

1-1-1985

# An Analysis of Durrett and Its Impact on Real and Personal Property Foreclosures: Some Proposed Modifications

William H. Henning  
bhenning@law.tamu.edu

Follow this and additional works at: <https://scholarship.law.unc.edu/nclr>



Part of the [Law Commons](#)

## Recommended Citation

William H. Henning, *An Analysis of Durrett and Its Impact on Real and Personal Property Foreclosures: Some Proposed Modifications*, 63 N.C. L. REV. 257 (1985).

Available at: <https://scholarship.law.unc.edu/nclr/vol63/iss2/1>

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact [law\\_repository@unc.edu](mailto:law_repository@unc.edu).

# AN ANALYSIS OF *DURRETT* AND ITS IMPACT ON REAL AND PERSONAL PROPERTY FORECLOSURES: SOME PROPOSED MODIFICATIONS

WILLIAM H. HENNING<sup>†</sup>

*Section 548(a)(2) of the Bankruptcy Code empowers a bankruptcy trustee to avoid fraudulent transfers of the debtor's assets if the debtor was insolvent at the time of the transfer. Since 1980, a number of federal courts have allowed trustees in bankruptcy to avoid properly conducted foreclosure sales of a debtor's pledged collateral when the collateral was sold for less than seventy percent of its fair market value. These courts have based their decisions on the theory that the transfers involved in these sales are fraudulent conveyances. This theory has been the subject of vigorous opposition from mortgage holders and other secured lenders. Professor Henning argues that the theory is a proper and useful tool for trustees because it permits the trustee to recapture equity in the collateral that otherwise would be lost from the debtor's estate. He concludes, however, that certain modifications should be made to the theory to prevent inequities to the secured lender, the debtor, and any third-party purchasers of the collateral.*

From the standpoint of the typical secured creditor, one of the most important aspects of a consensual security interest in real or personal property is its capacity to withstand a challenge by a trustee in bankruptcy. Most creditors are painfully aware that the Bankruptcy Reform Act of 1978 (Bankruptcy Code),<sup>1</sup> like its predecessor (Bankruptcy Act),<sup>2</sup> empowers trustees to avoid security interests in a variety of situations. The trustee may defeat a security interest that would be subordinated under state law to the rights of a judicial lien creditor or a bona fide purchaser of real property.<sup>3</sup> He also may be able to defeat the creditor's security interest by invoking the rules governing preferential transfers.<sup>4</sup> Secured creditors have learned to anticipate these challenges and to take steps to minimize these risks.

Recently, however, courts have approved a novel theory that few secured creditors anticipated. This theory views a postdefault, prebankruptcy disposition of collateral for less than seventy percent of its fair market value, that

---

<sup>†</sup> Professor of Law, University of Missouri-Columbia. J.D. 1976, University of Tennessee; LL.M. 1982, University of Illinois.

1. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended at 11 U.S.C. §§ 101-151326 (1982)) [hereinafter referred to as Bankruptcy Code].

2. Bankruptcy Act of July 1, 1898, ch. 541, 30 Stat. 544 (codified as amended at 11 U.S.C. §§ 1-1255 (1976)) repealed by Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549.

3. 11 U.S.C. § 544(a) (1982).

4. *Id.* § 547.

occurs while the debtor is insolvent, as a fraudulent conveyance which can be avoided under section 548(a)(2) of the Bankruptcy Code.<sup>5</sup> This theory can be used by a trustee, or by a debtor exercising the rights of a trustee, to set aside a disposition occurring within one year prior to the commencement of bankruptcy even if the secured creditor has complied meticulously with state foreclosure laws. The theory originated with a decision of the United States Court of Appeals for the Fifth Circuit, *Durrett v. Washington National Insurance Co.*,<sup>6</sup> and has been applied primarily as a vehicle for avoiding foreclosures on real property. No conceptual barriers, however, prevent its application to foreclosures on personalty. Indeed, the theory recently was applied for the first time to a private sale under Article 9 of the Uniform Commercial Code.<sup>7</sup> Similar decisions are certain to follow.

*Durrett* sent shock waves through the real estate bar, which has opposed the decision actively in the courts<sup>8</sup> and has promoted legislation designed to overrule it.<sup>9</sup> The controversy focuses on two factors—the long period of uncer-

5. *Id.* § 548(a). See generally Note, *Nonjudicial Foreclosure under Deed of Trust May Be a Fraudulent Transfer of Bankrupt's Property*, 47 Mo. L. REV. 345 (1982) (noting evolution of disposition as fraudulent conveyance theory).

6. 621 F.2d 201 (5th Cir. 1980).

7. See Calairo v. Pittsburgh Nat'l Bank (*In re Ewing*), 33 Bankr. 288 (Bankr. W.D. Pa. 1983), *rev'd*, 36 Bankr. 476 (W.D. Pa. 1984). The reversal was based on a misapplication of the law. *Ewing* is discussed *infra* notes 87-89 and accompanying text.

8. For example, in *Madrid v. Lawyers Title Ins. Co.* (*In re Madrid*), 725 F.2d 1197 (9th Cir. 1984), a case that rejected the *Durrett* analysis, the American Land Title Association, the Mortgage Brokers Institute, the American Council of Life Insurance, the American College of Real Estate Lawyers, the California Bankers Association, and the California Bank Clearing House Association filed amicus briefs. See Alden, Gross & Borowitz, *Real Property Foreclosure as a Fraudulent Conveyance: Proposals for Solving the Durrett Problem*, 38 BUS. LAW. 1605, 1607 n.8 (1983).

9. See Gold, *Proposed Amendment to Clarify Status of Property Bought in Foreclosure*, N.Y.L.J., Nov. 17, 1982, at 23, col. 1 (proposal to amend § 548); *Summary of Action of the House of Delegates*, 1983 A.B.A. PROC. 1, 31 (resolution endorsing amendment to state fraudulent conveyance law and to § 548).

An amendment to § 548 that equated reasonably equivalent value with any amount paid by a secured party or third-party purchaser at a good faith foreclosure was introduced in the Senate in 1983. See S. 445, 98th Cong., 1st Sess. § 360, 129 CONG. REC. 5972 (1983). The Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (amending 11 U.S.C. §§ 101-1113, 28 U.S.C. §§ 109, 151-158, 371, 1334-1452, 1930 (1982)), however, does not include this provision.

In addition, the American Bar Association Section of Real Property, Probate and Trust Law urged that the Drafting Committee to Revise the Uniform Fraudulent Conveyance Act include a provision abrogating *Durrett*. This would prevent trustees from circumventing § 548 and obtaining the same result under 11 U.S.C. § 544(b) (1982). Section 544(b) allows the trustee to avoid any transfer that could be avoided under state or federal nonbankruptcy law by a creditor holding an unsecured claim. The trustee's power is derivative in nature and requires that such a creditor actually exist.

This effort culminated when the National Conference of Commissioners on Uniform State Laws at its Summer 1984 conference adopted a new Uniform Fraudulent Transfer Act (UFTA) to supercede the Uniform Fraudulent Conveyance Act (UFCA). Section 3(b) of the UFTA rejects *Durrett* by providing that "a person gives a reasonably equivalent value if the person acquires an interest of the debtor in an asset pursuant to a regularly conducted, noncollusive foreclosure sale or execution of a power of sale . . . under a mortgage, deed of trust, or security agreement." This provision would not affect transfers such as strict foreclosure, the taking of a deed in lieu of foreclosure, or termination of a lease in which the property's value is not tested by sale. Section 8(g) of the UFTA, however, would prevent *Durrett's* application to lease terminations or nonsale dispositions under the Uniform Commercial Code by specifically providing as a defense that such transfers are not voidable.

tainty about title following foreclosure and the chilling effect that a de facto federal right of redemption could have on secured lending and participation at foreclosure sales. Much of this criticism is overstated. As this Article demonstrates, provisions already exist in the Bankruptcy Code that adequately protect secured lenders.<sup>10</sup> Moreover, the manner in which real estate foreclosure sales presently are conducted frequently leads to minimal participation and a sacrifice of part or all of the debtor's equity. Thus, it is unlikely that any "chill" generated by *Durrett* will worsen this situation significantly, particularly since roughly half the states already permit statutory postsale redemption.<sup>11</sup>

Although these criticisms are overstated, application of the *Durrett* analysis presents some problems. First, the period of uncertainty following foreclosure is excessive.<sup>12</sup> Second, application of the Bankruptcy Code's remedies following avoidance can lead to inequities, particularly with respect to third-party purchasers.<sup>13</sup> Third, the rules governing Article 9 foreclosures are designed to be more protective of the debtor's equity than real property laws. Furthermore, no state permits postsale redemption of personalty.<sup>14</sup> Thus, the potential for an adverse effect on bidding is greater for personalty than it is for realty. Last, *Durrett* may not sufficiently recapture the debtor's equity for the estate. If current inequities are eliminated, there is no reason to allow up to thirty percent of the collateral's fair market value to escape by arbitrarily limiting avoidance to foreclosures in which less than seventy percent of that value has been received.

*Durrett* advances one of the primary goals of bankruptcy by permitting the trustee to recapture the debtor's equity for the benefit of unsecured creditors. To the extent that it achieves this goal without substantial prejudice to secured lenders and subsequent purchasers, it should be encouraged. Accordingly, this Article argues that the basic premise of *Durrett* should be retained, but that the theory should be modified by new legislation<sup>15</sup> designed to increase the potential benefits to the estate while minimizing the doctrine's negative consequences.

## I. BACKGROUND TO *DURRETT*

The Anglo-American law of fraudulent conveyances generally is traced to an English act known as the Statute of Elizabeth.<sup>16</sup> This Act was designed to

---

10. See *infra* notes 134-48 and accompanying text.

11. See *infra* notes 96-115 and accompanying text.

12. See *infra* notes 116-17 and accompanying text.

13. See *infra* notes 149-55 and accompanying text.

14. See *infra* notes 118-33 and accompanying text.

15. A major revision of federal bankruptcy law, the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, does not address the issue directly. For a discussion of the impact of this legislation, see *infra* note 79.

16. Statute of Elizabeth, 1571, 13 Eliz. ch. 5. The original act, which was passed to facilitate the collection of judgments, later was supplemented by an act designed to protect purchasers of real property. Statute of Elizabeth, 1584-85, 27 Eliz. ch. 4. Avoidance of fraudulent conveyances existed in Roman law and the Statute of Elizabeth had antecedents in English law. See D.

avoid<sup>17</sup> voluntary conveyances made by debtors with the specific intent of hindering, delaying, or defrauding creditors. Because of the difficulty of proving subjective intent, the English courts allowed a creditor to prove intent by demonstrating the existence of circumstances that suggested the presence of fraud. These objective manifestations of intent, such as conveyances to family members or conveyances by insolvents, came to be known as "badges of fraud."<sup>18</sup>

American jurisdictions either enacted legislation similar to the Statute of Elizabeth or received the law of fraudulent conveyances as part of their common-law heritage. By the early twentieth century, however, this body of law was in a confused, disorganized state.<sup>19</sup> In 1918 the National Conference of Commissioners on Uniform State Laws approved the Uniform Fraudulent Conveyance Act (UFCA).<sup>20</sup> For present purposes, the most important provision of the UFCA is section 4, which renders conveyances for less than a fair consideration made by persons who are insolvent, or who are rendered insolvent by the conveyance, voidable irrespective of intent. Fair consideration is defined in market terms and means the giving, in good faith, of a "fair equivalent" for the property conveyed, including the satisfaction of an antecedent debt.<sup>21</sup>

Section 4 of the UFCA was intended to eliminate any legal presumptions regarding intent. Prior to its enactment, some states adopted the position that any voluntary conveyance by a debtor was conclusively presumed fraudulent as to existing creditors irrespective of the debtor's overall financial condition.<sup>22</sup> This view was adopted primarily to invalidate gifts by insolvents whose conveyances were harmful to creditors but whose intent was donative rather than fraudulent.<sup>23</sup> The rule, however, was so broad that it could invalidate a gift by a solvent debtor who later became insolvent for unrelated reasons.

Other states rejected the legal-presumption analysis and adopted the posi-

---

MOORE, A TREATISE ON FRAUDULENT CONVEYANCES AND CREDITORS' REMEDIES AT LAW AND IN EQUITY (1908).

17. The Act declared the proscribed conveyances to be "clearly and utterly void," but as the law developed such transactions were viewed as merely voidable by injured creditors. See 1 G. GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES § 111 (rev. ed. 1940).

