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The Case for the Tax Collector

MARIE T. REILLY

I. Introduction

Real property tax is always controversial. It is regressive and based on dubious assessments of value.[1] Proponents and detractors typically debate tax rates, rebates, exemptions, and assessment.[2] In contrast, discussion of the technicalities of tax collection—the means by which state and local governments turn tax liability into cash revenue—is usually left to tax collectors and other sinners.[3] In bad economic times, however, tax enforcement becomes front page news.[4] People become unable or unwilling to pay real property taxes as their income and property values fall. The tax collector responds to their defaults with foreclosures.[5]

The case for relief from the press of tax and mortgage debt for delinquent property owners faced with loss of a home is easy to make. Bankruptcy law provides an important source of this relief.[6] This article makes the more difficult case for the rights of the property tax collector. Abandoned properties turn neighborhoods into wastelands.[7] As the tax base shrinks, revenues drop, and costs rise, the tax enforcement process becomes critical to the survival of state and local governments and the communities they serve. In bad economic times, the tax collector more than ever needs a mechanism to seize property in satisfaction of tax debt swiftly and with finality.[8]

Real property tax enforcement process varies among jurisdictions.[9] Some features are common. Upon the tax debtor's default, the tax creditor acquires a lien on the subject property, typically senior to all other liens or interests.[10] In most jurisdictions, the tax creditor either sells the property at a public auction[11] or assigns its secured collection right to a third party via a public or private auction customarily known as a tax lien sale.[12] After expiration of the debtor's time to redeem legal title to the property by paying the tax plus interest, the third party forecloses the debtor's equity of redemption and takes title to the property free of

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all interests junior to the tax lien. In a few jurisdictions, the tax creditor can enforce the lien and obtain a deed to the property without auction or sale and without regard to the value of the property.[13]

If the property is worth more than the tax debt, the difference is the debtor's loss and the tax collector's gain. A bidder at a tax lien sale will take the prospect of the debtor's redemption into account in bidding for the tax collector's rights. To the extent that the right to the property is subject to post hoc reversal or avoidance, bidders will pay less and the tax collector will collect less on account of its foreclosure rights. Softening the process to provide relief to debtors comes at the expense of the tax collector and his constituents—state and local governments and the citizens they serve.

If the debtor files for bankruptcy shortly after a wealth-depleting tax foreclosure, the debtor's creditors become interested in reversing the transfer and recovering the lost wealth for the estate. The trustee can characterize the transfer as a constructive fraud, made while the debtor was insolvent, and for "less than a reasonably equivalent value in exchange."[14] If the trustee's argument is successful, the estate recovers the property. The tax creditor retains a lien against the property for the amount of the tax debt. However, the tax creditor loses to the estate the difference between the value of the property and the tax debt.

The application of the trustee's constructive fraud avoiding power to tax lien foreclosures pits federal bankruptcy law against state tax law. Federal bankruptcy law treats tax foreclosure as a "transfer" of the debtor's property.[15] It grants a bankruptcy trustee power to avoid the foreclosure and recapture lost wealth for the estate if, among other things, the transfer is "for less than "reasonably equivalent value in exchange."[16] If the hypothetical fair market value of the property is greater than the tax debt, then transfer of the property to the tax collector appears to be "for less than reasonably equivalent value in exchange." From the tax collector's perspective, however, assessment of the reasonableness of the foreclosure transfer by reference to the fair market value of the property makes no sense given the regulated conditions under which the foreclosure transfer actually occurs.

In *BFP v. Resolution Trust Corp.*,[17] the U.S. Supreme Court considered and resolved the conflict between federal and state law in the context of a mortgage foreclosure sale. It held that the price a bidder pays at a noncollusive, regularly conducted foreclosure sale is a "reasonably equivalent value in exchange" for the property.[18] The transfer to the winning bidder at the foreclosure sale is not avoidable under federal fraudulent transfer law even if the bid is less than the hypothetical fair market value of the property. In a footnote, the Court expressly limited

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its opinion to "mortgage foreclosures of real property."[19] "The considerations bearing upon other foreclosures and forced sales (to satisfy tax liens, for example) may be different."[20]

This article considers the question the Court reserved in this footnote. Is a transfer of property via a noncollusive, properly conducted property tax foreclosure process entitled to respect in bankruptcy against the trustee's fraudulent transfer avoiding power? It answers this question in the affirmative. Part II examines the Court's opinion in *BFP* and how courts have applied it in fraudulent transfer challenges to tax foreclosure transfers. Most courts have read *BFP* as requiring a comparison between the conditions under which the tax foreclosure at issue occurs and mortgage foreclosure. If the tax foreclosure process does not require public sale with competitive bidding, then *BFP* does not apply and the tax foreclosure transfer is not necessarily for "reasonably equivalent value in exchange." Part III criticizes this trend and makes the argument in defense of the tax collector. A foreclosure sale yields reasonably equivalent value because it complies with applicable nonbankruptcy law. Thus differences among the states in procedural attributes of tax or mortgage foreclosure transfers are not legally significant. As the footnote in *BFP* suggests, tax foreclosure is different than mortgage foreclosure in one legally significant respect, and the difference is in favor of the tax collector. A challenge to the "reasonableness" of a transfer under state tax foreclosure law is a challenge to the legality of the tax. Bankruptcy Code § 505 narrowly circumscribes the bankruptcy court's power to determine "the amount or legality of any tax." It may not substitute its judgment for that of the state legislature as to the validity and finality of tax foreclosure.

II. Tax Foreclosure and "Reasonably Equivalent Value" Under *BFP v. Resolution Trust Corp.*

A partnership named BFP acquired a house in Newport Beach, California subject to a mortgage in favor of Imperial Savings Association.[21] BFP defaulted, and Imperial properly noticed a foreclosure sale of the property. A third party purchased the property for $433,000, 59% of the property's estimated fair market value.[22] Three months later, BFP filed for relief under Chapter 11. As debtor in possession, it sought to avoid the transfer as a constructive fraud under § 548.

Section 548(a)(1) gives the trustee power to avoid certain prepetition transfers of the debtor's property that occur within the two years before the filing of a petition while the debtor is insolvent or which render him insolvent.[23] In particular, § 548(a)(1)(B) permits the trustee to avoid transfers if an insolvent debtor "voluntarily or involuntarily—(i)

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received less than a reasonably equivalent value in exchange for such transfer or obligation."[24] Although the Bankruptcy Code defines "value" for purposes of § 548, it does not define "reasonably equivalent value."[25]

The bankruptcy court dismissed the fraudulent transfer action, holding that the sale was conducted without collusion or fraud and in compliance with California law. Thus the transfer price achieved was a "reasonably equivalent value in exchange."[26] The district court and the Ninth Circuit affirmed.[27]

Justice Scalia, writing for a five-to-four majority, identified the issue as whether the debtor received "less than reasonably equivalent value in exchange" for the interest in real property that it lost at the foreclosure sale.[28] The transfer gave the winning bidder title to the property free of the debtor's equity of redemption in exchange for the foreclosure sale price. The debtor in possession contended that the price was not a "reasonably equivalent value in exchange" for the property because the winning bid of $433,000 was not reasonably equivalent to $725,000, the hypothetical fair market value of the property at the time of the sale.

