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Can Tax Sales Be Avoided in Bankruptcy Cases?

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CAN TAX SALES BE AVOIDED IN BANKRUPTCY CASES?

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I. INTRODUCTION

The titles of property purchased at tax sales are currently "under a *federally created cloud*"[1] because there is not a universally applied standard to determine whether tax sales are for "reasonably equivalent value" pursuant to § 548 of the Bankruptcy Code.[2] As a result, it remains uncertain and difficult to predict whether tax sales may or may not be avoided because tax sales may be avoided if they are not for "reasonably equivalent value." This "federally created cloud" raises the issue of whether there should be a presumption that lawfully conducted tax sales are for "reasonably equivalent value" precluding avoidance pursuant to 11 U.S.C. § 548, similar to the presumption provided in the United States Supreme Court's holding in *BFP v. Resolution Trust Corporation* "that 'reasonably equivalent value' is the price received at [a mortgage] foreclosure sale, so long as all of the requirements of the state's foreclosure laws have been complied with."[3] The courts are increasingly split on this issue.

The lack of a universally applied standard to determine whether tax sales are for "reasonably equivalent value" pursuant to § 548 of the Bankruptcy Code causes uncertainty and other negative effects, including causing harm to the general welfare of society and states' interests by significantly reducing the security of the title to real estate obtained through tax sales.[4] Therefore, there should be a presumption created by the courts in applying 11 U.S.C. § 548 that tax sales are for "reasonably equivalent value" when the tax sale in question meets the following four elements: notice, reasonable opportunity to cure, strict adherence to statutory requirements, and competitive bidding. Another solution is for the courts to apply *BFP v. Resolution Trust Corporation* to tax sales. Specifically, the courts should rule that, like in *BFP*, a "reasonably equivalent value" for property is the price in fact received at the forced sale, including tax sales, so long as all the requirements of the state's forced sale laws have been complied with.[5]

Part two of this Note discusses § 548 of the Bankruptcy Code, which sets forth the powers of a trustee in bankruptcy to avoid fraudulent transfers. Then, part three explains tax sales and the different procedures of tax sales employed in different jurisdictions. Part four discusses *BFP v. Resolution Trust Corporation*, a landmark case where the United States Supreme Court held that mortgage foreclosure sales may not be avoided if the sale complied with the

1. BFP v. Resolution Tr. Corp., 511 U.S. 531, 544 (1994) (emphasis added).

2. 11 U.S.C. § 548 (2012).

3. David P. Schwartz, *BFP v. Resolution Trust Corporation: Critiquing the Supreme Court's Method of Determining "Reasonably Equivalent Value" Within the Context of Bankruptcy Foreclosures,* 31 CAL. W. L. REV. 345, 363 (1995).

4. *See BFP*, 511 U.S. at 544.

5. *See id.* at 545; 11 U.S.C. § 548 (2012).

state's foreclosure laws.[6] Next, part five discusses the definition of "value" in § 548 of the Bankruptcy Code. Part six discusses the circuit split regarding whether tax sales can be avoided. In part seven, this Note discusses the negative effects caused by the lack of a universally applied standard to determine whether tax sales are for "reasonably equivalent value." Finally, in parts eight and nine, this Note suggests potential solutions to address these negative effects, including applying *BFP v. Resolution Trust Corporation* to tax sales, or adopting a presumption that the prices received at tax sales are for "reasonably equivalent value" based on four elements.

II. SECTION 548 OF THE BANKRUPTCY CODE

"Section 548 of the Bankruptcy Code, 11 U.S.C. § 548, sets forth the powers of a trustee in bankruptcy (or, in a Chapter 11 case, a debtor in possession) to avoid fraudulent transfers."[7] Section 548 permits the bankruptcy trustee to avoid transfers of property made within two years of the debtor's filing of bankruptcy which were made "with actual intent to hinder, delay, or defraud" a creditor or which were constructively fraudulent.[8] Further, transfers of property are considered constructively fraudulent and can be avoided if

> the trustee can establish (1) that the debtor had an interest in property; (2) that a transfer of that interest occurred within [two] year[s] of the filing of the bankruptcy petition; (3) that the debtor was insolvent at the time of the transfer or became insolvent as a result thereof; and (4) that the debtor received "less than a reasonably equivalent value in exchange for such transfer."[9]

6. 511 U.S. at 545.

7. *Id.* at 535 (citing 11 U.S.C. § 548 (2012)). Section 548 of the Bankruptcy Code provides in pertinent part:

> (a)(1) The trustee may avoid any transfer (including any transfer to or for the benefit of an insider under an employment contract) of an interest of the debtor in property, or any obligation (including any obligation to or for the benefit of an insider under an employment contract) incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily—
>
> (A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or
>
> (B)(i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and
>
> (ii)(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation . . .

11 U.S.C. § 548 (2012).

8. *Id.*

9. *BFP*, 511 U.S. at 535 (quoting 11 U.S.C. § 548 (2012)).

III. TAX SALES

Delinquent property taxes are collected through tax sales.[10] Generally, once property taxes are declared delinquent, most jurisdictions permit a private third party to purchase the local government's lien for the taxes due at a tax sale.[11] The transfer of the tax lien is distinct from the sale of the underlying property that occurs at a tax foreclosure sale, which is another type of tax sale that this Note addresses.[12] "Instead, what is transferred is the lien itself, vesting in the purchaser the right to enforce the lien in accordance with statutory procedures."[13]

"While all jurisdictions recognize a lien for property taxes, and all provide some mechanism for enforcement of that lien, the similarities end at that point."[14] A small amount of jurisdictions "functionally recognize a form of 'strict foreclosure' in which a final date is established for payment of the taxes, and upon nonpayment the property is conveyed to the government" without a public or private sale.[15] Alternatively, "in the overwhelming majority of jurisdictions enforcement of the property tax lien involves a sale of the lien itself, or of the underlying property, or sequential sales of first the lien and then the property."[16] In the jurisdictions that enforce the property tax lien with "one public sale, the sale is a sale of the underlying property, though the sale may be followed by a statutory right of redemption which requires subsequent termination by the passage of time or by affirmative action by the purchaser at the initial sale."[17] Alternatively, "[j]urisdictions that recognize two separate sales are first selling the lien, which is then enforced by a subsequent foreclosure sale."[18]

Furthermore, the public sale of a tax lien, or sale of the property itself, is conducted in three different ways, depending on the jurisdiction.[19] "The predominant approach" is offering "the property at a public auction to the highest bidder, with a minimum bid equal to the aggregate amount of delinquent taxes, interest, penalties, and costs."[20] If the sale price exceeds the minimum bid, "the surplus is held for the benefit of subordinate claimants and the original owner."[21] In a minority of jurisdictions, the public auction is conducted by

10. Frank S. Alexander, *Tax Liens, Tax Sales, and Due Process*, 75 IND. L.J. 747, 760 (2000).
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.* at 772.
15. Alexander, *supra* note 10, at 772.
16. *Id.*
17. *Id.* at 773.
18. *Id.*
19. *Id.* at 774.
20. Alexander, *supra* note 10, at 774.
21. *Id.*

awarding the property to the purchaser who is willing to purchase the smallest percentage of undivided interest in the real property.[22] "[F]our states sell the property to the purchaser offering the lowest effective rate of interest pending redemption of the property by the owner[,]" in an effort to reflect market conditions and interest rates.[23]

If a debtor files for bankruptcy shortly after a tax foreclosure, the debtor's creditors become interested in avoiding the tax sale to recover lost wealth for the estate.[24] The trustee can characterize the tax sale "as a constructive fraud, made while the debtor was insolvent, and for 'less than a reasonably equivalent value in exchange.'"[25] If this argument prevails, the tax sale is avoided, and the estate recovers the property.[26] The tax creditor would still retain a lien against the property for the amount of the tax debt, however, the tax creditor would lose to the estate the difference between the value of the property and the tax debt.[27] This Note addresses whether lawfully conducted tax sales, as described above, are for "reasonably equivalent value" precluding avoidance pursuant to 11 U.S.C. § 548.

