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BANKRUPTCY LAW

BFP v. IMPERIAL SAVINGS AND LOAN ASSOCIATION: RESOLVING THE "REASONABLY EQUIVALENT VALUE" STANDARD IN AVOIDING FORECLOSURE SALES

I. INTRODUCTION

In BFP v. Imperial Savings & Loan Association,¹ the Ninth Circuit ruled that when a foreclosure sale is held in compliance with applicable state procedural law² and is non-fraudulent,³ then the sale is not voidable under the Federal Bankruptcy Code.⁴ In an effort to resolve the conflict between state and federal law, the Ninth Circuit determined that the focus of judicial review of foreclosure sales should be shifted from price⁵ to pro-

1. BFP v. Imperial Savings and Loan Ass'n, 974 F.2d 1144 (9th Cir. 1992) (per Sneed, J., joined by Nelson, J., and Roll, D.J., sitting by designation), cert. granted, 114 S. Ct. 37 (1993). While this case was pending, the Resolution Trust Corporation was appointed receiver of Imperial Savings and Loan Association. The court continued, for convenience's sake, to refer to the appellee as Imperial, and this note will do the same.
2. A foreclosure sale held in compliance with applicable law is referred to by the courts as a "regularly conducted" foreclosure sale. In California, section 2924 of the California Civil Code governs foreclosure sale procedures. See CAL. CIV. CODE § 2924 (West 1993).
3. A nonfraudulent foreclosure sale is referred to by the courts as a "noncollusive" foreclosure sale. Essentially, the term "noncollusive" describes a good faith foreclosure sale. A "collusive" foreclosure sale is one in which the purchaser and debtor act in concert to defraud the debtor's creditors. These types of transactions are the focus of states' fraudulent conveyance laws. Such transactions are also clearly voidable under 11 U.S.C. § 548(a)(1) (1988).
4. BFP, 974 F.2d at 1148.
5. The Federal Bankruptcy Code seeks to protect the debtor in foreclosure, and his general creditors, by ensuring that the price received at foreclosure is reasonable. Section 548(a)(2)(A) of the Bankruptcy Code allows for avoidance of sales which fail to generate

547
As a result of the Ninth Circuit decision, a nonfraudulent foreclosure sale is no longer voidable simply because it deprives a debtor or his creditors of substantial value. In essence, the Ninth Circuit ruled that where a nonfraudulent foreclosure sale is in procedural compliance with state foreclosure law, the federal standard of reasonably equivalent value is also met.

The Ninth Circuit's decision has created a split among federal circuit courts as to the appropriate standard for evaluating the fairness of foreclosure sales in bankruptcy cases. The Fifth

6. The Ninth Circuit choose to evaluate the fairness of the foreclosure sale based strictly on compliance with applicable state procedures. See BFP, 974 F.2d at 1149 n.7 ("We also agree with the lower courts that the applicable state procedures were complied with in this case and that BFP received adequate notice of the foreclosure under California law.") (emphasis added).

7. A trustee may seek to avoid a foreclosure sale under 11 U.S.C. § 548(a)(2)(A) because the amount received at the sale is believed to be less than a reasonably equivalent value. For example, an owner of a property with a fair market value of $1,000,000 defaults on a loan against his property. The loan balance at the time of default is $500,000. The lender sells the property, complying with the appropriate procedural statutes, and receives $500,000 from a third party buyer. The sale price satisfies the outstanding debt on the property. The amount, however, is only one half the fair market value. The original owner, or the original owner's unsecured creditors, might argue that the equity in the property prior to the forced sale (the difference between the fair market value and the forced sale price) was unjustly depleted in the sale. Prior to the BFP holding, they could challenge the foreclosure sale as constructively fraudulent and avoidable under 11 U.S.C. §548(a)(2)(A) because reasonably equivalent value was not received.

8. "Reasonably equivalent value" is not defined in the Bankruptcy Code. "Value" is defined in 11 U.S.C. § 548(d)(2) (1988) as "property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor. . . ." Therefore, arguably, the price received at a mortgage foreclosure, because it is a forced sale, is a good indication of "reasonably equivalent value" under the circumstances. This rationale seems fair in cases such as BFP, where the foreclosure price was sufficient to pay off the antecedent debt. BFP, 974 F.2d at 1145. On the other hand, when a debtor's interest is sold at a foreclosure sale for a mere fraction of its fair market value, a convincing argument can be made that the sale was not for "reasonably equivalent value." For further discussion of reasonably equivalent value, see infra notes 50 to 120 and accompanying text.

9. BFP, 974 F.2d at 1149.
and Seventh Circuits, for example, have held that a nonfraudulent, properly conducted foreclosure sale is not necessarily adequate protection for debtors under the Federal Code. These courts have held that a separate inquiry is necessary to determine whether the federal requirement of "reasonably equivalent value" is established. In contrast, the Ninth Circuit's *BFP* decision declares that a separate inquiry is not necessary where procedural compliance with state foreclosure law exists.

By effectively preempting the federal statute in state foreclosure actions, the Ninth Circuit holding draws a clear line between sales that satisfy the reasonably equivalent value standard and those that do not. But by overlooking judicial middle ground between the two standards, the Ninth Circuit's holding has the effect of making the federal statute illusory. This note analyzes the reasoning behind the appellate court decision and the court's reliance on what it called "broader considerations." This note compares the Ninth Circuit holding with a previously suggested alternative model which advocates the review of a foreclosure sales price only when state foreclosure procedures are insufficiently structured to produce a maximum forced sale price. The conclusion is that both state and federal interests can be accommodated without resort to an exclusion of one in favor of the other.

10. See *Bundles v. Baker*, 865 F.2d 815, 824 (7th Cir. 1988) (explaining that "[i]n defining reasonably equivalent value, the court should neither grant a conclusive presumption in favor of a purchaser at a regularly conducted, noncollusive foreclosure sale, nor limit its inquiry to a simple comparison of the sale price to the fair market value . . . . Reasonable equivalence should depend on all the facts of each case."); see also *Durrett v. Washington Nat'l Ins. Co.*, 621 F.2d 201, 204 (5th Cir. 1980) (holding that the price paid at the trustee's sale was not a fair equivalent even though the foreclosure sale complied procedurally with state law).

11. See, e.g., *Bundles*, 865 F.2d at 824; *Durrett*, 621 F.2d at 204.


13. *BFP*, 974 F.2d at 1148. The court explained that the stability of the state foreclosure market and "due regard for traditional state areas of regulation" were considerations which outweighed the concern for a plain language interpretation of §548. *Id.* Moreover, judicial scrutiny and avoidance of properly conducted, nonfraudulent sales, could create foreclosure market instability. The court's fear is that foreclosure sale bidders would discount their bids to account for the uncertainty of the sale. Thus, the application of 11 U.S.C. § 548(a)(2)(A), intended to protect the debtor's assets, could in fact have a negative impact upon the value of the debtor's assets by discouraging aggressive foreclosure sale bidding. *See id.*

14. *See infra* notes 153-63 and accompanying text.
II. FACTS AND PROCEDURAL HISTORY

In July of 1987, several parties came together with the intention of purchasing, remodeling, and reselling the Newport Beach home of Sheldon and Ann Foreman. The parties involved were Wayne Pedersen, his wife Marlene, and Russell Barton. A written agreement was made between the Pedersens and Barton in which the Pedersens agreed to buy the Foreman home for $356,250 plus some rare coins. In turn, the Pedersens agreed to give Barton a 180-day option to purchase the home. In exchange for this option, Barton agreed to pay the Pedersens twenty-five percent of the profits realized from a later sale of the home.

After the sale to the Pedersens entered escrow, the nature of the agreement changed. Because of local newspaper reports about an investigation of fraudulent rare coin sales by Mr. Pedersen, an oral agreement was made between all of the parties to restructure the deal. This restructuring included the formation of a partnership which would purchase the home. The BFP partnership was formed with Wayne and Marlene Pedersen and Russell Barton as the sole partners. As in the prior arrangement, profits realized on the resale of the home were to be divided seventy-five percent to Barton and twenty-five percent to the Pedersens.

