



ANews

President's Message

With his characteristic graciousness, Sandy has given me the opportunity to write the final President's Message for 2003. He suggested that it would be a fine opportunity to preview 2004. And so it is.

But the first order of business must be expressing our gratitude and congratulations to Sandy for the very special accomplishments of his presidency. The focus upon seeking, attracting, and securing the best and brightest as new members while increasing the number of younger members has produced very positive results. Perhaps more importantly, it has resulted in an institutionalized member development process that will continue.

As we seek to admit and to involve younger members, we also must retain and engage our more senior members, and 2003 institutionalized that effort as well. Through the Senior Counselors Working Group, workshops, and the simple expedient of awareness and commitment, significant progress occurred.

Beyond question, Sandy's dream of and determination to build a Habitat for Humanity home as our 25th anniversary activity produced the high spot for 2003. That story is told elsewhere in this issue of the News and on the website. However, no one who participated came away unaffected. It was very special, and it shows what we can

accomplish and have a good time doing it. Hundreds of members supported the effort financially, and scores worked on site. We thank you all; all of us thank Sandy for his dream.

I frequently am hit by the wonder of the fact that I am *in* ACREL much less about to become president *of* ACREL. Both realities are the result of so many who have mentored, opened opportunities, and shared so generously of time and advice. I thank each of them again, and I look forward to working with each of you and to the responsibility and opportunity to serve the College.

In 2004, we will not build a house, but we will continue the emphasis on attracting a dynamic mix of new members while well-serving all of our current members.

We will undertake some new areas of activity as well and will do so through seven working groups. Actually, each one has already begun its work. *continued on page 2*

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ACRELades

President's Message

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The first, chaired by Jay Epstien, is the New Ideas & Best Practices Working Group. We did this exercise five years ago, and it produced lots of new ideas and concepts; it is time to do it again and to "restock the larder" of potential ways to enrich the ACREL experience.

The second, chaired by Kim Senecker, is a working group on Past Presidents' Involvement and Recognition. ACREL needs a meaningful method to recognize and to utilize its excellent past leadership, which remains a present resource.

Collegiality is the goal and subject of Susan Talley's working group. The Meetings Committee has made great efforts and strides in this regard; that was obvious in New Orleans. It will work closely with the Working Group.

A special interest of mine is the subject for the fourth working group. Chaired by Kevin Shepherd, it is Ethics and Professionalism. ACREL has a Statement on Professionalism (did you know that?), and it is a good one. But we need to look at it and at how to improve, use, and share it. We need to insure that past excellent work on this topic now fits present challenges and practice realities.

Although ACREL will not build a house in 2004, public service will be a major agenda item. Mark Senn chairs that working group, and it will look at ways and means to perform service while keeping the projects fresh, innovative, and truly contributory.

ACREL has not addressed policy issues as such in the past, yet many of our programs and our members' concerns are rich in policy implications. Ira Waldman chairs a Public Policy Forum working group to develop suggestions both as to topics and formats. It is already working closely with Ann Saegert's Program Committee in the planning of our

first Forum.

Our industry is affected by many "movements." One certainly is that of "smart growth," which frequently means no or very limited growth. As with most movements, there are pros and cons on both, or all, sides of the issue. The Growth is Smart working group, chaired by Greg Hummel, will look at this challenging topic to see what, if any, position ACREL might play.

That is a lot to do. Expectations are framed in reality, but, at the same time, I have great confidence in what we can accomplish working together. I could not ask for a better, more committed and supportive President Elect. I have a great support team. And then there is the ACREL membership. How could one not accomplish special things? ■

Happy New Year.



Wayne

STAFF BOX

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Lawyer Escrow-Holder Liable for Depository Bank's Failure

By: Harris Ominsky, Blank Rome LLP,
Philadelphia, PA

A recent New York decision held that a lawyer who deposited escrow funds in a small bank that failed could be held liable to his client for malpractice. In *Bazinet v. Kluge*, 2003 W.L. 21361746, 2003 N.Y. Slip Op. 23611 (N.Y. Sup. May 29, 2003), the Supreme Court of New York County refused to dismiss claims against a lawyer who had deposited downpayments from the sale of properties by his client. The deposited sum of \$2,730,000 represented a 10% downpayment by buyers on two sales, and it was deposited in the Connecticut Bank of Commerce, a small bank, in an IOLA (Interest On Lawyer Account) non-interest bearing account.

