

## The Procedure of Tax Lien Sales

### I. Introduction

This Appendix addresses the steps that local governments in West Virginia must take in tax lien foreclosure proceedings in order to comply with the West Virginia Code, as well as state and federal due process requirements. The Fourteenth Amendment to the U.S. Constitution prohibits the states from “depriv[ing] any person of . . . property, without due process of law,”<sup>1</sup> and the West Virginia Constitution provides that “[n]o person shall be deprived of . . . property, without due process of law, and the judgment of his peers.”<sup>2</sup> Depending on the circumstances, “due process” guarantees certain rights to procedures that provide notice and an opportunity to be heard, and that are applied fairly and evenhandedly before, and potentially after, property owners may be deprived of their property.<sup>3</sup> West Virginia’s modern statutory scheme implementing these requirements in the context of tax lien foreclosure became effective in 1994.<sup>4</sup> This Appendix outlines these statutes and relevant court-developed law that applies in West Virginia.

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<sup>1</sup> U.S. CONST. amend. XIV, § 1.

<sup>2</sup> W. VA. CONST. art. 3, § 10.

<sup>3</sup> See *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

<sup>4</sup> See W. VA. CODE ANN. § 11A-3-1 (West 2015).

In 1992 West Virginia voters repealed certain sections of Article XIII of the West Virginia Constitution primarily towards solving the State’s due process problem of title automatically vesting in the State after property went unsold at the sheriff’s sale without notice to owners. In 1994 and 1995, statutory law on tax sale procedures were substantially amended by the West Virginia Legislature to create constitutional notice procedures for the sale of non-entered lands and for the sale of tax liens, including tax liens which were not purchased at the annual sheriff’s sale, which previously had automatically vested in the State. The West Virginia legislature extended the time frame to identify parties entitled to notice while shifting the responsibility of notice and costs burden to the tax sale purchasers.”

D. Kevin Moffatt, *West Virginia Tax Sales and Tax Deeds: The Effect of Tax Deeds on Oil and Gas Leases and Easements*, 35<sup>th</sup> Annual Institute of the Energy and Mineral Law Foundation, §WV.05(1) (2014), at WV.04(1). Prior to the 1990s amendments, Section 4, Article XIII of the West Virginia Constitution “required absolute title to be vested in the State before a deputy commissioner could file suit to dispose of forfeited and delinquent lands.” John W. Fisher, II, *Delinquent and Non-Entered Lands and Due Process*, 115 W. VA. L. REV. 43, 59 (2012). Note that in 2005, the U.S. Court of Appeals for the Fourth Circuit rejected the argument that West Virginia’s notice requirements are less exacting than those required by the U.S. Constitution. See *Plemons v. Gale*, 396 F.3d 569, 572 & 572 n.2 (4th Cir. 2005) (“West Virginia’s statutory notice requirements parallel the requirements of the United States Constitution.”). Further, *Lilly v. Duke*, although “decided before and . . . actually the impetus behind the 1994 amendment and reenactment of the tax-sale scheme,” is the “seminal case in modern tax-sale jurisprudence” in

## II. Pre-Sale Proceedings

Real property taxes (also known as *ad valorem* taxes) in West Virginia are due in two installments per year and become delinquent on October 1 and April 1.<sup>5</sup> Taxes paid on or before the date they are payable are subject to a 2.5% discount.<sup>6</sup> Taxes not paid on or before the date they become delinquent are subject to an interest rate of 9% per year.<sup>7</sup>

A lien for all real property taxes due is created and attaches to the property on July 1 of each year,<sup>8</sup> and the sheriff commences collection on July 15, or as soon as the sheriff receives land or personal property books.<sup>9</sup> As soon as taxes become delinquent, the sheriff may “distrain any goods or chattels in the county belonging to the person or to the estate in land assessed with the taxes. If such goods or chattels are about to be removed from the county, the sheriff may distrain even before delinquency.”<sup>10</sup> This “distrain” provision gives the sheriff the power to

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West Virginia. Robert Louis Shuman, *Update: The Amended and Reenacted Delinquent and Nonentered Land Statutes—The Title Examination Ramifications*, 111 W. VA. L. REV. 707, 713–14 (2009).

<sup>5</sup> W. VA. CODE ANN. § 11A-1-3(a) (West).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* § 11A-1-2. The Code states,

There shall be a lien on all real property for the taxes assessed thereon, and for the interest and other charges upon such taxes, at the rate and for the period provided by law, which lien shall attach on the first day of July, one thousand nine hundred sixty-one, and each July first thereafter for the taxes payable for the *ensuing* fiscal year.

*Id.* (emphasis added). The United States District Court for the Southern District of West Virginia recently stated,

[t]his statutory provision has caused some confusion about the relation of tax years, assessment years, and calendar years. . . . The West Virginia Supreme Court of Appeals acknowledged that, although the assessment year was changed to the fiscal year, “the tax year still remained on a calendar year basis, in which manner property, both personal and real, had been assessed and taxed for many years[.]”

Interstate Props., Inc. v. K-Mart Corp., 88 F. Supp. 2d 609, 610 (S.D. W. Va. 2000) (quoting *George F. Hazelwood Co. v. Pitsenbarger*, 149 W. Va. 485, 488, 141 S.E.2d 314, 317 (1965); Londo H. Brown, *Changes in West Virginia Real Property Tax Law*, 66 W. VA. L. REV. 271 (1964)).

<sup>9</sup> W. VA. CODE ANN. §§ 11A-1-2, 11A-1-6 (West).

<sup>10</sup> *Id.* § 11A-2-3.

seize property.<sup>11</sup> The sheriff may not collect current real property taxes on a particular property until all of its delinquent real property taxes are paid.<sup>12</sup>

Taxing entities may sell real property liens,<sup>13</sup> but they must first fulfill notice requirements. As discussed below, before selling a tax lien at public auction, the sheriff must (1) publish a list of delinquent real estate; (2) make a second publication of delinquent real estate with a notice of sale; and (3) mail a certified letter to the landowner, and others who are entitled to notice, notifying of the tax delinquency and the upcoming sale.<sup>14</sup> These steps are explained below.

### **(1) First Notice of Delinquency**

On or after April 1 of a given year, the sheriff “*may* prepare and publish” notice stating which taxes for the previous year have become delinquent and which will be included in the upcoming first round of “delinquent lists” if not paid by April 30.<sup>15</sup> If the notice is published, it must be published in a Class II-0 legal advertisement.<sup>16</sup>

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<sup>11</sup> The West Virginia Supreme Court stated prior to the enactment of the current legislative scheme that “there is no lien denominated as such on personal property after assessment thereof for taxation [under West Virginia law] . . . [but i]t is difficult to see any practical difference between [distrain] and a lien.” *George F. Hazelwood Co.*, 149 W. Va. at 489, 141 S.E.2d at 317; *see also* *Don S. Co. v. Roach*, 168 W. Va. 605, 607, 285 S.E.2d 491, 492 (1981) (discussing statutory methods available to enforce payment of delinquent taxes, including distraint of personal property, collection from money due delinquent taxpayer by another, and sale of real property for taxes); *Equibank, N.A. v. Wheeling-Pittsburgh Steel Corp.*, 884 F.2d 80, 84 (3d Cir. 1989) (concluding that a lien is created under West Virginia law “at the time that the sheriff distrains property or receives judgment a lien”).

