure." Under "strict foreclosure," a creditor (here the County) asks the court to set a deadline for payment of a debt (here unpaid taxes) secured by the tax lien. If the lien is not paid by the deadline, as occurred here, the court enters an order transferring title and possession of the property to the creditor. There is no

foreclosure sale. Instead, the transfer occurs by court order and the transferee can then sell the property, as the County did.

Approximately three weeks before the auction, the Gunsaluses filed for protection under Chapter 13 of the Bankruptcy Code. To qualify under Chapter 13, a debtor must present a plan that, among other things, provides "adequate protection" to secured creditors like the County. Moreover, under Chapter 13, the County retains its lien until the tax arrears is paid in full. *See* 11 USC § 1325(a)(5)(B)(i)(I). Accordingly, the Gunsaluses' Chapter 13 plan provided that the County would receive all delinquent real estate taxes plus 12% interest. The Gunsaluses have made all delinquent tax payments, and they have continued to pay the new property taxes that have accrued since the judgment of foreclosure. During the bankruptcy proceedings, the Gunsaluses sought to avail themselves of the federal homestead exemption under Section 522(d)(1), which allows a debtor to exclude a home from the bankruptcy estate.

Shortly after the Chapter 13 filing, the Gunsaluses commenced a proceeding in Bankruptcy Court to set aside the transfer of their home to the County on the grounds that it was a fraudulent conveyance under Sections 548 and 522 of the Code. To establish a fraudulent conveyance, a debtor must prove, among other

things, that the debtor received less than a reasonably equivalent value in exchange for the transfer. *See* 11 U.S.C. § 548(a).

The Bankruptcy Court dismissed the complaint. Relying on the United States Supreme Court's opinion in *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994), the Bankruptcy Court held that a tax lien foreclosure proceeding conducted in compliance with Article 11 of the RPTL, like the mortgage foreclosure at issue in *BFP*, "is conclusively presumed to have provided reasonably equivalent value for purposes of 11 U.S.C. § 548(a)(1)(B)(i)." App'x 121.

On appeal, the District Court reversed. It reasoned that the mortgage foreclosure procedures at issue in *BFP* differed in material respects from the tax foreclosure procedures in the RPTL, explaining that

> [t]he Court in *BFP* expressly stated that state foreclosure laws had evolved to "avoid the draconian consequences of strict foreclosure," . . . but the RPTL has not. Unlike the foreclosure law in *BFP* and the "typical" state laws that the Supreme Court described before reaching its holding, the RPTL is a strict foreclosure regime that does not provide for a *pre-seizure* auction whereby the debtor may recovery equity. This difference between the RPTL and the state laws the *BFP* Court considered is significant to fraudulent conveyance analysis.

App'x 11 (footnote omitted). The District Court remanded the case to the Bankruptcy Court for trial on the fraudulent conveyance claim, where the Gunsaluses prevailed. The Bankruptcy Court found that the Gunsaluses had met

1 their burden of proving that the transfer of their home worth at least $22,000 in

2 exchange for satisfaction of the $1,290 tax debt owed Ontario County was, among

3 other things, not for "reasonably equivalent value."[1]

4 This appeal followed. *See* 28 U.S.C. § 158(d)(1). We review legal

5 determinations *de novo*. *See In re Anderson*, 884 F.3d 382, 387 (2d Cir. 2018).

6 **DISCUSSION**

7 The County seeks reversal on two grounds. First, the County argues that the

8 Gunsaluses lack standing to challenge the transfer of their property. Secondly, the

9 County argues that the District Court erred by refusing to extend the holding of

10 *BFP* from the mortgage foreclosure regime at issue there to the tax lien foreclosure

11 regime at issue here.

12 **I**

13 We first turn to the County's contention that 11 U.S.C. § 522(c)(2)(B) of the

14 Code deprived the Gunsaluses of standing to bring the avoidance proceeding. We

[1] Both the Bankruptcy Court and the District Court conducted proceedings in the present case alongside those raised by another similarly situation set of property owners, Joseph M. Hampton and Brenda S. Hampton. Before us, the County has also appealed the District Court's judgment in the Hamptons' case in Appeal No. 20-3868.

review this issue *de novo*. *See Bank Brussels Lambert v. Coan (In Re AROChem Corp.)*, 176 F.3d 610, 620 (2d Cir. 1999).

Section 522 of the Code authorizes debtors to exempt certain transfers of property. *See* 11 U.S.C. § 522. In Bankruptcy Court, the Gunsaluses claimed the federal homestead exemption, which allows a debtor to exempt a home from the bankruptcy estate. *See id.* § 522(d)(1). The Code provides that debtors who are eligible for the federal homestead exemption have standing to bring avoidance actions. *See id.* § 522(h); *Deel Rent-A-Car, Inc. v. Levine*, 721 F.2d 750, 754 (11th Cir. 1983).

The Code also provides, however, that exempted property is subject to certain limitations. Under Section 522(c)(2)(B), for example, certain exempted property remains liable for a tax lien:

> Unless the case is dismissed, property exempted under this section is not liable during or after the case for any debt of the debtor that arose . . . before the commencement of the case, except . . .
>
> (2) a debt secured by a lien that is—
>
> (B) a tax lien, notice of which is properly filed.

The County contends that this Section renders the Gunsaluses ineligible for the federal homestead exemption and deprives them of standing. We disagree. Section 522(c)(2)(B) is straightforward. It merely requires that the Gunsaluses—

who seek to avoid the transfer of their home and *not* to avoid paying off the tax lien on that home—remain liable for the unpaid taxes even if the fraudulent conveyance action succeeds.

The Gunsaluses' Chapter 13 plan achieves just that result. In accordance with 11 U.S.C § 1325, the plan provides that the County retains its lien until its secured claim for tax arrears is paid in full. The plan affords the Gunsaluses five years to pay their delinquent real estate taxes in full and, as noted, they are paying off that obligation in accordance with the plan.

The County thus incorrectly interprets Section 522(c)(2)(B) as barring the Gunsaluses from claiming the federal homestead exemption, when it merely provides that exempt property remains liable for a tax lien. They are not, as the County would have it, attempting to avoid paying the tax lien; they are attempting to avoid a transfer of the property. Accordingly, Section 522(c)(2)(B) does not deprive the Gunsaluses of standing under Section 522(h).

II

A

Next, the County challenges the District Court's holding that the forfeiture of the Gunsaluses' home is not entitled to the presumption of an exchange for

"reasonably equivalent value" under Section 548(a). The Bankruptcy Code empowers debtors to set aside a transfer of property if (1) the debtor had an interest in property; (2) a transfer of that interest occurred on or within two years of the bankruptcy petition; (3) the debtor was insolvent at the time of the transfer or became insolvent as a result of the transfer; and (4) the debtor received "less than a reasonably equivalent value in exchange for such transfer[,]" 11 U.S.C. § 548(a); *see id.* § 522(h). The parties agree that this case concerns only the fourth element. *See id.* § 548(a)(1)(B)(i).

Of the three statutory terms—"reasonably," "equivalent," and value"—only the last is defined. "Value" means, for purposes of Section 548, "property, or satisfaction or securing of a . . . debt of the debtor," 11 U.S.C. § 548(d)(2)(A). *See BFP*, 511 U.S. at 535-36. To decide whether a transfer is for "reasonably equivalent value," courts consider "whether the debtor has received value that is substantially comparable to the worth of the transferred property." *Id.* at 548. Were we writing on a clean slate, we would easily conclude that the transfer here is not entitled to the legal presumption of being in exchange for "reasonably equivalent value." Common sense dictates that receipt of $1,290 for a property that was sold for $22,000 fails the "reasonably equivalent value" test. But the County contends

1 that this approach does not resolve this appeal because in the mortgage foreclosure
2 context, the Supreme Court in *BFP* weighed in on the meaning of "reasonably
3 equivalent value."

4 In *BFP*, the debtor, a partnership formed to buy a home in California,
5 defaulted on its home loan payments. *Id*. at 533. The home later sold at a mortgage
6 foreclosure sale for $433,000. *Id*. at 533-34. The debtor alleged that the home was
7 actually valued at $725,000 and therefore challenged the sale as constructively
8 fraudulent because the $433,000 it received was not, in the debtor's view,
9 "reasonably equivalent" to the $725,000 it alleged the home was worth. *Id*. at 534.

10 The Supreme Court rejected that argument. It held that when a mortgage
11 foreclosure sale is conducted in compliance with state law, the price received at
12 that sale is the worth of the home—and, consequently, is "reasonably equivalent
13 value." *Id.* at 545. In reaching this result, the Court emphasized that over the years,
14 many state mortgage foreclosure laws had evolved from a system of strict
15 foreclosures to one of foreclosures by sale. *See id.* at 541-42. Under the strict
16 foreclosure regime (like that of RPTL Article 11), when a debtor had failed to make
17 past due mortgage payments, after a certain time period, his entire interest in the
18 property was forfeited, regardless of any accumulated equity. *Id.* at 541. By

1 contrast, foreclosures by sale—such as the sale in *BFP*—ensured that (1)
2 foreclosures would occur by sale, (2) the proceeds of that sale would be used to
3 satisfy the debt, and (3) any surplus over the debt would be refunded to the debtor.
4 *See id.* Foreclosures by sale, the Court noted, emerged to "avoid[] the draconian
5 consequences of strict foreclosure." *Id.* "Since then," the Court went on, "States
6 have created diverse networks of judicially and legislatively crafted rules
7 governing the foreclosure process, to achieve what each of them considers the
8 proper balance between the needs of lenders and borrowers." *Id.* at 541-42. The
9 Court adverted to the protections afforded by the current mortgage foreclosure
10 laws of many states, including notice to the defaulting borrower, a substantial lead
11 time before the commencement of foreclosure proceedings, publication of a notice
12 of sale, strict adherence to prescribed bidding rules and auction procedure, and
13 perhaps most importantly, foreclosure by sale with the surplus reverting to the
14 debtor. *Id*. at 542**. "**When these procedures have been followed," the Court stated,
15 "mere inadequacy of the foreclosure sale price is no basis for setting the sale aside
16 . . . ." *Id.*

17 Ultimately, the Court held that "the consideration received from a
18 noncollusive, real estate mortgage foreclosure sale conducted in conformance with

applicable state law" is conclusively presumed to be an exchange for "reasonably equivalent value" under 11 U.S.C. § 548(a). *Id.* at 533. Critical to that conclusion was the existence of an auction or sale which would permit some degree of market forces to set the value of the property even in distressed circumstances. *Id.* at 545-49. Because distressed properties that must be sold in the time and manner established by state mortgage foreclosure law are, the Court reasoned, "simply worth less," "reasonably equivalent value" in the mortgage foreclosure context is the foreclosure sale price itself. *Id.* at 549 (emphases omitted).

For those reasons, the Court explained, courts may not engage in the policy judgment of setting aside a mortgage foreclosure sale merely because the sale itself yielded a price that a court deemed inadequate. *See id.* at 542. The Court therefore rejected the debtor's view that the $433,000 home was actually worth $725,000. Instead, because the sale was conducted in compliance with state foreclosure-by-sale law, the home was worth $433,000. And because the value received by the debtor was equal to what the home was "worth," the Court held that the debtor had necessarily received "reasonably equivalent value" under Section 548.

1 **B**

2 In the County's view, *BFP* instructs that so long as state foreclosure law
3 provides a debtor with (1) notice; (2) ample opportunity to cure; and (3) judicial
4 oversight of the process, any foreclosure conducted in compliance with state
5 foreclosure law necessarily yields "reasonably equivalent value" under Section
6 548. Here, the County contends that the RPTL contains those elements and that the
7 transfer was conducted in compliance with the RPTL. Consequently, the County
8 argues, *BFP* compels the conclusion that the transfer of the Gunsaluses' home was
9 necessarily in exchange for "reasonably equivalent value."

10 For a host of reasons, we disagree. First, *BFP* itself rejects this contention. As
11 Justice Scalia noted, *BFP* "covers only mortgage foreclosures of real estate. The
12 considerations bearing upon other foreclosures and forced sales (*to satisfy tax liens,*
13 *for example*) may be different." 511 U.S. at 537 n.3 (emphasis added). That
14 admonition is dispositive because, as we have seen, the strict foreclosure
15 procedures under the RPTL offer far fewer debtor protections than the mortgage
16 foreclosure procedures at issue in *BFP*. *See In re Smith*, 811 F.3d 228, 239 (7th Cir.
17 2016) (finding that a state's tax foreclosure protections must compare favorably to
18 the mortgage foreclosure protections in *BFP* in order to receive a presumption of

1 "reasonably equivalent value"); *In re Hackler & Stelzel*, 938 F.3d 473, 479 (3d Cir.
2 2019) (same).

3 Although the County eventually sold the Gunsaluses' home, unlike the sale
4 in *BFP*, the sale occurred *after* foreclosure. The transfer of the Gunsaluses' title,
5 equity and all their interests in the home—the transfer that is relevant for Section
6 548(a)(1)(B) purposes—had already occurred by the time the County auctioned off
7 the property. The auction was conducted solely for the benefit of the County and
8 the amount of the proceeds bears no relation to the amount of the tax debt that led
9 to the foreclosure. Moreover, under the RPTL, the County pockets the difference
10 between the tax debt and the sales proceeds and is not accountable to other
11 creditors for what it does with the proceeds. Suffice it to say that under no
12 reasonable calculus do these procedures convey to the debtor value that is
13 substantially comparable to the worth of the transferred property. *See BFP*, 511
14 U.S. at 548. In short, because the RPTL procedures are fundamentally different
15 from the protections in place in *BFP*, that case is of little assistance to the County.

16 In addition, the County's position would produce results that are
17 fundamentally at odds with the goals of bankruptcy law. Here, it would give the
18 County a windfall at the expense of the estate, the other creditors, and the debtor—

which is precisely what the Code's fraudulent conveyance provisions are intended to prevent. *See In re Smith*, 811 F.3d at 238-39. For these reasons, we agree with the District Court that the transfer here should not be presumed to be in exchange for "reasonably equivalent value" under Section 548.

Finally, the County expresses concerns that our reading of Section 548 will hamper its ability to collect delinquent real property taxes. We are not insensitive to those concerns, but they do not carry the day on this appeal. First, Ontario County's legitimate interest in tax collection cannot overcome Congress' policy choice that "reasonably equivalent value" must be obtained for a transfer of a debtor's property in the bankruptcy context. *See In re Murphy*, 331 B.R. 107, 120 (Bankr. S.D.N.Y. 2005). As we have previously admonished, "there is a strong presumption of not allowing a secured creditor to take more than its interest." *In re Harris*, 464 F.3d 263, 273 (2d Cir. 2006)*; see also In re Smith*, 811 F.3d at 238 (noting that one goal of fraudulent conveyance law is to avoid a "windfall to one creditor at the expense of others"). Second, the County's concerns are unfounded in this case. As noted, the Gunsaluses have proposed in their Chapter 13 plan to pay the County all delinquent real estate taxes plus 12% interest. The Gunsaluses have also made all tax payments that have subsequently come due under the plan. Third,

1 even to the extent that today's ruling could, as the County cautions, introduce a
2 degree of disruption to the County's collection of delinquent property taxes, that
3 disruption arises from the interplay between the strict foreclosure regime of the
4 RPTL and a Bankruptcy Code fashioned by Congress to afford relief to debtors.
5 By its very nature, the Code upsets common and state law property interests and
6 recalibrates the relationship between debtors and creditors.

7 For these reasons, we conclude that the District Court correctly held that the
8 transfer of the Gunsaluses' home to the County was not entitled to the
9 presumption of having provided "reasonably equivalent value" under Section
10 548.

11 **CONCLUSION**

12 We **AFFIRM** the judgment of the District Court.

United States Court of Appeals
for the Second Circuit

August Term, 2022

(Argued: May 15, 2023 Decided: September 29, 2023)

Docket No. 21-2917-bk

CORI DUVALL,

Plaintiff-Appellee,

v.

COUNTY OF ONTARIO, NEW YORK,

Defendant-Appellant.*

Before:

CALABRESI, LOHIER, and KAHN, *Circuit Judges*.

After Ontario County, New York foreclosed on her property due to unpaid real estate taxes, Cori DuVall filed a Chapter 13 bankruptcy petition. In her bankruptcy schedules, DuVall disclosed that she was the beneficiary of an annuity and claimed the annuity as exempt from the bankruptcy estate. The County failed to object to the claimed exemption within the timeframe prescribed by Federal Rule of Bankruptcy Procedure 4003(b). DuVall filed an adversary proceeding against the County seeking to avoid the tax foreclosure as a constructively fraudulent conveyance under 11 U.S.C. § 548. The United States Bankruptcy Court for the Western District of New York found that the annuity

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* The Clerk of Court is directed to amend the caption as set forth above.

was exempt from DuVall's bankruptcy estate by operation of Rule 4003(b) and that DuVall was thus insolvent at the time of the foreclosure. The Bankruptcy Court held that the foreclosure therefore amounted to a constructively fraudulent transfer of property, and it avoided the transfer. The District Court affirmed. The County now principally argues that it was not subject to the deadline prescribed by Rule 4003(b). We disagree and conclude that the Bankruptcy Court correctly applied Rule 4003(b). We also find no error in the Bankruptcy Court's choice of remedy. We therefore AFFIRM.

ZACHARY J. PIKE, The Legal Aid Society of Rochester, NY, Rochester, NY, *for Plaintiff-Appellee*.

JASON S. DIPONZIO, Rochester, NY, *for Defendant-Appellant*.

LOHIER, *Circuit Judge*:

For the third time in recent years, Ontario County, New York (the "County") asks us to overturn a Bankruptcy Court's decision in a proceeding connected to a tax foreclosure of real property. See Gunsalus v. County of Ontario, 37 F.4th 859 (2d Cir. 2022), cert. denied, 143 S. Ct. 447 (2022); Hampton v. County of Ontario, No. 20-3868, 2022 WL 2443007 (2d Cir. July 5, 2022). As in those prior cases, the United States Bankruptcy Court for the Western District of New York (Warren, B.J.) in this case issued a judgment and order avoiding the tax foreclosure as a constructively fraudulent transfer of property, see 11 U.S.C. § 548(a)(1), and the District Court (Larimer, J.) affirmed. The County argues that the Bankruptcy Court misinterpreted the relevant sections of the Bankruptcy

Code and Federal Rule of Bankruptcy Procedure 4003. By avoiding the foreclosure rather than awarding DuVall damages, the County claims, the Bankruptcy Court also improperly awarded DuVall a windfall. We disagree with the County's arguments and affirm.

BACKGROUND

On December 29, 2014, Cori DuVall received a 49-acre farm and residence (the "Property") in West Bloomfield, New York from her mother. DuVall failed to pay approximately $22,000 in property taxes to the County in 2015. The County then brought an in rem tax foreclosure proceeding by filing a foreclosure petition under New York Real Property Tax Law Article 11. When DuVall failed to answer the foreclosure petition or redeem the Property by paying the unpaid taxes and penalties, the Ontario County Supreme Court entered a default judgment of foreclosure on the Property on March 7, 2017, and the Property was transferred from DuVall to the County that day.

DuVall sought to vacate the foreclosure in May 2017 in the Ontario County Supreme Court. When the Supreme Court denied her application, DuVall appealed to the Appellate Division, which affirmed. County of Ontario v. DuVall, 93 N.Y.S.3d 497 (4th Dep't 2019). The County, meanwhile, sold the

Property to third parties in an auction held on May 17, 2017, but refrained from transferring title pending resolution of the litigation against DuVall. Of the $91,000 in sale proceeds, the County kept approximately $69,000 in surplus funds after accounting for the roughly $22,000 tax debt, as permitted under New York law. See Hoge v. Chautauqua County, 104 N.Y.S. 3d 813, 815 (4th Dep't 2019); see also New York Real Property Tax Law § 1136(3).

On March 1, 2019, nearly two years after the foreclosure, DuVall filed a bankruptcy petition under Chapter 13 and filed bankruptcy schedules two weeks later. In all, DuVall claimed $295,419.22 in assets, including the Property, which she valued at $186,000. According to the schedules, the County had foreclosed on the Property but DuVall intended to "undo [the] transfer via [an] adversarial proceeding pursuant to Bankruptcy Code Section 548." Joint App'x 32. The schedules separately identified an annuity of unknown value (the "Annuity") of which DuVall was the beneficiary. DuVall claimed the full value of the Annuity (along with other property not relevant to this appeal) as exempt from the estate under Section 522(d)(11)(E) of the Bankruptcy Code.[1] The schedules also listed several unsecured creditors but revealed that DuVall's only secured creditor was

[1] All references to a "Section" are to sections of the Bankruptcy Code as codified in Title 11 of the U.S. Code.

the County. Lastly, the schedules provided that the Ontario County Attorney, Ontario County Treasurer, and the County's attorney would all receive notice of the bankruptcy filing.

DuVall served the County with the petition and schedules on March 14, 2019. Although a meeting of creditors as required under Section 341(a) was held on April 15, 2019, the County did not file any objections to DuVall's schedules at that time or request an extension of time to object.

DuVall commenced the adversary proceeding underlying this appeal on April 25, 2019 and served the County on May 3, 2019. DuVall claimed that transferring the Property was fraudulent under 11 U.S.C. § 548(a)(1)(B), because it gave her less than a reasonably equivalent value of the Property in exchange and left her insolvent. DuVall asked the Bankruptcy Court to avoid the property transfer and to allow her to satisfy the tax lien through a plan approved in the main bankruptcy proceeding.

In June 2020 the County moved in limine to admit evidence of the Annuity's value. According to the County, that evidence showed that DuVall was not insolvent on March 7, 2017 and so refuted DuVall's claim that the foreclosure amounted to a constructively fraudulent transfer. The Bankruptcy

Court denied the County’s motion in limine on the ground that property claimed as exempt by a debtor is exempt under Section 522(l) of the Code unless a party in interest objects to the claimed exemption “within 30 days after the meeting of creditors held under § 341(a) is concluded.” Fed. R. Bankr. P. 4003(b)(1). The County’s failure to object to the claimed exemption of the Annuity by May 16, 2019 (30 days after the meeting of creditors in this case and more than a year before the County filed its motion in limine), the Bankruptcy Court explained, meant that the Annuity was exempt, rendering evidence of its value irrelevant to the insolvency determination.

The case proceeded to trial without the evidence of the Annuity’s value, following which the Bankruptcy Court issued an order and judgment avoiding the tax foreclosure as a constructively fraudulent conveyance. The County appealed to the District Court, which affirmed, and now appeals to us.

DISCUSSION

“We exercise plenary review over a district court's affirmance of a bankruptcy court's decisions, reviewing de novo the bankruptcy court's

conclusions of law, and reviewing its findings of facts for clear error." Gasson v. Premier Cap., LLC, 43 F.4th 37, 41 (2d Cir. 2022) (quotation marks omitted).

I

When a debtor files a Chapter 13 bankruptcy petition, all of the debtor's assets become property of the bankruptcy estate subject to the debtor's right to reclaim certain property as "exempt." 11 U.S.C. § 522(l). The Bankruptcy Code specifies the types of property debtors may exempt. Id. § 522(b). Property a debtor claims as exempt will be excluded from the bankruptcy estate "[u]nless a party in interest" objects. Id. § 522(l). Specifically, Section 522(l) provides that a debtor must "file a list of property that the debtor claims as exempt," and that, "[u]nless a party in interest objects, the property claimed as exempt on such list is exempt." Under Rule 4003(b), "a party in interest may file an objection to the list of property claimed as exempt within 30 days after the meeting of creditors held under [11 U.S.C.] § 341(a) is concluded . . . . The court may, for cause, extend the time for filing objections if, before the time to object expires, a party in interest files a request for an extension." Fed. R. Bankr. P. 4003(b). "By negative implication, the Rule indicates that creditors may not object after 30 days 'unless, within such period, further time is granted by the court.'" Taylor v. Freeland &

Kronz, 503 U.S. 638, 643 (1992) (quoting Fed. R. Bankr. P. 4003(b) (1992)). Under Section 522(l) and Rule 4003(b), therefore, if an interested party fails to object within the time allowed, a claimed exemption will exclude the subject property from the estate.

Despite that framework and the County's failure to timely object to the claimed exemption over the Annuity, the County argues that the Bankruptcy Court should have granted its motion in limine because Rule 4003(b) does not operate as a time bar that prevents the County from objecting to the inclusion of the Annuity in DuVall's assets as of March 7, 2017. Instead, the County claims that it was entitled to use the Annuity's value to demonstrate that DuVall was not insolvent as of that date.

DuVall sought to have the tax foreclosure avoided as a constructively fraudulent conveyance under Section 548(a)(1)(B) of the Bankruptcy Code. A debtor seeking avoidance of a transfer under that provision must show the following:

> (1) the debtor had an interest in property; (2) a transfer of that interest occurred on or within two years of the bankruptcy petition; (3) the debtor was insolvent at the time of the transfer or became insolvent as a result of the transfer; and (4) the debtor received 'less than a

> reasonably equivalent value in exchange for such transfer.'

