AMERICAN BANKRUPTCY INSTITUTE

Consumer Practice Extravaganza

Real Property Potpourri

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CONCURRENT SESSION

2023

Real Property Potpourri

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CONSUMER PRACTICE EXTRAVAGANZA

Tax Foreclosures

Four Categories:

- **Public Auction of Entire Property:** Most similar to a foreclosure sale, equity (if any) returned to the debtor.
- **Partial Sale**: Sale of only the portion of the property necessary to satisfy the unpaid taxes.
- **Two-Step Process**: First step is a public sale of a tax lien or tax sale certificate (often to the bidder offering the lowest interest rate), second step is acquisition of title to the property. Right of redemption exists prior to purchaser acquiring a deed to the property.
- **Strict Foreclosure**: The municipality which has the tax lien, or its assignee, can become the owner of the property after expiration of the applicable redemption period. There is no public sale of any kind.

CONSUMER PRACTICE EXTRAVAGANZA

Can tax sales be avoided as a fraudulent transfer or preference upon the property owner (or former property owner) filing bankruptcy?

- The Second, Third, Sixth, and Seventh Circuits have all held that tax foreclosure sales can be attacked as fraudulent transfers.
  - *See Hackler v. Arianna Holdings Co., LLC*, 938 F.3d 473 (3d Cir. 2019).
- The Fifth, Ninth, and Tenth Circuits have held to the contrary.
  - *See Tracht Gut, LLC v. Los Angeles County Treasurer,* 836 F.3d 1146 (9th Cir. 2016).

CONSUMER PRACTICE EXTRAVAGANZA

Is the Tax Sale an Impermissible Taking?

On May 25, 2023, the Supreme Court reversed the Eighth Circuit and held that a real estate tax foreclosure can violate the Takings Clause of the Fifth Amendment when the municipality takes title but doesn't give the owner the difference between the unpaid taxes and the value of the property.

CONSUMER PRACTICE EXTRAVAGANZA

Reasonable Equivalent Value

Impact of §724(b) on Debtor's Homestead

Section 724 provides:
(a) The trustee may avoid a lien that secures a claim of a kind specified in section 726(a)(4) of this title.
(b) Property in which the estate has an interest and that is subject to a lien that is not avoidable under this title (other than to the extent that there is a properly perfected unavoidable tax lien arising in connection with an ad valorem tax on real or personal property of the estate) and that secures an allowed claim for a tax, or proceeds of such property, shall be distributed--
(1) first, to any holder of an allowed claim secured by a lien on such property that is not avoidable under this title and that is senior to such tax lien;
(2) second, to any holder of a claim of a kind specified in section 507(a)(1)(C) or 507(a)(2) (except that such expenses under each such section, other than claims for wages, salaries, or commissions that arise after the date of the filing of the petition, shall be limited to expenses incurred under this chapter and shall not include expenses incurred under chapter 11 of this title), 507(a)(1)(A), 507(a)(1)(B), 507(a)(3), 507(a)(4), 507(a)(5), 507(a)(6), or 507(a)(7) of this title, to the extent of the amount of such allowed tax claim that is secured by such tax lien;
(3) third, to the holder of such tax lien, to any extent that such holder's allowed tax claim that is secured by such tax lien exceeds any amount distributed under paragraph (2) of this subsection;
(4) fourth, to any holder of an allowed claim secured by a lien on such property that is not avoidable under this title and that is junior to such tax lien;
(5) fifth, to the holder of such tax lien, to the extent that such holder's allowed claim secured by such tax lien is not paid under paragraph (3) of this subsection; and
(6) sixth, to the estate.

Illustration of the §724(b) Waterfall

Tax Liens Against Property To Be Avoided/Subordinated						
Tax Auth.	Tax Period	Assessment Date	Recording Date	Balance Due	Tax & Interest on Tax	Penalty & Interest on Penalty
IRS	2006	5/31/2010	6/23/2010	$120,000	$100,000	$20,000
IRS	2008	11/23/2009	6/23/2010	$40,000	$30,000	$10,000
Subtotals				$160,000	$130,000	$30,000
Avoided & Preserved for Estate: Sections 724(a) & 551				$30,000		
Remainder of Tax Lien To Be Paid From Sale				$130,000		

Illustration of the §724(b) Waterfall

Distribution Waterfall Under §724(b)	
Sale Price Realized	$1,000,000
Bank of America 1st Lien	($500,000)
Wells Fargo 2nd Lien	($350,000)
Penalties Preserved for Estate	($30,000)
Subordinate Tax Lien Reallocated to §507(a)(1)-(a)(7)	($100,000)
Remainer Distribution to Holder of Tax Lien (§724(b)(3))	($20,000)
Ending Balance	$0

Practice Tips

- Discuss the risks posed by 11 U.S.C. §§ 724(b) and 363 and document this discussion in writing.
  - Review the distribution results that will occur if a sale occurs outside a Chapter 7.
- If no equity exists after secured debt, the tax lien and the homestead, ask the trustee to stipulate to an abandonment as soon as possible after the petition date.
  - If he or she declines the request, consider the merits of promptly filing a motion seeking an order compelling abandonment.
- If there is no equity in the home for unsecured creditors, and the trustee files a motion seeking to employ a broker to sell the home, oppose the motion.
  - Use that opportunity to educate the court as to the dispute that will come to fruition if this relief is granted.

CONSUMER PRACTICE EXTRAVAGANZA

Homeowner Assistance Fund

- The American Rescue Plan Act contained the Homeowner Assistance Fund (HAF).
- HAF was established to help homeowners impacted by COVID-19 catch up on mortgage delinquencies, avoid the loss of utilities and assist with other housing costs for a homeowner's primary residence.
- $9.961 billion to eligible states, territories and tribes to assist homeowners who have experienced a financial hardship since January 21, 2020.
- Treasury released guidance regarding how states should utilize the HAF funds pursuant to an approved plan. States had until July 31, 2021, to submit their proposed HAF plans for approval or provide information regarding when they will submit their proposed HAF plans.

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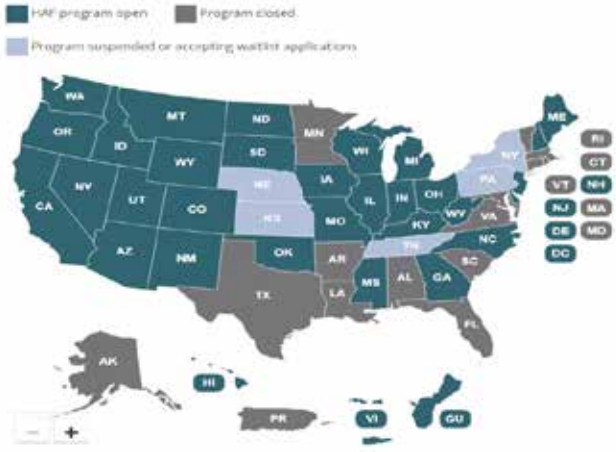
HAF Plan Status by State



View the current status: [Homeowner Assistance Fund — NCSHA]

CONSUMER PRACTICE EXTRAVAGANZA

HAF Requirements:

- Homeowner experience a financial hardship as a result of COVID
- Primary Residence located in the state where the application was submitted
- Household income is equal to or less than 150% of the median income
- Homeowner's mortgage is a conforming loan and meets the federal limits for the year in which the loan was taken

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HAF Disbursements

- If the application is approved, HAF programs disburse assistance to mortgage servicer, county treasurer, local taxing authority, and/or other payee.
- Grant or Interest-Free Loan?
  - Grant that doesn't have to be repaid – Most States
  - Interest-free loan that is forgiven over time, or does not have to be repaid until the borrower sells the home or refinance the loan – ID, IN, NV, NH, NJ, OH, OR
  - Combination of Loans and Grants – IL, KS, KY, MD
- The funds need to be applied timely, or they may have to be returned to the state agency.

HAF and Bankruptcy

- Debtor's Attorney's Role
  - Assist with application and obtain reinstatement figures
  - Is Court approval necessary before applying or accepting funds?
  - Notify interested parties that application was approved and funds are being disbursed.
  - File Amended Plan, if necessary.
- Creditor's Attorney's Role
  - What should the servicer be filing with the Court?
    - Amended Proof of Claim, if the prepetition arrears have been reduced
    - Payment Change Notice, if application of HAF funds will result in change
- Trustee's Role
  - Assist in communication
  - Update claim amount based on amended claim and/or amended plan

HAF Issues in Bankruptcy

- Communication
  - Servicers may be reluctant to speak to the debtor during bankruptcy
  - Conduit jurisdictions – how much is needed to reinstate the loan? Who has the best info on this?
- Court Permission? Is this necessary?
  - Some states are requiring that the borrower obtain court permission to participate in HAF.
- Time
  - Application, review and decision may take time, as will disbursement of funds.
  - Continued hearings – Confirmation and MFR hearings may be continued for months

Zombie Mortgages

- **Zombie Mortgage** - Properties that the debtor may not be able to sell or otherwise transfer because the mortgage exceeds the value of the property, and the secured creditor may not consent to a transfer for less than the amount owed nor commence foreclosure.
- **Zombie Second Mortgage** - Mortgage debts that the homeowner thought were forgiven or satisfied long ago, but still exist even though the creditor has been silent for a long period of time.