<sup>12</sup> W. VA. CODE ANN. § 11A-1-7 (West).

<sup>13</sup> *Id.* § 11A-2-10.

<sup>14</sup> *Rebuild Am., Inc. v. Davis*, 229 W. Va. 86, 92, 726 S.E.2d 396, 402 (2012).

<sup>15</sup> W. VA. CODE ANN. § 11A-2-10a (West) (emphasis added).

<sup>16</sup> *Id.* §§ 11A-2-10a, 59-3-2(b). Chapter 11A of the West Virginia Code regularly references Class I-0, Class II-0, and Class III-0 legal advertisements. “A Class I-0 legal advertisement shall be published one time,” and “a Class II-0 legal advertisement shall be published once a week for two successive weeks.” *Id.* § 59-3-2(b). A Class III-0 legal advertisement is more complicated, and requires publication “once a week for three successive weeks, in two qualified newspapers of opposite politics published in the publication area.” *Id.* However, “if two qualified newspapers of opposite politics are not published in the publication area or . . . will not publish the legal advertisement at the rates specified in . . . this article, the legal advertisement shall be published in one qualified newspaper published in the publication area.” *Id.* But, if there is no such qualified newspaper or none will publish the advertisement at the code’s specified rates, “the legal advertisement shall be published in one qualified newspaper published outside the publication area.” *Id.* If no such newspaper is published outside the publication area or no such newspaper will publish at specified rates,

the legal advertisement shall be posted in at least three public places in the publication area, one of which postings shall be in the county courthouse, at or near the front door thereof, if a county courthouse is located

By May 1, the sheriff *must* prepare three lists of delinquent taxes which were unpaid as of April 30, including “(1) [a] list of property in the land book improperly entered or not ascertainable; (2) a list of other delinquent real estate; and (3) a list of all other delinquent taxes.”<sup>17</sup> The lists must be posted at the courthouse door at least two weeks before the county commission session at which they will be presented.<sup>18</sup> Each list must be published as a Class I-0 legal advertisement,<sup>19</sup> with the county as the publication area.<sup>20</sup> The sheriff must submit the lists to the county court for examination by June 15.<sup>21</sup> If deemed correct, or after correction, the court clerk certifies a copy of each list to the State Auditor<sup>22</sup> no later than July 1.<sup>23</sup>

## **(2) Second Notice of Delinquency**

On or before September 10, the sheriff must prepare a second list of lands, including all real estate, that remain delinquent by September 1 after being published in the first delinquency list, together with notice of sale.<sup>24</sup> For the notice of sale, the sheriff must prepare a document

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in the publication area and one of which postings shall be in the municipal office building or municipal office or offices, at or near the front door thereof, if the publication area is a municipality.

*Id.*

<sup>17</sup> *Id.* § 11A-2-11. The sheriff will face personal liability for deliberately or accidentally including people on the list whose taxes were already paid. *Id.* § 11A-2-12.

<sup>18</sup> *Id.* § 11A-2-13.

<sup>19</sup> See definition, *supra* note 16.

<sup>20</sup> W. VA. CODE ANN. §§ 11A-2-13, 59-3-2(b).

<sup>21</sup> *Id.* § 11A-2-14.

<sup>22</sup> The State Auditor is a public office that “serves as the State’s official bookkeeper, Chief Inspector and Supervisor over Public Offices, Securities Commissioner and Commissioner of Delinquent and Non-entered lands.” *Glen B. Gainer III, State Auditor*, WEST VIRGINIA STATE AUDITOR’S OFFICE, <https://www.wvsao.gov/About.aspx> (last visited Jul. 27, 2015). The clerk of the county commission may petition the county commission for authorization to perform the duties of the State Auditor for certain aspects of the lien sale process. See W. VA. CODE ANN. § 11A-3-5b(a) (West).

<sup>23</sup> W. VA. CODE ANN. § 11A-2-14 (West). Generally,

[t]he auditor shall prepare and keep in his office a permanent record of all delinquent, nonentered, escheated and waste and unappropriated lands. The record shall as to every tract or lot listed set forth the information available as to quantity, local description, and, except in the case of waste and unappropriated lands, the name of the former owner and the respective dates of nonentry, or delinquency and certification to the auditor, or escheat, as the case may be. The record shall be prima facie evidence of all matters required by this section to be set forth therein, including the correctness of the description of lands as nonentered, delinquent, escheated or waste and unappropriated.

*Id.* § 11A-3-35.

<sup>24</sup> *Id.* § 11A-3-2.

stating that the property will be sold at public auction and providing the date of the sale; additional formatting details are provided in the Code.<sup>25</sup> The sheriff must publish the second list and notice prior to the sale date on the notice as a Class III-0 legal advertisement,<sup>26</sup> with the county as the publication area.<sup>27</sup>

### **(3) Notice by Mail of Delinquency and Upcoming Sale**

The notice of delinquency and date of sale must also be sent by certified mail, at least 30 days prior to the sale, to (1) the “last known address of each person listed in the land books whose taxes are delinquent”; (2) the last known address of anyone with a lien on the property in question; (3) anyone with an interest in the property or a fiduciary relationship to someone with an interest in the property, who properly requested notice of delinquency from the sheriff; and (4) individuals with mineral interests and related surface interests in the property, who also properly requested from the sheriff notice of delinquency.<sup>28</sup>

Those who claim a lien against real property must file a statement declaring their interest with the sheriff to avoid waiving their right to notice. The statement must be filed when the lien is created or released and upon any change of the lienholder’s postal address.<sup>29</sup> The sheriff must provide notice of these requirements at minimum once a year before July 1 in a Class I-0 legal advertisement<sup>30</sup> with the county as the publication area.<sup>31</sup> For fiduciaries and owners of mineral or surface interests, notice of delinquency must be requested from the sheriff in writing on specified forms.<sup>32</sup>

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<sup>25</sup> *Id.*

<sup>26</sup> *See* definition, *supra* note 16.

<sup>27</sup> W. VA. CODE ANN. § 11A-3-2.

<sup>28</sup> *Id.* § 11A-3-2(b).

<sup>29</sup> *Id.* § 11A-3-3(a).

<sup>30</sup> *See* definition, *supra* note 16.

<sup>31</sup> W. VA. CODE ANN. § 11A-3-3(b).

<sup>32</sup> *Id.* § 11A-3-2(b).

## II. Sale at Auction (“the Sheriff’s Sale”)

The sheriff sells the tax lien on each unredeemed property at public auction to the highest bidder after October 14 and before November 23.<sup>33</sup> The minimum bid includes the amount of taxes, interest, and charges due for each property.<sup>34</sup> After purchase, purchasers must be given a certificate of sale,<sup>35</sup> after which the sheriff certifies real estate to the State Auditor for disposition.<sup>36</sup> The Auditor then must send “notice of the requirements to secure a deed to the purchaser, or an assignee, by first-class mail.”<sup>37</sup> This notice must be mailed to the last known address of each person who received a certificate of sale between May 1 and September 1 of the year following the sheriff’s sale.<sup>38</sup> Requirements to secure the deed are discussed below.