The Court considered lower court opinions that used the fair market value of the transferred property as the benchmark against which to measure the "reasonable equivalence" of the foreclosure sale price.[29] It also considered *Matter of Bundles*[30] where the Seventh Circuit recognized a presumption that the price achieved at a properly conducted foreclosure sale is a reasonably equivalent value, subject to rebuttal based on evidence of the unreasonableness of a particular foreclosure.[31] The Court rejected both approaches. It concluded that both improperly referred to the estimated fair market value of the transferred property as the measure of its worth for purposes of determining the "reasonable equivalence" of the foreclosure sale price.[32]

The Court explained that comparison between hypothetical fair market value and the forced transfer price ignores: 1) the impact of market conditions on value; and 2) the traditional prerogative of states to regulate creditors' debt enforcement rights against property. On the first point, as a matter of statutory interpretation, because Congress could have used "fair market value" but chose "reasonably equivalent value" instead, "[o]ne must suspect the language means that fair market value cannot—or at least cannot always—be the benchmark."[33] When the transfer occurs as part of a creditor-forced sale, the "fair" market value referent is not a relevant point of comparison. "'[F]air market value' presumes market conditions that, by definition, simply do not obtain in the context of a forced sale."[34] Property subject to foreclosure is worth less than the same property valued under "fair market" conditions.[35]

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On the second point, the Court recognized that the phrase "reasonably equivalent value" could be interpreted to require comparison of the foreclosure sale price with a "reasonable" or "fair" forced sale price.[36] However, it rejected this interpretation. The required determination—whether a state-regulated foreclosure process is sufficiently "reasonable" as to yield a price that is the "reasonable equivalent" of the value of the property—would be a federal encroachment on state authority to regulate title to property that section 548 does not authorize.[37]

The Court related the first point to the second: the difference between a forced sale price of property and its fair market value depends on the terms of the forced sale, and the timing and manner in which the foreclosure occurs is a matter for states to decide. The Court observed that mortgage foreclosure processes are not standard but vary among the states "depending upon, among other things, how the particular State values the divergent interests of debtor and creditor."[38] It summarized typical features such as notice to the defaulting debtor, opportunity for the debtor or another party in interest to redeem the property by paying the debt, and bidding rules and auction procedures.[39] State law also governs the finality of foreclosure. Once the process is complete under state law, inadequacy of the foreclosure price is not grounds to set aside the transfer, although some states recognize that a price so low as to "shock the conscience" raises a rebuttable presumption of collusion or actual fraudulent intent.[40]

The Court concluded that Congress could have intended that § 548 "disrupt the ancient harmony"[41] between fraudulent conveyance law and state foreclosure law.[42] However, the phrase "for less than reasonably equivalent value in exchange" is insufficient textual guidance to justify "such a radical departure."[43]

The ominous footnote that "considerations bearing upon other foreclosures and forced sales (to satisfy tax liens, for example) may be different)" [44] offered no clue as to what aspects of tax foreclosures might be different, or how such a difference might affect the balance between federal and state authority. The footnote opened the way for bankruptcy courts to evaluate the "reasonableness" of foreclosure transfers whenever the transfer can be distinguished from the mortgage foreclosure in *BFP*.[45]

III. Tax Foreclosure Transfers and Reasonably Equivalent Value

After *BFP*, courts have struggled to determine its scope.[46] A few courts have held that, despite the footnote, tax foreclosures are not different than mortgage foreclosures. Both yield reasonably equivalent value.[47] Most courts have taken a narrower view of the scope of *BFP*. For these courts, the key to the holding is similarity between the condi-

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tions under which the transfer occurs and those that define a free market transaction, e.g., public notice, competitive bidding and other circumstances that tend to raise the transfer price toward fair market value.[48] So, for example, if the transfer occurred by a process that exposed the property to competitive bidding at an advertised public sale, the price achieved through such a process is a "reasonably equivalent value in exchange" for the property, even if the price is far less than the hypothetical fair market value of the property. On the other hand, if the process does not expose the property to competitive bidding, the transfer is not necessarily "for reasonably equivalent value in exchange."[49]

For example, in *Murphy*,[50] the debtor failed to pay property tax to the Town of Harrison during the three years that she held title, totaling about $30,000.[51] New York allows a tax creditor "strict foreclosure" of property subject to a tax lien. At a fixed time after default, if the taxpayer has not paid the debt, title to the property is transferred to the tax creditor in exchange for extinguishment of the debt.[52] The Town initiated an in rem proceeding to collect the unpaid property tax under New York law.[53] After the redemption period expired, the Receiver of Taxes and Enforcement Officer for the Town conveyed the property to the Town, and the Town cancelled the debtor's tax liability.

Six months later, the debtor filed for bankruptcy relief. The Chapter 7 trustee challenged the transfer as an avoidable constructive fraud under § 548.[54] The Town argued that under *BFP* the strict foreclosure of the debtor's property was for "reasonably equivalent value in exchange" and not subject to fraudulent transfer avoidance.[55] The trustee responded that *BFP* did not apply. It argued that the Court limited the holding in *BFP* to real property mortgage foreclosures by sale with competitive bidding. Because the strict foreclosure occurred without competitive bidding, indeed without sale of any kind, *BFP* did not apply, and the transfer was subject to avoidance under § 548 in the debtor's subsequent bankruptcy case. It noted that, "[u]nlike in a mortgage foreclosure under New York law, where the market is redefined, the market is completely destroyed by New York tax forfeiture proceedings."[56]

Most courts considering a tax foreclosure after *BFP* have followed this approach.[57] The key for courts adopting this view is whether the state-regulated foreclosure process is reasonable and, in particular, whether it exposes the property to competitive bidding. In *Murphy*, the court held that New York's tax foreclosure process whereby the tax collector receives a deed to the property upon expiration of the debtor's redemption period simply does not yield a "price" that necessarily reflects the "value" of the property for purposes of "reasonably equivalent value" under § 548.

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Although this argument has proven appealing, the Court in *BFP* squarely rejected it. The important aspect of a foreclosure transfer is not how the state regulates it, but rather that the state regulates it. The fact that a transfer occurs pursuant to a properly conducted, state-regulated foreclosure process fully accounts for the difference between the value that the debtor receives (debt forgiveness) and the hypothetical fair market value of the property. The difference is reasonable for fraudulent transfer purposes under bankruptcy law because the state-regulated foreclosure process is entitled to respect in bankruptcy without regard to whether the state regulated processes themselves are reasonably calculated to return the highest possible value to the debtor.

The Court in *BFP* compared state foreclosure law with zoning law: both affect the "value" of the property, and neither can be ignored by a bankruptcy court determining the property's "value." It held: "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."[58]

IV. Tax Claims Are Different

As the ominous footnote in *BFP* suggests, tax lien foreclosures are different from mortgage foreclosures. However, the difference has nothing to do with competitive bidding. The difference arises because of the nature of the tax collector's right and the treatment of tax liability under the Bankruptcy Code.

State and local governments use the tax foreclosure process to execute sovereign power to levy and collect tax on real property.[59] To strike an appropriate balance between state and federal power, the Tax Injunction Act (TIA) prohibits a federal court from hearing a challenge to a tax claim under state law whenever "a plain, speedy and efficient remedy may be had in the courts of such a state."[60] The purpose of the TIA is to preserve the fundamental balance between national and state governmental power with respect to taxation..[61]

The Bankruptcy Code provides a narrow exception to the TIA. Under § 505(a)(1), a bankruptcy court may determine the "amount or legality of any tax" except in circumstances specified in subsection (a)(2). The pertinent limitations are expressed in subsections (a)(2)(A) and (C).

Subsection (a)(2)(A) incorporates res judicata (claim preclusion) as a limit on the bankruptcy court's power to determine tax liability.[62] It bars the bankruptcy court from determining the amount or legality of a tax if it "was contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction."[63] Congress added subsection (a)(2)(C) as part of the 2005 Bankruptcy Reform Act.[64] It bars a bankruptcy court from considering the amount or legality of an ad valorem tax on

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real or personal property of the estate, "if the applicable period for contesting or redetermining that amount under any law (other than a bankruptcy law) has expired."[65] Thus subsection (a)(2)(C) overrules prior cases that interpreted § 505(a) to allow a bankruptcy court to determine tax claims even after the time for disputing the claim had expired under nonbankruptcy law.[66]

Congress offered no express guidance as to how to reconcile the prohibition on interference in matters of state taxation made clear in § 505(a)(2)(A) and (C) with the trustee's fraudulent transfer avoiding power under § 548(a)(1)(B). A challenge to a state tax foreclosure transfer on fraudulent transfer grounds under § 548 is an act to "enjoin, suspend or restrain the assessment, levy or collection of any tax" barred under the TIA. And it is a challenge to the "amount or legality of a tax" under § 505. As such, it is subject to the TIA and also to the limited exceptions to the injunction provided in § 505(a). Once the debtor's equity of redemption is extinguished under state law, under § 505(A)(2)(c), the bankruptcy court may not exercise jurisdiction because "the applicable period for contesting or redetermining [the tax] under [nonbankruptcy law] has expired." If the foreclosure transfer is not final at the time that the bankruptcy case is filed, a bankruptcy court determining the amount or legality of tax under § 505 must apply nonbankruptcy tax law.[67] The bankruptcy court cannot substitute its judgment for that of the state or local government regarding the amount or legality of the debtor's taxes.