When the lawyer went to draw the money out of the escrow account, his checks were dishonored, and it now appears that only a portion of the deposit will be recoverable from FDIC insurance of \$100,000 per account and the sale of the bank's assets.

Exculpation

The applicable contracts of sale provided that the funds should be deposited with the Connecticut Bank of Commerce and in addition, they provided exculpation for good-faith errors by the escrow holder. The contracts stated that the escrowee "shall not be liable for any error in judgment or for any act done or step taken or omitted in good faith, or for any mistake at fact or law, except for escrowee's own gross negligence or willful misconduct."

Among the claims made against the

lawyer are: (i) malpractice for not depositing the escrow funds "in some form of interest bearing account or instrument that would have been covered by FDIC insurance or taking some other steps to ensure preservation of those funds; (ii) gross negligence by depositing all of the escrow funds in the Connecticut Bank; and (iii) breach of fiduciary duty in making the aforesaid deposits."

The court dismissed the second and third claims but refused to dismiss the first claim for malpractice. In reaching its conclusion, the court rejected the lawyer's defense based on the exculpation clause. The court pointed out that the lawyer wore two hats: escrowee and lawyer. The suit was based on his duties as a lawyer, not as escrowee. This point was supported by the court's statement that the use of the IOLA account suggested that the lawyer was acting as a lawyer, not an escrowee:

"Since the monies were deposited by Reiser in CBC and IOLA accounts as mandated by the contracts, the exculpatory provision is irrelevant to the claims asserted against him herein."

The court also noted that a New York lawyer may not cause a client to contract away malpractice liability. It stated: "However, even if the provision could be interpreted to apply to Reiser's duties as Kluge's attorney, it could not result in a dismissal of her malpractice claims as any such provisions would be subject to court scrutiny. D.R. 6-102A provides that a 'lawyer

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shall not seek by contract or other means, to limit prospectively the lawyer's individual liability to a client for a malpractice." It then cited other cases and rulings that require careful scrutiny of exculpatory language used by attorneys with their own clients.

Legal Malpractice

This ruling means that the attorney has lost only the first battle. He has not yet lost the war. The court went on to say: "In order to sustain an action for legal malpractice, a plaintiff must prove the negligence of the attorney, that the negligence was the proximate cause of the loss sustained and actual damages. . . . An attorney is liable in a malpractice action if it can be proved that his conduct fell below the ordinary and reasonable skill and knowledge commonly possessed by a member of the profession However, an attorney is not held to the rule of infallibility and is not liable for an honest mistake of judgment where the proper course is open to reasonable doubt"

On the other hand, the client stated that she expects to offer expert testimony opining that leaving such large sums in a relatively small bank for the periods contemplated by the contracts is a deviation from the generally accepted practice of lawyers handling such types of transactions. Also, that she expects the testimony to indicate that under the circumstances presented, security should have been procured by maintaining the sums in Treasury bills or by obtaining supplementary insurance.

In response to this, the court held:

"While clearly an attorney is not a surety of the safety of a bank depository employed, under the circumstances presented plaintiff's complaint sufficiently sets forth a

viable claim that it was malpractice for Reiser to have drafted contracts for Kluge providing that escrow monies totaling \$2,730,000 be deposited in CBC without protection beyond the \$100,000 per account FDIC insurance. Thus, although such claim might not survive a motion for summary judgment, plaintiff is entitled to have the opportunity to offer expert opinion that in so drafting the agreements Reiser deviated from generally accepted standards for real estate practitioners."

Interest-bearing Accounts

The court also dealt with the question of whether or not a lawyer has a duty to deposit money in an interest-bearing account. This was a relatively minor sideshow in the case with much less at stake than the loss of the whole deposit. New York requires that lawyers use IOLA accounts (in Pennsylvania we sometimes call these IOLTA) for client funds "received by an attorney in a fiduciary capacity . . . and which, in the judgment of the attorney, are too small an amount or are reasonably expected to be held for too short a time to generate sufficient interest income to justify the expense of administering a segregated account." A New York regulation suggested \$150 in interest income was the threshold for establishing a segregated account. In this case the court noted that even one percent simple interest on the large escrow account would generate substantially more than \$1,000 per month.