Anyone entitled to redeem the property (i.e., the owner or anyone else entitled to pay taxes on the property)<sup>39</sup> may do so before the close of business on the day prior to the sale by paying the delinquent taxes, charges, and interest.<sup>40</sup> Payments received within fourteen business days prior to the date of sale must be made by cashier’s check, money order, certified check, or United States currency.<sup>41</sup>

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<sup>33</sup> *Id.* § 11A-3-5(a).

<sup>34</sup> *Id.* § 11A-3-8.

<sup>35</sup> *Id.* § 11A-3-14.

<sup>36</sup> *Id.* § 11A-3-8(b).

<sup>37</sup> *Id.* § 11A-3-14.

<sup>38</sup> *Id.*

<sup>39</sup> More specifically, those entitled to redeem are enumerated as follows:

[A]ny person having a lien on the land, or on an undivided interest therein, or any other person having an interest in the land, or in an undivided interest therein, which he desires to protect, shall be allowed to pay the whole, but not a part, of the taxes assessed thereon. Any co-owner of real estate whose interest is subject to separate assessment shall be allowed at his election to pay the taxes either on his own interest alone or in addition thereto upon the interest of any or all of his co-owners. If his own or any other interest less than the whole, on which he desires to pay the taxes, was included in a group assessment, he must before payment have the group assessment split and must secure from the assessor and present to the sheriff a certificate setting forth the changes made in the assessment.

*Id.* § 11A-1-9.

<sup>40</sup> *Id.* § 11A-2-18.

<sup>41</sup> *Id.* § 11A-3-2.

If it appears to the sheriff that particular real estate included in the sale list has certain impediments—including previous conveyances or incorrect amounts—he or she must suspend the sale and report the reasons to the county commission and the Auditor.<sup>42</sup> If the county commission agrees that there is a problem, it will order as much; but if the commission finds that the tax lien ought to be sold at a certain amount, it must order the sheriff to include the real estate in the next September list, unless it is redeemed beforehand.<sup>43</sup> If sale is rendered impossible because improper notice was provided or for any other procedural omission, the sheriff must certify an amended list to the Auditor by December 2 after the sale should have been held.<sup>44</sup>

### **III. Post-Sale Proceedings**

#### **(1) Sheriff’s Notice by Publication**

After a tax lien is sold, the sheriff must prepare and publish a list of all the sales and certifications he or she made, within one month of completing the sale, in a Class II-0 legal advertisement,<sup>45</sup> with the county as the publication area.<sup>46</sup> The format of this notice is provided in the Code.<sup>47</sup>

#### **(2) Purchaser’s Notice of the Right to Redeem**

In order to secure the deed to a property, a purchaser must prepare a list of those who must be served with notice to redeem and have the Auditor execute service.<sup>48</sup> The list must include the owner of the property and anyone else entitled to pay taxes on it, so long as they are “of record.”<sup>49</sup> The purchaser must prepare notice after October 31 in the year following the

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<sup>42</sup> *Id.* § 11A-3-7(a).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* § 11A-3-7(b).

<sup>45</sup> See definition, *supra* note 16.

<sup>46</sup> W. VA. CODE ANN. § 11A-3-13 (West).

<sup>47</sup> See *id.*

<sup>48</sup> *Id.* § 11A-3-19(a)(1); see also Fisher, *supra* note 4, at 60 (noting that the tax lien purchaser has duty to give notice and “countervailing interest in profiting from property owner’s failure to redeem”).

<sup>49</sup> Wells Fargo Bank, N.A. v. UP Ventures II, LLC, 223 W. Va. 407, 412, 675 S.E.2d 883, 888 (2009).

sheriff's sale and on or before December 31 of the same year.<sup>50</sup> Relevant public records include records of the sheriff's office, the county clerk's office, and the county assessor's office.<sup>51</sup> When real property subject to a tax lien is classified as Class II property—meaning, “property owned, used and occupied by the owner exclusively for residential purposes” and “[a]ll farms, including land used for horticulture and grazing, occupied and cultivated by their owners or bona fide tenants,”<sup>52</sup>—a purchaser must provide the State Auditor with the property's physical mailing address.<sup>53</sup>

Due process requires that parties with an interest in a property who can reasonably be identified from public records or otherwise must be provided notice “by mail or other means as certain to ensure actual notice.”<sup>54</sup> If the address of someone entitled to notice cannot be discovered by due diligence, it must be served by publication.<sup>55</sup> Note that there is no provision requiring lienholders to file a statement of their property interest as a prerequisite to receiving notice of their redemption rights.<sup>56</sup>

As to requirements at this stage, courts tend to engage in a fact-specific inquiry following a due-process challenge—they have not outlined a required procedure beyond these minimum

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<sup>50</sup> W. VA. CODE ANN. § 11A-3-19(a)(1) (West); *Wells Fargo Bank, N.A.*, 223 W. Va. at 410, 675 S.E.2d at 886 (tax sale purchaser need not supplement list and discover parties who became of record after December 31 of year following sale, or provide additional redemption notice before tax deed is delivered); *Rollyson v. Jordan*, 205 W. Va. 368, 518 S.E.2d 372 (1999). In *Huggins v. Professional Land Res. LLC*, No. 1:12CV46, 2013 WL 431770, at \*1 (N.D. W. Va. Jan. 25, 2013), the United States District Court for the Northern District of West Virginia concluded that the tax lien purchaser charged with notifying interested parties could be considered a state actor, and thus, could potentially be held liable for constitutional rights violations under 42 U.S.C. § 1983 by failing to meet the due diligence standard. *Id.* at \*4–6.

<sup>51</sup> *See* *Mingo Cnty. Redevelopment Auth. v. Green*, 207 W. Va. 486, 534 S.E.2d 40 (2000); *Moffatt*, *supra* note 4, at WV.06(1)(e); *Arnold v. Verdier*, 2011 W. Va. LEXIS 570 (W. Va. Oct. 11, 2011).

<sup>52</sup> W. VA. CODE ANN. § 11-8-5 (West).

<sup>53</sup> *Id.* § 11A-3-19(a)(2).

<sup>54</sup> *Wells Fargo Bank, N.A.*, 223 W. Va. at 411, 675 S.E.2d at 887 (quoting *Lilly v. Duke*, 180 W. Va. 228, 376 S.E.2d 122 (1988)).

<sup>55</sup> W. VA. CODE ANN. § 11A-3-55 (West); *Reynolds v. Hoke*, 226 W. Va. 497, 500–01 702 S.E.2d 629, 633 (2010) (“reasonable diligence” required purchaser to search public records in county clerk's office for any deed transfers indexed under name of party who appeared as taxpayer on certificate of sale issue by sheriff to purchaser).