CFPB Issues Guidance to Protect Homeowners

- On April 26, 2023, the CFPB issue an advisory opinion clarifying that a covered debt collector who brings or threatens to bring a state court foreclosure action to collect a time-barred mortgage debt may violate the Fair Debt Collection Practices Act and its implementing Regulation F.
- Advisory Opinion Reg F Time-barred Debt (consumerfinance.gov)


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Final
Thoughts

Real Property Tax Sales Issues

I. **The Issue:** In all states, municipalities may take real property and sell it to collect property tax debts. The state statutes at issue provide varying remedies and procedures upon non-payment of property taxes. Often the amount received in exchange for the property is significantly less than the fair market value of the property.

   a. Can these sales be avoided as a fraudulent transfer or preference upon the property owner (or former property owner as the case may be) filing bankruptcy? The Second, Third, Sixth, and Seventh Circuits have all held that tax foreclosure sales can be attacked as fraudulent transfers. *See Hackler v. Arianna Holdings Co., LLC*, 938 F.3d 473 (3d Cir. 2019). The Fifth, Ninth, and Tenth Circuits have held to the contrary. *See Tracht Gut, LLC v. Los Angeles County Treasurer,* 836 F.3d 1146 (9th Cir. 2016).

   b. **Is the Tax Sale an Impermissible Taking?** On May 25, 2023, the Supreme Court reversed the Eighth Circuit and held that a real estate tax foreclosure can violate the Takings Clause of the Fifth Amendment when the municipality takes title but doesn't give the owner the difference between the unpaid taxes and the value of the property. *Tyler v. Hennepin Cty.,* No. 22-166, 2023 U.S. LEXIS 2201 (May 25, 2023). This ruling resolved the circuit split that was created by the Sixth Circuit in the case of *Hall v. Meisner*, 51 F.4th 185 (6th Cir. 2022), which held that Michigan's tax foreclosure scheme is unconstitutional where the county took "absolute title" to the property valued at close to $300,000 to satisfy a $22,262 tax debt and refused to refund any of the difference.

   c. Since it is now settled that tax sales can violate the Constitution, it stands to reason that tax foreclosure sales can more easily be attacked as fraudulent transfers.

II. **Background:**

   a. Foreclosure Sales v. Tax Sales

      i. The Supreme Court held that provided all the requirements of the state's foreclosure law have been complied with, a sale of property through foreclosure is not avoidable. Further concluding that a "fair and proper price or a 'reasonably equivalent value,' for foreclosed property is the price in fact received at the foreclosure sale." *BFP Resolution Trust Corp.,* 511 U.S. 531, 545 (1994).

      ii. The Supreme Court limited its holding to "an otherwise lawful mortgage foreclosure sale of real estate," and specifically stated that "[t]he considerations bearing upon other foreclosures [to satisfy tax liens, for example] may be different." *Id.* at 537 n.3.

   b. Differing State Statutes

      i. "There are over 150 different systems in the United States for collecting the property tax. Most states have a least two entirely different approaches for

enforcing payment of the property tax, with one procedure having its origins in the mid-nineteenth century and an alternative second procedure, equally available for use by local government, having been developed in the middle of the twentieth century. Other states leave the enforcement of the property tax to local government, with little consistency in procedures as one moves from city to city and from county to county across a state." Frank S. Alexander, *Tax Liens, Tax Sales, and Due Process*, 75 Ind. L.J. 747, 748 (2000).

ii. Tax foreclosure across the nation fall into four general categories. *See* Laura B. Bartell, *Tax Foreclosures as Fraudulent Transfer-Are Auctions Really Necessary*, 93 AM BANKR. L.J. 681, 695-702 (2019)
   1. Public Auction of Entire Property: Most similar to a foreclosure sale, equity (if any) returned to the debtor.
   2. Partial Sale: Sale of only the portion of the property necessary to satisfy the unpaid taxes.
   3. Two-Step Process: First step is a public sale of a tax lien or tax sale certificate (often to the bidder offering the lowest interest rate), second step is acquisition of title to the property. Right of redemption exists prior to purchaser acquiring a deed to the property.
   4. Strict Foreclosure: The municipality which has the tax lien, or its assignee, can become the owner of the property after expiration of the applicable redemption period. There is no public sale of any kind.

iii. In all types of tax forfeitures or foreclosures the delinquent taxpayer has the opportunity to prevent the final transfer of the property by payment of the amounts owed.

iv. Is competitive bidding (and the ability to have equity returned to the debtor) the key factor to preventing avoidance?

III. The Relevant Bankruptcy Statutes:

a. **Preference**—Section 547 of The Bankruptcy Code allows a trustee to avoid and recover for the benefit of the bankruptcy estate payments or transfers of property made within 90 days of a bankruptcy filing (or longer with respect to "insiders" of the debtor) to the extent that such payment or transfer provided the creditor with an advantage in the bankruptcy case vis-à-vis other creditors.

11 U.S.C §547(b): Except as provided in subsections (c), (i), and (j) of this section, the trustee may… avoid any transfer of an interest of the debtor in property—

(1) to or for the benefit of a creditor;
(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
(3) made while the debtor was insolvent;
(4) made—

(A) on or within 90 days before the date of the filing of the petition; or
(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
(5) that enables such creditor to receive more than such creditor would receive if—
(A) the case were a case under chapter 7 of this title;
(B) the transfer had not been made; and
(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

Insolvency is presumed on and during the 90 days immediately preceding the date of filing of the petition. 11 U.S.C. §547(f)

b. **Fraudulent Transfer**—Section 548 of the Bankruptcy Code allows a trustee to avoid and recover for the benefit of the bankruptcy estate property that was transferred by the Debtor, voluntarily or involuntarily, within 2 years of the date of the bankruptcy if the Debtor received less than the property's value and the transfer meets certain criteria set forth in the Code. Despite the Code section being referred to as the "Fraudulent Transfer" section, it is not necessary for the Debtor to have intended to defraud creditors.

11 U.S.C §548(a)(1)(B): The trustee may avoid any transfer … of an interest of the debtor in property…that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor

(i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(ii)
(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;
(II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital;
(III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured; or
(IV) made such transfer to or for the benefit of an insider, or incurred such obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business.

IV. Case Law:

a. ***In re Smith*, 811 F.3d 228 (7th Cir. 2016)**-- A sale of a debtor's real property at a tax sale did not provide reasonably equivalent value and thus was constructively fraudulent, even though the sale complied with state law for tax sales, since the tax

sale procedure for bidding the lowest amount acceptable to pay the delinquent taxes in exchange for the tax lien bore no relationship to the value of the property.

b. ***In re Hackler*, 938 F.3d 473 (3d Cir. 2019)-**A tax sale foreclosure can be avoided as a preferential transfer under §547, noting that *BFP* was based upon statutory analysis of the term "reasonably equivalent value," which does not appear in §547.

c. ***Riendeau v. Town of Sabattus*, 645 B.R. 321 (Bankr. D. Me. 2022)**—The Court held that a real property tax lien foreclosure did not, as a matter of law, establish reasonable equivalent value, but successful bidder was immediate transferee who took for value, in good faith and without knowledge of voidability. Therefore, the transfer was not voidable.

d. ***Gunsalus v. County of Ontario, N.Y.*, 37 F. 4th 859 (2d Cir. 2022), *cert. denied*, 143 S. Ct. 447 (Nov. 21, 2022)**—The avoidance of the transfer of a property sold pursuant to a tax sale was proper because the owners had standing to bring the avoidance proceeding and the transfer effected by county in foreclosing on the lien was not entitled to the presumption of having yielded "reasonably equivalent value" under 11 U.S.C.S. §548(a).

e. ***Duvvall v. County of Ontario, N.Y.*,** No. 21-2917-bk, 2023 U.S. App. LEXIS 25804 (2d Cir. Sep. 29, 2023) – Exempt annuity was not included in calculation of assets to determine if debtor was insolvent at the time of foreclosure. Bankruptcy court was correct in avoiding the transfer.

V. **Practical Considerations:**

a. **Standing-**

i. The Bankruptcy Code clearly provides a Chapter 7 trustee with standing to pursue claims under §§547 and 548.

ii. Does a Chapter 13 debtor have independent standing to utilize the trustee's avoidance powers under §§547 and 548? 11 U.S.C. §1303 sets forth what rights and powers a debtor has in Chapter 13 and does not include avoidance powers, unlike §§1104 and 1203, which provide for avoidance by a debtor in Chapters 11 and 12.

iii. Does the debtor have concurrent standing with the trustee?

iv. Courts holding that the Bankruptcy Code grants avoidance powers to a debtor as well as to a Chapter 13 trustee have relied on policy concerns and legislative history. See Houston v. Eiler (In re Cohen), 305 B.R. 886, 899 (9th Cir. B.A.P. 2004) ("If we regard §1303 as ambiguous and look at legislative history for guidance, a strong case for debtor standing to assert trustee avoiding powers becomes a compelling case."); Smith v. U.S. Bank Nat'l Ass'n (In re Smith), No. 12-41260, AP No. 13-4009, 2014 WL 1404722, at *2 (Bankr. W.D. Ky. April 10, 2014) (specifying policy concerns support granting Chapter 13 debtors the standing to utilize strong-arm avoidance powers instead of adhering to a strictly technical approach and citing cases on each side of the issue). Thus, authority

exists for finding that either the trustee or the debtor may bring avoidance actions in a chapter 13 case.

b. **Date of the Transfer**—May vary depending on the procedural requirements of the state at issue.
c. **Insolvency of the Debtor**—Does equity in the property that was transferred get included in determining insolvency? *See In re Kopec*, 621 B.R. 621 (Bankr. D.N.J. 2020). Note the different standards and presumptions of §§547 and 548.
d. **Insurable Title--**
    i. Will the ability to potential avoid the sale thwart a potential purchaser's ability to obtain title insurance on a property purchased through a tax sale?
    ii. In *BFP*, the Supreme Court emphasized the need to maintain harmony between foreclosure law and fraudulent conveyance law and a desire to avoid a federally created cloud on the title. Does this same rationale apply to tax sales?

CONSIDER THE IMPACT OF 11 U.S.C. § 724(b) ON YOUR CLIENT'S HOMESTEAD BEFORE YOU FILE A CHAPTER 7

INTRODUCTION

Most debtors want to save the family home. Before advising a client on whether or not this is a viable objective in Chapter 7, check to see whether the home is subject to a tax lien, and the amount of the claim secured by that tax lien. Outside of bankruptcy, tax authorities such as the IRS will rarely foreclose upon a home. In contrast, a Chapter 7 trustee may force the sale of *even an over-encumbered home* by inserting the fees incurred in the case into the spot held by the taxing authority through 11 U.S.C. § 724(b). Stated otherwise, the filing of the Chapter 7 case may result in the loss of a client's home under these conditions, instead of its retention.