18. The concept of "badges of fraud" dates from *Twyne's Case*, 3 Coke 80b, 76 Eng. Rep. 809 (1601).

19. Commissioners' Prefatory Note, UNIF. FRAUDULENT CONVEYANCE ACT (1918). The Commissioners attributed the confusion to the absence of a well-defined concept of insolvency, the diverse rules determining the parties with standing to challenge a particular conveyance, and the efforts by some states to stretch the concept of intent to avoid conveyances—such as gifts by insolvents—that were harmful to creditors but were made without actual intent.

20. Twenty-five states have adopted the Uniform Fraudulent Conveyance Act. See UNIF. FRAUDULENT CONVEYANCE ACT, 7A U.L.A. (Supp. 1983).

21. UNIF. FRAUDULENT CONVEYANCE ACT § 3(a), 7 U.L.A. 444 (1968).

22. This presumption of law originated in the United States with Chancellor Kent's opinion in *Reade v. Livingston*, 3 Johns. 481 (N.Y. 1818). In 1829 New York enacted a statute declaring that the presence of fraud always is a factual issue. N.Y. Rev. Stat., pt. II, c. 7, tit. 3 (1829). Other states, however, continued to follow Chancellor Kent's view. See, e.g., *Unger v. Mayer*, 105 N.J. Eq. 253, 147 A. 509 (N.J. Ch. 1929), *aff'd*, 107 N.J. Eq. 185, 151 A. 907 (N.J. 1930). There was a significant split among the states at the time the UFCA was adopted. See 1 G. GLENN, *supra* note 17, § 268.

23. Commissioners' Prefatory Note, UNIF. FRAUDULENT CONVEYANCE ACT (1918).

tion that the presence of fraud always was an issue of fact to be proved by demonstrating the existence of badges of fraud.<sup>24</sup> By eliminating the intent requirement, section 4 of the UFCA established a new category of "constructive fraud." This category avoided the excesses possible in the legal-presumption states and simplified the proof required to avoid a conveyance in the factual-issue states. Section 4, however, was not intended to achieve results substantially different from those obtained under the Statute of Elizabeth. Instead, it was intended to be a simplified codification of one of the most important badges of fraud, insolvency of the debtor.<sup>25</sup>

Although the UFCA dispensed with the necessity of proving intent when each of the section 4 elements was present, it was consistent with existing law in that it focused primarily on voluntary conveyances. The UFCA did not specifically exclude involuntary transfers from the definition of "conveyance,"<sup>26</sup> but there is no reason to believe that it was drafted with such transfers in mind.<sup>27</sup> Section 4 refers to conveyances "made . . . by a person who is or will be thereby rendered insolvent."<sup>28</sup> Narrowly construing this provision to

24. See, e.g., *Butcher v. Cantor*, 185 F. 945 (E.D.N.Y. 1911); *Kingsbury v. Christy*, 21 Ariz. 559, 192 P. 114 (1920); *Webb's Trustee v. Lynchburg Shoe Co.*, 106 Va. 726, 56 S.E. 581 (1907).

25. Commissioners' Prefatory Note, UNIF. FRAUDULENT CONVEYANCE ACT (1918). See generally *McLaughlin, Application of the Uniform Fraudulent Conveyance Act*, 46 HARV. L. REV. 404 (1933) (§ 4 intended as external test of fraud).

26. "Conveyance" is defined in § 1 as "every payment of money, assignment, release, transfer, lease, mortgage or pledge of tangible or intangible property, and also the creation of any lien or encumbrance." UNIF. FRAUDULENT CONVEYANCE ACT § 1, 7 U.L.A. 426 (1968).

27. It is unclear whether an involuntary transfer of an interest in property would be voidable under the UFCA, the earlier state statutes, or common law. 4 W. COLLIER, COLLIER ON BANKRUPTCY § 548.01 (15th ed. 1983). The history of the law of fraudulent conveyances, however, suggests that voluntary action by the debtor is necessary for the conveyance to be voidable. Professor Glenn, who did not deal specifically with the voluntariness issue, defined fraudulent conveyances as follows: "Thus the touchstone is not a thing of form, nor is our inquiry bounded by the technicalities that attach to the terms 'conveyance' or 'transfer.' The real test of a fraudulent conveyance is the unjust diminution of the debtor's estate." 1 G. GLENN, *supra* note 17, § 195, at 348. Although this definition is sufficiently broad to encompass involuntary transfers, virtually every mode of transfer described by Glenn involves voluntary action or at least indifference evidenced by failure to assert a known defense by the debtor.

There is little direct authority supporting the view that only voluntary conveyances may be avoided under the UFCA. An unusual example is *Merriam v. Wimpfheimer*, 25 F. Supp. 405 (S.D.N.Y. 1938), in which a bankruptcy trustee relied on § 70(c) of the Bankruptcy Act to set aside a foreclosure sale of pledged stock. The trustee's rights were derived from state law and the court in denying his petition held, without citing authority, that New York's fraudulent conveyance law, the UFCA, was limited to voluntary conveyances. The voluntariness limitation usually is stated in dictum or may be ascertained only by inference. See, e.g., *Merrillat v. Hooker*, 33 App. D.C. 192 (1909); *Sheffield Progressive, Inc. v. Kingston Tool Co.*, 10 Mass. App. Ct. 47, 405 N.E.2d 985 (1980); *Kerr v. Blaine*, 49 Mont. 602, 144 P. 566 (1914).

There is ample authority that a judgment or foreclosure can be avoided, but the cases invariably involve collusive—and therefore voluntary—action by the debtor, or at least indifference and failure to assert a known defense. See, e.g., *Martin v. General Fin. Co.*, 239 Cal. App. 2d 438, 48 Cal. Rptr. 773 (1966); *Bernero v. Bernero*, 363 Ill. 328, 2 N.E.2d 317 (1936); *Sheffield Progressive, Inc. v. Kingston Tool Co.*, 10 Mass. App. Ct. 47, 405 N.E.2d 985 (1980); *Zakheim v. Dry Harbor Homes, Inc.*, 245 A.D. 769, 281 N.Y.S. 153 (1935); cf. *Security Nat'l Bank v. Lowrie*, 59 S.D. 102, 238 N.W. 304 (1931) (conveyance not set aside because of insufficient evidence); see also 1 G. GLENN, *supra* note 17, § 214(a) (collusive foreclosure of a pledge or mortgage is a fraudulent conveyance).

28. UNIF. FRAUDULENT CONVEYANCE ACT § 4, 7 U.L.A. 470 (1968) (emphasis added). For further discussion of the significance of this language, see *infra* note 47.

require debtor participation is consistent with the general thrust of fraudulent conveyance law—to invalidate deliberate actions taken by debtors that unfairly interfere with the expectations of their creditors.

The Chandler Act of 1938<sup>29</sup> incorporated concepts derived from the UFCA into the nation's bankruptcy laws. Like section 4 of the UFCA, section 67d(2)(a) of the Bankruptcy Act, as amended by the Chandler Act, rendered transfers fraudulent "as to creditors existing at the time of such transfers . . . if made . . . without fair consideration by a debtor who is or will be thereby rendered insolvent, without regard to his actual intent . . . ."<sup>30</sup> The trustee's rights under this provision applied to conveyances within one year prior to the commencement of bankruptcy proceedings.<sup>31</sup> Section 67d(1)(e)(1), like section 3 of the UFCA, defined "fair consideration" in market terms by stating that consideration was fair if "in good faith, in exchange and as a fair equivalent therefore, property is transferred or an antecedent debt is satisfied."<sup>32</sup>

Unlike the UFCA, however, the Bankruptcy Act specifically defined the term "transfer" to include both voluntary and involuntary transfers.<sup>33</sup> Since a mortgage foreclosure sale—whether judicial or nonjudicial—is an involuntary transfer of the debtor's interest in the encumbered property, the combination of the deletion of the intent requirement of the UFCA and the expansive definition of transfer in the Bankruptcy Act set the stage for the novel theory embraced in *Durrett v. Washington National Insurance Co.*<sup>34</sup>

Prior to 1938 the Bankruptcy Act's definition of transfer did not specifically include involuntary events.<sup>35</sup> Although the Chandler Act amended the definition by adding the language covering involuntary transfers,<sup>36</sup> it is unlikely that this change was related directly to the fraudulent conveyance issue. The definition was changed to make it sufficiently broad to cover the various contexts in which the term was used in the Act. For example, section 60<sup>37</sup> dealt with preferential transfers and permitted the trustee to avoid certain liens arising from legal or equitable proceedings against the debtor. To effectuate the purpose of section 60, the creation of these liens had to fit within the defini-

---

29. Act of June 22, 1938, ch. 575, § 1, 52 Stat. 840 (codified at 11 U.S.C. § 1 (1976) (repealed 1978)).

30. 11 U.S.C. § 107d(2)(a) (1976) (repealed 1978).

31. The trustee could have circumvented the one-year limitation by invoking the rights derived from state law pursuant to § 70 of the Bankruptcy Act, 11 U.S.C. § 110 (1976) (repealed 1978). The same result can be achieved under § 544(b) of the Bankruptcy Code. See *supra* note 9.

32. 11 U.S.C. § 107d(1)(e)(1) (1976) (repealed 1978).

33. *Id.* § 1(30) (repealed 1978).

34. 621 F.2d 201 (5th Cir. 1980).

35. Bankruptcy Act of July 1, 1898, ch. 541, § 1(25), 30 Stat. 544, 545 (repealed 1978). Prior to 1938 the courts had concluded that a transfer could be accomplished through legal proceedings; the Chandler Act simply clarified the law in this respect. See 1 W. COLLIER, *supra* note 27, § 1.30 (14th ed. 1974).

36. Act of June 22, 1938, ch. 575, § 1(30), 52 Stat. 840, 842 (codified at 11 U.S.C. § 1(30) (1976)) (repealed 1978).

37. *Id.* § 60, 52 Stat. 840, 869 (codified at 11 U.S.C. § 96 (1976)) (repealed 1978).

tion of transfer.<sup>38</sup>

Although *Durrett* was decided under the Bankruptcy Act, most subsequent decisions have been based on the Bankruptcy Code. Section 548(a)(2) of the Code is substantially the same as former section 67d<sup>39</sup> and section 101(48) continues to define "transfer" to include involuntary transfers.<sup>40</sup> The Code also continues to define consideration in market terms by permitting the avoidance of transfers for "less than a reasonably equivalent value."<sup>41</sup> Thus, the Bankruptcy Code lends itself to the same analysis employed by the court of appeals in *Durrett*.

---

38. The conclusion that the change in the definition of transfer was not related directly to fraudulent conveyances is supported by the legislative history.

The reason for the changes in this definition are that section 60, dealing with preferences, speaks of transfers and judgments; section 67, dealing with liens and fraudulent transfers, speaks of liens, conveyances, transfers, assignments, encumbrances, levies, judgments and attachments; and section 70(c) dealing with the avoidance by the trustee of transfers, uses merely the term "transfer." In order to achieve uniformity, the revised terminology of these sections, wherever possible, is restricted to the latter term. It therefore becomes necessary to expand the phraseology of this definition, in order to make certain that it shall include the full scope of all of the terms presently employed in the sections cited.

H.R. REP. NO. 1409, 75th Cong., 1st Sess. 5 (1937); see also J. HANNA & J. McLAUGHLIN, THE BANKRUPTCY ACT OF 1898 AS AMENDED INCLUDING THE CHANDLER ACT OF 1938, at 5 (1939) (definition added to promote uniformity and brevity in the Bankruptcy Act).

39. 11 U.S.C. § 548(a)(2) (1982) states:

(a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor—

...

(2)(A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(B)(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;

(ii) was engaged in business, or was about to engage in business or a transaction, for which any property remaining with the debtor was unreasonably small capital; or

(iii) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

The cases decided after *Durrett* invariably have relied on the grounds enumerated in § 548(a)(2)(A) and § 548(a)(2)(B)(i).

40. 11 U.S.C. § 101(41) (1982) defined transfer to include "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property, or with an interest in property, including retention of title as a security interest." *Id.* (emphasis added). The Bankruptcy Amendments and Federal Judgeship Act of 1984 in § 421(i) amended this definition to include foreclosure of the debtor's equity of redemption. The impact of this change is discussed *infra* note 79. The 1984 amendments also renumbered the definitional section. "Transfer" now is defined in § 101(48).

41. 11 U.S.C. § 548(a)(2)(A) (1982). Section 67d(2)(a) of the Bankruptcy Act required "fair consideration." Consideration was fair when it was equivalent in value and given in good faith. Act of June 22, 1938, ch. 575, § 67d(2)(a), 52 Stat. 840, 877 (codified at 11 U.S.C. § 107d(1)(e)(1) (1976) (repealed 1978)). The Bankruptcy Code deleted the good faith requirement; it requires only market equivalence. The Bankruptcy Act's good faith requirement imposed liability on insiders who had given a fair equivalent and whose interests could not be attacked under the preference provisions due to the limited avoidance period. See, e.g., *Burroughs v. Fields*, 546 F.2d 215 (7th Cir. 1976). Deletion of the good faith requirement was accompanied by an increase in the preference period to one year in the case of insiders. 11 U.S.C. § 547(b)(4)(B) (1982).



