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DEFINING REASONABLY EQUIVALENT VALUE UNDER SECTION 548(a) OF THE BANKRUPTCY CODE: IS *RISTICH* THE ANSWER?

Section 548(a) of the United States Bankruptcy Code[1] authorizes trustees[2] of bankrupt estates to avoid fraudulent transfers of debtors' interests in

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1. 11 U.S.C. § 548(a) (1982 & Supp. III 1985). In 1970 Congress formed the Commission on the Bankruptcy Laws of the United States to recommend revisions to the Bankruptcy Act of 1898. *See* Act of July 24, 1970, Pub. L. No. 91-354, 84 Stat. 468 (establishing special commission); *see also* Bankruptcy Act of 1898, ch. 541, § 67e, 30 Stat. 544, 564-65, *amended by* Act of June 22, 1938, ch. 575, § 67d, 52 Stat. 840, 877, *repealed by* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, 2600 (codified as amended at 11 U.S.C. § 548 (1982 & Supp. III 1985)). Congress originally designed the Bankruptcy Act of 1898 to address business bankruptcies. H.R. REP. No. 927, 91st Cong., 2d Sess. 2, *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 3559, 3560. The Commission, however, found that since 1950 the number of consumer bankruptcies had increased by 1000 percent and recognized that the Bankruptcy Act of 1898 failed to cope adequately with modern-day consumer bankruptcy proceedings. H. REP. No. 595, 95th Cong., 2d Sess. 1-2, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 5966. Based on the results of the Commission's study, Congress modernized federal bankruptcy law by enacting the Bankruptcy Reform Act of 1978. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended at 11 U.S.C. §§ 101-151326 (1982 & Supp. III 1985)).

Although the Bankruptcy Reform Act contains fraudulent transfer provisions, the foundation for American fraudulent conveyance law is the Statute of 13 Elizabeth, which the English Parliament enacted in 1570. Statute of Fraudulent Conveyances, 1570, 13 Eliz., ch. 5., *quoted in* G. GLENN, THE LAW OF FRAUDULENT CONVEYANCES § 53 (1931). Before Parliament enacted the Statute, debtors would transfer property solely to place legal title of the property beyond the reaches of creditors. F. WAIT, A TREATISE ON FRAUDULENT CONVEYANCES AND CREDITORS' BILLS § 19 (2d ed. 1889). To allow a creditor to avoid fraudulent transfers that debtors made specifically to defraud creditors of their lawful debts, Parliament enacted the Statute. *Id.*; D. MOORE, A TREATISE ON FRAUDULENT CONVEYANCES AND CREDITORS' REMEDIES § 8, at 11-12 (1908).

When the statutory law of bankruptcy began to develop in the United States, the Statute was a model for the fraudulent conveyance provisions. Zinman, Houle & Weiss, *Fraudulent Transfers According to Alden, Gross and Borowitz: A Tale of Two Circuits*, 39 BUS. LAW. 977, 989 (1984)[hereinafter Zinman]. Adopting the features and language of the Statute of 13 Elizabeth, Congress enacted the Bankruptcy Act of 1898. Bankruptcy Act of 1898, ch. 541, § 67e, 30 Stat. 544, 564-65, *amended by* Act of June 22, 1938, ch. 575, § 67d, 52 Stat. 840, 877, *repealed by* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, 2600 (codified as amended at 11 U.S.C. § 548 (1982 & Supp. III 1985)). The Bankruptcy Act of 1898 contained provisions covering both intentional and implied fraudulent conveyances. *Id.*

In 1918 the National Conference of Commissioners on Uniform State Laws codified a relaxed version of the Statute of 13 Elizabeth in the Uniform Fraudulent Conveyance Act (UFCA). Unif. Fraudulent Conveyance Act, 7A U.L.A. 427-638 (1985). Section 7 of the UFCA invalidates voluntary and intentional transfers made by debtors that interfere with the rights of creditors. Unif. Fraudulent Conveyance Act § 7, 7A U.L.A. 509 (1985); *see* 11 U.S.C. § 548(a)(1) (1982 & Supp. III 1985) (containing intentional fraudulent transfer provision). Section property occurring before debtors file petitions in bankruptcy.[3] Empowered

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4 of the UFCA, however, authorizes creditors to avoid constructive fraudulent conveyances without proving the debtor's fraudulent intent. Unif. Fraudulent Conveyance Act § 4, 7A U.L.A. 474 (1985); *see* 11 U.S.C. § 548(a)(2) (1982 & Supp. III 1985)(containing constructive fraudulent transfer provision). In enacting the constructive fraudulent transfer provision of the UFCA, the Commissioners intended to eliminate the legal presumption concerning the debtor's fraudulent intent. *See* Unif. Fraudulent Conveyance Act, Commissioners' Prefatory Note, 7A U.L.A. 428 (1985)(noting that, before UFCA, courts unreasonably had presumed debtor's fraudulent intent for transfers that harmed creditors even though creditors offered no proof of debtor's actual intent to defraud creditors). Using the modified fraudulent conveyance provisions of the Statute of 13 Elizabeth found in section 4 of the UFCA, Congress amended the Bankruptcy Act of 1898 with the Chandler Act of 1938 (Chandler Act). Act of June 22, 1938, ch. 575, § 67d, 52 Stat. 840, 877, *repealed by* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, 2600 (codified as amended at 11 U.S.C. § 548 (1982 & Supp. III 1985)). Although incorporating the substance and essential elements of the fraudulent conveyance sections of the UFCA, Congress also required that transfers, to be avoidable, had to occur within one year before debtors filed their petitions in bankruptcy. *Compare* Act of June 22, 1938, ch. 575, § 67d, 52 Stat. 840, 877 (containing one year time limit), *repealed by* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, 2600 (codified as amended at 11 U.S.C. § 548 (1982 & Supp. III 1985)) *with* Uniform Fraudulent Conveyance Act § 4, 7A U.L.A. 474 (1985)(not containing one year time limit). In addition to adding the one year time limit, Congress replaced the term "conveyance" in section 67(d) with the term "transfer" and also required the parties to the transfer to act in good faith. Act of June 22, 1938, ch. 575, § 67d(2), 52 Stat. 840, 877, *repealed by* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, 2600 (codified as amended at 11 U.S.C. § 548 (1982 & Supp. III 1985)); *see* Note, *Regularly Conducted Non-Collusive Mortgage Foreclosure Sales: Inapplicability of Section 548(a)(2) of the Bankruptcy Code*, 52 FORDHAM L. REV. 261, 267-68 (1983)(noting that change in language may indicate that Congress intended to broaden application of § 67(d)(2)).

Congress enacted section 548 of the Bankruptcy Code of 1978 to replace section 67(d) of the Chandler Act. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, 2600 (codified as amended at 11 U.S.C. § 548 (1982 & Supp. III 1985)). Congress intended to incorporate the substance of section 67(d) of the Chandler Act into section 548, the fraudulent transfer provision of the Bankruptcy Code. Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 137, 93d Cong., 1st Sess., § 20 (1973). In enacting section 548, however, Congress omitted the good faith requirement contained in section 67(d) of the Act because courts inconsistently applied the good faith standard to parties making transfers. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, 2600 (codified as amended at 11 U.S.C. § 548 (1982 & Supp. III 1985)); *see* Act of June 22, 1938, ch. 575, § 67d(1)(e), 52 Stat. 840, 877, *repealed by* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, 2600 (codified as amended at 11 U.S.C. § 548 (1982 & Supp. III 1985))(trier of fact could find that debtor received fair consideration in § 67(d) only if parties to transfer acted in good faith). In section 548 Congress also replaced the term "fair consideration" with the term "reasonably equivalent value." Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, 2600 (codified as amended at 11 U.S.C. § 548(a)(2)(1982 & Supp. III 1985)).

2. 11 U.S.C. § 323 (1982). Section 323 of the Bankruptcy Code defines the term "trustee" as the representative of the debtor's estate in a bankruptcy action. *Id.* Trustees are both officers of the court and representatives of the debtor's creditors. *In re* Benny, 29 Bankr. 754, 760 (Bankr. N.D. Cal. 1983). Generally, the duties of trustees include uncovering all property comprising the estate, protecting the property of the estate, defending the legal rights and interests of the estate, and preserving the value of the estate's property. L. KING, COLLIER

to avoid fraudulent transfers, trustees may protect creditors' interests in the bankruptcy estates.[4] Under section 548(a) the trustee must prove, first, that

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HANDBOOK FOR TRUSTEES AND DEBTORS IN POSSESSION § 4.03 (1985).

The specific duties of trustees, however, vary according to whether debtors file bankruptcy petitions for liquidation, business reorganization, or debt adjustment. In Chapter 7 liquidation proceedings, trustees must liquidate the property of the estate, maximize the size of the estate, and secure the largest possible distribution to creditors at the earliest possible time. *Id.* To accomplish their goals, Chapter 7 trustees collect and convert the property of the debtor's estate, account for all the property of the estate, investigate the financial affairs of the debtor, and file reports and summaries of the debtor's business with the court. 11 U.S.C. § 704 (Supp. III 1985). In Chapter 11 reorganization proceedings, however, trustees take possession of the estate's property, maintain all legal actions of the estate, operate the debtor's business, submit to the court a reorganization plan and a disclosure statement, obtain court confirmation of the plan, and implement the plan. 11 U.S.C. § 1106 (1982 & Supp. III 1985); *see* L. KING, *supra*, § 7.01 (listing duties of Chapter 11 trustee). Debtors, however, may retain title to the assets of the estate under a Chapter 11 reorganization proceeding. 11 U.S.C. § 1107 (1982 and Supp. III 1985). If the bankrupt debtor retains title to his assets, the debtor, as debtor-in-possession, "stands in the shoes of the trustee" and performs the functions of a trustee. Herman Cantor Corp. v. Cattle King Packing Co., 22 Bankr. 604, 606 (Bankr. E.D. Va. 1982). In Chapter 13 debt adjustment proceedings, trustees neither take possession of the estate's property nor operate the debtor's business. 11 U.S.C. §§ 1302(b)(1), 1303, 1304 (1982 & Supp. III 1985). Instead, Chapter 13 trustees work closely with the debtor to investigate the financial affairs of the estate, to examine and object to creditors' claims, to account for property received by the estate, and to oppose discharge of the estate's debts. L. KING, *supra*, § 8.01.