TREATMENT OF CERTAIN LIENS UNDER 11 U.S.C. § 724

Section 724 provides:

> (a) The trustee may avoid a lien that secures a claim of a kind specified in section 726(a)(4) of this title.
>
> (b) Property in which the estate has an interest and that is subject to a lien that is not avoidable under this title (other than to the extent that there is a properly perfected unavoidable tax lien arising in connection with an ad valorem tax on real or personal property of the estate) and that secures an allowed claim for a tax, or proceeds of such property, shall be distributed--
>
> > (1) first, to any holder of an allowed claim secured by a lien on such property that is not avoidable under this title and that is senior to such tax lien;
> >
> > (2) second, to any holder of a claim of a kind specified in section 507(a)(1)(C) or 507(a)(2) (except that such expenses under each such section, other than claims for wages, salaries, or commissions that arise after the date of the filing of the petition, shall be limited to expenses incurred under this chapter and shall not include expenses incurred under chapter 11 of this title), 507(a)(1)(A), 507(a)(1)(B), 507(a)(3), 507(a)(4), 507(a)(5), 507(a)(6), or 507(a)(7) of this title, to the extent of the amount of such allowed tax claim that is secured by such tax lien;
> >
> > (3) third, to the holder of such tax lien, to any extent that such holder's allowed tax claim that is secured by such tax lien exceeds any amount distributed under paragraph (2) of this subsection;
> >
> > (4) fourth, to any holder of an allowed claim secured by a lien on such property that is not avoidable under this title and that is junior to such tax lien;

> (5) fifth, to the holder of such tax lien, to the extent that such holder's allowed claim secured by such tax lien is not paid under paragraph (3) of this subsection; and
>
> (6) sixth, to the estate.
>
> (c) If more than one holder of a claim is entitled to distribution under a particular paragraph of subsection (b) of this section, distribution to such holders under such paragraph shall be in the same order as distribution to such holders would have been other than under this section.
>
> (d) A statutory lien the priority of which is determined in the same manner as the priority of a tax lien under section 6323 of the Internal Revenue Code of 1986 shall be treated under subsection (b) of this section the same as if such lien were a tax lien.
>
> (e) Before subordinating a tax lien on real or personal property of the estate, the trustee shall--
>
> (1) exhaust the unencumbered assets of the estate; and
>
> (2) in a manner consistent with section 506(c), recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving or disposing of such property.
>
> (f) Notwithstanding the exclusion of ad valorem tax liens under this section and subject to the requirements of subsection (e), the following may be paid from property of the estate which secures a tax lien, or the proceeds of such property:
>
> (1) Claims for wages, salaries, and commissions that are entitled to priority under section 507(a)(4).
>
> (2) Claims for contributions to an employee benefit plan entitled to priority under section 507(a)(5).

11 U.S.C. § 724.

In In re Navis Realty, Inc., 193 B.R. 998, 1004–05 (Bankr. E.D.N.Y. 1996), the court explained the operation of 11 U.S.C. § 724:

> Before addressing such claims, it is important to note that the *aggregate* amount of the payments to the holders of the priority claims under 11 U.S.C. § 724(b)(2) cannot exceed the amount of the tax lien.[19] Thus, "the money representing the amount of the tax lien should be set aside. From it, the first [six] priorities under section 507(a) should be paid." 4 *Collier on Bankruptcy* ¶ 724.03 (15th ed. 1993). Moreover, where the aggregate amount of the priority claims exceeds the amount of the tax lien (or where the proceeds to be distributed are not sufficient to pay the

> total amount of the priority claims to the extent of the tax lien), 11 U.S.C. § 724(c) provides that distribution to each holder of a priority claim shall be made in "the same order as distribution to such holders would have been other than under [11 U.S.C. § 724(b)]." 11 U.S.C. § 724(c).[20] The order of distribution for priority claims in a Chapter 7 case can be found in 11 U.S.C. § 726(b) which provides that payment on such claims shall be made pro-rata among each class of claims. 11 U.S.C. § 726(b). Accordingly, where the aggregate amount of the priority claims under 11 U.S.C. §§ 507(a)(1)–(a)(6) exceeds the amount of the tax lien, such claims would be paid on a pro-rata basis with the total payment on such claims equaling the amount of the tax lien.

Id.

ILLUSTRATION OF THE 11 U.S.C. § 724(b) WATERFALL

The subordination provision in Section 724(b) only comes into play after the estate has been unable to pay the Section 507 claims accorded priority from the funds generated from the liquidation of all other property in the estate. 11 U.S.C. § 724(b). The table below provides a simple illustration of the how the subordination waterfall would work under the circumstances indicated:

Tax Liens Against Property To Be Avoided/Subordinated						
Tax Auth.	**Tax Period**	**Assessment Date**	**Recording Date**	**Balance Due**	**Tax & Interest on Tax**	**Penalty & Interest on Penalty**
IRS	2006	5/31/2010	6/23/2010	$120,000	$100,000	$20,000
IRS	2008	11/23/2009	6/23/2010	$40,000	$30,000	$10,000
Subtotals				$160,000	$130,000	$30,000
Avoided & Preserved for Estate: Sections 724(a) & 551				$30,000		
Remainder of Tax Lien To Be Paid From Sale				$130,000		

Distribution Waterfall Under Section 724(b)	
Sale Price Realized	$1,000,000
Bank of America 1st Lien	($500,000)
Wells Fargo 2nd Lien	($350,000)
Penalties Preserved for Estate	($30,000)
Subordinated Tax Lien Reallocated to Section 507(a)(1)-(a)(7)	($100,000)
Remainder Distribution To Holder of Tax Lien (§ 724(b)(3)).	($20,000)
Ending Balance	$0.00

THE INTERFACE BETWEEN THE SECTION 724(b) SUBORDINATION AND EXEMPTION CLAIMS

Under certain circumstances, sections 724(b), 522(c) and 363(f) of the bankruptcy code may empower a trustee to significantly reduce the benefits an individual debtor might otherwise expect to receive from a Chapter 7 filing. This circumstance is illustrated by the result in the Chapter 7 case of In re Bolden, 327 B.R. 657, 662–63 (Bankr. C.D. Cal. 2005). The contest in Bolden was over whether the debtor's over-encumbered home should be sold, which was the trustee's position, or abandoned—the debtor's position. The trustee's plan was to sell the property free and clear of liens pursuant to 11 U.S.C. § 363(f), and then use 11 U.S.C. § 724(a) to create a pot of funds for the estate, and to use Section 724(b) to create a pot of funds to pay administrative claims. The court in Bolden authorized the sale. The net effect of the Bolden ruling was to 1) leave the debtor homeless, 2) transfer $100,000 that otherwise would have been used to pay tax claims to the trustee and his professionals, thereby increasing the debtor's already immense non-dischargeable tax burden, and 3) to the extent the debtor had any homestead rights, to eliminate the same. The foregoing circumstance can occur because a homestead claim is not protected from a tax lien. The government gets paid first, the exemption second. In re Pletz, 225 B.R. 206, 208 (Bankr. D. Or. 1997) ("[A] federal tax lien [pursuant to § 6321] attaches on assessment to all of the property of the taxpayer, even property that is exempt under state and bankruptcy law.").

THE ONGOING CONTEST OVER IF AND WHEN THE SECTION 724(b) DISTRIBUTION SECTION CAN OR SHOULD BE USED

The disagreements relating to Section 724(b) revolve more around when this statute comes into play, than over how it functions. In significant measure, the issue in contest boils down to this: Should a chapter 7 trustee be allowed to administer an over-encumbered property with the intent, ab initio, of using the subordination power in this section to ensure that he or she gets paid for this work, where the end result will not yield a dividend for unsecured creditors? A significant body of cases answers this question in the negative. Other cases are more permissive on the issue.

A. The Case For Barring The Administration and Sale of Over-Encumbered Property And Using Section 724(b) To Make This Option Profitable.

To quote a nearly century old ruling by the Second Circuit that addressed the foregoing issue:

> We can conceive of no benefit which the estate in receivership could obtain by selling free of liens, and of no interest which the receivers could have in so selling, except to get fees for themselves and their attorneys. We wish to condemn in no uncertain terms the practice of permitting the receiver to sell free of liens and without the consent of the lienors, under such circumstances.

Seaboard Nat. Bank v. Rogers Milk Prod. Co., 21 F.2d 414, 416-417 (2d Cir. 1927) (emphasis added). As the court stated in In re Feinstein Family P'ship, 247 B.R. 502, 507 (Bankr. M.D. Fla. 2000):"It is now almost universally recognized that where the estate has no equity in a property, abandonment is virtually always appropriate because no unsecured creditor could benefit from the administration." See also In re PW, LLC, 391 B.R. 25, 40–41 (B.A.P. 9th Cir. 2008); In re KVN

Corp., Inc., 514 B.R. 1, 4 (9th Cir. BAP 2014); In re Marko, 2014 WL 948492, at 5 (Bankr. W.D.N.C. Mar. 11, 2014) ("The Bankruptcy Code generally contemplates that over encumbered property not be sold. 11 U.S.C. § 363(f)(2)"). Office for United States Trustees, Handbook for Chapter 7 Trustees at 8–20 (2002).

At the core of argument in favor of a permissive use of Section 724(b) is the following assumption: 11 U.S.C. § 724(b) allows the trustee to administer and sell over-encumbered property, where one of the liens encumbering the property is a tax lien. The case law rejecting this position argues that this analysis ignores the fact that Section 724(b) is a *distributional* section, not an avoidance power. See In re Hernandez, 1996 WL 34569269, at 2 (Bankr. S.D. Ga. May 29, 1996). It only comes into play if a lawful basis exists for the sale of property, and the avoidance of the tax liens secured thereby and there is a significant body of case law that holds no such basis exists. See In re PW, LLC, 391 B.R. 25, 40–41 (B.A.P. 9th Cir. 2008); In re Marko, 2014 WL 948492, at 5 (Bankr. W.D.N.C. Mar. 11, 2014) ("The Bankruptcy Code generally contemplates that over encumbered property not be sold. 11 U.S.C. § 363(f)(2)"); In re Cunningham, 48 B.R. 509 (Bankr.M.D.Tenn.1985); In re Air Vermont, Inc., 41 B.R. 486 (Bankr.Vt.1984); Matter of Karl A. Neise, Inc., 31 B.R. 409 (Bankr.S.D.Fla.1983); In re Anspach, 13 B.R. 208 (Bankr.E.D.Pa.1981); In re Integrated Agri, Inc., 313 B.R. 419, 425 (Bankr. C.D. Ill. 2004) ("It is well settled that it is improper for a bankruptcy trustee to liquidate property solely for the benefit of secured creditors"). The "opportunistic" pairing of a Section 363(f) motion with a Section 724(b) priming strategy, particularly in the case of a home sale, also raises problematic policy and ethical issues.