II. *DURRETT* AND CONCURRING CASES

In *Durrett*, a trustee sold real property with a fair market value of \$200,000 under a power of sale clause in a deed of trust to a third-party purchaser who bid the amount of the debt, \$115,400. The deed of trust had been executed and recorded eight years earlier. Durrett commenced proceedings under Chapter XI of the Bankruptcy Act. In his capacity as a debtor in possession, he sought to set aside the foreclosure sale on the ground that it constituted a fraudulent conveyance under section 67d.

The United States District Court for the Northern District of Texas held that there had been a transfer within the one-year avoidance period but that a fair consideration had been received at the sale.<sup>42</sup> The court of appeals agreed that a section 67d "transfer" had occurred at the foreclosure sale<sup>43</sup> but reversed on the consideration issue and held that the sale was voidable. The court noted that the price received at the sale was only 57.7 percent of the property's fair market value and stated that it was unaware of any decision in which a transfer of real property for less than 70 percent of fair market value had withstood attack under section 67d.<sup>44</sup> The case was remanded with instructions that the district court deal with the property in a manner that protected the purchaser's interest.

The purchaser had argued that section 67d only applied to transfers made by the debtor. Although the full extent of the purchaser's position is unclear from the opinion, he apparently contended that a noncollusive sale by a third party was outside the scope of section 67d even if it constituted a transfer for bankruptcy purposes. The court of appeals, however, did not focus on this argument. Instead, the court limited its analysis to whether there had been a transfer within the avoidance period. Even though legal title to the property had been transferred to the trustee eight years earlier, Durrett had retained the right to possession until the foreclosure sale. The court cited *Collier on Bankruptcy* for the proposition that section 1(30) "'covers not only alienations of title but includes surrender of possession.'"<sup>45</sup> Thus, the court concluded that there had been a transfer; the court ignored the question whether section 67d applied to a transfer by a nondebtor.

A year later, the court of appeals reaffirmed its *Durrett* holding in *Abram-*

---

42. 460 F. Supp. 52, 54 (N.D. Tex. 1978).

43. *Durrett*, 621 F.2d at 204.

44. *Id.* at 203. *Durrett* has been cited as establishing a rule that a transfer can be avoided during the avoidance period for lack of reasonably equivalent value if the foreclosure sale brings less than 70% of the collateral's fair market value. See, e.g., Federal Nat'l Mortgage Ass'n v. Wheeler (*In re Wheeler*), 34 Bankr. 818 (Bankr. N.D. Ala. 1983); Coleman v. Home Sav. Ass'n (*In re Coleman*), 21 Bankr. 832 (Bankr. S.D. Tex. 1982); Wickham v. United Am. Bank in Knoxville (*In re Thompson*), 18 Bankr. 67 (Bankr. E.D. Tenn. 1982). The actual holding in *Durrett* is much more limited; the court merely suggested a standard equal to 70% of fair market value. Nonetheless, for purposes of convenience this Article will refer to *Durrett* as establishing a 70% rule.

45. *Durrett*, 621 F.2d at 204 (quoting 1 W. COLLIER, *supra* note 27, § 1.30, at 130.28 (2)-(3) (14th ed. 1967)).

*son v. Lakewood Bank and Trust Co.*<sup>46</sup> This decision is most notable for the strong dissent of Judge Clark,<sup>47</sup> who adopted the purchaser's position in *Durrett* and argued that a mortgage foreclosure is not a transfer *by a debtor* and therefore is not governed by section 67d. According to Judge Clark, the *Durrett* rule also is bad policy since it casts a cloud on the purchaser's title and, as a result, tends to depress the already low prices at foreclosure sales.<sup>48</sup> The effect is to increase deficiencies resulting from foreclosures.<sup>49</sup>

*Durrett* represented a radical departure from prior law.<sup>50</sup> The decision effectively created a federal right of redemption that could be exercised by filing a bankruptcy petition within one year following foreclosure. Because an action under section 548 can be brought until the earlier of two years after the appointment of a trustee or the time the case is closed or dismissed, the period of uncertainty for the purchaser can exceed three years.<sup>51</sup> Since a trustee may

---

46. 647 F.2d 547 (5th Cir. 1981). Like *Durrett*, *Abramson* was decided under § 67d of the Bankruptcy Act.

47. *Id.* at 549 (Clark, J., dissenting). Judge Clark based his position on the literal wording of § 67d, which refers to "[e]very transfer . . . by a debtor" (emphasis added). This language can be traced to § 4 of the UFCA. See *supra* text accompanying note 28.

Judge Clark's argument might have been strengthened by noting the historical uses of the fraudulent conveyance theory and by contrasting § 67d's use of "transfer . . . by the debtor" with the language of § 60a defining a preference as "a transfer . . . of any of the property of a debtor" (emphasis added). This argument, however, is diluted under the Bankruptcy Code because § 548(a) permits the trustee to avoid "any transfer of an interest of the debtor" (emphasis added). There is, however, no indication in the legislative history that Congress intended to expand the scope of fraudulent conveyance theory by this change. Most likely, the change reflects a desire to achieve uniformity with other sections, such as § 547. For further discussion of this issue, see *infra* note 84.

48. *Abramson*, 647 F.2d at 550 (Clark, J., dissenting). As in *Durrett*, the foreclosure in *Abramson* was a nonjudicial sale pursuant to a power of sale clause in a deed of trust. *Id.* at 548.

49. Absent unusual circumstances, deficiencies are discharged in bankruptcy. 11 U.S.C. § 727 (1982). Judge Clark undoubtedly was concerned that *Durrett* would spill over from its bankruptcy setting and increase deficiencies for all debtors whose property was subjected to foreclosure.

There are limitations on the right to a deficiency in a number of states. See G. OSBORNE, G. NELSON, & D. WHITMAN, REAL ESTATE FINANCE LAW §§ 8.1-8.3 (1979); Nelson, *Deficiency Judgments after Real Estate Foreclosures in Missouri: Some Modest Proposals*, 47 MO. L. REV. 151, 152-55 (1982); Washburn, *The Judicial and Legislative Response to Price Inadequacy in Mortgage Foreclosure Sales*, 53 S. CAL. L. REV. 843 (1980).

50. Several decisions prior to *Durrett* had concluded that a noncollusive foreclosure sale that brings less than fair market value was not a fraudulent conveyance. See, e.g., *Merriam v. Wimpfheimer*, 25 F. Supp. 405 (S.D.N.Y. 1938) (foreclosure on pledged stock); *Pierce v. Pierce*, 16 Cal. App. 375, 117 P. 580 (1911) (foreclosure on real property); *Harris v. Wagshal*, 343 A.2d 283 (D.C. 1975) (foreclosure on pledged security).

One case decided under the Bankruptcy Act supports *Durrett*. *Darby v. Atkinson (In re Ferris)*, 415 F. Supp. 33 (W.D. Okla. 1976), involved termination of a long-term lease prior to bankruptcy for nonpayment of rent. The lessees had constructed a twin theatre and restaurant complex on the land and termination of the lease involved a forfeiture of these improvements. The court determined that the lessor had terminated the lease properly under Oklahoma law, but had not given fair consideration for the leasehold. Accordingly, it avoided the termination under § 67d. The court undoubtedly was influenced by the fact that the lessees forfeited roughly \$129,000 equity in the complex.

51. 11 U.S.C. § 546(a) (1982). The risk to the transferee can be extended an additional year since only the avoidability of the transfer is determined in an action. *Id.* § 548(a)(2). The trustee will recover the property itself, *id.* § 550(a), which has its own statute of limitations. The trustee may not commence an action, *id.* § 550(a), "after the earlier of—(1) one year after the avoidance of the transfer on account of which recovery under this section is sought; and (2) the time the case is closed or dismissed." *Id.* § 550(c). Ordinarily, the trustee will couple an avoidance action under

not be appointed in a Chapter 11 proceeding, the debtor in possession theoretically can bring an action at any time during the pendency of the bankruptcy proceedings.<sup>52</sup> Even in a Chapter 7 proceeding the appointment of a trustee may not occur until a considerable time after the case is commenced.<sup>53</sup>

*Durrett* has been followed, sometimes reluctantly,<sup>54</sup> in a number of real property cases. The theory has been approved for nonjudicial foreclosures,<sup>55</sup> judicial foreclosures,<sup>56</sup> execution sales,<sup>57</sup> and strict foreclosures.<sup>58</sup> It has been used by trustees in Chapter 7 proceedings,<sup>59</sup> by debtors in possession in Chapter 11 proceedings,<sup>60</sup> and by debtors in Chapter 13 proceedings.<sup>61</sup> The theory

---

§ 548 and a recovery action under § 550 so that the additional limitation period is irrelevant. See 4 W. COLLIER, *supra* note 27, § 550.02, at 550-5 n.5.

52. The two-year limitation of § 546(a)(1) is not triggered unless a trustee is appointed under § 1104. Chapter 11 is organized on the assumption that the debtor will remain in possession and a trustee is not appointed except on request of a party in interest. Cf. *Alsop v. Alaska* (*In re Alsop*), 14 Bankr. 982 (Bankr. D. Alaska 1981) (statement as to interrelation of §§ 546(a)(1) and 1104 is dictum), *aff'd*, 22 Bankr. 1017 (D. Alaska 1982).

53. Election of a trustee in a Chapter 7 proceeding is governed by 11 U.S.C. § 702 (1982).

54. See *Coleman v. Home Sav. Ass'n* (*In re Coleman*), 21 Bankr. 832, 834 (Bankr. S.D. Tex. 1982), in which the judge acknowledged that he was bound by *Durrett*, but approved of Judge Clark's dissent in *Abramson*.

55. See *Federal Nat'l Mortgage Ass'n v. Wheeler* (*In re Wheeler*), 34 Bankr. 818, 820 (Bankr. N.D. Ala. 1983); *Cooper v. Smith* (*In re Smith*), 24 Bankr. 19, 23 (Bankr. W.D.N.C. 1982); *Gillman v. Preston Family Inv. Co.* (*In re Richardson*), 23 Bankr. 434, 448 (Bankr. D. Utah 1982); *Wickham v. United Am. Bank in Knoxville* (*In re Thompson*), 18 Bankr. 67, 70 (Bankr. E.D. Tenn. 1982) (relief denied because reasonably equivalent value given); *Marshall v. Spindale Sav. & Loan Ass'n* (*In re Marshall*), 15 Bankr. 738 (Bankr. W.D.N.C. 1981); see also *Rosner v. Worcester* (*In re Worcester*), 28 Bankr. 910, 914 (Bankr. C.D. Cal. 1983) (debtor not insolvent at time of transfer but foreclosure set aside on other grounds); *Alsop v. Alaska* (*In re Alsop*), 14 Bankr. 982, 987 (Bankr. D. Alaska 1981) (court held no transfer within avoidance period), *aff'd*, 22 Bankr. 1017 (D. Alaska 1982).

56. See *First Fed. Sav. & Loan Ass'n of Bismarck, Inc. v. Hulm* (*In re Hulm*), 738 F.2d 323 (8th Cir. 1984); *United Penn Bank v. Dudley* (*In re Dudley*), 38 Bankr. 666 (Bankr. M.D. Pa. 1984) (relief denied because reasonably equivalent value given); *Home Life Ins. Co. v. Jones* (*In re Jones*), 20 Bankr. 988 (Bankr. E.D. Pa. 1982).

57. See *Frank v. Berlin* (*In re Frank*), 39 Bankr. 166 (Bankr. E.D.N.Y. 1984); *Richard v. Tempest* (*In re Richard*), 26 Bankr. 560 (Bankr. D.R.I. 1983); *Smith v. American Consumer Fin. Corp.* (*In re Smith*), 21 Bankr. 345 (Bankr. M.D. Fla. 1982).

58. See *Carr v. Demusis* (*In re Carr*), 34 Bankr. 653 (Bankr. D. Conn. 1983); *Berge v. Sweet* (*In re Berge*), 33 Bankr. 642 (Bankr. W.D. Wis. 1983); *Perdido Bay Country Club Estates, Inc. v. Equitable Trust Co.* (*In re Perdido Bay Country Club Estates, Inc.*), 23 Bankr. 36 (Bankr. S.D. Fla. 1982) (applying Vermont law).

