



Property Tax Foreclosure Litigation: Class Actions and Impact of Supreme Court Rulings On Remaining Proceeds Claims

Michigan Association of Counties – Annual Conference 2024

Presented by Ted Seitz
September 25, 2024

MICHIGAN COUNTIES

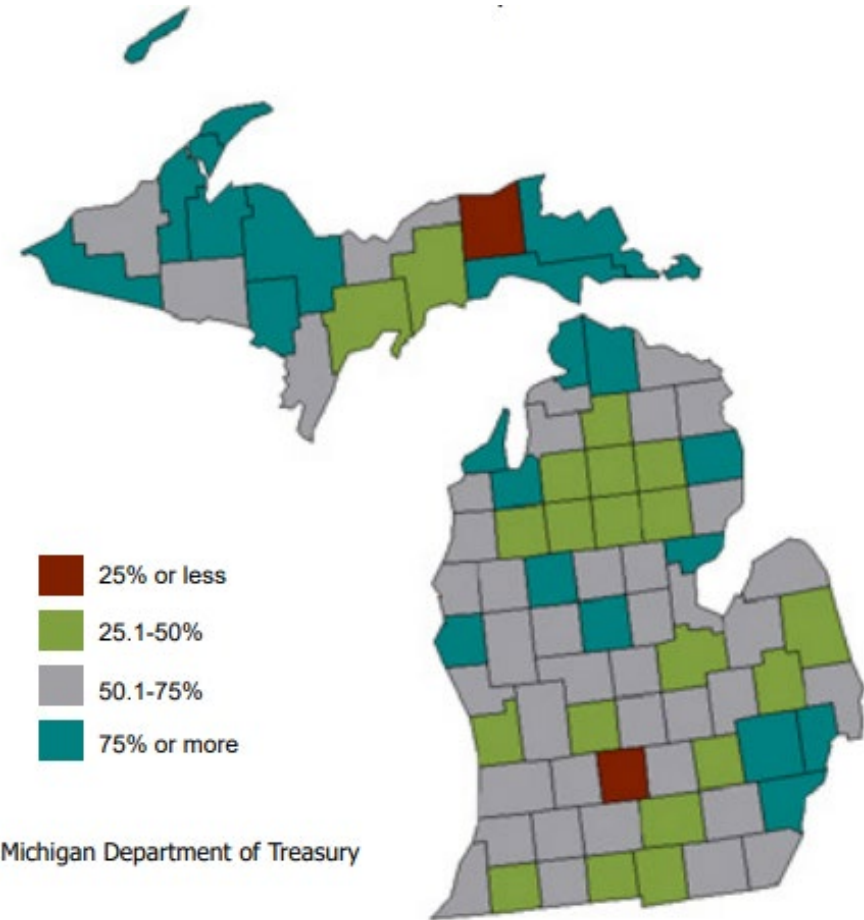


Where's the end to the long and winding road on tax foreclosure challenges?



Michigan's Property Tax System

Michigan—like many other states—has historically placed a heavy burden on property taxes to fund local governments and their services.



Source: Michigan Department of Treasury

Michigan's Property Tax System

The burden to collect unpaid property taxes falls almost entirely upon Michigan counties and their respective County Treasurers.



Michigan's Property Tax System

The statutory framework for the collection of unpaid property taxes is set forth in Michigan's General Property Tax Act (GPTA), which includes the tax foreclosure process enacted in 1999 Public Act 123 (PA 123).

1999 Public Act 123

The PA123 tax foreclosure process also allows for those potentially subject to foreclosure to offer objections to the foreclosure, which are to be addressed by the Circuit Court at a public hearing.

If property is ultimately foreclosed and not redeemed (by March 31) the property transfers to the “foreclosing governmental unit” (FGU) and then dispersed in several possible ways, including:

- (1) Right of First Refusal;
- (2) Public Auction; or
- (3) State or County Land Bank Authority.

1999 Public Act 123

Under PA 123, the FGU was statutorily obligated to keep all amounts received from tax foreclosure auctions and deposit the collected funds above the taxes owed into a Delinquent Tax Revolving Fund (DTRF), via a statutory waterfall.