Undoubtedly, the next battle at the trial will be on the question of whether a lawyer should have a duty to anticipate a bank failure. It would not be surprising for the plaintiff to explore whether the law firm derived a benefit, directly or indirectly, from depositing such large amounts in the bank's non-interest bearing accounts. Is it possible that the lawyer would get referrals from the

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bank or reduction of their banking costs that could possibly be related to these types of deposits? Also, as argued by the plaintiff, the trial is likely to cover what is reasonably customary by other escrow agents and what is the duty of a lawyer in that capacity to check out the creditworthiness of the depository institution, to use multiple accounts that may be insured by the FDIC, to make deposits in treasury accounts or to place protective insurance on such bank accounts that are not otherwise covered by other insurance.

Whatever the outcome of this particular case after trial, the Bazinet case sends out a warning to all lawyers to be careful about whether they should act as escrow agents, and if they graciously accept those assignments, they should not carry out their responsibilities casually. In addition, when substantial sums of money are involved, the parties should be careful about using interest-free accounts, even if they are trying to forward the many altruistic and well meaning goals of IOLTA programs. ■

www.acrel.org

Check the ACREL website for the latest committee information, meeting registration materials and other College news.

To log on, direct your browser to www.acrel.org, click on “Private Home Page” and enter your user id and password. Forgot your password? If you try to log on, the system will offer to email your password to you. Or, you may email Jill or Henri at the ACREL office (jhpacer@acrel.org or hkeller@acrel.org) or send a message to webmaster@acrel.org, or call us at 301-816-9811 for help.

From the Editorial Board

We need articles! We are particularly interested in materials not generally published in other real estate journals. For example:

- Issues or insights gleaned from ACREL programs or workshops
- Practical advice arising out of your practice
- Poetry or creative fiction relating to real estate
- Humor or satire
- Short profiles on ACREL members

We prefer short articles that apply to everyone. We would accept materials that

have already been published in a different format. Try taking a longer article you have written and providing us with a shorter version.

We also would like to augment our “ACRELADES” column. We are looking for newsworthy items about our members, including significant articles, appointments, awards, new books, and lectures.

Don't be modest. Without responses we will not be able to produce that column. Send this news about yourself or other ACREL members to Jill Pace now. ■

The ACREL House is a Reality

*By: Susan G. Talley, Chair Public Service Working Group,
Stone Pigman Walthers Wittmann L.L.C., New Orleans, LA*

Although we best all keep our day jobs, ACREL members really can hammer, saw, wrap insulation, raise a roof, safely operate power tools and have fun at the same time. As many of you know from prior newsletters, in celebration of ACREL's 25th anniversary, for the New



Orleans meeting, ACREL took on the job of funding a and working on a Habitat for Humanity house. In shifts spread out over Friday and Saturday, ACREL members, spouses and guests joined with prospective homeowners "JT" and Laverne Thompson and the Habitat for Humanity New Orleans crew to "blitz build" JT and Laverne's new home in the St. Roch neighborhood of New Orleans.

HfH New Orleans paired ACREL with JT and Laverne because of JT's history. In 1985, JT was arrested and ultimately convicted in murder and carjacking cases in New Orleans. He was sentenced to death and spent many years on death row at the Louisiana State Penitentiary in Angola, Louisiana (also known as "the Farm"). The two cases were linked by prosecutorial abuse and blood evidence. The Center for Equal Justice in New Orleans and several pro bono lawyers took on JT's case. The convictions were overturned on appeal and, as a result of newer DNA testing techniques, JT was exonerated. JT subsequently went to work as a clerk for the Center for Equal Justice and met and married Laverne, who has children of her own.

As many as 90 members, spouses and guests lent their talents and hard work to the project. Friday afternoon, roughly 60 members of the ACREL team were on the site. This hearty crew withstood unseasonable New Orleans heat

and a bit of light rain and still kept working. In fact, Jim Pate, the executive director of HfH New Orleans dubbed us the "Accrelians". Perhaps, he was trying to transform us into a carnival krewe. Selected pictures of the Accrelians are in this newsletter and more pictures are on the ACREL website.