B. The Case For Allowing The Administration and Sale of Over-Encumbered Property And Using Section 724(b) To Make This Option Profitable.

A series of cases have allowed the sale of over-encumbered property pursuant to 11 U.S.C. §363(f) based upon the assumption that the avoidance and subordination provisions in 11 U.S.C. §724 will yield a benefit to the estate. See In re Gill, 574 B.R. 709 (B.A.P. 9th Cir. 2017); In re Laredo, 334 B.R. 401, 410-411(Bankr. N.D. Ill. 2005); see also Peter A. Davidson, The IRS Is Your Friend: How Trustees Can Use Tax Liens to Weave Straw into Gold, 29 Cal. Bankr. J. 191 (2007). In Laredo, the chapter 7 trustee was authorized to sell the debtor's residence for the sum of $380,000. 334 B.R. at 407. The sales proceeds remaining after the payment of the secured mortgage debt, administrative expenses and the tax lien were insufficient to pay any distribution on the homestead. When the debtors, who were in pro per, argued that they would "be left out in the cold" unless their $15,000 homestead exemption was paid before the real estate broker's commission, the court rejected this contention citing the distributional priorities in Section 724(b). 334 B.R. at 408-409.

In In re Gill, 574 B.R. 709 (B.A.P. 9th Cir. 2017), the debtor filed a motion seeking to compel the abandonment of a residence with a value of $500,000. The residence was encumbered by a $368,000 first mortgage and $211,000 in IRS tax liens, of which $48,000 was comprised of penalties. The trustee opposed the motion contending that he could sell the property, and avoid and recover the $48,000 in penalties for unsecured creditors pursuant to 11 U.S.C. § 724(a). The bankruptcy court denied the abandonment motion and the debtor appealed to the BAP, which affirmed the ruling. The Gill case seems to suggest that the administration and sale of an over-encumbered property is acceptable. Contra In re Bird, 577 B.R. 365, 385 (B.A.P. 10th Cir. 2017); In re Covington, 368 B.R. 38, 41 (Bankr. E.D. Cal. 2006)("For instance, when an asset is fully

encumbered by a lien, it is considered improper for a chapter 7 trustee to liquidate the asset."); In re Preston Lumber Corp., 199 B.R. 415 (Bankr.N.D.Cal.1996); see also In re Babaee, Case No.

PRACTICE TIPS

A debtor-homeowner seeking debt relief through Chapter 7 will invariably ask two questions: "Can I keep my house?", and if not, "Will I get my homestead if my house is sold?" As the above referenced analysis of 11 U.S.C. § 724 indicates, the answer to these questions will depend upon a number of factors, if the property is subject to prepetition tax liens. Here are a few practice tips to consider if a putative Chapter 7 debtor-homeowner subject to tax liens seeks your counsel:

A. Discuss the risks posed by 11 U.S.C. §§ 724(b) and 363 and document this discussion in writing. Review the distribution results that will occur if a sale occurs outside a Chapter 7. *The client may fare better by not filing*.

B. If no equity exists after secured debt, the tax lien and the homestead, ask the trustee to stipulate to an abandonment as soon as possible after the petition date. If he or she declines the request, consider the merits of promptly filing a motion seeking an order compelling abandonment.

C. If there is no equity in the home for unsecured creditors, and the trustee files a motion seeking to employ a broker to sell the home, oppose the motion. Use that opportunity to educate the court as to the dispute that will come to fruition if this relief is granted. If you wait until the trustee has incurred fees in the sale effort, the trustee will contend that the sale is necessary to pay the fees incurred in preparing for the sale. See e.g., In re Christiansen, 561 B.R. 195 (Bankr. Utah 2016).

HOMEOWNER ASSISTANCE FUND GUIDANCE

U.S. DEPARTMENT OF THE TREASURY

June 12, 2023

INTRODUCTION

The Treasury Department is issuing this guidance regarding the Homeowner Assistance Fund (HAF), which was established under section 3206 of the American Rescue Plan Act of 2021 (the ARP). This guidance may be updated, revised, or modified at any time, and the Secretary of the Treasury may waive the terms of this guidance in her sole discretion to the extent permitted by law.[1]

Under the HAF, Treasury will provide financial assistance in an aggregate amount of approximately $9.9 billion. Treasury has separately published information regarding the allocation of HAF funding for eligible entities.

PURPOSE OF THE HAF

According to the ARP, the HAF was established to mitigate financial hardships associated with the coronavirus pandemic by providing funds to eligible entities for the purpose of preventing homeowner mortgage delinquencies, defaults, foreclosures, loss of utilities or home energy services, and displacements of homeowners experiencing financial hardship after January 21, 2020, through qualified expenses related to mortgages and housing.

DEFINITIONS

Treasury will apply the following definitions for purposes of this guidance.

100% of the area median income for a household means two times the income limit for very-low income families, for the relevant household size, as published by the Department of Housing and Urban Development (HUD) in accordance with 42 U.S.C. 1437a(b)(2) for purposes of the HAF. When determining area median income with respect to tribal members, tribal governments and TDHEs may rely on the methodology authorized by HUD for the Indian Housing Block Grant Program as it pertains to households residing in an Indian area comprising multiple counties (*see* HUD Office of Native American Programs, Program Guidance No. 2021-01, June 22, 2021).

100% of the median income for the United States means the median income of the United States, as published by HUD for purposes of the HAF.

[1] Guidance for HAF was initially released on April 14, 2021. The guidance was updated on November 12, 2021 to provide additional guidance on the HAF plan process, updated definitions, additional guidance on qualified expenses, administrative revisions arising from tribal consultations, and other updates to program requirements, including to reflect the extension of the deadline for tribes, tribal entities, and the Department of Hawaiian Home Lands to submit a notice of funds request. This guidance was further updated on February 24, 2022 to provide additional guidance on the use of program income, eligible housing counseling services, administrative expenses, eligible uses of funds, and approaches for household income verification. Treasury updated this guidance again on August 8, 2022 to provide additional guidance on the reimbursement of certain qualified expenses, on March 7, 2023 to clarify certain requirements for certain tribes and tribal entities, and on June 12, 2023 to provide guidance on the use of funds for payment assistance or principal reduction for Property Assessed Clean Energy loans.

150% of the area median income for a household means three times the income limit for very-low income families, for the relevant household size, as published by HUD in accordance with 42 U.S.C. 1437a(b)(2) for purposes of the HAF. When determining area median income with respect to tribal members, tribal governments and TDHEs may rely on the methodology authorized by HUD for the Indian Housing Block Grant Program as it pertains to households residing in an Indian area comprising multiple counties (*see* HUD Office of Native American Programs, Program Guidance No. 2021-01, June 22, 2021).

Dwelling means any building, structure, or portion thereof that is occupied as, or designed or intended for occupancy as, a residence by one or more individuals.

Eligible entity means (1) a State, (2) the Department of Hawaiian Home Lands, (3) each Indian Tribe (or, if applicable, the tribally designated housing entity of an Indian Tribe) that was eligible for a grant under Title I of the Native American Housing Assistance and Self-Determination Act of 1996 (25 U.S.C. 4111 et seq.) for fiscal year 2020, and (4) any Indian Tribe that opted out of receiving a grant allocation under the Native American Housing Block Grants program formula in fiscal year 2020.

Financial hardship means a material reduction in income or material increase in living expenses associated with the coronavirus pandemic that has created or increased a risk of mortgage delinquency, mortgage default, foreclosure, loss of utilities or home energy services, or displacement for a homeowner.

HAF participant means an eligible entity that receives funds from the HAF.

Mortgage means any credit transaction (1) that is secured by a mortgage, deed of trust, or other consensual security interest on a principal residence of a borrower that is (a) a one- to four-unit dwelling, or (b) a residential real property that includes a one- to four-unit dwelling; and (2) the unpaid principal balance of which was, at the time of origination, not more than the conforming loan limit. For purposes of this definition, the conforming loan limit means the applicable limitation governing the maximum original principal obligation of a mortgage secured by a single-family residence, a mortgage secured by a two-family residence, a mortgage secured by a three-family residence, or a mortgage secured by a four-family residence, as determined and adjusted annually under section 302(b)(2) of the Federal National Mortgage Association Charter Act (12 U.S.C. 1717(b)(2)) and section 305(a)(2) of the Federal Home Loan Mortgage Corporation Act (12 U.S.C. 1454(a)(2)). A reverse mortgage, a loan secured by a manufactured home, or a contract for deed (also known as a land contract) may fall within this definition if it satisfies the criteria in this paragraph, in accordance with applicable state law.

Socially disadvantaged individuals are those whose ability to purchase or own a home has been impaired due to diminished access to credit on reasonable terms as compared to others in comparable economic circumstances, based on disparities in homeownership rates in the HAF participant's jurisdiction as documented by the U.S. Census. The impairment must stem from circumstances beyond their control. Indicators of impairment under this definition may include being a (1) member of a group that has been subjected to racial or ethnic prejudice or cultural bias within American society, (2) resident of a majority-minority Census tract; (3) individual with limited English proficiency; (4) resident of a U.S. territory, Indian reservation, or Hawaiian Home

Land, or (5) individual who lives in a persistent-poverty county, meaning any county that has had 20% or more of its population living in poverty over the past 30 years as measured by the three most recent decennial censuses. In addition, an individual may be determined to be a socially disadvantaged individual in accordance with a process developed by a HAF participant for determining whether a homeowner is a socially disadvantaged individual in accordance with applicable law, which may reasonably rely on self-attestations.

State means any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, and the Commonwealth of the Northern Mariana Islands.

NOTICE OF REQUEST TO RECEIVE HAF PAYMENTS

The ARP requires eligible entities to notify Treasury of their request to receive payment from the HAF. Treasury published a notice of funds request form, available at https://home.treasury.gov/policy-issues/coronavirus/assistance-for-state-local-and-tribal-governments/homeowner-assistance-fund, which must be completed, signed by an authorized official of the eligible entity, and returned to Treasury.