If the FGU declares a surplus in the DTRF, the surplus can be transferred into a County's General Fund for uses approved by the County Board of Commissioners.



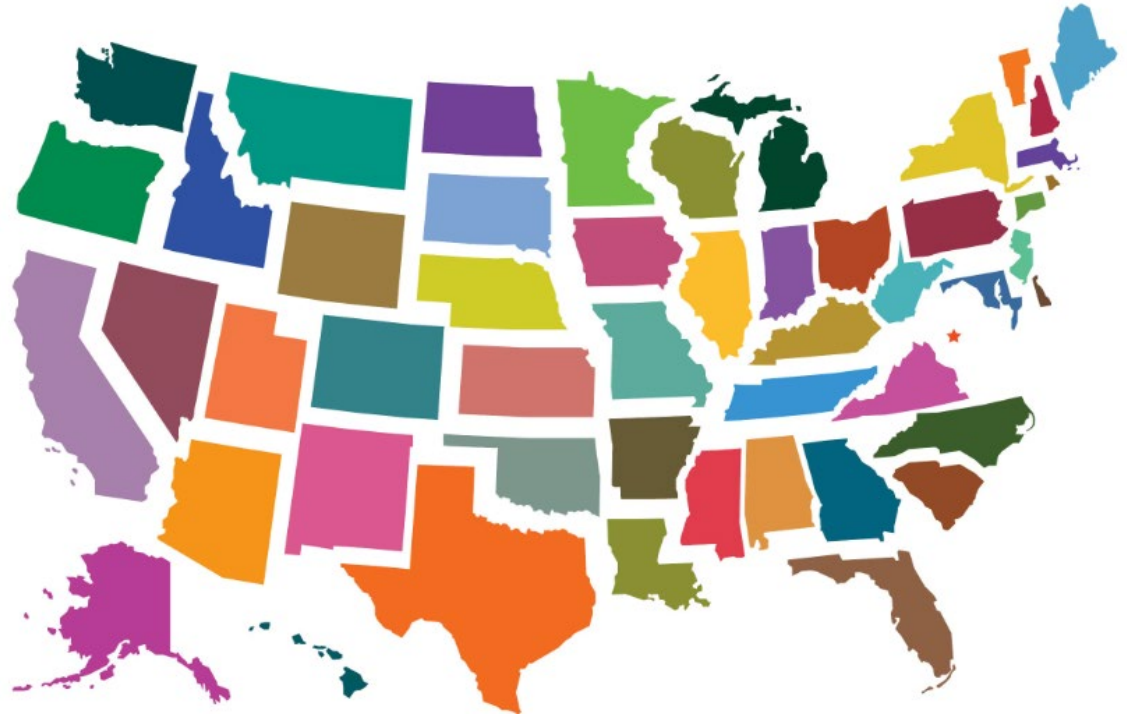
PA 123—A Resounding Success

- Significantly benefitted property owners, who were delinquent in their property taxes.
- Also, reduced blight and improved notice to taxpayers.
- Other benefits. . .



Michigan Becomes The Model

Other states amended their tax foreclosure statutes—using Michigan as the model—to streamline their tax foreclosure process, combat blight, and return properties to the market.



Constitutional Challenges To Michigan's Tax Foreclosure Statute

- Notwithstanding these improvements, and the FGUs' strict compliance with Act 123's requirements, beginning in 2014 delinquent taxpayers alleged that the requirement directing FGUs to retain all sale proceeds—and use the proceeds to pay unpaid taxes, maintain tax-foreclosed property that cannot be sold, and for costs associated with the foreclosure process—violates the Takings Clause.
- For years, these cases ran on parallel tracks in state and federal courts. The courts initially rejected these challenges, both on jurisdictional and constitutional grounds. *See Rafaeli, LLC v. Oakland Cty.*, (Mich. Ct. App. Oct. 24, 2017); *see also Wayside Church v. Van Buren Cty.*
- Treasurers, acting as the statutory “foreclosing governmental unit” often used surplus funds to offset losses on other properties that either failed to sell or sold for less than the unpaid taxes. However, most properties sold at foreclosure auctions do not result in surplus funds or the costs of unpaid property taxes, leaving counties and local communities responsible for the losses each year.

