

IN THE COMMONWEALTH COURT OF PENNSYLVANIA
SITTING IN PITTSBURGH, PENNSYLVANIA

In Re: : CIVIL DIVISION
Consolidated Return of the Tax Claim :
Bureau of the County of Beaver From : Case No. 733 CD 2014
The September 12, 2011 Upset Sale :
For Delinquent Taxes :

Eileen Battisti, :
Appellant :
vs. :
Tax Claim Bureau of Beaver County, and :
S.P. Lewis, :
Appellees :

BRIEF AMICI CURIAE OF AARP, NATIONAL ASSOCIATION
OF CONSUMER ADVOCATES, AND NATIONAL CONSUMER LAW
CENTER IN SUPPORT OF APPELLANT

Michael P. Malakoff
Attorney I.D. Number: 11048
Michael P. Malakoff, P.C.
The Frick Building
437 Grant Street, Suite 200
Pittsburgh, PA 15219
(412) 281-4217
(412) 281-3262 fax

Julie Nepveu (*Pro Hac Pending*)
AARP Foundation Litigation
601 E Street, NW
Washington, DC 20049
202-434-2060
202-434-6424 fax
jnepveu@aarp.org

COUNSEL FOR AMICI CURIAE

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STATEMENT OF INTEREST

It cannot be denied that home ownership plays a vital role in American life and the overall economy. Homes represent by far the largest single investment for most American families. Losing one's home to a tax sale or foreclosure is both financially devastating and emotionally wrenching. This is particularly true for older people, 80 percent of whom are homeowners, as they are disproportionately at risk of losing their homes to tax sales.

AARP is a nonprofit, nonpartisan organization with a membership that helps people 50+ have independence, choice and control in ways that are beneficial and affordable to them and society as a whole. As the leading organization representing the interests of people aged 50 and older, AARP advocates nationally protecting older homeowners from improper and unfair tax sales and abuse in lending, servicing and foreclosure, and other mechanisms that strip home equity and devastate their financial security.

The National Association of Consumer Advocates ("NACA,,) is a nonprofit corporation whose members are private and public sector attorneys, legal services attorneys, law professors and law students whose primary focus involves the protection and representation of consumers. NACA's mission is to promote justice for all consumers by maintaining a forum for information sharing among consumer advocates across the country and serving as a voice for its members as well as

consumers in the ongoing effort to curb unfair and abusive business practices. Enforcement and compliance with consumer protection laws has been a continuing concern of NACA since its inception.

The National Consumer Law Center (“NCLC,”) is a national research and advocacy organization focusing on the legal needs of consumers, especially low income and elderly consumers. For over 40 years the NCLC has been the consumer law resource center to which legal services and private lawyers, state and federal consumer protection officials, public policy makers, consumer and business reporters, and consumer and low-income community organizations across the nation have turned for legal answers, policy analysis, and technical and legal support. The NCLC staff provides a wide range of direct assistance to consumer law attorneys, including consultation on legal issues, co-counseling, expert testimony, legal research, continuing legal education, widely respected treatises, and technical support.

NCLC is author of the widely praised eighteen-volume *Consumer Credit and Sales Legal Practice Series*. These treatises on consumer law are widely used by consumer attorneys, and have repeatedly been cited by courts as authoritative. The eighteen volumes include the NCLC’s *Foreclosures* (4th ed. 2012), which includes a chapter devoted to property tax sales. It also includes, as an Appendix, a summary of all of the property tax sale laws in the United States. In 2012, NCLC

issued a report entitled: *The Other Foreclosure Crisis: Property Tax Lien Sales*, Nat'l Consumer Law Ctr. (July 2012), available at <https://www.nclc.org/issues/the-other-foreclosure-crisis.html>, which highlights the problems with state tax sale laws that fail to provide basic due process protections for homeowners. NCLC is deeply concerned about tax sale issues and has advocated for reforms in this area.

AARP, NACA, and NCLC, as amici, have significant interest in this case because of the impact it will have on protecting against the unfair and unjust sale of homes to collect often nominal or trivial amounts of taxes without due process of law. The taking of one's home is a momentous event and measure, which should only be taken after other more reasonable means to collect taxes have failed. Tax sales resulting from an inadvertent failure by a homeowner to pay taxes—as may result when older people have reduced income later in life, have difficulty managing their finances, or, as demonstrated by this case, find the notices sent by the taxing authority hopelessly incomprehensible—not only forces people out of their homes, but also seriously jeopardizes their financial security. Tax sale bids typically amount to only a fraction of the market value of a home. Such sales therefore deprive the homeowner of significant equity, and in most cases, the only substantial asset they own.

Amici's participation in this case will assist this Court in its consideration of the issues presented in this appeal, including due process requirements and factors that make older people disproportionately vulnerable to tax sales.

INTRODUCTION AND SUMMARY OF ARGUMENT

Homes are the single largest investment that most American families make. They represent by far the biggest item in most family's wealth portfolio. *See* Thomas Shapiro, Tatjana Meschede, and Sam Osoro, *The Roots of the Widening Racial Wealth Gap: Explaining the Black-White Economic Divide*, Inst. on Assets and Soc. Policy (2013), *available at* <http://bit.ly/1rnhxTd>. Historically, there has been widespread bipartisan support for federal policies designed to encourage homeownership. President Herbert Hoover called the owner-occupied home "a more wholesome, healthful, and happy atmosphere in which to raise children.,, *Homeownership And Its Benefits*, Urban Policy Br. 2 (Aug. 1995), *available at* <http://bit.ly/1AzFo2X>. President Lyndon Johnson promoted homeownership as part of a strategy for addressing the urban ills of the 1960s, declaring that "owning a home can increase responsibility and stake out a man's place in his community. . . . The man who owns a home has something to be proud of and reason to protect and preserve it.,, *Id.* President Ronald Reagan said that homeownership "supplies stability and rootedness.,, *Id.* President Bill Clinton has linked increasing homeownership to the challenge of expanding opportunity for working families.