Although no court to date has considered squarely whether a § 548 challenge to a tax foreclosure transfer is an act to "enjoin, suspend or restrain" the levy of a tax subject to the TIA and § 505, the court in *In re Northbrook Partners LLP* held that the debtor's challenge to real property taxes on grounds that they were larger than they should be under proper assessment is a challenge to the amount or legality of taxes under § 505(a).[68] An action to avoid a tax foreclosure transfer on grounds that it was for "less than reasonably equivalent value in exchange" is analogous. In both situations, the payment on account of taxes is, in the view of the challenger, larger than the law allows.

The counterargument is that a fraudulent transfer challenge to a tax foreclosure transfer is not an act to restrain the levy of a tax or a determination of the amount or legality of a tax and does not trigger the TIA or § 505. This argument fails for several reasons. First, the legal distinction between a challenge to a tax foreclosure transfer and a challenge to the amount or legality of a tax quickly collapses upon considering the common purpose of §§ 548 and 505. Both recognize a limited power for a bankruptcy court to redefine state law property rights. They also share a common bankruptcy purpose—to protect the debtor, and deriva-

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tively his creditors, from dissipation of the estate's assets caused by the debtor's failure to protect his own interests (by contesting a tax bill or resisting a wealth-depleting exchange) during his slide into insolvency before filing for bankruptcy relief.[69] Section 548 applies to a wide variety of wealth-depleting events, whereas § 505 applies to tax liability. Under the doctrine of ejusdem generis, the specific treatment of challenges to tax claims in § 505 should prevail over the general in § 548.[70]

A second possible counterargument rests on the effect of avoidance of a tax foreclosure. Arguably, avoidance of a tax foreclosure transfer under § 548 does not trigger the TIA because after avoidance, the tax debt will remain secured by a first lien on the property.[71] Thus avoidance of a tax foreclosure transfer is not a challenge to the amount or legality of taxes. Rather, the sole function of a § 548 challenge is to recover for the estate the surplus of value over tax debt lost by a constructively fraudulent transfer, and thus section 505 does not apply.

The court in *Murphy* did not consider the possible application of the TIA or section 505, but it did note the distinction between a tax creditor who retains a priming lien on the property for tax debt after fraudulent transfer avoidance and other creditors whose interests may be avoided under section 548.[72] The case presented an unusual situation. The market value of the property transferred to the town under New York strict foreclosure law was sufficient to pay all creditor claims against the estate with some left over. The court held that the transfer was avoidable but only to the extent necessary to pay the claims of creditors.[73] The town was entitled to the balance, which was more than sufficient to cover the debtor's taxes. The debtor recovered nothing. The court noted that its holding "impinged on a state regulatory scheme" but "only to the extent that the scheme conflicts with the clear dictates of the Bankruptcy Code."[74]

The argument that section 548 does not affect state sovereignty over taxation because only the value of property in excess of the tax debt is at stake ignores the economic reality of property tax collection. The tax collector's right to the surplus value is an integral part of the tax collection process and, indeed, an integral part of real property tax.[75] Even though fraudulent transfer avoidance leaves intact the tax creditor's lien in the property to the extent of the tax debt,[76] the prospect of loss of the surplus upon fraudulent transfer avoidance is not inconsequential to the state's interest in collecting taxes.

The tax creditor's ability to foreclose the debtor's property interest in the surplus creates a powerful incentive for the debtor to pay the tax. At the end of the foreclosure process, the tax creditor or its assignee is entitled to a deed to the property free of interests junior to the tax lien

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(such as a mortgage). Thus the right to obtain the surplus by foreclosure creates an incentive for mortgagees to monitor the debtor and pay the tax if he does not.[77] In bad times especially, when property values fall and people owe more on their property than it is worth, the tax creditor's right to foreclose the interests of mortgagees and other junior lien creditors is an important tool to ensure that someone remains interested in paying the tax.

Moreover, if the right to the surplus is subject to a bankruptcy-created cloud, the price that foreclosure sale bidders are willing to pay for the tax collector's rights declines.[78] Bidders at tax foreclosure sales subject to the debtor's equity of redemption take into account the risk associated with the prospect that the debtor will redeem by paying the tax before the expiration of the statutory redemption period. If this period is subject to extension in a subsequent bankruptcy proceeding, the value of the property at auction declines further.

The tax collector's case for the surplus remains troubling for those who view the tax collector's victory as a windfall at the expense of the debtor. In the debtor's bankruptcy, the debtor's loss falls on helpless creditors. Their right to justice comes from federal bankruptcy power to avoid such a transfer under § 548.

Justice for debtors and their creditors against the tax collector is in the eye of the beholder. State and local governments view the "fairness" of their tax foreclosure laws differently than bankruptcy courts who are primarily concerned with creditors of the estate. Tax foreclosure laws reflect the history of economic expansion and real property development in the U.S. Throughout the 19th century, enforcement of the tax collector's rights against the tax debtor in personam required personal service on the debtor within the territorial limits of the state.[79] A tax debtor who had left the jurisdiction left his in personam liability behind. Tax collectors relied on enforcement of in rem rights against the property to satisfy tax debt and to resolve issues of title to property subject to taxation.[80]

At the beginning of the 20th century, expedited in rem proceedings against the debtor's property to satisfy tax debt were the norm. The debtor and his creditors were entitled to notice of the tax foreclosure process, typically by publication not personal service.[81] Model tax foreclosure legislation at the mid-20th century emphasized swift, final, low-cost tax foreclosure, with minimal emphasis on time-consuming, expensive notice or other procedures that might increase the foreclosure sale price of the property for the benefit of the debtor or third parties with interests in it.[82]

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By the mid-20th century, federal due process jurisprudence took a different view of the swift and low-cost in rem tax foreclosure process and its effect on the nonvigilant debtor and his creditors. In *Mullane v. Central Hanover Bank & Trust Co.*,[83] the Court invalidated any distinction in the type of notice required in rem and in personam proceedings. For jurisdiction over any dispute, interested parties are entitled to "notice reasonably calculated under all the circumstances to apprise [them] of the pendency of the action and afford them an opportunity to present their objections."[84]

In 1983, the Supreme Court in *Mennonite Bd. of Missions v. Adams*[85] considered a mortgagee's constitutional due process challenge to foreclosure of its interest in property by a property tax foreclosure. Under Indiana law, the owner was entitled to notice of the sale by certified mail, but mortgagees were entitled to notice by publication only.[86] By the time that the mortgagee learned of the tax sale, the redemption period had run, and the purchaser had applied for a deed to the property and initiated an action to quiet title.[87] The mortgagee argued that it had not received constitutionally adequate notice of the tax sale or the opportunity to redeem the property following the sale.[88]

The Court held that the 14th Amendment guaranty of due process requires that a government conducting a tax foreclosure sale must provide notice to a mortgagee "reasonably calculated to apprise him of a pending tax sale."[89] If the mortgagee is identifiable in a publicly recorded mortgage, constructive notice by publication is not sufficient. The tax collector must also provide notice by mail to the mortgagee's last known address.[90]