3. 11 US.C. § 548(a) (1982 and Supp. III 1985). Debtors fraudulently transfer property when they either convey a property interest intentionally to harm creditors' interests or harm creditors' interests by accepting less than a reasonably equivalent value for the property interest. 11 U.S.C. § 548(a) (1982 & Supp. III 1985). The avoidance of a debtor's transfer as a fraudulent conveyance is not self-executing, but, rather, requires the trustee or debtor-in-possession to recover the property interest for the creditors' benefit by instigating a judicial action in a bankruptcy court. Bartl v. Garfinkel (*In re* Claxton), 30 Bankr. 199, 204 (Bankr. E.D. Va. 1983).

4. S. REP. No. 989, 95th Cong., 2d Sess. 1-2, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5791. The Commission on the Bankruptcy Laws of the United States, which recommended changes to the Chandler Act of 1938, recognized that Congress, by enacting federal bankrutpcy laws, intended to provide debtors with relief from debt and to protect the interests of the debtors' creditors. *See* REPORT OF THE COMMISSION ON THE BANKRUPCTY LAWS OF THE UNITED STATES, H.R. Doc. No. 137, 93d Cong., 1st Sess., pt. I, at 71 (1973)(Congress' intent was to give debtors fresh start and protect position of creditors in open credit economy). In codifying the rights of creditors in the Bankruptcy Reform Act of 1978, Congress intended to protect secured creditors. H. REP. No. 595, 95th Cong., 2d Sess. 1-2, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 5966. To benefit creditors, Congress enabled trustees to include as property of bankruptcy estates any property of value that debtors have and to dispose of bankruptcy estates' property in a manner that would maximize the benefit to the creditors. H. REP. No. 595, *supra*, at 6136-37. To allow trustees to include all of debtors' property in bankruptcy estates and, thus, to retain greater amounts of equity in bankruptcy estates for the creditors' benefit, Congress in section 548 authorized trustees to recover more easily property fraudulently transferred by debtors. S. REP. No. 989, *supra*. In section 548, Congress recognized that debtors could intentionally defraud creditors or jeopardize creditors' interests in bankruptcy estates by disposing of property for less than a reasonably equivalent value. *See id.* at 5875 (containing both intentional fraudulent transfer provision and constructive fraudulent transfer provision).

the debtor transferred his property within one year before he filed his bankruptcy petition.[5] Second, the trustee must prove that in transferring his property the debtor intentionally defrauded creditors[6] or the debtor harmed the creditors' interests by accepting less than a reasonably equivalent value for the property transferred.[7] The Bankruptcy Code's definition of the term "transfer" includes foreclosure sales.[8] In applying section 548(a) to foreclo-

5. 11 U.S.C. § 548(a) (1982 & Supp. III 1985). According to section 548(d) of the Bankruptcy Code, a transfer occurs when the transferee perfects the transfer so that a bona fide purchaser could not acquire an interest in the property superior to the interest of the transferee. 11 U.S.C. § 548(d)(1) (Supp. III 1985). In the Bankruptcy Amendments and Federal Judgeship Act of 1984, Congress amended the definition of the term "transfer" to include the foreclosure of the debtor's equity of redemption. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, §421(j)(1), 98 Stat. 333, 368 (codified at 11 U.S.C. § 101(48) (Supp. III 1985). Nevertheless, courts have differed over what constitutes perfection in the context of foreclosure sales. *See* Durrett v. Washington Nat'l Ins. Co., 621 F.2d 201, 204 (5th Cir. 1980)(time of transfer for purposes of Bankruptcy Code is foreclosure sale itself); Strauser v. Veterans Admin. (*In re* Strauser), 40 Bankr. 868, 871 (Bankr. N.D. Ohio 1984) (transfer occurs when parties have perfected creditors' security interest so that bona fide purchaser from debtor could not acquire superior title to property); Alsop v. Alaska (*In re* Alsop), 14 Bankr. 982, 968 (Bankr. D. Alaska 1981)(applying Alaska law, court held that time of transfer related back to when party so far perfected title that any subsequent purchaser from debtor could not acquire good title), *aff'd*, 22 Bankr. 1017 (D. Alaska 1982). Many courts now recognize, however, that a transfer under section 548 of the Bankruptcy Code occurs at the time of the foreclosure sale. *See* Christian v. Ryan (*In re* Christian), 48 Bankr. 833, 835-36 (D. Colo. 1985)(time of transfer is foreclosure sale because debtor can have multiple interests in property and individual interests conveyed through multiple transfers); New Yorketown Assocs. v. Pierce, Urstadt, Mayer & Greer, Inc. (*In re* New Yorketown Assocs.), 40 Bankr. 701, 706 (Bankr. E.D. Pa. 1984)(same); Lakeview Inv. Group, Inc. v. Pemberton (*In re* Lakeview Inv. Group, Inc.), 40 Bankr. 449, 452 (Bankr. E.D.N.C. 1984)(same).

6. 11 U.S.C. § 548(a)(1) (Supp. III 1985). The Bankruptcy Code authorizes a trustee to avoid a transfer if the debtor conveyed his property interest with the actual intent of hindering, delaying, or defrauding creditors. *Id.* The trustee need not produce direct evidence of the actual, subjective intent of the debtor. Wilson v. Upreach Ministries (*In re* Missionary Baptist Found. of Am., Inc.), 24 Bankr. 973, 976 (Bankr. N.D. Tex. 1982). The trustee only must prove facts that compel the conclusion that the debtor actually intended to defraud creditors. *See* Bartl v. Garfinkel (*In re* Claxton), 30 Bankr. 199, 213 (Bankr. E.D. Va. 1983)(holding that debtor who created network of relatives and friends to receive property intentionally defrauded creditors by transferring property out of reach of creditors).

7. 11 U.S.C. § 548(a)(2) (1982 & Supp. III 1985). The Bankruptcy Code authorizes trustees to avoid transfers by debtors as constructively fraudulent conveyances if the debtor "received less than a reasonably equivalent value in exchange for such transfer or obligation." 11 U.S.C. § 548(a)(2)(A) (Supp. III 1985). In addition to proving that the debtor received less than a reasonably equivalent value for the property interest, the trustee must establish that the debtor was insolvent when the transfer occurred or became insolvent because of the transfer, undercapitalized his business, or was unable to pay maturing debts. 11 U.S.C. § 548(a)(2)(B) (1982 & Supp. III 1985). Thus, Congress recognized in the fraudulent conveyance provision of the Bankruptcy Code that a debtor can jeopardize creditors' rights unintentionally by disposing of property for less than reasonably equivalent value. *See* S. REP. No. 989, 95th Cong., 2nd Sess. 1-2, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5875 (containing both intentional fraudulent transfer provision and constructive fraudulent transfer provision).

8. 11 U.S.C. § 101(48) (Supp. III 1985). In section 101(48) of the Bankruptcy Code

sure sales,[9] federal courts have disagreed on the meaning of the term "reasonably equivalent value" and, accordingly, have developed four different standards for determining reasonable equivalence.[10]

Congress defined the term "transfer," in pertinent part, as "every mode . . . of disposing of or parting with property or with an interest in property, including . . . foreclosure of the debtor's equity of redemption." *Id.*

9. *See* Durrett v. Washington Nat'l Ins. Co., 621 F.2d 201, 204 (5th Cir. 1980)(changing bankruptcy law in context of fraudulent conveyances by permitting trustee to avoid foreclosure sale). The *Durrett* decision marks the first time that a court in a bankruptcy proceeding used the fraudulent conveyance concept to avoid a valid, regularly conducted, noncollusive foreclosure sale. G. NELSON & D. WHITMAN, REAL ESTATE FINANCE LAW § 8.16(1)(a) (2d ed. 1985).

A mortgage foreclosure sale ends the debtor's equity of redemption. *Id.* § 7.5. A debtor's equity of redemption is a debtor's right after default to perform his obligation under the mortgage and to recover clear title to the property. *Id.* § 7.1. To be valid, however, the foreclosure sales must conform to the standards established by state statute. *Id.* § 7.16. Generally, state statutes provide that notice to all creditors must precede the foreclosure sale and that a sheriff or officer of the court must direct the foreclosure sale. *Id.*

In addition to regulating the conduct at the foreclosure sale, state statutes govern the type of foreclosure which the mortgagee-creditor may seek. *Id.* A judicial foreclosure in equity is the most common method of foreclosure. *Id.* Judicial foreclosure, although available in every state and the predominant method of foreclosure in half of the states, is also the most complex and lengthy foreclosure process. *Id.* A judicial foreclosure in equity includes a preliminary title search, a filing of a foreclosure complaint, service of process, a hearing, a decree or judgment, a notice of sale, a sale and issuance of a certificate of sale, a report of sale, a determination of right of surplus, possible redemptions, and an entry of decree for deficiency. *Id.*

The second most common method of foreclosure is the power of sale. *Id.* § 7.19. The deed of trust is the most common mortgage instrument containing the power of sale. *Id.* In the deed of trust, the debtor conveys the property to a trustee who holds legal title to the property in trust for the benefit of the debtor until the debtor has paid his debt in full. *Id.* If the debtor defaults on his payments, the trustee exercises his power of sale by holding a public sale of the property. *Id.* The power of sale requirements are much less stringent than the requirements of judicial foreclosure. *Id.* Unlike the judicial foreclosure, the power of sale foreclosure generally does not require a hearing, and notice simply may be notice of default. *Id.*

10. *Compare* Durrett v. Washington Nat'l Ins. Co., 621 F.2d 201, 204 (5th Cir. 1980)(proposing 70% of fair market value standard), Perdido Bay Country Club Estates, Inc. v. Equitable Trust Co. (*In re* Perdido Bay Country Club Estates, Inc.), 23 Bankr. 36, 39 (Bankr. S.D. Fla. 1982)(debtor receives less than reasonably equivalent value when purchase price is 57.7% of fair market value of property), Carr v. DeMusis (*In re* Carr), 34 Bankr. 653, 656-57 (Bankr. D. Conn. 1983)(purchase price of 31% of fair market value of property does not constitute reasonably equivalent value), *aff'd*, 40 Bankr. 1007 (D. Conn. 1984), *and* Coleman v. Home Sav. Ass'n (*In re* Coleman), 21 Bankr. 832, 834 (Bankr. S.D. Tex. 1982)(purchase price of less than 70% of fair market value of property does not constitute reasonably equivalent value); *with* Lawyers Title Ins. Corp. v. Madrid (*In re* Madrid), 21 Bankr. 424, 427 (Bankr. 9th Cir. 1982)(proposing bankruptcy standard of avoiding transfers under state foreclosure law that mere inadequacy of price, without fraud, oppression, or unfairness, will not justify setting aside foreclosure sale), *aff'd*, 725 F.2d 1197 (9th Cir.), *cert. denied*, 469 U.S. 833 (1984); *In re* Winshall Settlor's Trust, 758 F.2d 1136, 1139 (6th Cir. 1985) (adopting *Madrid* court standard that mere inadequacy of price is insufficent to justify avoiding foreclosure sale), Strauser v. Veterans Admin. (*In re* Strauser), 40 Bankr. 868, 869-70 (Bankr. N.D. Ohio 1984)(adopting conclusive presumption of reasonable equivalence at regularly conducted foreclosure sale), *and* William v. Travelers Ins. Co. (*In re* William), 39

