

TUCKER | HESTER, LLC

TAX SALES: ISSUES, PROBLEMS AND PROCEEDINGS **Can a Debtor Extend the One Year Redemption Period** **by Filing a Bankruptcy Petition?**

2006

A CLE Presentation

By: William J. Tucker*
Attorney at Law
bill@tucker-hester.com

Tucker | Hester, LLC
www.tucker-hester.com

Pennsylvania Center, Suite 100
429 North Pennsylvania Street
Indianapolis, IN 46204-1816

317.833.3030 | 317.833.3031 [fax]

*Also written by: Lara B. O'Dell

NOTICE

This is a CLE (continuing legal education) article, and it is not legal advice. This article was prepared for information purposes only for other lawyers only and deals with hypothetical or historical situations. The information is certainly not intended and should not in any way be construed as legal advice. Your receipt of this information does not in any way create an attorney-client relationship and cannot substitute for obtaining legal advice from an attorney. The author makes no claim about the correct interpretation of any law discussed in this article. The author does not make any claim about what the correct course of action might be in a particular matter. The author also does not make any claim that the information contained in this article is complete or correct. Finally, the information in this article may not be up to date. The contents of this article are not updated.

A purchaser at a tax sale receives a tax sale certificate. The owner of property purchased at a tax sale has a right of redemption. What happens to the property when the owner of property, sold at a tax sale, files for bankruptcy protection?

The redemption period limitations are provided by state law¹ and section 108 of the United States Bankruptcy Code² (the "Code").

The owner of property sold at a tax sale has the right to redeem the property for one year after the sale. If at any time during the redemption period the owner of the property files for protection under the Code, the redemption period continues, as provided for under state law, and is not tolled. However, if the redemption period would expire within sixty (60) days from the Order for Relief, the Code allows for the redemption period to extend for sixty (60) days from the Order for Relief.^{3 4}

For example:

1. property is sold at tax sale on January 1, 2006;
2. by state law the owner has until January 1, 2007 to redeem the property;
3. on July 1, 2006, the owner files for bankruptcy protection;
4. the filing of a bankruptcy petition does not change the deadline for redemption provided under state law; and
5. the Trustee still has until January 1, 2007 to redeem the property.

However, the result is different if the property is sold at tax sale on January 1, 2006, but the owner files for bankruptcy protection on December 1, 2006. Under Section 108(b) of the Code, the Trustee now has sixty (60) days from December 1, 2006 (or January 29, 2007) to redeem the property. If the owner waited until December 31, 2006 to file a bankruptcy petition, the Trustee would have until March 1, 2007 to redeem the property.

Because the owner (now Debtor) has an equitable interest in real property sold at tax sale, subject to executing his/her right of redemption, such right of redemption should be listed in the Debtor's schedules. The tax sale certificate holder should be listed as a secured creditor in the schedules, and therefore, receive notice of any bankruptcy proceeding. Once the petition is filed, the Debtor's right of redemption becomes property of the bankruptcy estate, and a Chapter 7 Trustee, a Chapter 11 or 13 Debtor acquires the right of redemption.

Indiana follows the above-detailed guidelines based on *In re Tynan*, a Seventh Circuit Court of Appeals decision in a case which centered on Illinois state law.⁵ In that case the Seventh Circuit relied heavily on an Eighth Circuit Court of Appeals case⁶. Other circuits have differed from the Seventh and Eighth. However, most of the differences in the treatment of the redemption period occur in states, such as Florida and California, where the laws regarding real property differ substantially from the laws in Indiana. Therefore, purchasers of property at a tax sale in states other than Indiana should research those states' laws to determine if a bankruptcy filing has a different impact.

The filing of a bankruptcy petition does not allow the Debtor to seek an extension of the time to redeem provided under state law. The Indiana Court of Appeals has held that the trial court does not have the discretion to extend the period of redemption beyond the one year limit.⁷ Thus, purchasers at tax sales in Indiana are protected by Indiana's statutes regarding tax sales⁸ with the only exception being the sixty (60) day extension for the Trustee under Section 108(b) of the Code.

In most cases, unless there is substantial equity in the real property over and above the lien of the purchaser, the trustee will abandon the interest in real property back to the Debtor. If the trustee abandons the property, the Debtor retains only the redemption period rights provided for under state law (the extension provided for under 108(b) is for the Trustee only).