Gunsalus, 37 F.4th at 864 (quoting 11 U.S.C. § 548(a)(1)(B)(i)). The parties do not dispute that DuVall owned the Property, lost her entire interest in a tax foreclosure within two years of the filing of her bankruptcy petition, and did not receive "reasonably equivalent value" in exchange for the Property because the entire Property was seized to pay for a tax deficiency that was much smaller than its assessed value. See id. at 865–66. Therefore, the only disputed question is whether DuVall was insolvent at the time the Property was transferred to the County.

A debtor is insolvent if the sum of her debts is "greater than all of [her] property, at a fair valuation, exclusive of . . . property that may be exempted from property of the estate under section 522" of the Bankruptcy Code. 11 U.S.C. § 101(32)(A). Whether certain property is "exempted from property of the [bankruptcy] estate under section 522" will determine if DuVall was solvent or insolvent when the transfer of the Property occurred in May 2017. As we have discussed, if an objection to a claim of exemption is not filed then property can be exempted by default under Rule 4003(b), which provides that "a party in interest may file an objection to the list of property claimed as exempt within 30 days

after the meeting of creditors held under § 341(a) is concluded or within 30 days after any amendment to the list or supplemental schedules is filed, whichever is later." Fed. R. Bankr. P. 4003(b).

The Bankruptcy Court found that the County received notice of the filing of DuVall's Chapter 13 petition and was served with the summons and complaint "well in advance of the objection deadline under Rule 4003(b)(1)" but failed timely to object to DuVall's claimed exemption of the Annuity from the bankruptcy estate. Joint App'x 211. The Bankruptcy Court concluded that the Annuity was therefore exempted from DuVall's estate. Because there was no reason for the County to introduce evidence regarding the value of exempt property, the Court denied the County's motion in limine.

We agree with the Bankruptcy Court. "In interpreting a statute, we begin of course by giving effect to the plain meaning of the text — and, if that text is unambiguous, our analysis usually ends there as well." Williams v. MTA Bus Co., 44 F.4th 115, 127 (2d Cir. 2022) (quotation marks omitted). Applying the language of Rule 4003(b), read together with Sections 101(32) and 522(l), makes clear that the Annuity is exempt due to the County's failure to timely object to Duvall's claimed exemption. Only "Congress may enact . . . provisions to

address [any] difficulties" that follow from the Rule's strict application. Taylor, 503 U.S. at 644.

The County raises several contrary arguments. First, it suggests that it was not required to object to DuVall's claimed exemption before the creditor's meeting under Section 341(a). This argument involves a somewhat convoluted and peculiar line of reasoning. As an initial matter, the County says, a tax foreclosure can be a fraudulent conveyance only if the debtor was insolvent on the date the transfer was made or if the debtor became insolvent as a result of the transfer. The second step, the County insists, is to ask whether property could be properly exempted at the time of the conveyance itself. The County reasons that the absence of an objection cannot affect whether a debtor was insolvent at the time of a pre-bankruptcy tax foreclosure because such an absence is relevant to what property belongs in the bankruptcy estate only as of the commencement of the bankruptcy proceeding. In the County's view, only the substantive provisions of Section 522 determine whether property is properly exempted at the earlier point. Thus, the County concludes, the 30-day time limit in Rule 4003(b), a procedural provision, is inapplicable to this case, and DuVall could not

claim the Annuity was exempt on March 7, 2017 based solely on the County's failure to object.

The County's logic conflicts with the logic and text of the statutory scheme. The Bankruptcy Code permits a trustee to avoid a transfer that occurred within two years of the filing of a bankruptcy petition. See 11 U.S.C. § 548(a)(1). As relevant here, because the Property was transferred within two years of DuVall's bankruptcy petition, that transfer may be avoided if DuVall did not receive reasonably equivalent value for it and was insolvent on the date of transfer or rendered insolvent by the transfer on March 7, 2017. Id. § 548(a)(1)(B). To determine whether DuVall was insolvent on the date of transfer or rendered insolvent by the transfer, the Bankruptcy Court was compelled to exclude from its calculation of DuVall's assets "property that may be exempted from property of the estate under section 522." Id. § 101(32)(A)(ii). The plain text of the Code thus contemplates that insolvency is determined based on the debts and properties of and exemptions from the bankruptcy estate.

The County asks us to interpret Section 101's reference to "section 522" to include only the substantive subsections of Section 522. In other words, the County says, we should ignore procedural subsections like Section 522(l), which

in conjunction with Rule 4003(b) authorizes debtors to claim property as exempt even if the property does not satisfy the substantive criteria set forth in other subsections of Section 522. Taylor, 503 U.S. at 642. But Section 101 plainly states that any property that is claimed as exempt and not objected to "may be exempted . . . under section 522," 11 U.S.C. § 101(32)(A)(ii) – even if no good faith basis for claiming such an exemption exists.[2]

Offering another counterargument, the County invites us to look at the statutory purpose of the Bankruptcy Code notwithstanding the plain terms of Section 522 and Rule 4003. Although "the Supreme Court has . . . explained in interpreting other sections of the Bankruptcy Code that we must not be guided by a single sentence or part of a sentence, but look to the provisions of the whole law, and to its object and policy," Cap. Commc'ns Fed. Credit Union v. Boodrow (In re Boodrow), 126 F.3d 43, 49 (2d Cir. 1997) (cleaned up), we decline to look

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[2] The County, seeking another textual hook for its argument, points to the word "may" in the phrase "property that may be exempted from property of the estate under section 522," id. § 101(32)(A)(ii) (emphasis added). The County contends that "may" here "connotes the exercise of discretion" and thus "means that the court must make [the] determination [of whether property may be exempted] as of the operative date." Reply Br. 2. This argument was not developed in the County's opening brief, so we need not, and in our discretion do not, consider it. Anilao v. Spota, 27 F.4th 855, 873 (2d Cir. 2022) ("[A]rguments not made in an appellant's opening brief are waived even if the appellant pursued those arguments in the district court." (quotation marks omitted)).

beyond the plain text of Section 522 and Rule 4003 in this case to craft exceptions to their application based on statutory purpose, see Taylor, 503 U.S. at 644.

The County's remaining arguments fare no better. The County attempts to distinguish Taylor on the ground that the bankruptcy trustee in Taylor sought the return of property to the bankruptcy estate, whereas the County "seek[s] to defend itself in a claim brought by [DuVall] that was wholly unrelated to whether the Annuity should be made available for payment of creditor claims." Appellant's Br. 29–30. This distinction does not matter. Taylor describes when property is exempt from a bankruptcy estate under Section 522(l). Nothing in Taylor, Section 522(l), or any other statutory provision at issue in this case suggests that Taylor's reading of Rule 4003(b) is limited to only some types of exemptions. Accordingly, Taylor dictates the result here.

The County also argues that Rule 4003(b)'s timely objection requirement is either a rule of estoppel, whereby failure to object to an exemption within the 30-day timeframe estops or precludes the creditor from challenging the exemption, or qualifies as a statute of limitations subject to equitable tolling. But nothing in the language of Rule 4003 or our caselaw suggests that it qualifies as an equitable doctrine. To the contrary, Taylor tells us that the rule imposes a hard deadline

not subject to equitable tolling, as one would expect of a statute of limitations or an equitable doctrine such as collateral estoppel. See CBF Indústria de Gusa S/A v. AMCI Holdings, Inc., 850 F.3d 58, 78 (2d Cir. 2017) (noting that "issue preclusion is an equitable doctrine").

Straining further to support its interpretation of Rule 4003(b), the County points to decisions in lien avoidance proceedings under Section 522(f). These decisions are far from on point. They rest on the distinctive treatment of lien avoidance actions under Rule 4003(d), not Rule 4003(b), or on the specific language of Section 522(f), not Section 522(l). See In re Schoonover, 331 F.3d 575, 578 (7th Cir. 2003) (holding that Taylor does not apply to Rule 4003(d)); Morgan v. FDIC (In re Morgan), 149 B.R. 147, 151–52 (B.A.P. 9th Cir. 1993) (stressing that § 522(f), by its plain terms, applies only where a debtor "would have been entitled to [an] exemption under § 522(b)" (quotation marks omitted)); In re Armenakis, 406 B.R. 610, 614 (Bankr. S.D.N.Y. 2009) (similar); In re Maylin, 155 B.R. 605, 612–13 (Bankr. D. Me. 1993) (relying on historical practice in Section 522(f) cases). Even a cursory reading of Rule 4003(d) and Section 522(f) shows

that they differ in important ways from the provisions – Rule 4003(b) and Section 522(l) – at issue here.[3]

For these reasons, we find no error in the Bankruptcy Court's decision to deny the County's motion in limine.[4]

II

The County alternatively argues that the proper remedy for a constructively fraudulent transfer of the Property in this case would have been to award DuVall damages limited to either the amount of creditor claims or the

[3] Some bankruptcy courts have sought to distinguish Taylor by applying the reasoning applicable to Section 522(f) to Section 522(h). See Shawhan v. Shawhan (In re Shawhan), No. BAP NV-08-1049, 2008 WL 8462964, at *11 (B.A.P. 9th Cir. July 7, 2008); Premier Cap., Inc. v. DeCarolis (In re DeCarolis), 259 B.R. 467, 471 n.8 (B.A.P. 1st Cir. Mar. 15, 2001); Ryker v. Current (In re Ryker), 315 B.R. 664, 673 (Bankr. D.N.J. 2004); Maylin, 155 B.R. at 613. But we do not think that Taylor is distinguishable in this way. As can be inferred from the Supreme Court's reasoning in Taylor, property may be exempted from the bankruptcy estate by default if no provision of the Bankruptcy Code prevents Rule 4003(b) from applying to actions under Section 522(h). See Taylor, 503 U.S. at 643–44.

[4] The County gestures at an argument that "[j]ust because Congress has codified a defense," it has not necessarily "barr[ed] all other defenses that have been permitted by common law." Appellant's Br. 28. Even assuming that proposition has merit, but see Taylor, 503 U.S. at 644, the County has failed to develop this argument and we deem it abandoned.

amount of the claimed exemption.[5] Specifically, the County contends that "[t]he purpose of fraudulent conveyance actions is to prevent harm to creditors by a transfer of property from the debtor." Appellant's Br. 30. Because DuVall's bankruptcy schedules demonstrate that she is "able to pay all creditor claims in full," it maintains, avoiding the tax foreclosure "would only benefit [DuVall] and provide no benefit to her creditors." Appellant's Br. 33. In the County's view, the Bankruptcy Court's choice to avoid the tax foreclosure altogether resulted in an undeserved windfall in DuVall's favor. To avoid this result, the County claims that DuVall should have been awarded damages "either representing the amount of creditor claims presented, or in the alternative, the value of [the] exempt portion of the Property." Appellant's Br. 34. We reject the County's arguments.

To start, the County's proposal to limit DuVall's damages to the amount of <u>creditor</u> claims lacks support in the text of Section 522(h), under which DuVall was entitled to bring this Section 548 proceeding. Section 522(h) provides that a

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[5] DuVall argues the County did not preserve this argument below, notwithstanding that the County raised this argument to the Bankruptcy Court in a post-trial motion. The District Court agreed with DuVall. Because we reject the County's argument on its merits, we need not address DuVall's contention that the County was required to raise this argument as an affirmative defense in its answer. <u>See</u> <u>Untied States v. Raniere</u>, 55 F.4th 354, 362 n.10 (2d Cir. 2022).

debtor "may avoid a transfer of property of the debtor or recover a setoff to the extent that the debtor could have exempted such property." 11 U.S.C. § 522(h). Section 552(i)(1) in turn provides that if a debtor avoids a transfer of property under Section 522(h), the debtor may recover "in the manner prescribed by" Section 550(a). See 11 U.S.C. § 522(i)(1).[6] Section 550(a) further provides that the "trustee may recover, for the benefit of the estate, the property transferred, or…the value of such property." Nothing in these provisions of the Bankruptcy Code appears to limit the award of damages to the amount of creditor claims. Cf. Brennan-Centrella v. Ritz-Craft Corp. of Pennsylvania, 942 F.3d 106, 111 (2d Cir. 2019) (noting that "it would be strange for [a] statute to mention specifically

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[6] Section 522(i)(1) provides: "If the debtor avoids a transfer or recovers a setoff under subsection (f) or (h) of this section, the debtor may recover in the manner prescribed by, and subject to the limitations of, section 550 of this title, the same as if the trustee had avoided such transfer, and may exempt any property so recovered under subsection (b) of this section." Section 550(a), for its part, provides as follows:

> (a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from—
>
> > (1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or
> > (2) any immediate or mediate transferee of such initial transferee.

several remedies . . . while leaving [the remedy at issue] to implication" (quotation marks omitted)).

We therefore turn to the Bankruptcy Court's decision to avoid the transfer of the Property rather than award DuVall damages in the amount of the claimed exemption. The parties appear to agree that the Bankruptcy Court had discretion to choose between the two remedies listed in Section 522(h), and so we take the same approach.

Even assuming that avoiding the transfer here resulted in a disfavored windfall for DuVall,[7] the County's argument ignores that we have been critical of windfalls to creditors and debtors alike. See Gunsalus, 37 F.4th at 866. In defense of the windfall the County would reap should we reverse the Bankruptcy Court's decision, the County explains that New York state law permitted it to keep the approximately $69,000 in surplus funds from the sale of the Property. But that defense is now unavailable in light of Tyler v. Hennepin County, 143 S. Ct. 1369, 1380 (2023), which held that there is an unconstitutional

[7] Windfalls to debtors are generally disfavored. See Vintero Corp. v. Corporacion Venezolana de Fomento (In re Vintero Corp.), 735 F.2d 740, 742 (2d Cir. 1984); Whiteford Plastics Co. v. Chase National Bank of N.Y.C., 179 F.2d 582, 584 (2d Cir. 1950).

taking in violation of the Takings Clause when a county keeps the surplus funds accrued from a tax foreclosure.

We accordingly decline to disturb the Bankruptcy Court's decision to avoid the transfer as the appropriate remedy.

CONCLUSION

We have considered the County's remaining arguments[8] and conclude that they are without merit. For the foregoing reasons, we **AFFIRM** the judgment of the District Court.

[8] The County also argued in its opening brief that the Bankruptcy Court erred by declining to extend the holding of BFP v. Resolution Trust, 511 U.S. 531 (1994), to tax foreclosure proceedings under New York Real Property Tax Law Article 11. Although we had already held in Gunsalus that BFP did not extend to Article 11 proceedings, 37 F.4th at 865–66, the County sought to preserve its argument pending the Supreme Court's disposition of the County's petition for certiorari in Gunsalus. After the Supreme Court denied the petition on November 21, 2022, see County of Ontario v. Gunsalus, 143 S. Ct. 447 (2022), the County withdrew this argument.

STATE OF NEW YORK

7549--A

2023-2024 Regular Sessions

IN SENATE

June 5, 2023

Introduced by Sen. THOMAS -- read twice and ordered printed, and when printed to be committed to the Committee on Rules -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT relating to a temporary in rem foreclosure moratorium; and providing for the repeal of such provisions upon the expiration thereof

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Legislative findings. The legislature finds that the United
2 States Supreme Court Case of Tyler v. Hennepin County, Minnesota,
3 decided on May 25, 2023, has created legal uncertainty with regard to
4 how municipalities must conduct their in rem delinquent real property
5 tax lien foreclosures and return any surplus funds thereby derived to
6 the appropriate parties, when necessary. As such, the legislature seeks
7 to find a solution that will provide legal certainty in this process and
8 ensure the rights of property owners and municipalities are adequately
9 protected.
10 § 2. No tax district, as defined in subdivision 6 of section 1102 of
11 the real property tax law or enforcing officer, as defined in subdivi-
12 sion 3 of such section, shall convey to any person title to any tax-del-
13 inquent parcel of real property which has been the subject of an in rem
14 tax foreclosure proceeding in any court of competent jurisdiction
15 against any parcel or parcels of real property located within the
16 geographic boundaries of such tax district until the expiration of the
17 moratorium under this act.
18 § 3. This act shall not apply to:
19 1. properties owned by a tax district which were acquired at any time
20 after May 25, 2023 and prior to July 1, 2023, pursuant to article 11 of
21 the real property tax law, or where the tax district filed the final
22 foreclosure judgement order with the court within such time period. In

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD11739-04-3

1 the event that any tax district has acquired title to any delinquent
2 parcel of real property prior to July 1, 2023 pursuant to an in rem tax
3 foreclosure proceeding under article 11 of the real property tax law,
4 the tax district may auction said parcel or parcels contingent upon the
5 foreclosing tax district holding any and all surplus funds in a segre-
6 gated trust account to be maintained by the chief fiscal officer of such
7 tax district until such time that this moratorium is repealed on June
8 30, 2024; or
9 2. a tax district that has a mechanism by which the municipality
10 offers the return of surplus funds to the delinquent tax property owner
11 and such municipality: (a) on January 1, 1993, was authorized to enforce
12 the collection of delinquent taxes pursuant to a county charter, city
13 charter, administrative code or special law; or (b) adopted a local law,
14 no later than July 1, 1994 providing that the collection of taxes in
15 such county, city or town shall continue to be enforced pursuant to such
16 charter, code or special law, as such charter, code or special law may
17 from time to time be amended; and (c) filed a copy of such local law
18 with the commissioner of taxation and finance no later than August 1,
19 1994.
20 § 4. This act shall take effect immediately and shall expire and be
21 deemed repealed on and after June 30, 2024.

NEW YORK STATE SENATE
INTRODUCER'S MEMORANDUM IN SUPPORT
submitted in accordance with Senate Rule VI. Sec 1

BILL NUMBER: S7549A

SPONSOR: THOMAS

TITLE OF BILL:

An act relating to a temporary in rem foreclosure moratorium; and providing for the repeal of such provisions upon the expiration thereof

PURPOSE:

Institutes an in rem foreclosure moratorium in response to United States Supreme Court Case Tyler v. Hennepin County, Minnesota.

SUMMARY OF PROVISIONS:

Section 1 explains the legislative findings, and the Legislature's conclusion that there should be a moratorium placed on in rem foreclosures as a result of the legal uncertainty that exists following the Supreme Court's decision in Tyler v. Hennepin County, Minnesota.

Section 2 institutes an in rem foreclosure moratorium and provides that no tax enforcement officer may convey title to any tax-delinquent parcel of real property owned by a tax district, which has been the subject of an in rem tax foreclosure proceeding, to the treasurer or other official of the tax district, in any in rem foreclosure action which was filed and adjudicated prior to the effective date of the act, and prior to its expiration date.

Section 3 provides that any properties that a tax district acquired title to prior to July 1, 2023 pursuant to an in rem tax foreclosure proceeding may be auctioned by the tax district if the surplus funds are held in a segregated trust account that's maintained by the chief fiscal officer of the tax district until the moratorium is repealed on June 30, 2024.

Tax districts that opted out of the state law and have local procedures that govern their tax foreclosures will be able to continue those foreclosures so long as they have, or they subsequently institute, a legal mechanism that provides for the return of the surplus funds that is compliant with the Tyler v. Hennepin decision.

Section 4 provides that the act is effective immediately and will expire on June 30, 2024.

JUSTIFICATION:

Tyler v. Hennepin County was a United States Supreme Court case decided in May, 2023 which ruled on local governments' ability to seize property for unpaid taxes, when the value of the property is greater than the tax debt. The Court unanimously held that the surplus value (the amount the property sells for above the value of the property) are protected by the

Fifth Amendment's Takings Clause. Effectively, this means that local governments must return surplus funds to homeowners.

In New York, tax foreclosures occur when a property owner is delinquent on their taxes and does not pay the delinquency by the redemption date. Localities then either foreclose on the property and sell it at auction or utilize a tax lien sale where the tax liens are sold to third party buyers. Some municipalities return the surplus funds, while others do not. In the wake of Tyler v. Hennepin, certain areas of New York's statute are incompatible with this recent Supreme Court precedent. As issues of real property tax, delinquencies, in rem foreclosures, and the associated surpluses are complex issues of policy and law, the Legislature seeks to provide time for the various stakeholders to discuss the tax foreclosure process and how best to change New York's statute; as such, this legislation institutes a moratorium on most in rem foreclosures until June 30, 2024.

LEGISLATIVE HISTORY:

New Bill.

FISCAL IMPLICATIONS:

None to the state or localities.

EFFECTIVE DATE:

This act shall take effect immediately and shall expire and be deemed repealed on and after June 30, 2024.

53 PART M

Section 1. The real property tax law is amended by adding a new section 989 to read as follows:

§ 989. Distribution of surplus in tax enforcement proceedings. 1. Notwithstanding the provisions of any general, special or local law to the contrary, when a property owner is divested of title due to the foreclosure of a delinquent real property tax lien on the property, and the property is sold to a third party, the proceeds of such sale shall be distributed as follows:

(a) If the proceeds of the sale are less than or equal to the total taxes due on the property plus interest, penalties and other charges duly imposed upon the property, including the administrative costs associated with the foreclosure process, the entire proceeds shall be paid to the local government.

(b) If the proceeds of the sale exceed the total taxes due on the property plus interest, penalties and other charges duly imposed upon the property, including the administrative costs associated with the foreclosure process, the excess shall be distributed as follows:

(i) If the property is not subject to other liens, the excess proceeds shall be paid to the prior owner or owners of the property.

(ii) If the property is subject to other liens, the lienholders shall be paid from the excess proceeds in the same order and to the same extent as they would be in an action to foreclose a mortgage pursuant to article thirteen of the real property actions and proceedings law. Any proceeds remaining after the other lienholders have been so paid shall be paid to the prior owner or owners of the property.

2. The provisions of this section shall apply whether property is sold through a public auction or otherwise.

3. When a foreclosure concludes with the tax district taking title to property, the provisions of this section shall not apply unless and until the tax district sells the property to a third party; provided that in such a case, if there are excess proceeds to be paid to the prior owner or owners of the property, such proceeds shall be paid to the owner or owners of the property prior to its acquisition by the tax district.

4. The provisions of this section shall not apply to the enforcement of tax liens on abandoned real property. For purposes of this section, real property shall be deemed abandoned if it:

(a) has been included on a local municipal roll, registry or list of vacant and abandoned residential property pursuant to section eleven hundred eleven-a of this chapter, or

(b) has been certified as abandoned commercial or industrial real property pursuant to article nineteen-A of the real property actions and proceedings law, or

(c) has been included on the statewide registry of vacant and abandoned property pursuant to section thirteen hundred ten of the real property actions and proceedings law.

5. This section shall be construed to supersede all general, special and local laws relating to tax enforcement to the extent that such laws would otherwise allow the proceeds of a sale to be distributed in a manner other than as set forth in this section. This section is not intended to supersede such laws in other respects.

§ 2. Subdivision 2 of section 1104 of the real property tax law, as amended by chapter 532 of the laws of 1994, paragraph (iii) as further amended by subdivision (b) of section 1 of part W of chapter 56 of the laws of 2010, is amended to read as follows:

1 2. The provisions of this article shall not be applicable to a county,
2 city or town which: (i) on January first, nineteen hundred ninety-three,
3 was authorized to enforce the collection of delinquent taxes pursuant to
4 a county charter, city charter, administrative code or special law; (ii)
5 adopted a local law, no later than July first, nineteen hundred ninety-
6 four, providing that the collection of taxes in such county, city or
7 town shall continue to be enforced pursuant to such charter, code or
8 special law, as such charter, code or special law may from time to time
9 be amended; and (iii) filed a copy of such local law with the commis-
10 sioner no later than August first, nineteen hundred ninety-four.
11 **Provided, however, that nothing contained herein shall be construed to**
12 **exempt any such county, city or town from the provisions of section nine**
13 **hundred eighty-nine of this chapter.**
14 § 3. Subdivision 1 of section 1166 of the real property tax law, as
15 amended by chapter 500 of the laws of 2015, is amended to read as
16 follows:
17 1. Whenever any tax district shall become vested with the title to
18 real property by virtue of a foreclosure proceeding brought pursuant to
19 the provisions of this article, such tax district is hereby authorized
20 to sell and convey the real property so acquired, which shall include
21 any and all gas, oil or mineral rights associated with such real proper-
22 ty, either with or without advertising for bids, notwithstanding the
23 provisions of any general, special or local law. **The proceeds obtained**
24 **from any such sale shall be distributed in the manner provided by**
25 **section nine hundred eighty-nine of this chapter.**
26 § 4. This act shall take effect October 1, 2023, and shall apply to
27 all tax foreclosure proceedings commenced on and after such date.

Real Property Actions and Proceedings Law §§ 1351-1362

§ 1351. Judgment of sale. 1. The judgment shall direct that the mortgaged premises, or so much thereof as may be sufficient to discharge the mortgage debt, the expenses of the sale and the costs of the action, and which may be sold separately without material injury to the parties interested, be sold by or under the direction of the sheriff of the county, or a referee within ninety days of the date of the judgment. The judgment shall also include the name and telephone number of the mortgage servicer for a plaintiff involving a mortgage foreclosure of a one- to four-family residential property.