<sup>56</sup> *Rollyson v. Jordan*, 205 W. Va. 368, 377, 518 S.E.2d 372, 381 (1999).

standards,<sup>57</sup> although the format of the notice itself is specifically provided in the Code.<sup>58</sup>

Required information includes the name of the purchaser; description and location of the real estate; date of sale; amount of back taxes, interest, and charges due on the date of the sale; and deadline for redemption.<sup>59</sup> If notice sent by mail is returned to the purchaser undelivered, additional steps to pursue notice are likely necessary.<sup>60</sup> Failure to meet these requirements results in lienholders losing the benefits of their purchase.<sup>61</sup>

Example timeline with the steps outlined thus far:

- the sheriff sells a lien on October 20, 2015 (since liens must be sold at auction after October 14 and before November 23);
- the purchaser then receives instructions from the Auditor on how to secure the deed on August 15, 2016 (because the Auditor sends instructions between May 1 and September 1, 2016);
- the purchaser then prepares a list of those to be served with notice to redeem and gives it to the Auditor on November 20, 2016 (because this must be done between November 1 and December 31, 2016)

### **(3) Service of Notice**

The manner of serving notice depends upon the party to be served. Generally, those listed as entitled to notice are served by the State Auditor, as soon as he or she has prepared the notice, in the same manner that process is served to commence civil actions or by certified mail, with return receipt requested.<sup>62</sup> The notice must be served on or before the thirtieth day after a request

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<sup>57</sup> See Fisher, *supra* note 4, at 86–88 (discussing case law suggesting that due process requirements are non-formulaic and tailored to each case’s circumstances).

<sup>58</sup> See W. VA. CODE ANN. § 11A-3-21(a) (West).

<sup>59</sup> See *id.*

<sup>60</sup> See Jones v. Flower, 547 U.S. 220 (2006); Plemons v. Gale, 396 F.3d 569, 578 (4th Cir. 2005).

<sup>61</sup> W. VA. CODE ANN. § 11A-3-19(a) (West).

<sup>62</sup> *Id.* § 11A-3-22(a), (b).

by a party entitled to notice.<sup>63</sup> If the party entitled to notice resides out of state and has a known address, the party must be served at that address by certified mail, with return receipt requested.<sup>64</sup> If the property is classified as exclusively residential or an occupied farm (Class II property), the clerk must forward a copy of the notice to redeem by first class mail to the physical address of the property, addressed to “Occupant.”<sup>65</sup>

“If the State Auditor fails or refuses to prepare and serve the notice to redeem,” the person requesting notice may petition the county circuit court for an order compelling the Auditor to do so.<sup>66</sup> The person requesting notice has from two weeks after the discovery of the failure or refusal until 60 days following the request for notice to petition the court.<sup>67</sup> If those seeking notice fail to petition the court within the time allowed, they lose the right to notice, but the Auditor may still be subject to penalties.<sup>68</sup>

#### **(4) Redemption Period, Ripening of the Deed, and Notice of Redemption**

The original owner of the property, or anyone else who was entitled to pay taxes on the property, has 18 months after a tax lien sale at auction to redeem the property by paying the taxes, interest, charges, and expenses related to the proceedings, and by filing the claim with the clerk of the county commission.<sup>69</sup>

Tax liens expire 18 months after being sold by the county.<sup>70</sup> Within the 18-month period, the purchaser must comply with notice requirements to maintain the right to have the lien ripen into a tax deed at the end of the period.<sup>71</sup> If the property is not redeemed between April 1 of the

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<sup>63</sup> *Id.*

<sup>64</sup> *Id.* § 11A-3-22(c).

<sup>65</sup> *Id.* §§ 11-8-5, 11A-3-22(d).

<sup>66</sup> *Id.* § 11A-3-28(a).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* §§ 11A-3-28(a), 11A-3-67.

<sup>69</sup> *Id.* § 11A-3-23(a), (d); *Mingo Cnty. Redevelopment Auth. v. Green*, 207 W. Va. 486, 494 534 S.E.2d 40, 48 (2000).

<sup>70</sup> W. VA. CODE ANN. § 11A-3-18(a) (West).

<sup>71</sup> *Id.* § 11A-3-18(d).

second year after the sheriff's sale and the time the lien expires, the Auditor must give the purchaser a quitclaim deed for the property, upon the purchaser's request; if the purchaser fails to request a deed within the 18-month period, the right to the deed is forfeited.<sup>72</sup> If, instead, the Auditor fails or refuses to execute the deed to a purchaser who has complied with the above steps, the person requesting the deed has until six months after the right to the deed accrued to petition the county circuit court for an order compelling the Auditor to execute the deed.<sup>73</sup> In making such petition, the party seeking the deed must prove his or her procedural compliance to preserve the right to the deed.<sup>74</sup>

If a party entitled to redeem pays the amount necessary to redeem, the Auditor must "deliver to the sheriff the redemption money paid and the name and address of the purchaser," and the sheriff must then notify the purchaser of the redemption by mail.<sup>75</sup> The purchaser is entitled to be reimbursed for the purchase, in addition to other taxes and expenses paid for the property, including interest at the rate of one percent per month from the date of sale to the date of redemption.<sup>76</sup> Notice to the purchaser must include a copy of the redemption certificate issued by the Auditor, an itemized statement of the redemption money to which the purchaser is entitled, and instructions for claiming relevant expenses where the purchaser has not provided satisfactory proof of expenses.<sup>77</sup>

Example timeline with the steps outlined thus far:

- the sheriff sells a lien on November 15, 2015;

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<sup>72</sup> *Id.* § 11A-3-27.

<sup>73</sup> *Id.* § 11A-3-28(b).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* §§ 11A-3-24, 11A-3-25(a).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* § 11A-3-25(b), (c).

- the purchaser then receives instructions from the Auditor on how to secure the deed between May 1 and September 1, 2016;
- the purchaser prepares her list of those to be served with notice to redeem and gives it to the Auditor on December 15, 2016;
- the Auditor effects service by January 15, 2016;
- if no one redeems, the purchaser’s certificate of sale expires and she requests a quitclaim deed by June 15, 2017

**(5) Redemption by Persons under Disability**

“[A]ny infant or mentally incapacitated person whose real estate was, during such disability, conveyed by tax deed . . . to an individual purchaser” may redeem the real estate by paying the purchaser within “one year after removal of the disability, but in no event more than twenty years after the deed was obtained,” the purchase amount, necessary charges incurred in obtaining the deed, taxes paid on the property since the sale, and interest on such items at the rate of twelve percent.<sup>78</sup> This provision means that “an interested party, under a disability, may have 20 years to set aside a tax deed.”<sup>79</sup>

**IV. Possible Second Auction (“the State’s Sale”)**

**(1) Property Subject to Sale & Discount for Non-Profits**

If no person bids the equivalent of the taxes, interest, and charges due on the property offered for sale (the minimum bid) at the first auction, the sheriff must certify the property to the Auditor, who has the authority “to hold and manage lands” for disposition in additional proceedings.<sup>80</sup> The owner of any real estate certified to the Auditor, or anyone entitled to pay

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<sup>78</sup> *Id.* § 11A-4-6.