In *Durrett v. Washington National Insurance Co.*[11] the United States Court of Appeals for the Fifth Circuit defined reasonably equivalent value for purposes of foreclosure sales as an amount that equalled or exceeded seventy percent of the fair market value of the debtor's property interest.[12] In *Durrett* a third party purchaser bought the debtor's property interest at a nonjudicial foreclosure sale for 57.7 percent of the fair market value of the property.[13] Nine days after the foreclosure sale the debtor, Durrett, filed a petition in bankruptcy.[14] Subsequently, Durrett, as plaintiff debtor-in-possession, petitioned the United States District Court for the Northern District of Texas to avoid the foreclosure sale under section 67(d) of the Chandler Act of 1938.[15] Concluding that the foreclosure sale purchase price was a fair equivalent of the property interest, the district court refused to avoid the foreclosure sale. Durrett appealed to the Fifth Circuit.[16] On appeal the Fifth Circuit in *Durrett* noted that it could not find a court approving a transfer for less than seventy percent of the fair market value of the property.[17] The Fifth Circuit held that, accordingly, the foreclosure sale of the debtor's interest constituted a fraudulent conveyance under section 67(d) of the Chandler Act.[18] Therefore, the Fifth Circuit in *Durrett* reversed the

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Bankr. 678, 680 (Bankr. D. Minn. 1984)(inadequacy of price insufficient grounds for challenging regularly conducted foreclosure sale); *with* First Fed. Sav. & Loan Ass'n of Bismarck v. Hulm (*In re* Hulm), 738 F.2d 323, 327 (8th Cir.)(requiring case-by-case analysis of facts and circumstances of each transfer), *cert. denied*, 469 U.S. 990 (1984). Ruebeck v. Attleboro Sav. Bank (*In re* Ruebeck), 585 Bankr. 163, 168 (Bankr. D. Mass. 1985)(avoiding foreclosure sale by determining reasonable equivalence on case-by-case approach), Adwar v. Capgro Leasing Corp. (*In re* Adwar), 55 Bankr. 111, 115 (Bankr. E.D.N.Y. 1985)(court must determine reasonable equivalence through factual analysis on case-by-case basis), *and* Lower Downtown Assocs. v. Brazosbanc Sav. Ass'n of Texas (*In re* Lower Downton Assocs.), 52 Bankr. 662, 666 (Bankr. D. Colo. 1985)(reasonable equivalence depends on many factors, not formula); *with In re* Ristich, 57 Bankr. 568, 577 (Bankr. N.D. Ill. 1986)(distinguishing between types of foreclosure sale purchasers before deciding on standard to apply to determine reasonably equivalent value).

11. 621 F.2d 201 (5th Cir. 1980).

12. *Id.* at 203.

13. *Id.* The trial court in *Durrett v. Washington National Insurance Co.* found that the fair market value of the property was 200,000.00 dollars. *Id.* The trial court also found that by buying the property for 115,400.00 dollars at the foreclosure sale, the purchaser deprived the bankrupt's estate of 84,600.00 dollars in equity. *Id.*

14. *Id.* at 202. In *Durrett* the trustee under the debtor's deed of trust exercised his power to foreclose on the debtor's property and conducted a foreclosure sale on January 4, 1977. *Id.* at 202-203. On January 13, 1977, the debtor filed a petition in bankruptcy under Chapter 11 of the Bankruptcy Act. *Id.* at 202 n.1.

15. *Id.*; *see supra* note 1 (section 548 of Bankruptcy Code replaced § 67(d) of Chandler Act).

16. Durrett v. Washington Nat'l Ins. Co., 621 F.2d 201, 202 (5th Cir. 1980). In *Durrett* the district court concluded that the nonjudicial foreclosure sale constituted a transfer within the meaning of section 67(d) of the Chandler Act. *Id.* The district court held that, nonetheless, the foreclosure sale purchase price was a fair consideration. *Id.*

17. *Id.* at 203.

18. *Id.* at 204. The United States Court of Appeals for the Fifth Circuit in *Durrett* found that the foreclosure sale purchase price was not a fair equivalent for the property conveyed. *Id.*

district court's decision and ordered the district court to avoid the transfer under section 67(d) of the Chandler Act.[19]

Declining to adopt the seventy percent standard suggested by the Fifth Circuit in *Durrett*, the United States Bankruptcy Appellate Panel for the Ninth Circuit in *Lawyers Title Insurance Co. v. Madrid (In re Madrid)*[20] equated reasonably equivalent value in section 548(a) of the Bankruptcy Code with the forum state's foreclosure law standard for reasonable equivalence.[21] In *Madrid* a third party purchaser at a nonjudicial foreclosure sale paid 80,224.00 dollars for the debtor's property, which had a fair market value of approximately 380,000.00 dollars at the time of the sale.[22] Within a week after the foreclosure sale, Madrid, as debtor, filed a petition in bankruptcy and, as plaintiff debtor-in-possession, successfully urged the United States Bankruptcy Court of the Ninth Circuit to avoid the foreclosure sale as a fraudulent conveyance under section 548(a).[23] Subsequently, the third party purchaser appealed to the Bankruptcy Appellate Panel.[24] On appeal the Bankruptcy Appellate Panel in *Madrid* applied the law of Nevada, the forum state, to determine reasonably equivalent value at the foreclosure sale.[25] The *Madrid* court noted that under Nevada foreclosure law mere

19. *Id.* The Fifth Circuit in *Durrett* remanded the case and directed a rescission of the foreclosure sale under section 67(d) of the Chandler Act in a manner that would protect the foreclosure sale purchaser's equity in the property. *Id.*

20. 21 Bankr. 424 (Bankr. 9th Cir. 1982).

21. *Id.* at 427. The Bankruptcy Appellate Panel in *Lawyers Title Insurance Co. v. Madrid (In re Madrid)* questioned whether the standard used in *Durrett* should apply to regularly conducted public foreclosure sales. *Id.* at 426. Noting that state foreclosure law should be in harmony with fraudulent conveyance law, the *Madrid* court construed the reasonably equivalent value standard in section 548(a) to mean that the consideration received at a noncollusive and regularly conducted foreclosure sale was a reasonably equivalent value. *Id.* at 427.

22. *Id.* at 425. In *Madrid* the defendant, debtor Madrid, purchased property for 290,000.00 dollars. *Id.* Madrid gave the seller 125,000.00 dollars in cash and executed a note secured by a deed of trust for 165,000.00 dollars. *Id.* Madrid raised the cash for the purchase with another note for 142,500.00 dollars secured by a second deed of trust. *Id.* When debtor Madrid defaulted on her payments on the second note, the trustee under the deed of trust conducted a foreclosure sale. *Id.* At the foreclosure sale, Madrid owed 175,000.00 dollars on the first deed of trust and 80,224.00 dollars on the second deed of trust. *Id.* The fair market value of the property was approximately 380,000.00 dollars. *See id.*(noting that Madrid's total indebtedness and also third party purchaser's bid were approximately 67% of fair market value of property). The foreclosure sale purchaser bought the property for 80,224.00 dollars subject to the first deed of trust for 175,000.00 dollars. *Id.*

23. *Id.* In *Madrid* the debtor filed a petition in bankruptcy under Chapter 11 of the Bankruptcy Code on January 16, 1981. *Id.* Debtor Madrid argued that the court should avoid the foreclosure sale because the sale did not comply with Nevada law and the sale constituted a fraudulent conveyance under section 548(a) of the Bankruptcy Code. *Id.* The trial court found that the foreclosure sale satisfied Nevada foreclosure law but that the foreclosure sale constituted a fraudulent conveyance. *Id.* Relying on the *Durrett* court's seventy percent standard, the bankruptcy court rescinded the foreclosure sale because the foreclosure sale purchase price was approximately sixty-seven percent of the property's fair market value. *Id.*

24. *Id.*

25. *Id.* at 427. In *Madrid* the Bankruptcy Appellate Panel rejected the *Durrett* standard

inadequacy of price is not sufficient justification to avoid a foreclosure sale.[26] The Bankruptcy Appellate Panel in *Madrid* held that, accordingly, under Nevada law the consideration received at the foreclosure sale satisfied the reasonably equivalent value requirement of section 548(a) because the foreclosure sale was noncollusive and regularly conducted.[27] Thus, the Bankruptcy Appellate Panel in *Madrid* reversed the bankruptcy court's judgment that avoided the foreclosure sale as a fraudulent conveyance.[28]

The United States Court of Appeals for the Eighth Circuit in *First Federal Savings & Loan Association of Bismarck v. Hulm (In re Hulm)*[29] disagreed with the *Madrid* court's state foreclosure law standard for determining reasonable equivalence at foreclosure sales and disregarded the *Durrett* court's seventy percent standard.[30] Instead, the Eighth Circuit directed the bankruptcy court to determine reasonably equivalent value at foreclosure sales by conducting evidentiary hearings on the facts and circumstances surrounding each foreclosure sale.[31] In *Hulm* mortgagee First Federal purchased the debtor's property interest at a foreclosure sale.[32] Seventeen days after the foreclosure sale debtor Hulm filed a petition in bankruptcy.[33] First Federal, as plaintiff-foreclosure sale purchaser, petitioned the United States Bankruptcy Court for the District of North Dakota to exclude the foreclosed property from the bankrupt debtor's estate.[34] Debtor Hulm unsuccessfully defended by claiming that the foreclosed property was part of the bankruptcy estate.[35] Reversing the bankruptcy court's use of the *Madrid* standard, the United States District Court for the District of North

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because the Fifth Circuit in *Durrett* relied on only one case to support its holding, and the one case on which the *Durrett* court relied involved a voluntary, private transfer of realty. *Id.* at 426. The transfer in *Madrid*, however, was a regularly conducted foreclosure sale. *Id.*

26. *See id.* at 427 (citing *Golden v. Tomiyasu*, 79 Nev. 503, 387 P.2d 989 (1963) and *Oller v. Sonoma County Land Title Co.*, 137 Cal. App. 2d 633, 290 P.2d 880 (1955)). The Bankruptcy Appellate Panel in *Madrid* noted that under Nevada law mere inadequacy of price, unaccompanied by fraud, oppression, or unfairness, is not sufficient justification to set aside a foreclosure sale. Lawyers Title Ins. Corp. v. Madrid (*In re* Madrid), 21 Bankr. at 427. The *Madrid* court reasoned that a regularly conducted foreclosure sale, open to all bidders and creditors, would protect creditors from debtors' collusive transfers. *Id.*

27. *Id.*

28. *Id.*

29. 738 F.2d 323 (8th Cir.), *cert. denied*, 469 U.S. 833 (1984).