On August 27, 1987, the Foremans deeded the property to the Pedersens who, on the same day, deeded the property to the BFP partnership. The $356,250 used to make the purchase was borrowed from Imperial Federal Savings and Loan Association (“Imperial”) and was secured by a first deed of trust on the

15. BFP v. Imperial Sav. and Loan Ass'n (In re BFP), 132 B.R. 748, 749 (Bankr. 9th Cir. 1991).
16. BFP v. Imperial Sav. and Loan Ass'n (In re BFP), 974 F.2d 1144, 1145 (9th Cir. 1992). The value of the coins was not disclosed in the pleadings.
17. Id. Barton intended to remodel the home for resale.
18. Id. It is not clear why the partnership was formed. See infra note 20.
19. Id.
20. Id. It is possible the formation of the BFP partnership was an attempt to create a “Bona Fide Purchaser” entity. The transfer of the property to the BFP partnership might have been intended to insulate the property, and BFP, from a possible voided transaction later. See infra note 34 for a discussion of “bona fide purchaser.”
In lieu of tendering the rare coins, the BFP partnership issued a six month promissory note to the Foremans in the amount of $200,000. This promissory note was secured by a second deed of trust on the property.

Concerns created by the investigation of Mr. Pedersen proved well founded. Following the purchase of the home from the Foremans, Mr. Pedersen conveyed the property not only to the BFP partnership, but also to a concern called Off Road Vehicles-Recreation and Family Campground, Inc. BFP and the Foremans immediately sued to quiet title to the property. While this state court action was pending, Imperial "entered a notice of default under the first deed of trust" and instituted foreclosure proceedings on the property. In an attempt to secure an automatic stay of this foreclosure proceeding, Off Road then filed an involuntary bankruptcy petition on behalf of BFP. BFP responded by moving to dismiss the involuntary petition. Imperial then moved to lift the automatic stay. The bankruptcy court granted both of these motions, lifting the stay on June 12, 1989, and dismissing the involuntary case on June 14, 1989.

On July 12, 1989, Imperial conducted a foreclosure sale and

21. BFP, 974 F.2d at 1145.
22. Id. It can be inferred that the Foremans, after becoming aware of the investigation of Mr. Pedersen’s rare coin dealings, decided not to accept rare coins in the transaction.
23. Id.
24. Id.
25. A quiet title action is “[a] proceeding to establish the plaintiff’s title to land by bringing into court an adverse claimant and there compelling him either to establish his claim or be forever after estopped from asserting it.” Black’s Law Dictionary 1249 (6th ed. 1990).
26. BFP, 974 F.2d at 1145.
27. BFP, 132 B.R. 748, 749 (Bankr. 9th Cir. 1991). Payments were not being made on the first deed of trust loan. Id.
28. BFP, 974 F.2d at 1145.
30. BFP, 974 F.2d at 1145; BFP, 132 B.R. at 749.
31. Id. Under California law, the foreclosure proceeding instituted by Imperial was automatically stayed by Off Road’s involuntary bankruptcy petition. See 11 U.S.C. § 303 (1988).
32. BFP, 974 F.2d at 1145.
sold the property to Paul Osborne for $433,000. Mr. Osborne had no notice of the title dispute and bought the property in good faith. BFP alleges that as a result of the sale it lost its equity in the property.

On July 21, 1989, the state court in the quiet title action announced its intention to settle the dispute by rescinding the original 1987 conveyance by the Foremans to the Pedersens. Damages were to be awarded to both the Foremans and Barton against the Pedersens. Final judgment on this quiet title action was entered on October 12, 1989.

After the quiet title decision was announced, BFP, joined by the Foremans, filed a second state court action attempting to have the foreclosure sale conveyance to Osborne rescinded. The suit alleged Imperial did not comply with California foreclosure procedures. This second state suit was stayed however, when on October 25, 1989, BFP filed for voluntary Chapter 11 bankruptcy protection.

BFP then instituted the action which formed the basis of the Ninth Circuit decision. In bankruptcy court, BFP attempted to have the transfer to Osborne voided. On March 6, 1990, the

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33. Id. Imperial was able to proceed with the foreclosure sale because the automatic stay had been lifted. See 11 U.S.C. § 303 (1988).
34. BFP, 974 F.2d at 1145. The fact that Mr. Osborne purchased the property without notice of the clouded title and in good faith is significant because this gives him "bona fide purchaser" status. A "bona fide purchaser" is defined as "[o]ne who has purchased property for value without any notice of any defects in the title of the seller." BLACK'S LAW DICTIONARY 177 (6th ed. 1990). Pursuant to California law, title to the property became vested in Mr. Osborne upon delivery and execution of the trustee's deed. See CAL. CIV. CODE §§ 1091, 1053, 1054 (Deering 1990).
35. BFP, 974 F.2d at 1145. BFP alleges the value of the property was $725,000. Since the sale was for $433,000, the equity allegedly lost amounted to $292,000. This amount includes the Foremans' $200,000 interest in the property via the second deed of trust.
36. BFP, 974 F.2d at 1145.
37. Id. at 1146.
38. Id.
39. Id. The Foremans joined BFP in this action because, although the state court had ruled the original conveyance to the Pedersens to be void, the Foremans still stood to lose their interest in the property (the second deed) because of Osborne's good faith purchase at the foreclosure sale. Id.
40. Id. (citing CAL. CIV. CODE § 2924 (West 1993)).
42. BFP, 974 F.2d at 1146.
bankruptcy court dismissed the complaint.\textsuperscript{43} The court also ruled that Osborne was a “bona fide purchaser for value, without notice,”\textsuperscript{44} and found “no legal authority to set aside the sale. . . .”\textsuperscript{45} The bankruptcy court decision was “summarily affirmed” by the district court.\textsuperscript{46}

BFP appealed on May 9, 1990.\textsuperscript{47} On July 10, 1990 the bankruptcy court again ruled in favor of Imperial, granting summary judgment.\textsuperscript{48} On November 5, 1991, the Ninth Circuit Bankruptcy Appellate Panel affirmed the bankruptcy court ruling.\textsuperscript{49}

\textsuperscript{43} Id. (‘BFP did not make any allegation that Imperial’s trustee sale was in violation of California law . . . [or that] the sale was conducted fraudulently or collusively.’). Under In re Madrid, the party seeking to set aside the transfer must show that the sale failed to comply with applicable California law or that the sale was conducted collusively. See In re Madrid, 21 B.R. 424, 427 (Bankr. 9th Cir. 1982) (construing the “reasonably equivalent value requirement of Code § 548(a)(2) to mean the same as the consideration received at a non-collusive and regularly conducted foreclosure sale”), aff’d on other grounds, 725 F.2d 1197 (9th Cir. 1984), cert. denied, 469 U.S. 833 (1984); see infra notes 57-63 and accompanying text for a discussion of Madrid.

\textsuperscript{44} BFP, 974 F.2d at 1146; see supra note 34.

\textsuperscript{45} BFP, 974 F.2d at 1146.

\textsuperscript{46} Id.

\textsuperscript{47} Id. The record incorrectly notes the date as May 9, 1991.

\textsuperscript{48} The court held that BFP did not in fact have a property interest because “the Petersons [sic] did not have an interest in property when they purported to transfer the title to . . . BFP. Therefor [sic], BFP never received good title.” BFP, 974 F.2d at 1146. Without a property interest, the court reasoned, BFP could not seek avoidance under 11 U.S.C. § 548(a)(2)(A). The court also held that there could be no avoidance under 11 U.S.C. § 548(a)(2)(A) because “a reasonably equivalent value was received in exchange for the transfer, [and] the nonjudicial foreclosure sale was non-collusive and regularly conducted.” BFP, 974 F.2d at 1146.