If any State (including the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, and the Commonwealth of the Northern Mariana Islands) did not submit a notice of funds request by April 25, 2021, the State would not have been eligible for a payment from the HAF, and Treasury would have been required to reallocate the funding that was previously allocated to that State among those States that did request funding by the statutory deadline. All States submitted a notice of funds request to Treasury by the deadline and, as such, no reallocations occurred.

The deadline for an Indian Tribe, tribal entity, or the Department of Hawaiian Home Lands to submit a notice of funds request is December 15, 2021.

FINANCIAL ASSISTANCE AGREEMENT

Each eligible entity approved to receive payment from the HAF must enter into a financial assistance agreement with Treasury. A form of the financial assistance agreement is available at https://home.treasury.gov/policy-issues/coronavirus/assistance-for-state-local-and-tribal-governments/homeowner-assistance-fund.

QUALIFIED EXPENSES

HAF participants may use funding from the HAF only for the following types of qualified expenses that are for the purpose of preventing homeowner mortgage delinquencies, homeowner mortgage defaults, homeowner mortgage foreclosures, homeowner loss of utilities or home energy services, and displacements of homeowners experiencing financial hardship:

1. mortgage payment assistance;
2. financial assistance to allow a homeowner to reinstate a mortgage or to pay other housing-related costs related to a period of forbearance, delinquency, or default;
3. mortgage principal reduction, including with respect to a second mortgage provided by a nonprofit or government entity;
4. facilitating mortgage interest rate reductions;

5. payment assistance for:
    a. homeowner's utilities, including electric, gas, home energy (including firewood and home heating oil), water, and wastewater;
    b. homeowner's internet service, including broadband internet access service, as defined in 47 CFR 8.1(b) (or any successor regulation);[2]
    c. homeowner's insurance, flood insurance, and mortgage insurance;
    d. homeowner's association fees or liens, condominium association fees, or common charges, and similar costs payable under a unit occupancy agreement by a resident member/shareholder in a cooperative housing development; and
    e. down payment assistance loans provided by nonprofit or government entities;
6. payment assistance for delinquent property taxes to prevent homeowner tax foreclosures;
7. measures to prevent homeowner displacement, such as home repairs to maintain the habitability of a home, including the reasonable addition of habitable space to alleviate overcrowding, or assistance to enable households to receive clear title to their properties;
8. counseling or educational efforts by housing counseling agencies approved by HUD or a tribal government (including such efforts by in-house housing counselors who are HUD-certified or Tribally approved), or legal services, targeted to households eligible to be served with funding from the HAF related to foreclosure prevention or displacement, in an aggregate amount up to 5% of the funding from the HAF received by the HAF participant;
9. reimbursement of funds expended by a state, local government, or entity described in clause (3) or (4) of the definition above of "eligible entity" during the period beginning on January 21, 2020, and ending on the date that the first funds are disbursed by the HAF participant under the HAF, for a qualified expense (other than any qualified expense paid directly or indirectly by another federal funding source, or any qualified expenses described in clauses (6), (7), (8), or (10) of this definition);
10. planning, community engagement, needs assessment, and administrative expenses related to the HAF participant's disbursement of HAF funds for qualified expenses, in an aggregate amount not to exceed 15% of the funding from the HAF received by the HAF participant;
11. payment of lot rent for a manufactured home, where such payment would promote housing stability and prevent the default of the resident of the manufactured home;
12. reimbursement of funds expended by a state, local government, or entity described in clause (3) or (4) of the definition above of "eligible entity" during the period beginning on the date the participant received its initial HAF payment and ending on the date the participant received the balance of funds requested in the participant's HAF plan for a qualified expense consistent with the participant's approved HAF Plan (other than any qualified expense paid directly or indirectly by another federal funding source); and

[2] As of the date of this guidance, the definition of "broadband internet access service" in 47 CFR 8.1(b) is "a mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up internet access service. This term also encompasses any service that the [Federal Communications] Commission finds to be providing a functional equivalent of the service described in the previous sentence or that is used to evade the protections set forth in this part."

13. payment assistance or principal reduction for Property Assessed Clean Energy (PACE) loans, where such expenditures would promote housing stability and prevent foreclosures or homeowner displacement.

If a contractor both plays an administrative role and provides housing counseling or other services, a grantee must allocate costs based on each such activity.

Arrearages of qualified expenses are eligible for purposes of HAF regardless of the date they were incurred, including if they arose before January 2020. Funding from the HAF may not be used for any use other than those provided for in this section. HAF participants may use program income earned during the period of performance as a result of implementing the objectives of the HAF award for eligible purposes outlined in this guidance. "Program income" is defined in 2 C.F.R. § 200.1 as gross income earned by a non-federal entity that is generated directly by a supported activity or earned as a result of the federal award during the period of performance except as provided by 2 C.F.R. § 200.307(f). Program income includes income from fees for services performed, the use or rental of real or personal property acquired under federal awards, and principal and interest on loans made with federal award funds. To the extent that HAF participants use HAF funds to supplement other loss-mitigation efforts, Treasury encourages participants to avoid using HAF funds in a manner that replaces other loss-mitigation resources that would otherwise be available. The HAF Plan (described below) will enable HAF participants to indicate whether they are requesting reimbursements under clause (9) above.

ELIGIBLE HOMEOWNERS

Homeowners[3] are eligible to receive amounts allocated to a HAF participant under the HAF if they experienced a financial hardship after January 21, 2020 (including a hardship that began before January 21, 2020, but continued after that date) and have incomes equal to or less than 150% of the area median income or 100% of the median income for the United States, whichever is greater. A HAF participant may provide HAF funds only to a homeowner with respect to qualified expenses related to the dwelling that is such homeowner's primary residence.

HAF participants must require homeowners to attest that they experienced financial hardship after January 21, 2020. The attestation must describe the nature of the financial hardship (for example, job loss, reduction in income, or increased costs due to healthcare or the need to care for a family member).

The HAF does not preclude Tribes or TDHEs from providing assistance to members, or individuals otherwise eligible for HAF, who reside outside the tribal government's geographic jurisdiction. Tribal authorities should confirm that any such assistance can be provided consistently with the Tribe's constitution and governing law.

Income Determinations. With respect to each household applying for assistance, HAF participants may use HUD's definition of "annual income" in 24 CFR 5.609 or use adjusted gross income as defined for purposes of reporting on Internal Revenue Service (IRS) Form 1040 series for individual federal annual income tax purposes.

[3] A HAF participant may determine an individual to be a "homeowner" if the individual holds a vested legal or equitable ownership interest in the relevant dwelling, in accordance with applicable state law.

HAF participants must have a reasonable basis under the circumstances for determining income for purposes of the requirements described above under "Eligible Homeowners." Two approaches for income verification are permissible: (1) the household may provide a written attestation as to household income together with supporting documentation such as paystubs, W2s or other wage statements, IRS Form 1099s, tax filings, depository institution statements demonstrating regular income, or an attestation from an employer; or (2) the household may provide a written attestation as to household income and the HAF participant may use a reasonable fact-specific proxy for household income, such as reliance on data regarding average incomes in the household's geographic area. Grantees may make reasonable determinations as to what constitutes a household for the purposes of the required household income determination.

HAF participants may provide waivers or exceptions to this documentation requirement as reasonably necessary to accommodate extenuating circumstances, such as disabilities, practical challenges related to the pandemic, or a lack of technological access by homeowners; in these cases, the HAF participant is still responsible for making the required determination regarding household income and documenting that determination.

If a HAF participant chooses to require households to provide supporting documentation for purposes of income determination, Treasury encourages HAF participants to avoid establishing documentation requirements that are likely to be barriers to participation for eligible households, including those with irregular incomes such as from a small business. Treasury also encourages grantees to exclude public benefits, such as Supplemental Nutrition Assistance Program benefits, from the calculation of income.

Treasury discourages HAF participants from imposing additional eligibility criteria such as foreclosure status, credit score, bankruptcy status, the existence of liens on the property, or previous cash-out refinances. HAF participants that wish to include additional eligibility criteria beyond those described in this guidance and other program documentation issued by Treasury must explain with specificity how those criteria would further the objectives of the HAF, including how they would help the program reach eligible homeowners.

TARGETING

Not less than 60% of amounts made available to each HAF participant must be used for qualified expenses that assist homeowners having incomes equal to or less than 100% of the area median income or equal to or less than 100% of the median income for the United States, whichever is greater. Any amount not made available to homeowners that meet this income-targeting requirement must be prioritized for assistance to socially disadvantaged individuals, with funds remaining after such prioritization being made available for other eligible homeowners.

INITIAL PAYMENTS

Treasury made initial payments from the HAF available to eligible entities that are approved to participate in the HAF in an amount equal to 10% of the total amount allocated to the eligible entity. In order to receive this initial payment, the eligible entity was required to (1) enter into the financial assistance agreement with Treasury described above and (2) commit to use the funds only for qualified expenses (other than those under clause (9) of the "Qualified Expenses" section above). Treasury made these payments to the eligible entity or agency of the eligible entity

identified on the eligible entity's notice of funds request. No more than 50% of the initial payment was permitted to be used for planning, community engagement, needs assessment, and administrative expenses described in clause (10) of the "Qualified Expenses" section above. Any eligible entity that elected not to receive this initial payment would receive its allocated funds after Treasury approves its HAF plan, as described below.

Treasury encouraged HAF participants to use these initial payments to create or fund pilot programs to serve targeted populations, and to focus on programs that are most likely to deliver resources most quickly to targeted populations, such as mortgage reinstatement programs.

HAF PLAN

To receive the remainder of its allocation, an eligible entity must develop and submit a plan for its use of HAF funding. These HAF plans will describe in detail the needs of homeowners within the relevant jurisdiction, the design of each program the eligible entity proposes to implement using HAF funds, performance goals, and information regarding the eligible entity's readiness to implement the programs. In developing HAF plans, Treasury expects that eligible entities will follow their state open meeting or "sunshine" laws (with associated public hearings conducted in a manner appropriate for local public health conditions), and Treasury encourages eligible entities to post draft HAF plans for public comment and hold public hearings. HAF participants will receive their remaining funds under the HAF only after Treasury approves a HAF plan. Treasury has provided eligible entities with a template for the HAF plan, which includes the following elements.