IV. *BFP V. RESOLUTION TRUST CORPORATION*

In *BFP v. Resolution Trust Corporation*, the United States Supreme Court considered the issue of

> whether the consideration received from a noncollusive, real estate mortgage foreclosure sale conducted in conformance with applicable state law conclusively satisfies the Bankruptcy Code's requirement that transfers of property by insolvent debtors within one year prior to the filing of a bankruptcy petition be in exchange for "a reasonably equivalent value."[28]

The petitioner in *BFP* "took title to a California home subject to a deed of trust in favor of Imperial Savings Association."[29] "After the petitioners were unable to continue payments and the loan was in default, the home was purchased for $433,000 at a properly conducted foreclosure sale" on July 12, 1989.[30]

Later, in October 1989, the petitioner filed for bankruptcy under Chapter 11 of the Bankruptcy Code.[31] "Acting as a debtor in possession, the petitioner filed a complaint in Bankruptcy Court to set aside the conveyance of the home . . . on

22. *Id.*
23. *Id.*
24. Marie T. Reilly, *The Case for the Tax Collector*, 18 NORTON J. BANKR. L. & PRAC. 627, 628 (Nov. 2009).
25. *Id.* (citing 11 U.S.C. § 548 (2012)).
26. Reilly, *supra* note 24, at 628.
27. *Id.*
28. 511 U.S. 531, 533 (1994) (quoting 11 U.S.C. § 548(a)(2) (2012)).
29. Schwartz, *supra* note 3, at 362 (citing *BFP*, 511 U.S. at 533).
30. Schwartz, *supra* note 3, at 362; *BFP*, 511 U.S. at 533–34.
31. *BFP*, 511 U.S. at 534.

the grounds that the foreclosure sale constituted a fraudulent transfer under § 548."[32] The petitioner alleged that the home was worth more than $725,000 at the time of the foreclosure sale, "and, thus, was not exchanged for a 'reasonably equivalent value' under section 548(a)(2) of the Bankruptcy Code."[33] "The bankruptcy court granted summary judgment to the purchaser[,]" and "[t]he bankruptcy appellate panel affirmed the dismissal, holding that consideration received in a non-collusive and regularly conducted, nonjudicial foreclosure sale establishes 'reasonably equivalent value' as a matter of law."[34] The court of appeals affirmed, and the United States Supreme Court reviewed the decision, holding "that 'reasonably equivalent value' is the price received at the foreclosure sale, so long as all of the requirements of the state's foreclosure laws have been complied with."[35]

In *BFP*, the Court had to interpret the phrase "reasonably equivalent value" in § 548 of the Bankruptcy Code to determine whether the transfer of property in that case could be avoided as constructively fraudulent.[36] The other elements of § 548 were not at issue before the Court in *BFP*.[37] In interpreting § 548, the Court stated that "of the three critical terms 'reasonably equivalent value,' only the last is defined: 'value' means, for purposes of § 548, 'property, or satisfaction or securing of a . . . debt of the debtor.'"[38] The Court stated that "'reasonably equivalent value' is not to be equated either with fair market value or with fair foreclosure price."[39] Instead, the Court concluded that "a 'reasonably equivalent value' for foreclosed property[] 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."[40] "Tax foreclosure sale statutes are often comparable to mortgage foreclosure sale statutes," and as a result, "by analogy, *BFP* is arguably applicable to tax foreclosure sales."[41] "However, because the Supreme Court expressly noted that *BFP* did not necessarily apply to tax foreclosures, the applicability of *BFP* to tax foreclosures has been somewhat inconsistent and largely dependent on the protections afforded by applicable state tax foreclosure law."[42] This Note will provide clarification on the issue of whether lawfully

32. *Id.*
33. Schwartz, *supra* note 3, at 362–63 (citing *BFP*, 511 U.S. at 534).
34. Schwartz, *supra* note 3, at 363.
35. *Id.*
36. 511 U.S. at 535; 11 U.S.C. § 548 (2012).
37. 511 U.S. at 535.
38. *Id.* at 535–36 (quoting 11 U.S.C. § 548(d)(2)(A) (2012)).
39. Schwartz, *supra* note 3, at 346.
40. *BFP*, 511 U.S. at 545; 11 U.S.C. § 548 (2012).
41. John T. Gregg, *A Federally Created Cloud: Reasonable Equivalent Value and Present Fair Equivalent Value in Tax Foreclosures and Forfeitures*, 2007 NORTON ANN. SURV. OF BANKR. L., PART II (Sept. 2007).
42. *Id.*

conducted tax sales are for "reasonably equivalent value" precluding avoidance pursuant to § 548.

V. DEFINING "VALUE" IN SECTION 548 OF THE BANKRUPTCY CODE

As mentioned earlier, in *BFP*, the United States Supreme Court was tasked with interpreting the ambiguous phrase "reasonably equivalent value" in 11 U.S.C. § 548.[43] The Court focused on the word "value," as "[t]his [was] the word that Justice Scalia and the majority found to be ambiguous."[44]

"Congress used the word 'value' throughout the [Bankruptcy] Code to enable the bankruptcy judge to select different values for different purposes," and thus "a fixed meaning [of 'value'] was just what Congress wished to avoid."[45] The Court in *BFP*, however, held that the term "value" was ambiguous and set out to define it, and the Court searched outside the Bankruptcy Code for the definition of "value," "utiliz[ing] history and interpretative 'rules' to find that the 'value' should be based on the individual state law's foreclosure-sale market."[46] Therefore,

> the price paid at the foreclosure-sale market, which is controlled by varying state laws, will always be equivalent to the value of the property taken by the creditor. As a result, foreclosure sales complying with state law can never be fraudulent transfers. Because the mortgagee is frequently the purchaser at its own foreclosure, the amount of the mortgage debt will create the price ceiling under most state laws.[47]

Justice Scalia supported this deference to state law with a historical argument and a reference to his view of the interrelationship between federal and state laws.[48] Justice Scalia stated that "value" cannot mean fair market value because that phrase is used in other parts of the Bankruptcy Code, and Congress specifically avoided the phrase fair market value in 11 U.S.C. § 548, and instead used "reasonably equivalent value."[49] Further, Justice Scalia stated that "[f]raudulent transfer law and foreclosure law enjoyed over 400 years of peaceful coexistence in Anglo-American jurisprudence until the Fifth Circuit's

43. 511 U.S. at 535; 11 U.S.C. § 548 (2012). It is important to note that Justice Scalia wrote the opinion of the Court in *BFP*, and when he finds ambiguity in statutory text, he "tends to part from his colleagues in his dismissal of most legislative history." Janet A. Flaccus, *Pre-Petition and Post-Petition Mortgage Foreclosures and Tax Sales and the Faulty Reasoning of the Supreme Court*, 51 ARK. L. REV. 25, 30 (1998). Instead, Justice Scalia "looks to context in which the law was passed for guidance. . . . In *BFP*, he relied on history and interpretative tools to resolve the ambiguity." *Id.* at 30–31.