\textsuperscript{49} BFP, 132 B.R. 748, 751 (Bankr. 9th Cir. 1991) The Bankruptcy Appellate Panel “hesitated to use the state court rescission to determine the interests of these parties or to dispose of this appeal.” Id. at 749 n.4. The Bankruptcy Appellate Panel noted that while the bankruptcy court found that BFP had no interest in the property (because of the rescission), the “same could be said of Imperial’s interest in the property.” Id. Instead, the Bankruptcy Appellate Panel affirmed that a noncollusive, regularly conducted non-judicial foreclosure sale could not “be challenged as a fraudulent conveyance . . . [because] such a sale establishes ‘reasonably equivalent value’ as a matter of law.” Id. at 750 (citing In re Madrid, 21 B.R. 424 (Bankr. 9th Cir. 1982)). In addition, the court found BFP had received proper notice of the foreclosure sale since “publication for three consecutive weeks is sufficient notice, even where the sale was postponed due to bankruptcy, and not renoticed after bankruptcy.” Id. (citing Lupertino v. Carbahal, 111 Cal.Rptr. 112, 115 (Ct. App. 1973)). The court also found BFP’s claim, that it was verbally misled by Imperial’s attorney into believing the foreclosure sale would not be held until after the conclusion of the state court proceeding, did “not state a claim for estoppel.” Id.
III. BACKGROUND

The Ninth Circuit, and other circuit courts, have developed differing approaches to the reasonably equivalent value issue addressed in BFP. Holdings within the Ninth Circuit have been inconsistent. Some courts have followed the 1982 In re Madrid decision while other courts have parted with its reasoning. Madrid held that a noncollusive, regularly conducted foreclosure sale established reasonable equivalence as a matter of law.

In Durrett v. Washington National Insurance Co., a 1980 decision by the Fifth Circuit, the court held that 57.7% of fair market value was not, in that case, a fair equivalent. Avoidance of the trustee sale was justified in Durrett despite compliance with applicable state procedural laws. Since the early eighties, many courts have referred to the reasonably equivalent value issue as the Madrid/Durrett debate. The following provides a brief background of the reasonable equivalence issue, as it has developed within the Ninth Circuit, and in the other circuits.

A. THE NINTH CIRCUIT HISTORY - A DIVIDED CIRCUIT

In 1982, the Ninth Circuit Bankruptcy Appellate Panel decided In re Madrid. Madrid held that properly conducted, noncollusive foreclosure sales establish reasonably equivalent value as a matter of law. In reaching its conclusion, the Appellate Panel first examined the Fifth Circuit’s holding in Durrett which voided a transfer for lack of reasonably equivalent value

50. In re Madrid, 21 B.R. 424 (Bankr. 9th Cir. 1982), aff’d on other grounds, 725 F.2d 1197 (9th Cir. 1984), cert. denied, 469 U.S. 833 (1984).
51. Id. at 427.
53. Id. at 203.
54. The sale in Durrett was made by the trustee pursuant to the power of sale provision of the deed of trust. Id. at 204.
55. See, e.g., Bundles, 856 F.2d at 821.
56. See In re Haider, 126 B.R. 796, 799 (Bankr. D.Mont. 1991) (describing the law in the Ninth Circuit regarding the application of Bankruptcy Code § 548(a)(2)(A) to non-judicial foreclosure sales as being in disarray as a result of conflicting decisions from the Central and Southern Districts of California).
57. Madrid, 21 B.R. 424.
58. Id. at 427.
59. 621 F.2d 201 (5th Cir. 1980).
under circumstances involving a voluntary, private transfer.\textsuperscript{60} Madrid, which involved an involuntary, public sale, declined to follow Durrett because it believed “a regularly conducted sale, open to all bidders and all creditors, is itself a safeguard against the evils of private transfers. . .”\textsuperscript{61} The Madrid court went on to conclude that “the law of foreclosure should be harmonized with the law of fraudulent conveyances. Compatible results can be obtained by construing the reasonably equivalent value requirement of Code § 548(a)(2) to mean the same as the consideration received at a non-collusive and regularly conducted foreclosure sale.”\textsuperscript{62} The Ninth Circuit affirmed the Bankruptcy Appellate Panel in Madrid on other grounds.\textsuperscript{63}

Some Ninth Circuit bankruptcy courts have followed the Bankruptcy Appellate Panel decision in Madrid while others have parted with its holding. The court in In re Verna,\textsuperscript{64} for example, followed Madrid, holding that “where a third party purchases property at a non-collusive and regularly conducted foreclosure sale, the sale establishes the reasonably equivalent value required by Bankruptcy Code section 548.”\textsuperscript{65} The Verna court followed the appellate panel in Madrid although it determined that stare decisis did not apply.\textsuperscript{66}

\textsuperscript{60} Madrid, 21 B.R. at 425-26. See infra notes 84-89 and corresponding text for discussion of the Durrett holding.

\textsuperscript{61} Id. at 426-27.

\textsuperscript{62} Id. at 427 (relying on Golden v. Tomiyasu, 387 P.2d 989 (Nev. 1963), and Oller v. Sonoma County Land Title Co., 290 P.2d 880 (Cal. 1955), for the proposition that more than mere inadequacy of price is required to upset a foreclosure sale).

\textsuperscript{63} In re Madrid, 725 F.2d at 1199. The Ninth Circuit found that the “foreclosure sale was not a transfer under § 548(a)” and therefore did “not decide whether the amount paid at foreclosure was a reasonably equivalent value.” Id.

\textsuperscript{64} In re Verna, 58 B.R. 246 (Bankr. C.D. Cal. 1986).

\textsuperscript{65} Id. at 251. This holding is in line with the Madrid decision. However Verna limits its decision to ‘third party’ purchasers. Madrid did not distinguish between a third party purchaser and a trustee purchaser. Madrid, 21 B.R. at 427.

\textsuperscript{66} Verna, 58 B.R. at 251-52 (finding the Madrid Bankruptcy Appellate Panel’s reasoning persuasive even though it believed the appellate panel’s decision was not controlling). The 1984 Bankruptcy Amendments and Federal Judgeship Act (“BAFJA”) revised the definition of “transfer” to include the foreclosure of the debtor’s equity of redemption. See infra note 110. This revision effectively overruled the Ninth Circuit decision in Madrid which had affirmed the appellate panel decision because it found the foreclosure sale was not a transfer. Madrid, 725 F.2d at 1199. According to the Verna court, the bankruptcy appellate panel decision did not survive the BAFJA amendments. Verna, 58 B.R. at 251-52. See also Alan S. Gover & Glenn D. West, The Texas Nonjudicial Foreclosure Process — A Proposal to Reconcile the Procedures Mandated by State Law with the Fraudulent Conveyance Principles of The Bankruptcy Code, 43 Sw. L.J. 1061,
The court in *In re Kachanizadeh* also followed *Madrid*. *Kachanizadeh* believed it was bound by stare decisis, stating “this court is required to follow the [*Madrid*] bankruptcy appellate panel’s holding on this issue.” *Kachanizadeh* believed it was bound because of the bankruptcy appellate panel decision in *In re Ehring*. The *Ehring* court, although deciding a § 547 case, “agree[d] with those courts which have found that *Madrid* is still valid law.”