2. Where the mortgage debt is not all due, and the mortgaged property is so circumstanced that it can be sold in parcels without injury to the interests of the parties, the final judgment shall direct that no more of the property be sold in the first place than is sufficient to satisfy the sum then due, with the costs of the action and expenses of the sale. Upon a subsequent default in the payment of principal or interest the plaintiff may apply for an order directing the sale of the residue, or of so much thereof as is necessary to satisfy the amount then due, with the costs of the application and the expenses of the sale. The plaintiff may apply for and obtain such an order as often as a default happens. If it appears that the mortgaged property is so circumstanced that a sale of the whole will be most beneficial to the parties, the final judgment may direct that the whole property be sold discharged from the entire mortgage debt and that the proceeds of the sale, after deducting the costs of the action and the expenses of the sale, be either applied to the satisfaction of the whole sum secured by the mortgage, with such a rebate of interest as justice requires; or be first applied to the payment of the sum due, and the balance, or so much thereof as is necessary, be invested at interest for the benefit of the plaintiff, to be paid to him from time to time as any part of the principal or interest becomes due, or may, at the option of the mortgagee, direct that the whole property be sold to satisfy the debt then due with the costs of the action and expenses of the sale, subject to the continuing lien of the mortgage for the amount of the debt not then due and unpaid according to its terms. The provisions of this section shall not limit or affect the plaintiff's right to judgment and sale in an action specified in section 1315.

3. If it appears to the satisfaction of the court that there exists no more than one other mortgage on the premisis which is then due and which is subordinate only to the plaintiff's mortgage but is entitled to priority over all other liens and encumbrances except those described in subdivision 2 of section 1354, upon motion of the holder of such mortgage made without valid objection of any other party, the final judgement may direct payment of the subordinate mortgage debt from the proceeds in accordance with subdivision 3 of section 1354.

§ 1352. Judgment foreclosing right of redemption. Where real property has been sold pursuant to a judgment in an action to foreclose a mortgage, and an action is thereafter brought to foreclose or extinguish a right of redemption in such real property, the judgment, instead of directing a sale of the property, shall fix the right of any person having a right of redemption therein or the right to foreclose a subordinate mortgage or other lien and shall provide that a failure to

redeem or commence an action for the foreclosure of such mortgage or other lien within such time shall preclude such person having a right of redemption or the holder of such mortgage or other lien from redeeming such property or foreclosing such mortgage or other lien, and thereafter such person having a right of redemption or the holder of such mortgage or other lien shall be excluded from claiming any title or interest in such property and all title or interests of such person having a right of redemption in, or the right to foreclose a subordinate mortgage or other lien against such property shall thereby be extinguished and terminated.

§ 1353. Conveyance. 1. After the property has been sold, the officer conducting the sale shall execute a deed to the purchaser. The plaintiff, or any other party, may become a purchaser. If the plaintiff (or its affiliate, as defined in paragraph (a) of subdivision one of section six-l of the banking law) is the purchaser, such party shall place the property back on the market for sale or other occupancy: (a) within one hundred eighty days of the execution of the deed of sale, or (b) within ninety days of completion of construction, renovation, or rehabilitation of the property, provided that such construction, renovation, or rehabilitation proceeded diligently to completion, whichever comes first, provided however, a court of competent jurisdiction may grant an extension for good cause.

2. Before a deed is executed to the purchaser, the plaintiff shall file the mortgage and any assignment not shown to have been lost or destroyed in the office of the clerk, unless it is in a form which can be recorded; in which case it shall be recorded in the counties where the lands are situated; the expense of filing or recording and entry shall be allowed in the taxation of costs; and, if filed with the clerk, he shall enter in the minutes the time of filing.

3. The conveyance vests in the purchaser the same estate only that would have vested in the mortgagee if the equity of redemption had been foreclosed. Such a conveyance is as valid as if it were executed by the mortgagor and mortgagee, and, except as provided in section 1315 and subdivision 2 of section 1341, is an entire bar against each of them and against each party to the action who was duly summoned and every person claiming from, through or under a party by title accruing after the filing of the notice of the pendency of the action.

§ 1354. Distribution of proceeds of sale. 1. The officer conducting the sale shall pay, out of the proceeds, unless otherwise directed, the expenses of the sale, and pay to the plaintiff, or his attorney, the amount of the debt, interest and costs, or so much as the proceeds will pay and take the receipt of the plaintiff, or his attorney, for the amount so paid, and file the same with his report of sale.

2. The officer conducting the sale shall pay out of the proceeds all taxes, assessments, and water rates which are liens upon the property sold, and redeem the property sold from any sales for unpaid taxes, assessments or water rates which have not apparently become absolute. In any city having a population of three hundred thousand or more or any city having a population between one hundred twenty-five thousand and one hundred seventy-five thousand, such officer shall pay out of the proceeds any liens or incumbrances placed by a city agency upon the real property which have priority over the foreclosed mortgage. The sums necessary to make those payments and redemptions are deemed expenses of

the sale. The provisions of this subdivision shall not apply to any judgment in an action wherein any municipal corporation of this state is the plaintiff and the purchaser at the foreclosure sale thereunder.

3. The officer conducting the sale after fully complying with the provisions of subdivisions one and two of this section and if the judgment of sale has so directed shall pay to the holder of any subordinate mortgage or his attorney from the then remaining proceeds the amount then due on such subordinate mortgage, or so much as the then remaining proceeds will pay and take the receipt of the holder, or his attorney for the amount so paid, and file the same with his report of sale.

4. All surplus moneys arising from the sale shall be paid into court by the officer conducting the sale within five days after the same shall be received.

§ 1355. Report of sale; confirmation. 1. Within thirty days after completing the sale and executing the proper conveyance to the purchaser, unless such time be extended by the court within said thirty days, the officer making the sale shall file with the clerk his report under oath of the disposition of the proceeds of the sale, accompanied by the vouchers of the persons to whom payments were made.

2. A motion to confirm such report of sale shall not be made within three months after the filing of the report and shall in any event be made not later than four months after the filing of such report, except that if there be no surplus moneys arising from the sale of the mortgaged premises under such judgment, an application for confirmation of the report of sale may be made at any time after the report shall have been filed eight days. Where the report of sale shows surplus money the party moving for confirmation of the report of sale shall present with his motion papers a proper voucher for the surplus moneys showing that they have been paid into court, a certificate of the clerk specifying the notices of claim to the surplus moneys, if any, so filed with him, and an affidavit showing any other unsatisfied lien on the property.

§ 1361. Application for surplus; reference. 1. Any person claiming the surplus moneys arising upon the sale of mortgaged premises, or any part thereof, either in his own name, or by his attorney, at any time before the confirmation of the report of sale, may file with the clerk in whose office the report of sale is filed, a written notice of such claim, stating the nature and extent of his claim and the address of himself or his attorney.

2. On the motion for confirmation, or at any time within three months thereafter, on notice to all parties who have appeared in the action or filed claims, on motion of any party to the action, or any person who has filed a notice of claim on the surplus moneys, the court, by reference or otherwise, shall ascertain and report the amount due to him or any other person who has a lien on such surplus moneys, and the priority of the several liens thereon and order distribution of surplus moneys.

3. The owner of the equity of redemption, or any party who has appeared in the action or any person who files a notice of claim or who has a recorded lien against the property shall be given notice by mail or in such other manner as the court shall direct, to attend any hearing on disposition of surplus money.

§ 1362. Payment of surplus out of court. 1. Upon confirmation of the report of sale, or upon such proceedings as are provided in section 1361, the court shall order the payment of the surplus proceeds of sale out of court to such persons as are entitled thereto.

2. If the property sold has included a right to dower, whether inchoate or consummate, a tendency by curtesy, or any other estate for life or years, the owner of such particular estate in the real property sold is entitled to receive from the surplus, in satisfaction of his estate or interest, either a sum in gross or the earnings of a sum invested for his benefit. The determination as to whether a sum in gross or the earnings of a sum invested shall be awarded to the owner of such particular estate shall be governed by the provisions of section 968 with respect to the proceeds of a sale in partition.

3. If real property or an interest in real property which is liable to be disposed of as prescribed in article thirteen of the surrogate's court act, be sold to satisfy a mortgage or other lien thereon, which mortgage or lien accrued during the decedent's lifetime, the surplus money shall be paid in to the surrogate's court having jurisdiction to issue letters testamentary or of administration upon the estate of the decedent, in the following cases: (a) If eighteen months have not elapsed since the date when letters testamentary or of administration were first issued. (b) If a proceeding for a judicial settlement of the accounts of such executor or administrator has been commenced within eighteen months from the date of the issue of such letters and is still pending. (c) If no such letters have been issued and two years have not elapsed since the death of the decedent.

STATE OF NEW YORK

5607

2023-2024 Regular Sessions

IN ASSEMBLY

March 16, 2023

Introduced by M. of A. WILLIAMS -- read once and referred to the Committee on Real Property Taxation

AN ACT to amend the real property tax law, in relation to distribution of surplus in tax enforcement proceedings

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. The real property tax law is amended by adding a new
2 section 989 to read as follows:
3 § 989. Distribution of surplus in tax enforcement proceedings. 1.
4 Notwithstanding the provisions of any general, special or local law to
5 the contrary, when a property owner is divested of title due to the
6 foreclosure of a delinquent real property tax lien on the property, and
7 the property is sold to a third party, the proceeds of such sale shall
8 be distributed as follows:
9 (a) If the proceeds of the sale are less than or equal to the total
10 taxes due on the property plus interest, penalties and other charges
11 duly imposed upon the property, including the administrative costs asso-
12 ciated with the foreclosure process, the entire proceeds shall be paid
13 to the local government.
14 (b) If the proceeds of the sale exceed the total taxes due on the
15 property plus interest, penalties and other charges duly imposed upon
16 the property, including the administrative costs associated with the
17 foreclosure process, the excess shall be distributed as follows:
18 (i) If the property is not subject to other liens, the excess proceeds
19 shall be paid to the prior owner or owners of the property.
20 (ii) If the property is subject to other liens, the lienholders shall
21 be paid from the excess proceeds in the same order and to the same
22 extent as they would be in an action to foreclose a mortgage pursuant to
23 article thirteen of the real property actions and proceedings law. Any
24 proceeds remaining after the other lienholders have been so paid shall
25 be paid to the prior owner or owners of the property.

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD10302-01-3

1 2. The provisions of this section shall apply whether property is sold
2 through a public auction or otherwise.
3 3. When a foreclosure concludes with the tax district taking title to
4 property, the provisions of this section shall not apply unless and
5 until the tax district sells the property to a third party; provided
6 that in such a case, if there are excess proceeds to be paid to the
7 prior owner or owners of the property, such proceeds shall be paid to
8 the owner or owners of the property prior to its acquisition by the tax
9 district.
10 4. The provisions of this section shall not apply to the enforcement
11 of tax liens on abandoned real property. For purposes of this section,
12 real property shall be deemed abandoned if it:
13 (a) has been included on a local municipal roll, registry or list of
14 vacant and abandoned residential property pursuant to section eleven
15 hundred eleven-a of this chapter, or
16 (b) has been certified as abandoned commercial or industrial real
17 property pursuant to article nineteen-A of the real property actions and
18 proceedings law, or
19 (c) has been included on the statewide registry of vacant and aban-
20 doned property pursuant to section thirteen hundred ten of the real
21 property actions and proceedings law.
22 5. A municipality shall notify a property owner when the owner's prop-
23 erty netted a surplus at a tax foreclosure auction that was held on or
24 after the effective date of this section. The notification shall be made
25 as directed by the court and shall state the possible existence of a
26 surplus, how to obtain the surplus and the steps the property owner must
27 take to obtain the surplus.
28 6. This section shall be construed to supersede all general, special
29 and local laws relating to tax enforcement to the extent that such laws
30 would otherwise allow the proceeds of a sale to be distributed in a
31 manner other than as set forth in this section. This section is not
32 intended to supersede such laws in other respects.
33 § 2. Subdivision 2 of section 1104 of the real property tax law, as
34 amended by chapter 532 of the laws of 1994, paragraph (iii) as further
35 amended by subdivision (b) of section 1 of part W of chapter 56 of the
36 laws of 2010, is amended to read as follows:
37 2. The provisions of this article shall not be applicable to a county,
38 city or town which: (i) on January first, nineteen hundred ninety-three,
39 was authorized to enforce the collection of delinquent taxes pursuant to
40 a county charter, city charter, administrative code or special law; (ii)
41 adopted a local law, no later than July first, nineteen hundred ninety-
42 four, providing that the collection of taxes in such county, city or
43 town shall continue to be enforced pursuant to such charter, code or
44 special law, as such charter, code or special law may from time to time
45 be amended; and (iii) filed a copy of such local law with the commis-
46 sioner no later than August first, nineteen hundred ninety-four.
47 Provided, however, that nothing contained herein shall be construed to
48 exempt any such county, city or town from the provisions of section nine
49 hundred eighty-nine of this chapter.
50 § 3. Subdivision 1 of section 1166 of the real property tax law, as
51 amended by chapter 500 of the laws of 2015, is amended to read as
52 follows:
53 1. Whenever any tax district shall become vested with the title to
54 real property by virtue of a foreclosure proceeding brought pursuant to
55 the provisions of this article, such tax district is hereby authorized
56 to sell and convey the real property so acquired, which shall include

1 any and all gas, oil or mineral rights associated with such real proper-
2 ty, either with or without advertising for bids, notwithstanding the
3 provisions of any general, special or local law. **The proceeds obtained**
4 **from any such sale shall be distributed in the manner provided by**
5 **section nine hundred eighty-nine of this chapter.**
6 § 4. This act shall take effect October 1, 2023, and shall apply to
7 all tax foreclosure proceedings commenced on and after such date.

NEW YORK STATE ASSEMBLY
MEMORANDUM IN SUPPORT OF LEGISLATION
submitted in accordance with Assembly Rule III, Sec 1(f)

BILL NUMBER: A5607

SPONSOR: Williams

TITLE OF BILL:

An act to amend the real property tax law, in relation to distribution of surplus in tax enforcement proceedings

PURPOSE OR GENERAL IDEA OF BILL:

The purpose of this legislation is to allow former property owners to recover excess funds resulting from the sale of foreclosed upon properties caused by property tax delinquencies.

SUMMARY:

This bill would provide that any surplus funds resulting from a foreclosure proceeding and resulting sale, after the municipality is made whole, shall be paid to the prior owner of the property. The bill would direct the local government to notify the prior owner of the surplus, how to obtain the surplus, and steps to obtaining it.

JUSTIFICATION:

New York State is in the midst of a housing crisis and this bill would provide relief to foreclosed upon homeowners while ensuring local governments and other lien holders are made whole. Under current law the local government may retain any surplus funds, instead of returning the surplus funds to the prior owner. This bill seeks to end this practice and return the surplus to the prior owner providing prior owners with more finances they can use to get back on their feet.

PRIOR LEGISLATIVE HISTORY:

New bill.

FISCAL IMPLICATIONS FOR STATE AND LOCAL GOVERNMENTS:

None to State.

EFFECTIVE DATE:

This act shall take effect October 1, 2023.

STATE OF NEW YORK

— — — —

2023-2024 Regular Sessions

SENATE - ASSEMBLY

______ ______, 2023

____

IN SENATE Introduced by ____________________ - - read twice and ordered printed, and when printed to be committed to the Committee on Real Property Taxation

IN ASSEMBLY -- Introduced by ____________________ - - read once and referred to the Committee on Real Property Taxation

AN ACT to amend the real property tax law, in relation to distribution of surplus in tax enforcement proceedings

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. The real property tax law is amended by adding a new section 989 to read as follows:

2 §989. Distribution of surplus in tax enforcement proceedings. 1. Notwithstanding the provisions
3 of any general, special or local law to the contrary, when a property owner is divested of title due
4 to the foreclosure of a delinquent real property tax lien on the property, and the property is sold to
5 a third party, the proceeds of such sale shall be distributed as follows:

6 (a) If the proceeds of the sale are less that or equal to the total taxes due on the property plus
7 interest, penalties and other charges duly imposed upon the property, including the administrative,
8 auction and reasonable legal fees and/or costs associated with the foreclosure process, the entire
9 proceeds shall be paid to the local government.
10 (b) If the proceeds of the sale exceed the total taxes due on the property plus interest, penalties
11 and other charges duly imposed upon the property, including and without limitation,
12 administrative, auction and reasonable legal fees and/or costs associated with the foreclosure
13 process, the excess shall be distributed to the prior owner or owners of the property.

2. The provisions of this section shall apply whether property is sold through public auction or otherwise.

3. When a foreclosure concludes with the tax district taking title to property and the tax district intends to retain title to the property for municipal use and/or purpose(s), the differential between the amount of taxes due and owing plus interest, penalties and other duly imposed charges, including and without limitation: administrative, auction and reasonable attorney fees and/or costs associated with the foreclosure process, and the full market value of the property, as indicated in the most recent tax roll, shall be deemed excess funds, and if any excess funds exist, they shall be paid to the prior owner or owners of the property.

4. The provisions of this section shall not apply to the enforcement of tax liens on abandoned real property. For the purposes of this section real property shall be deemed abandoned if it:

(a) has been included on a local municipal role, registry or list of vacant or abandoned residential property pursuant to section eleven hundred eleven-a of this chapter, or

(b) has been certified as abandoned commercial or industrial real property pursuant to article nineteen-A of the real property actions and proceedings law, or

(c) has been included on the statewide registry of vacant and abandoned property pursuant to section thirteen hundred ten of the real property actions and proceedings law.

5. Any former property owner that obtains surplus funds resulting from a foreclosing municipality's sale of foreclosed property is hereby estopped and forever barred from making any further or other claim or otherwise listing the value of the property, which was the subject of foreclosure due to delinquent real property tax lien(s), as an asset of a bankrupt estate, in any bankruptcy court, and/or proceeding filed by or on behalf of the former property owner or his/her/their estate. If the former property owner(s), his/her/their representative and/or estate shall violate the provisions of this section, the former property owner(s) shall indemnify and hold harmless, inclusive of reasonable attorney fees, the foreclosing municipality from any claim(s) brought by any party, including without limitation, the former property owner, bankruptcy trustee or creditors in any bankruptcy action and/or proceeding.

6. This section shall be construed to supersede all general, special and local laws relating to tax enforcement to the extent that such laws would otherwise allow the proceeds of a sale to get distributed in a manner other than as set forth in this section. This section is not intended to supersede such law in other respects.

7. Notwithstanding anything to the contrary contained herein, and/or any local or other law to the contrary, any former owner of a parcel or parcels of real property, improved or otherwise, who has become dispossessed of real property as a result of an in rem tax foreclosure proceeding may, within thirty (30) days of notice of foreclosure, make the appropriate application to the county treasurer in which the real property is located for surplus proceeds, if any, as heretofore defined. Failure to make said application for surplus proceeds within said thirty (30) day period shall constitute waiver and the former owner shall be forever barred from making any application and/or claim for surplus funds.

(a) Any former owner of a parcel or parcels of real property, improved or otherwise, who has become dispossessed of real property as a result of an in rem tax foreclosure proceeding and who makes application for, and accepts surplus proceeds in accordance with this paragraph, shall indemnify and hold harmless the foreclosing taxing jurisdiction, inclusive of reasonable attorney fees, from any and all claims, brought by any third parties, against the foreclosing taxing jurisdiction and relative to the subject parcel or parcels of real property. Additionally, any and all former owner or owners of real property who apply for and accept surplus proceeds are and shall continue to be estopped and forever barred from making any and all other and/or further claims relative to the value of the subject real property(ies).

§2. Subdivision 2 of section 1104 of the real property tax law, as amended by chapter 532 of the laws of 1994, paragraph (iii) as further amended by subdivision (b) of section 1 of part W of chapter 56 of the laws of 2010, is amended to read as follows:

2. the provisions of this article shall not be applicable to a county, city or town which: (i) on January first, nineteen hundred ninety-three, was authorized to enforce the collection of delinquent taxes pursuant to a county charter, city charter, administrative code or special law; (ii) adopted a local law, no later than July first, nineteen hundred ninety-four providing that the collection of taxes in such county, city or town shall continue to be enforced pursuant to such charter, code or special law, as such charter, code or special law may from time to time be amended; and (iii) filed a copy of such local law with the commissioner no later than August first, nineteen hundred ninety-four. Provided, however, that nothing contained herein shall be construed to exempt any such county, city or town from the provisions of section nine hundred eighty-nine of this chapter.

§3. Subdivision 1 of section 1166 of the real property tax law, as amended by chapter 500 of the laws of 2015, is amended to read as follows:

1. Whenever any tax district shall become vested with title to real property by virtue of a foreclosure proceeding brought pursuant to the provisions of this article, such tax district is hereby authorized to sell and convey the real property so acquired, which shall include any and all gas, oil or mineral rights associated with such real property, either with or without advertising for bids, notwithstanding the provisions of any general, special or local law. The proceeds from any such sale shall be distributed in the manner provided by section nine hundred eighty-nine of this chapter.

§4. This act shall take effect ______, 2154, and shall apply to all tax foreclosure proceedings commenced after such date.

STATE OF NEW YORK

5383

2023-2024 Regular Sessions

IN SENATE

March 3, 2023

Introduced by Sen. HARCKHAM -- read twice and ordered printed, and when printed to be committed to the Committee on Local Government

AN ACT to amend the real property tax law, in relation to surplus proceeds from tax lien foreclosures

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Subdivision 2 of section section 1166 of the real property
2 tax law, as amended by chapter 532 of the laws of 1994, is amended and a
3 new subdivision 3 is added to read as follows:
4 2. No such sale shall be effective unless and until such sale shall
5 have been approved and confirmed by a majority vote of the governing
6 body of the tax district, except that no such approval shall be required
7 when the property is sold at public auction to the highest bidder. *In*
8 *addition to any other notices required by law, where a tax district*
9 *sells property at a public auction pursuant to the provisions of this*
10 *section, such tax district shall post a notice of such auction on the*
11 *front door, or equivalent placement where applicable, of such property*
12 *fourteen days prior to such auction.*
13 *3. (a) A former owner of residential or farm property, as defined in*
14 *this article, or commercial property shall be entitled to any surplus*
15 *proceeds which result from the sale of such real property acquired by a*
16 *tax entity through tax foreclosure proceedings. The term "surplus" shall*
17 *mean the amount that is left after the property has been auctioned and*
18 *all outstanding taxes, interest, issues, payments for county tax and*
19 *utility liens and administrative and other fees have been paid.*
20 *(b) In the event that a sale authorized under this section shall*
21 *result in a surplus as to any piece or parcel of land offered at such*
22 *sale, the enforcing officer shall report the fact of such surplus to the*
23 *court which shall direct the enforcing officer to deposit such surplus*
24 *in trust with the county treasurer or commissioner of finance for the*
25 *benefit of whomsoever may be entitled to such surplus pursuant to this*

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD02602-01-3

1 subdivision. Such surplus shall be retained for a period of at least
2 three years.
3 (c) A municipality shall notify a property owner when the owner's
4 property netted a surplus at a tax foreclosure auction that was held on
5 or after the effective date of this subdivision. The notification shall
6 be made as directed by the court and shall state the possible existence
7 of a surplus, how to obtain the surplus and the steps the homeowner must
8 take to obtain the surplus.
9 (d) Notwithstanding subdivision two of section eleven hundred four of
10 this article, the provisions of this subdivision shall apply to all
11 counties, cities, towns and villages in this state.
12 (e) As used in this subdivision, "commercial property" means any non-
13 residential property used primarily for the buying, selling or otherwise
14 providing of goods or services.
15 § 2. This act shall take effect immediately.

STATE OF NEW YORK

2305

2023-2024 Regular Sessions

IN ASSEMBLY

January 25, 2023

Introduced by M. of A. O'DONNELL -- read once and referred to the Committee on Judiciary

AN ACT to amend the real property actions and proceedings law and the real property tax law, in relation to requiring the court in a foreclosure action to provide notice to the former owner of the real property of the right to apply for surplus moneys from the sale of such property

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Section 1354 of the real property actions and proceedings
2 law is amended by adding a new subdivision 5 to read as follows:
3 **5. The court shall provide notice to the former owner or owners of the**
4 **foreclosed real property of the existence of surplus moneys resulting**
5 **from the sale and their right to file a written notice of claim to all**
6 **or a portion of such proceeds pursuant to section thirteen hundred**
7 **sixty-one of this article.**
8 § 2. Section 1136 of the real property tax law is amended by adding a
9 new subdivision 4 to read as follows:
10 **4. Notice to former owners. In the event the court directs the sale of**
11 **real property pursuant to this section, the court shall provide notice**
12 **to the former owner or owners of the foreclosed real property that**
13 **ownership of such property has been transferred to a municipality or a**
14 **tax district, that after the sale thereof there is a potential that**
15 **surplus moneys may result from the sale and in the event a surplus**
16 **results, such owner or owners shall have a right to file a written**
17 **notice of claim to all or a portion of such proceeds pursuant to section**
18 **thirteen hundred sixty-one of the real property actions and proceedings**
19 **law.**
20 § 3. This act shall take effect immediately.

EXPLANATION--Matter in **italics** (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD03423-01-3

NEW YORK STATE ASSEMBLY
MEMORANDUM IN SUPPORT OF LEGISLATION
submitted in accordance with Assembly Rule III, Sec 1(f)

BILL NUMBER: A2305

SPONSOR: O'Donnell

TITLE OF BILL:

An act to amend the real property actions and proceedings law and the real property tax law, in relation to requiring the court in a foreclosure action to provide notice to the former owner of the real property of the right to apply for surplus moneys from the sale of such property

PURPOSE OR GENERAL IDEA OF BILL:

This bill will require that those who formerly owned foreclosed property are notified that they may be entitled to a portion of the surplus of funds remaining after an in rem foreclosure sale.

