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Finance, Insolvency & Restructuring/Real Estate Alert - Indiana Supreme Court Revisits And Reaffirms Constitutionality Of Tax Sale Mortgagee Notice Requirements

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A recent Indiana Supreme Court ruling in *M & M Investment Group, LLC v. Ahlemeyer Farms, Inc. and Monroe Bank*, No. 03S04-1211-CC-645 (Ind. 2013) reaffirms the constitutionality of the statutory tax sale mortgagee notice requirements in Indiana. The decision should serve as a reminder to any person, anywhere that provides mortgage financing on Indiana real estate that County Auditors can provide pre-sale notices if requested.

Rather than paraphrase, the following is Indiana Supreme Court Justice Steven David's summary of the issue, facts and the court's holding in *M & M Investment*:

> Before a parcel of real property can be sold at a tax sale, the Indiana Code requires the county auditor to mail notice of the pending sale to any mortgagee holding a mortgage on the property-provided, however, that the mortgagee has first affirmatively requested such notice by submitting a form to the auditor. Is such a procedure permissible under the Due Process Clause of the Fourteenth Amendment? The answer, we said over two decades ago, is "Yes."
>
> But in this case a bank failed to submit the required form to the Bartholomew County auditor and therefore was not notified that one of its mortgaged properties was tax-delinquent until after the property had been sold and the buyer requested a tax deed. The bank objected, challenging the constitutionality of this statutory scheme in light of a more recent case from the U.S. Supreme Court. The trial court below agreed with the bank and refused to issue the tax deed, but we remain firm that the answer to the constitutional question is still "Yes," and therefore reverse.

Pursuant to legislative changes made in 1988, which remain applicable today, the provision under the Indiana tax sale scheme requiring pre-sale notice to mortgagees of an impending tax sale was amended to require the auditor to mail notice by certified mail "to any mortgagee who annual requests a copy of the notice" (I.C. §6-1.1-24-3(b)) in addition to those long standing requirements of notification generally by publication and posting notice in the county courthouse.

The Indiana Supreme Court had previously addressed and upheld the revised statutory scheme on three separate occasions, all in the same year. First in *Elizondo v. Read*, 588 N.E. 2d 501 (Ind. 1992) where certified mail notice was mailed to an invalid address on file in the

RELATED PEOPLE

Michael B. Watkins
Of Counsel (Retired)

P 574-237-1159
mike.watkins@btlaw.com

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auditor's office and was returned unclaimed (after the mortgagee moved twice without updating the auditor's records); next, in *Miller Reeder v. Co. v. Farmers State Bank of Wyatt*, 588 N.E. 2d 506 (Ind. 1992) where the mortgagee failed to file the required form with the auditor requesting any pre-sale notices; and finally, in *Griffen v. Munco Assoc*., 589 N.E.2d 220 (Ind. 1992) where, similarly, neither mortgagee had submitted the proper request to the auditor.

Despite the similarity in the principal facts in *M & M Investment* with those in both *Miller Reeder* and *Griffen* (i.e., mortgagee did not furnish the auditor with the requisite form requesting notice) which would seemingly doom the mortgagee's appeal, the United States Supreme Court decided *Jones v. Flowers*, 547 U.S. 220 (2006) in the interim. In *Jones*, the Supreme Court, in overruling a decision by the Arkansas Supreme Court, found an auditor's efforts to notify a property owner of a tax sale insufficient where notice was attempted by certified mail which was returned unclaimed (twice), despite an Arkansas statute obligating property owners to update their address with the auditor.

The mortgagee in *M & M Investment* attempted to bootstrap the Jones decision to itself as a mortgagee, and analogized its predicament to that of the Arkansas property owner so as to be excused from the requirement to affirmatively make the advance, annual request of the auditor to send to the bank tax sale notices.

The Indiana Supreme Court didn't bite, reasoning that "a mortgagee is not a property owner" and thus not entitled to the same degree of due process as is an owner and holding that requiring a mortgagee to protect its interest by merely completing a simple form and submitting it to the auditor is certainly less burdensome, under a balancing approach, than requiring the state to search other county records in an attempt to ascertain the identity and address of any possible mortgage holders.

Consequently, and unless disturbed by the legislature or further ruling by the United States Supreme Court, it appears finally settled that the statute requiring mortgagees to first make request of the auditor for notice that a parcel of real estate is eligible for tax sale is constitutional for due process purposes. Regardless of whether this request is made, however, the purchaser of any tax lien certificate is required to provide a post-sale notice to mortgagees of record (and the opportunity to redeem) before being entitle to petition for a tax deed to the underlying property.

To obtain more information, please contact the Barnes & Thornburg attorney with whom you work or the following attorneys: Richard J. Deahl at 574-237-1240 or richard.deahl@btlaw.com, or Michael B. Watkins at 574-237-1159 or mike.watkins@btlaw.com.