30. *Id.* at 327.

31. *Id.*

32. *Id.* at 325. In *First Federal Savings & Loan Association of Bismarck v. Hulm* (*In re* Hulm), debtor Hulm secured a note for 61,000.00 dollars with a mortgage from First Federal. *Id.* When the debtor defaulted on his payment, the creditor mortgagee forclosed on the mortgage. *Id.* At the foreclosure sale the creditor mortgagee purchased the debtor's property for 64,443.64 dollars. *Id.*

33. *Id.*

34. *Id.* In *Hulm* First Federal sought a judicial determination that the foreclosed property was not an asset of the bankruptcy estate. *Id.*

35. *Id.* Rejecting debtor Hulm's argument, the bankruptcy court in *Hulm* held that, absent proof of fraud or collusion, the purchase price at a judicial foreclosure sale was, as a matter of law, a reasonably equivalent value for the property conveyed. *Id.*

Dakota concluded, without conducting an evidentiary hearing, that the foreclosure sale purchaser paid a reasonably equivalent value for the property conveyed at a foreclosure sale.[36] Defendant Hulm's trustee appealed the district court's finding to the Eighth Circuit.[37] On appeal the Eighth Circuit rejected the lower courts' findings of reasonably equivalent value.[38] The Eighth Circuit reasoned that a bankruptcy court cannot find automatically that a debtor received reasonable equivalence at a regularly conducted foreclosure sale.[39] Accordingly, the Eighth Circuit in *Hulm* ordered the bankruptcy court to determine at an evidentiary hearing of the facts and circumstances whether the foreclosure sale price was a reasonably equivalent value for the property transferred.[40]

The United States Bankruptcy Court for the Northern District of Illinois in *In re Ristich*[41] declined to adopt the *Durrett* court's seventy percent standard and the *Hulm* court's evidentiary hearing requirement.[42] Instead, the *Ristich* court adopted a modified version of the state foreclosure law standard suggested by the Bankruptcy Appellate Panel in *Madrid*.[43] In *Ristich* creditor First National Bank of Schiller Park purchased debtor Ristich's property at a foreclosure sale.[44] The creditor never obtained legal

36. *See id.* at 325-26 (discussing district court's opinion).

37. *Id.* at 325. The district court in *Hulm* found that the foreclosure sale purchaser paid a reasonably equivalent value for the property. *Id.* Neither the bankruptcy court, which applied the state foreclosure law standard suggested in *Madrid*, nor the district court conducted an evidentiary hearing to determine reasonable equivalence. *Id.* at 325-26.

38. *Id.* at 327.

39. *Id.*

40. *Id.*

41. 57 Bankr. 568 (Bankr. N.D. Ill. 1986).

42. *Id.* at 577. The bankruptcy court in *In re Ristich* rejected the *Durrett* seventy percent standard and the *Hulm* case-by-case standard because of the potential harm to the mortgage market and to title stability. *Id.* The *Ristich* court expressed concern that the risk of trustees' avoiding foreclosure sales would discourage potential third party purchasers from bidding at foreclosure sales, that trustees of bankrupt debtors would avoid foreclosure sales long after the statutory redemption period had expired, and that lenders would depress the real estate market by being less willing to lend money. *Id.*

43. *Id.* at 577-78; Lawyers Title Ins. Co. v. Madrid (*In re* Madrid), 21 Bankr. 424, 427 (Bankr. 9th Cir. 1982). The *Ristich* court adopted a conclusive presumption of reasonable equivalence at foreclosure sales, absent fraud or collusion, when the purchaser was an independent third party. *In re* Ristich, 57 Bankr. 568, 577 (Bankr. N.D. Ill. 1986). The *Ristich* court noted that the conclusive presumption protects both debtor and purchaser. *Id.* at 577-78. The *Ristich* court adopted the *Madrid* state foreclosure law standard, however, when the purchaser was the creditor. *Id.* at 578; Lawyers Title Ins. Co. v. Madrid (*In re* Madrid), 21 Bank. at 427. The *Ristich* court noted that the *Madrid* standard protects debtors from foreclosure sale irregularities. *Ristich*, 57 Bankr. at 578; Lawyers Title Ins. Co. v. Madrid (*In re* Madrid), 21 Bank. at 427.

44. *Ristich*, 57 Bankr. at 570. In *Ristich* creditor First National Bank of Schiller Park sought foreclosure of two of debtor Ristich's mortgages. *Id.* The Circuit Court of Cook County, Illinois, entered a judgment of foreclosure and scheduled a sheriff's sale of the property on August 8, 1984. *Id.* On August 7, 1984, however, debtor Ristich filed a Chapter 13 bankruptcy petition that prevented the foreclosure sale. *Id.* After the bankruptcy court dismissed Ristich's petition, the creditor purchased the property at the sheriff's sale. *Id.*

title to the foreclosed property, however, because debtor Ristich filed a petition in bankruptcy.[45] To obtain legal title to the property, the creditor urged the bankruptcy court to dismiss the debtor's bankruptcy petition.[46] In response, the bankrupt debtor Ristich contended that the foreclosure sale constituted a fraudulent transfer and that, therefore, the property was part of the bankruptcy estate.[47]

In deciding the standard for determining reasonable equivalence, the *Ristich* court distinguished between third party purchasers and creditor purchasers.[48] The *Ristich* court held that if the purchaser is an independent third party, a conclusive presumption of reasonable equivalence would exist, absent a showing of fraud or collusion.[49] The *Ristich* court held that if the purchaser is the creditor, however, state foreclosure law would determine reasonable equivalence as suggested by the *Madrid* court.[50] Finding that the foreclosure sale purchaser in *Ristich* was the creditor, the *Ristich* court determined reasonable equivalence under state law.[51] The *Ristich* court noted that under Illinois law, the law of the forum state, proof of mistake, accident, surprise, misconduct, or irregularity must accompany mere inadequacy of price to avoid a foreclosure sale.[52] Finding that the bankrupt debtor failed to prove lack of reasonable equivalence under the state law standard, the *Ristich* court did not avoid the foreclosure sale to the creditor purchaser.[53] The *Ristich* court, rather, allowed the creditor to obtain legal title to the property purchased at the foreclosure sale.[54]

Although courts have developed four different standards for determining reasonable equivalence at foreclosure sales, none of the standards is completely satisfactory. Although followed by many courts,[55] the *Durrett* seventy

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45. *Id.* In *Ristich* the debtor filed a second Chapter 13 bankruptcy petition on April 15, 1985, two days before the statutory redemption period expired and two days before the sheriff could issue the deed for the foreclosed property to the foreclosure sale purchaser. *Id.* The petition prevented the sheriff from issuing the deed. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 577-78.

49. *Id.* at 577; *see infra* notes 111-116 and accompanying text (explaining how conclusive presumption protects both debtors and foreclosure sale purchasers). In *Ristich* the bankruptcy court conditioned the conclusive presumption on independent third party purchasers' providing cash at the foreclosure sale and waiting for the statutory redemption period to expire. *Ristich*, 57 Bankr. at 577.

50. *Ristich*, 57 Bankr. at 578.

51. *Id.*

52. *See id.*(citing *Block v. Hooper*, 318 Ill. 182, 185, 149 N.E. 21, 22 (1925)).

53. *Ristich*, 57 Bankr. at 578.

54. *Id.*

55. *See, e.g.*, Federal Nat'l Mortgage Ass'n v. Wheeler (*In re* Wheeler), 34 Bankr. 818, 821 (Bankr. N.D. Ala. 1983)(debtor receives less than reasonably equivalent value when foreclosure sale purchase price is below 70% of fair market value of property); Carr v. DeMusis (*In re* Carr), 34 Bankr. 653, 656-57 (Bankr. D. Conn. 1983) (foreclosure sale purchase price of 31% of fair market value of property is less than reasonably equivalent value), *aff'd*, 40 Bankr. 1007 (D. Conn. 1984); Coleman v. Home Sav. Ass'n (*In re* Coleman), 21 Bankr. 832, 834 (Bankr. S.D. Tex. 1982)(foreclosure sale purchase price that is less than 70% of property's fair market value is not reasonably equivalent value).

percent standard is unsatisfactory because courts applying the percentage standard arbitrarily prevent trustees from maximizing the equity of bankrupt debtors' estates.[56] The *Durrett* seventy percent standard also may be objectionable as too rigid a formula.[57] Moreover, courts applying the *Durrett* standard do not recognize that the forced nature of the foreclosure market and the different degrees of states' prebankruptcy protection lead to unjust results and to lower foreclosure sale purchase prices.[58]

The *Durrett* seventy percent standard is unsatisfactory because courts apply the standard too rigidly.[59] Foreclosure sale purchase prices may be only slightly greater than seventy percent of the fair market value of the property. If so, based on a rigid percentage figure, courts would prevent trustees from avoiding foreclosure sales as fraudulent transfers.[60] By not permitting trustees to avoid foreclosure sales that yield only slightly more than seventy percent of fair market value, the seventy percent standard

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56. *See* Ruebeck V. Attleboro Sav. Bank (*In re* Ruebeck), 55 Bankr. 163, 167 (Bankr. D. Mass. 1985)(rigidity of *Durrett* standard prevents trustees from maximizing creditors' interests in bankruptcy estate); Adwar v. Capgro Leasing Corp. (*In re* Adwar), 55 Bankr. 111, 113 (Bankr. E.D.N.Y. 1985)(*Durrett* standard fails to consider mitigating circumstances of foreclosure sales and state's statutory redemption rights); White v. Luton (*In re* White), 47 Bankr. 98, 101 (Bankr. S.D. Tex. 1985)(*Durrett* standard fails to produce desirable and reliable results because of effect on mortgage lending); Davis & Standiford, *Foreclosure Sale as Fraudulent Transfer Under the Bankruptcy Code: A Reasonable Approach to Reasonably Equivalent Value*, 13 REAL EST. L.J. 203, 225-27 (1985)(*Durrett* standard is harsh and fails to consider nature of foreclosure sales); Note, *supra* note 1, at 278-80 (expressing concern over detrimental effects of *Durrett*'s de facto right of redemption on state foreclosure policies and on real estate markets); *see also supra* note 4 and accompanying text (discussing Congress' intent in enacting Bankruptcy Code and § 548 to maximize equity of bankruptcy estate for creditor's benefit).