SUMMARY OF SPECIFIC PROVISIONS:

Section 1 adds a new subdivision 5 to section 1354 of the real property actions and proceedings law to require that after the surplus monies resulting from an in rem foreclosure tax sale are provided to the court, the court shall provide notice to the former owner or owners Of the property of their right to file a written notice of claim to all of a portion of such proceeds pursuant to section 1361 of the real property tax law.

Section 2 adds a new subdivision 4 to section 1136 of the real property tax law to require a court that has vested title to in rem foreclosed property to a municipal entity shall notify the former property owner or owners that they may be entitled to file for any surplus funds which may result from a future tax sale of such property.

JUSTIFICATION:

Currently, there is no state requirement that former owners of a property foreclosed upon for failure to pay taxes must be notified of their potential entitlement to any surplus funds which may result when the property is sold.

The bill will close a loophole in state law which was high-lighted in a news article examining the city of Buffalo's unclaimed tax foreclosure process(http://wivb.com/2015/11/04/foreclosed-homeowners- could-beowed-millions-from-tax-sales/).

In that instance, the City retained approximately $11.6 million in auction proceeds after the in rem foreclosure sale, all of which remain unclaimed. The funds would eventually be transmitted to the state as unclaimed funds. Many former owners and other property lienholders were never made aware that the sale of their former property resulted in a surplus to which they may be legally entitled. This bill requires that the former owner be notified that there is a potential surplus when the

title is vested in the municipality and again, if, after the property has been sold by the municipality. This ensures former owners are afforded knowledge of the existence of a surplus to affirm their right to file a claim for a portion of those funds.

PRIOR LEGISLATIVE HISTORY:

A7579 (2021)
A7160 (2019)

A10168 (2018)

FISCAL IMPLICATIONS:

None.

EFFECTIVE DATE:
This act shall take effect immediately.

STATE OF NEW YORK

S. 5213 A. 4935

2023-2024 Regular Sessions

SENATE - ASSEMBLY

February 27, 2023

IN SENATE -- Introduced by Sen. THOMAS -- read twice and ordered printed, and when printed to be committed to the Committee on Local Government

IN ASSEMBLY -- Introduced by M. of A. WEINSTEIN -- read once and referred to the Committee on Real Property Taxation

AN ACT to amend the real property tax law, in relation to tax lien foreclosure

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Subdivision 1 of section 924-a of the real property tax
2 law, as amended by chapter 26 of the laws of 2003, is amended to read as
3 follows:
4 1. The amount of interest to be added on all taxes received after the
5 interest free period and all delinquent taxes shall be [~~one-twelfth the~~
6 ~~rate of interest as determined pursuant to subdivision two or two-a of~~
7 ~~this section rounded to the nearest one-hundredth of a percentage point~~]
8 sixteen percent per annum, or such other amount as prescribed by section
9 fourteen-a of the banking law, except as otherwise provided by a general
10 or special law, or a local law adopted by a city pursuant to the munici-
11 pal home rule law or any special law. Such interest shall be added for
12 each month or fraction thereof until such taxes are paid.
13 § 2. The real property tax law is amended by adding a new section 1185
14 to read as follows:
15 § 1185. Homeowner bill of rights. Any owner of a residential property,
16 as defined in section eleven hundred eleven of this article, who occu-
17 pies such property as their primary residence (or whose heirs or distri-
18 butees occupy the property as their primary residence where the homeown-
19 er is deceased) or any purchaser of a contract for a residential
20 property (or successor in interest to such purchaser) subject to a tax

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD04452-02-3

1 lien on any parcel of real property, including those liens otherwise
2 exempt under this article, shall have the following rights:
3 (a) to have any foreclosure on any real property tax lien pursuant to
4 section nine hundred two of this chapter be a judicial proceeding
5 specific to each parcel;
6 (b) where the property is the primary residence of an owner entitled
7 to tax exemption based on age, disability, or veteran status, a foreclo-
8 sure may not be maintained;
9 (c) to not have exemptions removed or waived for nonpayment of proper-
10 ty taxes;
11 (d) to be informed of the amount of tax due, the number of tax years
12 for which the parcel has been in arrears, the date on which the redemp-
13 tion period ends, the accepted forms of payment, the location where
14 payments shall be made, and the contact information for the responsible
15 taxing authority, including but not limited to, the taxpayer advocate or
16 other similar office within the taxing authority working with homeowners
17 to resolve tax arrears;
18 (e) to receive pre-foreclosure notices, which shall be conditions
19 precedent to maintenance of a foreclosure on any tax lien governed by
20 the service requirements of section thirteen hundred four of the real
21 property actions and proceedings law;
22 (f) to participate in a mandatory settlement conference process equiv-
23 alent to the process required in mortgage foreclosure actions pursuant
24 to rule thirty-four hundred eight of the civil practice law and rules,
25 which shall be governed by the same good faith negotiation standard
26 governing that provision, with the goal of: (i) negotiating a mutually
27 agreeable resolution to avert foreclosure, including, but not limited
28 to, establishing an affordable repayment plan, abatement of fees, penal-
29 ties or other charges, forbearance of amounts due, or other home saving
30 resolution; or (ii) whatever other purposes the court deems appropriate.
31 A party prosecuting a tax lien foreclosure shall be prohibited from
32 charging the homeowner for any fees associated with participating in the
33 settlement conference. Explicitly incorporated into this bill of rights
34 are subdivisions (c) through (n) of rule thirty-four hundred eight of
35 the civil practice law and rules, and the office of court administration
36 shall within ninety days of the effective date of this section promul-
37 gate rules implementing this mandatory settlement conference process
38 which shall adapt the foregoing subdivisions to the needs of tax lien
39 foreclosure cases and which shall, without limitation, include a notice
40 of the scheduling of the conference that shall require the parties to
41 appear at the conference with required information for a meaningful
42 conference and with authority to engage in settlement negotiations;
43 (g) to apply any payments toward delinquent taxes in the order in
44 which the liens became due;
45 (h) in the event that a residence is foreclosed upon, to receive any
46 surplus following the sale of the property after the tax lien is satis-
47 fied ahead of unsecured creditors pursuant to section fifty-two hundred
48 six of the civil practice law and rules; and
49 (i) where there is a transfer to a municipality pursuant to section
50 eleven hundred thirty-six of this article or where there is a foreclo-
51 sure auction with no bidders and the municipality takes possession of
52 the property, any subsequent sale of the property must be an arm's
53 length transaction in which the owner has an absolute right to any
54 surplus funds.
55 § 3. The real property tax law is amended by adding a new section
56 1185-a to read as follows:

1 § 1185-a. Pre-foreclosure notices. (a) The pre-foreclosure notice
2 required in subdivision (e) of section eleven hundred eighty-five of
3 this article shall appear as follows:
4 "YOU MAY BE AT RISK OF FORECLOSURE ON A PROPERTY TAX LIEN
5 PLEASE READ THE FOLLOWING NOTICE CAREFULLY.
6 As of (date), your property taxes have not been paid for the following
7 years and amounts each year:
8 The total needed to pay off all tax arrears as of the date of this
9 notice is:
10 Under New York State law, we are required to send you this notice to
11 inform you that you are at risk of losing your home.
12 Attached to this notice is a list of government approved housing coun-
13 seling agencies in your area which provide free counseling. You can also
14 call the NYS Office of the Attorney General's Homeowner Protection
15 Program (HOPP) toll-free consumer hotline to be connected to free hous-
16 ing counseling or legal services in your area at 1-855-HOME-456 (1-855-
17 466-3456), or visit their website at http://www.aghomehelp.com. A state-
18 wide listing by county is also available at https://www.dfs.ny.gov/
19 consumer/mortg_nys_np_counseling_agencies.html. Qualified free help is
20 available; watch out for companies or people who charge a fee for these
21 services.
22 Housing counselors from New York-based agencies listed on the website
23 above are trained to help homeowners who are having problems making
24 their tax payments and can help you find the best option for your situ-
25 ation. If you wish, you may also contact our office directly at
26 __________ or our taxpayer advocate at __________, who is responsible
27 for working with homeowners to resolve tax arrears, and ask to discuss
28 possible payment plans and other options.
29 PLEASE NOTE THAT IF YOU ARE A SENIOR CITIZEN, PHYSICALLY DISABLED,
30 AND/OR A VETERAN, YOU MAY BE ENTITLED TO A PARTIAL EXEMPTION FROM PROP-
31 ERTY TAXES or to have tax foreclosure delayed. The following exemptions
32 that local rules allow that could prevent foreclosure in your case are:
33 ____ Senior Citizen
34 ____ Veteran
35 ____ Physical Disability
36 We encourage you to contact our taxpayer advocate at the telephone
37 number above if you have any questions about whether you qualify for any
38 of these exemptions.
39 While we cannot assure that a mutually agreeable resolution is possible,
40 we encourage you to take immediate steps to try to achieve a resolution.
41 The longer you wait, the fewer options you may have.
42 If you have not taken any actions to resolve this matter within 90 days
43 from the date this notice was mailed (or sooner if you cease to live in
44 the dwelling as your primary residence), we may commence legal action or
45 other remedies against you to foreclose the tax lien, which may eventu-
46 ally result in eviction from your home.
47 Under New York State law, you may be barred from entering into a payment
48 plan or from being permitted to make any payment to save your home after
49 the "Redemption Date".
50 In your case, the "Redemption Date" is _____.
51 IMPORTANT: You have the right to remain in your home until you receive a
52 court order telling you to leave the property; however, you may lose the
53 right to continue ownership of your home after the Redemption Date. If a
54 foreclosure action is filed against you in court, you still have the
55 right to remain in the home until a court orders you to leave.

1 This notice is not an eviction notice, and a foreclosure action has not
2 yet been commenced against you."
3 (b) The notice required in subdivision (e) of section eleven hundred
4 eighty-five of this article shall be sent by such taxing authority or
5 purchaser of delinquent tax liens to the homeowner (or heirs or distri-
6 butees if the homeowner is deceased), by registered or certified mail
7 and also by first-class mail to the last known address of the homeowner,
8 and to the residence subject to the tax lien. The notices required by
9 subdivision (e) of section eleven hundred eighty-five of this article
10 shall be sent by the taxing authority or purchaser of delinquent tax
11 liens in a separate envelope from any other mailing or notice. Notice
12 is considered given as of the date it is mailed. The notice required by
13 subdivision (e) of section eleven hundred eighty-five of this article
14 shall contain a current list of at least five housing counseling agen-
15 cies serving the county where the property is located from the most
16 recent listing available from the department of financial services. The
17 list shall include the counseling agencies' last known addresses and
18 telephone numbers. The department of financial services shall make
19 available on its website a listing, by county, of such agencies. The
20 taxing authority or purchaser of delinquent tax liens shall use such
21 lists to meet the requirements of this section.
22 (c) For any homeowner known to have limited English proficiency, the
23 notice required by subdivision (e) of section eleven hundred eighty-five
24 of this article shall be in the homeowner's native language (or a
25 language in which the homeowner is proficient), provided that the
26 language is one of the six most common non-English languages spoken by
27 individuals with limited English proficiency in the state of New York,
28 based on United States census data. The department of financial services
29 shall post the notices required by subdivision (e) of section eleven
30 hundred eighty-five of this article on its website in the six most
31 common non-English languages spoken by individuals with limited English
32 proficiency in the state of New York, based on the United States census
33 data.
34 § 4. Section 1104 of the real property tax law is amended by adding a
35 new subdivision 3 to read as follows:
36 3. Notwithstanding the provisions of subdivision two of this section,
37 every county, city and town shall comply with the requirements of
38 sections eleven hundred eighty-five and eleven hundred eighty-five-a of
39 this article.
40 § 5. This act shall take effect immediately.

NEW YORK STATE SENATE
INTRODUCER'S MEMORANDUM IN SUPPORT
submitted in accordance with Senate Rule VI. Sec 1

BILL NUMBER: S5213

SPONSOR: THOMAS

TITLE OF BILL:

An act to amend the real property tax law, in relation to tax lien foreclosure

SUMMARY OF PROVISIONS:

Section 1 of the bill amends section 924-a of the real property tax law to cap the interest charged on delinquent taxes at sixteen percent.

Section 2 of the bill amends the real property tax law by creating a new section 1185 titled "homeowner bill of rights." Under this section, owners of residential property with fewer than four units subject to tax liens have the following rights, whether tax liens are sold to investors who then prosecute foreclosure proceedings or tax lien foreclosures pursued by local taxing authorities:

All foreclosures for property tax liens must be judicial proceedings;

If the owner is entitled to an exemption based on age, disability, or veteran status, the property may not be foreclosed on;

An exemption based on age, disability, or veteran status cannot be removed or waived for non-payment of property taxes;

The owner must be told the amount they owe for each tax year, how long they have to pay their delinquent taxes before a foreclosure is initiated, what form of payment will be accepted, where to make a payment, and contact information for the taxing authority responsible for assisting homeowners to resolve tax arrears;

The owner must receive a pre-foreclosure notice before a foreclosure can proceed;

The owner must have a chance to participate in a mandatory settlement conference process to avert foreclosure;

Any payments must be applied to the oldest liens first;

If the residential property is foreclosed on, the owner must receive any money remaining after the tax lien is satisfied; and

The owner's right to surplus funds remains even when the parcel is transferred to a municipality.

Section 3 of the bill amends the real property tax law by creating a new section 1185-a that describes the contents and requirements of the pre-closure notice required by section 1185 of the real property tax law, which is designed to be interpreted consistently with the real property act and proceedings law section 1104, which requires strict compliance

with all of its provisions.

The pre-foreclosure notice must clearly state the amount the homeowner owes for each tax ear, the amount the owner must pay to become current on their property taxes, provide information about local housing counseling agencies and how to contact them, provide contact information for the taxing authority, and notify homeowners that they may be entitled to an exemption from property taxes based on age, disability, or veteran status.

The pre-foreclosure notice must also tell the homeowner that they have 90 days from the date the pre-closure notice was mailed to pay their delinquent taxes before the taxing authority can initiate a foreclosure.

Section 4 of the bill amends section 1104 of the real property tax law to make the other bill sections mandatory for all jurisdictions, even those which previously opted out of or were exempted from Article 11 pursuant to Section 1104(2).

Section 5 of the bill states the effective date.

JUSTIFICATION:

In New York, when a homeowner owes property taxes or other property-related charges for an extended period, those delinquent taxes become liens that put the property at risk of a tax lien foreclosure. These property tax foreclosures disproportionately impact homeowners who have satisfied their mortgages. Because the typical mortgage products last 30 years, many of these owners are retired or approaching retirement and are living on fixed incomes. As such, inequity relating to tax liens and their collections falls most heavily on senior citizens. Additionally, research has consistently shown that more liens are generated in communities of color. These factors contribute to gentrification and stripping of equity and generational wealth in communities adversely impacted by appreciating real estate values.

Tax lien foreclosures are governed by Article 11 of the Real Property Tax Law Article 11, but many jurisdictions were exempted from the law or were permitted to opt out. Therefore, there are many parts of the State of New York that are not governed by the provisions of state law. This has created a hodgepodge of property tax collection schemes throughout the state and a homeowner's rights and the protections they are afforded are entirely dependent on where they live. Even for those localities to which Article 11 applies, many of the provisions in it are permissive, instead of prescriptive, and therefore carry little force or authority.

Additionally, Article 11 does not afford homeowners facing property tax foreclosures the same consumer protections that are available to homeowners in residential mortgage foreclosure actions and proceedings, such as pre-foreclosure notices under Article 13 of the Real Property Actions and Proceedings Law and mandatory settlement conferences under CPLR 3408. In many jurisdictions tax lien foreclosures are obscure processes with strict deadlines that can be a trap for unwary homeowners and have dire consequences because of the system's rigidity. The absence of these protections is especially harmful because tax lien foreclosures - due to the low amounts of debt involved as compared to the value of the encumbered homes - often can be easily resolved through affordable repayment plans or even lump sum payments (where the debt has been significantly increased by exorbitant interest and fees). This is especially the case for senior homeowners who have paid off their mortgages, but who may be tax burdened or who may have experienced health challenges that have caused their property taxes to become delinquent.

Foreclosures that are not averted can represent a loss of substantial equity if a home is sold to satisfy a tax lien that represents a small proportion of the home's value. Indeed, homeowners in some jurisdictions face total loss of the equity in their homes as the tax lien foreclosure is accomplished by a simple transfer to the municipality and a complete termination of all ownership rights.

These problems are exacerbated in some municipalities or counties that sell tax liens to Wall Street investors who relentlessly pursue foreclosure and refuse to engage in the sort of basic loss mitigation procedures that are required in the mortgage foreclosure context. Providing basic due process protections such as a pre-foreclosure notice comparable to those required in mortgage foreclosures - and governed by the same legal requirements - and a mandatory settlement conference process governed by a good faith negotiation standard can promote earlier resolution of tax lien arrears and ensure that taxing authorities are not promoting displacement of vulnerable citizens - and especially senior citizens - and gentrification in New York's communities of color.

In sum, this bill aims to protect the due process rights of homeowners who are at risk of losing their homes to property tax foreclosure by granting them the same protections that are afforded to borrowers in the residential mortgage foreclosure process - most importantly the right to retain the equity in their homes, which for many is their only significant asset.

PRIOR LEGISLATIVE HISTORY:

New legislation.

FISCAL IMPLICATIONS FOR STATE AND LOCAL GOVERNMENTS:

TBD.

EFFECTIVE DATE:
This act shall take effect immediately.

Erie County Tax Act §§ 11-20.0-11.26.0

§ 11-20.0 Final judgment. The court shall have full power to determine and enforce in all respects the priorities, rights, claims and demands of the several parties to such action as the same shall exist according to law, including the priorities, rights, claims, and demands of the defendants as between themselves, and to direct the sale of such lands and the distribution or other disposition of the proceeds of such sale. The order of priorities established by such judgment shall in all cases be in conformity with the provisions of section 9-10.0. of this act relating to priorities. The court shall further determine upon proof by affidavit or otherwise whether there has been due compliance by the county of Erie with the in rem provisions of this act and shall make its findings upon such proof.

§ 11-21.0 (Repealed - Chapter 789, Laws of 1944.)

§ 11-22.0 Municipalities may agree on conveyance. Where as to any parcel of land affected by an in rem foreclosure proceeding a city or village has an interest represented by tax liens or tax sale certificates, then and in that event the county and such city or village may enter into an agreement or agreements providing for the purchase of such property at such sale and the resale thereof as provided in section 14-2.0 of this act.

§ 11-23.0 Public sale; commissioner of finance to be referee. The sale directed by the court shall be at public auction under the direction of the commissioner of finance who shall act as referee thereat. Public notice thereof shall be given once a week for at least three successive weeks in a newspaper published in the county of Erie. The commissioner of finance shall receive no fee or compensation for is services as such referee. The description of the parcel of land offered for sale in such notice shall be that contained in the list of delinquent taxes and properties or such other description of such parcel as the court in its judgment may direct.

§ 11-24.0 Deed description as directed by court. The judgment of foreclosure and sale pursuant to the in rem provisions of this act, shall direct the commissioner of finance as such referee to execute and deliver to the purchaser a deed conveying title to the parcel or parcels affected by such judgment and sold at such sale. The description used in such deed shall be that contained in the list of delinquent taxes and properties or such other description as the court in its judgment may direct.

§ 11-25.0 Deed vests full title in grantee; exception. Such conveyance shall vest full and complete title unless it shall be made subject to tax liens pursuant to agreement as in section 11-22.0 provided. Upon the execution and recording of such deed, the grantee shall be seized of an estate in fee simple absolute unless expressly made subject to the tax liens of the county or a city or village, as herein provided; and all persons, including the state of New York, infants, incompetents, absentees and non-residents who may have had any right, title, interest, claim, lien or equity of redemption in, to or upon such parcel of land, shall be forever barred and foreclosed of all such right, title, interest, claim, lien or equity of redemption. All of the provisions of sections 9-11.0, 9-12.0, 9-13.0, 9-14.0 and 9-15.0 shall apply to the proceedings under this article as though fully herein again set forth.

§ 11-25.1 Conclusive presumption by deed; limitation. Every deed given pursuant to the provisions of this article shall be presumptive evidence that the action and all the proceedings therein and all proceedings prior thereto from and including the assessment of the lands affected and all notices required by law were regular, were regularly had, taken and given, and

in accordance with all provisions of law relating thereto. After two years from the date of recording such deed, such presumption shall be conclusive; except that as to such deeds, which were recorded on a date more than eighteen months prior to the date on which this section takes effect, such presumption shall become conclusive six months after this section takes effect. No action to set aside such deed may be maintained unless the action is commenced and a notice of pendency thereof is filed in the office of the clerk of the county prior to the time the presumption becomes conclusive as aforesaid.

§ 11-26.0 Report of sale and confirmation thereof not required. Notwithstanding the provisions of any general, special or local law to the contrary, it shall not be necessary for the commissioner of finance, as such referee, to make a report of his proceedings as such referee; nor shall it be necessary for the court to confirm by order or otherwise the proceedings of such commissioner of finance as such referee. In the event that such a sale shall result in a surplus as to any piece or parcel of land offered at such sale, such commissioner of finance as referee shall report the fact of such surplus to the court which shall direct the commissioner of finance as referee to deposit such surplus in trust with the commissioner of finance for the benefit of whomsoever may be justly entitled thereto.

CHAPTER 440

AN ACT authorizing the foreclosure of tax liens in the county of Monroe, and repealing chapter four hundred fifty-four of the laws of nineteen hundred thirty-six, relating to foreclosure of tax liens in such county

Became a law April 4, 1938, with the approval of the Governor. Passed, three-fifths being present

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. **Short title.** This act shall be known as the Monroe county tax foreclosure act.

§ 2. **Lien of tax sale purchaser.** The owner of any certificate of sale of lands in Monroe county sold for Monroe county taxes and any person entitled by law to such certificate of sale, including the state and the county of Monroe, shall have a lien on such lands until it is paid or otherwise satisfied, or cancelled as provided by law, for the amount of the purchase money paid, and all interest, fees, penalties and other charges allowed by law, which lien when held by the county of Monroe, shall be superior and prior in law, irrespective of whether the date of the levy of the taxes referred to in said certificate of sale, is prior or subsequent in point of time, to all other liens, tax liens, and liens of certificates of sale, upon and against such lands, regardless of whether such liens, tax liens, or liens of certificates of sale, are held by individuals or municipal taxing bodies, or the state of New York, excepting liens for unpaid city taxes and assessments held by the city of Rochester, and the lien of direct taxes upon the real estate, imposed by the state of New York. Such liens shall cease to exist if such lands be redeemed from the tax sale, or if the sale be cancelled or set aside, but if any cancellation of sale be set aside, such lien shall be revived.

§ 3. **Priorities between Monroe county taxes.** Monroe county taxes shall be deemed prior and paramount to each other in the inverse order of their respective dates of levy. The lien of such county taxes due the county of Monroe shall be superior and prior in law, irrespective of whether the dates of the levy of the taxes are prior or subsequent in point of time, to all other liens, tax liens, and liens of certificates of sale, upon and against the lands incumbered, regardless of whether such liens, tax liens, or liens of certificates of sale, are held by individuals or municipal taxing bodies, or the state of New York, excepting liens for unpaid city taxes and assessments held by the city of Rochester and the lien of direct taxes upon the real estate imposed by the state of New York.

§ 4. **Foreclosure authorized; procedure.** After the expiration of two years from the time of the said tax sale, the owner of such certificate, including the state or the county of Monroe, instead of taking a conveyance of the lands described therein, as by law provided, may at his or its option recover such purchase money and other such

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sums allowed by law, and for that purpose may maintain an action to foreclose such lien of the tax sale certificate in the supreme court or the Monroe county court, and for the sale of the lands affected thereby. When an action is brought by the county of Monroe as plaintiff the county shall be entitled to the costs so recovered. In an action to foreclose a tax lien as herein provided, any person shall be a proper party who has or may have, or any person that the plaintiff has reason to believe has or may have an interest in or claim upon the real property affected by the said tax lien. The people of the state of New York may be made a party to such action to foreclose a tax lien in the same manner as a natural person. Except as otherwise provided herein such an action to foreclose a tax lien shall be regulated by the provisions of the civil practice act and by all other provisions of law and rules of practice applicable to foreclosure of a mortgage on real property, and the remedy to foreclose herein provided shall be in addition to all other remedies allowed by law for the collection of any tax lien and shall not be dependent upon them or any of them, and may be had whether notice to redeem has been given or not. When the action is brought by the county of Monroe as plaintiff it shall first be authorized by the board of supervisors of Monroe county.