44. *Id.* at 31.

45. *Id.* at 31, 33.

46. *Id.* at 33 (citing *BFP*, 511 U.S. at 540–46).

47. Flaccus, *supra* note 43, at 33.

48. *Id.*

49. *Id.* at 33–34.

unprecedented 1980 decision in *Durrett* [*v. Washington National Insurance Company*]."[50] Justice Scalia stated that, to the Court's knowledge, *Durrett* was the first instance where fraudulent transfer law was used to set aside a foreclosure sale.[51]

The Court in *BFP* stated, "to say that the 'reasonably equivalent value' language in the fraudulent transfer provision of the Bankruptcy Code requires a foreclosure sale to yield a certain minimum price beyond what state foreclosure law requires, is to say, in essence, that the Code has adopted *Durrett* or *Bundles*," which were Fifth and Seventh Circuit cases, respectively, that held the foreclosure sales at issue were not for "reasonably equivalent value," and thus avoidable.[52] The Court continued, stating that Congress had the constitutional power "to disrupt the ancient harmony that foreclosure law and fraudulent conveyance law . . . have heretofore enjoyed. But absent clearer textual guidance than the phrase 'reasonably equivalent value'—a phrase entirely compatible with pre-existing practice—we will not presume such a radical departure."[53]

Moreover, the Court in *BFP* supported a deference to state law in defining "value" by arguing that states have a strong interest in preserving real estate titles.[54] Further, the Court stated that allowing mortgage foreclosure sales to be avoided would profoundly affect the state interest in preserving real estate titles by placing property purchased at mortgage foreclosure sales governed by state law under a *federally created cloud*.[55] The Court argued that "questions concerning state land records are fundamental state rights on which only 'clear and manifest' federal statutes can impinge," and "[b]ecause the word 'value' in section 548 was considered to be ambiguous, it could not meet the 'clear and manifest' standard."[56] The Court held that

> For the reasons described, we decline to read the phrase "reasonably equivalent value" in § 548(a)(2) to mean, in its application to mortgage foreclosure sales, either "fair market value" or "fair foreclosure price" (whether calculated as a percentage of fair market value or otherwise). We deem, as the law has always deemed, that a fair and proper price, or a "reasonably equivalent value," for foreclosed property, 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.[57]

50. *BFP*, 511 U.S. at 542.
51. *Id.*
52. *Id.* at 542–43.
53. *Id.* at 543.
54. *Id.* at 544.
55. *BFP*, 511 U.S. at 544.
56. Flaccus, *supra* note 43, at 40–41 (citing *BFP*, 511 U.S. at 544).
57. *BFP*, 511 U.S. at 545.

VI. CIRCUIT SPLIT: COURTS ADDRESSING THE ISSUE OF WHETHER TAX SALES MAY BE AVOIDED PURSUANT TO SECTION 548 OF THE BANKRUPTCY CODE

A. Extending BFP *to Tax Sales*

1. Ninth Circuit: *Tracht Gut, LLC v. L.A. County Treasurer & Tax Collector*.

In *Tracht Gut, LLC v. L.A. County Treasurer & Tax Collector*, the Ninth Circuit considered whether the rule in *BFP v. Resolution Trust Corporation* should be extended to California tax sales.[58] In *Tracht Gut*, plaintiff-appellant Tracht Gut, LLC acquired two properties in 2012, and real property taxes had not been paid on either property since 2008.[59] The two "properties were thus 'tax defaulted' under California state law, and subject to the County's power to sell."[60] "On August 31, 2012, the County served a Notice of Auction for a tax sale for each of the properties on all interested parties."[61] Then, "[o]n October 22, 2012, the County Treasurer sold both properties at public auction."[62] Tracht Gut filed for bankruptcy protection under Chapter 11 of the Bankruptcy Code on November 27, 2012, which was slightly more than one month after the tax sales on the properties.[63] Tracht Gut asserted on its Schedule A that

> [a] disputed tax sale occurred on or about October 21, 2012. The sales price was far less than market value of this property. Debtor attempted to pay the taxes in full, which the [County] refused to take. As of the date of this petition, no Tax Deed has been recorded and Debtor disputes the validity of the transfer as an avoidable transfer.[64]

Tracht Gut asserted that the tax sales were fraudulent transfers under 11 U.S.C. § 548.[65] Tracht Gut claimed that the properties were not sold for "reasonably equivalent values" at the tax sales as required by § 548, and thus the sales should be avoidable.[66] The Ninth Circuit disagreed, reasoning that the rule in *BFP v. Resolution Trust Corporation*, "that a prepetition mortgage foreclosure sale conducted in accordance with state law conclusively established that the price obtained at that sale was for reasonably equivalent value," should also apply to California tax sales because tax foreclosure sales, like the mortgage

58. *In re* Tracht Gut, LLC, 836 F.3d 1146, 1149 (9th Cir. 2016).
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Tracht Gut, LLC*, 836 F.3d at 1149.
64. *Id.*
65. *Id.*
66. *Id.* at 1148.

foreclosures at issue in *BFP*, are governed by state law, and have the same procedural safeguards under California law.[67]

The specific procedural safeguards that led to the United States Supreme Court's conclusion that mortgage foreclosures would yield "reasonably equivalent value" in *BFP* are that "'[f]oreclosure laws typically require notice to the defaulting borrower, a substantial lead time before the commencement of foreclosure proceedings, publication of a notice of sale, and strict adherence to prescribed bidding rules and auction procedures,'" and the Ninth Circuit reasoned that California tax sales have all of these procedural safeguards.[68]

Under California law, the tax collector may sell tax-defaulted property that has not been redeemed after the property has been in default for three years for commercial real estate, and five years for residential real estate, and the Ninth Circuit reasoned that these time periods provide a "'substantial lead time.'"[69] California law also requires notices for tax sales comparable to the notices required under the mortgage foreclosure laws at issue in *BFP*.[70] Additionally, California law requires all tax sales to be held at a public auction to the highest bidder, and that after a tax sale, the tax collector must execute a deed to the purchaser of the property.[71] Further, California law provides that the tax deed is "'conclusive evidence of the regularity of all proceedings from the assessment of the assessor to the execution of the deed.'"[72] Moreover, "[t]he conclusive nature of the tax deed establishes that tax sales in California are conducted with 'strict adherence to prescribed bidding rules and auction procedures.'"[73] Therefore, the Ninth Circuit held that "[b]ecause California tax sales have the same procedural safeguards as the California mortgage foreclosure sale at issue in *BFP*, . . . the price received at a California tax sale conducted in accordance with state law conclusively establishes 'reasonably equivalent value' for purposes of 11 U.S.C. § 548(a)."[74]

2. Tenth Circuit: *Kojima v. Grandote Int'l Ltd. Liab. Co. (In re Grandote Country Club Co.)*.

In *Kojima v. Grandote Int'l Ltd. Liab. Co.* (*In re Grandote Country Club Co.*), the Tenth Circuit considered an ancillary proceeding to avoid a tax sale

67. *Id.* at 1152.

68. *Tracht Gut, LLC*, 836 F.3d at 1153 (quoting BFP v. Resolution Tr. Corp., 511 U.S. 531, 542 (1994)).

69. *Id.*

70. *Id.*

71. *Id.* at 1153–54.

72. *Id.* at 1154 (quoting Cal. Rev. & Tax Code § 3711).