Rafaeli v. Oakland County – Michigan Supreme Court Steps In

That changed when, in *Rafaeli*, the Michigan Supreme Court held that Michigan’s Takings Clause is violated when FGUs sell tax-foreclosed property at auction and retain more than the taxes owed—as the GPTA required. *Rafaeli* held as a matter of Michigan property law that **those with property interests in foreclosed property have a “right to collect the surplus proceeds that are realized from the tax-foreclosure sale,”** and that a county’s **“retention of those surplus proceeds under the GPTA amounts to a taking of a vested property right requiring just compensation”** under Michigan’s Constitution.



Michigan Supreme Court Steps In (cont.)

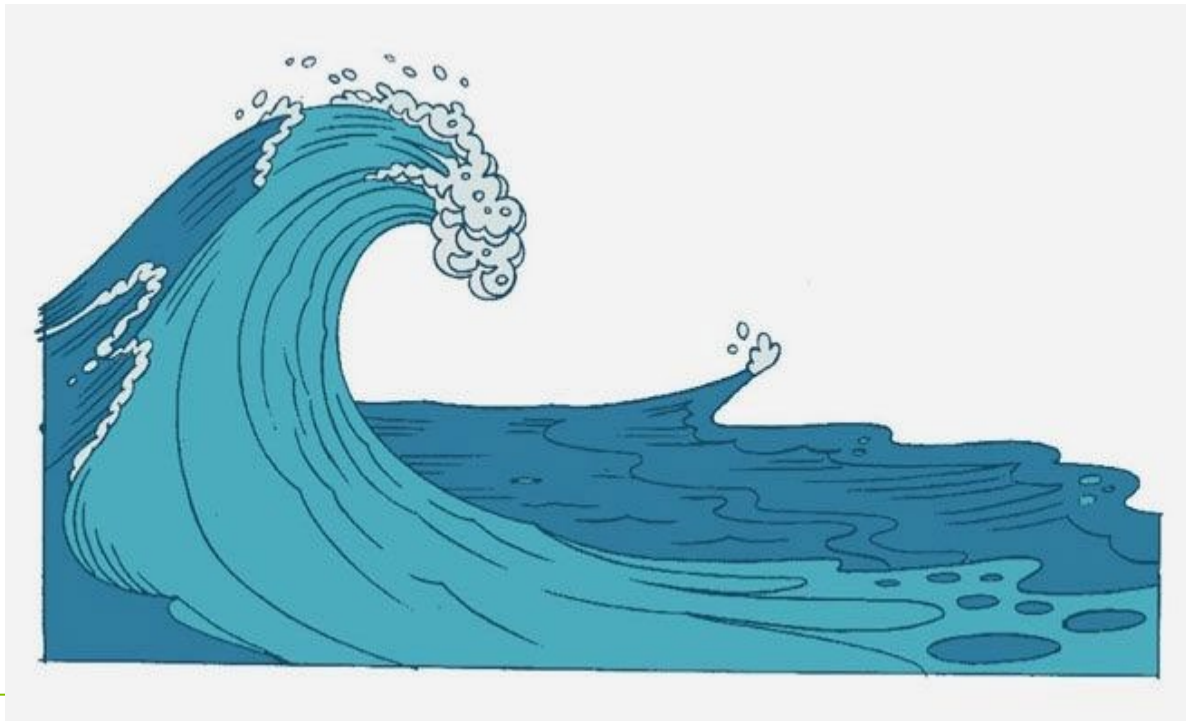
The Michigan Supreme Court reasoned that, “when a property is taken to satisfy an unpaid tax debt, just compensation requires the [FGU] to return any proceeds from the tax-foreclosure sale in excess of the delinquent taxes, interest, penalties, and fees reasonably related to the foreclosure and sale of the property—***no more, no less.***” *Rafaeli* (emphasis added).

The Court further clarified a number of issues with surplus proceeds claims under the GPTA, and rejected fair market value as a measure of compensation for claimants.



Wave Of State And Federal Court Lawsuits

The United States Sixth Circuit Court of Appeals notes “deluge of litigation” in Michigan state and federal courts regarding Michigan’s tax foreclosure system – based upon *Rafaeli*.