Judge Coachys' Decision Follows the Tynan Case

In re: Rodney O. Baker Case No.: 05-20841-JKC-13. After sixty (60) days after the filing of the Debtor's bankruptcy petition, Judge Coachys followed the *Tynan* decision in a case with a similar fact pattern allowing the abandonment of property sold at tax sale, prior to the bankruptcy petition, which was filed two days before the one year redemption period ended.

Could a Confirmed Chapter 13 Plan Modify a Tax Sale Certificate Holder's Rights?

In re: Burrell 346 BR 561 (1st CirBAP, 2006) At the time of the Debtor's bankruptcy petition she owed real estate taxes to the town of Marion on certain real property. The town recorded an instrument of taking regarding the property for the unpaid taxes. Additionally, the Debtor owed the town a separate debt for water charges. After the bankruptcy petition was filed, the town filed a proof of claim indicating that it held a secured claim for the unpaid taxes. However, the claim failed to request interest or list the charges for the water bill. The Debtor's Chapter 13 Plan, which was confirmed, provided for payment of the taxes without interest, as a secured claim, with payments to extend over sixty (60) months. The plan further provided that "Secured creditors shall retain their lien on collateral unless otherwise provided for in this Order."

The town applied the plan payments to interest first, and after full payment under the plan and discharge of the Debtor, the town continued to seek payment from the Debtor of pre-petition taxes, post-petition interest on the real estate taxes that had accrued pre-petition, the pre-petition water bill and the post-petition interest on the water bill.

The Debtor filed an adversary proceeding in her case asking that the court

- (a) determine that the Debtor's obligations for post-petition interest on real estate taxes were discharged;
- (b) determine that the Debtor's obligation for pre-petition charges was discharged;
- (c) order that the town did not have an in rem claim for such obligations;
- (d) order the town to release its liens related to such obligations; and
- (e) award damages for the town's alleged violation of the discharge injunction.

On appeal, the Bankruptcy Appellate Panel for the 1st Circuit, found for the Debtor stating, "in Chapter 13, a plan's treatment of an allowed secured claim can be confirmed if one of three conditions is satisfied:

- (1) the secured creditor accepts the plan;
- (2) the Debtor surrenders the property securing the claim to the creditor; and
- (3) the Debtor invokes the so called "cram down" power.

The BAP further said that "although the town held an allowed secured claim, the Debtor's plan failed to satisfy any of the three options for treatment of an allowed secured claim. The Debtor's plan treated the town's allowed secured claim as a priority unsecured claim The town did not object to its treatment under the plan and the Bankruptcy Court confirmed the plan. The town did not appeal the confirmed plan and accordingly the confirmation order is res judicata and binding on the Debtor and the town in accordance with §1327 of the U.S. Bankruptcy Code."

Due Process and the Legality of a Tax Sale

Jones v. Flowers, 126 S.Ct. 1708 (2006) (United States Supreme Court)

Jones and his wife bought a house and subsequently separated. Jones moved from the house and the wife continued to live there. Jones continued to make the mortgage payment, which included an escrow for the taxes that were paid by the mortgage company, until the mortgage was paid off. Thereafter, taxes went unpaid and the property was listed for the tax sale. Flowers bought the house, following statutory procedures whereby both the State Tax Commissioner and Flowers provided notice regarding its purchase and sale. The requirements of the statute were the sending of certified letters to Jones at the address of the subject house, advising of the tax sale and purchase of the property at tax sale. No one signed the certified letters and they were returned to the Commissioner and Flowers with that indication. After the purchase, Flowers had an unlawful detainer notice delivered to the property. Jones' daughter who was living there at the time, received it and notified him. He then filed suit alleging that the Commissioner failed to provide adequate notice resulting in the taking of his property without due process.

The US Supreme Court held the following:

1. Due process does not require actual notice, rather only that the government provide notice reasonably calculated under all the circumstances to apprise interested parties of the pendency of action and afford them an opportunity to present their objections.
2. When a mailed notice of tax sale is returned unclaimed, a state must take additional reasonable steps to attempt to provide notice to the property owner before selling the property, if it is practicable to do so.
3. The means a state employs to provide the notice "must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." The adequacy of a particular form of notice is assessed by balancing the state's interest against the individual interest sought to be protected by the 14th Amendment.
4. There is a separate and distinct obligation of the delinquent taxpayer to keep his address current with the state's taxing officials and the state's obligation to provide constitutionally

adequate notice to the delinquent taxpayer. The failure of one does not eliminate or change the obligation of the other.

The possible additional reasonable steps that were cited by the Court included:

1. re-sending the notice via regular first class mail;
2. posting notice on the front door; and
3. re-sending the notice addressed to occupant.