Speaking to the National Association of Realtors in November 1994, he expressed a national consensus that “more Americans should own their own homes, for reasons that are economic and tangible, and reasons that are emotional and intangible, but go to the heart of what it means to harbor, to nourish, to expand the American Dream., *Id.*

Courts and legislatures have long provided special protection against the loss of one’s home without due process of law, whether due to a tax sale or foreclosure. In *Hess v. Westerwick*, 366 Pa. 90, 96-98, 76 A.2d 745, 747-748 (PA. 1950), the Pennsylvania Supreme Court reiterated the words of Justice Pitney in explaining

It is a fundamental provision of both our state and federal constitutions that no person shall be deprived of property except by the law of the land or due process of law. Without due process of law the right of private property cannot be said to exist.

...

The principle, known to the common law before Magna Charta, was embodied in that charter (Coke, 2 Inst. 45, 50) and has been recognized since the Revolution as among the safest foundations of our constitutions. Whatever else may be uncertain about the definition of the term “due process of law,, all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and *without notice* or an opportunity for a hearing

Id. (quotation and emphasis in original) (quoting *Ochoa v. Hernandez y Morales*, 230 U.S. 139, 161 (1912)). Pennsylvania also protects older homeowners from unaffordable taxes. *See* Sec. 504 Real Estate Tax Sale Law, Act of July 7, 1947, P.L. 1368, as amended, 72 P.S. §5860.504 (allowing persons 65 and older – who

meet certain income limitations – to qualify for a three-month expansion of time to prevent their property from going to sale).

The sale at issue in this case allegedly stems from a disputed delinquency of \$6.30, initially assessed in 2009 when Mrs. Battisti paid her 2008 taxes late by 6 days. The Tax Claim Bureau contends that that amount remained unpaid and accrued additional interest and costs until it ballooned into a balance of \$234.72, and, as a result, Mrs. Battisti's home was duly noticed for sale and sold. Mrs. Battisti disputes the contention that her 2008 or 2009 taxes were delinquent, as she has paid all amounts alleged to be due and owing. In fact, it is clear that the 2008 and 2009 taxes were paid in full no later than Sept. 11, 2010. At no time was she notified that her home could be sold for the \$234.72 alleged to be delinquent 2009 taxes.

This is not merely a disputed factual issue: it cuts to the heart of the legal question. Even if a tax claim bureau goes through all the motions of meeting its service obligations, this Court should find that where the information contained in those notices is inaccurate or otherwise defective, the notices cannot satisfy due process. Moreover, the very fact that a homeowner cannot determine, on the face of a notice, whether she has a delinquency that exposes her home to a tax sale, nor the precise amount of a delinquency, should confirm that the tax claim bureau's notice process itself fails to provide adequate due process protection.

This case illuminates a process that, systemically, utterly and catastrophically fails to meet constitutionally required due process standards. Moreover, an extraordinarily high percentage of the notices sent by the Tax Claim Bureau of Beaver County were returned as undelivered, potentially suggesting some other undisclosed problem with the service of notices by the Tax Claim Bureau that Beaver County failed to address. *See Jones v. Flowers*, 547 U.S. 220, 230 (2006) (reiterating that when the “the government[] [has] knowledge that notice pursuant to the normal procedure was ineffective [this] trigger[s] an obligation on the government's part to take additional steps to effect notice.,,). The Tax Claim Bureau in this case failed repeatedly to do so. It is constitutionally unreasonable to expect any homeowner at risk of losing their home to discern the mysteries of the tax accounts that are not apparent on the face of these notices, which simply obfuscate the facts.

The trial court erred in finding that the Tax Claim Bureau met its due process obligations: several fatal and systemic flaws in the notice process preclude that finding as a matter of law. First, the amount of tax allegedly due was too trivial to fairly justify the sale of her home. Second, the decision to sell the home for the trivial amount of \$234.72 was arbitrary where, only one year earlier, the Tax Claim Bureau deemed the allegedly identical delinquent taxes too trivial to justify a tax sale. Third, the notices never accurately informed Mrs. Battisti of the

alleged delinquency. Under the current procedures, notices generated by the Tax Claim Bureau are inherently inaccurate and unreliable because they do not adequately alert the taxpayer to interest and costs that accrue for a prior tax year after a Notice of Return and Claim is sent in any given year. Moreover, the notices do not itemize or otherwise provide a means for a taxpayer to determine how payments were credited and what taxes are allegedly delinquent. The only means for a taxpayer to learn whether a tax is allegedly delinquent at any given time is to make a direct inquiry. This Court has already established that due process does not place the burden on taxpayers to make such an inquiry to avoid an unconstitutional taking. *See York v. Roach*, 163 Pa. 58, 629 A.2d 1291, 1292 (Pa. Commw. Ct. 1994). Fourth, despite having an affirmative obligation to inform a taxpayer who has paid at least 25 percent of her delinquent taxes that she has the opportunity to enter into an installment payment plan, it is the policy and practice of the Tax Claim Bureau of Beaver County to offer such plans only to those taxpayers who pay their taxes in person: no such offer is made to those who pay their taxes by mail. Such a distinction is contrary to statute and equal protection principles. *See Darden v. Montgomery Cnty. Tax Claim Bureau*, 157 Pa. Commw. 357, 629 A.2d 321, 323-24 (Pa. Comm. Ct. 1994).

The due process implications raised in this case have a particularly disproportionate negative impact on older homeowners, who are at particularly

high risk of losing their home to a tax sale. Tax sales have increased dramatically since the economic crisis of 2009, as homeowners struggle to stay above water despite rising costs (including taxes), lower incomes, and the loss of significant home equity and retirement assets. Older homeowners often have no mortgage or mortgages that do not provide them escrow accounts that can assist with making timely tax payments. Older people and people with disabilities also face a disproportionate risk that they will lose their homes to tax sales because of difficulties managing their finances and reduced mobility.

Courts should ensure homeowners are protected from arbitrary and unjustified sale of their homes—especially to collect trivial amounts of taxes—without due process of law. This Court should reverse and grant the petition to set aside the tax sale, which was conducted without affording Mrs. Battisti accurate, adequate notice.

ARGUMENT

- I. NO HOMEOWNER SHOULD BE EXPECTED TO WADE THROUGH THE MORASS OF CONTRADICTION AND CONFUSING NOTICES TO DETERMINE WHETHER THEY ARE AT RISK OF LOSING THEIR HOME TO A TAX SALE: IT SHOULD BE IMMEDIATELY APPARENT ON THE FACE OF THE NOTICE.