The Michigan Legislature Comes to The Rescue

The Michigan Supreme Court in *Rafaeli* stated that:

“[n]othing in [its] holding . . . prevents the Legislature from enacting legislation that would require former property owners to avail themselves of certain procedural avenues to recover the surplus proceeds.” *Id.* at 460 n.108.

So, during the depths of COVID restrictions and a little over a month after the 2020 elections...



The Michigan Legislature Comes to The Rescue (cont.)

The Legislature responded to *Rafaeli* by amending the GPTA and creating a mechanism for former interest holders in tax foreclosed property to recover the surplus proceeds.

In December 2020, the Legislature unanimously adopted 2020 Public Acts 255 and 256, which provide a process for former interest holders in tax foreclosed to claim an interest in sale proceeds in excess of the minimum bid and other foreclosure-related fees.



The Michigan Legislature Comes to The Rescue (cont.)

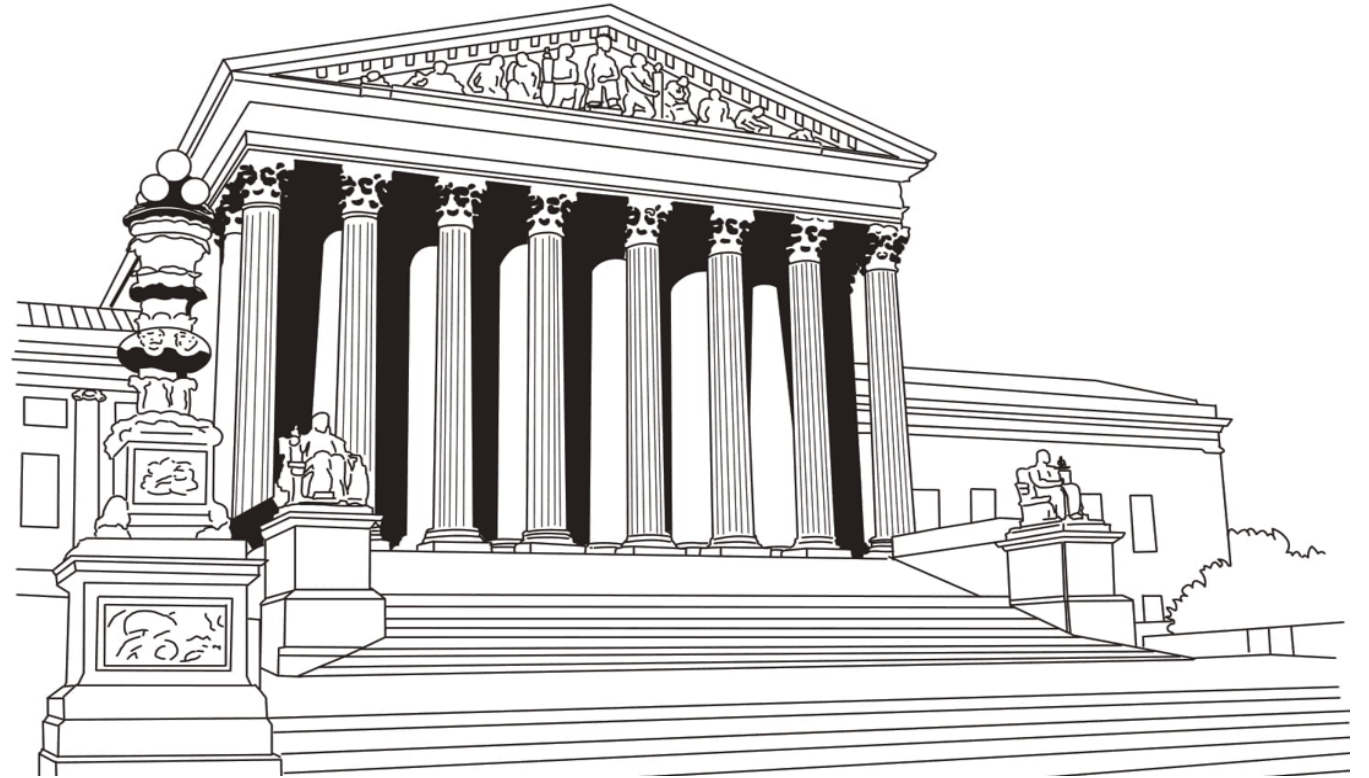
- The new process initially only applied to foreclosures occurring after *Rafaeli*. Acts 255 and 256 allow former interest holders of foreclosed property to recover remaining sale proceeds, but not fair market value. Mich. Comp. Laws § 211.78t.
- Built within PA 256 and the new Section 78t—was a provision that left it up to the Michigan Supreme Court to determine if *Rafaeli* was PROSPECTIVE or RETROACTIVE.
- And if *Rafaeli* was deemed RETROACTIVE the 78t process was to be the “exclusive mechanism” to claim remaining proceeds for the tax foreclosed properties.