The dissent in *Mennonite* took up the case of the tax collector. It reasoned that the majority improperly ignored the ability of the mortgagee to look after its own interests.[91] A mortgagee knows that property tax on the mortgaged property will be assessed on regular intervals and, armed with this knowledge, could protect its interests. "The historical justification for constructive notice was that those with an interest in property were under an obligation to act reasonably in keeping themselves informed of proceedings that affected that property."[92] Foreshadowing the majority opinion in *In re BFP*, the dissent noted that the state's interest in collection of tax revenue is vital and federal intrusion should be kept to the barest minimum.[93] In response to the majority's suggestion that mailing foreclosure notices to record owners and lien holders rather than publication might better serve the tax collector, the dissent retorted: "The Court neglects the fact that the State is a better judge of how it wants to settle its tax debts than this Court."[94]

After *Mennonite*, many states modified or completely overhauled real property tax foreclosure procedures.[95] The circuits split on the level

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of diligence in notifying parties with an interest in the property that the constitution requires. In *Jones v. Flowers*,[96] the Supreme Court considered whether the due process clause requires a government to take additional steps to notify a tax debtor when a notice of tax sale sent by certified mail is returned undelivered.[97] Justice Roberts for the majority held that while the tax debtor should have been more diligent regarding his property, the government must do more than simply "shrug [its] shoulders" and say "I tried" after the notice of tax foreclosure came back unclaimed.[98] The Court held that the state should have taken "additional reasonable steps" to notify the taxpayer of the sale and that its failure to take those steps was an unconstitutional deprivation of property without due process.[99] Justice Thomas, joined by Justices Scalia and Kennedy, dissented. An attempt to notify a tax debtor of impending foreclosure by certified mail at his address of record satisfies due process. "Due process requires nothing more—and certainly not here, where petitioner had a statutory duty to pay his taxes and to report any change of address to the state taxing authority."[100]

Due process challenges to tax foreclosure proceedings offer a promising strategy to address the equitable concern for the debtor and his creditors. Consider *In re Pontes,* decided before the Court's opinion in *Jones*, in which a delinquent tax debtor successfully argued in a Chapter 13 case that the Rhode Island tax foreclosure process was constitutionally defective.[101] The City of Providence sold the debtor's residence at a tax sale to recover delinquent property tax. The debtor received by mail a tax sale notice alerting him to the right to avoid the sale by paying the tax. The debtor did not pay, the sale was held, and a third party bought the property for the tax debt. At the end of the one-year statutory redemption period, the purchaser filed a petition to foreclose the tax lien and served it on the debtor. The debtor filed for relief under Chapter 13 and brought an adversary proceeding against the City to recover title to the property.[102] Although the market value of the house exceeded the tax debt, the debtor did not seek to avoid the transfer as a constructive fraud under § 548. Instead, he argued that the tax sale occurred without sufficient notice to him of his right to redeem the property in violation of his constitutional right to due process.[103]

The bankruptcy court held that it had jurisdiction under § 505(a) to consider the legality of the debtor's taxes and specifically to determine whether the Rhode Island tax sale process provided the debtor with constitutionally required due process regarding notice of his right to redeem property after a tax sale.[104] It held that the tax foreclosure statute "create[d] an unreasonable risk of erroneous deprivation of a significant property interest" and was constitutionally defective.[105] Although the

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debtor knew that he had not paid the property tax and that his home was to be sold, the fact that he did not receive notice of his right to redeem the property following the sale was an unconstitutional deprivation of due process.

V. Conclusion

Although the particular issue considered in this article is narrow, the issue is part of a larger controversy. The case for the tax collector's right to the surplus against a fraudulent transfer challenge is difficult to make because tax foreclosure and fraudulent transfer law differ on the appropriate standard of fairness to creditors. Fraudulent transfer law elevates the fair market transfer as the archetype of fairness. The tax foreclosure process departs from this norm because a process designed to achieve the highest possible value in exchange for tax delinquent property is a luxury that state and local governments cannot afford. State and local governments need a foreclosure process that creates a strong incentive for the debtor and mortgagees to pay property tax even as property values decline. They need a swift way to pass clear and final title to tax delinquent and abandoned property to purchasers who will occupy the property and stem the tide of urban blight. From the tax collector's perspective, a tax foreclosure process that achieves these goals is fair to taxpayers who pay their taxes and those who do not.

This article considers who decides which perspective on fairness governs the trustee's fraudulent transfer avoiding power in a bankruptcy case. Even after *BFP*, courts continue to cling to the view that the Court rejected in that case — that the foreclosure process yields "a reasonably equivalent value in exchange" only if it provides for transfer by competitive bidding and market-like conditions. In *BFP*, the Court rejected the fair market transfer as the relevant archetype. It held that state and local foreclosure transfers yield reasonably equivalent value because control of the foreclosure process is the province of state law, which Congress has not clearly preempted. Moreover, as of 2005, section 505(a)(2)(C) expressly preempts bankruptcy court interference in state tax foreclosure transfers.

The tax collector can state with confidence that competitive bidding and market-like conditions of a tax foreclosure transfer do not matter. Due process, not fraudulent transfer law, supplies the relevant safeguard for debtors and their creditors in bankruptcy.

NOTES

1. See, e.g., Arthur D. Lynn, Jr., Property Tax Development: Selected Historical Perspective, in Property Taxation USA 4, 7-8 (1967); Frank S. Alexander, Tax Liens, Tax Sales

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and Due Process, 75 Ind. L.J. 747, 752 (2000) ("Property taxation is consistently described as one of the worst forms of taxation from virtually every perspective").

2. The recent strategy in response to political opposition to property taxation is creation of tax caps, assessment limits, exemptions, rebates and other devices to reduce the property tax base, which may have exacerbated the effect of the economic downturn. See Nancy Y. Augustine, Michael E. Bell, David Brunori & Joan Youngman, Erosion of the Property Tax Base: Trends, Causes and Consequences (Lincoln Institute of Land Policy 2009).

3. Alexander, 75 Ind. L.J. at 756 (attention to property tax collection arises periodically in studies conducted in the aftermath of economic collapse); Jens Peter Jensen, Property Taxation in the United States 307 (1931) (of the aspects of property tax, collection process is "the least explored, yet most in need of careful study"); Henry J. Aaron, Who Pays the Property Tax?: A New View 56 (1975) ("For most mortals, mere mention of property tax administration is sufficient to make eyes glaze over and heads nod"). Cf. The Gospel of Luke, 5:27-32 (New International Version).

4. E.g., Carolyn Said, Property Tax Plummets With Home Values, S.F. Chron., Jan. 25, 2009, available online at: http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/01/24/MNV7155VSC.DTL&feed=rss.bayarea; Renae Merle, Unemployment Spike Compounds Foreclosure Crisis, Washington Post.com, Aug. 18, 2009, available at http://www.washingtonpost.com/wp-dyn/content/story/2009/08/18/ST2009081801234.html (unemployment overtakes high interest, subprime loans as cause of mortgage foreclosure); Tami Luhby, Obama Housing Fix Open for Business, CNNMoney.com., Mar. 5, 2009, available online at http://money.cnn.com/2009/03/04/news/economy/guidelines/index.htm.

5. Foreclosure refers to the legal process by which a lien creditor can extinguish the debtor's equitable right of redemption. See generally, Debra Pogrund Stark, Foreclosing on the American Dream: An Evaluation of State and Federal Foreclosure Laws, 51 Okla. L. Rev. 229, 231 (1998).

6. See generally, Elizabeth Warren & Jay Westbrook, The Law of Debtors and Creditors 301 (6th ed. Aspen Publishers 2009) (more than half of Chapter 13 debtors are homeowners seeking to save their home from foreclosure). E.g., In re Pontes, 280 B.R. 20 (Bankr. D. R.I. 2002), aff'd, 310 F. Supp. 2d 447 (D.R.I. 2004).

7. See National Vacant Properties Campaign, http://www.vacantproperties.org/ ("No matter how the phenomenon manifests itself, the increasingly profound effects of vacant properties are the same: lower tax revenues, higher municipal costs, and serious environmental and public health consequences"); see also http://www.detnews.com/article/20090820/METRO/908200428/Bad-economy-fuels-arson-spike-throughout-Michigan; George Sternlieb & Robert W. Burchell, Residential Tax Delinquency: A Forerunner to Residential Abandonment, 1 Real Est. L. J. 256 (1973).