By the topping out ceremony at the end of the day Saturday, the floor deck was down, the house was completely framed and wrapped with insulation, the roof trusses were all up, a good bit of the roof deck was complete and prefab windows and doors were installed and caulked. Over the course of subsequent weekends, groups comprised of local lawyers contributed to the finish work. Because of a \$25,000 donation from your gifts to the ACREL Foundation and a matching grant from a foundation supporting Habitat, all of the "hard money" costs of the home were covered. The house has been named The ACREL House.

By the time you see this article, The ACREL House will have been completed, the dedication ceremony will have taken place on December 20 and JT and Laverne will have moved into their new home in time for the Christmas holiday. Consistent with HfH policies, HfH is conveying the home to JT and Laverne in return for a long-term interest-free loan.



During the holiday season and new year, we ACREL members have much for which to be grateful in our personal and professional lives. Through your sweat, good humor and financial resources, we have now made it possible for a family, who might not otherwise have been able to do so, to own a home. ■

Back to Law School

*By: Harris Ominsky, Blank Rome LLP,
Philadelphia, PA*

At the New Orleans Annual Meeting, our program committee launched two unique workshops directed at ACREL members interested in law school teaching. They presented:

- Back to School as Adjunct Professor
- Enhancing Teaching Effectiveness

The workshop panels were graced with distinguished and experienced law professors, Ann Burkhart, Carl Circo, Celeste Hammond, Janet Johnson, and Dale Whitman. In addition, part-time-professor Stuart Ebby participated in the Back-To-School session with a personal and informative account of his experiences as an adjunct professor. Several of the panel members have been involved in seeking out and selecting adjunct professors of real estate law in their respective law schools. They concluded that some ACREL members would make likely candidates for some of these positions. However, one message from the workshop was that although being a part-time real estate teacher can be rewarding, preparing for class, teaching and marking papers can be demanding; and judged by our hourly rates, the main rewards will not be financial.

In the workshop on “Enhancing Teaching Effectiveness,” panel members delivered their message by example. The demonstrations ranged from use of group discussions to using lap-top computers for PowerPoint presentations and Interactive simultaneous video hookups with students and lecturers at difference locations.

Ann Burkhart discussed studies of learning-style theory and how a variety of teaching techniques worked best with different personality types. For example, students who tend to have a strong “rational

self,” learn best with techniques ranging from Socratic lectures and group discussions to role-playing and student presentations. Those that tend to fit into the category of “feeling self” will do better with listening and solo activities, such as lectures with visual aids and independent research and demonstrations, including problem-solving by the instructor.

Perhaps the most valuable revelation to emerge from these workshops was the sincere and generous offer made by the panelists to ACREL. Our professors would be available to advise any of our budding, adjunct real-estate teachers about class materials they can use, or teaching techniques; and some have even graciously offered to share PowerPoint and other presentations they have developed for their classes.

As it has been said:

“A mediocre teacher tells. The good teacher explains. The superior teacher demonstrates. The great teacher inspires.” ■