59. See *Richard v. Tempest* (*In re Richard*), 26 Bankr. 560 (Bankr. D.R.I. 1983); *Cooper v. Smith* (*In re Smith*), 24 Bankr. 19 (Bankr. W.D.N.C. 1982); *Gillman v. Preston Family Inv. Co.* (*In re Richardson*), 23 Bankr. 434 (Bankr. D. Utah 1982); *Wickham v. United Am. Bank in Knoxville* (*In re Thompson*), 18 Bankr. 67 (Bankr. E.D. Tenn. 1982).

60. See *Frank v. Berlin* (*In re Frank*), 39 Bankr. 166 (Bankr. E.D.N.Y. 1984); *Berge v. Sweet* (*In re Berge*), 33 Bankr. 642 (Bankr. W.D. Wis. 1983); *Perdido Bay Country Club Estates, Inc. v. Equitable Trust Co.*, (*In re Perdido Bay Country Club Estates, Inc.*), 23 Bankr. 36 (Bankr. S.D. Fla. 1982); *Alsop v. Alaska* (*In re Alsop*), 14 Bankr. 982 (D. Alaska 1981), *aff'd*, 22 Bankr. 434 (D. Alaska 1982).

61. See *United Penn Bank v. Dudley* (*In re Dudley*), 38 Bankr. 666 (Bankr. M.D. Pa. 1984); *Federal Nat'l Mortgage Ass'n v. Wheeler* (*In re Wheeler*), 34 Bankr. 818 (Bankr. N.D. Ala. 1983); *Carr v. Demusis* (*In re Carr*), 34 Bankr. 653 (Bankr. D. Conn. 1983); *Rosner v. Worcester* (*In re Worcester*), 28 Bankr. 910 (Bankr. C.D. Cal. 1983); *Coleman v. Home Sav. Ass'n* (*In re Coleman*), 21 Bankr. 832 (Bankr. S.D. Tex. 1982); *Smith v. American Consumer Fin. Corp.* (*In re Smith*), 21 Bankr. 345 (Bankr. M.D. Fla. 1982); *Home Life Ins. Co. v. Jones* (*In re Jones*), 20 Bankr. 988 (Bankr. E.D. Pa. 1982); *Marshall v. Spindale Sav. & Loan Ass'n* (*In re Marshall*), 15 Bankr. 738 (Bankr. W.D.N.C. 1981).

has not yet been applied when a deed has been taken by the mortgagee in lieu of foreclosure, but there is no doubt of its applicability in such a case since there is not even a pretense that the property's value has been tested by sale. Two significant cases, however, reject the *Durrett* analysis, at least in part.

### III. TRANSFER ISSUES: THE *ALSOP* AND *MADRID* CASES

#### A. *In re Alsop*

The first case to differ with *Durrett* was *Alsop v. Alaska (In re Alsop)*.<sup>62</sup> *Alsop* involved an attempt by a debtor in possession to set aside a nonjudicial sale under a deed of trust. The sale occurred two days before the commencement of Chapter 11 proceedings, but the deed of trust had been executed and properly recorded two years earlier. Although the Bankruptcy Court for the District of Alaska acknowledged that the foreclosure sale fit within the definition of transfer in the Bankruptcy Code,<sup>63</sup> it held that this definition must be interpreted in light of section 548(d)(1),<sup>64</sup> which establishes special rules for determining the time of a transfer. Under this latter section, a transfer is deemed to occur when it becomes so far perfected under state or nonbankruptcy federal law<sup>65</sup> that the transferee's interest is superior to the interest of a bona fide purchaser from the debtor against whom the transfer could have been perfected.

The court cited an Alaska Supreme Court decision<sup>66</sup> holding that the title of a purchaser at a foreclosure sale relates back to the time of execution of the deed of trust. Since no purchaser from the debtor could have acquired an interest superior to the interest created by the deed of trust after its recorda-

---

62. 14 Bankr. 982 (Bankr. D. Alaska 1981), *aff'd*, 22 Bankr. 1017 (D. Alaska 1982); *accord* Calairo v. Pittsburgh Nat'l Bank (*In re Ewing*), 36 Bankr. 476 (W.D. Pa. 1984).

The major cases in this area have involved nonjudicial sales conducted pursuant to power of sale clauses in deeds of trust. *See, e.g., Alsop*, 14 Bankr. 982. Thus, much of the analysis in this section of the Article is offered in the context of deeds of trust. The analysis, however, also is applicable, with minor modifications, to other kinds of foreclosure proceedings and to execution sales.

63. The court noted that the transfer involved divestiture of the debtor's legal title as well as his right to possession because a deed of trust merely creates a lien under Alaska law. Application of the *Durrett* doctrine is not affected by the particular theory—title, lien, or intermediate—underlying a state's mortgage law since the debtor will be divested of a sufficient quantum of rights upon foreclosure to trigger § 548 under each theory. *See supra* text accompanying note 45.

64. 11 U.S.C. § 548(d)(1) (1982) states:

For the purposes of this section, a transfer is made when such transfer becomes so far perfected that a bona fide purchaser from the debtor against whom such transfer could have been perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but if such transfer is not so perfected before the commencement of the case, such transfer occurs immediately before the date of the filing of the petition.

65. Perfection or lack of perfection is to be determined by reference to state or nonbankruptcy federal law even though § 548(d)(1) is not explicit on this point. *See Lovett v. Shuster*, 633 F.2d 98, 104 (8th Cir. 1980).

A similar provision in § 547(e)(1)(A) dealing with the time of transfer for purposes of calculating the voidable preference period is more explicit by referring to "applicable law." Notwithstanding their obvious similarities, there are significant differences between the timing rules of §§ 547 and 548. For a more complete discussion, see 4 W. COLLIER, *supra* note 27, § 548.08.

66. *Alaska Laborers Training Fund v. P & R Enters.*, 583 P.2d 825 (Alaska 1978).

tion, the court concluded that the time of transfer for purposes of section 548 was the date of recordation. Since that date was outside the one-year avoidance period, the foreclosure sale could not be avoided. The court further noted its general disapproval of the *Durrett* doctrine for many of the reasons advocated by Judge Clark in his *Abramson* dissent.<sup>67</sup> It did not, however, indicate that it would decline to follow *Durrett* in a case in which recordation of the deed of trust and foreclosure both occurred within the avoidance period.

The *Alsop* court probably applied section 548(d)(1) incorrectly. From a conceptual standpoint, execution of a deed of trust is a voluntary conveyance or transfer of a limited interest in the subject property. This execution creates a right of foreclosure in the event of default. It may transfer legal title to the property, or it may merely create a lien.<sup>68</sup> The transferee, the trustee under the deed of trust, can perfect his interest against subsequent purchasers from the debtor by complying with state law—usually by recording the deed of trust. If the value of the collateral is exceptionally high in relation to the debt, some authority suggests that insufficient value has been given and that the transfer—creation of the voluntary lien—can be set aside as a fraudulent conveyance.<sup>69</sup> Avoidance in this situation would occur irrespective of whether the deed of trust was recorded. Under section 548, however, the transfer could not be avoided unless it occurred within one year prior to the commencement of bankruptcy. Thus, a failure to record could have the effect of bringing an otherwise exempt transfer forward into the avoidance period.<sup>70</sup>

Foreclosure of the deed of trust involves an involuntary conveyance of the debtor's remaining interest in the property except for a statutory right of redemption in those states that grant such a right. This involuntary conveyance constitutes a separate transfer. The most important rights affected by this second transfer are the right to possession and the debtor's equity in the property, neither of which were conveyed under the deed of trust. When a pur-

---

67. *Alsop*, 14 Bankr. at 987.

68. See G. OSBORNE, G. NELSON & D. WHITMAN, *supra* note 49, § 1.6.

69. See, e.g., *Busick v. Mandeville*, 80 Cal. App. 2d 853, 183 P.2d 362 (1947). There is some authority that a mere difference in value between the collateral and the secured debt is an insufficient ground for avoidance. See *Downs v. Kissam*, 51 U.S. (10 How.) 102 (1850). More often, a court will acknowledge the avoidability of transfers of excessive security, but will find that in its specific case the difference in value is insufficient for avoidance. See, e.g., *Pereira v. Hope* (*In re* 550 Les Mouches Fashions, Ltd.), 24 Bankr. 509 (Bankr. S.D.N.Y. 1982); see also 1 G. GLENN, *supra* note 17, § 296a ("If the debtor puts up more than the next man in line might be required to deposit, that, in itself, means nothing.").

UFCA § 3(b) deals inferentially with the issue of excessive security by providing that fair consideration is given "[w]hen such property . . . is received in good faith to secure a present advance or antecedent debt in amount not disproportionately small as compared with the value of the property . . . obtained." UNIF. FRAUDULENT CONVEYANCE ACT § 3(b), 7 U.L.A. 444 (1968).

70. There is an additional benefit to the trustee in bringing the time of transfer forward. Under § 548(a)(2)(B)(i) the trustee must prove that the debtor was insolvent at the time of the transfer. He does not have the benefit of a presumption of insolvency. *But cf.* 11 U.S.C. § 547(f) (1982) (debtor presumed insolvent during 90 days preceding filing of petition). Thus, the closer the trustee can bring the transfer to the commencement of bankruptcy, the easier it will be to prove insolvency. "Insolvent" is defined by a balance sheet test. *Id.* § 101(29). For purposes of determining insolvency, the fair market value of the foreclosed property must be included as an asset with the value of any liens as liabilities. *Cf. id.* § 101(29)(A)(i) (fair valuation of property transferred with intent to defraud excluded).

chaser buys at the foreclosure sale, the deed of trust ordinarily will be considered discharged; if the purchaser fails to record the trustee's deed, however, he will not be protected against subsequent bona fide purchasers from the original debtor. Thus, recordation of the trustee's deed serves a different purpose from recordation of the original deed of trust because it protects a different set of rights. In this context, section 548(d)(1) refers to perfection of the interests acquired at the foreclosure sale, the second transfer, and not to perfection of the interests conveyed by the deed of trust, the first transfer. If the purchaser delays in perfecting his interest, the second transfer, like the first, can be brought forward into the avoidance period.<sup>71</sup>

In a sense, the purchaser's title does relate back to the deed of trust. This is another way of stating the general principle that the purchaser takes free of any interests that are subordinate to the foreclosing creditor.<sup>72</sup> It was in this limited context that the Alaska Supreme Court had applied the relation-back

---

71. In a recent article two commentators argue that there is precedent for holding that a foreclosure is not a separate transfer for bankruptcy purposes. See Coppel & Kahn, *Defanging Durrett: The Established Law of Transfer*, 100 BANKING L.J. 676 (1983). They cite *Thompson v. Fairbanks*, 196 U.S. 516 (1905), in which the United States Supreme Court held that the repossession of collateral subject to an after-acquired property clause in a chattel mortgage was not a separate transfer for purposes of the Bankruptcy Act's preference provisions. The Court noted that there was no indication that the debtor gave up possession for the purpose of defrauding creditors. *Id.* at 523.

Cases defining transfer for the preference provisions are weak authority for fraudulent conveyance cases because the underlying theories are different, even though the impact on the estate is similar. The preference rules are designed to promote equality of treatment among creditors. The fraudulent conveyance rules, however, are designed to retain assets for the estate that unsecured creditors reasonably anticipated would be available for repayment of their debts. See 4 W. COLLIER, *supra* note 27, § 547.02.

A series of cases have wrestled with the question whether the mere attachment, as opposed to subsequent foreclosure, of a security interest through an after-acquired property clause is a separate transfer for preference purposes. See, e.g., *DuBay v. Williams*, 417 F.2d 1277 (9th Cir. 1969); *Grain Merchants v. Union Bank & Sav. Co.*, 408 F.2d 209 (7th Cir.), cert. denied, 396 U.S. 827 (1969); see also Hogan, *Future Goods, Floating Liens, and Foolish Creditors*, 17 STAN. L. REV. 822 (1965) (This issue has been resolved under Bankruptcy Code § 547(c)(5), (e)(3)). Even though *DuBay* and other cases held that there was no separate transfer, they are not persuasive when applied to facts like those in *Durrett* because they deal with the creation of the security interest and not its enforcement.

Furthermore, when the question is whether the enforcement of a security interest is a separate transfer, the courts are less likely to scrutinize the definition of transfer in a preference case than they are in a fraudulent conveyance case. Even if the Supreme Court in *Thompson* had determined that repossession constituted a separate transfer, it would not have changed the outcome of the case; the secured creditor would not have received more than he could have received in bankruptcy. A secured creditor who perfects outside the preference period will obtain 100% of his debt, up to the value of the collateral. Thus, the creditor in *Thompson* did not gain an advantage vis-à-vis unsecured creditors by repossessing.