8. Swift and final tax lien foreclosure processes are an important tool for state and local governments to combat urban blight due to abandoned tax-delinquent property. See Kevin T. Smith, An Update on Foreclosure of Real Property Tax Liens Under Michigan's New Tax Foreclosure Process, 36 Mich. Real Prop. Rev. 30 (2009) (describing and evaluating Michigan's tax lien foreclosure law enacted in 1999 to combat urban blight).

9. Taxation Collections and Remedies: 50 State Statutory Surveys (Thomson Reuters/West 2009) (collecting tax foreclosure laws of 50 states) (Westlaw 0140 Surveys 1).

10. See Alexander, 75 Ind. L.J. at 770.

11. E.g., Ala. Code § 40-29-26 (2009) (authorizing sale of property to highest bidder); Conn. Gen. Stat. Ann. § 12-157(c) (2009) (tax collector may sell property at public auction to the highest bidder or may sell property to municipality if no bidder bids an amount equal to or greater than the tax debt). See generally 72 Am. Jur. 2d State and Local Taxation § 857 (2009). See generally 16 McQuillin Mun. Corp. § 44.148 (3rd ed. 2009).

12. E.g., Nev. Rev. Stat. § 361.570 (2008).

13. E.g., Idaho Code Ann. §§ 63-1005 to 1006 (2008) (if property subject to tax lien is not redeemed within three years after date of delinquency, county tax collector must issue deed

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in favor of county); N.Y. Real Prop. Tax Law § 1136 (2009); Me. Rev. Stat. Ann. 36, § 943 (2009); Tenn. Code. Ann. § 67-5-2702 (2008); Or. Rev. Stat. § 312.100 (2009) (on foreclosure, property is sold to county for tax debt). See also In re Sherman, 223 B.R. 555, 41 Collier Bankr. Cas. 2d (MB) 102, 41 Fed. R. Serv. 3d 978 (B.A.P. 10th Cir. 1998) (Wyoming tax lien foreclosure statute (repealed) that authorized sale of property for the tax debt to person chosen by lottery).

14. 11 U.S.C.A. § 548 (2005). 11 U.S.C.A. § 548(a)(1)(B) indicates:

> The trustee may avoid any transfer… of an interest of the debtor in property… that was made… on or within two years before the date of the filing of the petition, if the debtor voluntarily or involuntarily—received less than a reasonably equivalent value in exchange for such transfer… and was insolvent on the date that such transfer was made… or became insolvent as a result of such transfer or obligation.

15. 11 U.S.C.A. § 101(54) ("The term 'transfer' means… the foreclosure of a debtor's equity of redemption").

16. The same conflict can arise between state tax lien foreclosure law and state fraudulent transfer law outside the context of a bankruptcy case. Once the tax debtor files for bankruptcy, the trustee can seek to avoid a prepetition transfer as a constructive fraud using either § 548 or § 544(b). 11 U.S.C.A. §§ 548, 544(b) (2005). Under § 544(b), the trustee can assert a creditor's avoiding power under applicable state law, including state fraudulent transfer law.

17. BFP v. Resolution Trust Corp., 511 U.S. 531, 114 S. Ct. 1757, 128 L. Ed. 2d 556, 25 Bankr. Ct. Dec. (CRR) 1051, 30 Collier Bankr. Cas. 2d (MB) 345, Bankr. L. Rep. (CCH) P 75885 (1994).

18. BFP, 511 U.S. at 545 (Scalia, J.) ("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"). Justice Souter for the dissent asserted that state foreclosure law is procedural not substantive and thus "give[s] way" to contrary creditor entitlements under bankruptcy law, citing, e.g., United Sav. Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365, 370-71, 108 S. Ct. 626, 98 L. Ed. 2d 740, 16 Bankr. Ct. Dec. (CRR) 1369, 17 Collier Bankr. Cas. 2d (MB) 1368, Bankr. L. Rep. (CCH) P 72113 (1988) (right to immediate foreclosure is not an "interest in property" under nonbankruptcy law and is thereby subject to automatic stay).

19. BFP, 511 U.S. at 537, n.3.

20. BFP, 511 U.S. at 537, n.3.

21. After Imperial Savings Association failed, Resolution Trust Corp. was appointed as its receiver. BFP, 511 U.S. at 533, n.1.

22. BFP, 511 U.S.at 534 (the estimated fair market value of the property at the time of sale was $725,000).

23. 11 U.S.C.A. § 548(a) (2005). When the transfer at issue in *BFP* occurred, the reach-back period under § 548 was one year.

24. Section 548(a)(1)(B). When the Court decided *In re BFP*, the "reasonably equivalent value in exchange" requirement was codified at § 548(a)(2)(A).

25. 11 U.S.C.A. § 548(d)(2)(a) (2005) ("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").

26. BFP, 511 U.S. at 548.

27. In re BFP, 132 B.R. 748, 750, 22 Bankr. Ct. Dec. (CRR) 397 (B.A.P. 9th Cir. 1991), aff'd, 974 F.2d 1144, 23 Bankr. Ct. Dec. (CRR) 705, 27 Collier Bankr. Cas. 2d (MB) 1417, Bankr. L. Rep. (CCH) P 74837 (9th Cir. 1992), judgment aff'd, 511 U.S. 531, 114 S. Ct. 1757, 128 L. Ed. 2d 556, 25 Bankr. Ct. Dec. (CRR) 1051, 30 Collier Bankr. Cas. 2d (MB) 345, Bankr. L. Rep. (CCH) P 75885 (1994) (a "non-colllusive and regularly conducted nonjudicial foreclosure sale… cannot be challenged as a fraudulent conveyance because the consideration

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received in such a sale establishes 'reasonably equivalent value' as a matter of law."). See generally Marie T. Reilly, A Search for Reason in "Reasonably Equivalent Value" After *BFP v. Resolution Trust Corp.*, 13 Am. Bankr. L. Rev. 261, 263-65 (2005) (describing the evolution of the bankruptcy trustee's power to avoid involuntary transfers pursuant to state law governing creditors' foreclosure rights prior to *In re BFP*).

28. "The question presented here… is whether the amount of debt… satisfied at the foreclosure sale (viz., a total of $433,000) is "reasonably equivalent" to the worth of the real estate conveyed." BFP, 511 U.S. at 536. The foreclosure of the debtor's equity of redemption accomplished by the foreclosure sale was a "transfer" under bankruptcy law. BFP, 511 U.S. at 535; 11 U.S.C.A. § 101(54)(c) (2005) ("transfer" includes "foreclosure of a debtor's equity of redemption").

29. E.g., Durrett v. Washington Nat. Ins. Co., 621 F.2d 201, 6 Bankr. Ct. Dec. (CRR) 954, 23 C.B.C. 95 (5th Cir. 1980) (rejected by, In re DeVito, 111 B.R. 529 (Bankr. W.D. Pa. 1990)) and (rejected by, In re Serra Builders, Inc., 128 B.R. 615, Bankr. L. Rep. (CCH) P 74040 (Bankr. D. Md. 1991)) and (rejected by, In re Henry-Luqueer Properties, Inc., 145 B.R. 771, 23 Bankr. Ct. Dec. (CRR) 846, 27 Collier Bankr. Cas. 2d (MB) 1049 (Bankr. E.D. N.Y. 1992)) and (rejected by, In re Bennett, 154 B.R. 140 (Bankr. N.D. N.Y. 1992)) and (abrogated by, BFP v. Resolution Trust Corp., 511 U.S. 531, 114 S. Ct. 1757, 128 L. Ed. 2d 556, 25 Bankr. Ct. Dec. (CRR) 1051, 30 Collier Bankr. Cas. 2d (MB) 345, Bankr. L. Rep. (CCH) P 75885 (1994)) (pre-1978 Code bankruptcy law); In re Littleton, 888 F.2d 90, 19 Bankr. Ct. Dec. (CRR) 1627, 21 Collier Bankr. Cas. 2d (MB) 1158, Bankr. L. Rep. (CCH) P 73083 (11th Cir. 1989) (abrogated by, BFP v. Resolution Trust Corp., 511 U.S. 531, 114 S. Ct. 1757, 128 L. Ed. 2d 556, 25 Bankr. Ct. Dec. (CRR) 1051, 30 Collier Bankr. Cas. 2d (MB) 345, Bankr. L. Rep. (CCH) P 75885 (1994)).