57. Ruebeck v. Attleboro Sav. Bank (*In re* Ruebeck), 55 Bankr. 163, 167 (Bankr. D Mass. 1985); Lawyers Title Ins. Corp. v. Madrid (*In re* Madrid), 21 Bankr. 424, 427 (Bankr. 96th Cir. 1982); *aff'd*, 725 F.2d 1197 (9th Cir.), *cert. denied*, 469 U.S. 833 (1984); *see infra* notes 59-62 and accompanying text (examining how *Durrett* standard is too rigid).

58. *See* Adwar v. Capgro Leasing Corp. (*In re* Adwar), 55 Bankr. 111, 113-14 (Bankr. E.D.N.Y. 1985)(discussing problems of applying *Durrett* standard); Zinman, *supra* note 1, at 1004-07 (same); *infra* notes 63-69 and accompanying text (discussing problems arising from nature of foreclosure sales and differences in prebankruptcy protections).

59. Ruebeck v. Attleboro Sav. Bank (*In re* Ruebeck), 55 Bankr. 163, 167-68 (Bankr. D. Mass. 1985).

60. *See id.*(expressing concern about "70% litmus test" proposed in *Durrett*). To apply the *Durrett* standard, a court first determines the fair market value of the property. *See* Perdido Bay Country Club Estates, Inc. v. Equitable Trust Co. (*In re* Perdidio Bay Country Club Estates, Inc.), 23 Bankr. 36, 40 (Bankr. S.D. Fla. 1982)(finding maximum fair market value of property at $11.2 million). After determining the fair market value, a court determines whether the purchase price at the foreclosure sale was seventy percent of the fair market value. *Id.* If the foreclosure sale purchase price exceeds seventy percent of the fair market value of the property, the court does not avoid the foreclosure sale. *See id.*(finding that purchase price of $7.9 million was more than 70% fair market value of $11.2 million). If the foreclosure sale purchase price is less than seventy percent of the property's fair market value, however, the court avoids the foreclosure sale as a fraudulent conveyance. *See* Durrett v. Washington Nat'l Ins. Co., 621 F.2d 201, 203 (5th Cir. 1980)(avoiding foreclosure sale because foreclosure sale purchase price was only 57.7% of fair market value of property).

reduces the realizable equity of the bankruptcy estate[61] and undermines the purpose of the Bankruptcy Code to protect the creditors' interests in the bankruptcy estate.[62]

Furthermore, the *Durrett* seventy percent standard is undesirable because it fails to recognize the reality that debtors naturally receive lower purchase prices at foreclosure sales than at retail sales. Courts applying the *Durrett* standard use fair market value rather than foreclosure market value to determine reasonable equivalence.[63] Yet, the benchmark for fair market value is the retail market, and foreclosure sales, as forced sales, normally yield purchase prices lower than retail purchase prices.[64] By applying the seventy percent standard to the retail market price rather than to the wholesale market price at foreclosure sales, courts unfairly determine whether debtors receive less than a reasonably equivalent value for their property interests.[65] Furthermore, property values vary substantially from one city to another because the relative strengths of the foreclosure market and of the retail market differ among cities.[66] Thus, if applied to all potentially

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61. Henning, *An Analysis of* Durrett *and Its Impact on Real and Personal Property Foreclosures: Some Proposed Modifications*, 63 N.C.L. Rev. 257, 284 (1985)(to avoid foreclosure sales under *Durrett*, trustees potentially lose 30% of property value from equity of bankruptcy estate). The *Durrett* percentage standard is unfair because courts applying the percentage standard automatically will avoid a foreclosure sale yielding only slightly less than seventy percent of fair market value when, in fact, the bid price may have been the highest possible price in the context of the foreclosure market. *See* Lawyers Title Ins. Corp. v. Madrid (*In re* Madrid), 21 Bankr. 424, 425 (Bankr. 9th Cir.)(noting that bandruptcy court in applying *Durrett* seventy percent standard avoided foreclosure sale yielding 67% of property's fair market value), *aff'd.* 725 F.2d 1197 (9th Cir.), *cert. denied*, 469 U.S. 833 (1984). Conversely, courts will not avoid foreclosure sales yielding slightly more than seventy percent of fair market value when, in fact, the property has a much greater foreclosure market value. If, hypothetically, the foreclosure sale in *Madrid* had yielded seventy-one percent of the property's fair market value, a court applying the *Durrett* standard would not have avoided the foreclsoure sale. Thus, a court would deny the trustee the opportunity to maximize the potential equity for the benefit of the creditors although the foreclosure sale price only slightly exceeded a percentage of fair market value.

62. *See supra* note 4 and accompanying text (discussing Congressional intent for enacting Bankruptcy Code and § 548 to maximize equity of bankruptcy estate for creditors' benefit).

63. *See supra* note 60 (explaining how courts apply *Durrett* seventy percent standard).

64. Adwar v. Capgro Leasing Corp. (*In re* Adwar), 55 Bankr. 111, 113 (Bankr. E.D.N.Y. 1985). Because foreclosure sales are forced sales, the market of foreclosure sales is similar to the wholesale market. *Id.*

65. *See id.* (concluding that reasonable equivalence at foreclosure sale should turn on foreclosure market value, rather than retail value of property).

66. *Id.* In *Adwar v. Capgro Leasing Corp. (In re Adwar)*, the United States Bankruptcy. Court for the Eastern District of New York noted that a foreclosure market in a city may be very strong, with foreclosure sales consistently yielding purchase prices of ninety percent of fair market value. *Id.* The *Adwar* court found that another city, however, may have a weak foreclosure market that regularly yields purchase prices of less than fifty percent of fair market value. *Id.* The *Adwar* court concluded that to apply the *Durrett* standard in either situation would be unfair because reasonably equivalent value would not depend on the foreclosure sale market in each city. *Id.*

avoidable foreclosure sales, the *Durrett* seventy percent standard for determining whether a foreclosure sale was a fraudulent transfer is patently unfair.

Finally, the *Durrett* standard is unsatisfactory because prebankruptcy protections that affect foreclosure sale prices vary among states. Some states, for example, offer debtors extra protection by providing them a statutory redemption period.[67] In states that offer debtors additional statutory protection, foreclosure sale purchasers risk losing newly purchased realty. Consequently, the purchase prices in the states granting a statutory right of redemption are less than the prices in states where the risks of purchase are lower.[68] Courts in the states that offer debtors greater protection, therefore, systematically avoid the greatest number of foreclosure sales because the purchase prices are more likely to fall below seventy percent of fair market value.[69]

Like the *Durrett* seventy percent standard, the state foreclosure law standard of *Madrid* is an unsatisfactory method for determining whether the foreclosure sale purchase price is a reasonably equivalent value for the interest in property transferred.[70] In applying the state foreclosure law standard of *Madrid*, courts are responding to policy considerations to which Congress, not the judiciary, should respond.[71] In addition, the *Madrid* standard proscribes thorough factual inquiry into the circumstances of each foreclosure sale and thus prevents courts from determining reasonable equivalence from an analysis of all the facts of a foreclosure sale.[72] Furthermore, courts applying the *Madrid* state foreclosure law standard do not

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67. *Id.* The statutory right of redemption permits a debtor to cure defaults by repurchasing foreclosed property for the foreclosure sale purchase price plus incidental foreclosure costs. G. NELSON & D. WHITMAN, *supra* note 9, § 7.1. The length of the statutory redemption period varies from state to state. *See, e.g.*, COLO. REV. STAT. §§ 38-38-102, 38-39-102, 38-39-103 (1982)(75 days); MICH. COMP. LAWS ANN. § 600.3140 (1968)(six months); MINN. STAT. ANN. § 580.23 (West 1947)(12 months); TENN. CODE ANN, § 66-8-102 (1982)(two years).

68. *See* Zinman, *supra* note 1, at 1006 n.142 (noting that statutory right of redemption is "double-edged blade" because it protects debtors from sacrificing equity but also harms debtors by reducing foreclosure sale purchase prices).

69. Adwar v. Capgro Leasing Corp. (*In re* Adwar), 55 Bankr. 111, 113 (Bankr. E.D.N.Y. 1985).

70. First Fed. Sav. & Loan Ass'n of Bismarck v. Hulm (*In re* Hulm), 738 F.2d 323, 327 (8th Cir.), *cert. denied*, 469 U.S. 990 (1984); Ruebeck v. Attleboro Sav. Bank (*In re* Ruebeck), 55 Bankr. 163, 167 (Bankr. D. Mass. 1985); Adwar v. Capgro Leasing Corp. (*In re* Adwar), 55 Bankr. 111, 114 (Bankr. E.D.N.Y. 1985); Hoffman v. Heritage Sav. & Loan Ass'n (*In re* Garrison), 48 Bankr. 837, 840 (Bankr. D. Colo. 1985); Frank v. Berlin (*In re* Frank), 39 Bankr. 166, 175 (Bankr. E.D.N.Y. 1984).

71. First Fed. Sav. & Loan Ass'n of Bismarck v. Hulm (*In re* Hulm), 738 F.2d 323, 327 (8th Cir.), *cert. denied*, 469 U.S. 990 (1984); *see infra* notes 76-78 and accompanying text (discussing whether courts should address policy concerns).