73. *Tracht Gut, LLC*, 836 F.3d at 1154 (quoting *BFP*, 511 U.S. at 542).

74. *Id.*

brought by the trustee of a Japanese entity involved in a Japanese insolvency.[75] The court found that similar to the Bankruptcy Code's fraudulent transfer statute codified in 11 U.S.C. § 548, "[a] transfer is not fraudulent under CUFTA [(the Colorado fraudulent transfer statute at issue in this case)] where an asset is acquired for 'a reasonably equivalent value' through a 'regularly conducted, non-collusive sale, foreclosing on assets subject to a lien.'"[76]

The Tenth Circuit extended *BFP v. Resolution Trust Corporation* to the tax sale in this case, finding that the tax sale, like the mortgage foreclosure sale in *BFP*, "constitutes a transfer 'for reasonably equivalent value,' even if the purchase price was below market value, as long as there is no evidence of collusion."[77] Further, the Tenth Circuit acknowledged *BFP* did not address a tax sale, however, it stated that *BFP* had been extended to tax sales in other cases.[78] The Tenth Circuit also stated that other courts had refused to extend *BFP* to the tax sale context, including its own Circuit's Bankruptcy Appellate Panel in *Sherman v. Rose*, where the court "refus[ed] to extend *BFP* to a tax sale conducted under Wyoming statutes that 'do not permit a public sale with competitive bidding.'"[79] The court, however, stated that "the decisive factor in determining whether a transfer pursuant to a tax sale constitutes 'reasonably equivalent value' is a state's procedure for tax sales, *in particular, statutes requiring that tax sales take place publicly under a competitive bidding procedure*."[80] In *Grandote*, the property was transferred "through a regularly conducted tax sale under Colorado law subject to a competitive bidding procedure."[81] Therefore, "[t]he Tenth Circuit found that the subject transfer [(through a tax sale)] was not fraudulent under the Colorado fraudulent transfer statute because the property was acquired through a regularly conducted, noncollusive sale."[82]

3. Fifth Circuit: *T.F. Stone Co. v. Harper (In re T.F. Stone Co.)*.

In *T.F. Stone Co. v. Harper (In re T.F. Stone Co.)*, the Fifth Circuit considered "whether a peppercorn price received in a noncollusive, lawfully conducted tax foreclosure sale of the real property of a Chapter 11 debtor can

75. Gregg, *supra* note 41 (citing *In re* Grandote Country Club Co., Ltd., 252 F.3d 1146, 1152 (10th Cir. 2001)).

76. *Grandote Country Club Co., Ltd.*, 252 F.3d at 1152 (quoting Colo. Rev. Stat. § 38-8-104(2) (1991)).

77. *Id.*

78. *Id.*

79. *Id.* (quoting Sherman v. Rose (*In re* Sherman), 223 B.R. 555, 558–59 (B.A.P. 10th Cir. 1998)).

80. *Id.*

81. *Grandote Country Club Co., Ltd.*, 252 F.3d at 1152 (citing Colo. Rev. Stat. §§ 39-11-101 (2007), 39-11-108 (2005)).

82. Gregg, *supra* note 41 (citing *Grandote Country Club Co., Ltd.*, 252 F.3d at 1152).

constitute 'present fair equivalent value' within the meaning of § 549(c) of the Bankruptcy Code, 11 U.S.C. § 549(c)."[83] In *T.F. Stone*, T.F. Stone Companies, Inc. acquired title to approximately five acres of land in Bryan County, Oklahoma.[84] On July 3, 1989, Stone Companies filed for Chapter 11 bankruptcy, and listed the Oklahoma property in its schedule of assets at a value of $65,000.[85] Though Stone Companies did not pay ad valorem taxes on the Oklahoma property in 1989, it did not list Bryan County as a creditor in its bankruptcy, and it did not file notice of its bankruptcy in Bryan County.[86] On October 1, 1990, the County Treasurer of Bryan County conducted a tax foreclosure sale of the property attempting to satisfy Stone Companies' delinquent tax obligation, as authorized under Oklahoma law.[87] No bids were made at the tax sale, and as a result, title to the property transferred to Bryan County.[88] During the two years after Bryan County took title to the Oklahoma property, Stone Companies had a right to redeem the Oklahoma property by paying its outstanding tax debt.[89] Stone Companies did not exercise this right, and did not pay taxes on the property in 1990, 1991, or 1992.[90]

On June 4, 1993, Bryan County conducted a tax resale of the property and sold it for $325, and this was used to satisfy Stone Companies' delinquent tax debt.[91] The sale terminated Stone Companies' redemption right and eliminated Stone Companies' remaining equity in the property.[92] On October 21, 1993, Stone Companies sued in bankruptcy court under 11 U.S.C. § 549, seeking to void the effects of Bryan County's acquisition of title to the Oklahoma property and subsequent resale as an unauthorized post-petition transfer.[93]

The bankruptcy court granted summary judgment for the county, holding that the price obtained at the county's foreclosure sale was presumptively its present fair equivalent value.[94] The Fifth Circuit affirmed, holding that the United States Supreme Court in *BFP* "*expressly eschewed any consideration of the substantive value received in a forced-sale context and instead pinned the validity of the transfer on whether the forced sale was non collusive and*

83. Matter of T.F. Stone Co., Inc., 72 F.3d 466, 467 (5th Cir. 1995).

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* (citing Okla. St. Ann. Titl. 68 §§ 3105, 3107 (2019)).

88. *T.F. Stone Co., Inc.*, 72 F.3d at 467.

89. *Id.* (citing Okla. St. Ann. Titl. 68 § 3113 (2019)).

90. *Id.* at 467–68.

91. *Id.* at 468 (citing Okla. St. Ann. Titl. 68 § 3125 (2019) (providing for the resale of unredeemed properties after the two-year redemption period)).

92. *Id.*

93. *T.F. Stone Co., Inc.*, 72 F.3d at 468.

94. Marie T. Reilly, *A Search for Reason in "Reasonably Equivalent Value" After BFP v. Resolution Trust Corp.*, 13 AM. BANKR. INST. L. REV. 261, 282–83 (2005).

conducted in compliance with state law."[95] Further, the Fifth Circuit reasoned that "Congress may have meant 'fair equivalent value' in section 549 to mean something different than 'reasonably equivalent value' in section 548, but the court could not find a 'meaningful difference' between the two phrases," supporting its decision to extend *BFP* in this case.[96] The Fifth Circuit also supported its extension of *BFP* to this case by stating that deference should be given to state regulatory interests, as states have strong interests in ensuring security of the titles to real estate in mortgage foreclosure sales and tax sales of real property.[97]

B. Declining to Extend BFP *to Tax Sales*

1. Seventh Circuit: *Smith v. SIPI, LLC (In re Smith)*.

"In January 2016, the Seventh Circuit became the first circuit to rule directly on the issue of 'reasonably equivalent value' in a tax sale where the state tax sale laws did not include competitive bidding."[98] In *Smith v. SIPI, LLC (In re Smith)*, the Seventh Circuit considered "whether compliance with state law for tax sales is sufficient to establish that the sale was for 'reasonably equivalent value,' or whether the debtor may try to set aside the sale under § 548(a)(1)(B)."[99] The Seventh Circuit applied the general rule that a sale or other transfer of an insolvent's property may be set aside as fraudulent if the transfer was for less than "reasonably equivalent value" to a lawfully conducted sale of real estate under Illinois property tax sale procedures.[100]

The Seventh Circuit distinguished its holding from the holdings of the Fifth and Tenth Circuits,

> which held that tax sales conducted in compliance with state law establish reasonably equivalent value for purposes of § 548, noting that the tax sales in each of those cases were conducted in a similar manner to the foreclosure sale reviewed in *BFP*, while the case before it did not include the competitive-bidding component found in *BFP*.[101]

Further, in *Smith*, the United States Bankruptcy Court for the Northern District of Illinois, the lower court whose decision was affirmed by the Seventh Circuit, concurred with *City of Milwaukee v. Gillespie*, where the United States District Court for the Eastern District of Wisconsin held that "'a judgment of foreclosure, based solely upon delinquent taxes in a non-sale foreclosure proceeding, does

95. *Id.* at 283 (quoting *T.F. Stone Co., Inc.*, 72 F.3d at 470 (emphasis added)).