30. Matter of Bundles, 856 F.2d 815, 18 Bankr. Ct. Dec. (CRR) 554, Bankr. L. Rep. (CCH) P 72461 (7th Cir. 1988) (abrogated by, BFP v. Resolution Trust Corp., 511 U.S. 531, 114 S. Ct. 1757, 128 L. Ed. 2d 556, 25 Bankr. Ct. Dec. (CRR) 1051, 30 Collier Bankr. Cas. 2d (MB) 345, Bankr. L. Rep. (CCH) P 75885 (1994)).

31. Matter of Bundles, 856 F.2d at 824-25.

32. In response to the dissent's assertion that the meaning of "reasonably equivalent value" is plain ("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… less than the latter" BFP, 511 U.S. at 552), the majority agreed but pointed out that the dissent's statement begs the question: what is foreclosed property worth? BFP, 511 U.S. at 546-47.

33. BFP, 511 U.S. at 537.

34. BFP, 511 U.S. at 538. The Court cited to a standard definition of "fair market value:" the hypothetical 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." BFP, 511 U.S. at 538, citing Black's Law Dictionary 971 (6th ed. 1990).

35. BFP, 511 U.S. at 539.

36. BFP, 511 U.S. at 540.

37. BFP, 511 U.S. at 540.

38. BFP, 511 U.S. at 540.

39. BFP, 511 U.S. at 542, citing G. Osborne, Mortgages 144, 683, 733-35 (2d ed. 1977).

40. BFP, 511 U.S. at 545 ("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 re followed, the mere inadequacy of a foreclosure sale price is no basis for setting the sale aside").

41. The Court explained the history of foreclosure law from its origin in English courts of chancery to modern times. BFP, 511 U.S. at 541-543. States' power to provide for and regulate creditor-initiated foreclosure of real property interests is an "essential state interest." BFP, 511 U.S. at 544, citing American Land Co. v. Zeiss, 219 U.S. 47, 60, 31 S. Ct. 200, 55 L. Ed. 82 (1911) ("the general welfare of society is involved in the security of titles to real estate" and power to ensure security of title to real property "inheres in the very nature of [state] government."), but

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see BFP, 511 U.S. at 566 (Souter, J. dissenting) (criticizing majority's citation to *American Land Co.* as conversion of a "stray phrase" in that case "into a pronouncement about the allocation of responsibility between the National Government and the States").

42. BFP, 511 U.S. at 543.

43. BFP, 511 U.S. at 543.

44. BFP, 511 U.S. at 537, n.3.

45. See Reilly, 13 Am. Bankr. L. Rev. at 276-77.

46. Reilly, 13 Am. Bankr. L. Rev. at 277-81.

47. E.g., In re Fisher, 355 B.R. 20, 56 Collier Bankr. Cas. 2d (MB) 1375 (Bankr. W.D. Mich. 2006), following Matter of Winshall Settlor's Trust, 758 F.2d 1136, 1139, 13 Bankr. Ct. Dec. (CRR) 839, 12 Collier Bankr. Cas. 2d (MB) 605 (6th Cir. 1985) (rejected by, In re DeVito, 111 B.R. 529 (Bankr. W.D. Pa. 1990)) (holding before *BFP* that the consideration received at a noncollusive regularly conducted foreclosure sale constitutes reasonably equivalent value); In re McGrath, 170 B.R. 78, 31 Collier Bankr. Cas. 2d (MB) 586, Bankr. L. Rep. (CCH) P 76022 (Bankr. D. N.J. 1994) (reasoning of BFP applies to New Jersey mortgage and tax foreclosure process); In re Comis, 181 B.R. 145, 150 (Bankr. N.D. N.Y. 1994) (bankruptcy court is "without authority to void a tax foreclosure sale conducted in accordance with state law"); In re Talbot, 254 B.R. 63, 36 Bankr. Ct. Dec. (CRR) 243, 45 Collier Bankr. Cas. 2d (MB) 280 (Bankr. D. Conn. 2000) (Connecticut strict foreclosure of tax lien yielded reasonably equivalent value).

48. E.g., In re Grandote Country Club Company, Ltd., 252 F.3d 1146, 46 Collier Bankr. Cas. 2d (MB) 737, Bankr. L. Rep. (CCH) P 78467 (10th Cir. 2001) (Colorado law requires tax lien foreclosure sales to be public with competitive bidding, thus sale price is reasonably equivalent value); In re Murphy, 331 B.R. 107 (Bankr. S.D. N.Y. 2005) (New York strict foreclosure does not conclusively yield reasonably equivalent value) (same); In re Harris, 2003 Bankr. Lexis 2323 (Bankr. N.D.N.Y. 2003); In re Fitzgerald, 255 B.R. 807, 37 Bankr. Ct. Dec. (CRR) 18 (Bankr. D. Conn. 2000) (Connecticut strict foreclosure of tax liens does not conclusively yield reasonably equivalent value); In re Washington, 232 B.R. 340, 349 (Bankr. E.D. Va. 1999) (comparing Virginia tax and mortgage foreclosure process); In re Hollar, 184 B.R. 243, 252 (Bankr. M.D. N.C. 1995) (Under North Carolina law, both mortgage and tax foreclosure sales are conducted with public notice, auction, and competitive bidding); In re Lord, 179 B.R. 429 , 435(Bankr. E.D. Pa. 1995) (Pennsylvania mortgage and tax lien foreclosure processes require competitive bidding); In re Russell-Polk, 200 B.R. 218, 221, 29 Bankr. Ct. Dec. (CRR) 952 (Bankr. E.D. Mo. 1996) (comparing Missouri tax lien and mortgage foreclosure processes to ascertain whether the tax process provides notice to the owner and competitive bidding similar to mortgage foreclosure process); In re Lord, 179 B.R. 429, 434 (Bankr. E.D. Pa. 1995) ("We may not conclude that reasonably equivalent value has been provided simply because the applicable state statutory requirements have been met"); In re Golden, 190 B.R. 52, 58 (Bankr. W.D. Pa. 1995) (same). Courts have adopted this comparative approach for state-regulated forced transfers other than tax lien foreclosure, e.g., In re Grady, 202 B.R. 120, 124, 29 Bankr. Ct. Dec. (CRR) 1169 (Bankr. N.D. Iowa 1996) (forfeiture of debtor's interest under a defaulted land sale contract by operation of state law was fraudulent transfer); but see In re Vermillion, 176 B.R. 563, 26 Bankr. Ct. Dec. (CRR) 598, Bankr. L. Rep. (CCH) P 76377 (Bankr. D. Or. 1994) (applying *In re BFP* to land sale contract forfeiture under Oregon law); and to mortgage foreclosures, e.g., In re Fitzgerald, 237 B.R. 252, 266 (Bankr. D. Conn. 1999) (Connecticut strict mortgage foreclosure process).

49. E.g., Murphy, 331 B.R. at 119-21 (New York tax lien forfeiture process did not yield reasonably equivalent value); In re Wentworth, 221 B.R. 316, 40 Collier Bankr. Cas. 2d (MB) 132 (Bankr. D. Conn. 1998) (Maine's tax lien strict foreclosure process without public sale did not yield reasonably equivalent value).

50. Murphy, 331 B.R. 107.

51. Murphy, 331 B.R. at 114.

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52. N.Y. Real Prop. Tax Law § 1120, N.Y. Real Prop. Tax Law § 1136[1]. Note that the tax collector's option to direct a sale of real property subject to tax foreclosure was omitted when the statute was amended in 1995. See In re Harris, 2003 Bankr. Lexis 2323 (Bankr. N.D.N.Y. 2003).