On its face, this case epitomizes due process abuse by a taxing authority over the property rights of a homeowner. “Somehow, over the years, taxing authorities have lost sight of the fact that it is a momentous event under the United

States and the Pennsylvania Constitutions when a government subjects a citizen's property to forfeiture for the non-payment of taxes., *Tracy v. County of Chester Tax Claim Bureau*, 507 Pa. 288, 297, 489 A.2d 1334, 1339 (1985); *see also Smith v. Tax Claim Bureau*, 834 A.2d 1247, 1251-1253 (Pa. Commw. Ct. 2003). Chief Justice Roberts cited *Tracy* with approval in *Jones v. Flowers*, in which the Court held “we conclude, at the end of the day, that someone who actually wanted to alert [the homeowner] that he was in danger of losing his house would do more when the attempted notice letter was returned unclaimed and there was more that reasonably could be done., 547 U.S. at 238 (vacating a tax sale where compliance with Arkansas notice requirements nevertheless failed to satisfy constitutional due process notice requirements).

Generally, Beaver County’s tax sales are conducted as follows: in June of each year, the Bureau sends by certified mail a Notice of Return and Claim to homeowners who have a tax delinquency. This notice advises homeowners that their home is exposed to risk of sale and states a sum certain that must be paid to avoid a tax sale in September of the following year. The June notice in any given year includes only past due amounts for the particular tax year in question. It neither includes past due amounts for prior years, i.e., it does not reflect a cumulative balance on the homeowner’s account, nor does it include an estimate of the after accrued amounts, i.e., costs that may—but have not yet—accrued at the

time the notice is sent. Such costs may include additional interest or costs for service and posting in the event the property actually is exposed to the tax sale the following year.

On the one hand, it is understandable that a definite statement of such costs is not included in the Notice of Return and Claim. Such costs have not yet accrued and are not at that point delinquent. It nevertheless creates confusion and results in notices that are inherently inaccurate because those amounts are not included in the Notice of Return and Claim that is mailed the following year. A Notice of Return and Claim that is sent each year explicitly informs the homeowner that any amount due for tax assessed in prior years *is not included in the notice for the current tax year.*

The defect, i.e., failure to provide notice of the amounts accrued after the Notice of Return and Claim in the first year but before the same notice the next year, is not cured by the Notice of Public Tax Sale that is sent when a property is scheduled for a tax upset sale after tax has been delinquent for two years. The Notice of Public Tax Sale does not itemize the amounts alleged to be past due. It does not establish a sum certain that must be paid to stop a tax sale. Instead, it states only an *approximate* upset sale price. There is no explanation on the Notice of Public Tax Sale describing what an upset sale price is, what items are included

in it, how it is calculated, what must be paid by a homeowner to stop the impending sale, or how the payments will be allocated when made.

It may include amounts that have accrued too recently to legally expose the property to a sale but nevertheless must be included in the tax sale price. This may make it appear the sale is based on a much larger amount of delinquent tax than is in fact the case. For example, in this case the tax sale allegedly resulted from only \$234.72 in delinquent taxes, but the Notice of Public Tax Sale listed the taxes as over \$4000. Most of that amount was not then delinquent and could not be the basis for exposing the property to the sale.

Mrs. Battisti's brief carefully details the essential facts related to the notices, which will not be repeated here. The notices do not appear to be designed to provide adequate notice to protect the homeowner; slogging through them is not for the faint of heart. The task is made all the more difficult because the notices are not itemized and generally lack any supporting detail. It is impossible to determine on the face of the notices how payments have been allocated and whether there are delinquent amounts from prior years that could expose the home to a tax sale. The notices are also inconsistent: the amount stated in the Notice of Return and Claim is not cumulative, but it is cumulative in the Notice of Public Tax Sale. This important difference, which can easily lead to confusion, is not explained or highlighted in anyway. As a result, a homeowner would not be able to distinguish

whether a discrepancy between the stated amounts in the two notices is due to a delinquent tax, newly accrued costs or taxes, or some other amount.

II. THIS TAX SALE SHOULD BE SET ASIDE BECAUSE THE NOTICE PROVIDED FAILS TO SATISFY CONSTITUTIONAL DUE PROCESS REQUIREMENTS.

The facts leading up to a tax sale should not unfold like a dime store *who done it* story. It should be clear on the face of the notice exactly what is due and how it was arrived at. Surely, if the constitutional right to due process of law guarantees anything, it is that a typical homeowner at risk of losing her home to a tax sale could discern from the face of the notices sent how much she would have to pay in order to prevent her home from being sold. After all, the ultimate purpose of the notice is to give the homeowner an opportunity to prevent the taking of the property to satisfy a tax debt. Such notice is not adequate if it merely puts the homeowner on notice that she should inquire as to what tax is due in order to prevent the government from taking her home. *See Jones v. Flowers*, 547 U.S. at 232.

A. Mrs. Battisti Was Never Informed That Her Home Would Be Sold For Allegedly Delinquent 2009 Taxes Of \$234.72

Mrs. Battisti testified at trial that she did not understand from reading the notices she received that her home would be sold for an outstanding 2009 tax balance of \$234.72. Her confusion is wholly justified and unsurprising. After all, she paid the full approximate sale price stated in the 2008 Notice of Public Tax

Sale of \$897.19. The next year, she paid \$3990.03, as the 2009 Notice of Public Tax Sale stated was due to satisfy the approximate upset bid price. Unlike the Notice of Return and Claim, the balance in this notice is presumably cumulative of all past due taxes. Her payment exceeded the amount stated in the 2009 Notice of Return and Claim—\$3832.72—that should be binding on the Tax Claim Bureau. If it was accurate, Mrs. Battisti clearly paid all outstanding amounts in full. If it was not accurate it violates due process as a matter of law.

Moreover, the record does not demonstrate that the Tax Claim Bureau notified Mrs. Battisti of the exposure to the tax sale due to the alleged balance of \$234.72 from 2009. The record includes only 2 documents that even mention an amount due of \$234.72, neither of which is designed to or actually satisfies the statutory notice requirements. The first is the receipt generated after Mrs. Battisti paid \$3990.03 on Sept. 11, 2010, to satisfy her 2009 taxes, delivery of which is unknown. It inexplicably indicates a balance due of \$234.72, without attribution. There is no indication of what year the balance accrued or whether the amount accrued due to assessed taxes, fees, interest, costs, or some combination thereof. It also fails to explain how there could be a balance due considering that the payment equals the total of all itemized costs of which Mrs. Battisti was provided notice.¹ In

¹ Sound accounting and government integrity principles also support requiring a taxing authority to itemize the allocation of payments to assist in preventing fraud

fact the payment made was greater than the total amount stated in the 2009 Notice of Return and Claim. The second and only other document that states that amount is entitled TAX CLAIM ON FILE AT TIME OF UPSET SALE, dated Sept. 12, 2011, which indicates that the amount of delinquent tax from 2009 is \$234.72. This notice is clearly not designed to alert Mrs. Battisti to the amount due, but rather to enable to sale.