96. *Id.* at 283.

97. *Id.*

98. Frederick F. Rudzik & Kristine H. Rudzik, *Seventh Circuit Decision Might Impact State Property Tax Sales,* AM. BANKR. INST. J. 14, 63 (May 2016).

99. 811 F.3d 228, 234 (7th Cir. 2016).

100. *Id.* (citing 11 U.S.C. § 548(a)(1)(B)).

101. Rudzik & Rudzik, *supra* note 98, at 63.

not necessarily provide a property owner "reasonably equivalent value" for real estate without a public sale offering.'"[102] Additionally, in *Gillespie*, the court stated, "if property is seized without a sale or *competitive bidding*, it cannot be presumed as a matter of law that 'reasonably equivalent value' was received by a debtor transferor because market forces were completely absent."[103]

Furthermore, the United States Bankruptcy Court for the Northern District of Illinois stated that the defendant's reliance on *BFP* was

> further hampered by the fact that the Illinois real estate tax sale process is not analogous to the Illinois mortgage foreclosure sale process. Unlike at a mortgage foreclosure sale, a debtor's interest in the property is not sold at a tax sale; rather, only the delinquent taxes are purchased by the winning bidder, not the title to the property. The court in *McKeever v. McClandon (In re McKeever),* described the Illinois tax sale process as follows: "the only purpose of a tax sale is for the taxing authority to obtain payment of its delinquent taxes at the lowest cost of redemption. There is *no correlation between the sale price and the value of the property.* Therefore, it will be a rare case where the taxes paid at a tax sale will approximate the actual value of the property."[104]

The court continued, stating "[a]s a result of the Illinois tax statute, competitive bidding was not present at the time of the transfer to ensure that market forces were acting efficiently to create a fair value for the property transferred."[105] Further, the court reasoned that a lack of competitive bidding and other procedures ensuring a fair value is received for transferred property is "a significant bar to adjudicating 'reasonably equivalent value' in a tax sale context."[106] Therefore, the United States Bankruptcy Court found "that *BFP* does not bar recovery by the Debtors under section 548(a)(1)(B) of the Code because the price received at the tax sale does not necessarily reflect a reasonably equivalent value for the underlying property."[107]

In *Smith*, the Seventh Circuit affirmed the Bankruptcy Court's decision, holding that

> [u]nlike mortgage foreclosure sales and some other states' tax sales, Illinois tax sales do not involve competitive bidding where the highest bid wins. Instead, bidders bid how *little* money they are willing to accept in return for payment of the owner's delinquent taxes. The *lowest* bid wins, and the bid amounts bear no relationship to the value of the underlying real estate. We therefore agree with

102. *In re* Smith, 501 B.R. 843, 847 (Bankr. N.D. Ill. 2013) (citing City of Milwaukee v. Gillespie, 487 B.R. 916, 920 (E.D. Wis. 2013)).

103. *Gillespie*, 487 B.R. at 920.

104. *Smith*, 501 B.R. at 847 (quoting McKeever v. McClandon (*In re* McKeever), 166 B.R. 648, 650–51 (Bankr. N.D. Ill. 1994)).

105. *Smith*, 501 B.R. at 847.

106. *Id.*

107. *Id.*

the bankruptcy court, disagree with the district court, and apply the general rule of § 548(a)(1)(B).[108]

2. Second Circuit: *Clinton County Treasurer v. Wolinsky*.

In *Clinton County Treasurer v. Wolinsky*, the United States District Court for the Northern District of New York considered an appeal arguing "that a valid pre-petition tax foreclosure proceeding and subsequent transfer of property to a [bona fide purchaser] is not the type of fraudulent conveyance contemplated by Bankruptcy Code § 548."[109] In *Wolinsky*, the property at issue was transferred on March 18, 2011 from the debtor to Clinton County through an *in rem* tax foreclosure proceeding Clinton County commenced after the debtor failed to pay $2,406.45 in property taxes in 2008 and 2009, and then failed to answer the foreclosure petition or pay the delinquent taxes prior to the redemption deadline.[110] The property value was assessed at $42,000 at the time of foreclosure.[111] Clinton County then sold the property at a public auction to a bona fide purchaser for $25,500 in June of 2011.[112] The debtor filed for bankruptcy on December 20, 2011.[113] The trustee commenced the adversary proceeding on June 28, 2012 seeking a judgment against Clinton County declaring the tax foreclosure transfer to be fraudulent and avoiding the transfer for the benefit of the estate pursuant to 11 U.S.C. § 548(a)(1).[114]

Clinton County argued that the tax foreclosure proceeding cannot be avoided pursuant to 11 U.S.C. § 548(a)(1)(B).[115] Clinton County further argued that allowing tax sales to be avoided would "impinge[] upon a municipality's right to collect unpaid real property taxes through foreclosure actions."[116] Instead, the court in *Wolinsky* reasoned that *BFP* should not apply to tax sales.[117] The court stated that, in *BFP*, the United States Supreme Court refrained from extending its holding to other foreclosures and forced sales, including tax sales as an example.[118] Additionally, the court in *Wolinsky* stated that other federal courts in New York have specifically refused to extend *BFP* to tax sales because, according to these courts, mortgage and *in rem* tax foreclosures are substantially different, and these differences justify differing treatment pursuant to § 548.[119]

108. *Id.* at 234.
109. Clinton Cty. Treasurer v. Wolinsky, 511 B.R. 34, 36 (N.D.N.Y. 2014).
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. *Wolinsky*, 511 B.R. at 36.
115. *Id.* at 37.
116. *Id.*
117. *Id.* at 39.
118. *Id.* at 38.
119. *Wolinsky*, 511 B.R. at 38.