<sup>79</sup> Moffatt, *supra* note 4, at WV.05(3).

<sup>80</sup> W. VA. CODE ANN. § 11A-3-8(a) (West); *Lexington Land Co., LLC v. Howell*, 211 W. Va. 644, 648, 567 S.E.2d 654, 658 (2002).

taxes on it, may redeem the property any time before the Auditor certifies it to the deputy commissioner (an agent of the Auditor); the Auditor certifies properties to the deputy commissioner between May 1 and October 1 of each year.<sup>81</sup> All lands for which no one bid the minimum bid, and which were not redeemed from the Auditor within 18 months of certification to the Auditor, are subject to sale by the deputy commissioner.<sup>82</sup>

The deputy commissioner must sell the tax liens at public auction 120 days after properties are certified to the deputy commissioner.<sup>83</sup> Private, nonprofit, charitable corporations, incorporated in West Virginia that have the principal purpose to construct housing or other public facilities receive preferential treatment at auction. These entities must notify the deputy commissioner of their intention to bid and then may submit a bid that is up to five percent lower than the highest bidder, and so long as the highest bidder is not also one of these entities, they must be sold the tax lien.<sup>84</sup>

The deputy commissioner must publish notice of the auction once a week for three consecutive weeks as a Class III-0 legal advertisement,<sup>85</sup> and properties may be redeemed any time prior to the auction.<sup>86</sup> If any lands offered for sale at this public auction remain unsold after the auction, the deputy commissioner may sell them any time after the auction, without further auction or additional advertising, to any party willing to purchase the property.<sup>87</sup> The former owner of any lands sold at this auction is “entitled to the surplus received from the sale over and

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<sup>81</sup> W. VA. CODE ANN. §§ 11A-3-34, 11A-3-38, 11A-3-44 (West).

<sup>82</sup> *Id.* § 11A-3-42.

<sup>83</sup> *Id.* § 11A-3-45(a).

<sup>84</sup> *Id.* § 11A-3-45(b).

<sup>85</sup> *See* definition, *supra* note 16.

<sup>86</sup> W. VA. CODE ANN. §§ 11A-3-46, 11A-3-47 (West).

<sup>87</sup> *Id.* § 11A-3-48 (the purchase price is subject to approval by the Auditor).

above the taxes and interest . . . including all costs of the sale,” but a claim for the surplus must be filed in the county circuit court within two years after the sale confirmation date.<sup>88</sup>

## **(2) Securing the Deed & Right of Redemption**

Within 45 days of the Auditor’s approval of the sale,<sup>89</sup> the purchaser at the second auction must do the following to secure the deed: (1) prepare a list of those to be served with notice to redeem and ask the deputy commissioner to serve it; (2) if the property was classified as exclusively residential or an occupied farm (Class II), provide the deputy commissioner with the actual mailing address of the property; and (3) deposit or offer to deposit with the deputy commissioner the cost of preparing and serving notice.<sup>90</sup> The notice must be in a format provided by the Code, and include the identity of the purchaser, description and location of the real estate, date of sale, deadline for redemption, and amount necessary for redemption.<sup>91</sup>

This notice must be served within 30 days of the request, mailed, and, if necessary, published at least 30 days prior to the first day when a deed may be issued following the deputy commissioner’s sale.<sup>92</sup> Additionally, if the property was classified as Class II, the deputy must forward a copy of the notice to the delinquent taxpayer by first class mail, addressed to “Occupant,” to the property’s physical mailing address. If the deputy commissioner fails or refuses to prepare and serve the notice to redeem, a purchaser may petition the court for an order compelling the deputy commissioner to act; the petition must be filed any time within two weeks after discovery of the failure or refusal, but no later than 60 days following the request for notice.<sup>93</sup>

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<sup>88</sup> *Id.* § 11A-3-65.

<sup>89</sup> *Id.* § 11A-3-51.

<sup>90</sup> *Id.* § 11A-3-52.

<sup>91</sup> *Id.* § 11A-3-54.

<sup>92</sup> *Id.* § 11A-3-55.

<sup>93</sup> *Id.* § 11A-3-60.

The owner or anyone entitled to pay taxes on the real estate may redeem the property any time before a tax deed is issued.<sup>94</sup> If the sum necessary for redemption is paid, the deputy commissioner must “promptly deliver to the sheriff the redemption money paid and the name and address of the purchaser.”<sup>95</sup> The sheriff must then “promptly notify the purchaser . . . by mail, of the redemption,” and pay the purchaser reimbursement for the sale and relevant taxes, expenses, and statutory costs, including interest at the rate of one percent per month.<sup>96</sup> This notice must also include a copy of the redemption certificate issued by the deputy commissioner, an itemized statement of the redemption money to which the purchaser is entitled, and instructions for proving any expenses that have not been satisfactorily proven.<sup>97</sup>

If the property is not redeemed by at least 30 days after service of notice to redeem, the deputy commissioner must provide the purchaser with a quitclaim deed for the property, upon the purchaser’s request.<sup>98</sup> If the deputy commissioner fails or refuses to prepare and execute the deed, the purchaser may petition the county circuit court for an order either compelling the deputy commissioner to do so or appointing a commissioner to do so.<sup>99</sup> The petition must be filed within six months after the purchaser’s right to the deed accrues; failure to do so results in losing the right to the deed, but the deputy commissioner may still be subject to penalties.<sup>100</sup>

Example timeline with the steps outlined thus far:

- a lien remains unsold on November 20, 2015, and the sheriff certifies the property to the Auditor;

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<sup>94</sup> *Id.* § 11A-3-56.

<sup>95</sup> *Id.* § 11A-3-57(a).

<sup>96</sup> *Id.* § 11A-3-58(a).

<sup>97</sup> *Id.* § 11A-3-58(b).

<sup>98</sup> *Id.* § 11A-3-59.

<sup>99</sup> *Id.* § 11A-3-60.

<sup>100</sup> *Id.* § 11A-3-67.

- if the lien is not redeemed, on May 20, 2017 (between May 1 and October 1 and allowing for the 18-month redemption period), the Auditor certifies the property to the deputy commissioner;
- on September 15, 2017, the deputy commissioner sells the lien at public auction;
- by October 30, 2017, the purchaser prepares a notice list and gives it to the deputy commissioner;
- the deputy commissioner effects service by November 29, 2017;
- after requesting it, the purchaser receives a quitclaim deed by December 30, 2017

## V. An Action to Set Aside a Tax Deed

Those who were entitled to notice to redeem but did not receive sufficient notice may bring an action to set aside a quitclaim deed issued to a purchaser.<sup>101</sup> This right is extinguished three years after the deed is delivered to the purchaser.<sup>102</sup> In West Virginia, tax sale purchasers need not take actual possession of the property for the statute of limitations to run.<sup>103</sup> A complainant must show by clear and convincing evidence that the tax sale purchaser “failed to exercise reasonably diligent efforts to provide notice of his intention to acquire . . . title to the complaining party or his predecessors in title.”<sup>104</sup> Generally, no procedural mistake “leading up to and including delivery of the tax deed by the State Auditor” invalidates the title, unless the mistake is “expressly made a ground for instituting a suit to set aside the sale or the deed.”<sup>105</sup>

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<sup>101</sup> *Id.* § 11A-4-4(a).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*; Wells Fargo Bank, N.A. v. UP Ventures II, LLC, 223 W. Va. 407, 413–14, 675 S.E.2d 883, 889–90 (2009).