While *Verna, Kachanizadeh*, and *Ehring* followed *Madrid*, other Ninth Circuit bankruptcy courts did not. In Oregon, the court in *In re Staples* determined it was not bound by stare decisis and after an “independent determination of the law” concluded that the reasoning of the dissent in *Madrid* was persuasive. The court held that “the price paid at a regularly conducted foreclosure sale should be accorded, at best, a strong presumption of adequacy.” The *Staples* court emphasized the equity concerns involved: “It is not inequitable to require that a purchaser who receives a windfall at a foreclosure sale return that value to the estate. . . . Buyers wishing to bargain-hunt do so at their own risk.” The court pointed out that if a sale is

1079 n.139 (1990) (stating that the 1984 bankruptcy amendments did not overrule the *Madrid* appellate panel decision).
68. *Kachanizadeh*, 108 B.R. at 738. In contrast to the court in *Verna*, the *Kachanizadeh* court believed the *Madrid* Bankruptcy Appellate Panel decision did survive the BAFJA amendments. It is worth noting that the court, although it followed the *Madrid* appellate panel, stated that it “believe[d] Lindsay is the better approach.” *Id*. See infra notes 78-83 and accompanying text for a discussion of *Lindsay*.
69. 91 B.R. 897 (Bankr. 9th Cir. 1988).
70. *Ehring*, 91 B.R. at 901. In dicta, the court also stated: “This argument [that the creditor received a windfall when it purchased the property at the foreclosure sale and resold it at fair market value] . . . should properly be challenged under Section 548 as a fraudulent transfer. Even assuming this argument was properly raised before this Panel, we find no windfall where the property is sold at the lien value in a non-collusive regularly held foreclosure sale.” *Id*. This dicta in effect restates the holding in *Madrid*. See *Madrid*, 21 B.R. at 427.
72. *Staples*, 87 B.R. at 646 (stating that the bankruptcy appellate panel’s decision in *Madrid* was not revived when Congress overruled the Ninth Circuit’s *Madrid* decision).
73. *Id*.
74. *Id*. See *In re Madrid*, 21 B.R. at 428 (Volinn, J., dissenting); see also notes 190-94 and accompanying text for discussion of *Madrid* dissent.
76. *Staples*, 87 B.R. at 646.
avoided, the good faith purchaser will be protected under § 548 (c).77

The court in Lindsay v. Beneficial Reinsurance Co. (In re Lindsay)78 also parted with Madrid, suggesting a three-part inquiry.79 The first inquiry according to the Lindsay court, should be whether the foreclosure sale “was properly conducted in accordance with state law and was non-collusive.”80 The second inquiry should go beyond mere compliance with state law and ask “whether commercially reasonable steps were taken to achieve the best price at the foreclosure.”81 And finally, only if the sale is deemed to be commercially unreasonable, should the court make the third inquiry and analyze evidence of the value of the property to determine if less than reasonably equivalent value was received.82 By applying this three-part test, the court stated it was “not elevating compliance with state court foreclosure standards above all other factors. . . and neither was the Court looking solely to percentage of fair market value achieved.”83

These cases demonstrate how Ninth Circuit courts have struggled with the reasonably equivalent value issue where the value received at foreclosure is very low yet state foreclosure

77. Id. Section 548(c) (1978) reads in pertinent part:
   Except to the extent that a transfer or obligation voidable under this section is voidable under section 544, 545, or 547 of this title, a transferee or obligee of such a transfer or obligation that takes for value and in good faith has a lien on or may retain any interest transferred or may enforce any obligation incurred, as the case may be, to the extent that such transferee or obligee gave value to the debtor in exchange for such transfer or obligation.


79. Id. at 991; see also In re Haider, 126 B.R. 796 (Bankr. D. Mont. 1991) (applying the Lindsay three part test in measuring reasonable equivalence).

80. This portion of the Lindsay test is equivalent to the Madrid test; see Madrid, 21 B.R. at 427.

81. Lindsay, 98 B.R. at 991. This second inquiry, requiring commercial reasonableness at the foreclosure sale, goes beyond Madrid. The Lindsay court states that if commercially reasonable steps are taken by the foreclosing creditor, to achieve the best possible price at the foreclosure sale, the sale will remain undisturbed even if the price received is a very low percentage of the property's fair market value.

82. Id.

83. Id.
procedures have been followed. Madrid established a bright line standard by holding that compliance with state foreclosure procedures assured reasonably equivalent value. Some Ninth Circuit courts have followed Madrid, but others have been uncomfortable with the Madrid result. The Ninth Circuit decision in BFP resolves the issue by essentially reaffirming the holding in Madrid.

B. THE OTHER CIRCUIT COURTS - FROM DURRETT TO BUNDLES

There has also been a lack of consensus regarding the proper application of the reasonably equivalent value standard among the other circuits. The Fifth Circuit opened the debate in 1980. In Durrett v. Washington National Insurance Co., the court found that where a parcel of real estate sold at a foreclosure sale for “approximately 57.7 percent of [its] . . . fair market value,” a “fair equivalent” was not received. In voiding the transfer, the Fifth Circuit used the fraudulent conveyance avoiding powers of the Bankruptcy Code for one of the first times. The Durrett court found that after “review of the entire evidence,” the foreclosure sale should not stand due to lack of fair equivalence. In its holding, the court remarked it was unable to find district or appellate court precedent approving a transfer of real property for less than seventy percent of market value. Because of this commentary by the court, Durrett has

84. Durrett, 621 F.2d 201 (5th Cir. 1980).
85. Id. at 203.
86. Durrett was decided under § 67(d) of the Bankruptcy Act which allowed avoidance of transfers in which a “fair equivalent” was not received. Section 548(a)(2)(A), enacted in 1978 to replace § 67(d), substitutes the wording “reasonably equivalent value” in place of “fair equivalent.” The meaning of the two phrases is substantially the same. See Ehrlich, supra note 116 at 945 (discussing the change in terminology from “fair equivalent” to “reasonably equivalent value”).
87. Gover & West, supra note 66, at 1073 (noting that despite the existence of fraudulent conveyance provisions in the bankruptcy laws since the early 1800’s, the provisions do not appear to have been applied to set aside a foreclosure sale prior to the Fifth Circuit’s holding in Durrett); but see Schafer v. Hammond, 456 F.2d 15 (10th Cir. 1972)) (where a sale was voided because the value received was determined to be 50% of market value). The Durrett court’s decision was widely criticized. See, e.g., Lawrence D. Coppel & Lewis A. Kahn, Defanging Durrett: The Established Law of Transfer, 100 Banking L.J. 676 (1983); Robert M. Zinman, James A. Houle, & Alan J. Weiss, Fraudulent Transfers According to Alden, Gross & Borowitz: A Tale of Two Circuits, 39 Bus. Law. 977 (1984); see also Gover & West, supra note 66, at 1061 n.9 (listing numerous articles that have been written on the Durrett holding).
88. Durrett, 621 F.2d at 203.
come to stand for the proposition that a transfer is voidable under the fraudulent conveyance statutes when the value received is less than seventy percent of market value. While not an accurate interpretation of Durrett, it has become the popular reading. 89

In re Hulm 90 was the next significant Circuit court decision on the 'reasonably equivalent value' issue. This Eighth Circuit decision came after the Ninth Circuit holding in Madrid and declined to adopt the reasoning of the Ninth Circuit Bankruptcy Appellate Panel. 91 Although the North Dakota Bankruptcy Court relied on Madrid and found reasonably equivalent value as a matter of law, the Eighth Circuit remanded stating, "we do not believe that the sale price at a regularly conducted foreclosure sale, although absent fraud or collusion, can automatically be deemed to provide a reasonably equivalent value in exchange for the interest of the debtor transferred within the meaning of section 548 (a)." 92 The court believed an evidentiary hearing was needed to provide an answer. 93

In re Winshall Settlors' Trust 94 was decided in 1985. The Sixth Circuit followed the Ninth Circuit Madrid decision stating "the better view is that reasonable equivalence for the purposes of a foreclosure sale under § 548(a)(2)(A) should be consonant with the state law of fraudulent conveyances." 95 The Winshall court points to Madrid and what the Winshall court calls the "well nigh universal rule that mere inadequacy of price alone does not justify setting aside an execution sale ... there must be in addition proof of some element of fraud, unfairness or oppression. ..." 96 The Winshall court found the Durrett holding objectionable because it believed that "following the Durrett
holding would radically alter these rules."97

The Winshall court also recognized the argument of the court in In re Richardson.98 The Richardson court argued that allowing state law to sanction:

exchanges in foreclosures which are not reasonably equivalent gives effect to state contract and foreclosure policy but may overlook the interests of other creditors of the debtor. The determination of reasonable equivalence should not be controlled by state law . . . [it] should be determined in light of the function of Section 548 in fostering an equitable distribution of the debtor's property.99