§ 5. **Tax liens to be included; joinder of separate causes of action; right of defendant certificate holders.** The plaintiff in such action may include therein any or all claims which he holds at the time of the commencement thereof for all village, town, state and county tax liens and for all tax sale certificates relating to the same real property in whole or in part. He may also include in one action any or all such certificates relating to several and different parcels of real property owned by the same person or persons, corporation or corporations. The defendants in any such action who are the holders of certificates of sale or of tax liens may make and file an answer alleging their respective claims and recover from the proceeds of the sale the amounts thereof against said real estate covered by their said tax liens or described in their certificates with all interest and expenses allowed by law as the same shall be made or decreed by the court in such action, unless the plaintiff shall set forth in his complaint a copy or the substance of such certificates of sale or tax liens, in which event it shall not be necessary for a defendant holder of such certificates or liens to serve an answer unless the validity, amount or priority of his certificates or liens are contested by the plaintiff or another defendant.

§ 6. **Validity of tax sale and certificate presumed; irregularity or defect must be pleaded.** Whenever under this act a cause of action, defense or counterclaim is for the foreclosure of any such tax, tax lien, or tax sale certificate, or is in any manner founded upon such tax, tax lien, or tax sale certificate, the same shall be presumptive evidence that the lien purported to be represented or transferred by such instrument was a valid and enforceable lien, and that it has been duly sold or assigned to the purchaser, and it

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shall not be necessary to plead or prove any act, proceeding, notice or action preceding the delivery of such tax sale certificates, nor to establish the validity of the tax lien, represented or transferred by such tax sale certificate. If a party or person in interest in any such action or proceeding shall claim that any tax lien or tax sale certificate is irregular or invalid or that there is any defect therein or that any transfer or issuance of any tax sale certificate is irregular or invalid, such invalidity, irregularity or defect must be specifically pleaded or set forth and must be established affirmatively by the party or person pleading or setting forth the same, and in any such action or proceeding the transcript of the county treasurer and his certificate thereof shall be presumptive evidence of the legality of the taxes and assessments therein described and of the regularity of all proceedings required by law to be taken.

§ 7. **Costs, allowances and disbursements.** Either party to such an action shall be entitled to recover the necessary actual disbursements made in such action and the same costs and allowances as are provided in the civil practice act in the case of foreclosures of mortgages on real property by action.

§ 8. **Determination by court of rights of parties; rights to purchase on sale.** The court shall have full power to determine and enforce in all respects the rights and equities of the several parties to the action, including the rights and equities of the defendants as between themselves, to direct the sale of such real estate and the distribution or other disposition of the proceeds of sale. Any party to the action may become a purchaser on any such sale. When the county of Monroe is a party, the treasurer of the county of Monroe, the deputy treasurer of the county of Monroe, or the chairman or the clerk of the board of supervisors, may bid for and purchase in the name of the county upon such sales under judgments in actions to foreclose tax liens or liens of certificates of sale.

§ 9. **Conveyance under foreclosure.** A conveyance made pursuant to a judgment in any action brought as herein provided shall vest in the purchaser all right, title, interest, claim, lien and equity of redemption of all the parties to the action, and of all persons claiming under them, or any or either of them subsequent to the filing of a notice of the pendency of the action, or whose conveyance or incumbrance is subsequent or is subsequently recorded, except subsequent taxes and assessments and sales on account thereof, and all such parties and persons shall be forever barred and foreclosed by the judgment in said action of all right, title, interest, claim, lien and equity of redemption in and to the premises sold, or any part thereof except as aforesaid. All real property heretofore or hereafter conveyed to the county of Monroe, pursuant to a judgment in any action brought as herein or as heretofore provided for the foreclosure of taxes, tax liens, and liens of certificates of sale in Monroe county, shall be deemed, from the date of such conveyance to the county of Monroe, and during the time the said county of Monroe shall continue to be the record

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owner thereof, to be owned, possessed and held by said county of Monroe for a public use, and shall have the same exemptions from taxation accorded the real property of a municipal corporation held for a public use. The judgment in any such action may direct the cancellation or satisfaction of record of any lien or liens, including tax liens, of any of the parties to the action. So much of section two hundred seventeen of the civil practice act as requires the court to allow a defendant to defend an action after final judgment, does not apply to an action to foreclose a tax lien under the provisions of this act.

§ 10. **Distribution of proceeds of sale.** After the payment of all lawful costs, allowances and disbursements, the plaintiff and the defendants in said action who are the owners or holders of any liens on or interests in the lands, evidenced by certificates of sale, or otherwise, shall be paid from the proceeds of the sale the several amounts of their respective liens and interests to which they may be entitled, so far as the said proceeds shall suffice to pay the same, in the order of the lawful priority of such liens and interests of the respective parties on or in the lands, as the same may be determined in such action.

§ 11. **Final judgment; cancellation of county taxes.** All taxes due the county of Monroe that are liens upon the property sold prior to the final judgment in any tax foreclosure action provided for by this act, wherein the county of Monroe is plaintiff, shall be cancelled and the final judgment in said tax foreclosure action shall so provide, and the delivery of certified copies of said final judgment to the director of finance of the county of Monroe shall be authority for him to cancel said taxes on the books in his office.

§ 12. **Right of redemption; notices eliminated.** In the case of lands against which actions to foreclosure shall be commenced pursuant to this act the right of redemption on the part of any person to whom such right is given under existing law shall continue until the property is sold pursuant to the final judgment in said foreclosure action upon paying said tax or assessment with all interest and penalties accrued thereon and all the costs and disbursements of said tax foreclosure action up to the time of said payment, and the service of the summons and complaint or summons and notice of the object of the action in any manner permitted by law shall be construed as, shall take the place of, and shall constitute notice to redeem on all parties including mortgagees, tax lienors and other lienors, but any and all rights to redeem from any and all taxes and any and all tax sales shall terminate and be forever barred by the sale of the property pursuant to the judgment in said tax foreclosure action provided for by this act. In the case of lands against which actions of foreclosure shall be commenced pursuant to this act, all general and special acts requiring the service of any notice to redeem or requiring any notice to be given to any party including mortgagees, tax lienors or other lienors, to start the time to redeem or to terminate the time to redeem from any tax sale,

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are hereby superseded in so far as they affect actions to foreclosure tax liens and liens of certificates of sale in the county of Monroe.

§ 13. **Limitation of right to attack sales under tax foreclosure.** An action can not be maintained to recover real property hereafter sold in an action brought to foreclose any tax, tax lien, or lien of a certificate of sale on land in the county of Monroe, unless an action therefor is commenced within one year after the entry or filing of the order of confirmation of the sale of any lands sold pursuant to the judgment of foreclosure of such tax, tax lien, or lien of certificate of sale, and within one year from the time this act takes effect in the case of sales heretofore had. The limitations herein provided shall apply to and bar nonresident persons, persons temporarily absent from the state, minors, insane persons, persons in prison, and all other persons and corporations, whether under disability or not.

§ 14. **Laws repealed.** Chapter four hundred fifty-four of the laws of nineteen hundred thirty-six, entitled "An act authorizing the foreclosure of taxes in the county of Monroe and to validate tax sales heretofore held in the county of Monroe and to repeal chapter six hundred sixty-three of the laws of nineteen hundred thirty-three and to amend and repeal certain provisions of law applicable to said county relating to notice to redeem from tax sales and for repeal of inconsistent legislation," is hereby repealed except in cases where an action to foreclose a tax lien has been commenced and lis pendens has been filed in Monroe county clerk's office prior to the passage of this act; and all acts and parts of acts inconsistent with the provisions of this act are hereby repealed so far as respects the county of Monroe; but such repeal shall not revive any act already repealed, nor affect any act done or right accrued, or any suit, proceeding or prosecution had or commenced, or any penalty incurred, previous to the passage of this act.

§ 15. **Statute of limitations no bar to foreclosure actions.** The statute of limitations shall not bar or be a defense to any action, brought as herein provided, to foreclose taxes, tax liens, or liens of certificates of sale.

§ 16. **Restriction of invalid parts of this act.** If any clause, sentence, paragraph or part of this act shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph or part thereof, directly involved in the controversy in which such judgment shall have been rendered.

§ 17. This act shall take effect immediately.

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Mandarin Trading Ltd. v Wildenstein
2011 NY Slip Op 00741 [16 NY3d 173]
February 10, 2011
Jones, J.
Court of Appeals
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
As corrected through Wednesday, April 6, 2011

[*1]

Mandarin Trading Ltd., Appellant,
v
Guy Wildenstein et al., Respondents.

Argued January 5, 2011; decided February 10, 2011

Mandarin Trading Ltd. v Wildenstein, 65 AD3d 448, affirmed.

{**16 NY3d at 176} OPINION OF THE COURT

Jones, J.

In a dispute arising from the purchase and sale of the painting *Paysage aux Trois Arbres* by Paul Gauguin, this Court is asked to determine whether claims sounding in fraud, negligent misrepresentation, breach of contract, and unjust enrichment were properly pleaded in [*2]the plaintiff's complaint.

In July 2000, J. Amir Cohen approached plaintiff Mandarin Trading Ltd.[FN*] to solicit interest in the purchase of the painting for investment purposes. Cohen explained that he could arrange a transaction for the sale and subsequent resale of the painting at an auction. Mandarin was interested in the opportunity, but sought (1) an appraisal of the painting, (2) a report of its

condition, and (3) a report of its prior ownership. Cohen agreed to obtain the requested information and recommended defendant{**16 NY3d at 177} Guy Wildenstein, an allegedly renowned expert on Gauguin, for the appraisal.

On July 28, 2000, Wildenstein presented a written appraisal letter to Michel Reymondin, which stated that the painting was worth $15 million to $17 million. Neither Reymondin's role in the transactions, nor his relationship to the parties is pleaded. Furthermore, the letter is addressed solely to Reymondin and neither indicates the purpose of the letter nor who requested the valuation of the painting. While the letter revealed that the painting was part of Mrs. Arthur Lehman's collection and was once sold by Wildenstein, it did not disclose any contemporaneous ownership interest. Mandarin received the letter, the complaint does not say from whom, on August 12, 2000.

On August 9, 2000, Cohen contacted and informed Mandarin that if the painting was purchased expeditiously, it could be sold at auction through Christie's at an optimum price. Christie's had outlined the logistics of the auction in a letter to Cohen in which Christie's proposed to hold an auction for the painting in New York with a reserve price of $12 million—a price below which the painting would not sell. Christie's estimated that the painting could sell for $12 million to $16 million.

Mandarin purchased the painting through a series of transactions that occurred during the period of August 16, 2000 to August 30, 2000. First, Peintures Hermes S.A., a company allegedly owned by Wildenstein, forwarded an invoice to Calypso Fine Art Ltd., an intermediary, for the sale transaction. Mandarin then wired $11.3 million for the purchase of the painting to Calypso's account. Finally, Calypso paid $9.5 million to Peintures in exchange for the painting and then transferred the painting to Mandarin. It is further alleged that Peintures deposited $8.8 million into a bank account owned by Wildenstein.

On November 8, 2000, Christie's held an auction for the painting, but the highest bid failed to exceed the reserve price and the painting was not sold. Mandarin has since retained ownership of the painting. [*3]

Before discovery, Supreme Court granted Wildenstein's CPLR 3211 (a) (1) and (7) motion to dismiss Mandarin's complaint (17 Misc 3d 1118[A], 2007 NY Slip Op 52059[U]). Supreme Court held that Mandarin's fraud claims failed because the complaint did not allege that Wildenstein intended to defraud Mandarin through a misstatement of fact upon which Mandarin could{**16 NY3d at 178} justifiably rely. The negligent misrepresentation claim was dismissed for lack of a special relationship, privity, or a privity-like relationship between the parties. In addition, the breach of contract claims were dismissed for failure to plead the existence of a contract. Finally, the unjust enrichment claim was dismissed because Supreme Court concluded that Mandarin unjustifiably relied upon the appraisal.

In a 3-2 decision, the Appellate Division affirmed dismissal of Mandarin's complaint by holding that the pleadings did not sufficiently allege claims for fraud, negligent misrepresentation, breach of contract, and unjust enrichment (65 AD3d 448 [1st Dept 2009]). One dissenting Justice voted to affirm dismissal of the claims at law, but to reinstate the equity claim of unjust enrichment, while the other dissenting Justice sought to reinstate Mandarin's entire complaint. Mandarin appeals to this Court as of right, from the two-Justice dissent, pursuant to CPLR 5601 (a).

In the context of a CPLR 3211 motion to dismiss, the pleadings are "to be afforded a liberal construction. [The Court must] accept the facts as alleged in the complaint as true, [and] accord plaintiffs the benefit of every possible favorable inference" (*Leon v Martinez*, 84 NY2d 83, 87 [1994] [citation omitted]; *see also Morone v Morone*, 50 NY2d 481, 484 [1980]). Even

affording Mandarin all favorable inferences, the complaint fails to sufficiently plead its claims, and we now affirm.

Fraud

Generally, in a claim for fraudulent misrepresentation, a plaintiff must allege "a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]; *see also Channel Master Corp. v Aluminium Ltd. Sales*, 4 NY2d 403, 406-407 [1958]). Furthermore, where a cause of action is based in fraud, "the circumstances constituting the wrong shall be stated in detail" (*see* CPLR 3016 [b]; *see also Lanzi v Brooks*, 43 NY2d 778, 780 [1977] ["(CPLR 3016 [b]) requires only that the misconduct complained of be set forth in sufficient detail to clearly inform a defendant with respect to the incidents complained of"]).

Mandarin argues that the complaint properly pleads that Wildenstein's omission of his ownership interest in the painting{**16 NY3d at 179} when providing the appraisal was a fraudulent, material misrepresentation intended to induce Mandarin's reliance. Wildenstein asserts that the complaint fails to plead that Wildenstein specifically intended to defraud Mandarin, and also owed a [*4]fiduciary duty to disclose an alleged ownership interest.

Wildenstein's letter regarding the painting's value constituted nonactionable opinion that provided no basis for a fraud claim (*see Jacobs v Lewis*, 261 AD2d 127, 127-128 [1st Dept 1999] ["alleged misrepresentations amounted to no more than opinions and puffery or ultimately unfulfilled promises, and in either case were not actionable as fraud"]). The letter merely disclosed Wildenstein's familiarity with the painting, a belief that the painting was worth $15 million to

$17 million, and an acknowledgement that the letter was addressed in response to Reymondin, with no mention of Mandarin.

Furthermore, with respect to a claim of fraudulent omission, the complaint fails to allege that Wildenstein owed a fiduciary duty to Mandarin (*see P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d 373, 376 [1st Dept 2003] ["A cause of action for fraudulent concealment requires, in addition to the four foregoing elements (of fraudulent misrepresentation), an allegation that the defendant had a duty to disclose material information and that it failed to do so"]).

The narrative within the complaint is devoid of facts indicating any connection between Mandarin and Wildenstein that would give rise to a fiduciary duty. Highlighting this deficiency are pleadings that require leaps of fact and logic such as the unknown role played by Reymondin—the man who allegedly received the appraisal from Wildenstein. By failing to plead the role played by Reymondin or how he was related to the parties, no inference can be drawn, for example, that Wildenstein misrepresented his alleged ownership interest or the painting's value, knowing that Reymondin would transfer the information to Mandarin. Moreover, the letter offers no assistance to Mandarin's claim, in light of the fact that the letter was addressed solely to Reymondin, and in the absence of allegations creating a bridge between Mandarin and Wildenstein. Rather than alleging that Wildenstein misrepresented his ownership to Mandarin specifically, an insufficient, general allegation is proffered that Wildenstein was required to disclose his interest because he should have known that a hypothetical purchaser would rely on the appraisal letter (*see Garelick v Carmel*, 141 AD2d 501, 502 [2d Dept 1988] ["Moreover, in order to plead a{**16 NY3d at 180} valid cause of action sounding in fraud, the complaint must set forth all of the elements of fraud including the making of material representations by the defendant to the plaintiff"]).

As such, Mandarin's fraud claims were properly dismissed.

Negligent Misrepresentation

It is well settled that "[a] claim for negligent misrepresentation requires the plaintiff to demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information" (*J.A.O. Acquisition Corp. v Stavitsky*, [*5]8 NY3d 144, 148 [2007]; *see also Parrott v Coopers & Lybrand*, 95 NY2d 479, 483-484 [2000]).

Mandarin argues that the Appellate Division majority erred in affirming dismissal of this claim because, here, a buyer-seller relationship established privity. Wildenstein responds that no relationship existed between the parties.

A special relationship may be established by "persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified" (*Kimmell v Schaefer*, 89 NY2d 257, 263 [1996]). Although Mandarin generally pleads that "a special relationship of trust or confidence" existed between the parties, the lack of allegations showing a relationship with Wildenstein mandates dismissal of this claim. The complaint does not allege whether Wildenstein had any contact with Mandarin, whether Mandarin solicited the appraisal directly from Wildenstein, whether Wildenstein knew the purpose of the appraisal letter, or whether Wildenstein was even aware of Mandarin's existence.

In *Kimmell*, the defendant sought to induce plaintiffs to invest in a business venture by directly sending them a memo regarding business projections, meeting with them personally, and sending out correspondence to assure the safety of the investment. We held that the record supported a finding that the

defendant established a special relationship with the plaintiffs because of the financial skill and expertise of the defendant, and his continued attempts to communicate directly with the plaintiffs to induce their investment (*id.* at 264).

Ravenna v Christie's Inc. (289 AD2d 15 [2001]) involved a similar issue in the context of the sale of a painting where the{**16 NY3d at 181} plaintiff alleged negligent misrepresentation after meeting with a Christie's representative and receiving advice on the value of a painting. The Appellate Division held that gratuitous advice given in a single meeting, "which did not even create a business relationship, cannot be said to have created a relationship of trust and confidence" (*id.* at 16).

Here, the pleadings fail to allege the existence of any relationship between Mandarin and Wildenstein that would support a negligent misrepresentation claim. Unlike the defendant in *Kimmell*, there are no allegations here that Wildenstein ever met with Mandarin, was retained by Mandarin for an appraisal, or knew that the appraisal would be used by Mandarin for the purpose of purchasing the painting (*see Spitzer v Christie's Appraisals*, 235 AD2d 266 [1st Dept 1997]). And this case has an even more tenuous basis for finding privity, or a privity-like relationship, as it lacks even the bare, minimal contact of the parties in *Ravenna*. Wildenstein's art expertise alone cannot create a special relationship where otherwise the relationship between the parties is too attenuated.

Mandarin further argues that Wildenstein should have known or foreseen that the appraisal was requested by a purchaser for the purpose of buying the painting, but this Court has

"previously rejected a rule 'permitting recovery by any "foreseeable" plaintiff who relied on the negligently prepared report, and have rejected even a somewhat narrower rule that would permit recovery where the reliant party or

class of parties was actually known or foreseen' but the individual defendant's conduct did not link it to that third party" (*Parrott*, 95 NY2d at 485).

Accordingly, without further allegations establishing a relationship between the parties, Mandarin's complaint fails and was properly dismissed.

Breach of Contract

Mandarin alleges that it has sufficiently pleaded a breach of contract claim because it was an intended third-party beneficiary to an appraisal contract between Wildenstein and Reymondin. However, the failure to allege a relationship between the parties again proves fatal to this claim as well.

Generally, a party alleging a breach of contract must "demonstrate the existence of a . . . contract reflecting the terms and {**16 NY3d at 182} conditions of their . . . purported agreement" (*American-European Art Assoc. v Trend Galleries*, 227 AD2d 170, 171 [1st Dept 1996]). In the context of a third-party beneficiary claim, the plaintiff must establish:

"(1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for [its] benefit, and (3) that the benefit to [it] is sufficiently immediate . . . to indicate the assumption by the contracting parties of a duty to compensate [it] if the benefit is lost" (*Mendel v Henry Phipps Plaza W., Inc.*, 6 NY3d 783, 786 [2006]).

The complaint only offers conclusory allegations without pleading the pertinent terms of the purported agreement. We are left to speculate as to the parties involved and the conditions under which this alleged appraisal contract was formed. Consequently, by failing to plead the salient terms of a valid and binding contract, Mandarin cannot show that the contract was intended for its immediate benefit.

Unjust Enrichment

"The essential inquiry in any action for unjust enrichment . . . is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered" (*Paramount Film Distrib. Corp. v State of New York*, 30 NY2d 415, 421 [1972]). A plaintiff must show "that (1) the other party was enriched, (2) at that party's expense, and (3) that 'it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered' " (*Citibank, N.A. v Walker*, 12 AD3d 480, 481 [2d Dept 2004]; *Baron v Pfizer, Inc.*, 42 AD3d 627, 629-630 [3d Dept 2007]).

Mandarin's unjust enrichment claim fails for the same deficiency as its other claims—the lack of allegations that would indicate a relationship between the parties, or at least an awareness by Wildenstein of Mandarin's existence. Although privity is not required for an unjust enrichment claim, a claim will not be supported if the connection between the parties is [*6]too attenuated (*see Sperry v Crompton Corp.*, 8 NY3d 204, 215 [2007]).

Moreover, under the facts alleged, there are no indicia of an enrichment that was unjust where the pleadings failed to indicate a relationship between the parties that could have caused reliance or inducement. Without further allegations, the{**16 NY3d at 183} mere existence of a letter that happens to find a path to a prospective purchaser does not render this transaction one of equitable injustice requiring a remedy to balance a wrong. Without sufficient facts, conclusory allegations that fail to establish that a defendant was unjustly enriched at the expense of a plaintiff warrant dismissal (*see North Salem Psychiatric Servs., P.C. v Medco Health Solutions, Inc.*, 50 AD3d 986 [2d Dept 2008]; *Vassel v Vassel*, 40 AD2d 713 [2d Dept 1972], *affd* 33 NY2d 533 [1973]).

Accordingly, the order of the Appellate Division should be affirmed, with costs.

Chief Judge Lippman and Judges Ciparick, Graffeo, Read, Smith and Pigott concur.

Order affirmed, with costs.

Footnotes

Footnote *: Phoenix Capital Reserve Fund is the parent corporation of Mandarin. Phoenix Capital's director, Patrick Blum, was approached by Cohen to determine interest in purchase of the painting.

Georgia Malone & Co., Inc. v Rieder
2012 NY Slip Op 05200 [19 NY3d 511]
June 28, 2012
Graffeo, J.
Court of Appeals
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
As corrected through Wednesday, August 22, 2012

[*1]

Georgia Malone & Company, Inc., Appellant, v Ralph Rieder et al., Defendants, and Rosewood Realty Group, Inc., et al., Respondents.

Argued May 31, 2012; decided June 28, 2012

Georgia Malone & Co., Inc. v Rieder, 86 AD3d 406, affirmed.

{**19 NY3d at 513} OPINION OF THE COURT

Graffeo, J.

In this action, a real estate company that prepared due diligence reports for a developer in connection with the potential purchase of commercial properties alleges that a rival [*2]brokerage firm was unjustly enriched when it acquired the materials from the developer and later obtained a commission on the ultimate sale of the properties. The issue before us is whether a sufficient relationship existed between the two real estate firms to provide a basis for an unjust enrichment cause of action. Based on the allegations presented in the complaint, we hold that the relationship between these two parties was too attenuated.

Plaintiff Georgia Malone & Company, Inc. (Malone) is a licensed real estate brokerage and consulting firm that provides{**19 NY3d at 514} its clients with information regarding the purchase and sale of properties not yet on the market. Its principal officer is Georgia Malone. Defendant Rosewood Realty Group, Inc. (Rosewood) and defendant Aaron Jungreis, a broker in the firm, are also engaged in the real estate trade.

In the course of its realty business, Malone introduced defendant CenterRock Realty, LLC (CenterRock), a developer, to the sellers of residential apartment buildings in midtown Manhattan. Thereafter, Malone and CenterRock, by its managing member, defendant Ralph Rieder, entered into a contract in which Malone agreed to produce due diligence materials relating to the properties for CenterRock's review for potential acquisition. CenterRock acknowledged that it would keep the due diligence information confidential and agreed to pay Malone a commission of 1.25% of the total purchase price for its brokerage services.[FN1]

Malone then provided CenterRock with certain documents, including an underwriting model, purchase contract, certificates of occupancy, income summary, short aging summary, bank accounts and bank deposit reports, rent rolls, reports of environmental and engineering investigations and recommendations for the selection of consultants. In December 2007, CenterRock executed a contract of sale with the owners to purchase the properties for $70 million.

Under the terms of the purchase agreement, CenterRock had 25 days to perform due diligence investigations, during which time it could terminate the deal without a penalty. [*3]According to Malone, Rieder delayed tender of the down payment and the sellers agreed to extend the due diligence deadline an additional 21 days. During the due diligence period, Malone claims that it continued to collect, create and provide CenterRock with confidential

information pertaining to the properties and that{**19 NY3d at 515} Rieder repeatedly represented that CenterRock would be ready to close on time.

About a week before the expiration of the contract extension, Georgia Malone received an e-mail from Rieder that stated: "See what you can do about finding [another] buyer for [the properties]. If it falls flat I am prepared to do whatever you think is fair including making up your entire fee. Ideally, I would like to tack it on to our next deal." Malone attempted but failed to locate another buyer.[FN2] CenterRock terminated the contract on the last day of the due diligence period and refused to pay Malone's demand for its commission in the amount of $875,000 (1.25% of the contract price).