<sup>104</sup> W. VA. CODE ANN. § 11A-4-4(b) (West); *see also* Syl. pt. 5, Bayer Material Science, LLC v. State Tax Commissioner, 223 W. Va. 38, 672 S.E.2d 174 (2008) (burden of proof placed on taxpayer does not violate constitutional due process protections).

<sup>105</sup> W. VA. CODE ANN. § 11A-3-31 (West).

## VI. Effect of Co-Owners or Other Interested Parties

Several interested parties are permitted to pay all, but not a part, of the taxes owed on a piece of real estate: “[a]ny owner of real estate whose interest is not subject to separate assessment, or any person having a lien on the land, or on an undivided interest therein, or any other person having an interest in the land, or in an undivided interest therein.”<sup>106</sup> If a particular co-owner has an interest in real estate that is subject to separate assessment, the co-owner may pay taxes on his or her own interest or the interest of any or all co-owners.<sup>107</sup> Also, if the separate assessment is less than the whole and was included in a group assessment, the co-owner must “have the group assessment split and must secure from the assessor and present to the sheriff a certificate setting forth the changes” before making a payment.<sup>108</sup> The sheriff must record the necessary changes, prepare new tax bills, and then deliver the certificate to the clerk of the county court, who must record the changes.<sup>109</sup>

Those entitled to pay taxes on a particular piece of real estate are also entitled to certain rights throughout the tax lien foreclosure process. They may redeem at any time before the close of business on the last business day prior to the first sale;<sup>110</sup> purchase the tax lien on the interest of any co-owners, and receive a tax deed conveying the interest without being required to hold the tax lien or interest under a constructive trust;<sup>111</sup> acquire a lien on the interest of real estate purchased by another individual for the amount paid to redeem the interest, after being compelled to redeem the tax lien on all of the real estate in order to remain protected;<sup>112</sup> redeem

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<sup>106</sup> *Id.* § 11A-1-9.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* § 11A-1-9.

<sup>110</sup> *Id.* § 11A-1-18.

<sup>111</sup> *Id.* § 11A-3-6.

<sup>112</sup> *Id.* §§ 11A-3-23, 11A-3-56(b).

the property before certification to the deputy commissioner for the second auction;<sup>113</sup> redeem prior to the second auction;<sup>114</sup> purchase, at the second auction, the interest of any, or all, of their co-owners in any real estate, without being required to hold such interest under a constructive trust;<sup>115</sup> and redeem before the tax deed is issued after the second auction.<sup>116</sup>

## **VII. Effects of Bankruptcy Proceedings<sup>117</sup>**

In the interest of avoiding litigation and maximizing collection of property taxes, it can be helpful for municipal attorneys to be familiar with certain aspects of bankruptcy law as it relates to property tax liens. This section provides a review of resources useful to municipal attorneys working in this context, including a guide drafted by William Miller and James Lanik.

They start by explaining:

The federal bankruptcy system is designed to give honest debtors an opportunity to start over financially by discharging their debts (a “fresh start”) while providing for the orderly liquidation or reorganization of the debtor’s estate. By discharging debts “it [bankruptcy] gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt.”<sup>118</sup>

At the same time, bankruptcy law recognizes the governmental interest in collecting taxes. Therefore, tax debt is sometimes treated in a more favorable manner (than some other types of debt, such as credit card debt) . . . .

The treatment of tax debt in bankruptcy can be complex, and generally depends on the bankruptcy chapter chosen by the Debtor and classification of the particular tax debt. While the filing of bankruptcy may delay or hinder collection of taxes, in many cases the taxes will eventually be paid, perhaps with interest, and an understanding of the process may increase collection percentages and lead to less stress for the informed tax collector.<sup>119</sup>

As Miller and Lanik explain, there are four common types of bankruptcy proceedings:

Chapter 7 (the majority of cases, involving liquidation of a debtor’s non-exempt assets, with

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<sup>113</sup> *Id.* § 11A-3-38.

<sup>114</sup> *Id.* § 11A-3-47.

<sup>115</sup> *Id.* § 11A-3-49(b).

<sup>116</sup> *Id.* § 11A-3-56.

<sup>117</sup> Bankruptcy proceedings are highly complex and specialized. This section is intended to serve as an introduction and overview, but it is highly recommended that those involved in bankruptcy proceedings seek out assistance from an experienced bankruptcy lawyer.

<sup>118</sup> William P. Miller & James C. Lanik, *How the Bankruptcy Code Can Affect Your City: A Bankruptcy Primer for Municipal Attorneys*, Municipal Attorney’s General Conference, School of Government Chapel Hill 4 (2009) (quoting *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934)).

<sup>119</sup> *Id.*

proceeds paid to creditors in order of priority established in the Bankruptcy Code, taking approximately four to six months; debtors frequently convert from another chapter to Chapter 7);<sup>120</sup> Chapter 11 (a business reorganization with a Plan of Reorganization setting out how and when creditors will be paid); Chapter 12 (“a streamlined Chapter 11 for farmers and fishermen”); and Chapter 13 (“a reorganization for individuals with regular income, where a Plan of 3 to 5 years in duration is filed at the beginning of the case and payments to creditors are disbursed through a Trustee”).<sup>121</sup> The “bankruptcy estate,” which includes the debtor’s property interests with certain exceptions, is created at the moment of filing.<sup>122</sup> Bankruptcy petitions must be filed in federal district courts, which oversee bankruptcy courts and have broad jurisdiction to deal with “all matters connected with the bankruptcy estate.”<sup>123</sup>

Municipalities should be given notice of properties within their jurisdiction that are part of a bankruptcy filing in order for them to “keep watch of any new developments regarding the property. Even if formal notice is not given, the municipality may be charged with notice if it had actual notice or hard reason to know of the bankruptcy filing.”<sup>124</sup> Additionally, bankruptcy attorney Richard Strenk recommends that “municipal attorneys should get into the practice of putting municipal [tax] lien holders on notice when a property owner files for bankruptcy in order to avoid any type of conflict that may arise with the lien holders later on, when the assets are sold.”<sup>125</sup>

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<sup>120</sup> Donald L. Ariail et al., *Discharging Taxes in Bankruptcy*, 210 J. OF ACCT. 2, 59 (Aug. 2010).

<sup>121</sup> Miller & Lanik, *supra* note 118, at 5.

<sup>122</sup> 11 U.S.C. § 541 (2013).

<sup>123</sup> See 28 U.S.C. §§ 157, 158, 1334(a) (2013); *Celotex Corp. v. Edwards*, 514 U.S. 300 (1995); *Gonzales v. Parks*, 830 F.2d 1033 (9th Cir. 1987).