Winshall contests this argument, agreeing that “the power of the trustee to avoid certain preferential transfers was clearly intended to assure the equitable distribution of a debtor's assets among unsecured creditors” but arguing that Congress could not have intended “the rights of such creditors necessarily to override those of good faith purchasers at state foreclosure sales or the policy judgments of states in balancing the interests of parties thereto.”100

In 1988, the Seventh Circuit decided Bundles v. Baker.101 After summarizing the holdings in Durrett and Madrid,102 the Bundles court concluded, in a lengthy analysis, that § 548(a)(2)(A) “establishes a federal basis - independent of state law - for setting aside a foreclosure sale.”103 The court found that the “unambiguous language” of § 548 “requires the review-

97. Id. The inference is that Durrett is seen as voiding a sale based solely on the sale price received. A careful reading of Durrett, however, does not reveal a price only analysis. The court's decision was based on “review of the entire evidence.” Durrett, 621 F.2d at 203.
99. In re Winshall Settlors' Trust, 758 F.2d at 1139 n.4 (quoting In re Richardson, 23 B.R. at 447).
100. Id. Cf. Kapela v. Hewman, 649 F.2d 887, 890-91 (1st Cir. 1981) (stating that where Bankruptcy Act rules conflict with Article 9 of the U.C.C. relating to secured transactions, the conflicting statutes should be interpreted in a way that minimizes the conflict and harmonizes the policies that underlie them).
101. 856 F.2d 815 (7th Cir. 1988).
102. The court considered Durrett and Madrid the “seminal cases” on the issue. Id. at 819.
103. Id. at 823.
ing court to make an independent assessment of whether reasonable equivalence was given."¹⁰⁴

This conclusion is based on a statutory construction analysis. The court cites the Supreme Court in *Central Trust Co. v. Official Creditors' Committee of Geiger Enterprises*,¹⁰⁸ which counsels that "the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law making body which passed it, the sole function of the courts is to enforce it according to its terms."¹⁰⁶

In analyzing the language of the statute, the *Bundles* court notes that § 548(a)(2)(A) "makes no distinction between sales that do and sales that do not comply with state law."¹⁰⁷ To confirm that Congress did not intend that § 548 equate reasonable equivalence with compliance with state law, the court examined the relevant legislative history.¹⁰⁸ Specifically, the court reviewed the history surrounding the passage of the 1984 Bankruptcy Amendments and Federal Judgeship Act ("BAFJA").¹⁰⁹ BAFJA was significant because it revised the definition of "transfer" for Bankruptcy Code purposes.¹¹⁰ A dialogue between Senators Dole and DeConcini included several comments expressly confirming that the BAFJA Amendments were not meant to affect the rights of debtors under the "reasonably equivalent value" standard in § 548(a)(2)(A).¹¹¹ In addition, the BAFJA legislative his-

¹⁰⁴. Id. at 821.
¹⁰⁶. Id. at 359-60.
¹⁰⁷. Bundles, 856 F.2d at 821.
¹⁰⁸. Id.
¹¹⁰. BAFJA proposed three changes to the Bankruptcy Code, two of which were enacted into law. The two provisions enacted included one revising the definition of "transfer" in § 101 of the Bankruptcy Code to include the "foreclosure of the debtor's equity of redemption." 11 U.S.C. § 101(50) (1988). The other change amended § 548 to "emphasize its applicability to transfers where the debtor 'voluntarily or involuntarily' received less than reasonably equivalent value." Bundles, 856 F.2d at 817 n.4.
¹¹¹. The following are excerpts from a scripted colloquy inserted into the Congressional Record by Senators Dole and DeConcini:

DeConcini: "My understanding is that these provisions were not intended to have any effect one way or the other on the so called Durrett issue. Is my understanding correct?"
tory reveals the withdrawal of an amendment, proposed by Senator Thurmond, that would have resolved the issue by granting an irrebuttable presumption of reasonably equivalent value when certain procedural requirements were met.112

Continuing its analysis, the Bundles court reviewed the Ninth Circuit Madrid decision and attempted to reconcile the Madrid holding with the language of § 548(a)(2)(A).113 The Bundles court concluded that Madrid's irrebuttable presumption rule was inconsistent with the federal bankruptcy code in three ways.114 First, it found Madrid inconsistent because the irrebuttable presumption rule creates, in essence, a judge-made "exception to the trustee's avoiding powers under section 548(a)(2)(A) - an exception not otherwise found in the statute."115 Secondly, the Bundles court found Madrid inconsistent because it has the effect of reading "good faith" into § 548(a)(2)(A).116 The court found the Madrid holding to imply

Dole: "The Senator's understanding is correct... Senator Thurmond agreed to delete from his amendment all provisions dealing with the Durrett issue... [N]o provision of the bankruptcy bill passed by this body was intended to intimate any view one way or the other regarding the correctness of the position taken... in the Durrett case, or... in Madrid, which reached a contrary result.

... [T]he amendment[s] should not be construed to in any way codify Durrett or throw a cloud over noncollusive foreclosure sales.

... Finally, neither of the [amendments] purport to deal with the question of whether a noncollusive, regularly conducted foreclosure sale should be deemed to be for a reasonably equivalent value."

See Bundles, 856 F.2d at 821 n.8 (citing 130 Cong.Rec. § 13,771-13,772 ((Daily ed.) No. 131, Pt. II, October 5, 1984); see also In re Verna, 58 B.R. at 250.

112. In re Verna, 58 B.R. at 250. Senator Metzenbaum had objected to the inclusion of the last proposed amendment because "this issue had not been considered in committee." See also In re Kachmizadeh, 108 B.R. 734, 738 (stating the 1984 BAFJA amendments did not address the reasonably equivalent value issue).

113. Bundles, 856 F.2d at 823

114. Id.

115. Id. (citing In re Richardson 23 B.R. 434, 446 (Bankr. D. Utah 1982) (stating that an irrebuttable presumption of reasonable equivalence for noncollusive, regularly conducted public sales "proscribes" the factual inquiry into reasonable equivalence which § 548(a)(2) was designed to facilitate); see also In re Madrid 21 B.R. at 428 (Volinn, J., dissenting) (stating that an irrebuttable presumption of reasonable equivalence excises "vital language" from § 548).

116. Bundles, 856 F.2d at 823. See also Scott B. Ehrlich, Avoidance of Foreclosure Sales as Fraudulent Conveyances: Accommodating State and Federal Objectives, 71 VA. L. REV. 933, 945 (1985). Ehrlich analyzes the appearance of the "reasonably equivalent value" terminology in § 548 of the 1978 Bankruptcy Code as a replacement for the "fair consideration" language of section 67d(2) of the old Code. He concludes that the switch in phraseology "was an attempt to remove subjective considerations, such as good faith, as criteria for the avoidance of fraudulent transfers." (emphasis added). Id.
this good faith condition because "as long as the sale is conducted in good faith and in accordance with state law, the sale price is conclusively presumed to be a reasonably equivalent value." The Bundles court found such a result "inconsistent with section 548(a)(2)'s purpose of permitting the trustee to avoid transfers as constructively fraudulent, irrespective of the parties' actual intent." The Bundles court emphasized that reading "good faith" into § 548(a)(2) was inconsistent with the section's purpose of allowing avoidance of constructionally fraudulent transfers. Finally, the Bundles court found Madrid inconsistent with § 548 because "an irrebuttable presumption renders section 548(a)(2) merely duplicative of other Code provisions such as section 548(a)(1) and 544(b)."

The Bundles decision offers a recent and extensive analysis of the reasonably equivalent value issue and represents the present law in the Seventh Circuit. Since Durrett in 1980, the various circuit courts, including the Ninth Circuit, have attempted to formulate a workable rule of law with regard to the application of § 548(a)(2)(A). The courts have struggled to balance the interests represented by the Bankruptcy Code's fraudulent conveyance statutes with equally important concerns for stability in the state foreclosure markets. These efforts have resulted in a split among the circuits as evidenced by the above cases.