Calendar

2004 Mid-Year Meeting

March 18-21, 2004
Disney's Grand Floridian
Orlando, FL

2004 Annual Meeting

October 13-17, 2004
Hyatt Regency Denver
Denver, CO

***BFP* and “Reasonably Equivalent Value”: Are There Any Loose Ends?**

By John C. Murray, First American Title Insurance Company,
Chicago, IL ©2003

Introduction

The purpose of § 548 of the Bankruptcy Code (“Code”) is to provide the bankruptcy trustee the ability and authority to avoid “fraudulent transfers.” The policy underlying § 548 is to protect creditors against the depletion of the bankruptcy estate by granting the trustee the power to set aside fraudulent transfers of the debtor’s interests in property taking place within one year before the bankruptcy petition was filed. While § 548(a) provides that the trustee cannot recover property as a fraudulent conveyance unless he or she can prove “actual intent” to hinder, delay, or defraud a creditor, § 548(a)(2) allows the trustee, under an “implied fraud” analysis, to recover transfers that were made under such suspicious circumstances that they are conclusively presumed to have been fraudulent without any proof of the debtor’s subjective intent. A transfer is deemed to be constructively fraudulent under § 548, and may be avoided by the trustee or debtor in possession, if within one year prior to the filing of the bankruptcy petition the creditor receives “less than reasonably equivalent value” in a transaction *and* the transaction meets any one of the following requirements: (1) the transferor was insolvent at the time of the transfer or was rendered insolvent as the result of the transfer; (2) the transferor was undercapitalized at the time of the transfer or became undercapitalized as the result of the transfer; or (3) the transferor was unable or rendered unable by the transfer to pay the transferor’s debts as they became due. These tests are sometimes referred to as respectively, the “insolvency test,” the “capitalization test,” and the “cash flow test.” Under § 548(a)(1)(B), upon avoidance of the transfer the property would then be transferred back to the estate, subject to a lien for whatever price was paid for the asset. Inadequate consideration would not apply to sales

at the market price that would generally benefit creditors, and therefore such sales would not be avoidable.

Reasonably Equivalent Value: What is it?

“Reasonably equivalent value” is not defined or explained in the Code, and is determined by both federal and state courts on a case-by-case factual basis. Factors considered by the courts include the good faith of the parties, the difference between the amount paid and the fair market value, the percentage of the fair market value paid, and whether the transaction was arm’s length. *See, e.g., Mellon Bank, N.A. v. Official Comm. of Unsecured Creditors of R.M.L., Inc. (In re R.M.L., Inc.)*, 92 F.3d 139, 151-54 (3d Cir. 1996) (stating that “when the debtor is a going concern and its realizable going concern value after the transaction is equal to or exceeds its going concern value before the transaction, reasonably equivalent value has been received”); *Liebowitz v. Parkway Bank & Trust Co.*, 210 B.R. 298, 301, *aff’d sub nom In re Image Worldwide, Ltd.*, 139 F.3d 574 (7th Cir. 1998) (holding that determination of whether debtor received reasonably equivalent value “turns on an analysis of the type and amount of benefit obtained by the Debtor in return for the transfers”); *In Heritage Bank Tinley Park v. Steinberg*, 121 B.R. 983, 994 (Bankr. N.D. Ill. 1990) (ruling that whether debtor received reasonably equivalent value is a comparison of “what went out” with “what was received”); *In re Joshua Slocum, Ltd.*, 103 B.R. 610, 618 (Bankr. E.D. Pa. 1989) (stating that “an exchange or obligation undertaken for reasonably equivalent value depends on the facts of each case”).

Foreclosures and Other “Forced Sales”: *BFP v. Resolution Trust Corp.*

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In the case of forced sales (such as foreclosures), the foregoing factors may not be appropriate or determinative. (Black’s Law Dictionary defines “forced sale” as “a hurried sale by a debtor because of financial hardship or a creditor’s action.” black’s law dictionary, 7th ed. 1999, at p. 1338). The U.S. Supreme Court specifically addressed the issue of reasonably equivalent value in the context of a mortgage foreclosure sale in *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994). In *BFP*, the court rejected “fair market value” as the standard for measuring reasonably equivalent value and ruled that relevant determination, in the case of a mortgage foreclosure, is the price received at a regularly conducted, non-collusive foreclosure sale of the property as long as all the requirements of the State’s foreclosure laws have been complied with. *Id.* at 536-37. However, the Supreme Court was careful to note that its opinion applied only to real estate mortgage foreclosures and that “[t]he considerations bearing upon other foreclosures and forced sales (to satisfy tax liens, for example) may be different.” *Id.* at 537 n. 3.

Thus, the Court’s holding in *BFP* would not necessarily apply to non-judicial foreclosures or to certain other real estate transactions, such as “strict foreclosures,” deeds in lieu of foreclosure (where reasonably equivalent value for conveyance of the property must be established), or tax sales. *See, e.g., Federal Nat’l Mortgage Ass’n v. Fitzgerald*, 237 B.R. 252, 266 (Bankr. D. Conn. 1999) (“Fitzgerald I”) (holding that because Connecticut’s strict foreclosure statute does not provide for public sale, *BFP* decision, which applies only to properly conducted, non-collusive foreclosure sale, did not automatically control as to whether property had been transferred for reasonably equivalent value; accordingly, court agreed to conduct further factual proceedings to ascertain value of property and mortgagee’s claim); *Federal Nat’l Mortgage Ass’n v. Fitzgerald*, 255 B.R. 807, 810 (Bankr. D. Conn., Dec. 13, 2000) (“Fitzgerald II”) (reaffirming court’s rationale in Fitzgerald I, and finding that Connecticut made legislative decision