53. N.Y. Real Prop. Tax Law at §§ 1125 (tax creditor must serve the property owner by certified mail with petition for foreclosure and the deadline for redemption by payment of taxes and penalties); 1124 (providing for published notice of foreclosure in at least two newspapers for three nonconsecutive weeks in a two-month period); 1101 (debtor's redemption period expires two years from the date of the tax lien or upon the date specified in the published notice of foreclosure as long as that date is more than two years from the date of the tax lien); and 1136 (if the debtor does not redeem or answer, the tax creditor is entitled to conveyance of the property in fee simple).

54. Murphy, 331 B.R. at 114. The circumstances of the transfer were somewhat unusual in that the debtor asserted an interest in the property net of the claims of creditors. At the time of the transfer, the fair market value of the property was greater than $1 million. The debtor owed creditors approximately $700,000. Murphy, 331 B.R. at 114-15. The debtor intervened in the adversary proceeding between the trustee and the Town. Murphy, 331 B.R. at 115.

55. Murphy, 331 B.R. at 115.

56. Murphy, 331 B.R. at 115.

57. See supra notes 47-48.

58. BFP, 511 U.S. at 539; but see BFP, 511 U.S. at 557, n.10 (Souter, J. in dissent):

> [T]he analogy proposed ignores the patent difference between these two aspects of the 'regulatory background'… while the zoning ordinance would reduce the value of the property "to the world," foreclosure rules affect not the price any purchaser 'would pay' [reference omitted] but rather the means by which the mortgagee is permitted to extract its entitlement from the entire 'value' of the property.

Justice Scalia rejects the distinction, reasoning that even if creditors' foreclosure rights are procedural, they affect the value of the property the same as zoning restrictions.). BFP, 511 U.S. at 540. See also BFP, 511 U.S. at 548 (foreclosure redefines the market for the property).

59. See Dows v. City of Chicago, 78 U.S. 108, 20 L. Ed. 65, 1870 WL 12848 (1870):

> It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers, upon whom the duty is devolved of collecting the taxes, may derange the operations of government, and thereby cause serious detriment to the public.

60. Tax Injunction Act, 28 U.S.C.A. § 1341 (1937) ("The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." Under a judicially created exception to the TIA, the U.S. and its instrumentalities "can initiate actions in federal court to protect themselves from "unconstitutional state exactions"). See Simon v. Cebrick, 53 F.3d 17, 22 (3d Cir. 1995); Department of Employment v. U.S., 385 U.S. 355, 358, 87 S. Ct. 464, 17 L. Ed. 2d 414 (1966).

61. Arkansas v. Farm Credit Services of Cent. Arkansas, 520 U.S. 821, 826-27, 117 S. Ct. 1776, 138 L. Ed. 2d 34 (1997) (noting that the TIA reflects "a congressional concern to confine federal court intervention in state government").

62. In re Northbrook Partners LLP, 245 B.R. 104, 35 Bankr. Ct. Dec. (CRR) 207 (Bankr. D. Minn. 2000).

63. 11 U.S.C.A. § 505(a)(2)(A) (2005). See In re Mantz, 343 F.3d 1207, 41 Bankr. Ct. Dec. (CRR) 285, Bankr. L. Rep. (CCH) P 78916 (9th Cir. 2003) (holding that a tax liability is not "adjudicated" for purposes of this subsection unless the adjudication had become final before the petition date).

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64. Pub. L. 109-8, § 701(b)(3) (2005).

65. 11 U.S.C.A. § 505(a)(2)(C) (2005). To date, no reported cases have applied § 505(a)(C). Two bankruptcy courts have noted it as a new limitation on a bankruptcy court's power to adjudicate tax claims. In re Melvin, 410 B.R. 705, 103 A.F.T.R.2d 2009-1836 (Bankr. M.D. Ala. 2009); In re Delafield 246 Corp., 368 B.R. 285, 48 Bankr. Ct. Dec. (CRR) 57 (Bankr. S.D. N.Y. 2007).

66. In re Ledgemere Land Corp., 135 B.R. 193, 196-97, 22 Bankr. Ct. Dec. (CRR) 669, Bankr. L. Rep. (CCH) P 74383 (Bankr. D. Mass. 1991) (the debtor may contest tax debts in bankruptcy court even though his prior inaction would bar him from contesting them under nonbankruptcy law); In re Home and Housing of Dade County, Inc., 220 B.R. 492, 494-95 (S.D. Fla. 1998) (§ 505 jurisdiction gives the debtor a new opportunity to contest the tax without regard to the time limits applicable in another forum); In re 499 W. Warren Street Associates, Ltd. Partnership, 143 B.R. 326, 329 (Bankr. N.D. N.Y. 1992) (same).

67. E.g., In re R-P Packaging, Inc., 278 B.R. 281, 48 Collier Bankr. Cas. 2d (MB) 948 (Bankr. M.D. Ga. 2002); In re A.C. Williams Co., 51 B.R. 496, 498, 13 Bankr. Ct. Dec. (CRR) 523 (Bankr. N.D. Ohio 1985) ("there is nothing in the history of bankruptcy or reorganization legislation to support the theory that Congress intended to set the federal courts up as super-assessment tribunals over state taxing agencies"). Cf. Matter of Carlson, 126 F.3d 915, 920, Bankr. L. Rep. (CCH) P 77508, 97-2 U.S. Tax Cas. (CCH) P 50702, 80 A.F.T.R.2d 97-6558 (7th Cir. 1997) (bankruptcy court could not invalidate federal income tax liability under its general equitable power in § 105 because § 505 provided exclusive and limited basis for challenging taxes in bankruptcy court).

68. In re Northbrook Partners LLP, 245 B.R. 104, 115, 35 Bankr. Ct. Dec. (CRR) 207 (Bankr. D. Minn. 2000).

69. E.g., In re New Haven Projects Ltd. Liability Co., 225 F.3d 283, 288-89 36 Bankr. Ct. Dec. (CRR) 198, Bankr. L. Rep. (CCH) P 78265 (2d Cir. 2000); City Vending of Muskogee, Inc. v. Oklahoma Tax Com'n, 898 F.2d 122 (10th Cir. 1990); Central Valley AG Enterprises v. U.S., 531 F.3d 750, 755, 50 Bankr. Ct. Dec. (CRR) 49, 59 Collier Bankr. Cas. 2d (MB) 1624, Bankr. L. Rep. (CCH) P 81269, 2008-2 U.S. Tax Cas. (CCH) P 50405, 101 A.F.T.R.2d 2008-2682 (9th Cir. 2008), citing In re Mantz, 343 F.3d 1207, 1211, 41 Bankr. Ct. Dec. (CRR) 285, Bankr. L. Rep. (CCH) P 78916 (9th Cir. 2003) (grant of jurisdiction over tax liability "protects a debtor from being bound by a pre-bankruptcy tax liability determination that, because of a lack of financial resources, he or she was unable to contest" and protects creditors of the estate by allowing the estate to contest a debtor's prebankruptcy tax liability). The bankruptcy court's authority to determine the amount or legality of a tax claim also offers a forum for adjudication of tax issues that might otherwise delay the orderly administration of the case and distribution to the debtor's creditors. See In re D'Alessio, 181 B.R. 756, 759-60, 76 A.F.T.R.2d 95-5001 (Bankr. S.D. N.Y. 1995).

70. Fourco Glass Co. v. Transmirra Products Corp., 353 U.S. 222, 228-29, 77 S. Ct. 787, 1 L. Ed. 2d 786, 113 U.S.P.Q. 234 (1957) ("However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment… [s]pecific terms prevail over the general in the same or another statute which otherwise might be controlling"'); Markair, Inc. v. C.A.B., 744 F.2d 1383, 1385 (9th Cir. 1984) ("It is a well-settled canon of statutory interpretation that specific provisions prevail over general provisions").