The Michigan Legislature Comes to The Rescue (cont.)

Since 2020, PA 255 and 256, along with 211.78t, the remaining proceeds claim process has been working well and the Michigan and Federal Courts have upheld its constitutionality. See, *In re Muskegon County* (Mich. Ct. of Appeals); *Metro Properties v. Wayne County* (E.D. Mich); and *Howard v. Macomb County* (E.D. Mich).

Michigan Is Not Alone – The U.S. Supreme Court and *Tyler v. Hennepin County*

United States Supreme Court granted cert in case challenging Minnesota's tax foreclosure system under the federal Fifth (Takings) and Eighth Amendments (Excessive Fines).



Tyler v. Hennepin County Decision

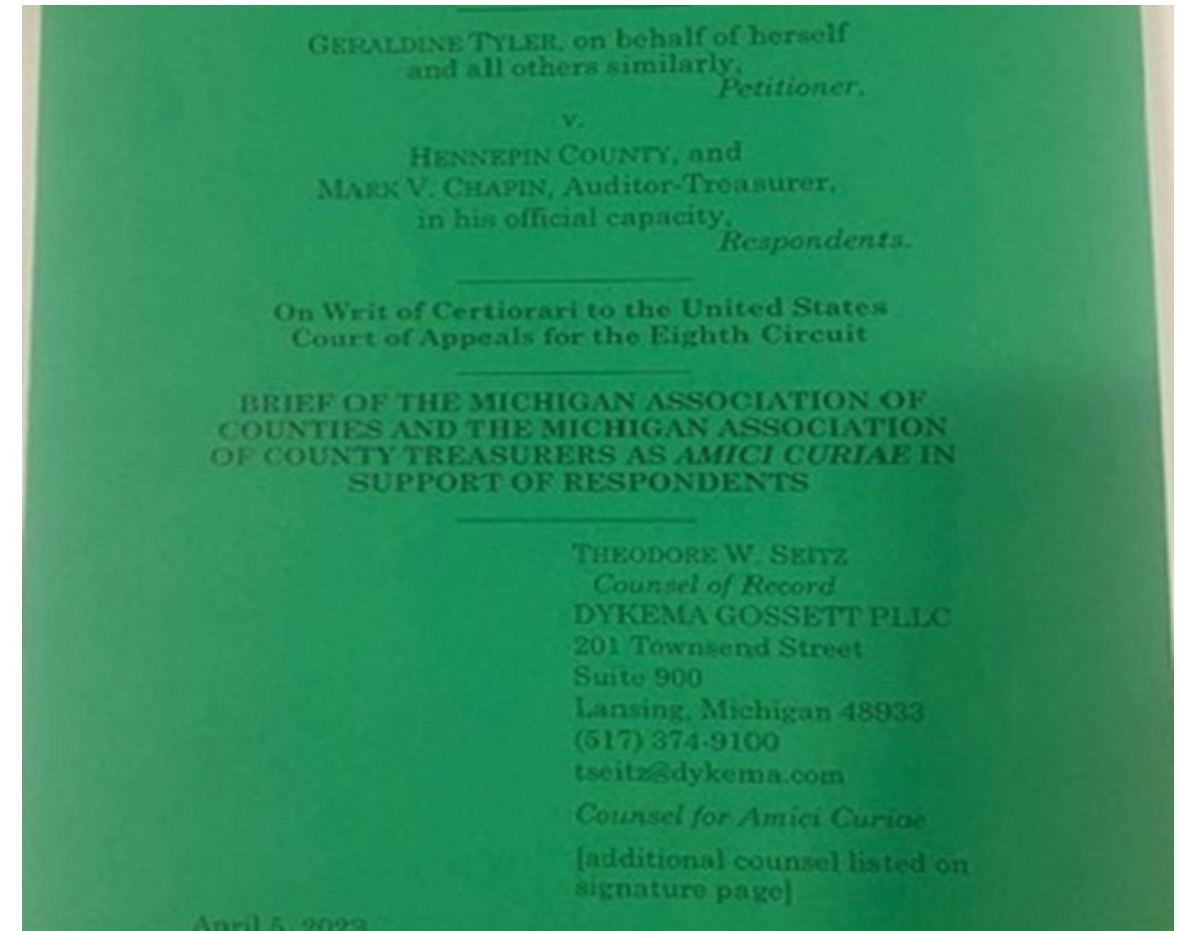
In late May 2023, the United States Supreme Court weighed in: holding in *Tyler v. Hennepin County* that Minnesota’s tax foreclosure law, which offered no ability for interest holders to obtain surplus proceeds, violated the Fifth Amendment Takings Clause of the U.S. Constitution.