72. Ruebeck v. Attleboro Sav. Bank (*In re* Ruebeck), 55 Bankr. 163, 167 (Bankr. D. Mass. 1985); Frank v. Berlin (*In re* Frank), 39 Bankr. 166, 175 (Bankr. E.D.N.Y. 1984); *see infra* notes 79-84 and accompanying text (discussing restrictions imposed by *Madrid* standard).

allow trustees to avoid foreclosure sales for price inadequacy, while under the Bankruptcy Code obtaining less than a reasonably equivalent value at foreclosure sales is sufficient to avoid a transfer.[73] Moreover, an implicit characteristic of the *Madrid* standard, the good faith requirement, directly contradicts the intent of Congress to eliminate trustees' proving bad faith of the parties to fraudulent transfers.[74] Additionally, the *Madrid* state foreclosure law standard is unfair because the degree of protection in the context of foreclosure sales varies among states.[75]

In applying the state foreclosure law standard, the *Madrid* court apparently was responding to policy concerns expressed in *Alsop v. Alaska (In re Alsop).*[76] In *Alsop,* the United States Bankruptcy Court for the District of Alaska noted that permitting trustees to avoid foreclosure sales would have detrimental effects on the stability of titles purchased at foreclosure sales, on the participation at foreclosure sales, and on the marketability of property at foreclosure sales.[77] Although the *Alsop* court presented

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73. Adwar v. Capgro Leasing Corp. (*In re* Adwar), 55 Bankr. 111, 113 (Bankr. E.D.N.Y. 1985); *see infra* notes 85-89 and accompanying text (comparing grounds for avoiding foreclosure sale under Bankruptcy Code and state foreclosure law).

74. Adwar v. Capgro Leasing Corp. (*In re* Adwar), 55 Bankr. 111, 114 (Bankr. E.D.N.Y. 1985); *see infra* notes 90-92 and accompanying text (examining erroneous assumption of *Madrid* standard).

75. Adwar v. Capgro Leasing Corp. (*In re* Adwar), 55 Bankr. 111, 113-14 (Bankr. E.D.N.Y. 1985); *see infra* notes 67-69 and accompanying text (discussing differences in state foreclosure laws).

76. *See* Alden, Gross & Borowitz, *Real Property Foreclosure as a Fraudulent Conveyance: Proposals for Solving the* Durrett *Problem,* 38 BUS. LAW. 1605, 1613-14 (1983)(suggesting that Bankruptcy Appellate Panel wanted to avoid decreased participation at foreclosure sales)[hereinafter Alden]; *see also* Alsop v. Alaska (*In re* Alsop), 14 Bankr. 982, 987 (Bankr. D. Alaska 1981)(noting *Durrett*'s effect of decreased participation at foreclosure sales), *aff'd,* 22 Bankr. 1017 (D. Alaska 1982).

77. Alsop v. Alaska (*In re* Alsop), 14 Bankr. 982, 987 (Bankr. D. Alaska 1981), *aff'd,* 22 Bankr. 1017 (D. Alaska 1982). Each state has an interest in maintaining the stability of titles. Accordingly, some states refuse to grant statutory rights of redemption to debtors who have been subject to foreclosure. *See* CAL. CIV. PROC. CODE § 725a (West Supp. 1983)(state's legislature recently abolishing right of redemption). Permitting a trustee to avoid a sale as a fraudulent transfer effectively would be granting the debtor a de facto right of redemption. *Alsop,* 14 Bankr. at 987. Stability of titles purchased at foreclosure sales would decrease because trustees could avoid foreclosure sales for three years after the foreclosure sale. Goodman, *supra* note 1, at 280 (noting that trustee may avoid transfer if debtor filed bankruptcy petition within one year after foreclosure sale and that court has maximum of two years after debtor files petition in bankruptcy to appoint trustee). The de facto right of redemption, therefore, is precisely what states are trying to avoid by declining to grant the statutory right of redemption to the debtor. *Id.* at 281.

The *Alsop* court noted that the possibility of a trustee's avoiding a foreclosure sale also will decrease participation at foreclosure sales. *Alsop,* 14 Bankr. at 987. Furthermore, the instability of titles resulting from the possibility of avoidance decreases the marketability of foreclosure sale transfers. Coppel & Kann, *Defanging* Durrett*: The Established Law of "Transfer,"* 100 BANKING L.J. 676, 677 (1983)(noting that purchasers are not as willing to buy property that may be taken from them at some future, indefinite time). With the decreased participation at foreclosure sales and the decreased marketability of property, the bidding at sound policy arguments, Congress, not the judiciary, should address policy considerations by amending the Bankruptcy Code.[78]

The *Madrid* state foreclosure law standard is also unsatisfactory because it proscribes thorough factual inquiry into the circumstances surrounding each transfer.[79] In applying the *Madrid* standard, courts do not consider all relevant facts to determine whether debtors received the highest possible foreclosure sale price. Instead, courts applying the *Madrid* state law standard limit trustees' challenges that debtors received less than a reasonably equivalent value to the propriety of the foreclosure proceedings.[80] Congress, however, authorized trustees to avoid transfers for less than a reasonably equivalent value to permit trustees to maximize the equity of the bankruptcy estate.[81] By refusing to consider the nature of the foreclosed property, the property's marketability, and the strength of the foreclosure market, courts often do not maximize the equity in the bankruptcy estate in determining whether the purchase price was a reasonably equivalent value for the property transferred.[82] By failing to maximize the estate's equity, the *Madrid* standard ignores the interests of all creditors in the debtor's assets.[83] Thus, the *Madrid* state foreclosure law standard fails to advance the objective of section 548.[84]

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foreclosure sales is less competitive. *Alsop*, 14 Bankr. at 987. Less competition results in lower purchase prices and a greater number of deficiency judgments against debtors. *See* Note, *supra* note 1, at 278 (explaining results of decreased foreclosure sale participation and decreased marketability of property). In turn, lower prices detrimentally affect creditors by not maximizing equity of the debtor's estate. *See supra* note 4 and accompanying text (discussing Congress' intent in enacting Bankruptcy Code to protect interests of creditors in bankruptcy estate). Thus, the decreased participation at foreclosure sales and the instability of titles resulting from the possibility of avoidance may have influenced the *Madrid* court to presume reasonable equivalence.

78. *See* First Fed. Sav. & Loan Ass'n of Bismarck v. Hulm (*In re* Hulm), 738 F.2d 323, 327 (8th Cir.)(court must enforce Bankruptcy Code and let Congress address policy considerations, which cannot affect courts' determining reasonable equivalence), *cert. denied*, 469 U.S. 990 (1984).

79. *See* Ruebeck v. Attleboro Sav. Bank (*In re* Ruebeck), 55 Bankr. 163, 167 (Bankr. D. Mass. 1985)(courts applying *Madrid* state foreclosure law fail to consider lender's goal at foreclosure sale of covering unpaid amount of loan and buyer's objectives of paying minimum price for property at foreclosure sale while obtaining stable title).

80. Frank v. Berlin (*In re* Frank), 39 Bankr. 166, 175 (Bankr. E.D.N.Y. 1984)(challenges at foreclosure sales include adequacy of notice, duress, and fraudulent or collusive conduct at foreclosure sale).

81. 11 U.S.C. § 548 (1982 & Supp. III 1985); *see supra* note 4 and accompanying text (discussing Congress' intent in enacting Bankruptcy Code).

82. *Compare* Zinman, *supra* note 1, at 1003-06 (foreclosure laws exist to protect mortgagors and creditor mortgagees) *with supra* note 4 and accompanying text (intent of Bankruptcy Code to protect interests of debtor's creditors).

83. *See* Frank v. Berlin (*In re* Frank), 39 Bankr. 166, 175 (Bankr. E.D.N.Y. 1984)(by applying state law and failing to avoid foreclosure sale yielding less than reasonably equivalent value, courts overlook interests of creditors).

84. *See supra* note 4 and accompanying text (explaining goals of Congress in enacting Bankruptcy Code to benefit creditors).

In addition to proscribing factual inquiry in each case, courts applying the *Madrid* court's state foreclosure law standard of reasonable equivalence prevent trustees from avoiding transfers of property for reasons permitted by section 548.[85] Unlike state foreclosure law, section 548(a) permits trustees to avoid transfers as fraudulent conveyances when debtors receive less than a reasonably equivalent value for their interests in property.[86] State foreclosure law does not permit trustees to avoid transfers for mere price inadequacy.[87] Under state law, therefore, trustees can avoid fewer transfers. Accordingly, although promoting stability of titles through a presumption of reasonable equivalence,[88] the *Madrid* state law standard undermines the Bankruptcy Code's objective of protecting the creditors' interests in the bankruptcy estate.[89]

Aside from failing to promote the objective of the Bankruptcy Code, the *Madrid* state law standard of reasonable equivalence, if applied to debtors in all states, is inherently unfair to creditors because some states grant debtors more protection through statutory rights of redemption than other states.[90] Because foreclosure laws vary among states,[91] courts applying

85. Adwar v. Capgro Leasing Corp. (*In re* Adwar), 55 Bankr. 111, 113 (Bankr. E.D.N.Y. 1985); *see* 11 U.S.C. § 548 (1982 & Supp. III 1985)(containing Bankruptcy Code's fraudulent transfer provisions). The fraudulent conveyance provision of section 548(a)(2) authorizes the debtor to avoid a transfer for price inadequacy. *Id.* at § 548(a)(2). Courts applying the *Madrid* standard do not permit trustees to avoid foreclosure sales simply for price inadequacy when the state law creates a presumption of reasonably equivalent value. *See, e.g.*, Lawyers Title Ins. Corp. v. Madrid (*In re* Madrid), 21 Bankr. 424, 427 (Bankr. 9th Cir. 1982)(under state foreclosure law mere inadequacy of price, without fraud, oppression, or unfairness, will not justify setting aside foreclosure sale), *aff'd*, 725 F.2d 1197 (9th Cir.), *cert. denied*, 469 U.S. 833 (1984); *In re* Winshall Settlor's Trust, 758 F.2d 1136, 1139 (6th Cir. 1985) (adopting *Madrid* court standard that mere inadequacy of price is insufficient to justify avoiding foreclosure sale), Strauser v. Veterans Admin. (*In re* Strauser), 40 Bankr. 868, 869-70 (Bankr. N.D. Ohio 1984) (adopting conclusive presumption of reasonable equivalence at regularly conducted foreclosure sale); *and* William v. Travelers Ins. Co. (*In re* William), 39 Bankr. 678, 680 (Bankr. D. Minn. 1984) (inadequacy of price insufficient grounds for challenging regularly conducted foreclosure sale).