<sup>124</sup> Richard D. Trenk, *Bankruptcy’s Impact on Municipalities: Be Aggressive!*, N.J. MUN. MAG., Oct. 2002, at 1, available at [http://www.trenklawfirm.com/publications/bankruptcys\\_impact\\_on\\_municipalities.pdf](http://www.trenklawfirm.com/publications/bankruptcys_impact_on_municipalities.pdf).

<sup>125</sup> *Id.*

When an individual files for bankruptcy under any chapter, an automatic stay is imposed on all proceedings against the debtor in order to:

give the debtor a breathing spell from his creditors and to stop all collection efforts, stop all harassment of a debtor seeking relief, and to maintain the status quo between the debtor and her creditors, thereby affording the parties and the [c]ourt an opportunity to appropriately resolve competing economic interests in an orderly and effective way.<sup>126</sup>

If a tax-delinquent property owner has filed for bankruptcy, local officials should cease any efforts to enforce delinquent tax liens because such efforts might violate the automatic stay. In

2015, the Supreme Court of Appeals of West Virginia held:

the acts required under West Virginia Code § 11A-3-2-(a) and (b) [providing for sheriff's notice of delinquency by publication and certified mail] constitute acts in enforcement of a lien against property and, where there exists an automatic stay pursuant to the provisions of 11 U.S.C. § 362, such acts are violative of the stay.<sup>127</sup>

Because “acts taken in violation of the automatic stay provisions of 11 U.S.C. § 362 are void,”<sup>128</sup> continued enforcement of tax liens in a bankruptcy estate will waste time and resources and could also subject local governments to contempt, sanctions, or payment of damages and costs to the debtor.<sup>129</sup> As provided in 11 U.S.C. § 106, local government units do not have sovereign immunity against claims in bankruptcy proceedings.

However, two exceptions to the automatic stay “are specifically designed to protect ad valorem tax authorities.”<sup>130</sup> First, Section 362(b)(9)(D) provides that filing a bankruptcy claim does not stay the ability to make an assessment for any tax and issue a notice and demand for payment.<sup>131</sup> This means that tax collectors may still send notice for taxes that become due during the course of bankruptcy, may publish statutory notice of delinquent taxes due, and may create or

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<sup>126</sup> *Rebuild America, Inc. v. Davis*, No. 14-0432, 2015 WL 1720609, at \*6 (W. Va. Apr. 9, 2015) (discussing 11 U.S.C. § 362(a)).

<sup>127</sup> *Rebuild America Inc.*, No. 14-0432, 2015 WL 1720609, at \*6.

<sup>128</sup> *Id.* at \*7.

<sup>129</sup> *See Miller & Lanik, supra note 118*, at 12–13.

<sup>130</sup> Elizabeth Weller, *Things Local Governments Wish Bankruptcy Attorneys Knew About Property Taxes*, AM. BANKR. INST. J., May 2009, at 60.

<sup>131</sup> *Id.*

perfect a lien for an ad valorem property tax when the tax becomes due, even after the petition was filed.<sup>132</sup> But, Miller and Lanik warn:

[t]he tax collector must be careful . . . not to threaten enforced collection such as garnishment of wages . . . [and] may not wish to send notices or publish the statutory notice, to avoid the computer generating enforced collection notices. Tax collectors should refrain from sending more than one notice to taxpayers while the bankruptcy is pending as subsequent notices may be viewed as efforts to enforce payment of the tax.<sup>133</sup>

Second, Section 362(b)(18) provides that the creation or perfection of a statutory ad valorem tax lien or a special assessment on real property does not violate the automatic stay. “As a practical matter, the bankruptcy filing only operates as a stay of a local tax authority’s right to seize, sue, foreclose or otherwise act to collect a debt—not to assess the tax or impose the related lien upon property of the debtor or of the estate.”<sup>134</sup>

In some cases, the local government “may wish to move the Bankruptcy Court to ‘lift the stay’ in order to proceed with actions outside the bankruptcy.”<sup>135</sup> This requires filing a motion in bankruptcy court under Section 362. Attorney Richard Strenk notes:

“[m]ost bankruptcy judges are sensitive to the critical lifeblood which real estate taxes mean to all communities. Due to this fact, most courts will favorably consider lifting the stay to permit tax sales to go forward and will not tolerate post-petition arrearages of any obligations. Courts are even receptive to orders compelling monthly payments for real estate taxes instead of the normal quarterly payments.”<sup>136</sup>

Local governments can still pursue the tax lien debt through the bankruptcy proceedings. Miller and Lanik explain that those listed as creditors in a debtor’s bankruptcy petition, “receive a form notice . . . contain[ing] very important information. Within 15 days of the filing . . . the Debtor must file his lists, schedules and statements,” which “contain important information as to the Debtor’s assets and liabilities, as well as the amount and classification of claims.”<sup>137</sup>

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<sup>132</sup> Miller & Lanik, *supra* note 118, at 12.

<sup>133</sup> *Id.* at 12–13.

<sup>134</sup> Weller, *supra* note 130, at 60.

<sup>135</sup> Miller & Lanik, *supra* note 118, at 13.

<sup>136</sup> Trenk, *supra* note 124, at 2.

<sup>137</sup> Miller & Lanik, *supra* note 118, at 7.

However, note that local government may need to take initiative to be listed as a creditor: because of the limited bankruptcy experience of many municipal attorneys, “it is rare that cities, counties, school districts, utility districts, improvement districts and the many other local ‘municipal corporations’ with taxation power are listed as creditors on the notice matrix, scheduled or even have their debts included in budgets, but they should be.”<sup>138</sup> If property tax creditors are excluded from bankruptcy proceedings, they may have been denied due process, and may not be subject to certain orders of the bankruptcy court.<sup>139</sup>

Other than in some Chapter 11 cases, to assert a claim against a bankruptcy estate and participate in distributions, creditors must file a proof of claim using a Proof of Claim form pursuant to Federal Rule of Bankruptcy Procedure 3002.<sup>140</sup> As a general rule, property tax liens are “secured claims” and survive bankruptcy proceedings, remaining attached to the property as of the date of the petition and entry of the stay.<sup>141</sup> Under 11 U.S.C. § 502, “[t]ax claims are limited to the value of the interest of the estate in [the] property.”<sup>142</sup>

However, the effect of bankruptcy on tax liens depends upon the chapter:

“[L]iens always survive Chapter 7 and Chapter 13 bankruptcy discharges. Liens survive a Chapter 11 reorganization so long as they are provided for by the plan. Unpaid priority tax claims survive a discharge under Chapter 7, an individual discharge under Chapter 11, and a hardship discharge under Chapter 13, but may not survive a regular Chapter 13 discharge.”<sup>143</sup>

“In all cases, after the petition is filed, a [s]ection 341 meeting of creditors is held.”<sup>144</sup>

Under Chapter 7 bankruptcy, “a tax lien recorded before the bankruptcy was filed survives the bankruptcy to the extent it attaches to property owned by the debtor at the time of the

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<sup>138</sup> Weller, *supra* note 130, at 12.