HAF PLAN SUBMISSION

Treasury will open a portal online for HAF participants to enter and submit their HAF plan. Treasury is extending the deadline for each State to submit a completed HAF plan or provide Treasury with an estimated date by which a HAF plan will be submitted to 14 days after the portal becomes accessible.

A HAF participant may elect to submit a single, comprehensive HAF plan that describes the intended uses for the participant's entire HAF allocation, or multiple, partial HAF plans that each describe only a portion of the intended uses for the participant's allocation. Submission of partial HAF plans may allow HAF participants to proceed more quickly to implement portions of their plan while conducting planning and community engagement for other aspects. Treasury will promptly begin reviewing HAF plans that are submitted before the deadline.

HAF PLAN COMPONENTS

The HAF plan template provided by Treasury includes sample language and term sheet templates that HAF participants may use to develop their plans. Treasury encourages HAF participants to use these examples and templates to promote consistency across programs, minimize operational complexity, and promote a common understanding of eligibility criteria. If deviating from these examples and templates, HAF participants should specifically explain how their approach would further the objectives of the HAF, including the targeting and prioritization requirements.

HAF plans will address the following issues.

- **Homeowner Needs and Engagement:**
  - *Data-Driven Assessment of Homeowner Needs*: HAF participants must provide information and data that they use to design their programs in a way that effectively targets eligible homeowners. HAF participants must include data about financial hardships of target homeowners and socially disadvantaged individuals, including data on mortgage delinquencies, defaults, foreclosures, post-foreclosure evictions, and the loss of utilities or home energy services, including trends over time disaggregated by demographic categories and geographic areas.
  - *Evidence of Public Participation and Community Engagement:* HAF participants should seek input from organizations and individuals representing eligible homeowners regarding the data-driven assessment of homeowner needs. HAF plans must describe the extent to which their information on homeowner needs reflects their engagement with organizations and individuals representing eligible homeowners, and how the HAF participant will allow for public participation in the development of the HAF plan, including any public hearings.
- **Program Design:**
  - *Program Descriptions:* HAF participants must describe each program for which they will use HAF funding. The description must describe the targeted population of homeowners and the financial challenges the program would address based on the data-driven assessment of homeowner needs (e.g., the immediate challenge of mortgage delinquency, or displacement prevention). Each program description must include a description of eligibility requirements; the intended impact on eligible homeowners; the application process; conditions or limitations, including the maximum dollar amount that the program will provide to each homeowner for each type of qualified expense; a description of the payment process; and other available sources of assistance for targeted homeowners. HAF participants must have one or more programs intended to reduce mortgage delinquency among targeted populations.[4] Treasury encourages HAF participants to consider homeownership preservation programs for low-income households in areas where property taxes and utility costs are increasing, including for households that do not have mortgages. Treasury also encourages HAF participants to consider program designs that leverage utility assistance from other federal programs that have been created expressly for that purpose before using HAF funds for utility assistance.
  - *Equity and Accessibility*: HAF participants should design programs to be as accessible as possible to homeowners in different circumstances, including by offering multiple intake formats, engaging with nonprofit organizations to provide additional pathways into the program, and providing culturally and linguistically

[4] Tribes and tribal entities are exempt from the requirement to provide one or more programs intended to reduce mortgage delinquency when the tribe or tribal entity's circumstances indicate such requirement would not best serve the homeowners in its community. Such circumstances may include the scarcity of mortgages eligible for assistance in the relevant community; a sufficiently small total HAF allocation such that provision of mortgage assistance is impractical; or evidence that housing needs other than those met by mortgage-delinquency assistance are more pressing in the community and qualified expenses related to such needs will exhaust substantially all of the tribe or tribal entity's total HAF allocation.

relevant outreach.

- *Methods for Targeting HAF Funding:* The HAF plan must describe how the HAF participant will effectively target HAF resources to (1) homeowners having incomes equal to or less than 100% of the area median income or equal to or less than 100% of the median income for the United States, whichever is greater; and (2) socially disadvantaged individuals. The HAF participant must describe its targeting strategies according to disaggregated characteristics of the targeted population such as income ranges, racial and ethnic demographics, and/or geographic areas (including rural communities), as appropriate for the relevant jurisdiction. Targeting methods may include marketing, community engagement strategies, partnerships with housing counseling agencies or legal aid organizations, or other educational services that are aligned with the HAF participant's program design, in a manner that is culturally and linguistically relevant to the targeted communities.

  Treasury encourages HAF participants to prioritize assistance to homeowners who have Federal Housing Administration (FHA), Department of Veterans Affairs (VA), or U.S. Department of Agriculture (USDA) mortgages and homeowners who have mortgages made with the proceeds of mortgage revenue bonds or other mortgage programs that target low- and moderate-income borrowers. In addition, homeowners with private mortgages may be at greater risk of foreclosure due to limited options for loss mitigation, so the HAF plan must describe how the HAF participant will determine and address these needs.

- *Best Practices and Coordination with Other HAF participants*: The HAF participant must describe the extent to which its program descriptions or models are based on best practices and/or the participant's effective implementation of a previous program, including those funded with the initial payment under HAF. The HAF participant should describe its efforts to coordinate with other HAF participants, or plan for coordination, including with respect to engagement with mortgage servicers that operate in multiple states or with recipients of other large federal grants or financial assistance funds. Treasury encourages HAF participants to develop and participate in information-sharing with servicers through a Common Data File format. Further, HAF participants should describe any relevant coordination with federal agencies including FHA, VA, and USDA, as well as with state or local agencies that hold mortgage portfolios that have covenants or targeting requirements that match the HAF participants' HAF targeting strategies and goals.

- **Performance Goals:**
  - Each HAF participant must establish goals and benchmarks, by program and by targeted population, for assistance using HAF funds. The performance goals must identify how they address homeowner needs identified by the HAF participant in its plan. Performance goals must be disaggregated by key characteristics such as mortgage type, racial and ethnic demographics, and/or geographic areas (including rural communities), as appropriate for the jurisdiction. Each HAF

participant must include a goal focused on reducing mortgage delinquency among targeted populations.

- **Readiness:**
  - *Staffing and Systems*: The HAF participant must describe the staffing and systems in place or planned to ensure effective program delivery, compliance, and reporting, in a manner consistent with applicable program requirements and guidance using the programs described in the plan.
  - *Contracts and Partnerships*: The HAF participant must describe the contractors, partners, and other organizations that are critical to the HAF participant's program delivery, compliance, and reporting.
  - *Existing and Pilot Programs*: The HAF participant must describe in detail how it used its initial 10% payment, if applicable (as described above under "Initial Payments").
- **Budget:**
  - The HAF participant must provide a budget, by qualified expense category, using a template that Treasury will provide.

In lieu of the detailed HAF plans described above, Treasury has provided a streamlined template to be submitted by any HAF participant that is allocated less than $5 million of HAF funds. Other HAF participants must submit a more detailed HAF plan as described above.

HAF PLAN ASSESSMENTS AND APPROVALS

Treasury will assess HAF plans based on the following factors:

- **Alignment of Community Needs and Program Design**: The extent to which programs are responsive to community needs and based on a best practice model or evidence of the HAF participant's effective implementation of a previous program or pilot program.
- **Alignment of Performance Goals with Data on Targeted Populations:** The extent to which the performance goals would address the needs of specific eligible populations within targeted communities, in a manner that is appropriate to the jurisdiction.
- **Methods of Targeting**: The extent to which the HAF participant describes targeting methods reasonably likely to result in HAF assistance being made available to eligible homeowners consistent with the targeting requirements described in the ARP and in applicable guidance issued by Treasury. Recognizing that homeowners earning up to 100% of the area median income are overrepresented in portfolios of government-backed and guaranteed mortgages compared to the market as a whole, Treasury will favorably consider the prioritization of assistance to homeowners who have FHA, VA, or USDA mortgages, and to homeowners who have mortgages made with the proceeds of mortgage revenue bonds or other mortgage programs that target low- and moderate-income borrowers, when assessing a HAF participant's proposed methods of targeting HAF funds.
- **Readiness**: The extent to which the HAF participant demonstrates readiness to implement a program at scale, including having in place policies and procedures for the program and an appropriate mix of staffing, contractors, and partners. Implementation of a pilot program or pre-existing program that successfully targeted resources to the

targeted populations will be a strong indication of readiness.

- **Alignment of Budget with Performance Goals**: The extent to which the funding budgeted by program reasonably supports the achievement of the performance goals.

Treasury may approve a HAF plan in whole or in part. If Treasury approves a HAF plan only in part, the HAF participant will be provided an opportunity to address the weaknesses identified by Treasury. Treasury may also return a HAF plan to the HAF participant with recommendations for improvement and resubmission to Treasury for reconsideration. In addition, to enable HAF participants to rapidly receive approval for certain HAF-funded programs that can be developed quickly, a HAF participant may elect to submit multiple HAF plans over time regarding different programs it proposes to implement. After Treasury approves a HAF plan in whole or in part, Treasury will inform the HAF participant of the schedule for disbursements to the participant for purposes of the approved portions of the plan.

In the event that the information required in the HAF plan is not available to a Tribe, Treasury will accept alternative information regarding the relevant community. In addition, a HAF plan submitted by a Tribe whose population consists largely or entirely of socially disadvantaged individuals may be tailored to reflect the limited effort necessary to target its programs for those individuals.

A HAF participant must seek prior approval from Treasury to reallocate funding from a program as described in the approved HAF plan to be used for a different purpose if any of the following is true:

- the aggregate reallocations from any qualified expense category equals or exceeds 10% of the amount allocated to that qualified expense category in the HAF plan approved by Treasury;
- the HAF participant is proposing to allocate funding to a new qualified expense category or is creating a new program or terminating a previously approved program; or
- the reallocation redirects 1% or more of the participant's total HAF allocation from program costs to administrative costs.