“The taxpayer must render unto Caesar what is Caesar’s, but no More.” Chief Justice Roberts, *Tyler v. Hennepin County*



Tyler Decision

MAC, along with the Michigan Association of County Treasurers, submitted an amicus brief to the Court—explaining how Michigan’s enactment of PA 256 fixed this issue in Michigan and should be left alone. The U.S. Supreme Court implicitly blessed Michigan’s statutory surplus proceeds claim process by stating that if there is an avenue for interest holders to obtain surplus proceeds (i.e. like 78t)—**there is no Fifth Amendment Takings.**



***Wayside Church v. Van Buren County* Class Settlement**

On June 27, 2024, U.S. District Court of the Western District of Michigan approved a class action settlement that will return surplus proceeds to those foreclosed by Michigan counties due to unpaid property taxes between 2013 and 2020.

The decision approving the settlement covering all of the counties within the Western District (with the exception of one) arises from *Wayside Church v. Van Buren County*, a 2014 federal lawsuit where three property owners failed to pay property taxes and lost their property to tax foreclosure. All three properties were sold at auction for more than taxes owed. At the time, Michigan law required the surplus funds to be retained by the County. The property owners sued for those excess amounts, saying the county should be required to pay just compensation under the Fifth Amendment.

Wayside Church Class Settlement

- The *Wayside Church v. Van Buren County et al.* settlement was the result of lengthy negotiations overseen by the Mediation Office of the U.S. Court of Appeals for the Sixth Circuit.
- To obtain the benefit of the settlement, former property owners filed claims during the spring and summer of 2023. The settlement, federal Judge Paul Maloney noted, had claim rate that “is quite high, and the relief provided for the class is substantial.”

Wayside Church Class Settlement

Nevertheless, because of the appeal filed by competing plaintiff class action counsel, a final payout to claimants is not expected until late 2025.



Back Again: The Michigan Supreme Court Rules on Retroactivity

- *Schafer v. Kent County* and *Hathon v. State of Michigan*
- On July 24, 2024, the Michigan Supreme Court issued a decision in the *Schafer v. Kent County* and *Hathon v. State of Michigan* cases, which held the *Rafaeli* decision to be RETROACTIVE, BUT limited it to a six-year look back period (i.e. until as long as 2014) for claims against the Counties AND a three-year period (i.e. until 2017) for claims against the State of Michigan (acting as the “foreclosing governmental unit” for several Counties).

Back Again: The Michigan Supreme Court Rules on Retroactivity

However, the Michigan Supreme Court also held that the surplus proceeds process set forth in the Section 78t of the GPTA was also the **RETROACTIVE “exclusive remedy”** for potential interest-holder claimants and that any and all notices of intent to submit claims for surplus proceeds must be filed by **MARCH 31, 2025**—with the clock starting from the date the *Schafer* opinion was issued.



Nevertheless, litigation remains pending in the federal courts on Takings cases brought as class actions against the Counties within the federal Eastern District of Michigan. Takings cases have also been brought against counties in Illinois, Wisconsin, New Jersey, Ohio, and Massachusetts.