86. 11 U.S.C. § 548(a)(2) (1982 & Supp. III 1985).

87. Lawyers Title Ins. Corp. v. Madrid (*In re* Madrid), 21 Bankr. 424, 427 (Bankr. 9th Cir. 1982)(referring to state law, court held that mere inadequacy of price is not sufficient justification to avoid foreclosure sale transfer), *aff'd*, 725 F.2d 1197 (9th Cir.), *cert. denied*, 469 U.S. 833 (1984).

88. *See* Alsop v. Alaska (*In re* Alsop), 14 Bankr. 982, 987 (Bankr. D. Alaska 1981)(disagreeing with *Durrett* standard because of effect on title stability), *aff'd*, 22 Bankr. 1017 (D. Alaska 1982). Of all the decisions using the *Madrid* standard, not one has allowed an avoidance as a fraudulent conveyance. *See, e.g.*, White v. Luton (*In re* White), 47 Bankr. 98, 101 (Bankr. S.D. Tex. 1985); Strauser v. Veterans Admin. (*In re* Strauser), 40 Bankr. 868, 870 (Bankr. N.D. Ohio 1984); Reinboldt v. Travelers Ins. Co. (*In re* Reinboldt), 39 Bankr. 678, 680 (Bankr. D. Mn. 1984).

89. *See supra* note 4 and accompanying text (discussing purpose of Bankruptcy Code to benefit creditors).

90. *See supra* notes 67-69 and accompanying text (discussing statutory rights of redemption).

91. *See generally* G. NELSON & D. WHITMAN, *supra* note 9, § 8.1-.8 (discussing generally

the *Madrid* standard must ascertain whether the foreclosure sale proceedings satisfy the foreclosure laws of the forum state. To allow courts to make a presumption of reasonable equivalence under the *Madrid* standard when laws of states vary so much would be unrealistic and unfair.[92]

In addition to ignoring differences in state laws, the *Madrid* standard contradicts the unambiguous intent of Congress. Courts applying the *Madrid* standard to determine reasonable equivalence under section 548 assume that the parties at foreclosure sales acted in good faith.[93] By assuming the parties' good faith, however, the *Madrid* standard contradicts the intent of Congress, which deleted the good faith test from section 548 of the Bankruptcy Code.[94] Congress deleted the good faith requirement because triers of fact inconsistently applied the standard to determine foreclosure sale parties' good faith.[95]

Unlike the Bankruptcy Appellate Panel's standard in *Madrid* and the Fifth Circuit's seventy percent standard in *Durrett*, the *Hulm* standard is acceptable because no one factor is dispositive in courts' determining whether trustees may avoid foreclosure sales.[96] In analyzing each case factually, courts applying the *Hulm* standard have considered the attendance at the sale and the participation by bidders attending the sale.[97] The nature of the

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protections state statues offer parties to foreclosure); Washburn, *The Judicial and Legislative Response to Price Inadequacy in Mortgage Foreclosure Sales*, 53 S. CAL. L. REV. 843 (1980)(comprehensively discussing state law standards that protect parties in mortgage foreclosure process); Zinman, *supra* note 1, at 1004-09 (noting court's role and summarizing protections that courts and statutes afford mortgagors and mortgagees).

92. *See* Adwar v. Capgro Leasing Corp. (*In re* Adwar), 55 Bankr. 111, 114 (Bankr. E.D.N.Y. 1985)(noting inherent unfairness of courts' applying same presumption with such variance in state laws).

93. Frank v. Berlin (*In re* Frank), 39 Bankr. 166, 175 (Bankr. E.D.N.Y. 1984); *see* Bankruptcy Reform Act of 1978, Pub. L. No. 9598, 92 Stat. 2549, 2600 (codified as amended at 11 U.S.C. § 548(a)(2) (1982 & Supp. III 1985) (containing no good faith requirement)).

94. Bankruptcy Reform Act of 1978, Pub. L. No. 9598, 92 Stat. 2549, 2600 (codified as amended at 11 U.C.S. § 548(a)(2) (1982 & Supp. III 1985)); *see supra* note 1 (discussing good faith requirement in § 67(d) of Chandler Act).

95. *See supra* note 1 and accompanying text (discussing why Congress deleted good faith requirement of §67(d) of Chandler Act in enacting § 548 of Bankruptcy Code).

96. *See infra* notes 97-104 and accompanying text (reviewing factors that courts consider when applying *Hulm* standard for determining reasonable equivalence).

97. *See* Ruebeck v. Attleboro Sav. Bank (*In re* Ruebeck); 55 Bankr. 163, 168 (Bankr. D. Mass. 1985)(attendance at sale is factor for courts applying *Hulm* standard to consider because attendance indicates participation and level of competitive bidding at foreclosure sales); Hoffman v. Heritage Sav. and Loan Ass'n (*In re* Garrison), 48 Bankr. 837, 840 (Bankr. D. Colo. 1985)(same); *see also* Washburn, *supra* note 91, at 888 (for purposes of avoiding foreclosure sales, state courts consider competitiveness of bidding at foreclosure sale because level of competition indicates relative fairness of purchase price); Note, *The Big Chill: Applicability of Section 548(a)(2) of the Bankruptcy Code to Noncollusive Foreclosure Sales*, 53 FORDHAM L. REV. 813, 836 (1985)(high level of participation at foreclosure sales indicates competitive bidding).

property[98] and the relative marketability of the realty[99] are also important factors. Additionally, courts consider the fair market value of the property relative to the purchase price at the foreclosure sale.[100] By determining reasonable equivalence on each set of facts, courts applying the case-by-case analysis benefit creditors and prevent a depletion of the debtors' assets to the detriment of creditors.[101] Furthermore, under the *Hulm* standard, unlike the *Durrett* standard, reasonable equivalence does not depend solely upon the fair market value of the property.[102] Instead, the *Hulm* position requires courts to determine reasonable equivalence in light of the facts and circumstances of each foreclosure sale.[103] Thus, courts applying the *Hulm* standard fulfill the implications in the use of the term "reasonable" by examining the relevant facts of each transfer.[104]

The *Hulm* standard is not completely satisfactory, however, because it does not protect foreclosure sale purchasers. Foreclosure sale purchasers

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98. *See* Ruebeck v. Attleboro Sav. Bank (*In re* Ruebeck), 55 Bankr. 163, 167 (Bankr. D. Mass. 1985)(in applying *Hulm* standard, courts consider nature of property as factor because nature of property affects marketability of property and demand for type of property); Hoffman v. Heritage Sav. and Loan Ass'n (*In re* Garrison), 48 Bankr. 837, 840 (Bankr. D. Colo. 1985)(same).

99. *See* Ruebeck v. Attleboro Sav. Bank (*In re* Ruebeck), 55 Bankr. 163, 167 (Bankr. D. Mass. 1985)(courts consider relative marketability of property as factor when applying *Hulm* standard because foreclosure sale purchase price partly turns on property's marketability); Hoffman v. Heritage Sav. & Loan Ass'n (*In re* Garrison), 48 Bankr. 837, 840 (Bankr. D. Colo. 1985)(same); Note, *supra* note 97, at 836 (same).

100. Cooper v. Smith (*In re* Smith), 24 Bankr. 19, 23 (Bankr. W.D.N.C. 1982). By focusing on the disparity between the purchase price and the equity potentially available to creditors, a court may avoid the foreclosure sale transfer if the unrealized, remaining equity in the property is much greater than the foreclosure sale price. *Id.*

101. *Cf.* Lawyers Title Ins. Corp. v. Madrid (*In re* Madrid), 21 Bankr. 424, 427 (Bankr. 9th Cir. 1982)(court failing to maximize equity of bankruptcy estate by not considering all facts of foreclosure sale), *aff'd*, 725 F.2d 1197 (9th Cir.), *cert. denied*, 469 U.S. 833 (1984).

102. *See* First Fed. Sav. & Loan Ass'n of Bismarck v. Hulm (*In re* Hulm), 738 F.2d 323, 327 (8th Cir.)(evidentiary hearing determines reasonably equivalent value in each case based on all facts of foreclosure sale), *cert. denied*, 469 U.S. 990 (1984); *see also* Ruebeck v. Attleboro Sav. Bank (*In re* Ruebeck), 55 Bankr. 163, 167 (Bankr. D. Mass 1985)(determining reasonable equivalence on case-by-case basis to examine all relevant factors concerning foreclosure sale purchase price); Adwar v. Capgro Leasing Corp. (*In re* Adwar), 55 Bankr. 111, 113 (Bankr. E.D.N.Y. 1985)(conducting factual analysis in each case to determine reasonably equivalent value); Cooper v. Smith (*In re* Smith), 24 Bankr. 19, 23 (Bankr. W.D.N.C. 1982)(court examines all facts and circumstances bearing on foreclosure sale to determine whether debtor received reasonably equivalent value); Home Life Ins. Co. v. Jones (*In re* Jones), 20 Bankr. 988, 994 n.23 (Bankr. E.D. Pa. 1982)(conducting thorough factual analysis to determine reasonably equivalent value in each case).

103. *See* Ruebeck v. Attleboro Sav. Bank (*In re* Ruebeck), 55 Bankr. 163, 167-68 (Bankr. D. Mass. 1985)(explicitly adopting case-by-case analysis); Adwar v. Capgro Leasing Corp. (*In re* Adwar), 55 Bankr. 111, 114-15 (Bankr. E.D.N.Y. 1985)(same); DeMusis v. Carr (*In re* Carr), 40 Bankr. 1007, 1008 (D. Conn. 1984)(same).