REPORTING AND MONITORING

HAF participants will be required to submit quarterly reports to Treasury that include financial data, targeting data, and other information. Treasury will release additional guidance regarding HAF reporting. HAF participants will be subject to the reporting requirements under 2 C.F.R. Part 200, other than such provisions as Treasury may determine are inapplicable to the HAF.

HAF participants will also be required to submit an annual program report to Treasury regarding the impact of the HAF program.

SANCTIONS

In the event of a HAF participant's noncompliance with applicable law or HAF program requirements or guidance, Treasury may impose additional conditions on the receipt of additional HAF funds by the HAF participant, terminate further payments from the HAF, seek the repayment of previous HAF payments, or take other available remedies.

CFPB Issues Guidance to Protect Homeowners from Illegal Collection Tactics on Zombie Mortgages

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It is illegal for debt collectors to sue or threaten to sue to collect debts past the statute of limitations

APR 26, 2023

WASHINGTON, D.C. – Today, the Consumer Financial Protection Bureau (CFPB) issued guidance on debt collectors, covered by the Fair Debt Collection Practices Act, threatening to foreclose on homes with mortgages past the statute of limitations. The advisory opinion clarifies that a covered debt collector who brings or threatens to bring a state court foreclosure action to collect a time-barred mortgage debt may violate the Fair Debt Collection Practices Act and its implementing regulation. A time-barred debt is one whose statute of limitations has expired. The CFPB is issuing today's advisory opinion in light of a series of actions by debt collectors attempting to foreclose on silent second mortgages, also known as zombie mortgages, that consumers thought were satisfied long ago and that may be unenforceable in court.

"Some debt collectors, who sat silent for a decade, are now pursuing homeowners on zombie mortgages inflated with interest and fees," said CFPB Director Rohit Chopra. "We are making clear that threatening to sue to collect on expired zombie mortgage debt is illegal."

Leading up to the 2008 financial crisis, many lenders relied on predatory practices to lock homebuyers into mortgages they could not repay. In the case of today's advisory opinion, the CFPB is focusing on "piggyback" mortgages. Generally, this piggyback mortgage product, known as an 80/20 loan, involved a first lien loan for 80% of the value of the home and a second lien loan for the remaining 20% of the home's valuation.

By and large, lenders did not pursue homeowners on second mortgages, instead selling off these mortgages to debt collectors for pennies on the dollar. Now, over a decade later, and often without any intervening communication with homeowners who were able to save their homes, some of these debt collectors are demanding the mortgage balance, interest, and fees, and threatening foreclosures on families who do not or cannot pay.

Debt collectors now attempting to collect on these zombie second mortgages may be in violation of the Fair Debt Collection Practices Act. The CFPB is issuing this advisory opinion to remind covered debt collectors that:

- The Fair Debt Collection Practices Act and its implementing Regulation F prohibit a debt collector from suing or threatening to sue to collect a time-barred debt.
- The prohibition applies even if the debt collector does not know that the debt is time barred. Accordingly, any debt collector who is covered under the Fair Debt Collection Practices Act and who brings or threatens to bring a state court foreclosure action to collect a time-barred mortgage debt may violate the law.

The Fair Debt Collection Practices Act and its implementing Regulation F govern the conduct of covered debt collectors when they collect debt. Many individuals and entities that seek to collect defaulted mortgage loans, and many of the attorneys that bring foreclosure actions on their behalf, are Fair Debt Collection Practices Act debt collectors.

Along with private plaintiffs, the CFPB and state attorneys general have the authority in appropriate circumstances to take action against institutions and individuals violating the Fair Debt Collection Practices Act and Regulation F.

The CFPB will be monitoring the debt collection market for violations related to time-barred mortgages as well as to time-barred non-mortgage debt.

Read the advisory opinion, *Fair Debt Collection Practices Act (Regulation F); Time-Barred Debt* (https://files.consumerfinance.gov/f/documents/cfpb_regulation-f-time-barred-debt_advisory-opinion_2023-04.pdf).

Read the blog, *Zombie second mortgages: When collectors come for long forgotten home loans* (cfpb.gov/about-us/blog/zombie-second-mortgages-when-collectors-come-for-long-forgotten-home-loans/).

Read Director Chopra's Prepared Remarks of Director Rohit Chopra on Zombie Mortgage Debt at Brooklyn Law School in New York (cfpb.gov/about-us/newsroom/prepared-remarks-of-director-rohit-chopra-on-zombie-mortgage-debt/).

Consumers can submit complaints about zombie mortgages, time-barred debts, and other financial products or services by visiting the CFPB's website (cfpb.gov/complaint/) or by calling (855) 411-CFPB (2372).

Employees who believe their companies have violated federal consumer financial protection laws, including the Fair Debt Collection Practices Act, are encouraged to send information about what they know to whistleblower@cfpb.gov.

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The Consumer Financial Protection Bureau (CFPB) is a 21st century agency that helps consumer finance markets work by making rules more effective, by consistently and fairly enforcing those rules, and by empowering consumers to take more control over their economic lives. For more information, visit www.consumerfinance.gov (cfpb.gov/).

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CONSUMER FINANCIAL PROTECTION BUREAU

12 CFR Part 1006

Fair Debt Collection Practices Act (Regulation F); Time-Barred Debt

AGENCY: Consumer Financial Protection Bureau.

ACTION: Advisory opinion.

SUMMARY: The Consumer Financial Protection Bureau (CFPB) is issuing this advisory opinion to affirm that the Fair Debt Collection Practices Act (FDCPA) and its implementing Regulation F prohibit a debt collector, as that term is defined in the statute and regulation, from suing or threatening to sue to collect a time-barred debt. Accordingly, an FDCPA debt collector who brings or threatens to bring a State court foreclosure action to collect a time-barred mortgage debt may violate the FDCPA and Regulation F.

DATES: This advisory opinion is effective on [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

FOR FURTHER INFORMATION CONTACT: Seth Caffrey, Courtney Jean, or Kristin McPartland, Senior Counsels, Office of Regulations at (202) 435-7700 or https://reginquiries.consumerfinance.gov/. If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov*.

SUPPLEMENTARY INFORMATION: The CFPB is issuing this advisory opinion through the procedures for its Advisory Opinions Policy.[1] Refer to those procedures for more information.

[1] 85 FR 77987 (Dec. 3, 2020).

I. Advisory Opinion

A. Background

Leading up to the 2008 financial crisis, many lenders originated mortgages to consumers without considering their ability to repay the loans.[2] These practices, which harmed millions of people, included in some cases originating products such as "piggyback" mortgages in which high-interest second mortgages were issued simultaneously with the origination of the first mortgage. One common piggyback mortgage product, known as an 80/20 loan, involved a first lien loan for 80 percent of the value of the home and a second lien loan for the remaining 20 percent of the valuation. Some consumers in these loans found themselves unable to make full payments on their first and second mortgages, and when housing prices began to decline in 2005, refinancing became more difficult.[3]

When a borrower defaults on a second mortgage, the mortgage holder may be able to initiate a foreclosure even if the borrower is current on the first mortgage. However, the second mortgage holder only receives proceeds from the foreclosure sale if there are any funds left after paying off the first mortgage. As a result, many second mortgage holders of piggyback loans, recognizing that a foreclosure would not generate enough money to cover even the first mortgage, charged their defaulted loans off as uncollectible and ceased communicating with the borrowers. Some sold the loans to debt buyers, often for pennies on the dollar. Such sales often occurred unbeknownst to borrowers, who continued to receive no communications regarding the loans. Many borrowers, having not received any notices or periodic statements for years, concluded that their second mortgages had been modified along with the first mortgage, discharged in bankruptcy, or forgiven.

[2] *See generally* 78 FR 79730, 79732-33 (Dec. 31, 2013).
[3] *Id.* at 79733.

In recent years, as home prices have increased and borrowers have paid down their first mortgages, after years of silence, some borrowers are hearing from companies that claim to own or have the right to collect on their long-dormant second mortgages.[4] These companies often demand the outstanding balance on the second mortgage, plus fees and interest, and threaten to foreclose if the borrower does not or cannot pay. The CFPB is concerned about homeowners who survived the 2008 financial crisis but who are now facing foreclosure threats and other collection activity because of long-dormant second mortgages. These borrowers are often told that they face a choice between entering into onerous payment plans or losing their homes and the equity they have diligently built since the financial crisis.

Because of the amount of time that has lapsed on these long-dormant loans, some have likely become time barred under State law. Time-barred debts are debts for which the applicable statute of limitations has expired.[5] Statutes of limitation are, typically, State laws that provide time limits for bringing suit on legal claims.[6] In most States the expiration of the applicable statute of limitations, if raised by the consumer as an affirmative defense, precludes the debt collector from recovering on the debt using judicial processes.[7] In many jurisdictions, State court (*i.e.*, judicial) foreclosure actions are subject to a statute of limitations.

The CFPB understands that some debt collectors collecting on long-dormant second mortgages may have filed or have threatened to file judicial foreclosure actions even though the underlying debt is time barred. The CFPB is issuing this advisory opinion to affirm that: (1) the FDCPA and its implementing Regulation F prohibit a debt collector, as that term is defined in

[4] *See generally* Michael Hill, *"Zombie Debt": Homeowners face foreclosure on old mortgages*, Associated Press (Nov. 16, 2022), https://apnews.com/article/business-mortgages-44b1ffad08a80b96a8630e091d1e96f2.
[5] *See* 86 FR 5766, 5776-77 (Jan. 19, 2021); 12 CFR 1006.26(a)(2).
[6] *See* 86 FR at 5775-76; 12 CFR 1006.26(a)(1).
[7] *See* 86 FR at 5777.

the statute and regulation, from suing or threatening to sue to collect a time-barred debt; and (2) this prohibition applies even if the debt collector neither knows nor should know that the debt is time barred. Accordingly, an FDCPA debt collector who brings or threatens to bring a State court foreclosure action to collect a time-barred mortgage debt may violate the FDCPA and Regulation F.

B. Coverage

This advisory opinion applies to debt collectors as defined in section 803(6) of the FDCPA and implemented in Regulation F, 12 CFR 1006.2(i).