IV. THE COURT'S ANALYSIS

In BFP v. Imperial Savings and Loan Association, the Ninth Circuit settled two issues. First, the court held that the BFP partnership did in fact have a property interest in the Foreman home as a result of the state court ruling quieting title

117. Bundles, 856 F.2d at 823.
118. Id; see 4 L. King, COLLIER ON BANKRUPTCY, ¶ 548.02-03 (15th ed. 1988); see also Ehrlich, supra note 116, at 956 (supporting the Bundles court analysis).
119. Bundles, 856 F.2d at 823.
120. Id. The court points out that such a reading would make § 548(a)(2)(A) redundant in the sense that section 548(a)(1) already allows for avoidance of transfers "with actual intent to hinder, delay, or defraud any entity . . . ." Bundles, 856 F.2d at 823 n.13. Section 544(b) provides "the trustee may avoid any transfer . . . that is voidable under applicable law . . . ." 856 F.2d at 823 n.14.
121. BFP v. Imperial Savings and Loan Ass'n (In re BFP), 974 F.2d 1144 (9th Cir. 1992), cert. granted, 114 S. Ct. 37 (1993).
in favor of the BFP partnership and the Foremans. The finding of a property interest was a necessary element in allowing BFP to seek avoidance of the transfer under § 548(a)(2). The Ninth Circuit gave the state court holding "full faith and credit" as a valid judgment despite finding the state court's reasoning "difficult to follow." Secondly, the Ninth Circuit affirmed the judgment of the Bankruptcy Appellate Panel holding that the "price received at a non-collusive, regularly conducted foreclosure sale established irrebuttable reasonably equivalent value under 11 U.S.C. § 548(a)(2)(A)." This holding is squarely in line with the long standing Bankruptcy Appellate Panel decision in In re Madrid.

A. BFP Property Interest Existed

The Ninth Circuit held that the state court judgment quieting title in favor of BFP and the Foremans (as against all others) would stand, and did create a property interest in BFP. The court affirmed the state court quiet title judgment in spite of the state court's unclear reasoning.

Imperial argued that BFP did not obtain good title to the property because of the earlier state court ruling rescinding the sale of the home from Foreman to Pedersen. Imperial also pointed out that the Pedersens, whose fraudulent behavior caused the rescission of the deed from Foreman to Pedersen,
were general partners in BFP. Therefore, Imperial argued, BFP should not have been able to obtain "bona fide purchaser" status since knowledge of the fraud would be imputed to BFP under California partnership law. The Ninth Circuit implicitly acknowledged that both arguments were sound and that neither was clearly resolved by the lower courts. In addition, the Ninth Circuit noted that the state court ruling seemed to confuse the consideration issue with the Pedersen's fraudulent behavior. The Ninth Circuit did not attempt to harmonize all of the language or judgments of the lower courts. Instead, the court resolved the issue by affirming the state court quiet title judgment in favor of BFP and confirming BFP's interest in the property at the time of the foreclosure sale.

B. REASONABLY EQUIVALENT VALUE RECEIVED

The Ninth Circuit, acknowledging the issue was a "close one," affirmed the judgment of the Bankruptcy Appellate Panel which found reasonably equivalent value to exist irrefutably when a noncollusive, regularly conducted state foreclosure sale is held. This decision follows the reasoning of the earlier Bankruptcy Appellate Panel decision in In re Madrid. It is also in line with the decision in In re Winshall Settlor's Trust, in which the Sixth Circuit stated "the better view is that reasonable equivalence for the purposes of a foreclosure sale under § 548(a)(2)(A) should be consonant with the state law of fraudulent conveyance."

The Ninth Circuit conceded its decision was at odds with both the Seventh Circuit decision in Bundles, and the Fifth Cir-
cuit decision in *Durrett*. It explained that the analyses of these two courts rested "on a plain language interpretation of § 548(a)(2)"\(^{140}\) and call for a determination of reasonable equivalence "depend[ing] on all the facts of each case."\(^{141}\) The Ninth Circuit noted the *Bundles* court's argument that the granting of an irrebuttable presumption, in effect, creates a judicial exception to the avoiding powers of § 548.\(^{142}\) This exception, the Ninth Circuit pointed out, undermines the ability of the debtor or trustee to recover lost equity, the very purpose of the § 548 avoiding power.\(^{143}\)

The Ninth Circuit recognized the "persuasive"\(^{144}\) position represented by these contrary cases, but reasoned that "broader considerations require a different result."\(^{146}\) The court concluded that the stability of the state foreclosure market and "due regard for traditional state areas of regulation"\(^{146}\) were considerations which outweighed the concerns expressed by the *Bundles* and *Durrett* courts and their plain language interpretations of § 548.\(^{147}\) The court stated that by using the "Madrid formulation, [it is] able to balance bankruptcy policy and comity concerns."\(^{148}\) Furthermore, the court cited support for its position within both the National Conference of Commissioners on Uniform State Laws and the American Bar Association.\(^{149}\)

### V. CRITIQUE

While acknowledging the merit of a plain language interpretation of § 548(a)(2), the Ninth Circuit nevertheless determined, in *BFP v. Imperial Savings and Loan Association*,\(^{150}\) that

\(^{139}\) *BFP*, 974 F.2d at 1148.
\(^{140}\) Id. (citing *In re Bundles*, 856 F.2d 815, 824 (7th Cir. 1988)).
\(^{141}\) *BFP*, 974 F.2d at 1148 n.5 (quoting *Bundles*, 856 F.2d at 824).
\(^{142}\) Id. (citing *Bundles*, 856 F.2d at 823).
\(^{143}\) Id.
\(^{144}\) *BFP*, 974 F.2d at 1148.
\(^{145}\) Id.
\(^{146}\) *BFP*, 974 F.2d at 1149.
\(^{147}\) Id. at 1148-49.
\(^{148}\) Id. at 1149.
\(^{149}\) Id. at 1149 n.6. See Uniform Fraudulent Transfer Act § 3(b) (West 1984); see also 1983 A.B.A. SEC. OF REAL PROP. REP. 106B.
\(^{150}\) *BFP v. Imperial Savings and Loan Ass'n (In re BFP)*, 974 F.2d 1144 (9th Cir. 1992), cert. granted, 114 S. Ct. 37 (1993).
"broader considerations require a different result."161 The reasoning behind the Ninth Circuit decision then, lies in the substance of these "broader considerations."

A. THE POTENTIAL DESTABILIZING EFFECT OF APPLICATION OF § 548(a)(2)(A) ON STATE FORECLOSURE MARKETS

First, the Ninth Circuit voiced concern that "allowing a bankruptcy court to undo a foreclosure sale carries with it the strong potential to destabilize state mortgage transactions."162 Quoting Professor Ehrlich in his article Avoidance of Foreclosure Sales as Fraudulent Conveyances: Accommodating State and Federal Objectives,163 the Ninth Circuit points to the problems created from both federal and state perspectives:

The prospect that trial courts will determine reasonable equivalence on a case-by-case basis is untenable from both federal and state perspectives. From the state viewpoint, an ad-hoc approach produces intolerable uncertainty regarding the finality of any purchase at a foreclosure sale . . . . From a federal perspective, this uncertainty undermines the price-maximizing objectives of section 548(a)(2) because potential buyers will discount their bids . . . to reflect this uncertainty.164

This assessment by Professor Ehrlich captures the nature of the dilemma faced by courts endeavoring to effectively apply § 548 without defeating its purpose. By avoiding transfers for lack of reasonably equivalent value, courts could potentially be decreasing the amounts bid at future foreclosure sales by creating doubt about the finality of any given transaction. Such doubt can create instability in foreclosure markets and decrease the number of willing, aggressive purchasers. When demand at

151. Id. at 1148. The two considerations identified by the court are: 1) the instability created in foreclosure markets when a foreclosure sale is undone by a bankruptcy court, and 2) the tension that exists in balancing the interests of the federal Bankruptcy Code with state foreclosure laws. Id.
152. Id.
154. BFP, 974 F.2d at 1148 (citing Ehrlich, supra note 153, at 963-64).
forced sales is lower, prices received will inevitably fall. The
great concern the Ninth Circuit expressed for the potentially de-
stabilizing effect of overturning foreclosure sales through case-
by-case application of § 548(a)(2)(A) is clearly valid. Most cir-
cuit court opinions on the § 548 issue address this concern.165
However, it is worth noting that the Ninth Circuit, while relying
on Professor Ehrlich’s concise assessment of the problem, ig-
nored his proposed solution. It is especially worthy of note be-
cause the ultimate BFP holding is inconsistent with Ehrlich’s
thesis.