Minnesota Resolves its Constitutional Takings Claims from *Tyler v. Hennepin County* With Help From Minnesota Legislature

- Earlier this year, Minnesota announced that it had entered into a class action settlement on behalf of Minnesota counties that includes properties impacted by those tax forfeiture practices rejected by the U.S. Supreme Court in the *Tyler* case. The proposed class settlement, which totals \$109 million dollars and covers a period of seven years, will be funded by State of Minnesota as part of the budget passed by the Minnesota Legislature and signed into law by Minnesota Governor (and now Vice-Presidential candidate) Tim Walz. Minnesota also is attempting to enact legislation, which modifies its tax foreclosure process—using PA 256 as a model.

Minnesota Resolves its Constitutional Takings Claims With Help From Minnesota Legislature



WHERE ARE WE NOW AND WHERE ARE WE GOING?

- *Wayside Church v. Van Buren, et al.*
- *Fox v. Gratiot County, et al.*



WHERE ARE WE NOW AND WHERE ARE WE GOING?

Bowles v. Wayne County

IN THE MEANTIME,....

March 2025						
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9	10	11	12	13	14	15
16	17	18	19	20	21	22
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30	31					

**6th
Circuit**



78t Claims for Remaining Proceeds: March 31, 2025

Michigan Department of Treasury
6156 (09-24)

Notice of Intention to Claim Interest in Foreclosure Sale Proceeds From Sales Occurring Prior to December 22, 2020

Issued under authority of Public Act 206 of 1893.

For a claimant seeking remaining proceeds from the transfer or sale of a foreclosed property transferred or sold under MCL 211.78m prior to December 22, 2020, and otherwise meeting the requirements set forth in Schaffer v Kent County and Hathon v State of Michigan, and MCL 211.78t, the claimant must complete and return this notarized notice to the Foreclosing Government Unit by March 31, 2025. This notice must be delivered via certified mail, return receipt requested, or by personal service. Completing and returning this form evidences an intent to make a future claim but is not itself a claim for sales proceeds.

DATE STAMP

PART 1: APPLICANT INFORMATION		
Claimant Last Name or Business Name	Claimant First Name	Middle Initial
Claimant's Address to be used for Service (Street Number, City, State, ZIP Code)		
Claimant's Telephone Number	Claimant's E-mail Address	
PART 2: PROPERTY IDENTIFICATION		
County	Local Taxing Unit	Foreclosure Year
Parcel Address (Street Number, City, State, ZIP Code)		Local Parcel Number
PART 3: EXPLANATION OF INTEREST		
I hereby claim an interest in the above parcel, as of the foreclosure date, due to the reason(s) selected below:		
<input type="checkbox"/> Warranty Deed Dated: _____ Recorded in Liber/Page: _____		
<input type="checkbox"/> Quit Claim Deed Dated: _____ Recorded in Liber/Page: _____		
<input type="checkbox"/> Mortgage Dated: _____ Amount: _____ Recorded in Liber/Page: _____		
<input type="checkbox"/> Other Lien Dated: _____ Amount: _____ Nature of Lien: _____ Recorded in Liber/Page: _____		
I know of the following other interests in this property, which were in effect immediately prior to foreclosure:		
PART 4: CERTIFICATION AND NOTARY		
I hereby swear that the above information is true and correct in relation to the subject property		
Claimant's Signature	Date	
Subscribed and sworn to before me by Applicant on the following date:		
Notary's Signature	Commission Expiration	
Notary State of Authorization	Notary County of Authorization	Notary Acting in County
FORECLOSING GOVERNMENTAL UNIT RECEIPT ACKNOWLEDGMENT		
FGU Staff Signature of Receipt	FGU Staff Printed Name	Date of Receipt

Instructions for Form 6156, Notice of Intention to Claim Interest in Foreclosure Sale Proceeds From Sales Occurring Prior to December 22, 2020

Purpose of Form 6156: This form enables claimant seeking remaining proceeds from the transfer or sale of a foreclosed property transferred or sold prior to 2021, the claimant must complete and return this notarized notice to the Foreclosing Government Unit (FGU) by March 31, 2025.