C. Legal Analysis

The FDCPA[8] and its implementing Regulation F[9] govern the conduct of "debt collectors" when they collect "debt." The statute and regulation generally define a debt collector as "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another."[10] Many individuals and entities that seek to collect defaulted mortgage loans, and many of the attorneys that bring foreclosure actions on their behalf, are FDCPA debt collectors.

The FDCPA and Regulation F define "debt" as "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment."[11] A consumer's

[8] 15 U.S.C. 1692-1692p.
[9] 12 CFR part 1006.
[10] 15 U.S.C. 1692a(6); 12 CFR 1006.2(i). The statute and regulation also provide that, for purposes of section 808(6) and 12 CFR 1006.22(e), the term debt collector also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests. *Id*.
[11] 15 U.S.C. 1692a(5); 12 CFR 1006.2(h).

payment obligation arising from a mortgage transaction primarily for personal, family, or household purposes, such as the purchase of the consumer's residence, falls within the plain language of this definition.[12] It follows that State court foreclosure proceedings often constitute the collection of "debt" under the FDCPA,[13] and debt collectors who engage in such debt collection activity are subject to the requirements and prohibitions of the FDCPA and Regulation F.

Regulation F prohibits a debt collector from suing or threatening to sue to collect a time-barred debt.[14] As the CFPB explained in finalizing this prohibition, "a debt collector who sues or threatens to sue a consumer to collect a time-barred debt explicitly or implicitly misrepresents to the consumer that the debt is legally enforceable, and that misrepresentation is material to consumers because it may affect their conduct with regard to the collection of that debt, including whether to pay it."[15] Regulation F's prohibition on suits and threats of suit on time-barred debt is subject to a strict liability standard.[16] That is, a debt collector who sues or threatens to sue to collect a time-barred debt violates the prohibition "even if the debt collector neither knew nor should have known that a debt was time barred."[17] Accordingly, a debt collector who brings or threatens to bring a State court foreclosure action with respect to a time-barred mortgage debt may violate the FDCPA and Regulation F. This is true even if the debt collector neither knew nor should have known that the debt was time barred.

The CFPB also notes that a broad range of non-foreclosure debt collection-related activity, such as communicating with consumers about defaulted mortgages, can be covered by

[12] *See, e.g.*, *Cohen v. Rosicki, Rosicki & Assocs., PC*, 897 F.3d 75, 83 (2d Cir. 2018).
[13] *Id.* at 83-84.
[14] 12 CFR 1006.26(b).
[15] 86 FR 5776, 5778 (Jan. 19, 2021).
[16] *See id.* at 5777, 5781.
[17] *Id.* at 5777.

the FDCPA. FDCPA debt collectors undertaking such activity are subject to the other requirements and prohibitions of the statute and Regulation F when collecting debt[18] whether or not that debt is time-barred. These include, for example, the prohibition on debt collectors: falsely representing the character, amount, or legal status of any debt;[19] threatening to take any action that cannot legally be taken or that is not intended to be taken;[20] and selling, transferring for consideration, or placing for collection a debt that the debt collector knows or should know has been paid or settled or discharged in bankruptcy.[21] They also include, for example, the requirement that debt collectors: identify themselves as a debt collector in all communications with the consumer (except formal pleadings in connection with a legal action);[22] provide the consumer with validation information in certain circumstances;[23] and respond to consumer disputes adequately before continuing to collect.[24] Finally, even if an FDCPA debt collector engages only in actions necessary to undertake a nonjudicial foreclosure action, the debt collector is still subject to FDCPA section 808(6)[25] and Regulation F, 12 CFR 1006.22(e),[26] which generally prohibit taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if the debt collector has no present right or intention to do so.[27]

[18] *See* 15 U.S.C. 1692a(5); 12 CFR 1006.2(h).
[19] 15 U.S.C. 1692e(2)(a); 12 CFR 1006.18(b)(2).
[20] 15 U.S.C. 1692e(5); 12 CFR 1006.18(c)(1); 15 U.S.C. 1692f(6); 12 CFR 1006.22(e).
[21] 12 CFR 1006.30(b).
[22] 15 U.S.C. 1692e(11); 12 CFR 1006.18(e).
[23] 15 U.S.C. 1692g(a); 12 CFR 1006.34.
[24] 15 U.S.C. 1692g(b); 12 CFR 1006.38(d); 85 FR 76734, 76845-48 (Nov. 30, 2020).
[25] 15 U.S.C. 1692f(6).
[26] *See* 15 U.S.C. 1692a(6); 12 CFR 1006.2(i)(1).
[27] *See Obduskey v. McCarthy & Holthus LLP*, 139 S.Ct. 1029 (2019) (holding that a business engaged in no more than nonjudicial foreclosure proceedings is not a debt collector under FDCPA section 803(6), except for the limited purpose of FDCPA section 808(6)).

Although not the focus of this advisory opinion, the CFPB also notes that entities selling or collecting on these second mortgages who are mortgage servicers may also be subject to certain requirements under the Real Estate Settlement Procedures Act,[28] the Truth in Lending Act,[29] and the CFPB's mortgage servicing regulations.[30] For example, unless an exemption applies, the CFPB's mortgage servicing regulations require servicers to provide periodic statements to consumers.[31]

II. Regulatory Matters

This advisory opinion is issued under the CFPB's authority to interpret the FDCPA, including under section 1022(b)(1) of the Consumer Financial Protection Act of 2010,[32] which authorizes guidance as may be necessary or appropriate to enable the CFPB to administer and carry out the purposes and objectives of Federal consumer financial laws.[33]

An advisory opinion is a type of interpretive rule. As an interpretive rule, this advisory opinion is exempt from the notice-and-comment rulemaking requirements of the Administrative Procedure Act.[34] Because no notice of proposed rulemaking is required, the Regulatory Flexibility Act does not require an initial or final regulatory flexibility analysis.[35] The CFPB has also determined that this advisory opinion does not impose any new or revise any existing

[28] 12 U.S.C. 2601 et seq.
[29] 15 U.S.C. 1601 et seq.
[30] *See, e.g.*, 12 CFR 1024.33(b) (requiring a transferee and transferor servicer to provide a timely notice of transfer of servicing to the affected borrower), 12 CFR 1024.39 (requiring servicers to make early intervention contacts with delinquent borrowers), 12 CFR 1024.41 (requiring servicers to follow certain loss mitigation procedural requirements, including certain foreclosure-related protections). Note that small servicers, as defined in 12 CFR 1026.41(e)(4), are exempt from certain of these requirements. *See* 12 CFR 1024.30(b).
[31] *See* 12 CFR 1026.41(a); *see also, e.g.*, 12 CFR 1026.41(e)(4) (exempting small servicers from this requirement) and 12 CFR 1026.41(e)(6) (exempting servicers from periodic statement requirements for certain charged-off loans but only if, among other conditions, the servicer sends a specific notice to the consumer and does not charge additional fees or interest on the account).
[32] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010).
[33] 12 U.S.C. 5512(b)(1).
[34] 5 U.S.C. 553(b).
[35] 5 U.S.C. 603(a), 604(a).

recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring approval by the Office of Management and Budget under the Paperwork Reduction Act.[36]

Pursuant to the Congressional Review Act,[37] the CFPB will submit a report containing this interpretive rule and other required information to the United States Senate, the United States House of Representatives, and the Comptroller General of the United States prior to the rule's published effective date. The Office of Information and Regulatory Affairs has designated this interpretive rule as not a "major rule" as defined by 5 U.S.C. 804(2).

Rohit Chopra,

Director, Consumer Financial Protection Bureau.

[36] 44 U.S.C. 3501-3521.
[37] 5 U.S.C. 801 *et seq*.

Faculty

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Sean A. O'Keefe is principal of O'Keefe & Associates Law Corporation, P.C. in Irvine, Calif., and is recognized by his peers as one of Southern California's most skilled bankruptcy and insolvency strategists. He has represented lenders and other creditors in complex chapter 11 cases, assignments for the benefit of creditors, and a broad range of commercial litigation. Mr. O'Keefe's experience in real estate insolvency encompasses the entire asset spectrum — from raw land and large residential developments to retail, industrial, office and other commercial property portfolios. He also is an experienced federal appellate court practitioner. Mr. O'Keefe is licensed to practice law in New York (1984), California (1986), Virginia (2017), the District of Columbia (2018) and Texas (2021). He is admitted to practice before the U.S. Courts of Appeals for the Second and Ninth Circuits, all U.S. District and Bankruptcy Courts in California, the U.S. District Courts for the Southern District of New York, Eastern District of Virginia, and Northern and Southern Districts of Texas, and the U.S. Bankruptcy Courts for the Southern District of New York, Eastern District of Virginia, and the Northern and Southern Districts of Texas. Mr. O'Keefe specializes in counseling clients in the real estate, manufacturing, retail, service and health care industries. He also represents some of California's largest shopping center owners in tenant bankruptcy proceedings, and he aggressively represents both buyers and sellers of distressed business entities. Mr. O'Keefe is AV-rated by Martindale-Hubbell, and he has been recognized in *The Best Lawyers in America* for the past seven years and by *Super Lawyers* for over a decade. He has written and spoken on bankruptcy and insolvency matters for more than 20 years and is a past chairman of the Commercial Law and Bankruptcy Section of the Orange County Bar Association. Mr. O'Keefe received his B.A. in 1980 from Dartmouth College and his J.D. in 1983 from Fordham University School of Law.

Krista M. Preuss is the standing chapter 13 trustee for the Eastern District of New York in Jericho, appointed on Oct. 1, 2021. Prior to that, she was the chapter 13 standing trustee for the Southern District of New York from Feb. 1, 2018, through May 31, 2023. Prior to her 2018 appointment, she was the staff attorney for Chapter 13 Trustee Marianne DeRosa for more than 12 years. Ms. Preuss has lectured on chapter 13 bankruptcy issues at numerous law school classes and seminars. She is a

member of the Hudson Valley, Nassau County, Suffolk County and Westchester County Bar Associations and ABI. Ms. Preuss serves on the Consumer Lawyers Advisory Committee for both Brooklyn and Central Islip for the Eastern District of New York. She also is a board member of the National Association of Chapter 13 Trustees, for which she also serves on its Public Relations Committee and Mortgage Committee. Ms. Preuss received her J.D. from Albany Law School, where she was president of its tax law society.