Professor Ehrlich is concerned about the destabilizing, un-
dermining effects of case-by-case trial court analysis and sug-
gests that “federal courts must be sensitive to the context in
which the transfer occurred and the disruptive effects of post
foreclosure avoidance on real estate transactions.”166 Import-
antly, he also recognizes that “the purpose and function of sec-
tion 548(a)(2) is precisely to allow the trustee to pierce the final-
ity of the foreclosure sale.”167 Professor Ehrlich’s proposed
solution is a compromise: “The courts should limit the scope
of section 548(a)(2) review to an initial evaluation of the state fore-
closure procedures, rather than to the quantitative sufficien-
ty of the bid received at sale.”168 As a result, the trustee must meet
a “double burden.”169 First, the trustee must show that “state
foreclosure procedures are insufficiently structured to produce a
maximum forced sale price,”166 and second, if the foreclosure
procedures are inadequate, “the trustee must also prove that the
sale price was less than a reasonably equivalent value.”161 Thus,

155. See, e.g., In re Madrid, 725 F.2d 1197, 1202 (9th Cir. 1984) (“[C]reation of a de
facto right of redemption would significantly chill participation at foreclosure sales,
where sale prices . . . already are frequently lower than the actual value of the property
sold.”), cert. denied, 469 U.S. 833 (1984); In re Bundles, 856 F.2d 815, 823, n.12 (7th Cir.
1988) (“[T]he central policy concern expressed in the opinions is that permitting avoid-
ance of foreclosure sales under § 548(a)(2) would have a negative effect on the foreclo-
sure market.”).

156. Ehrlich, supra note 153, at 966.
157. Id. at 962.
158. Id. (emphasis added).
159. Id. at 967.
160. Id.
161. Id. Ehrlich also states that “[i]n making this determination, however, the
courts must recognize that due to the failings of state procedures, no rational forced sale
value is available for comparative use, and the courts should apply section 548 strictly,
using the retail market value of the property for comparative purposes.” Id.
under Professor Ehrlich’s proposed system of judicial review, “federal courts should continue, as many have done, to enforce section 548 in accordance with its terms until state procedures are revamped.”162 This proposed system attempts to address the state and federal concerns, while sustaining the authority of § 548(a)(2) and the policies it embodies.163

In contrast, while the Ninth Circuit holding does address the state and federal concerns about uncertainty in the foreclosure markets, it does so at the expense of the Federal Bankruptcy Code’s authority. To the extent that compliance with ‘regular’ state foreclosure procedures creates an irrebuttable presumption of reasonably equivalent value received, § 548(a)(2) is stripped of its capacity to “pierce the finality of the foreclosure sale.”164 Professor Ehrlich’s model, focusing on the sufficiency of existing state foreclosure sale procedures, rather than on price, seeks to interpret § 548(a)(2) in a way that will lessen the potential for uncertainty in foreclosure markets and, at the same time, keep the avoiding power of § 548 alive. The Ninth Circuit holding effectively eliminates the avoiding power of § 548 by telling the courts: “You may not, under § 548(a)(2), undo any foreclosure sale that complies with applicable law and is non-collusive.”

There are two problems with the Ninth Circuit’s interpretation of § 548(a)(2). First, a judicial interpretation of § 548(a)(2) which renders it ineffective is arguably beyond the Ninth Circuit’s proper power.165 The concern over foreclosure market instability is essentially a policy concern. It is well settled that when policy concerns call for an outcome that directly conflicts with the intentions of an unambiguous federal statute, the call is

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162. Id.
163. Ehrlich is suggesting that the courts use § 548 to indirectly monitor the reasonably equivalent value standard by beginning the judicial inquiry with attention to the procedures in place within the state. In this way, the courts can employ § 548(a)(2), protecting the interests of the debtor (and his or her unsecured creditors), and at the same time, provide the foreclosure markets with some degree of insulation, so that price alone will not void a transfer. Instead, a combination of inadequate procedures and insufficient price would be required to avoid a sale.
164. Ehrlich, supra note 153, at 962.
165. The Bundles court expressed clearly the court’s duty stating: “Congress has set forth a federal standard. We must give effect to that congressional will, however ambiguous its manifestation.” Bundles, 856 F.2d 815, 822 (emphasis added).
for congressional action, not judicial action.\(^\text{166}\) Courts and commentators analyzing § 548(a)(2) cases have, for the most part, come to the same conclusion.\(^\text{167}\)

Secondly, under this Ninth Circuit holding, § 548(a)(2) ceases to be an impetus to improve state foreclosure sale procedures. Importantly, it is these procedures which, in the long run, generate higher foreclosure sale prices.\(^\text{168}\) There is no longer an impetus because, under BFP, so long as the foreclosure sale is regular and noncollusive, there no longer exists the threat of avoidance for lack of reasonably equivalent value received under § 548(a)(2).\(^\text{169}\) Where there is no threat of avoidance, there is no incentive to improve the methods which generate the sale price received.\(^\text{170}\)

\(^\text{166.}\) See, e.g., Solberg v. Superior Court, 137 Cal. Rptr. 460 (Cal. 1977) (“When statutory language is . . . clear and unambiguous there is no need for construction, and courts should not indulge in it.”).

\(^\text{167.}\) See, e.g., Bundles, 956 F.2d at 823 (“Any change deemed desirable on policy grounds should be addressed to Congress rather than to this court.”); In re Hulm, 738 F.2d 323, 327 (8th Cir. 1984) (“The Bankruptcy Code provisions are clear. . . . [P]olicy considerations cannot affect the outcome in this case, but must be addressed, if at all, by Congress.”); Madrid, 21 B.R. at 428 n.1 (Volinn, J., dissenting) (defining the issue as essentially a policy concern that should probably be dealt with legislatively); Ellen A. Feinberg, Durrett, After the 1984 Amendments to the Bankruptcy Code, 59 JUL Fla. B.J. 41 (noting the detrimental effects on the stability of titles purchased at foreclosure sales and suggesting that Congress, not the judiciary, should address policy considerations by amending the Bankruptcy Code; but see Madrid, 725 F.2d 1197 (9th Cir. 1984) (expressing by its holding the belief that judicial action is appropriate); see In re Winshall Settlor’s Trust, 758 F.2d 1136 (6th Cir. 1985) (following the holding in Madrid).

\(^\text{168.}\) See infra notes 173-178 and related text for discussion of the effect of improved foreclosure sale procedures on sale prices received.

\(^\text{169.}\) In contrast, under Professor Ehrlich’s system, § 548(a)(2) of the Bankruptcy Code continues to act as an impetus to the equitable distribution of the debtor’s property. Under Professor Ehrlich’s model, the courts will ultimately evaluate the foreclosure sale price to determine if it is reasonably equivalent value. This is done only when, in the court’s judgment, the state foreclosure procedures are not structured in a way that maximizes the foreclosure sale price; Ehrlich, supra note 153, at 967.

\(^\text{170.}\) To be sure, there could be other incentives to improving foreclosure sale procedures. But under this Ninth Circuit holding, § 548(a)(2) would not provide an incentive. Section 548’s value as an impetus to improving foreclosure procedures can be seen in a hypothetical example:

State A’s foreclosure procedures are inadequate and consistently result in low foreclosure sale prices. State B’s foreclosure sale procedures are effective and consistently result in relatively higher foreclosure sale prices received. Section 548(a)(2)’s avoiding powers would be used successfully more often in State A, where a reasonably equivalent value is rarely received. This would encourage State A to improve its foreclosure procedures to avoid the disruptive effects of § 548.
The Ninth Circuit decision, by creating an irrebuttable presumption of reasonably equivalent value, removes the destabilizing effect of § 548(a)(2) avoidances on state foreclosure markets. In theory, more stable foreclosure markets should lead to higher prices received. But at the same time, the Ninth Circuit must be aware that in effectively erasing the avoiding power of § 548(a)(2), the court is also removing a force which would also lead to higher prices received.