“not to accord a conclusive presumption of ‘reasonably equivalent value’ to strict foreclosures under state fraudulent transfer law”). *But see Talbot v. Federal Home Loan Mortgage Corp.*, 254 B.R. 63, 70-71 (Bankr. D.Conn. 2000) (holding that judgment entered under Connecticut’s strict foreclosure law conclusively established that “reasonably equivalent value” was received and precluded debtors from asserting that foreclosure judgment was constructively fraudulent transfer, and stating that, “Connecticut’s strict foreclosure law provides a debtor with sufficient procedural safeguards to render it analogous to the foreclosure sale context of *BFP*”); *Chase Manhattan Mortgage Corp. v. St. Pierre (In re St. Pierre)*, 295 B.R. 692, 697 (Bankr. D. Conn. 2003) (rejecting argument that BFP does not apply to strict foreclosures, and stating that, “[t]here are no allegations that the debtors were denied their procedural rights or that there were irregularities in the foreclosure process”).

Applicability of BFP to Tax Sales

Several bankruptcy courts have applied the BFP holding to other forced-sale situations, such as judicial tax sales, and have upheld such sales upon a finding that the rights of the debtor had been protected. These courts have upheld state tax sales under the BFP rationale so long as the procedures were sufficiently similar to those provided in a mortgage foreclosure sale under state law, concerning notice to the owner-borrower and true competitive bidding. *See, e.g., Washington v. County of King William (In re Washington)*, 232 B.R. 340, 344 (Bankr. E.D. Va. 1999) (finding delinquent tax sale valid because sale was held in strict accordance with state statutory requirements, which gave delinquent taxpayer “more than adequate protection,” including notice and opportunity to cure); *In re Samaniego*, 224 B.R. 154 (Bankr. E.D. Wash. 1998) (holding that tax foreclosure sale was valid because debtor’s rights had been adequately protected); *Russell-Polk v. Bradley*, 200 B.R. 218, 220-222 (Bankr. E.D. Mo. 1996) (comparing

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statutory procedure for tax foreclosure sales with that applied to mortgage foreclosure sales and ruling that debtor was provided with same protections, most notably competitive bidding and a two-year redemption period; and finding that same rule should apply even where tax sale price was far below the property’s fair market value, which was still “reasonably equivalent value” for purposes of § 548.); *T.F. Stone v. Harper (In re T.F. Stone Co.)*, 72 F.3d 466, 471 (5th Cir. 1995) (“That [the county’s] sale to the [tax purchaser] was a tax sale rather than a mortgage foreclosure sale does not change the fact that it was a forced sale”); *Golden v. Mercer County Tax Claim Bureau (In re Golden)*, 190 B.R. 52, 58 (Bankr. W.D. Pa. 1995) (finding that BFP applied to “regularly conducted tax sales”); *Hollar v. Myers (In re Hollar)*, 184 B.R. 243, 252 (Bankr. M.D. N.C. 1995) (noting similarities of procedural safeguards, including requirement under state statute for public notice and public auction); *Lord v. Neumann (In re Lord)*, 179 B.R. 429, 432-35 (Bankr. E.D. Pa. 1995) (noting requirement for competitive bidding under specific bidding procedures); *McGrath v. Simon (In re McGrath)*, 170 B.R. 78, 82 (Bankr. D.N.J. 1994) (noting requirement for public notice of tax sale and procedures to encourage competitive bidding); *Comis v. Bromka (In re Comis)*, 181 B. R. 145, 150 (Bankr. N.D.N.Y. 1994) (“The Bankruptcy Court is without authority to void a tax foreclosure sale conducted in accordance with state law”).