In *Wolinsky*, the court also reasoned that the language in § 548 of the Bankruptcy Code suggests tax sales can be avoided because the statute states that "*any transfer*" that occurred within two years prior to the bankruptcy filing date may be avoided if the transfer involved actual or constructive fraud.[120] The court in *Wolinsky* stated that, based on this language, there is no indication that Congress intended to carve out an exception for tax sales.[121] The court also reasoned that permitting avoidance of tax sales "comports with the Bankruptcy Code's general policy favoring equal treatment of creditors."[122] Therefore, the court in *Wolinsky* concluded that § 548 of the Bankruptcy Code "permits the Trustee to avoid 'any transfer'—including a valid state tax foreclosure proceeding—that occurred within two years prior to the filing of the bankruptcy petition and involved actual or constructive fraud."[123]

3. Second Circuit: *In re Wentworth*.

In *In re Wentworth*, the United States Bankruptcy Court for the District of Connecticut considered "whether a non-judicial strict foreclosure of a town tax lien conducted pursuant to a state law may constitute an avoidable fraudulent transfer under Bankruptcy Code § 548 where there is a one to thirteen ratio between the amount of the tax lien and the value of the property."[124] In *Wentworth*, the Town of Acton, Maine filed a tax lien and then obtained title through the forfeiture procedure to the debtor's property in Acton prior to the debtor's bankruptcy filing date.[125] The plaintiff claimed that Acton's foreclosure of its tax lien, when the debtor was insolvent, was an avoidable transfer pursuant to § 548 of the Bankruptcy Code "because the debtor received less than a reasonably equivalent value in exchange for such transfer."[126] The defendant contended that the transfer of property cannot be avoided because the debtor received "reasonably equivalent value" through the tax foreclosure proceeding.[127]

Furthermore, the defendant in *Wentworth* argued that under *BFP*, the defendant's forfeiture procedure provided "reasonably equivalent value."[128] The court stated that in *BFP*, the United States Supreme Court held that the consideration received from a noncollusive mortgage foreclosure sale that conforms to applicable state law is "reasonably equivalent value" pursuant to §

120. *Id.* (emphasis added).

121. *Id.*

122. *Id.* at 39 (citing Cty. of Clinton v. Warehouse at Van Buren St., Inc., 496 B.R. 278, 283 n.5 (N.D.N.Y. 2013)).

123. *Id.* at 41.

124. *In re* Wentworth, 221 B.R. 316, 317 (Bankr. D. Conn. 1998).

125. *Id.*

126. *Id.* at 318.

127. *Id.*

128. *Id.* at 319.

548 of the Bankruptcy Code, and emphasized that this decision covered only mortgage foreclosure sales.[129] Further, the Court in *BFP* stated that the considerations may be different in the context of other foreclosures and forced sales, including tax sales.[130] In *Wentworth*, the defendant argued that in a "reasonably equivalent value" analysis, market value is irrelevant and equivalence must be measured by compliance with state mandated procedures.[131] The court in *Wentworth* stated that

> [t]he cases that have extended *BFP* to tax foreclosure sales have generally compared the protections offered to the property owner under the state's mortgage foreclosure and tax foreclosure statutes and found that the property owner is at least as well protected in a tax foreclosure proceeding as in a mortgage foreclosure.[132]

Moreover, in *Wentworth*, the court stated "[t]he rationale of the cases extending *BFP* to tax foreclosure sales does not apply to the instant matter because under Maine's forfeiture procedure for foreclosure of tax liens, the property was transferred without the possibility of judicial oversight, without competitive bidding, and without a public sale."[133] The court in *Wentworth* distinguished Maine's forfeiture procedure at issue in that case from mortgage foreclosure sales and other tax foreclosure sales, such as the ones in the cases that extended *BFP* to tax foreclosure sales, stating that Maine's forfeiture procedure eliminates the market while mortgage foreclosure sales and the other tax foreclosure sales only redefine the market.[134] Further, the court stated, "[w]hile 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."[135] Therefore, the court in *Wentworth* "conclude[d] that the transfer of a debtor's real property with a market value of $20,700 for a tax lien of $1,515.63, pursuant to the forfeiture procedure, is not for reasonably equivalent value," and, "[c]onsequently, the transfer is a fraudulent transfer pursuant to § 548."[136]

VII. THE NEGATIVE EFFECTS CAUSED BY THE LACK OF A UNIVERSALLY APPLIED STANDARD TO DETERMINE WHETHER TAX SALES ARE FOR "REASONABLY EQUIVALENT VALUE"

The lack of a universally applied standard to determine whether tax sales are for "reasonably equivalent value" precluding avoidance pursuant to § 548 of the

129. *Wentworth*, 221 B.R. at 319.
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.* at 319–20.
134. *Wentworth*, 221 B.R. at 320.
135. *Id.* (emphasis in original).
136. *Id.*

Bankruptcy Code causes uncertainty and other negative effects. Allowing tax sales to be considered not for "reasonably equivalent value," and as a result, avoidable, "impinges upon a municipality's right to collect unpaid real property taxes through foreclosure actions."[137] Additionally, allowing tax sales to be avoidable could "*always* result in real property tax foreclosures [being] set aside because [i]nvariably, there will *always* be a significant disparity between the amount of taxes due and [the] value of the property itself."[138] Providing that tax sales may be avoided significantly harms the tax sale market by making it risky to acquire property through tax sales. Individuals and entities may stop attempting to acquire property through tax sales because of the threat that purchasers could lose their investment if the tax sale is avoided in bankruptcy. This, as mentioned earlier, may make it difficult for municipalities to collect unpaid property taxes through tax sales, which is a significant state interest.[139]

Moreover, it is unjust to take property away from good faith purchasers who acquire property through tax sales. These good faith purchasers are acquiring property through tax sales administered and controlled by state and local governments, and have no reason to suspect that their purchase may be "constructively fraudulent" pursuant to § 548 of the Bankruptcy Code. The fact that these purchasers are acquiring property from state and local governments should arguably increase tax sale purchasers' confidence in the security of the titles to real estate purchased at tax sales. Therefore, avoiding tax sales unjustly and unpredictably harms innocent acquirers of property through tax sales.

Furthermore, the United States Supreme Court recognized the negative effects and issues that would be caused by holding that mortgage foreclosure sales controlled by state law are avoidable in *BFP*, stating

> Federal statutes impinging upon important state interests cannot . . . be construed without regard to the implications of our dual system of government . . . When the Federal Government takes over . . . local radiations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, those charged with the duty of legislating must be reasonably explicit. It is beyond question that an essential state interest is at issue here: We have said that the general welfare of society is involved in the security of the titles to real estate and the power to ensure that security inheres in the very nature of state government. Nor is there any doubt that the interpretation urged by petitioner [that the mortgage foreclosure at issue should be deemed not for "reasonably equivalent value," and as a result, avoidable] would have a profound effect upon that interest: The title of every piece of realty purchased at foreclosure would be under a federally created cloud . . . To displace traditional state regulation in such a manner, the federal statutory purpose must be clear and

137. Clinton Cty. Treasurer v. Wolinsky, 511 B.R. 34, 37 (N.D.N.Y. 2014).

138. Cty. of Clinton v. Warehouse at Van Buren St., Inc., 496 B.R. 278, 281 (N.D.N.Y. 2013) (emphasis in original) (internal quotation marks omitted).

139. *Wolinsky*, 511 B.R. at 37.

> manifest. Otherwise, the Bankruptcy Code will be construed to adopt, rather than to displace, pre-existing state law.[140]

These same interests and issues exist equally in the context of tax sales controlled by state law. Additionally, the Bankruptcy Code should be construed to adopt pre-existing state law controlling tax sales because the federal statutory purpose of avoiding tax sales is not clear and manifest, which is required to displace traditional state regulation. Therefore, the courts should similarly find that a fair and proper price, or a "reasonably equivalent value," for foreclosed property, including property foreclosed at tax sales, 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, precluding avoidance pursuant to § 548 of the Bankruptcy Code.[141]

Significantly, the United States Supreme Court stated in the above quoted text from *BFP* that the general welfare of society is involved in the security of the titles to real estate, and the Court stated this is an essential interest of states.[142] Further, the Court continued, providing that the states have the power to ensure the security of the titles to real estate.[143] The Court acknowledged that allowing mortgage foreclosure sales to be avoided would profoundly affect that state interest by placing property purchased at mortgage foreclosure sales governed by state law "under a *federally created cloud*."[144] The same interests and issues exist with respect to tax sales. This Note argues that allowing tax sales to be avoided harms the general welfare of society and states' interests by significantly reducing the security of the titles to real estate obtained through lawfully conducted tax sales. Specifically, by avoiding tax sales, the federal government is taking property away from good faith acquirers of property, and not allowing the states to ensure the security of the titles to property transferred through tax sales. Further, the federal government is disregarding state laws governing tax sales when it deems property acquired through tax sales "constructively fraudulent" pursuant to § 548 of the Bankruptcy Code. Avoiding tax sales is a displacement of traditional state regulation, and this Note argues this is federal government overreach, and it harms the general welfare of society and states' interests by significantly reducing the security of the titles to real estate obtained through tax sales.