After CenterRock pulled out of the deal, Malone alleges that Elie Rieder gave the due diligence materials to a third party for the purpose of selling the documentation to Rosewood. In return, Rosewood paid the Rieders $150,000 for the materials and obtained a new buyer who eventually purchased the properties for $68.5 million. Rosewood received a commission of $500,000 from the sale.

Following that transaction, Malone commenced this action alleging a breach of contract against CenterRock and Ralph Rieder and interposing unjust enrichment claims against all defendants. Supreme Court dismissed all claims except those against CenterRock. On Malone's appeal, the Appellate Division modified, with two Justices dissenting, by reinstating the unjust enrichment claims against the Rieders and otherwise affirmed (86 AD3d 406 [2011]). The Appellate Division granted Malone's motion for leave to appeal and certified the following question: "Was the order of this Court, which modified the order of the Supreme Court, properly made?" (2011 NY Slip Op 85308[U] [2011]).

On appeal, Malone seeks reinstatement of its unjust enrichment claim against Rosewood. Malone contends that Rosewood knew that it produced the

due diligence materials and that, as a consequence, Rosewood unfairly profited at Malone's expense by collecting a commission on the sale of the properties. In opposition, Rosewood argues that Malone's complaint fails to make out an unjust enrichment claim against it because there was no {**19 NY3d at 516} business relationship or connection between them. In addition, Rosewood submits that Malone's [*4]complaint is inadequate because it does not assert that Rosewood was aware that the information had been deemed confidential, nor does it allege that Rosewood knew that CenterRock had not paid Malone for production of the due diligence documents.

As we have stated on several occasions, " '[t]he theory of unjust enrichment lies as a quasi-contract claim' " and contemplates "an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties" (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009], quoting *Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 572 [2005]). An unjust enrichment claim is rooted in "the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another" (*Miller v Schloss*, 218 NY 400, 407 [1916]). Thus, in order to adequately plead such a claim, the plaintiff must allege "that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011] [brackets and internal quotation marks omitted]).

In *Sperry v Crompton Corp.* (8 NY3d 204 [2007]), we held that a plaintiff cannot succeed on an unjust enrichment claim unless it has a sufficiently close relationship with the other party. In that case, the plaintiff, who claimed to have purchased overpriced tires, asserted a cause of action for unjust enrichment against the producers of the chemicals used by tire manufacturers (*id.* at 209). The plaintiff's theory was that the chemical producers overcharged the tire

manufacturers, who, in turn, passed the cost to the plaintiff and others similarly situated (*id.*). Defendants moved under CPLR 3211 to dismiss the claim for failure to state a cause of action and we held that, while "a plaintiff need not be in privity with the defendant to state a claim for unjust enrichment," there must exist a relationship or connection between the parties that is not "too attenuated" (*id.* at 215-216).

More recently, we elaborated on the pleading requirements for unjust enrichment in *Mandarin*, wherein the plaintiff sought to purchase a famous painting with the intent to later auction it for a profit (16 NY3d at 177). The defendant, an alleged art expert, wrote a letter to a third party estimating the painting's value at $15 million to $17 million but the letter did not{**19 NY3d at 517} disclose the defendant's ownership interest in the artwork (*id.*). After obtaining a copy of the letter, the plaintiff claimed to have relied on defendant's representations on valuation in ultimately purchasing the painting for $11.3 million (*id.*). Unbeknownst to the plaintiff, $8.8 million of the sale proceeds went to defendant (*id.*). When the plaintiff was unable to resell the painting for a price greater than or equal to its acquisition cost, it sued the defendant for unjust enrichment.

Upon defendant's motion to dismiss, we dismissed the unjust enrichment claim due to "the lack of allegations [in the complaint] that would indicate a relationship between the parties, or at least an awareness by [the defendant] of [the plaintiff's] existence" (*Mandarin*, 16 [*5]NY3d at 182).
Reaffirming *Sperry*, we held that although the plaintiff was not required to allege privity, it had to assert a connection between the parties that was not too attenuated (*id.*). We concluded that

"under the facts alleged, there are no indicia of an enrichment that was unjust where the pleadings failed to indicate a relationship between the parties that could have caused reliance or inducement. Without further allegations, the mere

existence of a letter that happens to find a path to a prospective purchaser does not render this transaction one of equitable injustice requiring a remedy to balance a wrong. Without sufficient facts, conclusory allegations that fail to establish that a defendant was unjustly enriched at the expense of a plaintiff warrant dismissal" (*id.* at 182-183).

Seizing on *Mandarin*'s reference to "awareness," Malone argues that its unjust enrichment claim should be allowed to proceed because Rosewood was aware that Malone had created the due diligence reports and Rosewood had used the materials for its own benefit without compensating Malone. But mere knowledge that another entity created the documents is insufficient to support a claim for unjust enrichment under the facts of this case. Our mention of awareness in *Mandarin* was intended to underscore the complete lack of a relationship between the parties in that case.[FN3]

Similar to *Sperry* and *Mandarin*, the relationship between Malone and Rosewood is too attenuated because they simply{**19 NY3d at 518} had no dealings with each other. Accepting as true the facts alleged in the complaint and affording Malone the benefit of every favorable inference, as we must on a motion to dismiss (*see Roni LLC v Arfa*, 18 NY3d 846, 848 [2011]), the complaint does not contain sufficient allegations to support an unjust enrichment claim against Rosewood. In particular, the complaint does not assert that Rosewood and Malone had any contact regarding the purchase transaction.[FN4] And, although the complaint states that Rosewood "knew at all times" that Malone produced the due diligence reports and provided them to CenterRock with the expectation that it would be compensated in the event a purchase agreement was reached, there is no allegation that Rosewood was aware that Malone and CenterRock had agreed to the confidential nature of the due diligence information or that Rosewood knew that CenterRock had failed to pay Malone before the documents were conveyed to Rosewood. Indeed, Jungreis's [*6]e-mail communications submitted by Malone in opposition to the

motions to dismiss allude to Rosewood's offer to pay the Rieders for the "due diligence costs" they "laid out," suggesting that Rosewood believed that the Rieders had compensated Malone for its services.

Contrary to Malone's contentions, there is no claim that Rosewood had anything other than arm's length business interactions with CenterRock or the Rieders. The pleadings do not implicate Rosewood in the Rieders' alleged wrongdoing. The Rieders furnished the due diligence documents and, in exchange, Rosewood paid them $150,000. Rosewood obtained a buyer and negotiated the purchase transaction with the sellers and their broker. Hence, Malone's argument that Rosewood profited without doing any work lacks merit.

The dissent cites *Simonds v Simonds* (45 NY2d 233 [1978]), a case that involved an unjust enrichment action against the second wife of the plaintiff's ex-husband. Plaintiff sought a portion of her ex-husband's life insurance proceeds obtained by the second wife. We imposed a constructive trust on the insurance proceeds held by the second wife on the basis that "[a] bona fide purchaser of property upon which a constructive trust would otherwise be imposed takes free of the constructive trust, but a gratuitous donee, however innocent, does not" (*id.* at 242). We determined that the second wife in *Simonds* was a{**19 NY3d at 519} gratuitous donee. In contrast, here, Malone has alleged that Rosewood paid the Rieders for the due diligence files. Additionally, because the complaint fails to allege that Rosewood was aware of the wrongfulness of CenterRock's actions, Rosewood appears to fit the criteria of a good-faith purchaser for value which, under *Simonds*, would not support an unjust enrichment claim.

Moreover, regardless of whether Rosewood was a good-faith purchaser of the due diligence materials, the complaint fails to present a sufficient connection between Malone and Rosewood to form the basis of an unjust enrichment claim. In this respect, Malone's and the dissent's reliance on *Bradkin v Leverton* (26

NY2d 192 [1970]) is misplaced because the defendant in that case was an officer of the corporation with which the plaintiff contracted and thus his relationship with the plaintiff was much closer.

The rule urged by Malone would require parties to probe the underlying relationships between the businesses with whom they contract and other entities tangentially involved but with whom they have no direct connection. This would impose a burdensome obligation in commercial transactions. Although Malone's alleged loss of compensation for preparation of the due diligence reports certainly appears unfair, its unjust enrichment claim against Rosewood falls short of stating facts establishing a sufficient relationship to impose potential liability against that party. Such claims may be more properly pursued against CenterRock and the Rieders and, since those claims remain pending, Malone is not without recourse.

Accordingly, the order of the Appellate Division should be affirmed, with costs, and the certified question answered in the affirmative. [*7]

Chief Judge Lippman (dissenting). We have established that "[t]he essential inquiry in any action for unjust enrichment . . . is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011] [internal quotation marks and citation omitted]). It is apparent that equity and good conscience do not permit Rosewood to retain the benefits of Malone's diligent work, and that plaintiff has adequately pleaded that Rosewood was unjustly enriched. Therefore, I respectfully dissent.

The allegations of this complaint are sufficient to state a cause{**19 NY3d at 520} of action that Rosewood cannot retain the sales commission it received by using Malone's work product. According to the pleadings, Malone performed the services and due diligence necessary to equip a buyer to negotiate and to

execute the purchase of the commercial properties. Rosewood then profited by using the fruits of Malone's labor and transmitting the diligence materials to a different buyer, netting Rosewood a hefty commission while Malone never received compensation for its work. Furthermore, Rosewood had an appreciation and awareness that the diligence materials were drafted by Malone, as alleged in the complaint.[FN1] Rosewood knew that it was receiving a benefit from Malone, its competitor in the New York real estate brokerage market, because it was evident from the materials themselves. In an affidavit in opposition to Rosewood's motion to dismiss, Georgia Malone stated, "[A]ll of the [due diligence] materials either were printed on plaintiff's letterhead or contained other information linking them to plaintiff" (emphasis omitted). Evaluating Malone's unjust enrichment claim under the "broad considerations of equity and justice" (*Paramount Film Distrib. Corp. v State of New York*, 30 NY2d 415, 421 [1972]), it is only fair to allow Malone's claim against Rosewood to proceed at this early stage in the litigation. At the motion to dismiss stage under CPLR 3211, "the pleading is to be afforded a liberal construction," and we "accord plaintiffs the benefit of every possible favorable inference" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). The majority's intimation that Rosewood believed Malone had been compensated by the Rieders for its services and that Rosewood is a good-faith purchaser for value inappropriately draws inferences in favor of defendants in the context of a CPLR 3211 motion to dismiss.

In addition to requiring proof that defendant was inequitably enriched at plaintiff's expense, we held in *Sperry v Crompton Corp.* (8 NY3d 204, 215-216 [2007]) that there needs to [*8]be some nexus between the plaintiff and defendant, and the "connection" between the party conferring the benefit and the enriched party cannot be "too attenuated." Disregarding the equitable concerns at hand, the majority rules on the basis that Malone's connection to Rosewood does not satisfy the standard of *Sperry*. The majority now requires plaintiffs

pleading unjust enrichment to{**19 NY3d at 521} have a "sufficient relationship" with defendant, involving "dealings with each other" (*see* majority op at 513, 518). Requiring a relationship of mutual dealing where the plaintiff confers a benefit on the unjustly enriched party treads too close to requiring privity, which this Court expressly disclaimed in *Sperry* and *Mandarin Trading*. Our holdings in *Sperry* and *Mandarin Trading* never required that there be direct contact or a close relationship between the parties.

In *Mandarin Trading*, we indicated that "an awareness" by defendant of plaintiff's existence was sufficient for an unjust enrichment claim (16 NY3d at 182). The language describing the connection between Mandarin Trading and Wildenstein as not a "relationship . . . caus[ing] reliance or inducement" was merely for illustrative purposes and was dicta alluding back to how Mandarin also failed to meet the standard for negligent misrepresentation (*id.*). It was not a statement of the standard for unjust enrichment actions,[FN2] and the majority here likewise correctly refrains from applying the heightened reliance/inducement standard. Rather, our holding in *Mandarin Trading* was that the connection between the defendant, who was not aware of plaintiff's existence, was "too attenuated" under *Sperry*. In *Mandarin Trading*, the appraisal letter drafted by Wildenstein was not addressed to Mandarin Trading, and there was no information about how the letter reached plaintiff's hands. Also the plaintiff did not plead that Wildenstein [*9]was aware that Mandarin existed. The connection between the parties here by contrast was made out because Rosewood was aware that it was profiting from its competitor's work. Williston on Contracts § 68:5 is instructive here, stating that an unjustly{**19 NY3d at 522} enriched party must have "an appreciation or knowledge . . . of the benefit" and have accepted or retained the benefit inequitably without payment for its value (26 Lord, Williston on Contracts § 68:5 [4th ed]). The Court here is dealing with an equitable concept and should not propagate a

standard that gives an impregnable defense to a party allegedly dealing in misappropriated property.[FN3]

This Court's precedent on unjust enrichment has never required that there be a close relationship or dealings between the parties. We stated in *Simonds v Simonds* (45 NY2d 233, 242 [1978], quoting *Miller v Schloss*, 218 NY 400, 407 [1916]) that "[u]njust enrichment, however, does not require the performance of any wrongful act by the one enriched . . . . Innocent parties may frequently be unjustly enriched. What is required, generally, is that a party hold property 'under such circumstances that in equity and good conscience he ought not to retain it.' " In *Simonds*, plaintiff prevailed in an action against her ex-husband's second wife and daughter for a portion of her ex-husband's life insurance proceeds. We determined that though defendants had not acted wrongly and had no dealings with the plaintiff, they were still unjustly enriched as beneficiaries of the insurance policies (*Simonds*, 45 NY2d at 242-243). Nowhere in *Simonds* did we require defendant to have procured the unjust benefit or that there be contact between plaintiff and defendant. The majority attempts to distinguish *Simonds* on the basis that the defendant in *Simonds* did not pay for the insurance proceeds it received whereas Rosewood "appear[ed]" to be a good-faith purchaser for value of the diligence materials (majority op at 519). Drawing every inference in favor of plaintiff, Rosewood could not have been a good-faith purchaser because it had notice from Malone's letterhead that the diligence materials did not belong to CenterRock and the Rieders. The requirement that defendant not be a gratuitous donee is only applicable in the context of constructive trusts, and more importantly, it is not relevant to the connection between the plaintiff and defendant. The fact that the defendant in *Simonds* did not pay for life insurance does not change the fact that she had no relationship with plaintiff. As we stated in *Simonds*, "to evolve formalisms narrowing the broad scope of equity is to defeat its essential purpose" (45 NY2d at 239).

{**19 NY3d at 523}In *Bradkin v Leverton* (26 NY2d 192 [1970]), we found a viable unjust enrichment claim where there were no direct dealings between plaintiff and defendant. "[T]he defendant received a benefit from the plaintiff's services under circumstances which, in justice, [*10]preclude him from denying an obligation to pay for them" (*id.* at 197). The defendant in *Bradkin* knowingly used plaintiff's contacts without paying for them, similar to Rosewood's alleged use of Malone's due diligence materials.

The majority's policy concerns are unfounded. A ruling that Rosewood was unjustly enriched here would not impede commercial transactions or create an excessive burden on contracting parties. If a business partner conveys information whose source is clearly the company's direct competitor, the company can inquire about the circumstances of the transmission of the information. Since Malone's name was allegedly printed on the due diligence materials themselves and Malone obviously had an interest in obtaining the sales commission, Rosewood should have known that the materials were suspect. The majority ruling would appear to simply condone willful ignorance.

For these reasons, I would modify the Appellate Division order to reinstate the unjust enrichment claims against Rosewood and Jungreis.

Judges Ciparick, Read, Smith and Jones concur with Judge Graffeo; Chief Judge Lippman dissents in a separate opinion in which Judge Pigott concurs.

Order affirmed, etc.

Footnotes

Footnote 1: Specifically, the agreement provided that CenterRock "agrees to treat all [i]nformation [furnished to it by Malone] as confidential and shall not duplicate, distribute, disclose, or disseminate such documentation or information without the prior written consent of [Malone], in each instance,

which [Malone] may withhold in its sole discretion." The contract further stated that CenterRock could, on a confidential basis, "reveal the [i]nformation only to its affiliates, representatives, key employees, lenders, partners, advisors, outside counsel and accountants ('Related Parties') . . . who (x) need to know the [i]nformation for the purpose of evaluating the [p]ropert[ies], and (y) are informed by [CenterRock] of the confidential nature of the [i]nformation." CenterRock also agreed to be held liable for the breach of the confidentiality clause by any of the Related Parties.

Footnote 2: While these events were transpiring, Malone alleges that Rieder and defendant Elie Rieder (Rieder's son and an officer of CenterRock) were secretly attempting to obtain equity partners in order to purchase the properties through another entity to avoid paying Malone its commission.

Footnote 3: Contrary to the dissent's contention, the "awareness" language in *Mandarin* was dicta since the thrust of the holding pertained to the attenuation of the relationship between the parties.

Footnote 4: Malone conceded at oral argument that it had no relationship with Rosewood.

Footnote 1: Paragraph 86 of the complaint states, "Rosewood and Jungreis knew at all times that Malone[ ] had performed the aforementioned work, labor and services and had supplied the aforesaid information with the expectation that Malone[ ] would be compensated therefor in the event that an agreement was reached to purchase the Property."

Footnote 2: Only plaintiffs pleading a quantum meruit theory of unjust enrichment are required to show that they performed services for the defendants or at the defendant's behest (*see Monex Fin. Servs., Ltd. v Dynamic Currency Conversion, Inc.*, 62 AD3d 675, 676 [2d Dept 2009]). A claim of quantum meruit requires the plaintiff to allege that services were performed for defendant in good faith, that defendant accepted the services, an expectation of compensation arose, and the reasonable value of the services rendered (*AHA Sales, Inc. v Creative Bath Prods., Inc.*, 58 AD3d 6, 19 [2d Dept 2008]). The rule espoused in *Kagan v K-Tel Entertainment* (172 AD2d 375, 376 [1st Dept 1991]), which required that services resulting in unjust enrichment be performed at the "behest" of defendant, is not the correct standard for unjust

enrichment. *Kagan* cited an action for quantum meruit in support of its "behest" requirement (*Kagan*, 172 AD2d at 376), and as noted by the dissent below, "limiting unjust enrichment claims to those where the benefit was conferred at the behest of the defendant . . . virtually collapses the distinction between claims for quantum meruit and those for unjust enrichment" (86 AD3d 406, 416 n 5 [1st Dept 2011]).

Footnote 3: The majority acknowledges that "Malone's alleged loss of compensation for preparation of the due diligence reports certainly appears unfair" (*see* majority op at 519).

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CENTER FOR CONTINUING LEGAL EDUCATION

September 28, 2023

Joseph Gerberg, Esq.
NYS Taxation and Finance
Harriman Campus Bldg 9, Rm 100
Albany, NY 12227

Dear Mr. Gerberg:

This letter confirms your participation as a speaker at the CAASNY Winter Meeting taking place at **The Otesaga Hotel, Cooperstown, NY**. You are scheduled to speak on **RPTL Article 11 and the implications of Tyler v. Henepin County** on **Monday, December 3, 2023 from 11:00am - 11:50am**. Albany Law School's Center for Continuing Legal Education will be certifying your session for mandatory Continuing Legal Education ("CLE") credit in New York. As a presenter, you are eligible for additional CLE credit hours because of your participation.

In order to best coordinate your panel, would you kindly send me the following materials by **November 9, 2023**.

A short biography,
A signed speaker release form (attached), and
A completed audiovisual needs sheet (attached) and
A **timed outline** of the topics your program will cover. This is simply an outline of your presentation, with time allocations for each topic, as required by the State CLE Board. (for example, if there are four main topics it should be indicated the amount of time to be spent on each topic).

In accordance with the New York State CLE Board Rules and Regulations, the session needs to be accompanied by reference materials for our attendees. Please send me reference material that you feel should be included in the materials by **November 9, 2023**. These materials can include, relevant articles on the topic you will discuss, important regulation or statutes, case law, and any scholarly references you feel are appropriate to assist the audience in your issue area. Brief outlines without citations or explanatory notations shall not constitute compliance with the program accreditation criteria).

Please email me these items. I can be reached at lriva@albanylaw.edu or (P) 518-472-5888. If you cannot provide these materials, or have questions please feel free to reach out.

Sincerely,

Lisa Rivage

Enc.

INSTITUTE OF LEGAL STUDIES
ALBANY LAW SCHOOL
SPEAKER RELEASE

Albany Law School, 80 New Scotland Avenue, Albany, NY 12208, (518) 472-5888

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Date of Program: **Monday, December 4, 2023**

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Matter of Hoge v Chautauqua County

2019 NY Slip Op 04821 [173 AD3d 1731]

June 14, 2019

Appellate Division, Fourth Department

Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.

As corrected through Wednesday, July 31, 2019

[*1]

In the Matter of Bradley K. Hoge et al., Appellants,
v
Chautauqua County, Respondent.

Brautigam & Brautigam, LLP, Fredonia (Andrew D. Brautigam of counsel), for petitioners-appellants.

Stephen M. Abdella, County Attorney, Mayville, for respondent-respondent.

Appeal from an order of the Supreme Court, Chautauqua County (David W. Foley, A.J.), entered September 18, 2017. The order granted respondent's motion to dismiss the application of petitioners to obtain surplus funds after a tax foreclosure sale of real property formerly owned by petitioners.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs.

Memorandum: Petitioners appeal from an order granting respondent's motion to dismiss petitioners' application for surplus proceeds resulting from a tax foreclosure sale of real property formerly owned by them. Prior to petitioners' application, respondent obtained the real property by default judgment of foreclosure pursuant to RPTL article 11 and resold the property at auction. We affirm.

Preliminarily, to the extent that petitioners challenge the validity of the default judgment of foreclosure on the ground that respondent failed to comply with constitutional and statutory requirements during the in rem tax foreclosure proceeding (*see generally Matter of County of Seneca [Maxim Dev. Group]*, 151 AD3d 1611, 1611-1612 [4th Dept 2017]), that challenge is not properly before us inasmuch as this is not an appeal from the order denying petitioners' motion to vacate the

default judgment (*see Matter of Scott*, 116 AD2d 1020, 1020 [4th Dept 1986], *lv denied* 67 NY2d 608 [1986]).

We reject petitioners' contention that they have a right to the surplus proceeds of the foreclosure sale. As respondent correctly contends, petitioners' application for surplus proceeds was improperly predicated upon provisions of RPAPL article 13 that apply to surplus monies arising from the sale of property in mortgage foreclosure proceedings (*see e.g.* RPAPL 1361 [1]). RPAPL article 13, entitled "Action to Foreclose a Mortgage," does not apply to properties acquired by a tax district pursuant to an in rem foreclosure proceeding under RPTL article 11. Thus, petitioners' reliance on RPAPL article 13 and cases involving mortgage foreclosures is misplaced (*cf. Manufacturers & Traders Trust Co. v Berthole*, 130 AD3d 881, 881-882 [2d Dept 2015], *appeal dismissed* 26 NY3d 1022 [2015]).

Moreover, petitioners are not entitled to surplus proceeds under RPTL article 11. Contrary to petitioners' assertion that RPTL article 11 is "silent" regarding any remaining interest that former property owners may have, such as entitlement to surplus proceeds upon the sale of the property following a default judgment of foreclosure, the statute provides that, when property owners neither redeem the property nor interpose an answer, the tax district is entitled to a deed conveying an estate in fee simple absolute and the property owners are "barred and forever foreclosed of all . . . right, title, interest, claim, lien or equity of redemption" that they may have had in the property (RPTL 1136 [3]; *see Matter of Ellis v City of Rochester*, 227 AD2d 904, 904-905 [4th Dept 1996]). Where the tax district obtains a valid default judgment of foreclosure, which is presumed here given that the default judgment is not subject to challenge on this appeal, the former property owners are not "entitled to any compensation upon the resale of the property" (*Ellis*, 227 AD2d at 905), and the tax district may "retain . . . the entire proceeds from [the re]sale" (*Scott*, 116 AD2d at 1020; *see Nelson v City of New York*, 352 US 103, 109-110 [1956]; *Sheehan v County of Suffolk*, 67 NY2d 52, 59 [1986], *rearg denied* 67 NY2d 918 [1986]; *Matthew v Thompson*, 65 AD3d 1095, 1097 [2d Dept 2009]; *Matter of City of Lockport [Marine Midland Bank]*, 187 AD2d 993, 993-994 [4th Dept 1992]). Present—Whalen, P.J., Peradotto, Lindley, DeJoseph and NeMoyer, JJ.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

DANIEL J. MERCKX, AS ADMINISTRATOR OF THE ESTATE OF RONALD P. MERCKX, TIMOTHY S. LARAWAY, JR., BARBARA SNASHELL, and CHIGNARD NOELIZAIRE, individually and on behalf of all others similarly situated, Plaintiffs, v. RENSSELAER COUNTY, by and through MARK WOJCIK, in his official capacity as CHIEF FISCAL OFFICER OF RENSSELAER COUNTY, CATTARAUGUS COUNTY, by and through MATTHEW J. KELLER, in his official capacity as TREASURER OF CATTARAUGUS COUNTY, and CITY OF PORT JERVIS, by and through LAURA QUICK, in her official capacity as CITY CLERK-TREASURER of the CITY OF PORT JERVIS, individually and on behalf of all others similarly situated; and the STATE OF NEW YORK, Defendants.	1:23-cv-1354 (MAD/CFH) **CLASS ACTION COMPLAINT AND DEMAND FOR JURY TRIAL**

COMPLAINT

Plaintiffs Daniel J. Merckx as Administrator of the Estate of Ronald P. Merckx, Timothy S. Laraway, Jr., Barbara Snashell, and Chignard Noelizaire ("Plaintiffs") bring this action individually and on behalf of all others similarly situated ("Plaintiff Class") against Cattaraugus County, by and through Matthew J. Keller, in his official capacity as Treasurer Of Cattaraugus County, Rensselaer County, by and through Mark Wojcik, in his official capacity as Chief Fiscal Officer Of Rensselaer County, and City Of Port Jervis, by and through Laura Quick, in her official capacity as City Clerk-Treasurer of the City Of Port Jervis ("Local Government Defendants"),

individually and on behalf of all others similarly situated ("Defendant Class"), and the State of New York, and say:

NATURE OF THE ACTION

1. This case seeks relief for the unconstitutional practice of local governments in New York foreclosing on and selling homes and keeping the full proceeds, instead of retaining only the amount needed to cover unpaid taxes and related charges.