However, other courts have ruled that a tax sale, although conducted in accordance with state law, was invalid and constituted a fraudulent transfer. In *Sherman v. Rose (In re Sherman)*, 223 B.R. 555 (B.A.P. 10th Cir. 1998), *reh’g denied*, 1998 Bankr. LEXIS 1265 (B.A.P. 10th Cir. Oct. 9, 1998), *aff’d*, 2001 U.S. App. LEXIS 19459 (Aug. 31, 2001), the court held that unlike mortgage foreclosure sales, the principle of “fair market value” must be applied to tax sale cases to determine whether the transfer was for reasonably equivalent value. The applicable Wyoming statute provided for the property to be sold to a

person selected in a random lottery for the amount of the outstanding taxes, and did not permit a public sale with competitive bidding. According to the court, “there is a significant difference between the circumstances of this case and those surrounding [other bankruptcy court decisions] that have upheld the applicability of the BFP decision to tax sales.” *Id.* at 559. The court further held that, as a matter of equity, the *BFP* case did not apply to this particular tax because the \$450 paid for the debtor’s real estate at the tax sale was not “reasonably equivalent” value for property worth between \$10,000 and \$50,000.

See also Wentworth v. Town of Acton (In re Wentworth), 221 B.R. 316, 319-20 (Bankr. D. Conn. 1998) (holding that non-judicial tax forfeiture sale of tax lien under state statute without judicial oversight, competitive bidding, public notice, or public sale, with 1 to 13 ratio between tax lien amount and property value, was not for reasonably equivalent value; and stating that “[u]nlike a forced sale, whether a mortgage sale such as in *BFP*, or a tax foreclosure sale . . . Maine’s forfeiture sale procedure eliminates rather than redefines the market. While the forced sale price may be legitimate evidence of the property’s value the amount of a tax lien is no evidence whatsoever of the property’s value (citation omitted)”; *Dunbar v. Johnson (In re Grady)*, 202 B.R. 120, 125 (Bankr. N.D. Iowa 1996) (holding that BFP does not apply to forfeiture of real estate contract under state law because “where no sale occurs, the only barometer to determine value is the amount of any debt remaining on the sale contract. This amount has no relationship to market forces . . . [and] could be minuscule and bear no relationship to reasonably equivalent value”).

BFP and State Fraudulent Conveyance and Fraudulent Transfer Statutes

Section 548 applies not only to transfers made by the debtor within one year before the commencement of the bankruptcy case, but also

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incorporates state fraudulent conveyance statutes. Both state laws and the Code contain provisions that make transfers under certain circumstances void as to creditors of the transferor (the seller in the case of a sale transaction; the borrower in the case of a loan transaction). A transfer would violate these laws and may be voided by the trustee or debtor in possession (“DIP”) if it is either intentionally fraudulent or constructively fraudulent as to the transferor’s creditors. The Uniform Fraudulent Transfer Act (“UFTA”) has been enacted in forty states and the District of Columbia. (Four states have retained the Uniform Fraudulent Conveyance Act (“UFCA”): Maryland, New York, Tennessee, and Wyoming.) The UFTA was adopted in order to address changes in bankruptcy law (especially in the area of fraudulent transfers) and debtor-creditor relations in general.

Fraudulent conveyance challenges may occur under the UFCA or the UFTA, because § 544(b) of the Code gives the DIP or the trustee the status of a creditor as of the date of the bankruptcy petition. Section 544(b)(1) incorporates state law into the bankruptcy process and enables the trustee to exercise the rights of creditors under state fraudulent transfer law. The UFCA and UFTA are available to the bankruptcy trustee or the DIP under the foregoing “strong arm” provision of § 544(b), which enables the trustee or DIP to void any transfer of an interest of the debtor in property that is avoidable under applicable state law. The policy of both § 548 and the UFTA is to preserve assets of the estate for the benefit of creditors. Under § 548(a)(1), the trustee or DIP can “reach back” one year before the filing of the bankruptcy petition, and seek to avoid as fraudulent any transfer made or obligation incurred by the debtor within that year. However, state fraudulent conveyance statutes do not require that the transfer be made within one year before the filing of the bankruptcy petition, because the action is independent of bankruptcy. If the trustee or DIP elects to proceed under state fraudulent conveyance laws, state statutes of limitation control.