There was, therefore, a valid policy reason for holding that the enforcement of the lien was irrelevant for preference purposes. There may be policy reasons for holding that the enforcement of a lien is not a separate transfer for fraudulent conveyance purposes as well, but the policies are different and the courts should articulate the differences. For cases applying § 547 directly to completed foreclosures in which the value of the collateral exceeds the amount of the debt, see *infra* note 110. In any event, this issue has been resolved by an amendment of the definition of transfer in the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333. See *supra* note 40.

72. The purpose of foreclosure is to give the purchaser "essentially the same title to the land as that possessed by the mortgagor when the foreclosed mortgage was executed." G. OSBORNE, G. NELSON, & D. WHITMAN, *supra* note 49, § 7.12, at 448.

doctrine in the case cited by the *Alsop* court.<sup>73</sup> This principle, however, does not provide a satisfactory basis for fusing the two transfers for purposes of section 548(d)(1).<sup>74</sup> Section 548(d)(1) should be applied strictly as a mechanism for bringing a transfer, whether voluntary or involuntary, forward into the avoidance period.

*Alsop* also is problematic from a policy perspective. The court implied that it would follow *Durrett* and set aside a foreclosure sale conducted under a deed of trust executed within a year prior to bankruptcy if it brought less than reasonably equivalent value. Although it can be contended that *Durrett*'s attempt to recapture the debtor's equity for the bankruptcy estate creates more problems than it resolves, there is no reason to differentiate between foreclosure of a recently executed deed of trust and a deed of trust executed more than a year prior to bankruptcy. Thus, there is an element of capriciousness to the *Alsop* approach.

### B. *In re Madrid*

A second case that takes issue with *Durrett* is *Madrid v. Lawyers Title Insurance Co. (In re Madrid)*.<sup>75</sup> *Madrid* involved an attack on a nonjudicial foreclosure of a second deed of trust by a debtor in possession in a Chapter 11 proceeding. The United States Bankruptcy Court for the District of Nevada, following *Durrett*, set aside the foreclosure, which brought approximately sixty-seven percent of the property's fair market value.<sup>76</sup> The Bankruptcy Appellate Panel of the United States Court of Appeals for the Ninth Circuit reversed.<sup>77</sup> In a two-to-one decision, the panel held that a regularly conducted foreclosure sale itself is a safeguard against fraud and that the law of foreclosures and the law of fraudulent conveyances could be harmonized by "construing the reasonably equivalent value requirement of § 548(a)(2) to mean the same as the consideration received at a non-collusive and regularly conducted foreclosure sale."<sup>78</sup> The panel, however, did not discuss the transfer

73. See *supra* note 66 and accompanying text.

74. See *Gillman v. Preston Family Inv. Co. (In re Richardson)*, 23 Bankr. 434 (Bankr. D. Utah 1982), in which the court distinguished between the different interests and concluded: Section 548(d)(1) does not require the joinder of these two transfers when only one is challenged under Section 548(a). That the title of the purchaser at a foreclosure sale may relate back to the recording of the deed of trust is of no concern. The transfer of title in this case is not questioned; here, the trustee seeks to avoid a transfer of equity in the property.

*Id.* at 445-46; see also *First Fed. Sav. & Loan Ass'n of Bismarck, Inc. v. Hulm (In re Hulm)*, 738 F.2d 323 (8th Cir. 1984) (foreclosure effects a "transfer" of the debtor's property); *Alden, Gross & Borowitz, supra* note 8, at 1608-13 (foreclosure is a transfer under Bankruptcy Code definition).

75. 725 F.2d 1197 (9th Cir. 1984).

76. *Madrid v. Del Mar Commerce Co. (In re Madrid)*, 10 Bankr. 795 (Bankr. D. Nev. 1981), *rev'd sub nom. Lawyers Title Ins. Co. v. Madrid*, 21 Bankr. 424 (Bankr. 9th Cir. 1982), *aff'd*, 725 F.2d 1197 (9th Cir. 1984).

77. *Lawyers Title Ins. Co. v. Madrid (In re Madrid)*, 21 Bankr. 424 (9th Cir. 1982), *aff'd*, 725 F.2d 1197 (9th Cir. 1984).

78. *Madrid*, 21 Bankr. at 427; accord *Moore v. Gilmore (In re Gilmore)*, 31 Bankr. 615 (E.D. Wash. 1983). Judge Volinn dissented, arguing that the majority's construction created a conclusive presumption that the price received at a properly conducted foreclosure sale is sufficient to

issue.

The court of appeals affirmed, but on different grounds. The court held that the only relevant transfer occurred when the deed of trust was perfected.<sup>79</sup> This holding differs significantly from *Alsop*. Even though the *Madrid* holding since has been rejected by the Bankruptcy Amendments and Federal Judgeship Act of 1984, *Madrid* was an improvement on *Alsop* because the result in a particular case did not depend on the age of the deed of trust.

The court of appeals specifically stated that it was not relying on a relation-back doctrine to reach its conclusion, even though the deed of trust had been recorded more than a year prior to bankruptcy.<sup>80</sup> Instead, the court summarized the history of the law of fraudulent conveyances and concluded that there was no evidence that section 548(a)(2) or its predecessors ever were intended to affect enforcement of a valid lien.<sup>81</sup> The court also echoed many of the concerns stated by Judge Clark in his *Abramson* dissent, stressing the "[n]egative repercussions" in the lending area and the chilling effect that a federal right of redemption would have at foreclosure sales.<sup>82</sup>

In a concurring opinion, Judge Farris agreed that there had not been a transfer within the meaning of the Bankruptcy Code at the foreclosure sale.<sup>83</sup> He contended, however, that the majority opinion was overly broad and could be interpreted as rendering legally irrelevant all conduct occurring after the deed of trust was recorded. This interpretation would include a collusive foreclosure engineered by the debtor with intent to defraud other creditors. Thus, Judge Farris suggested that the definition of transfer be limited in the context of section 548 to transfers in which the debtor is an active participant.<sup>84</sup>

There is a certain logic to the *Madrid* approach. As already demon-

---

insulate the foreclosure from attack under § 548. He stated that he would, at most, create a strong presumption that the price received on foreclosure was reasonably equivalent to the property's value. *Madrid*, 21 Bankr. at 428 (Volinn, J., dissenting). The best judicial discussion of the meaning of "reasonably equivalent value" is *Gillman v. Preston Family Inv. Co. (In re Richardson)*, 23 Bankr. 434, 441-45 (Bankr. D. Utah 1982).

79. *Madrid*, 725 F.2d at 1199. Section 421(i) of the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, 368 (codified at 11 U.S.C. § 101(48) (1982)), amends the definition of transfer to include foreclosure of the debtor's equity of redemption. It is unclear whether this signifies congressional approval of *Durrett*, but it probably overrules *Madrid*. But see 130 CONG. REC. § 13771-72 (daily ed., pt. II, Oct. 5, 1984) (colloquy between Senators Dole and DeConcini).

80. *Madrid*, 725 F.2d at 1199 n.1.

81. *Id.* at 1199-1200. The court concluded that the antecedents of § 548(a)(2) "provide authority for the proposition that conveyances are set aside when there is actual fraud or a situation indicative of fraud." *Id.* at 1200.

82. *Id.* at 1202.

83. *Id.* at 1203 (Farris, J., concurring).

84. Judge Farris agreed with Judge Clark's interpretation of the Bankruptcy Act, see *supra* note 47, stating that:

Section 67(d) of the prior Bankruptcy Act, virtually identical in all substantive respects to the present § 548, applied only to "transfers made . . . by debtors." If the language of § 548 does not reflect the debtor's active role as clearly as that of its predecessor, the purpose and origin of the present statute give clarity of meaning to phrases that might otherwise be ambiguous. I would therefore hold that only transfers where the bankrupt was a participant can be set aside for absence of "reasonably equivalent value."

*Id.* at 1203-04 (Farris, J., concurring).



strated, although *Durrett* is justified by a literal reading of the Bankruptcy Code, it does not fit easily within the contours of fraudulent conveyance law. As a matter of construction, it is appropriate to limit a statute's application in a manner consistent with its historical antecedents.<sup>85</sup> Such a construction, however, is not mandatory and should be adopted only if it is consistent with policy considerations. The law is a process and an evolution of ideas; to deal with new situations is commonplace. *Durrett* promotes one of the basic policies of bankruptcy law by increasing the potential distribution to unsecured creditors. This benefit significantly outweighs *Durrett*'s "negative repercussions." Accordingly, the doctrine should be maintained, although in somewhat modified form, notwithstanding the fact that it breaks with tradition.

#### IV. SOME BASIC DISTINCTIONS IN APPLYING *DURRETT* TO FORECLOSURES ON REALTY AND PERSONALTY

The *Durrett* doctrine has been applied only once to an Article 9<sup>86</sup> foreclosure. In *In re Ewing*,<sup>87</sup> the United States Bankruptcy Court for the Western District of Pennsylvania denied a secured party's motion to dismiss a trustee's attack on a private foreclosure sale of pledged stock to the issuing corporation.<sup>88</sup> The bankruptcy court rejected an argument based on *Alsop* and held that it would set aside the foreclosure sale if further testimony indicated that the creditor received less than reasonably equivalent value.<sup>89</sup> The district court subsequently accepted the *Alsop* rationale and reversed the bankruptcy court's findings. The *Alsop* rationale, however, is suspect and future cases involving Article 9 foreclosures are likely to follow *Durrett*. Despite the obvious similarities, significant differences between real and personal property foreclosures exist.

##### A. Timing Issues

There are some minor differences in applying the timing rules of section 548(d)(1) to real and personal property. Section 548(d)(1) provides that the transfer on foreclosure is deemed to take place when it is so far perfected that a bona fide purchaser from the debtor, against whom the transfer could have been perfected, cannot acquire an interest superior to that of the transferee.<sup>90</sup>

85. See, e.g., *Segal v. Rochelle*, 382 U.S. 375 (1966), in which the United States Supreme Court limited the meaning of "transfer" as applied to § 70(a)(5) of the Bankruptcy Act, 11 U.S.C. § 110(a)(5) (1976) (repealed 1978).

86. U.C.C. §§ 9-101 to -507 (1978).

87. 33 Bankr. 288 (Bankr. W.D. Pa. 1983), *rev'd*, 36 Bankr. 476 (W.D. Pa. 1984) (reversal based on application of theory from *Alsop*).

88. Bankruptcy proceedings were initiated under Chapter 11 and then converted to Chapter 7 proceedings.

89. *Ewing*, 33 Bankr. at 292.

90. See *supra* notes 64-71 and accompanying text. The timing rules for preferential transfers relate perfection to protection from bona fide purchasers in the case of realty, 11 U.S.C. § 547(e)(1)(A) (1982), but perfection of an interest in fixtures or personalty occurs "when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee." *Id.* § 547(e)(1)(B). Section 548(d)(1) does not differentiate between realty and personalty; the time of transfer in all cases occurs at the time of protection from bona fide purchasers from the

Unlike the real estate recording system, Article 9 generally does not subject the buyer at a foreclosure sale to a risk from subsequent purchasers from the debtor.<sup>91</sup> Accordingly, the time of transfer for bankruptcy purposes ordinarily will correspond to the time of the actual foreclosure sale. Article 9, however, does apply to sales of accounts and chattel paper,<sup>92</sup> and a buyer who fails to perfect his interest in these types of collateral could be subordinated to a subsequent purchaser from the debtor. Thus, a foreclosure sale outside the avoidance period could be brought forward if the buyer failed to perfect. The problem is unlikely to arise, however, because a secured party typically will foreclose on accounts and chattel paper by collecting<sup>93</sup> from the account debtor rather than by sale. In such cases, the secured party already will be perfected at the time of foreclosure.<sup>94</sup> There also could be timing problems when perfection and the effects of perfection are governed by non-Code provisions that subject the buyer to a risk from subsequent purchasers from the debtor.<sup>95</sup>

### B. Overview of Real Property Foreclosures

Aside from minor timing problems, there are significant differences in applying *Durrett* to real and personal property foreclosures. Most importantly, the default provisions of Article 9 are designed to be more protective of the debtor's interests than the typical state mortgage foreclosure laws. There is no doubt but that *Durrett* is in part a reaction to the harsh nature of real property foreclosure in this country. One of the values of *Durrett* is that it may stimulate a reevaluation and reformation of the foreclosure process.

The mortgagee often is the only party to attend a real property foreclosure sale.<sup>96</sup> Unlike other parties, however, he has little incentive to bid more than the amount of the debt. Even when other parties attend, the procedures

---

debtor. This differing treatment derives in part because a fraudulent transfer by definition cannot be protected from simple creditors of the debtor. See 4 W. COLLIER, *supra* note 27, § 548.08, at 548-82 to -83 nn.1-3.

91. "Purchaser" is defined in § 101(35) to mean "transferee of a voluntary transfer, and includes immediate or mediate transferee of such a transferee." 11 U.S.C. § 101(35) (1982). This conforms to the definition of purchaser in U.C.C. § 1-201(33), (32) (1978).