On these facts, it is clear the Tax Claim Bureau failed to meet its burden to show that it provided Mrs. Battisti adequate notice that her home was exposed to a tax sale due to the alleged 2009 delinquency of \$234.72. The Tax Claim Bureau's failure to notify Mrs. Battisti that the \$234.72 was due is the equivalent of providing her no notice at all. *See Jones v. Flowers*, 547 U.S. at 238 (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950) (holding that "when notice is a person's due . . . [t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.,,)). "Successfully providing notice is often the most efficient way to collect unpaid taxes,, and would ease the collection burden on the taxing authority compared to taking the extraordinary steps of selling the property at an upset sale.

and conducting responsible oversight. It also prevents the Tax Claim Bureau from arbitrarily allocating the payments to one cost when it should be allocated to another, or changing its explanation of how a tax payment is allocated if the tax delinquency is later disputed.

Jones v. Flowers, 547 U.S. at 236 (citing *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 800, n. 5 (1982)).

After the certified letter about the \$6.30 charge was returned unclaimed, the Tax Claim Bureau should have taken additional steps short of initiating the tax sale to notify Mrs. Battisti. *See Jones v. Flowers*, 547 U.S. at 238 (declining to establish a standard but holding additional reasonable steps should have been taken where tax commissioner knew notice was not received). It could easily have attempted to collect the \$6.30 for the price of a postage stamp and letter rather than undertaking the infinitely more cumbersome, expensive, and draconian route of selling the home at an upset sale to recover such a trivial amount. *See Jones v. Flowers*, 547 U.S. at 236-7 (holding Arkansas violated due process because “rather than taking relatively easy additional steps to effect notice, the State undertook the burden and expense of purchasing a newspaper advertisement, conducting an auction, and then negotiating a private sale of the property,,).

B. No Home Should Be Exposed—Let Alone Sold—For A Trivial Amount Of Delinquent Taxes

No home should ever be exposed to a tax sale for trivial or nominal amounts of unpaid taxes, regardless of the quality and sufficiency of notice provided. As the *Hess* Court explained, “it would be an outstanding reproach of our system of justice,, to permit “the owner of the property [to be] punished by the taxing authorities' neglect or worse, and deprived of an extremely valuable property . . .

[over] a comparatively trivial sum of taxes unpaid in one of the previous years.,, 366 Pa. at 98-99, 76 A.2d at 748-749.

In particular, Mrs. Battisti's home never should have been subject to tax sale stemming from a \$6.30 interest charge that accrued when she paid her 2008 taxes late by six days. As stated, there is no indication the Tax Claim Bureau of Beaver County ever took steps to notify her of that charge. The amount is not only a trivial amount of tax, it is also trivial in comparison to the value Mrs. Battisti lost due to the low sale price of her home at the tax sale, which was less than one half of its market value. If notice had been provided as constitutionally and statutorily required, Mrs. Battisti obviously would have paid the \$6.30. She testified that "of course,, she had the ability to pay it because, as she noted, "that's like lunch money.,, Trial Tr. p. 135:14-15.

That Mrs. Battisti's home was actually sold for such a trivial amount is all the more shocking considering that *she paid in full all taxes assessed against her property in each subsequent year*. The Court recognized in *Hess* that with proper notice, the owner "would have brought forth payment of the delinquent tax immediately, an assurance warranted by the fact taxes of all subsequent years had been consistently paid.,, 366 Pa. at 98-99, 76 A.2d at 748-749.

C. The Sale Was Arbitrary Where The Identical Delinquency Was Deemed Too Minimal To Justify It The Previous Year.

That the amount of \$234.72 is trivial cannot be disputed under the facts of this case. The Director for the Tax Claim Bureau of Beaver County, Mr. Kohlman, testified that “the receipt [generated after Mrs. Battisti paid the \$3990.03] indicates that there was a balance of \$234. Consequently the property was pulled from 2010 Upset Sale because of the minimal balance.,, Trial Tr. p. 23:3-5. Mr. Kohlman further testified that “because the payment was a substantial payment and it left a rather small balance in comparison, the property, in fact, was pulled from the September 13, 2010 Upset Sale.,, Trial Tr. p. 25:15-17.

One year later, however, this same trivial amount apparently formed the basis for selling Mrs. Battisti’s home in an upset tax sale. The sale violates due process because it is arbitrary: it follows logically that where \$234.72 was too minimal to justify a tax sale in 2010, it was also too minimal to justify such a sale in 2011. This Court should set aside the tax sale because “the core of the concept of due process is ‘protection against arbitrary action.’,, *Kaucher v. County of Bucks*, 455 F.3d 418, 425 (3d Cir. 2006) (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998)).

D. The Notice Of Delinquent Taxes Provided Was Factually Inaccurate And The Procedure Utilized By The Tax Claim Bureau Of Beaver County Is Systemically Flawed Because It Fails To Accurately Inform The Homeowner Of The Amount That Must Be Paid To Stop A Tax Upset Sale Of Her Home.

Mrs. Battisti disputes that she had an unpaid balance of 2009 taxes in the amount of \$234.72 that could have subjected her home to sale because, she claims, all 2009 costs are included in Notice of Return and Claim provided by the Bureau that she paid on Sept. 11, 2010. Indeed, Mr. Kohlman testified that her payment of \$3990.03 would have satisfied that notice. Although he equivocated that “if there was a balance on other claims, the payment would have been applied first to the earliest claim of record leaving a balance on the current [2011] claim,, there is no evidence that happened in this case. Trial Tr. p. 65:2-7.

Regardless of the ultimate resolution of that factual dispute—which logically and mathematically should be decided in her favor, in light of Mr. Kohlman’s admission that the payment would have been applied to the oldest claims first—it is clear that the sale should be vacated. If the disputed amount was paid, it cannot be collected through a sale. If it was due and unpaid, she paid the full amount the Bureau notified her to pay. If it was owed and not included within the costs the Bureau notified her were due, notice was improper as a matter of law and the sale must be set aside.