Claimant: means a person with a legal interest in property immediately before the effectiveness of a judgment of foreclosure of the property under section 78k who seeks pursuant to this section recognition of its interest in any remaining proceeds associated with the property.

Remaining proceeds: means the amount equal to the difference between the amount paid to the foreclosing governmental unit for a property due to the sale or transfer of the property under section 78m and the sum of all of the following:

- (i) The minimum bid under section 78m.
- (ii) All other fees and expenses incurred by the foreclosing governmental unit pursuant to section 78m in connection with the forfeiture, foreclosure, sale, maintenance, repair, and remediation of the property not included in the minimum bid.
- (iii) A sale commission payable to the foreclosing governmental unit equal to 5% of the amount paid to the foreclosing governmental unit for the property.

Foreclosing Governmental Unit (FGU): A listing of all counties, with contact information, and the FGU designation can be found on the State of Michigan Property Tax Forfeiture and Foreclosure website located at <https://www.michigan.gov/taxes/property/forfeiture-foreclosure>.

Complete Form in Entirety: You must complete each line in its entirety.

Line-by-Line Instructions

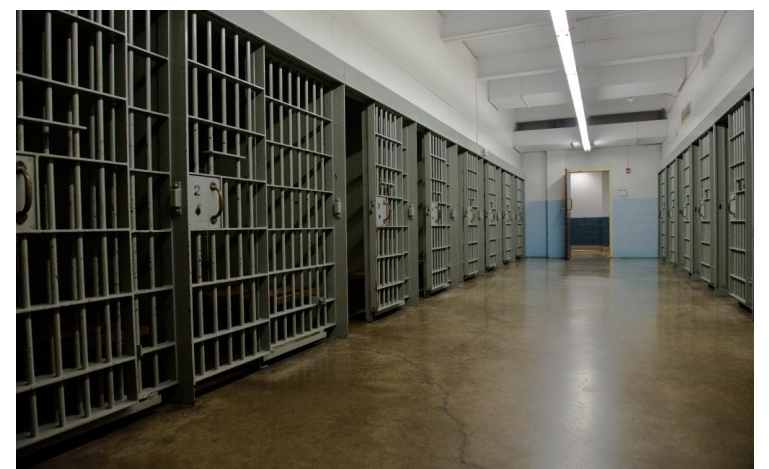
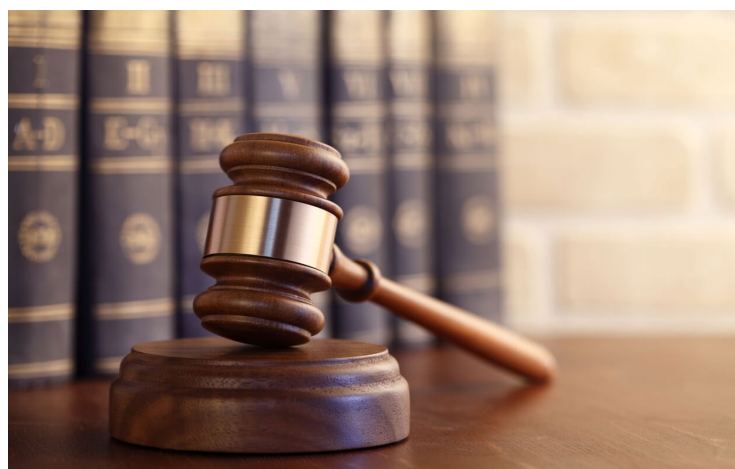
Lines not listed here are explained on the form.

Part 2: Local Parcel Number is identified with a property tax identification number. This number will be found on your tax bill and on your property tax assessment notice. Enter this number in the space indicated. If you cannot find this number, call your township or city assessor. Foreclosure year must be for any foreclosure sale prior to 2021.

Part 3: Only a valid claimant may complete this form. Please list the document, date, and recording information to indicate you are a valid claimant. If you cannot find this information, contact the County Register of Deeds where the property is located.

Submission of Form/Mailing Information: Mail your completed form to the correct FGU. Mail must be by personal service or by certified mail, return receipt requested.

Impact?



WHAT CAN WE ALL DO?



WHAT CAN WE ALL DO?



Questions?

- Email: tseitz@dykema.com
- Call after presentation:
 - Ted Seitz (517) 374-9149