140. BFP v. Resolution Tr. Corp., 511 U.S. 531, 544–45 (1994) (internal citations, alterations, and quotation marks omitted).

141. *See id.* at 545.

142. *Id.* at 544.

143. *Id.*

144. *Id.* (emphasis added).

VIII. SOLUTION: SHOULD *BFP* APPLY TO TAX SALES?

An ideal solution to resolve the issue of whether tax sales may be avoided pursuant to § 548 of the Bankruptcy Code is to apply *BFP* to tax sales. In *BFP*, the United States Supreme Court "expressly noted that *BFP* did not apply to tax foreclosures," and this has created confusion surrounding the issue of whether tax sales may be avoided pursuant to § 548 of the Bankruptcy Code.[145] In *BFP*, the Court stated in a footnote that "[w]e emphasize that our opinion today covers only mortgage foreclosures of real estate. The considerations bearing upon other foreclosures and forced sales (*to satisfy tax liens*, for example) may be different."[146] It is important to highlight that the Court stated the considerations *may* be different.[147] This does not mean that the Court *would* have ruled differently if *BFP* involved a tax sale, only that it *could* have ruled differently.[148] The Court has not ruled on this issue with respect to tax sales, however, and thus the issue remains unresolved.

This Note argues that the differences between tax sales and mortgage foreclosure sales do not justify treating these sales differently when considering whether the sales yield "reasonably equivalent value" pursuant to § 548 of the Bankruptcy Code. In *In re McGrath*, the United States Bankruptcy Court for the District of New Jersey provided reasoning for why *BFP* should apply "with as much force" in the context of tax sales as it does in mortgage foreclosure sales.[149] While some courts have disagreed with this decision, this Note argues the reasoning and holding in *McGrath* is correct. The court in *McGrath* reasoned that "[a] tax foreclosure is as much a forced sale process as a mortgage foreclosure."[150] Further, "the policy considerations favoring deference to mortgage foreclosure sales apply with as much force to tax foreclosure sales."[151]

Additionally,

> [t]he holding in *BFP*, that reasonably equivalent value for foreclosed property is the price received at a non-collusive foreclosure sale, is based in large part upon the premise that "'the general welfare of society is involved in the security of the titles to real estate' and the power to ensure that security 'inheres in the very nature of [state] government.'"[152]

The Court continued, "not[ing] that foreclosure laws vary from state to state based upon how each state values the interests of creditors and debtors, and

145. Gregg, *supra* note 41.

146. *BFP*, 511 U.S. at 537 n.3 (1994) (emphasis added).

147. *Id.*

148. *Id.*

149. *In re* McGrath, 170 B.R. 78, 82 (Bankr. D.N.J. 1994).

150. *Id.*

151. *Id.*

152. *Id.* (citing *BFP*, 511 U.S. at 542–44 (quoting American Land Co. v. Zeiss, 219 U.S. 47, 60 (1911))).

setting a federal 'reasonable' foreclosure price would place 'federal bankruptcy law well beyond the traditional field of fraudulent transfers.'"[153] The Court avoided placing "the title of property purchased at foreclosure under a 'federally created cloud,'" holding "that reasonably equivalent value was the price paid at a foreclosure sale provided that all of the requirements of the state's foreclosure law have been complied with."[154]

The court in *McGrath* then conceded that tax sales will likely yield lower sale prices than mortgage foreclosures "because the amount of taxes due is usually much less than the amount due on a mortgage."[155] As a result, "[the] difference between the fair market value and the forced sale price is going to be greater with a tax foreclosure than with a mortgage foreclosure."[156] *BFP* states that fair market value is not the value to consider in a forced sale context, and the *McGrath* court stated this should be true for tax sales also.[157] Further, pursuant to New Jersey state law, a tax sale foreclosure is not a fraudulent transfer.[158] The *McGrath* court reasoned that

> [w]hile the state statutes do not determine whether a transfer is avoidable under Bankruptcy Code § 548(a)(2), . . . this confirms the concern expressed in *BFP* that the federal courts should not interpret bankruptcy law as to fraudulent transfers in a manner which differs from state law absent a clear expression of Congressional intention that the federal courts should do so.[159]

Therefore, in *McGrath*, the court ultimately concluded "that the reasoning of *BFP* applies with as much force to tax foreclosures in New Jersey as it does to mortgage foreclosures," and that the price paid for the tax sale certificate in that case was "reasonably equivalent value" for the debtors' interest in the property pursuant to 11 U.S.C. § 548.[160]

This Note disagrees with the courts that have held that *BFP* should not apply in the tax sale context, and that the tax sales in question were not for "reasonably equivalent value." These courts are incorrectly comparing the price received at tax sales to the fair market values of properties to determine if tax sales were for "reasonably equivalent value." This is in contrast to the United States Supreme Court's reasoning provided in *BFP* that courts should not "refer to fair market value as the benchmark against which determination of reasonably equivalent value is to be measured. In the context of an otherwise lawful mortgage foreclosure sale of real estate, such reference is in our opinion not consistent

153. *McGrath*, 170 B.R. at 82 (quoting *BFP*, 511 U.S. at 540).
154. *Id.* (quoting *BFP*, 511 U.S. at 544).
155. *Id.*
156. *Id.*
157. *Id.*
158. *McGrath*, 170 B.R. at 82 (citing N.J.S.A. §§ 25:2-20 to N.J.S.A. § 54:5-87).
159. *Id.* at 83 (citing *BFP*, 511 U.S. at 542–43).
160. *Id.*

with the text of the Bankruptcy Code."[161] Further, the U.S. Supreme Court provided that

> we decline to read the phrase "reasonably equivalent value" in § 548(a)(2) to mean, in its application to mortgage foreclosure sales, either "fair market value" or "fair foreclosure price" (whether calculated as a percentage of fair market value or otherwise). We deem, as the law has always deemed, that a fair and proper price, or a "reasonably equivalent value," for foreclosed property, 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.[162]

Again, in *BFP*, the Court restricted this holding to mortgage foreclosures.[163]

This Note argues that this reasoning and definition of "reasonably equivalent value" should apply to tax sales. It is inappropriate to change the definition of the phrase "reasonably equivalent value" in § 548 of the Bankruptcy Code depending on the circumstances because this creates uncertainty and unevenly applied law. Additionally, the distinction between tax sales and mortgage foreclosure sales is not significant enough to use different definitions of the phrase "reasonably equivalent value" for tax sales as compared to mortgage foreclosure sales. They are both forced sales, and will likely yield lower prices than fair market value, however, the Court in *BFP* reasoned that fair market value is irrelevant when considering whether a mortgage foreclosure sale is for "reasonably equivalent value."[164] Therefore, fair market value should be irrelevant when considering whether tax sales are for "reasonably equivalent value." Furthermore, the protections offered to property owners in mortgage foreclosure sales and tax sales are comparable and generally "the property owner is at least as well protected in a tax foreclosure proceeding as in a mortgage foreclosure."[165] Moreover, the United States Bankruptcy Court for the Eastern District of Missouri, for example, applied *BFP* to Missouri tax sales, and responded to the fair market value issue stating

> [t]he Court is sensitive to the fact that most, if not all, forced tax sales yield a purchase price much lower than the "fair market value" of the property. The Supreme Court also recognized this fact in the mortgage foreclosure context, yet it did not control their analysis. Similarly, the consideration received at a tax sale should not control the analysis in this case.[166]

161. BFP v. Resolution Tr. Corp., 511 U.S. 531, 536–37 (1994).

162. *Id.* at 545.