2. Acting under color of state law, instead of returning the surplus money to the property owner, who is now square with the local government on the tax debt and bereft of his or her property, the local government took for its coffers the surplus value of the taxpayer's equity.

3. The Supreme Court of United States held, in its most recently concluded term, that such conduct is unconstitutional. *Tyler v. Hennepin County*, 598 U.S. 631 (2023). The Supreme Court unanimously held that the government's retention of surplus proceeds without adequate means for the foreclosed property owners to recover the surplus proceeds, is a taking of private property for public use without just compensation.

4. Local Government Defendants' retention of surplus proceeds in excess of Plaintiffs' unpaid taxes and associated charges violates the U.S. and New York Constitutions' prohibition on the taking of private property for public use without just compensation as well as the prohibition on the imposition of excessive fines.

5. Plaintiffs did not pay their property taxes — at first. While Plaintiffs' life circumstances may differ, whether they be elderly, poor, sick and dying, from broken-up families, suffering substance disorders, had hard luck or good luck, or if they just decided to give up their property, it makes no difference. What they have in common is they lost their equity to an unconstitutional taking. The local governments took their property and took the taxes. That was allowed. The local governments did not stop there, though. They also took the surplus proceeds,

as provided under New York Real Property Tax Law, Article 11. *See, e.g.*, *Hoge v. Chautauqua Cnty.*, 173 A.D.3d 1731, 1732 (2019) (concluding that former property owners "are not entitled to surplus proceeds under [Real Property Tax Law] article 11") or under color of other New York state or local laws. That is the wrong this case would remedy.

6. This action seeks to certify a plaintiff class of New York property owners and those with an ownership interest in property whose property interests and surplus proceeds were taken and to certify a defendant class of New York local governments who took their property and kept the surplus proceeds.

7. Plaintiffs and the proposed Plaintiff Class seek just compensation for the taking of their private property and restitution of excessive fines. Plaintiffs assert claims for violation of the Takings Clause of the Fifth Amendment to the U.S. Constitution prohibiting takings without just compensation under 42 U.S.C. §1983, violation of the Takings Clause, Article I, §7 of the New York Constitution, a declaratory judgment that Article 11 of New York's Real Property Tax Law, and more specifically Real Property Tax Law §1136 violates the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution, unjust enrichment, money had and received, an equitable accounting, and inverse condemnation, together with prejudgment interest, costs, and attorneys' fees.

JURISDICTION AND VENUE

8. This Court has subject matter jurisdiction of this action as the federal claims in this Complaint arise under the Fifth Amendment, Eighth Amendment, and Fourteenth Amendment to the United States Constitution and, as a result, jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1331.

9. This Court has supplemental jurisdiction over the legal and equitable claims in this Complaint arising under New York law pursuant to 28 U.S.C § 1367 since those claims arise out of a common nucleus of operative facts with the federal claims that are within the Court's original jurisdiction**.**

10. Venue of this action is properly laid in the United States District Court for the Northern District of New York, pursuant to 28 U.S.C. §§1391(b)(1) and (2), as, among other factors, Defendants Rensselaer County and the State of New York are within its geographic jurisdiction. A substantial part of the events that give rise to the claims occurred here, and certain property that is the subject of the action is located here, including the properties in Rensselaer County formerly owned by Daniel J. Merckx and Timothy S. Laraway, Jr.

THE PARTIES

A. PLAINTIFFS

Daniel J. Merckx, Administrator of the Estate of Ronald P. Merckx

11. Plaintiff Daniel J. Merckx is a resident of East Greenbush, NY ("Plaintiff Merckx"), and was duly appointed as the Administrator of the Estate of his late brother, Ronald P. Merckx ("Merckx Estate").

12. The Merckx Estate included the property located at 3 Pinewood Ave, East Greenbush, Rensselaer County, NY 12061 ("Merckx Property").

13. Rensselaer County, through its Chief Fiscal Officer, currently Mark Wojcik, foreclosed on the Merckx Property due to around $37,707 in taxes, fees, and/or penalties owed.

14. Ronald Merckx died on July 25, 2018. Rensselaer County then sold the Merckx Property for $80,000 on or around August 31, 2018.

15. Rather than return the approximately $42,293 in surplus proceeds to the Estate of Ronald P. Merckx, Rensselaer County retained the surplus proceeds.

16. Rensselaer Couty retained and distributed $42,293 in surplus proceeds pursuant to N.Y. Real Prop. Tax Law § 1136.

17. Rensselaer County offered no process for the Estate of Ronald Merckx to regain any of the surplus proceeds from the tax foreclosure sale of the Merckx Estate's former property.

18. To this day, Rensselaer County has not refunded the surplus proceeds to Plaintiff Merckx.

Timothy S. Laraway, Jr.

19. Plaintiff Timothy S. Laraway, Jr. is a resident of the Village of East Nassau, Town of Nassau, Rensselaer County, NY.

20. Mr. Laraway formerly owned the property located at 3135 U.S. Highway, Nassau, Rensselaer County, NY 12123 ("the Laraway Property") in the Town of Nassau and Rensselaer County.

21. Rensselaer County, through its Chief Fiscal Officer, currently Mark Wojcik, foreclosed on the Laraway Property due to around $8,810 in taxes, fees, and/or penalties owed to Rensselaer County and the Town of Nassau.

22. Rensselaer County then sold the Laraway Property for $29,000 on or about October 30, 2017.

23. Rather than return approximately $20,190 in surplus proceeds to Mr. Laraway, Rensselaer County retained the surplus proceeds.

24. Rensselaer County retained and distributed approximately $20,190 in surplus proceeds pursuant to N.Y. Real Prop. Tax Law § 1136.

25. Rensselaer County offered no process for Mr. Laraway to regain any of the surplus proceeds from the tax foreclosure sale of his former property.

26. To this day, Rensselaer County has not refunded the surplus proceeds to Mr. Laraway.

Barbara Snashell

27. Plaintiff Barbara Snashell, formerly Barbara Cortright, is a resident of Springville, NY.

28. Plaintiff Barbara Snashell and her late husband formerly owned 9152 Route 219, West Valley, NY 14171 in Cattaraugus County ("the Snashell Property"). When her husband died, she became sole owner of the property.

29. Cattaraugus County, through its Treasurer Matthew J. Keller, obtained a judgment of foreclosure on the Snashell Property due to around $11,846 in taxes, fees, and/or penalties owed and conveyed the property from Ms. Snashell to Cattaraugus County.

30. In 2021, Cattaraugus County then sold the Snashell Property for $60,400.

31. Rather than return approximately $48,554 in surplus proceeds to Mrs. Snashell, Cattaraugus County retained all proceeds of the sale.

32. Cattaraugus County retained and distributed $48,554 in surplus proceeds pursuant to N.Y. Real Prop. Tax Law § 1136.

33. Cattaraugus County offered no process for Mrs. Snashell to regain any of the surplus proceeds from the tax foreclosure sale of her former property.

34. To this day, Cattaraugus County has not refunded the surplus proceeds to Mrs. Snashell.

Chignard Noelizaire

35. Plaintiff Chignard Noelizaire is a resident of Newburgh, NY.

36. Mr. Noelizaire formerly owned the property at 185 Ball Street, Port Jervis, NY 12771 ("the Noelizaire Property").

37. Acting by and through its City Clerk-Treasurer, currently Defendant Laura Quick, in her official capacity, the City of Port Jervis foreclosed on the Noelizaire Property, via warrant for the collection of City tax issued by the Common Council of the City, due to around $2,563 in taxes, fees, and/or penalties owed and conveyed the Noelizaire Property to the City of Port Jervis.

38. The City of Port Jervis then sold the Noelizaire Property to a third party for $26,500.

39. Rather than return the approximately $23,937 of surplus proceeds to Mr. Noelizaire, the City of Port Jervis retained the surplus proceeds.

40. The City of Port Jervis retained and distributed the $23,937 of surplus proceeds pursuant to Article VI of the City Charter of Port Jervis.

41. The City of Port Jervis offered no process for Mr. Noelizaire to regain any of the surplus proceeds from the tax foreclosure sale of his former property.

42. To this day, the City of Port Jervis has not refunded the surplus proceeds to Mr. Noelizaire.

B. DEFENDANTS

43. Defendant Rensselaer County is a political subdivision of the State of New York.

44. Defendant Mark Wojcik, named in his official capacity as Chief Fiscal Officer of Rensselaer County, is the "enforcing officer" for Rensselaer County under New York Real Property Tax Law, § 1102.

45. Defendant Cattaraugus County is a political subdivision of the State of New York.

46. Defendant Matthew J. Keller, named in his official capacity as Treasurer of Cattaraugus County, is the "enforcing officer" for Cattaraugus County under New York Real Property Tax Law, § 1102.

47. Defendant City of Port Jervis is a political subdivision of the State of New York, and is located in Orange County, New York.

48. Defendant Laura Quick is the current City Clerk-Treasurer of the City of Port Jervis and is the enforcing officer of property tax collections in the City of Port Jervis.

49. Defendant the State of New York is one of the 50 U.S. States. The State of New York maintained, enforced, and permitted New York counties and other local governments, including without limitation Local Government Defendants and Defendant Class, to enforce one or more statutes or local laws to retain and distribute surplus proceeds of tax foreclosures in violation of the United States and New York constitutions.

50. Defendants Cattaraugus County and Rensselaer County follow the same process regarding the retention and distribution of surplus proceeds that N.Y. Real Prop. Tax Law § 1136 requires. The City of Port Jervis follows a process established in its City Charter regarding the retention and distribution of surplus proceeds.

51. Enforcing officers in local governments of the State of New York are authorized pursuant to the laws of the State of New York to enforce the payment and collection of property taxes in accordance with N.Y. Real Prop. Tax Law § 1136 or local law. All Defendants are juridically related and a single resolution would be expeditious.

GENERAL ALLEGATIONS

52. From at least May 25, 2017 to the present ("the Class Period"), Local Government Defendants and members of Defendant Class sold real property in which Plaintiffs and members of Plaintiff Class had an interest, for non-payment of taxes or other local government charges.

Local Government Defendants and members of Defendant Class received as proceeds of the sales a greater sum than the debt owed to the tax authorities, and offered no opportunity for the taxpayer to recover the excess value.

53. In some cases, during the Class Period, Local Government Defendants and members of Defendant Class seized and retained ownership of real property in which Plaintiffs and members of Plaintiff Class had an interest, for non-payment of taxes or other local government charges, and received greater value than the debt owed to the tax authorities, and offered no opportunity for the taxpayer to recover the excess value.

54. Until the U.S. Supreme Court's decision in *Tyler*, Plaintiffs and Plaintiff Class were not on notice, could not have been on notice, and should not, in justice and equity, be deemed to have been on notice of the existence of the claims asserted herein.

55. The ongoing failure of Local Government Defendants and Defendant Class to refund the surplus proceeds of foreclosure sales to Plaintiffs and Plaintiff Class: (1) constitutes a continuing violation of the U.S. and New York constitutions, and (2) constitutes continuing wrongful conduct giving rise to the other claims the Plaintiffs and Plaintiff Class assert herein.

56. With each passing day that Local Government Defendants and Defendant Class retain the surplus proceeds and do not refund the surplus proceeds to Plaintiffs and Plaintiff Class: (1) a new violation arises of the U.S. and New York constitutions, and (2) the other claims Plaintiffs' and Plaintiff Class assert herein also newly arise.

57. The Supreme Court of the United States has declared unconstitutional the practice of local government tax authorities retaining surplus proceeds of tax foreclosures and tax sales.

58. The Government may not "forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

59. To that end, on May 25, 2023, the United States Supreme Court held that the retention of surplus proceeds following the sale of a foreclosed-upon property constitutes a "classic taking in which the government directly appropriates private property for its own use." *Tyler v.*, 598 U.S. at 639. The Supreme Court explained that State law cannot "sidestep the Takings Clause by disavowing traditional property interests in assets it wishes to appropriate," *Id.* at 638.

60. New York's Real Property Tax Law, Chapter 50-a, Article 11 ("Article 11") establishes a procedure whereby Local Government Defendants may retain proceeds from the sale of foreclosed property in excess of taxes owed, in violation of the principle announced in *Tyler*.

61. Under N.Y. Real Prop. Tax Law § 1136[3], which is still on the books, the taxing entity takes possession of the foreclosed-upon property in fee simple, "and all persons . . . who may have had any right, title, interest, claim, lien or equity of redemption in or upon such parcel, shall be barred and forever foreclosed of all such right, title, interest, claim, lien or equity of redemption."

62. In other words, when an individual's property is foreclosed upon under this procedure, the individual loses all right to the property, including any property value in excess of the taxes owed by the individual to the taxing entity. *See, e.g.*, Hoge, 173 A.D.3d at 1732.

63. Certain taxing entities have opted not to implement the procedure set forth in Article 11. However, many of these entities enact and followed analogous local laws, procedures and practices whereby they seize and sell foreclosed-upon property and retain the proceeds of the sale in excess of taxes owed.

64. Both the Fifth Amendment to the United States Constitution and Article I, Section 7 of the New York Constitution declare the same prohibition *verbatim*: "Private property shall not be taken for public use without just compensation."

65. The New York and United States Constitutions also prohibit the imposition of excessive fines. The Eighth Amendment of the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed." Similarly, Article I, Section 5 of the New York Constitution provides: "Excessive bail shall not be required nor excessive fines imposed, nor shall cruel and unusual punishments be inflicted, nor shall witnesses be unreasonably detained."

66. The Fourteenth Amendment to the United States Constitution makes the Fifth and Eighth Amendments of the United States Constitution applicable to States. It provides, in pertinent part, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

CLASS ACTION ALLEGATIONS

67. Plaintiffs respectfully request that this Honorable Court enter an Order certifying this action as a Class Action on behalf of a proposed Plaintiff Class and against a proposed Defendant Class.

Plaintiff Class

68. Plaintiffs request that this Court enter an Order certifying this action as a Plaintiff Class Action or Plan pursuant to Rule 23(a), 23(b)(1)(A), (B), 23(b)(2), and 23(b)(3). Plaintiffs request the Court to certify a Plaintiff Class defined as follows:

> All Persons and entities, their heirs and successors, who owned or had an ownership interest in real property that a Local Government Defendant or

> member of Defendant Class seized to satisfy unpaid real estate taxes and associated charges and that was subsequently: (1) sold during the Class Period for more than the amount necessary to satisfy such taxes and associated charges and the local government tax authority offered no opportunity for the taxpayer to recover the surplus proceeds; or (2) retained by the local government tax authority during the Class Period and the value of the retained property exceeds such taxes and associated charges and the local government entity offered no opportunity for the taxpayer to recover the excess value.

Excluded from Plaintiff Class are Defendants, the presiding Judge, and Court staff assigned to this case, the U.S. Department of Treasury, and the U.S. Internal Revenue Service. Plaintiffs reserve the right to modify or amend Plaintiff Class Definition, as appropriate, during the course of this litigation. Plaintiffs further request that the Court appoint counsel for the named Plaintiffs as Plaintiff Class counsel.

69. The members of Plaintiff Class are so numerous that their individual joinder is impracticable. On information and belief, members of Plaintiff Class number at least in the thousands. The precise number of members of each of Plaintiff Class and their current addresses are presently unknown to Plaintiffs but may be ascertained from County and other local government property and tax records. Class members may be notified of the pendency of this action by mail, email, text, Internet postings, and/or publication.

70. Common questions of law and fact exist as to all members of Plaintiff Class and predominate over questions affecting only individual Class members. Such common questions of law or fact include:

a) Whether Local Government Defendants and Defendant Class have been unjustly enriched by retaining Surplus Proceeds following the sale of foreclosed-upon properties;

b) Whether Local Government Defendants and Defendant Class committed a taking of Plaintiffs' and the Plaintiff Class Members' properties without just compensation in violation of the Fifth Amendment of the United States Constitution;

c) Whether Local Government Defendants and Defendant Class's taking of Plaintiffs' and Plaintiff Class members' properties for public use was without "compensation first assessed and tendered" in violation Article I, Section 7 of the New York Constitution;

d) Whether Local Government Defendants and Defendant Class imposed an excessive fine on Plaintiffs and Plaintiff Class in violation of the Eighth Amendment to the United States Constitution;

e) Whether Local Government Defendants and Defendant Class imposed an excessive fine on Plaintiffs and Plaintiff Class in violation of Article I, Section 5 of the New York State Constitution;

f) Whether N.Y. Real Prop. Tax Law § 1136[2](d), on its face or as applied violates the Fifth, Eighth, or Fourteenth Amendments to the U.S. Constitution and should be declared unconstitutional;

g) Whether local laws, procedures or practices on their face or as applied violate the Fifth, Eighth, or Fourteenth Amendments to the U.S. Constitution; and

h) Whether Local Government Defendants and Defendant Class are liable for inverse condemnation of Plaintiffs' and Plaintiff Class members' property.

71. Plaintiffs' claims are typical of the claims of the other members of Plaintiff Class, because, among other reasons, Plaintiffs and all Class Members of Plaintiff Class suffered the same type of injury, namely, each Local Government Defendant or member of Defendant Class retained all surplus proceeds of the sale of their former properties and distributed the surplus proceeds pursuant to N.Y. Real Prop. Tax Law § 1136[2](d). Plaintiffs are adequate class representatives because their interests do not conflict with the interests of the other class members they seek to represent. Moreover, they have retained counsel competent and experienced in class action litigation, including tax surplus takings litigation specifically, and their counsel will prosecute this action vigorously. Plaintiffs and their counsel will fairly and adequately protect the interests of Plaintiff Class.

72. A class action is superior to any other available means for the fair and efficient adjudication of this controversy, and no unusual difficulties are likely to be encountered in the management of this class action. The damages or other financial detriment suffered by Plaintiffs and members of Plaintiff Class individually are relatively small compared to the burden and expense that would be required to separately litigate their claims against Defendants, so it would be uneconomical and impracticable for many Plaintiff Class members to individually seek redress for the wrongful conduct. Individualized litigation creates a potential for inconsistent or contradictory judgments and increases the delay and expense to all parties and the court system. By contrast, the class action device presents far fewer management difficulties and provides the benefits of a single adjudication, economies of scale, and comprehensive supervision by a single court.

Defendant Class

73. Plaintiffs also request the Court to certify this action as a defendant class action pursuant to Rule 23(a), 23(b)(1)(A),(B), 23(b)(2) and 23(b)(3), and to appoint counsel for Local Government Defendants as Defendant Class counsel.

74. Plaintiffs request certification of "Defendant Class" defined as follows:

> All local government tax authorities in New York that either: (1) sold real property for non-payment of taxes or other local government charges during the Class Period for a sum greater than the debt and associated charges owed to the tax authorities, and offered no opportunity for the taxpayer to recover the surplus proceeds; or (2) took ownership of and retained real property for non-payment of taxes or other local government charges during the Class Period worth more than the debt and associated charges owed to the tax authorities, and offered no opportunity for the taxpayer to recover the excess value.

Plaintiffs reserve the right to modify or amend the Defendant Class definition, as appropriate, during the course of this litigation.

75. The members of Defendant Class acted in a uniform manner pursuant to N.Y. Real Prop. Tax Law § 1136[2](d) and other state and local laws in New York when they retained surplus proceeds and offered no opportunity for the taxpayer to recover the excess value.

76. Individual joinder is impracticable compared to establishing a Defendant Class consisting of the numerous local governments. Prosecuting separate actions by or against the individual Defendant Class members could establish incompatible standards of conduct. Defendant Class members may be notified of the pendency of this action by mail, email, text, Internet postings, and/or publication.

77. Common questions of law and fact exist as to all members of Defendant Class and predominate over questions affecting only individual Defendant Class members. Such common questions of law or fact include:

a) Whether Local Government Defendants and Defendant Class have been unjustly enriched by retaining surplus proceeds following the sale of foreclosed upon properties;

b) Whether Local Government Defendants and Defendant Class committed a taking of Plaintiffs' and Plaintiff Class members' properties without just compensation in violation of the Fifth Amendment of the United States Constitution;

c) Whether Local Government Defendants' and members of Defendant Class's takings of Plaintiffs' and Plaintiff Class Members' properties for public use was without "compensation first assessed and tendered" in violation Article I, Section 7 of the New York Constitution;

d) Whether Local Government Defendants and Defendant Class imposed an excessive fine on Plaintiffs and Plaintiff Class Members in violation of the Eighth Amendment to the United States Constitution;

e) Whether Local Government Defendants and Defendant Class imposed an excessive fine on Plaintiffs and Plaintiff Class Members in violation of the New York State Constitution;

f) Whether N.Y. Real Prop. Tax Law § 1136[2](d), on its face or as applied by Local Government Defendants and Defendant Class violates the Fifth, Eighth, or Fourteenth Amendments to the U.S. Constitution;

g) Whether local laws, procedures or practices on their face or as applied by Local Government Defendants and Defendant Class violate the Fifth, Eighth, or Fourteenth Amendments to the U.S. Constitution; and

h) Whether Local Government Defendants and Defendant Class are liable for inverse condemnation.

78. Defendants' defenses are typical of the defenses of the other members of Defendant Class. Plaintiffs and all Class Members of Plaintiff Class suffered the same type of injury, namely, Defendants and each member of Defendant Class retained all surplus proceeds from the sale (or retention) of the members of the Plaintiffs' and Plaintiff Classes former properties and distributed the surplus proceeds pursuant to either: (1) N.Y. Real Prop. Tax Law § 1136[2](d); or (2) other state and local law, procedure or practice.

79. Defendants and each member of Defendant Class acted consistently and uniformly in retaining the surplus proceeds or value pursuant to either: (1) N.Y. Real Prop. Tax Law § 1136[2](d), which mandates a set of non-discretionary retention and distribution procedures that apply to surplus proceeds; or (2) other state or local law, procedures or practices that authorized local governments to retain and distribute surplus proceeds or value.

80. Defendants are adequate Defendant Class representatives because their interests do not conflict with the interests of Defendant Class Members they represent. Each County retains and distributes surplus proceeds from property foreclosed upon within that County. The distribution of the surplus proceeds remains within each County and does not conflict with distribution within other counties. Defendants share the same defenses regarding such distribution.

81. Members of the proposed Defendant Class are too numerous to be individually named. On information and belief, during the Class Period, several hundred local government entities in New York were authorized by New York state or local law to levy and collect property taxes, foreclose on real estate to collect back taxes and associated charges and retain surplus proceeds or value.

82. It would be impracticable and an undue burden on the courts, Plaintiffs and Plaintiff Class, and members of Defendant Class to litigate and try several thousand individual actions against every local government tax authority in New York, rendering it uneconomical for Plaintiffs and Plaintiff Class to obtain just compensation for the unconstitutional takings that Local Government Defendants and the members of Defendant Class have perpetrated.

83. A class action is superior to any other available means for the fair and efficient adjudication of this controversy, and no unusual difficulties are likely to be encountered in the management of this class action.

84. Individualized litigation creates a potential for inconsistent or contradictory judgments and increases the delay and expense to all parties and the court system. By contrast, the Class action device presents far fewer management difficulties and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single court.

COUNT I

(AGAINST LOCAL GOVERNMENT DEFENDANTS AND DEFENDANT CLASS)

VIOLATION OF THE UNITED STATES CONSTITUTION'S FIFTH AMENDMENT PROHIBITION ON TAKINGS WITHOUT JUST COMPENSATION, 42 U.S.C. § 1983

85. Plaintiffs reallege all previous paragraphs as if fully set forth herein.

86. Known colloquially and jurisprudentially as the "Takings Clause" of the United States Constitution, a portion of the Fifth Amendment to the United States Constitution provides that "nor shall private property be taken for public use, without just compensation." U.S. Const., Amend. V.

87. The Takings Clause applies to all States of the United States of America through the Fourteenth Amendment, and by extension their subdivisions, instrumentalities, and departments, including Local Government Defendants and Defendant Class.

88. The purpose of the Takings Clause is to prevent the government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.

89. Local Government Defendants' retention of the surplus proceeds amounts to a taking of private property for public use without just compensation. *See Tyler*, 598 U.S. at 639.