While the Ninth Circuit cites Professor Ehrlich’s model, the idea that efforts to increase the price received at a forced sale should focus on improving the procedures surrounding the sale has wide support among other commentators as well. Many commentators have identified the need for more effective procedures in state foreclosure proceedings. Some have suggested improved quality and scope of foreclosure sale publication through the use of readily available marketing systems. Other suggestions include the allowance of time for due diligence. Such allowance would increase bid prices by removing buyer concerns over title status and property conditions which exist in typical foreclosure proceedings. The creation of a sys-
tem with available financing would necessarily broaden the potential purchaser market. These suggested changes, many of which are reasonable and can be easily implemented, must be tempered by concerns for the timing and certainty of the foreclosure sale process. The trustee cannot be expected to bear the financial burden of a cumbersome foreclosure process.

This note does not attempt to catalogue the inadequacies that exist in the various state foreclosure procedures. Nor does it note all of the proposed solutions. Suffice it to say that the large volume of writings on the inadequacy of the foreclosure procedures in many different states, lends great support to the proposition that the elimination of § 548(a)(2) as an impetus to improving state foreclosure procedures is unwise.

B. BALANCING STATE AND FEDERAL COMITY CONCERNS

The second of the Ninth Circuit's broad considerations was "the growing tension between preemption and the requirements of a vigorous federal system." Essentially the court is identifying the comity concerns involved in § 548(a)(2) cases. The court claimed that it saw the issue as one of both "statutory interpretation" and this "growing tension." The Ninth Circuit concluded that "by following the Madrid formulation we are able to give a reasonable meaning to § 548 without unduly upsetting . . . state law." By use of the Madrid formula, "we are
The Ninth Circuit decision does avoid ‘unduly upsetting’ state law. The court’s irrebuttable presumption interpretation results in a federal standard of reasonably equivalent value that is essentially subsumed under state law. If state law is satisfied, the reasonably equivalent value standard is satisfied, without further inquiry. However, the question remains: “Does this interpretation give ‘reasonable meaning’ to the federal statute?”

There is strong argument, presented in the Bundles decision and recognized by the Ninth Circuit as “persuasive,” that such an interpretation gives the federal statute essentially no meaning.185 It is difficult to understand the Ninth Circuit’s reasoning here. In one paragraph, the court recognized as “persuasive” the Bundles court position that an irrebuttable presumption creates a judicial exception which undermines the purpose of the § 548 avoiding powers.186 In the next paragraph, the court claimed that such an interpretation gives ‘reasonable meaning’ to the statute.187 The Ninth Circuit provides no real analytical support for this conclusion. Neither is there any real analysis to support the court’s conclusion that it has balanced bankruptcy policy and comity concerns.

The Ninth Circuit sought support for its deferential position in the Supreme Court case of Cipollone v. Liggett Group.188 Cipollone emphasized that “interpretation of federal statutes should be tempered with due regard for traditional state areas of regulation.”189 It can be argued, that in interpreting § 548(a)(2)(A), the court went further in the BFP holding than

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184. Id.
185. The Bundles court recognized the irrebuttable presumption interpretation as inconsistent with the language of § 548. Bundles, 856 F.2d at 823. The Ninth Circuit acknowledged the strength of the Bundles court’s reasoning stating: “The [Bundles court’s] position is persuasive but we think that broader considerations require a different result.” BFP, 974 F.2d at 1148. Bundles also cites the dissent of Justice Volinn in In re Madrid (“The majority has excised vital language from § 548 in order to create an exception to the statute. . . .”), In re Madrid, 21 B.R. at 428 (Volinn J., dissenting); and In re Richardson (“[An] irrebuttable presumption . . . proscribes the factual inquiry . . . § 548(a)(2) was designed to facilitate.”) In re Richardson, 23 B.R. 434, 446 (Bankr. D.Utah 1982).
186. BFP, 974 F.2d at 1148.
187. Id.
189. Id. at 2617-18.
is suggested by the *Cipollone* Court. *Cipollone* counseled the courts to proceed with due regard when federal statutes apply in areas where state regulation is traditional. The state foreclosure markets are such areas. What the Ninth Circuit accomplished with its holding is not, however, an expression of due regard. In accommodating the state law in this area of traditional state regulation, *BFP* effectively preempts the federal statute. The *Madrid* dissent argued that “with a conclusive or irrebuttable presumption of reasonableness . . . the majority’s logic in applying § 548 as a factor in its decision is illusory.”

Judge Volinn’s dissent in *Madrid* also set forth an interpretation of the § 548 standard which seems to satisfy *Cipollone’s* call for “due regard for traditional state areas of regulation.” Judge Volinn suggested giving a “strong presumption of adequacy” for value received where state foreclosure procedures are followed in a non-collusive foreclosure sale. Such an interpretation properly places state and federal concerns on unequal footing: deference, by way of the strong presumption, is made to state regulations. At the same time, such a reading does not make the federal statute “illusory.”

**VI. CONCLUSION**

In *BFP v. Imperial Savings and Loan Association*, the Ninth Circuit held that the price received at a nonfraudulent foreclosure sale, when conducted in compliance with applicable procedural law, satisfies the reasonably equivalent value standard of § 548(a)(2) as a matter of law. The Ninth Circuit opinion was heavily influenced by concerns for certainty in the state

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191. *In re BFP*, 974 F.2d at 1149.
192. *Madrid*, 21 B.R. at 428; *see also In re Grissom*, 955 F.2d 1440, 1446 (11th Cir. 1992) (stating that absent fraud, collusion, or irregular procedures, the courts should presume that a legitimate foreclosure sale brings a price which is reasonably equivalent to the property’s value).
193. *See Grissom*, 955 F.2d at 1449 (“[O]nly by] conduct[ing] a thorough inquiry of all relevant facts and circumstances . . . . do we provide adequate deference to state foreclosure proceedings and the rights of secured creditors, without unduly trammeling upon the policies of the bankruptcy laws.”) (emphasis added). This statement supports the notion that deference, or ‘due regard,’ can be paid to state foreclosure law while thorough inquiries are made under § 548.
194. *In re Madrid*, 21 B.R. 424, 428 (Volinn, J. dissenting) (Bankr. 9th Cir. 1982).
foreclosure markets. To assure certainty and stability in these markets, the Ninth Circuit equated compliance with state foreclosure law, in a nonfraudulent setting, to reasonable equivalence for purposes of the Federal Bankruptcy Code.

The holding is troubling, however, because the court overlooked judicial middle ground which would give meaning to the federal standard of “reasonably equivalent value” and, at the same time, maintain stability in the state foreclosure markets. Judicial scrutiny, focusing on the quality of the state foreclosure procedures, rather than on mere compliance with the procedures, or on the quantitative price received at sale, can accomplish this aim. Courts, such as In re Lindsay,196 and commentators, such as Professor Ehrlich,197 have described this middle ground.

In addition, the question is raised, whether the Ninth Circuit, in departing from a plain language interpretation of § 548(a)(2), went too far in its judicial capacity. In trying to balance state and federal interests, without unduly upsetting state law, the Ninth Circuit stripped the Bankruptcy Code's reasonably equivalent value standard of its meaning. When a federal statute is interpreted judicially in such a way that it loses its meaning, the call for legislative action is loud and clear.

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196. In re Lindsay, 98 B.R. 983 (Bankr. S.D.Cal. 1989) (proposing a three-part test which included commercial reasonableness as a factor). See supra notes 78-83 and accompanying text.

197. Ehrlich, supra note 153 at 965-66 (suggesting the courts focus on a review of the procedural aspects of the foreclosure sale rather than on the price received at the sale).

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