The facts actually demonstrate that the amount is not a past due 2009 tax. Instead, it is the total of charges that accrued because the property was exposed to sale in 2010 after the notice of delinquency was returned unclaimed and the Tax Claim Bureau failed to take additional steps to notify her. The planned 2010 sale was stopped because Mrs. Battisti paid the full delinquency about which she was notified. Thus, the alleged delinquent balance of \$234.72 from tax year 2009 actually accrued in the 2010 tax year. After the 2009 notice was sent informing Mrs. Battisti of the deficiency in the amount of \$3990.03, but prior to the stop sale deadline of Sept. 13, 2010, the Tax Claim Bureau incurred additional costs in preparation to sell her property. Specifically, these costs were:

Aug 3, 2010: \$125 for property posted and owner served
Aug 10, 2010: \$14 for first class mail of Sale Notice
July – Sept. 2010: interest accrual increased by \$70.72.
Sept 9, 2010: \$25 applied for sale preparation cost
Total: \$234.72.

Although related to the 2009 taxes, the Bureau did not incur the costs until 2010. Thus, the amount of \$234.72 that accrued after the 2009 Notice of Return of Claim and the 2009 Notice of Public Tax Sale was not included in the 2009 notice cycle. Nor was it included in the 2010 Notice of Return of Claim: Tax Claim Bureau arbitrarily and improperly deemed those expenses to be delinquent 2009 taxes that would not be reflected in a notice limited to 2010 taxes. Thus, the amount was never included in either the 2009 Notice of Public Tax Sale or the

2010 Notice of Return of Claim. In fact, the \$234.72 could not legally be included in any of the 2009 or 2010 notices because the time period provided by law for a taxpayer to dispute the amount of the charges had not yet and would not run until June, 2011. *See* Sec. 311 Real Estate Tax Sale Law, Act of July 7, 1947, P.L. 1368, as amended, 72 P.S. § 5860.311 (providing “On the first day of January following,, the tax notice, “if the amount of the tax claim referred to in the notice has not been paid, or no exceptions thereto filed, the claim shall become absolute.,,); *see also In re Tax Sale Pursuant to the Real Estate Tax Sale Law of 1947*, 8 A.3d 358, 367 (Pa. 2010) “Appellant did not receive notice from the Tax Bureau. Thus, the Tax Bureau's tax notice did not become absolute for the years in question here and the issue was properly before the trial court.,,).

E. The Tax Claim Bureau Admitted It Failed To Fulfill Its Affirmative Obligation To Inform Mrs. Battisti And Other Homeowners Who Pay Taxes By Mail Of The Opportunity To Enter Into An Installment Payment Plan To Stop Tax Sales.

Compounding the other due process violations, the Bureau never affirmatively offered Mrs. Battisti the opportunity to make installment payments after she paid over 90 percent of the actual total she owed. On the basis of this admission alone, a matter of law, Mrs. Battisti's petition to set aside the tax sale should have been granted.

The Tax Claim Bureau was affirmatively obligated to inform Mrs. Battisti of the opportunity to pay in installments pursuant to Sec. 603 of the Real Estate Tax

Sale Law, Act of July 7, 1947, P.L. 1368, as amended, 72 P.S. § 5860.603, because she paid over 25 percent of the taxes due. *See In re Upset Sale of Properties etc.*, 126 Pa. Commw. at 282, 559 A.2d at 601 (noting that “prior to sale any owner may, at the option of the bureau, enter into an agreement with the bureau to stay the sale. The sale will be stayed upon the payment of twenty-five percent of the amount due and an agreement to pay the balance in installments.,,).

This Court repeatedly has vacated tax upset sales in order to enforce the Pennsylvania Supreme Court’s admonition that “the purpose of tax sales is not to strip the tax payer of his property but to insure the collection of taxes., *Hess*, 366 Pa. at 98, 76 A.2d at 748; *Ross Appeal*, 366 Pa. 100, 103, 76 A.2d 749, 751 (Pa. 1950). For example, this Court held that “an element of fundamental fairness, procedural due process,, requires a tax upset sale to be vacated where the taxing authority failed to notify the taxpayer of his opportunity to enter into a payment plan. *In re Upset Sale of Properties etc.*, 126 Pa. Commw. 280, 281, 559 A.2d 600, 601 (Pa. Commw. Ct. 1989) (declaring that “[t]he strict provisions of the tax sale laws were meant not to punish taxpayers who, through oversight or error, failed to pay taxes. Tax acts were meant to protect local governments against willful, persistent, and long-standing delinquencies.,,).

This Court has reiterated in numerous other cases the holding that the tax claim bureaus have an affirmative duty to offer an installment payment option where at least 25 percent of taxes have been paid. Failure to offer the option requires the tax upset sale to be vacated as a matter of law. In *York v. Roach*, this Court stated:

Considering whether *fundamental fairness and procedural due process required the tax unit to affirmatively inquire of the taxpayer* whether he desired to enter into an installment agreement, we held that where the tax unit had retained a payment in excess of twenty-five percent of the tax due, failure to do so would deprive the taxpayer of his property without due process of law.

163 Pa. Commw. at 61, 639 A.2d at 1292 (emphasis added) (overturning tax sale where notice of opportunity to enter into installment plan was not provided); *see also Reilly v. Susquehanna Cnty. Tax Claim Bureau*, 904 A.2d 49, 53 (Pa. Commw. Ct. 2006) (despite “[t]here [being] no dispute that all proper notice of the sale was provided,, the court still reversed the trial court order denying the petition to set aside the upset tax sale because notice of the payment plan was not provided); *Darden*, 157 Pa. Commw. 357, 629 A.2d at 323-24; *Moore v. Keller*, No. 302 C.D. 2013, 2014 Pa. Commw. Unpub. LEXIS 343 at *5-6 (Pa. Commw. Ct. 2014) (setting aside tax sale where it was error “as a matter of law[,] . . . [to] deny[] Appellant's petition to set aside tax sale when the record showed that the Bureau failed to offer . . . an equitable owner of the property [who] had paid well

in excess of 25% of the taxes due, the opportunity to enter into an installment agreement,,).