The Court stated that the state was not required to search local telephone books or other government records to locate a new address of the delinquent taxpayer. It said that such a requirement would “..... impose burdens on the State significantly greater than the several relatively easy options outlined above.” The Court would not identify what form of notice would be effective. It stated; “[i]t is not our responsibility to prescribe the form of service that the [government] should adopt.” “The State can determine how to proceed in response to our conclusion that notice was inadequate here....”

¹ I.C. 6-1.1-25-4. The redemption period is one hundred twenty (120) days if the purchaser is a qualified purchasing agency; if the property has been designated as unsafe and is not being used as a residence or for a business enterprise, and a metropolitan development commission believes is suitable for rehabilitation and development; or if the property was sold after a second offer of sale. For purposes of this article, we assume that the redemption period is one year. However, the same analysis would apply to property sold which has a 120-day redemption period.

² Title 11 of the United States Code.

³ 11 USC 108(b).

⁴ In most voluntary Chapter 7 and Chapter 13 cases, the Order for Relief pursuant to 11 USC 362, also known as the Automatic Stay, is entered on the date the petition is filed with the Court. Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), the Order for Relief may not enter if a Debtor has repetitively filed bankruptcy petitions.

⁵ *In re Tynan*, Goldberg v. Tynan 773 F.2d 177 (7th Cir 1985).

⁶ *Johnson v. First National Bank of Montevideo* 719 F.2d 270 (8th Cir 1983).

⁷ *2002 Lake County Tax Sale of Real Property* Strezovski v. Frazee 818 NE2d 505 (Ind Ct App 2004).

⁸ I.C. 6-1.1-24 et seq and 6-1.1-25 et seq.

RELEVANT CODE SECTIONS AND CASES

Applicable Indiana Code Sections

IC 6-1.1-25-1. Time for redemption of property.

Sec. 1. Any person may redeem the tract or real property:

(1) sold; or

(2) for which the certificate of sale is sold under IC 6-1.1-24: under IC 6-1.1-24 at any time before the expiration of the period of redemption specified in section 4 of this chapter by paying to the county treasurer the amount required for redemption under section 2 of this chapter.

IC 6-1.1-25-4. Period for redemption; tax deed; limitations on expectation of tax deed; county auditor removal of taxes from tax duplicate

Sec. 4 (a) The period of real property sold under IC 6-1.1-24 is: one (1) year after the date of sale.

IC 6-1.1-25-4.6. Petition to court for issuance of tax deed; court action; effects of issuance of tax deed

Sec.4.6.(a) After the expiration of the redemption period specified in section 4 of this chapter but not later than six (6) months after the expiration of the period of redemption:

(1) the purchaser, the purchaser's assignee, the county, or the purchaser of the certificate of sale under IC 6-1.1-24 may

(2) file a verified petition in the same Court and under the same cause number in which the judgment of sale was entered asking the Court to direct the county auditor to issue a tax deed if the real property is not redeemed from the sale. If a written objection is timely filed, the Court shall conduct a hearing on the objection.

(b) Not later than sixty-one (61) days after the petition is filed under subsection (a), the Court shall enter an order directing the county auditor (on the production of the certificate of sale and a copy of the order) to issue to the petitioner a tax deed if the Court finds that the following conditions exist:

(1) The time of redemption has expired.

(2) The tract or real property has not been redeemed from the sale before the expiration of the period of redemption specified.

Applicable Bankruptcy Code Sections

11 U.S.C. § 105. Power of court

(a) The Court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the Court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement Court orders or rules, or to prevent an abuse of process.

11 U.S.C. § 108. Extension of time

(b) Except as provided in subsection (a) of this section, if applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period within which the

Debtor or an individual protected under section 1201 or 1301 of this title may file any pleadings, demand, notice, or proof of claim or loss, cure a default, or perform any other similar act, and such period has not expired before the date of the filing of the petition, the trustee may only file, cure, or perform, as the case may be, before the later of –

- (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
- (2) 60 days after the order for relief.

11 U.S.C. § 362. Automatic stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of-

(1) the commencement or continuation, including the issuance or employment of process, of a judicial administrative, or other action or proceeding against the Debtor that was or could have been commenced before the commencement of the case under the is title, or to recover a claim against the Debtor that arose before the commencement of the case under this title;

(2)

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the Debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title.

(6)

(7)

(8)

CITED CASES

Johnson v. First National Bank of Montevideo

In re Tynan

Stezovski v. Frazee

In re Baker

In re Burrell

Jones v. Flowers