92. U.C.C. §§ 1-201(37), 9-102(1)(b), 9-105(1)(m) (1978). A sale of accounts or chattel paper as part of a sale of the debtor's entire business is also outside the scope of Article 9. *Id.* § 9-104(f).

93. An assignment by the secured party for purposes of collection is also outside the scope of Article 9. *Id.* § 9-104(f).

94. This simply means that the time of transfer cannot be brought forward for bankruptcy purposes. It does not suggest that the foreclosure sale relates back to the original perfection as held in *Alsop*.

95. This could occur when the collateral is a vehicle subject to a state certificate of title act. It also could occur under federal perfection regimes. See, e.g., 35 U.S.C. § 261 (1982) (patents); 49 U.S.C. § 1403(c) (1976) (aircraft liens).

96. See Nelson, *supra* note 49, at 151. Nelson cites several reasons for this phenomenon: mortgagees can bid up to the amount of the debt without using new money; notice of sale frequently is published in periodicals of limited circulation; notices often are so technical that potential bidders cannot tell what property is being sold; potential purchasers often have difficulty inspecting the premises; and purchasers face problems obtaining good and marketable title. *Id.* at 151-52; see also Lifton, *Real Estate in Trouble: Lender's Remedies Need Overhaul*, 31 BUS. LAW. 1927 (1976) (statutory redemption right's effect on foreclosure sale participation).

governing mortgage foreclosures usually ensure that the debtor's equity will be sacrificed. Sales invariably are conducted by auction rather than by placement with a qualified broker. Purchasers must pay in cash, further reducing the bidding pool. Finally, many states grant a statutory, postsale right of redemption.<sup>97</sup> This right of redemption reduces the reliability of the purchaser's title and further discourages bidders.

Legislative attempts to reform this system have not been successful. One such attempt is the Uniform Land Transactions Act (ULTA),<sup>98</sup> which provides:

Sale may be at a public sale or by private negotiation, by one or more contracts, as a unit or in parcels, at any time and place, and on any terms including sale on credit, but every aspect of the sale, including the method, advertising, time, place, and terms, must be reasonable.<sup>99</sup>

This provision applies to all power-of-sale foreclosures,<sup>100</sup> and to judicial foreclosures, unless the judgment specifies that the sale is to be held in accordance with the state's laws governing execution sales of realty.<sup>101</sup> There are no post-sale rights of redemption under the ULTA,<sup>102</sup> and there are specific provisions assuring a good faith purchaser of marketable title even if the mortgagee fails to comply with the technical foreclosure requirements.<sup>103</sup>

If provisions similar to those contained in the ULTA were adopted and enforced strictly, there might be no need for *Durrett*. In particular, encouraging private sales on credit could dramatically increase recoveries. One commentator has suggested a system that in some respects goes even further than the ULTA.<sup>104</sup> Professor Nelson proposes that for a specified period of time, property be placed for sale with brokers using ordinary commercial methods, including descriptive and pictorial advertising.<sup>105</sup> To encourage the highest return, he also suggests a system of public trustees who would place the property for sale and whose compensation would be indexed to the excess that the private sale brings over the mortgage debt.<sup>106</sup> If the property does not sell within the specified period, this is a strong indication that there is no equity to recover.

---

97. See, e.g., ALA. CODE, § 6-5-230 (1975); CAL. CIV. CODE § 725a (West 1954); MICH. COMP. LAWS § 600.3140 (1963) (MICH. STAT. ANN. § 27A.3140 (Callaghan 1980)); WYO. STAT. § 1-480 (Supp. 1975). See generally G. OSBORNE, G. NELSON & D. WHITMAN, *supra* note 49, § 8.4 (characteristics of statutory redemption).

98. The ULTA was approved by the National Conference of Commissioners on Uniform State Laws in August, 1975 and amended substantially in 1977. For a more complete discussion of its foreclosure provisions, see Kuklin, *The Uniform Land Transactions Act: Article 3*, 11 REAL PROP., PROB. & TR. J. 12 (1976).

99. UNIF. LAND TRANSACTIONS ACT § 3-508(a) (1977).

100. *Id.*

101. *Id.* § 3-509.

102. *Id.* § 3-512(a).

103. *Id.* § 3-511.

104. See Nelson, *supra* note 49.

105. *Id.* at 163.

106. *Id.* at 163-64.

State legislatures have resisted these attempts at reform and the courts have been reluctant to intervene. The prevailing judicial attitude is that a sale will not be set aside unless the price is so low that it "shocks the conscience" and raises an inference of fraud;<sup>107</sup> the debtor is not entitled to avoidance or monetary damages for mere inadequacy of price.<sup>108</sup> Foreclosures not only sacrifice the debtor's equity, they also reduce the pool of assets available for unsecured creditors. These unsecured creditors do not receive notice of the sale and rarely enter the bidding to protect their investments.

The loss of the debtor's equity conflicts with one of the major goals of bankruptcy—retention of assets for distribution to unsecured creditors. Prior to *Durrett*, bankruptcy courts were powerless in the face of a completed foreclosure sale,<sup>109</sup> even though the effect of a foreclosure was similar to the loss of assets through preferential transfers.<sup>110</sup> The trustee could not set aside the sale or recover damages from the mortgagee by asserting any rights of the debtor,<sup>111</sup> and could not enhance the estate by asserting any of his own powers or subrogating to the rights of unsecured creditors. The debtor's equity could

---

107. This is true in both judicial and power-of-sale foreclosures. For a discussion of judicial foreclosures, see *Ballentyne v. Smith*, 205 U.S. 285 (1907); *Wiesel v. Ashcroft*, 26 Ariz. App. 490, 549 P.2d 585 (1976); see also G. OSBORNE, G. NELSON & D. WHITMAN, *supra* note 49, § 7.16 (judicial and statutory foreclosure sales).

For a discussion of power-of-sale foreclosures, see *Jackson v. Klein*, 320 S.W.2d 553 (Mo. 1959); *Anderson v. Anderson*, 107 R.I. 202, 266 A.2d 46 (1970); *Pugh v. Richmond*, 58 Tenn. App. 62, 425 S.W.2d 789 (1968); see also G. OSBORNE, G. NELSON & D. WHITMAN, *supra* note 49, § 7.21 (problems in power-of-sale foreclosures).

108. The ULTA, after requiring that all aspects of a foreclosure sale be reasonable, grants the debtor, or any person entitled to notice, a right to recover money damages from the creditor for any loss caused by the creditor's failure to observe the standards for foreclosure sales. UNIF. LAND TRANSACTIONS ACT § 3-513(b) (1977).

109. If foreclosure is incomplete at the time a voluntary or involuntary bankruptcy petition is filed, the automatic stay prevents enforcement of any lien against property of the estate. 11 U.S.C. § 362(a)(4) (1982). The collateral is property of the estate. *Id.* § 541(a)(1). If the mortgagee is in possession, custody, or control of the property, he must turn it over to the trustee unless it is of inconsequential value. *Id.* § 542(a). The trustee then can capture the debtor's equity by asserting his right to use, sell, or lease the collateral. *Id.* § 363.

110. Two courts have used the preference provisions to avoid foreclosures when the mortgagee bought in, even though the sales could not have been set aside under state law. See *Federal Nat'l Mortgage Ass'n v. Wheeler (In re Wheeler)*, 34 Bankr. 818 (Bankr. N.D. Ala. 1983) (holding §§ 547(b) and 548(a)(2) applicable to avoid sale); *Morris Plan Co. v. Fountain (In re Fountain)*, 32 Bankr. 965 (Bankr. W.D. Mo. 1983) (holding § 547 applicable to avoid sale). *But cf. Myers v. Shekter (In re Hill)*, 39 Bankr. 894 (Bankr. D. Or. 1984) (analogizing to the United States Court of Appeals for the Ninth Circuit's reasoning in *Madrid*).

The application of § 547 in this context is as significant an expansion of that section as *Durrett* is in the context of § 548. It also is equally problematic since the mortgagee arguably gets no more than he would have received in bankruptcy proceedings. See 11 U.S.C. § 547(b)(5) (1982). The mortgagee, however, does obtain the debtor's equity, and the policies that led to these decisions are the same as those underlying *Durrett*.

Applying § 547 has some attraction since it reduces the avoidance period to 90 days except for insiders. *Id.* § 547(b)(4). It can be applied only when the mortgagee is the foreclosure sale purchaser, since that is the only situation in which the mortgagee will receive more than he would have received in bankruptcy. *Id.* § 547(b)(5). It also permits recapture of the debtor's equity when more than 70% of the property's fair market value was paid at the foreclosure sale. These features closely parallel some of the modifications of *Durrett* suggested in this Article.

111. Since the trustee succeeds to "all legal and equitable interests of the debtor in property as of the commencement of the case," 11 U.S.C. § 541(a)(1) (1982), he can assert the debtor's right to any state-created remedy arising out of the foreclosure proceedings. In the real property context, however, such remedies are rare.

be recovered only when there was an unexpired right of redemption.<sup>112</sup>

*Durrett*, however, provides the trustee with a theoretical basis for recapturing lost equity. Its effect is to create a de facto federal right of redemption that is similar to statutory redemption but with some distinguishing features. First, there is a cost associated with statutory redemption. The redeeming party must secure sufficient cash to reimburse the foreclosure purchaser's sale price, plus interest and certain costs.<sup>113</sup> There is no out-of-pocket cost associated with avoidance under *Durrett*, and the purchaser is reimbursed out of the proceeds of resale. Second, no existing statutory redemption scheme extends protection to unsecured creditors.<sup>114</sup> Thus, *Durrett* goes further than existing laws by extending the right of redemption to the representative of such creditors.

In the roughly twenty-five states that currently permit postsale redemption, the impact of *Durrett* will be to increase the risk that the property will be redeemed; it will not change the nature of the risks assumed by the purchaser. In those states without statutory redemption, *Durrett* may have some adverse impact on participation at foreclosure sales.<sup>115</sup> The benefits to unsecured creditors, however, outweigh this impact particularly in light of the fact that the other procedures surrounding foreclosures tend to drive the amounts bid down to unacceptable levels even when there is no statutory redemption. There is no reason to permit secured creditors to reap the benefit of assets that might have paid off unsecured creditors. Ideally, secured lenders would be required to take reasonable steps to ensure that market value is received for collateral. If that were the case, there would be no need for either *Durrett* or statutory redemption. Given the current state of real property foreclosure laws, however, *Durrett* is sound despite its potential impact in nonredemption states. The solution to "chilled" bidding lies in a structural reform of the system, not in a repeal of *Durrett*.

The extremely long period of uncertainty in *Durrett* creates problems in the context of real property.<sup>116</sup> This period is economically wasteful since it

---

112. The debtor's statutory right of redemption is an asset of the estate. See *Harsh Inv. Corp. v. Bialac (In re Bialac)*, 24 Bankr. 580 (Bankr. 9th Cir. 1982); *In re Nelson*, 9 F. Supp. 657 (D.S.D. 1935); 4 W. COLLIER, *supra* note 27, § 541.07(3).

The trustee will have at least 60 days to assert the right, even if it otherwise would have expired after commencement of the case but before the end of the 60-day period. 11 U.S.C. § 108(b)(2) (1982).

In states that grant judicial lien creditors a right of redemption, the trustee could assert such a right in his capacity as a hypothetical lien creditor even if the mortgagor's redemption period had expired. *Id.* § 544(a)(1).

113. See G. OSBORNE, G. NELSON & D. WHITMAN, *supra* note 49, § 8.4.

114. See *id.* § 8.5. In some states, creditors who have obtained liens through a judicial process are entitled to redeem. See, e.g., IOWA CODE ANN. § 628.3 (West 1949); MINN. STAT. ANN. § 586.23 (West 1947).

115. See McElhone & Cramer, *Loan Foreclosure Costs Affected by Varied State Regulations*, 36 MORTGAGE BANKER 41 (1975); Comment, *Cost and Time Factors in Foreclosure of Mortgages*, 3 REAL PROP., PROB. & TR. J. 413 (1968). The relationship between lost time and the price received at foreclosure is discussed in a study sponsored by the Federal Home Loan Bank Board. See TOUCHE, ROSS & CO., *THE COSTS OF MORTGAGE LOAN FORECLOSURE: CASE STUDIES OF SIX SAVINGS & LOAN ASSOCIATIONS* (1975).