As discussed more fully in Mrs. Battisti's brief, the uncontroverted testimony conclusively establishes that the Tax Claim Bureau of Beaver County did not inform Mrs. Battisti that she could avoid the sale of her home by entering into a payment plan for the remaining unpaid amount. The trial court erred by failing to hold the Tax Claim Bureau to its full statutory and constitutional duty prior to selling Mrs. Battisti's home. *See Aronauer Appeal*, 404 Pa. 654 (Pa. 1961) (“[t]o validate the tax sale here would overlook the County's failure to follow the statutory requirements,,); *Hess*, 366 Pa. at 95-96, 76 A.2d 745, 747 (if the “simple provision of the Act had been obeyed this case would not have been here,,).

Moreover, Mrs. Battisti testified that she believed her home would not be sold upon her payment of the full amount stated on the tax sale notice. Although she paid the full amount noticed, a balance allegedly remained, subjecting her home to the sale. But because her payment amounted to greater than 90 percent of the delinquent taxes, fees, and interest due on her home, the Tax Claim Bureau was required to make her an affirmative offer to allow installment payments and save her home pursuant to Section 603. *See e.g. In re Upset Sale of Properties etc.*, 126 Pa. Commw. at 282, 559 A.2d at 601 (vacating tax sale on due process grounds where homeowner “testified that he thought such a payment would not subject the

property to a sale. The clerk who waited on him testified that if the property owner said he wanted to stop the sale, she would have given him the installment agreement.,,).

Thus, despite having provided Mrs. Battisti with certain notice of the tax sale, the Tax Claim Bureau was not relieved of this affirmative obligation to offer Mrs. Battisti the option to make installment payments pursuant to Section 603. *See Ross Appeal*, 366 Pa. 100, 103-104, 76 A.2d 749, 753 (1950) (vacating tax upset sale where each of the statutory notice requirements, including the option to make installment payments, was not met).

Additionally, this Court rejected in *Darden* the notion that it is constitutionally and statutorily sufficient to merely include as part of the tax sale notice a notation regarding the option to enter into a payment plan: the taxing authority must affirmatively offer the taxpayer the opportunity to enter into such a plan upon payment of greater than 25 percent of the delinquent taxes. *Darden*, 629 A.2d at 323. The holding in *Darden* is consistent with that in *Jones v. Flowers*, where the Supreme Court rejected the argument that because it is common knowledge that a tax delinquency may subject a home to sale, additional notice of a tax sale is unnecessary. 547 U.S. at 232-33 (finding “[a]n interested party’s ‘knowledge of delinquency in the payment of taxes is not equivalent to notice that a tax sale is pending.’,,) (quoting *Mennonite*, 462 U.S. at 800). As the

Pennsylvania Supreme Court explained in *Hess*, failing to provide a required notice is no different from requiring no notice, which clearly violates due process.

Had the legislature provided for no notice at all there is little doubt the Act would have been invalid as offending these fundamental provisions of both state and federal constitutions. Can it then by indirection do what it cannot do directly? Can it direct notice in one breath so to speak and in the next breath practically say it need not be given? To state the proposition is to answer it.

366 Pa. at 97.

III. HOMEOWNERS, ESPECIALLY OLDER ONES WHO FACE A DISPROPORTIONATE RISK OF LOSING THEIR HOMES TO TAX SALES, NEED PROTECTION FROM ARBITRARY AND UNJUST SALE OF THEIR HOME TO COLLECT TAXES.

The economic crisis that triggered millions of mortgage foreclosures nationwide also triggered an alarming nationwide increase in tax related sales of homes. See John Rao, *The Other Foreclosure Crisis: Property Tax Lien Sales*, Nat'l Consumer Law Ctr. at 10-11 (Jul. 2012) (hereinafter "*The Other Foreclosure Crisis*,"), available at <https://www.nclc.org/issues/the-other-foreclosure-crisis.html>. Older people are at particular risk of losing their homes to tax sales for a variety of reasons, including economic hardship, rising costs, having no mortgage payment, having a subprime or reverse mortgage, and increased incidence of disability and diminished capacity. *Id.*; see also Odette Williamson and Jillian McLaughlin, *Tax Lien Sales Put Low-Income, Seniors, and the Disabled at Risk of Foreclosure*, 34

Bifocal 1 (Oct. 2012), *available at* <http://bit.ly/VFLQWP> (hereinafter “*Tax Lien Sales*”).

A. Older Homeowners Face Extraordinary Economic Pressures That Make Them Disproportionately Vulnerable To Tax Sale.

Rising costs and lower income plays a significant role in making older people extremely vulnerable to losing their homes through tax upset sales. Even older people who own their homes outright have significant housing related costs, including taxes, utilities, insurance, and repairs and maintenance. These costs are often unaffordable to older people who no longer work and have limited retirement income.

Older Americans long have been considered among the most resistant to debt due to their generally conservative attitude toward spending. Changing economic conditions have made debt a more serious issue for them, however, especially in recent years. The median income of people aged 50+ was lower in 2009 than it was in 1997 due in part to declining pension and investment income, waning employment prospects, and longer periods of unemployment than their younger counterparts. *See* Amy Traub, *In the Red: Older Americans and Credit Card Debt*, AARP Pub. Policy Inst. Middle Class Sec. Project 7 (Jan. 2013), *available at* <http://bit.ly/1o5wCHI>. At the same time, costs for basic expenses such as housing, utilities, prescription drugs, and health care are continuously rising: a living wage is typically 3 to 4 times the federal minimum wage, which has not kept

pace with inflation. *See id.* at 5; *see generally* Craig Copeland, *Debt of the Elderly and Near Elderly 1992-2010*, 43 *Emp. Benefit Research Inst.* 2 (Feb. 2013), available at <http://bit.ly/UofvUr>. As a result, many people enter their retirement years incurring expenses for basic needs that exceed their income—particularly for home-related expenses and health care. *See* Sudipto Banerjee, *Income Composition, Income Trends, and Income Shortfalls of Older Households*, *Emp. Benefit Research Inst. Issue Br.* 383, No. 383, 13, 14 (Feb. 2013), available at <http://bit.ly/1tYkntI>. Approximately two-fifths of families that include a person over age 65 have an income shortfall. *See id.* at 11.