<sup>139</sup> *See id.* at 59.

<sup>140</sup> Miller & Lanik, *supra* note 118, at 7.

<sup>141</sup> *See* 11 U.S.C. 362(b)(18); *Butner v. U.S.*, 440 U.S. 48, 55 (1979); *Long v. Bullard*, 117 U.S. 617, 620–21 (1886). *Cf.* 11 U.S.C. 507(a)(8) (establishing priority of unsecured claims).

<sup>142</sup> Miller & Lanik, *supra* note 118, at 15.

<sup>143</sup> *Id.* at 24.

<sup>144</sup> *Id.* at 12.

bankruptcy.”<sup>145</sup> The debtor receives a discharge 60 days after the Section 341 meeting, and once he or she does, local governments may pursue secured claims against the collateral, unless the asset is still being administered by the Chapter 7 trustee.<sup>146</sup>

Under Chapter 13, the debtor’s plan, subject to creditors’ objections and after it is approved, determines how the taxing authority is paid.<sup>147</sup> “To receive disbursements, a creditor must file a proof of claim with evidence of a perfected lien,” though a creditor with a secured tax lien may also rely on its secured status, which gives the claim priority under 11 U.S.C. § 507.<sup>148</sup> In such cases, “the collector should continue to monitor the case for his treatment and watch that the Debtor or Trustee does not file a proof of claim for him . . . . In that case, the tax collector should file his own (amended) proof of claim.”<sup>149</sup> “Many Chapter 13 cases are dismissed . . . for failure of the Debtor to make his plan payments. In such cases, the Tax Collector returns to the same position as if the bankruptcy had not been filed.”<sup>150</sup> If the tax lien creditor files a proof of claim for property taxes, “the plan should provide for the payment of priority tax claims in full.”<sup>151</sup>

Miller and Lanik note that “[p]robably the two most common problems for [t]owns (and others) in dealing with Chapter 13 cases are (1) double payments and (2) claims which arise post-petition”:

Double payments. It is not uncommon for a tax collector to file a claim in a Chapter 13, receive money from the Chapter 13 office, and then receive a payment from the mortgage creditor for the taxes claimed, for a double payment. In such a case, if real estate taxes are no longer due, the second payment received should be returned, with notice to the other party. If real estate taxes are due, the payment might be held in suspense, and instructions sought from the Chapter 13 office as to its application.

Post petition Claims. It is also not uncommon for Debtors to fail to pay their taxes post petition, although it is a term of all Chapter 13 Plans that the Debtor pay his taxes when due. . . . Post-petition claims in an ongoing bankruptcy case are referred to as administrative claims. Should the Debtor not pay his taxes,

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<sup>145</sup> Ariail et al., *supra* note 120, at 59.

<sup>146</sup> Miller & Lanik, *supra* note 118, at 14.

<sup>147</sup> *See id.* at 16.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 16.

<sup>151</sup> *Id.* at 23.

however, remember that his property, in a Chapter 13 (or Chapter 11), is still property of the bankruptcy estate, and protected by the automatic stay. Therefore, no actions may be taken to collect these taxes. However an unpaid administrative claim is not discharged. The tax collector should also contact the Chapter 13 office, and keep them apprised of your contacts with the debtor and your situation. The tax collector should file a request for payment of administrative claim. The Chapter 13 office may wish the Debtor to pay the claim directly, if possible. However, if that is not possible, the Chapter 13 office will file a motion to pay the claim in the Plan as funds become available. If there are insufficient funds available in the Plan to pay the administrative claim, the tax collector may simply need to wait until the case is dismissed or discharged, but remember that collection efforts are prohibited. In order to assert an administrative claim, you must file a proof of claim.<sup>152</sup>

Under Chapter 11, tax liens “are entitled to be paid in regular installments over a period of no more than five years from the petition date, and in a manner not less favorable than the most favored nonpriority unsecured claim provided for in the plan.”<sup>153</sup> Chapter 11 plans are often written by the debtor without supervision, so a local government “should attempt to ensure that its liens are protected under the Plan, as upon confirmation, property dealt with by the Plan is freed of pre-existing liens” under 11 U.S.C. § 1141.<sup>154</sup>

Local governments should ensure accuracy when filing proofs of claims. “Claims should have all the appropriate tax bills attached: all districts require ‘the attachment of documentation in electronic format sufficient to establish the validity and status of the claim asserted.’”<sup>155</sup> The United States Bankruptcy Court for the Northern District of West Virginia stated in *Watson v. Stonewall Jackson Memorial Hosp. Co.*,<sup>156</sup>

[w]hen a creditor files a false or fraudulent proof of claim, that filing contravenes the purpose of a specific bankruptcy statute and rule. Namely, under 11 U.S.C. § 501, a creditor is allowed to file a proof of claim, and under § 502(a), the mere filing of a proof of claim means that it is deemed allowed. Under Fed. R. Bankr. P. 3001(f), a proof of claim filed in accordance with the Bankruptcy Rules constitutes prima facie evidence of the validity and amount of the claim. When a creditor files a false or fraudulent proof of claim, which is deemed allowed by § 502(a), and entitled to prima facie presumption of validity and amount by Rule 3001(f), the creditor is abusing the bankruptcy process.<sup>157</sup>

Note that a debtor’s property subject to a tax lien may be sold:

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<sup>152</sup> *Id.* at 17–18.

<sup>153</sup> Weller, *supra* note 130, at 60 (citing 11 U.S.C. § 1129(a)(9)(d) (2013)).

<sup>154</sup> Miller & Lanik, *supra* note 118, at 20.

<sup>155</sup> *Id.* at 20–21.

<sup>156</sup> 2010 WL 4496837 (Bankr. N.D.W. Va. 2010).

<sup>157</sup> *Id.* at \*3–4.

Debtors, and particularly Chapter 11 Debtors, may propose sales of property under Section 363 . . . “free and clear of liens, with liens to attach to proceeds.” These sales are often authorized, particularly if there is no objection. See 11 U.S.C. § 363(f). But, note that credit bids are allowed, and if the proceeds are insufficient, the tax lien may not receive payment. See 11 U.S.C. § 363(k). The tax collector may wish to object to such a sale and ask the court not to transfer its lien. Note that ad valorem tax liens may not be subordinate to administrative claims.<sup>158</sup>

Finally, Miller and Lanik note that trustees have “a professional office staff, which may be in a position to answer your questions, if they can not be answered by the public information.”<sup>159</sup> Municipal attorneys should “communicate and be active,” because,

[a]s with many areas of the law, bankruptcy involves a great amount of negotiation between the various parties in interest. . . . Bankruptcy cases have shorter notice periods, expedited hearings and other processes which work against parties in interest who do not actively participate in the case. Accordingly, cases where the city is involved should be actively monitored and affirmative relief requested when appropriate.<sup>160</sup>

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<sup>158</sup> Miller & Lanik, *supra* note 118, at 26.

<sup>159</sup> *Id.* at 15.

<sup>160</sup>