116. See *supra* note 51 and accompanying text.

discourages development of the land until title is secure. A one-year avoidance period prior to bankruptcy may be appropriate when there is actual fraud, but in the *Durrett* context it makes more sense to conform to the three-month limitation period in section 547. There also must be a time limit on the right to initiate avoidance proceedings following commencement of bankruptcy. One possibility is to establish a separate, nine-month statute of limitations for avoidance of regularly conducted, noncollusive foreclosure sales. This nine-month limitation period would allow ample time for appointment of a trustee and would limit the total period of uncertainty to one year following the foreclosure sale. This conforms to the one-year redemption period available in many states.<sup>117</sup> Other time limits also might be logical, but it is important that the period of uncertainty be reduced significantly.

### C. Overview of Article 9 Foreclosures

The Uniform Commercial Code (UCC), which served as the model for the ULTA foreclosure provisions,<sup>118</sup> in theory is more protective of the debtor's equity in collateral than are real property foreclosure laws. The secured party can "sell, lease or otherwise dispose of any or all of the collateral"<sup>119</sup> so long as "every aspect of the disposition including the method, manner, time, place and terms"<sup>120</sup> is commercially reasonable. A sale may be conducted by auction or by private proceedings,<sup>121</sup> although the secured party generally cannot purchase at a private sale.<sup>122</sup> A good faith purchaser's title is protected from defects in the foreclosure proceedings,<sup>123</sup> and there is no post-sale right of redemption.<sup>124</sup> Although the secured party may take advantage of a simplified strict foreclosure proceeding under some circumstances,<sup>125</sup> the debtor—or another secured party who has requested notice—can protect his equity by blocking strict foreclosure and forcing a sale.<sup>126</sup>

The UCC also specifies the manner in which sale proceeds are to be distributed<sup>127</sup> and requires that any surplus be turned over to the debtor.<sup>128</sup> Most importantly, the UCC permits the debtor to recover monetary damages for any loss caused by the secured party's failure to observe the strictures of

---

117. Although many states that permit redemption have a one-year redemption period, there is variance from as little as six months to as long as two years. See G. OSBORNE, G. NELSON & D. WHITMAN, *supra* note 49, § 8.4.

118. See Commissioners' Prefatory Note, UNIF. LAND TRANSACTIONS ACT (1977).

119. U.C.C. § 9-504(1) (1978).

120. *Id.* § 9-504(3). A secured party attempting to collect on intangible collateral also must proceed in a commercially reasonable manner except in cases of nonrecourse financing. *Id.* § 9-502(2).

121. *Id.* § 9-504(3).

122. *Id.* The exceptions occur when damages from an unreasonable purchase price are easily calculable.

123. *Id.* § 9-504(4).

124. *Id.* § 9-506.

125. *Id.* § 9-505.

126. *Id.*

127. *Id.* § 9-504(1).

128. *Id.* § 9-504(2).

part 5 of Article 9.<sup>129</sup> Thus, if a secured party holds an auction sale when such a sale is not commercially reasonable, the debtor has a right to damages for the difference between the sale price and the price that would have been received if the secured party had acted reasonably.<sup>130</sup>

The debtor's cause of action can be asserted by the bankruptcy trustee. This permits the estate to recover some part of the debtor's equity directly from the offending creditor. In theory, the availability of this remedy makes *Durrett* less necessary when personalty is involved. Unfortunately, theory and reality differ in this instance. Despite the protective tone of Article 9, case law is replete with instances in which courts have sustained sales as commercially reasonable even though the collateral brought significantly less than its fair market value.<sup>131</sup> This result is due in large measure to section 9-507(2), which states that "[t]he fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the secured party is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner."<sup>132</sup>

Section 9-507(2) frequently has been cited to support the idea that in Article 9 foreclosures, as in real property foreclosures, "mere inadequacy" of price is insufficient to support a finding that a sale is commercially unreasonable.<sup>133</sup> Generally, Article 9 protects debtors to a significant degree. Nonetheless, there is no reason to believe that prices at Article 9 foreclosures are so uniformly high that application of *Durrett* would not be beneficial to the bankruptcy estate.

There is a potentially negative aspect to the application of *Durrett* in the personal property context. Although there is no redemption period following foreclosure under Article 9, *Durrett* creates one. If the protective features of Article 9 bring proportionately higher prices than the procedures governing real property foreclosures, there is a greater chance that any "chill" resulting from *Durrett* will have a substantial impact. In the absence of any meaningful empirical studies of the foreclosure process, however, this concern is speculative. Nonetheless, this potential impact suggests that there should be a high level of protection for third-party purchasers who act in good faith.

---

129. *Id.* § 9-507(1).

130. *See, e.g.,* United States v. Willis, 593 F.2d 247 (6th Cir. 1979); Old Colony Trust Co. v. Penrose Indus. Corp., 280 F. Supp. 698 (E.D. Pa.), *aff'd*, 398 F.2d 310 (3d Cir. 1968).

131. *See, e.g.,* Sierra Fin. Corp. v. Brooks-Farrer Co., 15 Cal. App. 3d 698, 93 Cal. Rptr. 422 (1971) (\$500 price for goods with fair market value of \$27,616 held commercially reasonable); Chicago City Bank & Trust Co. v. Wilson, 86 Ill. App. 3d 452, 407 N.E.2d 964 (1980) (sale of 3-month-old car for 62% of purchase price held commercially reasonable).

132. U.C.C. § 9-507(2) (1978).

133. *See, e.g.,* Galligan v. General Motors Acceptance Corp. (*In re* Galligan), 10 Bankr. 841 (Bankr. D. Me. 1981); Sierra Fin. Corp. v. Brooks-Farrer Co., 15 Cal. App. 3d 698, 93 Cal. Rptr. 422 (1971); National Blvd. Bank v. Jackson, 92 Ill. App. 3d 928, 416 N.E.2d 358 (1981).

## V. EFFECTS OF THE REMEDIAL SYSTEM

A. *Recovery of the Collateral from the Lender*

There are problems in applying the Bankruptcy Code's remedies for avoided transactions. When a transfer is avoided under section 548, a purchaser who takes for value and in good faith—the initial transferee—is granted a lien on the property to the extent of any value given.<sup>134</sup> The Chapter 7 trustee who avoids the transfer will seek to recover the property from the purchaser under section 550(a)<sup>135</sup> and resell it to realize on the equity. The trustee, however, can sell free of the purchaser's lien only under limited circumstances; the most important restriction is that the price obtained by the trustee must be greater than the value of the purchaser's interest.<sup>136</sup> The purchaser also is entitled to "adequate protection" of his interest on request to the bankruptcy court.<sup>137</sup> Generally, this means that the purchaser's lien will attach to the proceeds of the trustee's sale and he will be repaid in full for his investment.<sup>138</sup> In short, the trustee is given an opportunity to attempt to wring excess value out of the property. If he cannot obtain a price greater than the value of the purchaser's lien, the property will not be sold and should be abandoned to the purchaser.<sup>139</sup>

This procedure is protective when the initial purchaser is the secured lender. The only negative aspect is the lost earning potential of the money tied up in the property from the time of foreclosure to the time the trustee resells. The section 548(c) lien does not include this amount since it is limited to value given, and value in this context refers to sums that operate to reduce the

---

134. 11 U.S.C. § 548(c) (1982). In noncollusive, regularly conducted foreclosure sales the good faith of the purchaser will not be an issue. Thus, the purchaser will obtain a lien to the extent of the value given. The elements of value are discussed *infra* note 137.

135. 11 U.S.C. § 550(a) (1982). See S. REP. NO. 989, 95th Cong., 2d Sess. 90 reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5787, 5876; H.R. REP. NO. 595, 95th Cong., 1st Sess. 375-76 (1977) reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5963, 6331-32; see also *supra* note 51.

136. 11 U.S.C. § 363(f)(3) (1982).

137. *Id.* § 363(e). The initial purchaser's protection extends beyond the amount paid for the property. The lien of § 548(c) protects the initial price paid by the purchaser. Value includes "property, or satisfaction or securing of a present or antecedent debt." *Id.* § 548(d)(2)(A). Since the debt will include such items as attorney's fees and the costs of foreclosure in a well-drafted mortgage or security agreement, the purchaser's lien also will extend to these amounts.

In addition, the purchaser's lien includes the value of improvements to the property made after the purchase. *Id.* § 550(d)(1). "Improvement" includes both physical additions or improvements and such items as payment of taxes, discharge of prior liens, and preservation of the property. *Id.* § 550(d)(2). The lien for improvements is limited to the lesser of the actual cost to the purchaser, less any profits realized therefrom, or any increase in value resulting from the improvements. *Id.* § 550(d)(1). This limitation creates a disincentive to make improvements that will not directly increase market value.

If the property is recovered and resold by the trustee, the lien will not fully protect the purchaser since there will be a loss of earning potential on funds tied up in the property. See *infra* notes 140-44 and accompanying text.

138. Section 361 suggests a specific method of providing adequate protection. 11 U.S.C. § 361 (1982). The notes of the Committee on the Judiciary following § 363 state that, "most often, adequate protection in connection with a sale free and clear of other interests will be to have those interests attach to the proceeds of the sale." S. REP. NO. 989, *supra* note 135, at 56 reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5787, 5842.

139. 11 U.S.C. § 554 (1982).



debtor's obligation.<sup>140</sup> Moreover, the lost interest is not picked up by section 550(d), which grants a good faith transferee from whom recovery of the property is sought a lien to the extent of any improvements made after acquisition.<sup>141</sup> The loss of interest is an economic loss but it does not qualify as an improvement since it does not enhance the value of the property.

Despite its exclusion from the purchaser's lien, lost interest does not simply "fall between the cracks" in the Bankruptcy Code. A purchaser with a lien under either section 548(c) or section 550(d) has a secured claim against the estate under section 506(a) for the value of the lien.<sup>142</sup> Section 506(b) then provides that:

To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided under the agreement under which such claim arose.<sup>143</sup>

In the *Durrett* context, there is by definition excess value in the property; this provision should protect the lender. Section 506(b) does not specify the rate of interest; bankruptcy courts undoubtedly have discretion in the matter. Conceptually, one can argue that the effect of avoidance should be a reinstatement of the contract terms, including the rate of interest. On the other hand, the amount of the loss in earning potential is a function of the market rate at the time the loss is incurred and a court reasonably could apply that rate. Even if the court applied the judgment rate in the particular state, the potential harm to the creditor would be insignificant compared with the potential benefits to the estate.<sup>144</sup>

### *B. Recovery of Monetary Damages From the Lender*

A different remedy is available when the secured creditor buys in at the foreclosure sale and subsequently resells the property. If the subsequent transferee has given value, acted in good faith, and has no knowledge of the voidability of the foreclosure sale, he, or any immediate or mediate good faith transferee from him,<sup>145</sup> is protected from the trustee by section 550(b).<sup>146</sup> The trustee, however, can recover the value of the property from the secured credi-

---

140. *Id.* § 548(c), (d)(2)(A); see also *supra* note 137.

141. See *supra* note 137.

142. 11 U.S.C. § 506(a) (1982). Section 506(a) states that an allowed claim "is a secured claim to the extent of the value of such creditor's interest in such property." *Id.* The value of the creditor's interest would be the sum of the liens granted by §§ 548(c) and 550(d).

143. *Id.* § 506(b). Section 506(c) permits the trustee to recover from the property "the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim." *Id.* § 506(c). Because only expenses that accrue to the creditor's benefit can be recovered under this section, it does not materially decrease the level of protection granted under § 506(b).

144. See, e.g., *In re Klein*, 10 Bankr. 657 (Bankr. E.D.N.Y. 1981) (court used average of contract rate and judgment rate).

145. 11 U.S.C. § 550(b)(2) (1982). This is an application of the shelter principle.

146. *Id.* § 550(b).

tor under section 550(a). This causes no unfairness if the monetary recovery is measured by the difference between the value of the secured creditor's lien and the value paid by the subsequent transferee. The procedure is more efficient than recovery and resale by the trustee, but it does not permit the lender to recoup from an increased sale price the loss of earning potential that accrues during the period between his purchase at the foreclosure sale and his subsequent resale. As in cases in which the property itself is recovered from the secured lender, this loss can be compensated by granting the lender credit under section 506(b).