Even among the 20 percent lowest income 65+ seniors, 5.1 million own their homes free and clear of any debt. *See* William C. Apgar and Zhu Xiao Di, *Housing Wealth and Retirement Savings: Enhancing Financial Security for Older Americans*, Harvard Joint Ctr. for Hous. Studies, W05-8 (Sept. 2005), available at <http://bit.ly/1AzZABO>, reprinted in Gordon L. Clark, *et al. Oxford Handbooks in Business and Management*, Oxford University Press (2006). Of those homeowners without mortgage debt, however, one in four pays 50 percent or more of their income for housing costs, such as taxes and utilities. *Id.* For homeowners still paying off their mortgage debt but living at the lower economic margins, the vast majority are paying most of their income for housing costs. *Id.*

Older homeowners struggling with chronic income shortfalls may have great difficulty keeping up with their taxes. Indeed, the situation is particularly dire for older people in the lowest income brackets, who suffer hunger or food insecurity due to income shortfalls. “In 2011, almost one in every 12 people above the age of 60 in the United States was food insecure. That represents 4.8 million seniors nationwide, which is more than double the number of food insecure seniors in 2001.,, *Executive Summary: Spotlight on Senior Hunger 2011*, Feeding America and Nat’l Found. To End Senior Hunger (May 2013), available at <http://bit.ly/1qX0Wjo>.

The effects of the foreclosure crisis, especially those resulting from abuses within the lending and legal system, have also led to tax sales. Foreclosures have lowered property values and tax revenues alike, negatively impacting both homeowners and the communities in which they live. See Debbie Gruenstein Bocian, Wei Li, Carolina Reid, and Roberto G. Quercia, *Lost Ground, 2011: Disparities in Mortgage Lending and Foreclosures* 7, Ctr. for Responsible Lending (2011), available at <http://bit.ly/1q1Oelm>. While facing the continuing effects of an unrecovered economy, a difficult job market, declining home values and high foreclosures, homeowners must also contend with rising property taxes as “[l]ocal governments face financial pressures that necessitate a steady stream of tax revenue.,, *The Other Foreclosure Crisis* at 5. “Homeowners who are unable pay

their mortgages are likewise struggling to keep up with payments on home property taxes,, and “local governments have sought to bridge these budget gaps by instituting more aggressive tax collection practices.,, *Id.* at 11.

B. Paying Off A Mortgage Or Having A Subprime Mortgage Loan Can Increase One’s Risk Of Losing Their Home To A Tax Sale

Paying off one’s mortgage also plays a significant role in the increase of tax sales. *See Tax Lien Sales.* Mortgage companies typically collect property taxes as part of the monthly payment on a conventional 30-year mortgage, which they hold in an escrow account for the homeowner. When the taxes become due, the mortgage company pays them directly to the taxing authority. Upon paying off a mortgage, however, a homeowner must begin to set aside sufficient funds to pay the taxes when they become due and make the payments directly. Making this adjustment can create significant problems for older homeowners, particularly for those with disabilities and diminished capacity.

Similarly, homeowners with subprime mortgage loans also face challenges paying their taxes. Prior to 2010—when laws were changed to require most mortgage loans to have escrow accounts for taxes and insurance—few subprime lenders collected and paid taxes for the homeowner. “Some lenders used the lower monthly loan payment without an escrow to induce consumers into believing the loans were affordable. Of course, [] the monthly mortgage payments on many of

these loans were unaffordable even without considering property tax obligations.,,

The Other Foreclosure Crisis at 5.

C. The Growth Of Reverse Mortgages Increases The Risk That Older Homeowners Will Lose Their Home To A Tax Sale

Many older homeowners have taken a reverse mortgage on their property as a means to access the equity in their home while continuing to live in it. Such mortgages are insured through the Home Equity Conversion Mortgage (HECM) Program administered by the Department of Housing and Urban Development (HUD). Borrowers aged 62 and over can obtain either cash payments or a line of credit based on the value of their home, which they are not required to repay while they continue to live in the house, but they must carry hazard insurance, maintain the property, and make their tax payments.

While reverse mortgage lenders can assist property owners to pay their taxes and avoid tax sales, they rarely establish escrow accounts for that purpose. As with older homeowners who no longer make mortgage payments, those with reverse mortgages are required to manage tax payments on their own. If a reverse mortgage borrower fails to pay taxes, the lender may pay to avoid the tax sale and add the amount to the loan principle. Where a lender makes a payment on time to avoid a tax sale, the home may nevertheless be lost because such payment may cause the loan to exceed the principle loan limit established under the HECM

program, thereby putting the loan into default. Unfortunately, such payments by the lender may not be made in sufficient time to avoid the tax sale.

The extraordinary hardship of a homeowner being subjected to a tax sale because she is having difficulty managing her tax payments is exacerbated greatly where, as in Beaver County, there is no right of redemption following a tax sale. This places a heightened responsibility on the Tax Claim Bureau to comply strictly with the notice requirements and refrain from exposing homes to tax sale for trivial amounts.

D. Older Homeowners Are At Increased Risk Of Losing Their Home To A Tax Sale Because They Have A Significantly Higher Incidence Of Isolation, Disability, And Diminished Capacity

“Homeowners most at risk [of losing their homes to tax sales] are those who have fallen into default because they are incapable of handling their financial affairs, such as individuals suffering from Alzheimer’s, dementia, or other cognitive disorders.,, *The Other Foreclosure Crisis* at 5. The risk of having such disorders increases exponentially with advancing age. See Marson D & Sabatino C, *Financial Capacity in an Aging Society*, *Generations* (J. of the Am. Soc. on Aging), vol. 36, no. 2 (Summer 2012), available at <http://bit.ly/1moAJIL>. Similarly, isolation caused by physical illnesses or being unable to drive increases the risk of being subject to a tax sale.