104. *See* Davis & Standiford, *supra* note 56, at 230 (term "reasonable" generally implies that courts investigate facts and circumstances).

wanting to purchase stable titles cannot determine with any certainty whether courts, in balancing the facts and circumstances, will avoid a foreclosure sale as a fraudulent transfer.[105] Thus, the many factors considered by courts do not provide any certain guidelines for foreclosure sale purchasers.[106]

In contrast to the Fifth Circuit's seventy percent standard in *Durrett*, the Bankruptcy Appellate Panel's state foreclosure law standard in *Madrid*, and the Eighth Circuit's evidentiary hearing standard in *Hulm*, the *Ristich* court's conclusive presumption when the purchaser is a third party protects both debtors and foreclosure sale purchasers.[107] Under *Ristich*'s conclusive presumption, debtors receive protection through open, competitive bidding indicated by foreclosure sale purchases by third parties.[108] Thus, purchases of property interests by third parties would indicate that the purchase price was the highest possible price in light of the forced nature of the foreclosure sale. Thus, purchases by third parties would benefit creditors by maximizing the equity in bankruptcy estates. Because of the presumed competitive bidding at foreclosure sales where purchasers are third parties, the *Ristich* court reasoned that the foreclosure sale purchase price would be the highest possible price even though a retail market transaction might bring a higher price.[109]

In addition to protecting debtors, the *Ristich* presumption of reasonable equivalence protects third party purchasers at foreclosure sales.[110] The conclusive presumption prevents trustees from avoiding transfers as constructively fraudulent conveyances. Consequently, the presumption of reasonably equivalent value makes titles purchased by third party purchasers at foreclosure sales more valuable and certain.[111] Under the *Ristich* presumption,

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105. *See* First Fed. Sav. & Loan Ass'n of Bismarck v. Hulm (*In re* Hulm), 738 F.2d 323, 327 (8th Cir.)(noting that evidentiary hearing standard will affect strategies of foreclosure sale purchasers), *cert. denied*, 469 U.S. 990 (1984); *supra* notes 97-104 and accompanying text (discussing factors that courts consider when applying *Hulm* standard).

106. *But see* Durrett v. Washington Nat'l Ins. Co., 621 F.2d 201, 204 (5th Cir. 1980)(seventy percent standard provides specific, definite guidelines for purchasers' determining reasonable equivalent value).

107. *In re* Ristich, 57 Bankr. 568, 577-78 (Bankr. N.D. Ill. 1986); *see infra* notes 108-12 and accompanying text (examining how conclusive presumption protects both debtors and foreclosure sale purchasers).

108. *In re* Ristich, 57 Bankr. 568, 577 (Bankr. N.D. Ill. 1986). At a foreclosure sale, a creditor will try to preserve its security interest in the property by bidding the amount of outstanding indebtedness. Alden, *supra* note 76, at 1619. Because a creditor will insure that the foreclosure sale purchase price equals or exceeds its security interest, a third party's purchase price will be the highest possible foreclosure sale purchase price. *Id.*

109. *Ristich*, 57 Bankr. at 577-78. The purchase price in a retail sale would be higher than the foreclosure sale purchase price because the foreclosure sale is a forced sale whereas the retail sale is an ordinary arms-length transaction. *See supra* notes 63-66 and accompanying text (explaining differences between foreclosure sale prices and retail sale prices).

110. *In re* Ristich, 57 Bankr. 568, 577-78 (Bankr. N.D. Ill. 1986).

111. *Id.*; *see* Alden, *supra* note 76, at 1618 (noting that conclusive presumption gives foreclosure sale purchaser more certain title to foreclosed property and prevents courts from transforming purchaser's real estate investment into secured loan by avoiding foreclosure sale).

third party purchasers would bid for realty at foreclosure sales subject only to risks normally associated with foreclosure sales.[112] The conclusive presumption of *Ristich*, however, does not expose third party purchasers to the additional risk of trustees' avoiding the foreclosure sale under section 548 of the Bankruptcy Code.

Instead of conclusively presuming reasonably equivalent value when third parties are foreclosure sale purchasers, the *Ristich* court adopted the *Madrid* standard when creditors are foreclosure sale purchasers.[113] Accordingly, the state law of fraudulent conveyance governs whether purchasers at foreclosure sales paid reasonably equivalent values for property.[114] When creditors purchase property at foreclosure sales, however, the *Ristich* position does not avoid the problems inherent in the *Madrid* standard of determining reasonably equivalent value at foreclosure sales.[115] The *Madrid* standard effectively promotes title stability but fails to fulfill the purpose of the Bankcruptcy Code because the state foreclosure law standard ignores the concerns of every creditor.[116] The state foreclosure law standard of *Madrid* benefits creditors who purchase at foreclosure sales but ignores the other creditors' interests in the bankruptcy estate.

The bifurcated approach proposed in *Ristich* for determining reasonably equivalent value of property transferred at foreclosure sales is unprecedented. Moreover, courts applying a different standard of reasonable equivalence to third party purchases at foreclosure sales than to creditor purchases at foreclosure sales benefit both foreclosure sale purchasers and trustees. Foreclosure sale purchasers are searching for the most stable title, while trustees want to protect creditors' interests in the bankruptcy estate. The conclusive presumption of *Ristich* when the purchaser is an independent third party successfully stabilizes the title transferred at foreclosure sales while fulfilling the purpose of the Bankruptcy Code.[117] By adopting the *Madrid* standard when creditors are the purchasers at foreclosure sales,

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112. *See* Coppel & Kann, *supra* note 77, at 681 (explaining that risks normally associated with foreclosure sale purchase are debtor's exercise of statutory right of redemption and possiblity of other creditors' claims to property).

113. *In re* Ristich, 57 Bankr. 568, 577 (Bankr. N.D. Ill. 1986). The *Madrid* court determined reasonable equivalence by referring to state foreclosure law and held that mere inadequacy of price is not sufficient to set aside a foreclosure sale. Lawyers Title Ins. Corp. v. Madrid (*In re* Madrid), 21 Bankr. 424, 427 (Bankr. 9th Cir. 1982), *aff'd*, 725 F.2d 1197 (9th Cir.), *cert. denied*, 469 U.S. 833 (1984).

114. *In re* Ristich, 57 Bankr. 568, 578 (Bankr. N.D. Ill. 1986); *see supra* note 51 and accompanying text (discussing Illinois foreclosure law standard for determining reasonable equivalence).

115. *See supra* notes 70-95 and accompanying text (discussing problems of courts' applying *Madrid* state foreclosure law standard).

116. *See supra* notes 88-89 and accompanying text (discussing consequences to title stability of courts' applying *Madrid* state foreclosure law standard).

117. *See supra* notes 108-12 and accompanying text (explaining that *Ristich*'s presumption benefits foreclosure sale purchasers and debtors).

however, the *Ristich* court ignores creditors' interests in the bankruptcy estate by not fulfilling the objective of the Bankrupcty Code.[118]

The *Ristich* court could have strengthened its standard for determining reasonable equivalence when the foreclosure sale purchaser is the creditor by using *Hulm*'s evidentiary hearing standard.[119] By allowing the trier of fact to determine reasonably equivalent value for each individual purchase by the creditor, courts conducting a thorough, factual analysis will benefit creditors of bankrupt debtors.[120] Even though creditor purchasers could not invest at foreclosure sales with any certainty of title stability, courts applying the *Hulm* standard can fulfill the objective of the Bankruptcy Code by maximizing the debtor's equity for the benefit of creditors.[121] In contrast, courts applying the *Madrid* state foreclosure law standard benefit only foreclosure sale purchasers and neglect the concerns of the Bankruptcy Code.[122]

The unique distinction between third party purchasers and creditor purchasers proposed in *Ristich* is the judiciary's most recent standard for determining reasonable equivalence at foreclosure sales.[123] The *Ristich* standard, when the purchaser is a third party, overcomes the objections to *Durrett*'s seventy percent standard and to *Madrid*'s state foreclosure law standard. By adopting *Hulm*'s evidentiary hearing standard, rather than *Madrid*'s standard, when the foreclosure sale purchaser is the creditor-mortgagee, a court would determine whether the price received by the debtor

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118. *See supra* notes 113-15 and accompanying text (discussing *Ristich*'s weakness in using *Madrid* standard); *see also supra* notes 79-95 and accompanying text (discussing weaknesses of *Madrid* standard).

119. *See supra* notes 29-40 and accompanying text (discussing Eighth Circuit's *Hulm* standard); *supra* notes 105-06 and accompanying text (noting that *Hulm* evidentiary hearing standard does not protect foreclosure sale purchasers because purchasers cannot determine whether courts will avoid foreclosure sales as fraudulent transfers).

The bankruptcy court in *Ristich* was responding to policy considerations expressed in *Goldberg v. Tynan (In re Tynan)*, a recent decision by the United States Court of Appeals for the Seventh Circuit. *See In re* Ristich, 57 Bankr. 567, 576-77 (Bankr. N.D. Ill. 1986)(citing recent Seventh Circuit decision, *Goldberg v. Tynan (In re Tynan)*, 773 F.2d 177 (1985)). According to the *Ristich* court the Seventh Circuit in *Tynan* opposed the Bankruptcy Code's interference with foreclosure sales because of the detrimental effect on title stability. *See In re* Ristich, 57 Bankr. at 576-77 (Bankr. N.D. Ill. 1986) (citing recent Seventh Circuit decision, *Goldberg v. Tynan (In re Tynan)*, 773 F.2d at 179). Because the Seventh Circuit had expressed concern over the effects that *Durrett*'s standard and *Hulm*'s standard would have on foreclosure sale participation, the *Ristich* court felt compelled to follow the rationale of the *Tynan* court. *In re* Ristich, 57 Bankr. at 576-77 (Bankr. N.D. Ill. 1986).

120. *See supra* notes 97-104 and accompanying text (discussing how *Hulm* standard protects creditors).

121. *Id.*; *see supra* note 4 (discussing Congress' purpose to protect creditors' interests in enacting Bankruptcy Code).

122. *See supra* notes 70-95 and accompanying text (discussing unsatisfactory characteristics of *Madrid* standard); *supra* note 4 (discussing Congress' intent in enacting Bankruptcy Code to protect creditors' interests in bankruptcy estate).

123. *See supra* notes 48-54 and accompanying text (discussing *Ristich* court's distinction between third party purchasers and creditor purchasers).

at a foreclosure sale constituted reasonable equivalence by considering all the facts and circumstances of the foreclosure market.[124] In enacting section 548, Congress intended to benefit all of the debtor's creditors by authorizing trustees to recover property transferred for less than reasonably equivalent value.[125] Thus, courts should determine reasonable equivalence by considering the interests of all creditors.

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124. *See supra* notes 97-104 and accompanying text (reviewing factors that courts consider when applying *Hulm* standard for determining reasonable equivalence).

125. *See supra* note 4 and accompanying text (explaining that Congress' reason for enacting § 548 of Bankruptcy Code was to protect creditors).