



Strict Foreclosure: Can the State Take More Than is Owed?

May 5, 2023

Michael H. Traison

Chicago/NYC – 312.860.4230

Jennifer Hanna

NYC – 212.510.2255

Our November 2022 client alert^[1] discussed the Sixth Circuit Court of Appeals' decision, *Hall v. Meisner*, Case No. 21-1700 (6th Cir. Oct. 13, 2022), in which a Michigan county ("County") took title to a debtor's property, via strict foreclosure, in satisfaction of the debtor's accumulated property tax liabilities. The controversial aspect of this foreclosure, on which the Sixth Circuit focused its decision, was that the value of the property far exceeded the tax liabilities. Generating a Circuit split on the issue, the Sixth Circuit determined that the County's actions were a clear violation of the Takings Clause, as the strict foreclosure process left the debtor with no vehicle to recover their equity.

More recently, the United States Supreme Court heard oral argument on the same legal issue— mainly, whether the foreclosure sale of a property violates the Takings Clause where the surplus proceeds are not turned over to the debtor/homeowner. *Tyler v. Hennepin County*, Docket 22-166 (Sup. Ct. April 26, 2023). Recognizing the importance of this decision in not only vindicating the rights of homeowners, but in its resolution of the recently developed Circuit split, the Court allowed two hours for argument.

While a decision on the issue is not expected until late June, there were several noteworthy takeaways gleaned from the arguments presented. One of the most remarkable aspects of last week's oral argument was an apparent agreement, among both the liberal and conservative justices, that a violation of the Takings Clause may have occurred. Also of importance is the possibility that the Court's decision may turn on the understanding of tax foreclosures at the time of the Constitution's inception. Justice Elena Kagan, however, was adamant that a controlling precedent set by the past would be problematic. Still, the possibility that the Court employs an originalist approach is very likely, considering the discussions regarding 18th century "history and tradition." Given the Supreme Court's inherent authority of constitutional interpretation, this could have wide-ranging impacts in Takings Clause cases in unrelated contexts.

Like *Hall*, the arguments were focused on the Takings Clause of the Fifth Amendment and related issues such as determining when the violation arose, the appropriate time at which to value the property, and more generally, the level of protection afforded by the Takings Clause. Acknowledging that the Founding Fathers held the fundamental conviction that takings by the government are inconsistent with their proposed democracy, Chief Justice John G. Roberts, Jr. criticized the absurdity of allowing a government entity to take a property in satisfaction of a tax debt where the ratio of debt to property value was significantly small. Nevertheless, the import of the government's right to a tax foreclosure was not lost on the Chief Justice. Like any constitutionality question, the Chief Justice's insights are just the beginning of the Court's task of balancing the interests of the government in the redemption of its rights with the interest of homeowners in the protection of theirs.

Approximately 20 states have statutes like the one at issue, which permit the forfeiture of all proceeds in tax foreclosure situations. The Sixth Circuit already struck down Michigan's statute on that same issue in *Hall*. With just under half of the country employing similar statutory language, the decision in *Tyler* may do more than just resolve the recently created Circuit split—it has the capacity to change well-established foreclosure laws across the country.

As this is an area which is actively evolving, we will continue to monitor and provide further updates as appropriate.

Please note this is a general overview of developments in the law and does not constitute legal advice. Nothing herein creates an attorney-client relationship between the sender and recipient. If you have questions regarding real estate tax foreclosures, please contact Michael H. Traison (mtraison@cullenllp.com) at 312.860.4230.

Thank you to Jennifer Hanna, a Law Clerk pending New York bar admission, who assisted in the preparation of this alert.

Footnotes

[1] [Tax Forfeitures: The 6th Circuit Calls Strict Foreclosure State Sponsored Theft](#)

Practices

- Bankruptcy and Creditors' Rights

Attorneys

- Michael H. Traison