As a result, the Tax Claim Bureau's installment payment procedures present serious due process concerns that disproportionately impact people with disabilities and those with diminished capacity. Specifically, Mr. Kohlman testified that the only people to whom the Tax Claim Bureau offered an installment plan were those who paid their taxes in person. Trial Tr. p. 80:15-22. Older people with health conditions, dementia, or who no longer drive have significantly reduced mobility and are less likely to pay their taxes in person, putting them at greater risk of a tax sale. Because older adults are more likely to experience chronic health conditions, such as heart disease and diabetes, they face heightened risks for becoming secluded and homebound. See Brian W. Ward & Jeannine S. Schiller, *Prevalence of Multiple Chronic Conditions Among US Adults: Estimates from the Nat'l Health Interview Survey*, 10 *Preventing Chronic Disease* 1, 5 (2013); see also Jeannine S. Schiller et al., *Summary Health Statistics for U.S. Adults: Nat'l Health Interview Survey, 2010*, U.S. Dep't of Health & Human Servs. at 19 (2012) (older adults suffer from heart disease at rate three times higher than younger adults). As a result, they will be at greater risk of losing their homes if only walk-in taxpayers are affirmatively provided notice.

It is vitally important to note that the high prevalence of such conditions also has a disproportionate impact on the group of older homeowners least likely to enjoy the protection provided by having an escrow account to pay taxes. It is

essential that courts take such “practicalities and peculiarities of the case . . . into account in determining whether constitutional requirements were met., *Jones v. Flowers*, 547 U.S. at 232 (quoting *Mullane*, 339 U.S. at 314-315). The *Jones* Court noted the necessity of taking unique circumstances into account.

In prior cases, we have required the government to consider unique information about an intended recipient regardless of whether a statutory scheme is reasonably calculated to provide notice in the ordinary case. In *Robinson v. Hanrahan*, [409 U.S. 38 (1972),] we held that notice of forfeiture proceedings sent to a vehicle owner's home address was inadequate when the State knew that the property owner was in prison. 409 U.S., at 40. In *Covey v. Town of Somers*, 351 U.S. 141 (1956), we held that notice of foreclosure by mailing, posting, and publication was inadequate when town officials knew that the property owner was incompetent and without a guardian's protection. *Id.*, at 146-147.

Jones v. Flowers, 547 U.S. at 230 (string cites omitted).

Unfortunately, the reality of an aging population and the increased incidence of diminished capacity are no longer unique. The demands of due process must adjust to the reality of the people most at risk of losing their homes to tax sale. The procedures utilized by the tax authorities should take into account the factors that put older people at greater risk of losing their homes to tax sale, because the procedures being utilized currently are not designed and should not be deemed to provide constitutionally required notice to the increasing numbers of people in such circumstances.

Additionally, the tax sales notices, such as those used by Beaver County, are printed in font sizes too small to give effective notice, especially to people with vision impairments. The testimony presented in this case demonstrates the problem. While the trial court attempted to ascertain whether notice of the option to make installment sales was provided, counsel for Mrs. Battisti and the judge both commented about the font being too small to read without glasses. *See* Trial Tr. p. 55:6; p. 96:3-5.

Older people will be negatively impacted by the use of small font sizes because vision impairments are disproportionately prevalent in older people. As part of the natural aging process, many people begin to have trouble reading small print beginning in their 40s. Added to that are disease processes common in older people that may cause cataracts and macular degeneration, among others. Ctr. for Disease Control, Division of Diabetes Translation, *Common Eye Disorders*, Nat'l Cntr for Chronic Disease Prevention and Health Promotion (Ap. 23. 2013), *available at* <http://1.usa.gov/1kX2AV3>. Despite the lack of font type statutory standards, the circumstances of this case clearly demonstrate that the notice constitutionally required must be more prominent than what was provided in the fine print of the Beaver County tax bills.

Additionally, the language used in those notices is very legalistic: most people would not have the literacy skills or educational background needed to

comprehend such notices. Indeed, Mrs. Battisti testified that she has dyslexia making it difficult for her to read and causing her to mix up numbers. Trial Tr. p. 124:22-23. Such conditions are common in the population and should not be ignored in the due process context.

CONCLUSION

Mrs. Battisti's home should not have been subject to tax sale over the trivial amount allegedly due, about which she was never actually notified or provided an opportunity for a payment plan. The Tax Claim Bureau was constitutionally required to provide adequate and appropriate notice, including by notifying her at the outset that there was an unpaid interest charge, by accurately stating the amount she was required to pay to prevent the sale, and by complying strictly with the notice requirements set forth by statute. The tax sale should be set aside because the Tax Claim Bureau failed to comply strictly with constitutionally required due process prior to selling Mrs. Battisti's home.

Respectfully submitted,

Michael P. Malakoff
Attorney I.D. Number: 11048
Michael P. Malakoff, P.C.
The Frick Building
437 Grant Street, Suite 200
Pittsburgh, PA 15219
(412) 281-4217
(412) 281-3262 fax

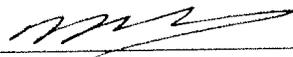
Julie Nepveu (*Pro Hac Pending*)
AARP Foundation Litigation
601 E Street, NW
Washington, DC 20049
202-434-2060
202-434-6424 fax
jnepveu@aarp.org

COUNSEL FOR AMICI CURIAE

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Pa R. App. P. 2135 because the brief contains 8,941 words.

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Michael P. Malakoff
Attorney I.D. Number: 11048
Michael P. Malakoff, P.C.
The Frick Building
437 Grant Street, Suite 200
Pittsburgh, PA 15219

CERTIFICATION OF SERVICE

I, Michael P. Malakoff, Esquire of Michael P. Malakoff, P.C., The Frick Building, 437 Grant Street, Suite 200, Pittsburgh, PA 15219 certify:

That I am, and at all times hereinafter mentioned was, more than 18 years of age;

That on the 22nd day of August 2014, I served a copy of the within Brief Amici Curiae of AARP, NACA and NCLC upon the following (*as listed on the Commonwealth Court's docket*):

Edgardo D. Santillan, Esquire
Santillan Law Firm, P.C.
775 Fourth Street
Beaver, PA 15009

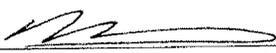
Joseph A. Askar, Esquire
Beaver County Solicitor's Office
810 Third Street
Beaver, PA 15009

Michael Kohlman, Director
Beaver County Tax Claim Bureau
Beaver County Courthouse
Beaver, PA 15009

David E. Holland, Esquire
100 State Street
Suite 700
Erie, PA 16507-1459

I certify under penalty of perjury that the foregoing is true and correct.

EXECUTED ON August 22, 2014



Michael P. Malakoff
Attorney I.D. Number: 11048
Michael P. Malakoff, P.C.
The Frick Building
437 Grant Street, Suite 200
Pittsburgh, PA 15219
(412) 281-4217
(412) 281-3262 fax