The UFTA contains its own statute of limitations. The UFTA extinguishes any claim not brought within four years after the transfer was made or the obligation was incurred, unless the fraud was intentional and was not discovered until a later time, in which event the limitations period is extended for an additional year after such discovery. Under § 4(a)(2) of the UFTA, a transfer made or obligation incurred “without receiving a reasonably equivalent value in exchange” may be fraudulent as to present and, under two of the three alternative financial tests, future creditors. (The UFCA, in its counterpart constructive-fraud provision, uses the language “without fair consideration” and also considers both present and future creditors.) The UFTA and the UFCA also require that an additional element be present: either under capitalization of the transferor or the incurrence of debts by the transferor beyond its ability to pay.

At least one court, considering the similarities in both purpose and language of § 548 and the fraudulent conveyance provisions of the UFTA, has applied the same “reasonably equivalent value” analysis under both laws to a tax foreclosure sale. *See Kojima v. Grandote Int’l Ltd. Liab. Co. (In re Grandote Country Club Co.)*, 252 F.3d 1146, 1152 (10th Cir. 2001) (noting that the transfer of real property was for reasonably equivalent value, and not fraudulent under Colorado Uniform Fraudulent Transfer Act, where defendant acquired property through regularly conducted tax sale under Colorado law subject to competitive bidding procedure). *See also Marie T. Reilly, Making Sense of Successor Liability*, 31 Hofstra L. Rev. 745, 763 (2003), n. 85 (“[a]lthough courts interpreting the UFTA (including bankruptcy courts applying UFTA via 11 U.S.C. 544(b)) may consider BFP as persuasive, they are not bound by the holding even in cases involving real property foreclosure sales”).

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BFP and “Reasonably Equivalent Value”...

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Conclusion

The U.S. Supreme Court, in the *BFP* case, prohibited the use of § 548 of the Code to void a pre-bankruptcy petition foreclosure sale, holding that “a fair and proper price, or a ‘reasonably equivalent value,’ is the price in fact received at the foreclosure sale, so long as all the requirements of the State’s foreclosure law have been complied with.” 511 U.S. at 545. However, uncertainty remains as to whether the *BFP* rationale applies to non-judicial “strict foreclosures” (or foreclosures by “power of sale”) in states that permit such proceedings. There is also uncertainty as to whether the holding applies to tax foreclosure sales, tax forfeitures, and

certain other non-judicial sales. The burden in such situations will be on the creditor to clearly establish that all substantive requirements and procedural safeguards were strictly complied with to render the sale sufficiently analogous to the foreclosure-sale context of *BFP*. With respect to a voluntary recovery of the real property security by the lender pursuant to a deed in lieu of foreclosure where there is no auction or arms-length sale, it appears clear that the lender will not be entitled to the “safe harbor” of *BFP*. In this situation the lender would be well advised, before agreeing to accept a deed from the borrower, to obtain an independent appraisal of the property establishing that the value is less than the outstanding indebtedness. ■

ACRELades

Philip J. Bagley, III has been elected chair of the ABA’s Section of Real Property Probate and Trust Law. This is the culmination of a three-year progression through RPPT leadership positions.

Robert Harms Bliss just finished his year as the chair of the 6,777 member Real Estate Probate and Trust Law section of the State Bar of Texas. Last year he was named by Texas Lawyer newspaper as one of the five “top notch” real estate lawyers in Texas, and this year he was named one of the “super lawyers” of Texas by Texas Monthly magazine.

Matthew Comisky was elected to the Board of Regents of the American College of Mortgage Attorneys and planned and moderated a seminar for ACMA at its annual meeting at The Greenbrier Resort on “Cutting edge Provisions in Commercial Mortgage Documents.” In November, Matt was reelected as a Commissioner of Lower Merion Township, Pennsylvania.

Craig W. Johnson who serves on the Board of Trustees of Austin Medical Center, Austin, MD, has been elected a director and President of Austin Medical Center Foundation.

Neil Kessler has been selected by Virginia Business magazine as a member of the “Legal Elite.”

James P. McAndrews was presented with the Bob Rosewater Award for Meritorious Service at a Cleveland Bar Association meeting, in recognition of his service to the Real Estate Law Section, the Association and the community.

Stanley Sklar has been elected to a two-year term as president of the Society of Illinois Construction Attorneys. The group is composed of invited attorneys who have specialized in construction law and have been recognized for their significant contributions to the field of construction law. ■