If the purpose of *Durrett* is to permit the trustee to recover the debtor's equity for the benefit of the estate, it is logical that "value" for purposes of section 550(b) should correspond to the property's fair market value.<sup>147</sup> If this analysis is accurate, however, there is a potential danger in applying the monetary recovery provision of section 550(a), particularly when moveable items of personalty are involved. Suppose an Article 9 secured party purchases moveable collateral at a commercially reasonable auction sale for sixty-five percent of its fair market value. He then resells the property for seventy-five percent of its fair market value and the purchaser disappears. It would be grossly unfair to permit the trustee to recover from the secured party the difference between the price paid at the auction and the property's fair market value, since this would leave the secured party with an uncompensable loss. This possibility supports the argument that the trustee's recovery should be limited to the excess value, less a credit for lost interest, actually received by the secured lender.<sup>148</sup>

### C. Recovery of the Collateral from Third Parties

If value for purposes of section 550(b) means fair market value, the section does not fully protect subsequent transferees. Suppose a mortgagee buys residential real property at foreclosure and then resells the property for less than its fair market value to a purchaser who intends to live in the home. Avoidance is unduly burdensome to the purchaser, who would have to give up his home. Recovering the differential from the ultimate purchaser as monetary damages could be equally burdensome and might lead to insolvency and loss of the home. Because recovery may lead to irreparable injury, the purchaser should be protected absolutely. The purchaser for residential purposes

---

147. See *Slutsky v. Michel Tire Co. (In re Vann)*, 26 Bankr. 148 (Bankr. S.D. Ohio 1982); *Federman v. Falcone (In re Nevada Implement Co.)*, 22 Bankr. 105 (Bankr. W.D. Mo. 1982); *Reiber v. Baker (In re Baker)*, 17 Bankr. 392 (Bankr. W.D.N.Y. 1982). Defining value in this manner creates a paradox since it exposes a subsequent transferee to liability even though he paid an amount that, if paid by the initial purchaser, would have been considered reasonably equivalent under *Durrett*. Accordingly, an argument can be made that, in the *Durrett* context, value for purposes of § 550(b) means the same as reasonably equivalent value in § 548(a)(2)(A), or roughly 70% of fair market value. If such a definition is adopted, it becomes even more important to limit monetary recoveries against initial purchasers under § 550(a) to actual excess value received on resale.

148. See *Kuhn v. Nance (In re Nance)*, 26 Bankr. 105 (Bankr. S.D. Ohio 1982).

also should be protected if he is the initial purchaser at a regularly conducted foreclosure sale.

Protection can be accomplished by a statute designating residential purchasers as "protected parties," an idea already embodied in another context in the ULTA.<sup>149</sup> Such a statute resolves one of the problems created by the de facto right of redemption implicit in *Durrett*. Since a protected party cuts off the right of recovery, he should be able to obtain good and marketable title to the extent currently permitted by state foreclosure procedures. This reduces his disincentive to bid.

There may be situations other than in the residential context in which a purchaser of real property would be injured irreparably by application of section 550(a). Accordingly, the term "protected party" should be defined broadly to include residential purchasers and other parties who might suffer irreparable harm. Because of the significant potential for harm, the trustee should bear the burden of showing that there will not be irreparable injury. Blanket protection, however, should not be granted to all purchasers in the real property context. If the property was purchased for speculative purposes, recovery of the property or the excess value received on resale by the speculator is entirely appropriate provided he is given the same protections as secured lenders, including credit for lost interest.<sup>150</sup>

When personal property is purchased by someone other than the secured party, the best approach may be to deny the trustee a remedy in all cases. Because the foreclosure mechanism in Article 9 is designed to bring higher prices than those obtained on sales of realty, a right of redemption could have a correspondingly greater "chilling" effect on bidding.<sup>151</sup> More importantly, the greater availability of a damage remedy under UCC section 9-507(1) creates a greater chance of recovering damages directly from the secured party without resort to *Durrett*. It is true that there may be cases in which this approach leads to a loss of value that otherwise might have been captured, but the overall benefit to Article 9 debtors justifies this loss. At the very least, consumer purchasers should be protected parties and other purchasers should have the advantage of the presumption of irreparable injury.<sup>152</sup>

---

149. See UNIF. LAND TRANSACTIONS ACT § 1-203(a) (1977). ULTA § 1-203(b) defines "residential real estate" in terms of acreage, dwelling units, and usage. *Id.* § 1-203(b). A similar definition should be employed in any new bankruptcy legislation.

150. Subsequent transferees are not protected directly by the lien of § 548(c), which arises only "to the extent that such transferee . . . gave value to the debtor in exchange for such transfer." 11 U.S.C. § 548(c) (1982) (emphasis added). The transferee, however, undoubtedly acquires the initial purchaser's lien. This interpretation is supported by § 550(a), which permits the trustee to recover only "to the extent" that the transfer is avoided under § 548. See S. REP. NO. 989, *supra* note 135 reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5787; H.R. REP. NO. 595, *supra* note 135 reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5963. The transfer is avoided under § 548(c) only to the extent of the property's value in excess of the initial purchaser's lien.

151. See *supra* notes 118-33 and accompanying text.

152. Section 8(g)(2) of the new UFTA, *supra* note 9, exempts all UCC dispositions from avoidance.

*D. Remedies in Rehabilitation Proceedings*

There are additional problems when *Durrett* is applied in rehabilitation proceedings under Chapter 11<sup>153</sup> or Chapter 13.<sup>154</sup> When the property is in the possession of the lender, recovery of the property for a purpose other than resale prevents immediate realization of the property's value. The lender, however, assumed a credit risk when he made the original loan. As long as he is protected adequately he is no worse off than he would have been if bankruptcy proceedings had been commenced before foreclosure was complete.<sup>155</sup> When the property has been sold to a third party who has not given sufficient value to gain protection under section 550(b), however, recovery for use by the estate converts the purchaser into a forced lender. Even if the purchaser is "adequately protected" in the sense that he eventually will recoup his investment plus interest, the consequences of having funds tied up for a significant period of time can be catastrophic. Accordingly, the Bankruptcy Code should be amended to permit recovery of the collateral from a third-party purchaser only for the purpose of immediate resale. If the trustee or debtor exercising the rights of the trustee needs the property to conduct the business, he should be required to purchase the property outright, even if the purchase money must be borrowed. Use of the rehabilitation procedures may come too late in

---

153. Because chapters 1, 3, and 5 of the Bankruptcy Code apply in chapter 11 proceedings, the trustee may use § 548 to avoid a foreclosure sale. 11 U.S.C. § 103(a) (1982). In addition, a debtor in possession has all the rights and powers of a trustee. *Id.* § 1107(a).

154. Section 103(a) also applies chapters 1, 3, and 5 to chapter 13 proceedings and the trustee no doubt has the power to assert rights granted under § 548. The chapter 13 trustee, however, usually plays a passive role and the debtor remains in possession of the estate. 11 U.S.C. § 1306(b) (1982). The debtor also has the rights granted to the trustee under certain subsections of § 363 to use, sell, or lease the property. *Id.* § 1303. There is no general grant of the trustee's powers to the debtor.

Some cases have predicated the debtor's power to use § 548 on § 522(h). Under § 522(h), the debtor may avoid a transfer only if the trustee does not act and only to the extent that the property could have been exempted under § 522(b) if the transfer by the debtor was not voluntary and the debtor did not conceal the property. *Id.* § 522(g)(1). Since neither of these events occur in the *Durrett* context, the debtor can use the trustee's powers to salvage his exemption rights to the equity in mortgaged property. See *United Penn Bank v. Dudley (In re Dudley)*, 38 Bankr. 666 (Bankr. M.D. Pa. 1984); *Federal Nat'l Mortgage Ass'n v. Wheeler (In re Wheeler)*, 34 Bankr. 818 (Bankr. N.D. Ala. 1983); *Rosner v. Worcester (In re Worcester)*, 28 Bankr. 910 (C.D. Cal. 1983); *Coleman v. Home Sav. Ass'n (In re Coleman)*, 21 Bankr. 832 (Bankr. S.D. Tex. 1982); *Home Life Ins. Co. v. Jones (In re Jones)*, 20 Bankr. 988 (Bankr. E.D. Pa. 1982).

There is some authority that the debtor has standing to bring an avoidance action directly under § 548 without using the detour of § 522(h). The argument is based on 11 U.S.C. § 1306 (1982), which includes in the chapter 13 estate all property designated in 11 U.S.C. § 541 (1982). Section 541(a)(3) specifies property that the trustee recovers under § 550. Because of the passive nature of the chapter 13 trustee, a recovery right in the debtor could be inferred from these provisions since property that is technically part of the estate otherwise will be lost. See *Carr v. Demusis (In re Carr)*, 34 Bankr. 653 (Bankr. D. Conn. 1983); *Russo v. Ciavarella (In re Ciavarella)*, 28 Bankr. 823 (Bankr. S.D.N.Y. 1983).

If the debtor recovers the property under § 522(h), his ability to claim an exemption is subject to the limitations of § 550. 11 U.S.C. § 522 (i)(1) (1982). The purchaser's lien therefore is effective and can cut off the debtor's exemption rights.

155. For a discussion of the extent to which the concept of adequate protection requires the maintenance of an "equity cushion" in the property to absorb lost expenses, see Weintraub & Resnick, *Puncturing the Equity Cushion—Adequate Protection for Secured Creditors in Reorganization Cases*, 14 U.C.C. L.J. 284 (1982).

some circumstances; that the debtor could have protected himself by initiating bankruptcy before the foreclosure was complete cannot be ignored.

### *E. Application of the Seventy Percent Rule*

In its present form, *Durrett* may not go far enough in empowering the trustee to avoid foreclosure sales. There is little justification for a system that permits a secured lender—or a subsequent, unprotected purchaser—to acquire and retain the debtor's equity without compensation; under current foreclosure laws, however, this result frequently occurs. *Durrett* is triggered only when the foreclosure sale price is less than seventy percent of the property's fair market value; thus, up to thirty percent of that value can be lost. Although invariably there will be costs associated with an effort to obtain market value for collateral, the present system still may result in an unjustifiable sacrifice of equity.

Suppose real property with a fair market value of \$300,000 is sold at foreclosure to the lender for seventy percent of that amount, \$210,000. Under *Durrett*, the sale is final. The lender can resell the property for \$300,000 and pocket a significant portion of the debtor's equity. If the property is placed with a broker who charges a 7 percent commission, the lender's profit is only reduced by \$21,000. In addition, the lender will have \$210,000 tied up in the property during the resale period. Assuming a 12 percent market rate of interest, he will be losing approximately \$2,100 per month. There also will be closing costs associated with the resale. Even with these costs, however, the lender or a subsequent purchaser will capture a significant profit. There is no reason why this profit should not be available to unsecured creditors.

Accordingly, the definition of "reasonably equivalent value" in section 548(a)(2) should not be limited by a seventy percent rule. The phrase, however, also should not be construed as the equivalent of fair market value. Instead, the test for avoidance should be whether it is likely to result in a substantial benefit to the estate, with the burden on the trustee to show the potential for such benefit. The bankruptcy judge then would consider such factors as the actual costs of resale and the lost earning potential of the lender to determine whether avoidance was appropriate. If the other modifications suggested in this Article are adopted, such an approach should increase the return to the estate without significant prejudice to the lender since the trustee will be forced to abandon the sale if his expectations are not satisfied.<sup>156</sup> Bankruptcy judges can further minimize the risks by setting reasonable time limitations on the trustee's resale efforts.

## VI. CONCLUSION

Notwithstanding the opposition it has engendered, *Durrett* represents an improvement in the law. Any negative effect that it may have on foreclosures is outweighed by its benefit to unsecured creditors, particularly in light of the

---

156. See *supra* note 139 and accompanying text.

low prices traditionally generated at real property foreclosures. The real estate bar's energies would be better spent urging fundamental reforms in foreclosure laws, a process that could render *Durrett* irrelevant.

Despite the differences in foreclosure procedures, there is reason to believe that *Durrett* also will be beneficial when applied to personalty, particularly when the remedies are invoked against secured lenders. *Durrett*, however, is a blunt instrument forged from statutes that were not drafted with such a doctrine in mind. To avoid inequities and to increase its potential to benefit bankruptcy estates, the instrument should be honed by remedial legislation. Although legitimate debate over the necessary degree of modification exists, the following specific steps are recommended:

1. Reduce the prebankruptcy avoidance period for noncollusive, regularly conducted foreclosure proceedings to three months;
2. Adopt a nine-month statute of limitations following the commencement of bankruptcy for bringing an avoidance action;
3. Abandon the seventy percent rule and permit avoidance whenever the trustee can persuade the court that there will be a substantial benefit to the estate;
4. Clarify section 550(a) by limiting monetary awards to the amount that a purchaser's resale price exceeds the amount of his lien plus interest;
5. Adopt a provision classifying as a "protected party" any person who in good faith pays fair market value for collateral, purchases real estate primarily for use as his own residence, purchases personal property, and any other good faith party who will be injured irreparably by application of a remedy—with a presumption of irreparable injury in favor of all parties except the foreclosing creditor; and
6. In rehabilitation proceedings, prohibit recovery of collateral from unprotected parties, other than the secured lender, for any purpose except immediate resale.

Adoption of these proposals should leave bankruptcy trustees with a powerful new tool to protect unsecured creditors and simultaneously minimize the negative aspects of *Durrett*.