71. 11 U.S.C.A. § 506(a) (2005).

72. "Defendant is not denied its very important interest in securing payment of outstanding tax obligations by reason of avoidance of the transfer to the extent necessary to protect other creditors." Murphy, 331 B.R. at 121.

73. Murphy, 331 B.R. at 121.

74. Murphy, 331 B.R. at 121. A similar argument is that the surplus is in effect a penalty. The tax creditor's (or its assignee's) interest in it is in the nature of a claim for penalty against the taxpayer, subject to subordination in a Chapter 7 case to the claims of claims of general unsecured creditors under § 726(a)(4).

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75. E.g., In re Hemstreet, 258 B.R. 134, 138, 37 Bankr. Ct. Dec. (CRR) 88 (Bankr. W.D. Pa. 2001), citing Povlow v. Brown, 12 Pa. Commw. 303, 307, 315 A.2d 375, 377 (1974) ("[t]he dominant purposes of the Real Estate Tax Sale Law [are] to provide speedier and more efficient procedures for enforcing tax liens and to improve the quality of titles obtained at a tax sale").

76. Pursuant to state or local law, the tax lien is typically first in priority even as to prior recorded mortgages or other encumbrances against the property. See, e.g., Van Prooyen Builders, Inc. v. Lambert, 907 N.E.2d 1032, 1036 (Ind. Ct. App. 2009), aff'd on reh'g, 911 N.E.2d 619 (Ind. Ct. App. 2009).

77. E.g., U.S. v. Sayer, 450 F.3d 82 (1st Cir. 2006) (under Maine law, purchaser of property at tax lien foreclosure sale took title to property free of mortgage held by Farm Security Administration). See generally William Brueggeman & Jeffrey D. Fisher, Real Estate Finance and Investments 32-33 (McGraw Hill-Irwin 2008). Real property mortgages typically contain tax clauses authorizing the mortgagee to pay real property taxes if the mortgagor does not. If the mortgagee pays the tax, it is entitled to add the tax to the principal balance of the loan. See generally Brueggeman & Fisher, Real Estate Finance and Investments at 32-33.

78. In *Sayer*, the court held that the tax creditor could pass its right to foreclose the liens of junior creditors to an assignee who acquired the tax lien certificate at a public auction. Sayer, 450 F.3d at 86. It observed the chilling effect on foreclosure sale prices by a decision to the contrary: "Were the tax lien amount close to the value of the property, no reasonable purchaser would be likely to pay anything close to the full taxes due for a property that could, if the value went up, be redeemed by the mortgagee not merely for three months after notice but forever." Sayer, 450 F.3d at 86.

79. Pennoyer v. Neff, 95 U.S. 714, 724-25, 24 L. Ed. 565, 1877 WL 18188 (1877) (overruled in part by, Shaffer v. Heitner, 433 U.S. 186, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977)).

80. E.g., Leigh v. Green, 193 U.S. 79, 90-92, 24 S. Ct. 390, 48 L. Ed. 623 (1904) ("a proceeding in rem… may be instituted and carried to judgment without personal service upon claimants within the state, or notice by name to those outside of it").

81. E.g., Longyear v. Toolan, 209 U.S. 414, 418, 28 S. Ct. 506, 52 L. Ed. 859 (1908); Ballard v. Hunter, 204 U.S. 241, 261-62, 27 S. Ct. 261, 51 L. Ed. 461 (1907).

82. See National Municipal League, Model Real Property Tax Collection Law at xi-xvi (2d ed. 1954); Note, The Constitutionality of Notice by Publication in Tax Sale Proceedings, 84 Yale L.J. 1505, 1507 (1975) (constructive notice by publication was appropriate for all in rem proceedings including those involving property owned by residents of the state).

83. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950).

84. Mullane, 339 U.S. at 314.

85. Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 103 S. Ct. 2706, 77 L. Ed. 2d 180 (1983).

86. The law required the county auditor to post notice of a tax foreclosure sale in the county courthouse and publish notice in the local newspaper once per week for three weeks. The property was sold at public auction to the highest bidder. The purchaser acquired a certificate of sale, which gave him title to the property senior to all liens against the property as of the sale, subject to a two-year redemption period in which the owner or mortgagee could redeem the property. Mennonite, 462 U.S. at 793.

87. Mennonite, 462 U.S. at 793. The previous owner and mortgagees may defeat the quiet title action only by proving certain defects in the foreclosure process, for example, that the property sold was not subject to the tax or that the taxes had in fact been paid or the property redeemed. Mennonite, 462 U.S. at 794.

88. Mennonite, 462 U.S. at 795.

89. Mennonite, 462 U.S. at 798.

90. Mennonite, 462 U.S. at 798. Three justices dissented, arguing that the holding inappropriately departed from Mullane, 339 U.S. at 314 ("[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice

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reasonably calculated under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections"). Justice O'Connor, joined by Justices Powell and Rehnquist, would not have required notice by mail in all cases but would leave to the states the task of balancing the interest of the state and the individual's interest in property. Mennonite, 462 U.S. at 803 (O'Connor, J. dissenting). See generally Alexander, 75 Ind. L.J. at 767-70.

91. Mennonite, 462 U.S. at 803, 807 (O'Connor, J. dissenting).

92. Mennonite, 462 U.S. at 804.

93. Mennonite, 462 U.S. at 805-06.

94. Mennonite, 462 U.S. at 806.

95. Alexander, 75 Ind. L.J. at 768 (noting that state and local governments have "struggled to develop constitutionally adequate procedures" and that many have failed).

96. Jones v. Flowers, 547 U.S. 220, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006).

97. Courts were in disagreement. Jones, 547 U.S. at 227-28. Compare Akey v. Clinton County, N.Y., 375 F.3d 231, 236 (2d Cir. 2004) (requiring "reasonably diligent efforts to learn correct address after notice was returned undelivered); and Kennedy v. Mossafa, 100 N.Y.2d 1, 9, 759 N.Y.S.2d 429, 789 N.E.2d 607 (2003) (sending notice once does not always satisfy due process when notice is returned); with Smith v. Cliffs on the Bay Condominium Ass'n, 463 Mich. 420, 429, 617 N.W.2d 536 (2000) (abrogated by, Jones v. Flowers, 547 U.S. 220, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006)) (that the notice is returned undelivered does not impose on the state an obligation to find a new address).

98. Jones, 547 U.S. at 229, 234.

99. Jones, 547 U.S. at 239. Reasonable additional steps included resending the notice by regular, noncertified mail, posting the notice on the front door, or addressing the notice to occupant. Jones, 547 U.S. at 234-35.

100. Jones, 547 U.S. at 242. The dissent noted that Arkansas certifies approximately 18,000 parcels of real property for tax foreclosure each year and will bear the burden of locating thousands of owners. Jones, 547 U.S. at 246. See also Orange County Com'r of Finance v. Helseth, 24 Misc. 3d 204, 875 N.Y.S.2d 754 (Sup 2009) (distinguishing *Jones* on grounds that tax debtor should have protected his own interests).

101. In re Pontes, 280 B.R. 20 (Bankr. D. R.I. 2002), aff'd, 310 F. Supp. 2d 447 (D.R.I. 2004).

102. Pontes, 280 B.R. at 23, citing Fuentes v. Shevin, 407 U.S. 67, 86-87, 92 S. Ct. 1983, 32 L. Ed. 2d 556, 10 U.C.C. Rep. Serv. 913 (1972).

103. Perhaps the debtor chose to attack the tax sale on constitutional rather than fraudulent transfer grounds because the Rhode Island tax sale process provided for sale of property by public auction and would likely be considered "for reasonably equivalent value." R.I. Gen. Laws §§ 44-9-8. Rhode Island law provided delinquent tax debtors with a right to redeem the property after the sale but did not require notice to the debtor regarding the right of redemption. Pontes, 280 B.R. at 24-25.

104. Pontes, 280 B.R. at 27.

105. Pontes, 280 B.R. at 34.

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