163. *Id.* at 537 n.3.

164. *Id.* at 536–37.

165. *In re* Wentworth, 221 B.R. 316, 319 (Bankr. D. Conn. 1998).

166. *In re* Russell-Polk, 200 B.R. 218, 222 (Bankr. E.D. Mo. 1996) (citing *BFP*, 511 U.S. at 538–39).

BFP should apply to tax sales, and as a result, there should be a presumption that lawfully conducted tax sales are for "reasonably equivalent value" precluding avoidance pursuant to § 548 of the Bankruptcy Code.

Therefore, similar to the court in *McGrath*, this Note argues that *BFP* should apply to tax sales.[167] "Tax foreclosure sale statutes are often comparable to mortgage foreclosure sale statutes," and as a result, "by analogy, *BFP* is arguably applicable to tax foreclosure sales."[168] Further, the considerations in *BFP* involving mortgage foreclosures are analogous to the considerations involving tax sales. Just as the courts in interpreting § 548 of the Bankruptcy Code are required to defer to state law governing mortgage foreclosure sales pursuant to *BFP*,[169] the courts in interpreting § 548 should be required to defer to state law governing tax sales. Specifically, the courts should rule that, like in *BFP*, a "reasonably equivalent value" for property is the price in fact received at the forced sale, including tax sales, so long as all the requirements of the state's forced sale laws have been complied with.[170]

IX. SOLUTION: ADOPTING A PRESUMPTION THAT THE PRICE RECEIVED AT A TAX SALE PROVIDES FOR "REASONABLY EQUIVALENT VALUE" BASED ON FOUR ELEMENTS

"In reliance on the *BFP* holding, some courts have found that the price received through a tax sale provides for reasonably equivalent value where three procedural protections are present: notice, reasonable opportunity to cure and strict adherence to statutory requirements."[171] Further, "[t]hese courts generally view *BFP* as instructing that federal courts should not interpret bankruptcy's fraudulent-transfer provisions in a manner that differs from state law, absent a clear expression of congressional intent."[172] States generally hold that tax sales are not subject to their fraudulent conveyance statutes, and as a result, bankruptcy courts using the fraudulent-conveyance provisions of § 548 should not reach a different result.[173] These courts reason that "what is a reasonable price under the provisions of the state statute providing for the forced sale should be deemed reasonably equivalent value under § 548."[174] Moreover, "[t]his method provides tax sales in each state the same protections, and only sales that do not comply with a state's statutory requirements may be set aside."[175]

167. *In re* McGrath, 170 B.R. 78, 83 (Bankr. D.N.J. 1994).
168. Gregg, *supra* note 41.
169. *BFP*, 511 U.S. at 545.
170. *See id.*; 11 U.S.C. § 548 (2012).
171. Rudzik & Rudzik, *supra* note 98, at 63.
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*

"Other courts require a fourth element: the need for competitive bidding."[176] Adding this fourth element creates the potential of differing results depending on the provisions of the state statute authorizing the sale in question.[177] The courts requiring the fourth element still rely on *BFP*.[178] In *BFP*, the United States Supreme Court noted that not all forced sales pursuant to state law would be deemed to be for a "reasonably equivalent value."[179]

> These courts look to the facts of *BFP*, recognizing that the state procedure in question, as noted by the Supreme Court, provided for *competitive bidding*. The bidding allows for *a market* to establish the value—a value not necessarily related in any way to "fair market value," but for a "reasonably equivalent value" to the debtor's interest under the circumstances of the forced sale.[180]

This Note agrees with the courts that have found that the price received through a tax sale provides for "reasonably equivalent value" where the following four procedural protections are present: notice, reasonable opportunity to cure, strict adherence to statutory requirements, and competitive bidding.[181] This approach is ideal because it addresses the negative effects caused by the uncertainty under the current system while ensuring that bankruptcy estates receive a fair value because a tax sale meeting the aforementioned four elements will likely yield a fair value. Further, adopting this presumption could provide an additional incentive for states to amend their tax sale procedures to meet the elements required to establish "reasonably equivalent value" in tax sales. This could benefit states because their tax sales would presumably yield higher values if the tax sales meet the aforementioned elements.

Therefore, as some courts have recognized, an ideal solution to address the negative effects caused by the lack of a universally applied standard to determine whether tax sales are for "reasonably equivalent value" pursuant to § 548 of the Bankruptcy Code is for the courts to adopt a universally applied presumption that tax sales are for "reasonably equivalent value" when the tax sale in question meets the following four elements: notice, reasonable opportunity to cure, strict adherence to statutory requirements, and competitive bidding. This solution addresses the negative effects caused by the uncertainty under the current system while still ensuring that a fair value is received by the bankruptcy estate to be distributed among creditors of the estate, fulfilling the bankruptcy courts' mission of "ensuring equal treatment for both debtors and creditors."[182]

176. Rudzik & Rudzik, *supra* note 98, at 63.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* (emphasis added).

181. Rudzik & Rudzik, *supra* note 98, at 63.

182. United States Bankruptcy Court for the Eastern District of Missouri, *Welcome to the official website for the United States Bankruptcy Court Eastern District of Missouri* (last visited February 10, 2019), https://www.moeb.uscourts.gov [https://perma.cc/2L26-KYK2].

X. CONCLUSION

Currently, there is no universally applied standard to determine whether tax sales are for "reasonably equivalent value" pursuant to § 548 of the Bankruptcy Code. As a result, it remains uncertain and difficult to predict whether tax sales may or may not be avoided because tax sales may be avoided if they are not for "reasonably equivalent value." This uncertainty has numerous negative effects, including causing harm to the general welfare of society and states' interests by significantly reducing the security of the titles to real estate obtained through tax sales.[183] One solution to address this issue is to apply *BFP* to tax sales. Specifically, the courts should rule that, like in *BFP*, a "reasonably equivalent value" for property is the price in fact received at forced sales, including tax sales, so long as all the requirements of the state's forced sale laws have been complied with.[184] Another solution is for the courts to adopt a presumption that tax sales are for "reasonably equivalent value" when the tax sale in question meets the following four elements: notice, reasonable opportunity to cure, strict adherence to statutory requirements, and competitive bidding. One of these solutions is necessary to remove the titles of property purchased at tax sales from under the current "*federally created cloud*."[185]

ZACHARY W. LANGREHR*

183. *See* BFP v. Resolution Tr. Corp., 511 U.S. 531, 544 (1994).

184. *Id.* at 545; 11 U.S.C. § 548 (2012).

185. *BFP*, 511 U.S. at 544 (emphasis added).

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