90. A legislature cannot constitutionally enact a law that effects a taking of private property without just compensation. *See, e.g.*, *Tyler*, 598 U.S. at 638.

91. Plaintiffs and members of the Plaintiff Class had a cognizable property interest in their respective parcels and have a cognizable property interest in the surplus proceeds that the Fifth Amendment to the United States Constitution and its Takings Clause protects.

92. Defendants physically took Plaintiffs' and Plaintiff Class members' real property and physically took, now possess, and refuse to tender and deliver to Plaintiffs and Plaintiff Class members their surplus proceeds or value.

93. Defendants have expended or will expend the surplus proceeds from the auction or sale of real property belonging to Plaintiffs and Plaintiff Class members. These proceeds have not been used for a valid public use.

94. In the alternative, some or all of the proceeds have been used for a valid public use, but Plaintiffs and members of the Plaintiff Class have not received just compensation and Plaintiffs and members of the Plaintiff Class have been and would be forced to bear public burdens alone which, in all fairness and justice, the public as a whole should bear.

95. Defendants did not offer to pay just compensation before, during, or after taking the property of Plaintiffs and the Plaintiff Class.

96. Defendants have not provided Plaintiff or the Plaintiff Class members adequate procedure to seek just compensation for the taking of their surplus proceeds and have therefore violated Plaintiffs' and the Plaintiff Class members' rights to due process that the Fifth Amendment guarantees. *Cf. id.* (finding that plaintiffs adequately alleged that no process was provided to enable foreclosed-upon landowners to recover surplus equity).

97. Plaintiffs' and Plaintiff Class members' claims asserted herein before this Court are mature and ripe.

98. Plaintiffs and Plaintiff Class members have suffered damages. The Takings Clause requires Defendants to pay Plaintiffs and Plaintiff Class members money damages that constitute just compensation for the taking of their private property.

99. Plaintiffs' and Plaintiff Class members' constitutional right to just compensation for government seizure of their property for public purposes is a fundamental right deeply rooted in this country's legal traditions and central to the concept of ordered liberty. Defendants conduct has deprived Plaintiff and Plaintiff Class members of that fundamental right.

100. It is the policy, custom and practice of Local Government Defendants and Defendant Class to use for public purposes and not deliver or tender to Plaintiffs or Plaintiff Class members their property that Local Government Defendants and Defendant Class took.

101. Local Government Defendants and Defendant Class acted under color of state law.

102. While acting under color of state law, Local Government Defendants and Defendant Class deprived Plaintiffs and Plaintiff Class of a federal constitutional right and committed a taking from them without just compensation.

103. Local Government Defendants and Defendant Class are persons under 42 U.S.C. § 1983.

104. Local Government Defendants' and Defendant Class's actions have caused Plaintiffs and Plaintiff Class to suffer material damages pursuant to 42 U.S.C. § 1983. Local Government Defendants and Defendant Class are liable to pay Plaintiffs and Plaintiff Class members money damages for their injuries suffered.

COUNT II

(AGAINST LOCAL GOVERNMENT DEFENDANTS AND DEFENDANT CLASS)

VIOLATION OF THE TAKINGS CLAUSE, ARTICLE I § 7, OF THE NEW YORK CONSTITUTION

105. Plaintiffs reallege all previous paragraphs as if fully set forth herein.

106. Article I, Section 7 of the New York Constitution provides that "Private property shall not be taken for public use without just compensation."

107. The guarantees of Article I, Section 7 of the New York Constitution are generally coextensive with the Takings Clause of the United States Constitution.

108. For the same reasons why Defendants' actions violate the Takings Clause of the United States Constitution, their conduct also violates Article I, Section 7 of the New York Constitution.

109. The Local Government Defendants' takings of Plaintiffs' and the Plaintiff Class members' property without just compensation injured Plaintiff and the Plaintiff Class members, and they are entitled to just compensation and other relief.

COUNT III

(AGAINST LOCAL GOVERNMENT DEFENDANTS AND DEFENDANT CLASS)

VIOLATION OF THE UNITED STATES CONSTITUTION'S EIGHTH AMENDMENT PROHIBITION OF EXCESSIVE FINES, 42 U.S.C. § 1983

110. Plaintiffs reallege all previous paragraphs as if fully set forth herein.

111. The Eight Amendment to the United States Constitution prohibits the imposition of excessive fines and applies to the states through the Fourteenth Amendment. U.S. Const. amends. VIII, XIV.

112. The determination of whether a financial penalty is excessive under the Eighth Amendment is a two-step inquiry: (1) Is the payment or forfeiture at issue a "fine"?, meaning that it is punitive in nature and not purely "remedial"; and (2) Is the fine "grossly disproportional" to the underlying offense?

113. A fine may be punitive where it imposes an economic penalty on the person for that person's actions and seeks to deter future wrongdoing. By contrast, a fine is remedial if it is intended only to compensate the government for lost revenue.

114. The court must balance four factors to determine if a fine is grossly disproportional to the underlying offense: (1) the essence of the underlying offense; (2) whether the Plaintiffs fit into the class of persons for whom the statute was principally designed; (3) the maximum sentence and fine that could have been imposed; and (4) the nature of the harm caused by the Plaintiffs' conduct. Ultimately, whether a fine is excessive involves solely a proportionality determination.

115. Plaintiffs and Plaintiff Class assert a viable claim for violation of the Excessive Fines Clause where the Local Government Defendants and Defendant Class seized and retained plaintiffs' surplus equity through *in rem* foreclosure proceedings for non-payment of property taxes.

116. Confiscating the entire value of Plaintiffs property and property of Plaintiff Class, including the excess or surplus equity in Plaintiffs' property, because of non-payment of amounts of real estate taxes less than the sale price of the properties, or less than the value of properties that

Local Government Defendants and Defendant Class retained and did not sell, is an excessive fine under the Eighth Amendment to the United States Constitution.

117. Plaintiffs and Plaintiff Class have suffered damages in an amount to be proven at trial, which damages include the surplus proceeds.

118. The unlawful excessive fines under the United States Constitution have injured and damaged Plaintiffs and the Plaintiff Class and they are entitled to relief as a result.

COUNT IV

(AGAINST LOCAL GOVERNMENT DEFENDANTS AND DEFENDANT CLASS)

VIOLATION OF NEW YORK'S PROHIBITION ON EXCESSIVE FINES, ARTICLE I §5 OF THE NEW YORK CONSTITUTION

119. Plaintiffs reallege all previous paragraphs as if fully set forth herein.

120. Article I, Section 5 of the New York State Constitution prohibits the imposition of excessive fines.

121. New York's Excessive Fines Clause, N.Y. Const. Article I § 5, requires the same analysis as the federal clause and provides no greater protection. *Grinberg v. Safir*, 694 N.Y.S.2d 316, 326-27 (1999); *see also* Dorce, 608 F. Supp. 3d at 143-44.

122. For the same reasons Defendants' actions violate the Excessive Fines Clause of the United States Constitution, their conduct also violates Article I, Section 5 of the New York State Constitution.

123. Plaintiffs and those similarly situated have suffered damages in an amount to be proven at trial, which damages include the surplus proceeds.

COUNT V

(AGAINST DEFENDANT STATE OF NEW YORK)

DECLARATORY JUDGMENT THAT N.Y. REAL PROPERTY TAX LAW § 1136[2](D) VIOLATES THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

124. Plaintiffs reallege all previous paragraphs as if fully set forth herein.

125. In material part, the Declaratory Judgments Act, 28 U.S.C. § 2201 (a), provides that "[i]n a case of actual controversy within its jurisdiction … any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

126. On its face, or as applied, today or in the past, N.Y. Real Prop. Tax Law § 1136[2](d) violates the Fifth, Eighth and Fourteenth Amendments to the U.S. Constitution.

COUNT VI

(AGAINST LOCAL GOVERNMENT DEFENDANTS AND DEFENDANT CLASS)

UNJUST ENRICHMENT

127. Plaintiffs reallege all previous paragraphs as if fully set forth herein.

128. Local Government Defendants and Defendant Class have been enriched at Plaintiffs' and Plaintiff Class's expense.

129. It is against equity and good conscience to permit Local Government Defendants and Defendant Class to retain the surplus proceeds.

130. Though Local Government Defendants and Defendant Class have not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from Local Government Defendants and Defendant Class to Plaintiffs and Plaintiff Class.

131. Local Government Defendants and Defendant Class have received money or value to which they are not entitled.

132. Local Government Defendants and Defendant Class were enriched when they collected the surplus proceeds.

133. Local Government Defendants and Defendant Class are not entitled to the surplus proceeds because Plaintiffs and Plaintiff Class are "entitled to the surplus in excess of the debt owed" to Local Government Defendants and Defendant Class. *Tyler*, 598 U.S. at 642.

134. Plaintiffs and Plaintiff Class, by losing property to the Local Government Defendants and Defendant Class to fulfill a tax debt of a lesser value, have made a greater contribution to Local Government Defendants and Defendant Class than they owed. *Cf. id*. It is therefore against equity and good conscience to permit Local Government Defendants and Defendant Class to retain the surplus proceeds.

135. For the foregoing reasons, Plaintiffs and Plaintiff Class are owed restitution in the amount of the surplus proceeds collected by the Local Government Defendants and Defendant Class.

COUNT VII

(AGAINST LOCAL GOVERNMENT DEFENDANTS AND DEFENDANT CLASS)

MONEY HAD AND RECEIVED

136. Plaintiffs reallege all previous paragraphs as if fully set forth herein.

137. Local Government Defendants and Defendant Class received money belonging to Plaintiffs and Plaintiff Class.

138. Local Government Defendants and Defendant Class benefitted from receipt of the money.

139. Under principles of equity and good conscience, Local Government Defendants and Defendant Class should not be permitted to keep the money.

140. Local Government Defendants and Defendant Class received money belonging to Plaintiffs and Plaintiff Class when it collected the surplus proceeds because Plaintiffs and Plaintiff Class are "entitled to the surplus in excess of the debt owed" to Local Government Defendants and Defendant Class. *Tyler*, 598 U.S. at 642.

141. Plaintiffs and Plaintiff Class, by losing property to the Local Government Defendants and Defendant Class to fulfill a tax debt of a lesser value, have made a greater contribution to Local Government Defendants and Defendant Class than they owed. *Cf. id*. It is therefore against equity and good conscience to permit Local Government Defendants and Defendant Class to retain the surplus proceeds.

142. For the foregoing reasons, Plaintiffs and Plaintiff Class are owed restitution in the amount of the surplus proceeds collected by the Local Government Defendants and Defendant Class.

COUNT VIII

(AGAINST LOCAL GOVERNMENT DEFENDANTS AND DEFENDANT CLASS)

EQUITABLE ACCOUNTING

143. Plaintiffs reallege all previous paragraphs as if fully set forth herein.

144. "An equitable accounting involves a remedy designed to require a person in possession of financial records to produce them, demonstrate how money was expended[,] and return pilfered funds in his or her possession." *Metro. Bank & Trust Co. v. Lopez*, 137 N.Y.S.3d 319, 322, 189 A.D.3d 443, 446 (2020) (quotation omitted).

145. Local Government Defendants and Defendant Class as public bodies had a special, fiduciary, or legal relationship to Plaintiffs and Plaintiff Class as taxpayers, citizens, residents, voters, owners of private property within Local Government Defendants' jurisdiction, and members of the body politic. That relationship gave rise to an obligation for Local Government Defendants and Defendant Class to husband Plaintiffs' and Plaintiff Class's property and the proceeds of the sale of that property, and a legal obligation to account to Plaintiffs and Plaintiff Class for the fate of Plaintiffs' and Plaintiff Class's property and the proceeds of sale, for the payment of taxes and associated charges from those proceeds and the amount of any surplus proceeds or value.

146. Through the power of the state and its political subdivisions, Plaintiffs' and Plaintiff Class's money or property was entrusted to Local Government Defendants and Defendant Class, voluntarily or involuntarily, imposing the burden of accounting.

147. There is no adequate remedy at law.

148. There is no justification to impose a demand requirement in the circumstances of this action. In any event, any such demand or refusal requirement is moot or would be futile insofar as Local Government Defendants and Defendant Class have already failed or refused to turn over the surplus proceeds, or spent them, or included them in their budgets as revenue, or stood on their purported taxation authority prior to the Supreme Court's decision in *Tyler,* and even after that decision have failed to reimburse Plaintiffs their surplus proceeds or value. Moreover, this action constitutes and should be deemed to constitute a satisfactory demand in itself, *nunc pro tunc*, to any date by which such demand may be required.

149. When foreclosing on the property, Local Government Defendants and Defendant Class had a burden of accounting to demonstrate compliance with Article 11 or other state or local law, procedure or practice.

150. Sometimes New York counties act as tax collectors for towns within the counties and allocate tax foreclosure sale proceeds between and among various local tax authorities. Because Local Government Defendants and Defendant Class, not Plaintiffs or Plaintiff Class, are in possession of the relevant financial records, Plaintiffs and Plaintiff Class cannot ascertain what portion of the outstanding taxes and associated charges that led to foreclosure of the Plaintiffs' and Plaintiff Class's Properties was due to the tax collecting entity of Local Government Defendants and members of Defendant Class and what portion was due to other local government tax authorities.

151. Similarly, because Local Government Defendants and Defendant Class, not Plaintiffs or Plaintiff Class, are in possession of the relevant financial records, and because N.Y. Real Prop. Tax Law § 1136[2](d) and other state or local laws, procedures and practices purport to allow Local Government Defendants and Defendant Class to choose how to distribute collected surplus proceeds, Plaintiffs and Plaintiff Class cannot ascertain how the surplus proceeds were distributed.

152. Therefore, absent an accounting, a remedy at law would be insufficient to ensure that Plaintiffs and Plaintiff Class are returned the correct amount of proceeds from the correct entities.

153. For the foregoing reasons, Local Government Defendants and Defendant Class must produce financial records related to the collection and spending of surplus proceeds or value

in order to ascertain what entities owe what portion of the surplus proceeds to the Plaintiffs and Plaintiff Class.

COUNT IX

(AGAINST LOCAL GOVERNMENT DEFENDANTS AND DEFENDANT CLASS)

INVERSE CONDEMNATION

154. Plaintiffs reallege all previous paragraphs as if fully set forth herein.

155. Local Government Defendants and members of Defendant Class:

a. Possess the power of eminent domain;

b. Intruded onto the private property of Plaintiffs and Plaintiff Class;

c. Intruded in a manner so serious as to amount to a compensable taking under the New York Constitution and U.S. Constitution; and

d. Have not exercised eminent domain power or compensated Plaintiffs or members of Plaintiff Class.

156. Plaintiffs and Plaintiff Class have suffered damages in an amount to be proven at trial, which damages include the surplus proceeds or value.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs demand that:

a) The Court determine this action may be maintained as a plaintiff class action pursuant to Federal Rule of Civil Procedure Rule 23(a), 23(b)(1)(A),(B), 23(b)(2), and 23(b)(3) with Plaintiffs being designated as class representatives, and appointing Plaintiffs' counsel as counsel to Plaintiff Class;

b) The Court determine this action may be maintained as a defendant class action pursuant to Federal Rule of Civil Procedure Rule 23(a), 23(b)(1)(A),(B), 23(b)(2), and 23(b)(3) with Local Government Defendants being designated as class representatives, and appointing Local Government Defendants' counsel as counsel to Defendant Class;

c) The Court issue a declaratory judgment declaring and adjudging that N.Y. Real Prop. Tax Law § 1136[2](d) violates the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution;

d) The Court issue a declaratory judgment declaring and adjudging that Local Government Defendants' and Defendant Class's use and taking of the surplus proceeds constitute a taking of private property for public use without just compensation in violation of the Fifth Amendment to the United States and New York Constitutions;

e) The Court find and declare that Local Government Defendants' and Defendant Class members' taking of Plaintiffs' and Plaintiff Class Members' property was for no valid public use and violates the United States and New York Constitutions;

f) The Court award Plaintiffs and Plaintiff Class compensatory damages in an amount to be determined at trial;

g) The Court award equitable restitution to Plaintiffs and Plaintiff Class on account of the unjust enrichment of Local Government Defendants and Defendant Class;

h) The Court order Local Government Defendants and Defendant Class to provide an equitable accounting of their takings of the surplus proceeds of the sale of properties formerly owned by Plaintiffs and Plaintiff Class, including, without limitation, cash proceeds and the value of property taken and retained by Local Government Defendants and Defendant Class;

i) The Court order Local Government Defendants and Defendant Class to provide just compensation for inverse condemnation of the private property of Plaintiffs and Plaintiff Class;

j) The Court award Plaintiffs and Plaintiff Class prejudgment and post-judgment interest, as permitted by law;

k) The Court award Plaintiffs and Plaintiff Class their costs, reasonable litigation expenses, and reasonable attorneys' fees, as permitted by law and pursuant to 42 U.S.C. § 1988 and N.Y. C.P.L.R. 909 (McKinney 2011); and

l) The Court grant such other and further legal, declaratory, and equitable, relief as the Court may deem just and proper.

Demand for Jury Trial

Plaintiffs and the proposed Plaintiff Class demand trial by jury of all issues so triable.

Dated: October 30, 2023

/s/ George F. Carpinello
George F. Carpinello
Jenna Smith
BOIES SCHILLER FLEXNER LLP
30 South Pearl Street, 11th Floor
Albany, NY 12207
Tel: (518) 434-0600
Fax: (518) 434-0665
gcarpinello@bsfllp.com
jsmith@bsfllp.com

Gregory P. Hansel
Shana M. Solomon
Elizabeth F. Quinby
Michael D. Hanify
Kat Mail
PRETI FLAHERTY BELIVEAU &
PACHIOS, CHARTERED, LLP
One City Center
P.O. Box 9546
Portland, ME 04112
(207)791-3000
ghansel@preti.com
ssolomon@preti.com
equinby@preti.com
mhanify@preti.com
kmail@preti.com

David H. Fink
Nathan J. Fink
FINK BRESSACK
38500 Woodward Avenue Suite 350
Bloomfield Hills, MI 48304
(248) 971-2500
dfink@finkbressack.com
nfink@finkbressack.com

Joseph C. Kohn
Zahra R. Dean
Elias A. Kohn
KOHN SWIFT & GRAF, P.C.
1600 Market Street, Suite 2500
Philadelphia, PA 19103
(215) 238-1700
jkohn@kohnswift.com
zdean@kohnswift.com
ekohn@kohnswift.com

Counsel for Plaintiffs and the Proposed Plaintiff Class

JS 44 (Rev. 08/18)

CIVIL COVER SHEET

1:23-cv-1354

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

I. (a) PLAINTIFFS

Daniel J. Mercx, Timothy S. Laraway, Jr., Barbara Snashell, and Chignard Noelizaire, individually and on behalf of all others similarly situated

(b) County of Residence of First Listed Plaintiff: Rensselaer County, NY
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys *(Firm Name, Address, and Telephone Number)*

Boies Schiller Flexner LLP, 30 South Pearl Street, Albany, NY 12207, (518) 434-0600

DEFENDANTS

RENSSELAER COUNTY, by and through MARK WOJCIK, CATTARAUGUS COUNTY, by and through MATTHEW J. KELLER, and CITY OF PORT JERVIS, by and through LAURA QUICK individually and on behalf of all others similarly situated; and the STATE OF NEW YORK,

County of Residence of First Listed Defendant: Rensselaer County, NY
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ❒ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question *(U.S. Government Not a Party)*
- ❒ 2 U.S. Government Defendant
- ❒ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*

(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	❒ 1	❒ 1	Incorporated *or* Principal Place of Business In This State	❒ 4	❒ 4
Citizen of Another State	❒ 2	❒ 2	Incorporated *and* Principal Place of Business In Another State	❒ 5	❒ 5
Citizen or Subject of a Foreign Country	❒ 3	❒ 3	Foreign Nation	❒ 6	❒ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

Click here for: Nature of Suit Code Descriptions.

CONTRACT
- ❒ 110 Insurance
- ❒ 120 Marine
- ❒ 130 Miller Act
- ❒ 140 Negotiable Instrument
- ❒ 150 Recovery of Overpayment & Enforcement of Judgment
- ❒ 151 Medicare Act
- ❒ 152 Recovery of Defaulted Student Loans (Excludes Veterans)
- ❒ 153 Recovery of Overpayment of Veteran's Benefits
- ❒ 160 Stockholders' Suits
- ❒ 190 Other Contract
- ❒ 195 Contract Product Liability
- ❒ 196 Franchise

REAL PROPERTY
- ❒ 210 Land Condemnation
- ❒ 220 Foreclosure
- ❒ 230 Rent Lease & Ejectment
- ❒ 240 Torts to Land
- ❒ 245 Tort Product Liability
- ❒ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ❒ 310 Airplane
- ❒ 315 Airplane Product Liability
- ❒ 320 Assault, Libel & Slander
- ❒ 330 Federal Employers' Liability
- ❒ 340 Marine
- ❒ 345 Marine Product Liability
- ❒ 350 Motor Vehicle
- ❒ 355 Motor Vehicle Product Liability
- ❒ 360 Other Personal Injury
- ❒ 362 Personal Injury - Medical Malpractice

PERSONAL INJURY
- ❒ 365 Personal Injury - Product Liability
- ❒ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ❒ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ❒ 370 Other Fraud
- ❒ 371 Truth in Lending
- ❒ 380 Other Personal Property Damage
- ❒ 385 Property Damage Product Liability

CIVIL RIGHTS
- ☒ 440 Other Civil Rights
- ❒ 441 Voting
- ❒ 442 Employment
- ❒ 443 Housing/ Accommodations
- ❒ 445 Amer. w/Disabilities - Employment
- ❒ 446 Amer. w/Disabilities - Other
- ❒ 448 Education

PRISONER PETITIONS

Habeas Corpus:
- ❒ 463 Alien Detainee
- ❒ 510 Motions to Vacate Sentence
- ❒ 530 General
- ❒ 535 Death Penalty

Other:
- ❒ 540 Mandamus & Other
- ❒ 550 Civil Rights
- ❒ 555 Prison Condition
- ❒ 560 Civil Detainee - Conditions of Confinement

FORFEITURE/PENALTY
- ❒ 625 Drug Related Seizure of Property 21 USC 881
- ❒ 690 Other

LABOR
- ❒ 710 Fair Labor Standards Act
- ❒ 720 Labor/Management Relations
- ❒ 740 Railway Labor Act
- ❒ 751 Family and Medical Leave Act
- ❒ 790 Other Labor Litigation
- ❒ 791 Employee Retirement Income Security Act

IMMIGRATION
- ❒ 462 Naturalization Application
- ❒ 465 Other Immigration Actions

BANKRUPTCY
- ❒ 422 Appeal 28 USC 158
- ❒ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ❒ 820 Copyrights
- ❒ 830 Patent
- ❒ 835 Patent - Abbreviated New Drug Application
- ❒ 840 Trademark

SOCIAL SECURITY
- ❒ 861 HIA (1395ff)
- ❒ 862 Black Lung (923)
- ❒ 863 DIWC/DIWW (405(g))
- ❒ 864 SSID Title XVI
- ❒ 865 RSI (405(g))

FEDERAL TAX SUITS
- ❒ 870 Taxes (U.S. Plaintiff or Defendant)
- ❒ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ❒ 375 False Claims Act
- ❒ 376 Qui Tam (31 USC 3729(a))
- ❒ 400 State Reapportionment
- ❒ 410 Antitrust
- ❒ 430 Banks and Banking
- ❒ 450 Commerce
- ❒ 460 Deportation
- ❒ 470 Racketeer Influenced and Corrupt Organizations
- ❒ 480 Consumer Credit
- ❒ 485 Telephone Consumer Protection Act
- ❒ 490 Cable/Sat TV
- ❒ 850 Securities/Commodities/ Exchange
- ❒ 890 Other Statutory Actions
- ❒ 891 Agricultural Acts
- ❒ 893 Environmental Matters
- ❒ 895 Freedom of Information Act
- ❒ 896 Arbitration
- ❒ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ❒ 950 Constitutionality of State Statutes

V. ORIGIN *(Place an "X" in One Box Only)*

- ☒ 1 Original Proceeding
- ❒ 2 Removed from State Court
- ❒ 3 Remanded from Appellate Court
- ❒ 4 Reinstated or Reopened
- ❒ 5 Transferred from Another District *(specify)*
- ❒ 6 Multidistrict Litigation - Transfer
- ❒ 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing ***(Do not cite jurisdictional statutes unless diversity)***:
42 U.S.C. Section 1983

Brief description of cause:
Defendants and Defendant Class engaged in unjust enrichment by retaining surplus from tax foreclosures.

VII. REQUESTED IN COMPLAINT:

☒ CHECK IF THIS IS A **CLASS ACTION** UNDER RULE 23, F.R.Cv.P.

DEMAND $ To be determined

CHECK YES only if demanded in complaint:
JURY DEMAND: ☒ Yes ❒ No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE ______ DOCKET NUMBER ______

DATE: 10/30/2023

SIGNATURE OF ATTORNEY OF RECORD: /s/ George F. Carpinello

FOR OFFICE USE ONLY

RECEIPT # ______ AMOUNT $402 APPLYING IFP ______ JUDGE MAD MAG. JUDGE CFH

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