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TAX FORECLOSURES AS FRAUDULENT TRANSFERS - ARE AUCTIONS REALLY NECESSARY?

by

Laura B. Bartell*

Under § 548(a)(1)(B) of the Bankruptcy Code,1 the bankruptcy trustee is permitted to avoid as a fraudulent transfer a transfer of an interest of the debtor in property made within two years before the commencement of the bankruptcy case if the debtor "received less than a reasonably equivalent value in exchange for such transfer"2 and one of the provisions of § 548(a)(1)(B)(ii) is satisfied.3

Prior to 1994, courts assumed that in all cases the determination of whether "reasonably equivalent value" had been received in exchange for a transfer required a comparison of the value actually received by the debtor with the fair market value of the property transferred by the debtor, and if the disparity between the two was too great, the transfer was potentially avoidable. The Supreme Court rejected this approach in BFP v. Resolution Trust Corp.,4 concluding that "a fair and proper price, or a 'reasonably equivalent value,' for foreclosed property, is the price in fact received at the foreclosure sale, so long as all the requirements of the State's foreclosure law

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*Professor of Law, Wayne State University Law School. My thanks to Beth Applebaum for her assistance on this article.


2Id. at § 548(a)(1)(B)(ii).

3These include the following:

(I) [the debtor] was insolvent on the date that such transfer was made . . . or became insolvent as a result of such transfer . . . ;

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

(III) [the debtor] 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; or

(IV) [the debtor] made such transfer to or for the benefit of an insider, . . . under an employment contract and not in the ordinary course of business.

Id. at § 548(a)(1)(B)(ii).

have been complied with."\(^5\)

However, the Court limited its holding to "an otherwise lawful mortgage foreclosure sale of real estate."\(^6\) In footnote 3 of its opinion, the Court emphasized, "our opinion today covers only mortgage foreclosures of real estate. The considerations bearing upon other foreclosures and forced sales (to satisfy tax liens, for example) may be different."\(^7\) The dissenting Justices, criticizing the notion that "reasonably equivalent value" as used in § 548 has different meanings depending on the context of the transfer, seized upon this footnote and commented, "Indeed, the Court candidly acknowledges that the proliferation of meanings may not stop at two: not only does ‘reasonably equivalent value’ mean one thing for foreclosure sales and another for other transfers, but tax sales and other transactions may require still other, unspecified ‘benchmark[s].’"\(^8\)

In this Article I look at the actual and potential impact of footnote 3 in the BFP opinion on fraudulent transfer cases involving tax foreclosure sales.\(^9\) In Part I I discuss the cases that gave rise to the decision in BFP, and what the Court decided and implied in the decision. Next, I review subsequent cases addressing the issue in Part II. In Part III, I examine state statutes providing varying remedies upon non-payment of property taxes, and whether dispositions of property pursuant to their provisions are potentially voidable. In Part IV I argue that, notwithstanding recent cases to the contrary, the implementation of state tax sales of property should not be subject to fraudulent transfer attack, without regard to whether the state law provides for a public auction of the property to satisfy delinquent taxes. Part V is my conclusion.

I.

The Fifth Circuit fired the opening salvo in the attack on foreclosures as fraudulent transfers in 1980 in Durrett v. Washington National Insurance Co.\(^10\) The debtor in possession sought to avoid as constructively fraudulent a transfer of real property made in a regularly-conducted foreclosure sale pursuant to Texas law conducted nine days prior to its bankruptcy filing.\(^11\) The property was sold by the trustee under a deed of trust at a public

\(^5\)Id. at 545.
\(^6\)Id. at 537.
\(^7\)Id. at 537 n.3.
\(^8\)Id. at 557 n.9 (dissenting opinion of Souter, J.).
\(^9\)This article does not discuss the question of whether a tax foreclosure sale can be challenged as a preferential transfer. See, e.g., Hackler v. Arianna Holdings Co. (In re Hackler), No. 18-1650, 2019 WL 4309510 (3d Cir. Sept. 12, 2019).
\(^10\)621 F.2d 201 (1980).
\(^11\)The parties agreed that the transfer was not made with actual fraudulent intent. Id. at 203.
\(^12\)Id. at 202.
sale to an unaffiliated purchaser for $115,400, the only bid received and the exact amount necessary to pay in full the indebtedness secured by the deed of trust. The debtor in possession challenged this amount as less than the "fair equivalent" of the property within the meaning of § 67(d)(1) of the Bankruptcy Act. The district court found that the fair market value of the property on the date of the sale was $200,000 (a finding accepted by both parties), but nevertheless held that the amount paid at the foreclosure sale was a "fair equivalent" for the property and rejected the fraudulent transfer claim.

On appeal the Fifth Circuit concluded that the price paid at the trustee's sale, which was approximately 57.7 percent of the fair market value of the property, was not a "fair equivalent" for the transfer of the property. It vacated the judgment of the district court, and remanded with instructions to order the rescission of the sale and take action to protect the equity of the purchaser.

Although the Fifth Circuit did not purport to establish any kind of bright line test for the percentage of fair market value that must be obtained at a foreclosure sale to immunize the sale from fraudulent transfer attack, it did note that it had been "unable to locate a decision of any district or appellate court dealing only with a transfer of real property as the subject of attack under section 67(d) of the Act, which has approved the transfer for less than 70 percent of the market value of the property."

13 Id. at 203.
14 Section 67(d)(2) provided that a transfer made within one year prior to the filing of a bankruptcy petition "is fraudulent ... as to creditors existing at the time of such transfer ... if made ... without fair consideration by a debtor who is or will be thereby rendered insolvent." Section 67(d)(1) provided that "consideration given for the property ... of a debtor is 'fair' (1) when, in good faith, in exchange and as a fair equivalent therefor, property is transferred ... " 11 U.S.C. § 67(d) (repealed 1978).
16 621 F.2d at 203.
17 621 F.2d at 204. The only case the court actually cited was Schafer v. Hammond, 456 F.2d 15 (10th Cir. 1972), which the court said affirmed a district court finding that a sale of property for approximately fifty percent of its market value was not fair consideration. Durrett, 621 F.2d at 203. The Schafer case was a bit more complicated than the Fifth Circuit suggested. The property at issue was purchased by Gibson Products of Durango, Inc., the debtor, in 1965 for $10,000. Schafer, 456 F.2d at 16. Three months later Gibson Products conveyed the property in a private sale to Mrs. Richards, the mother of the principal stockholder of Gibson Products, in exchange for $10,000 par value of stock of the Gibson store which she owned. This stock was in fact worthless, so the conveyance to her was clearly without consideration. Id. at 17. As a result, had she still had title to the property after the bankruptcy filing, the court could have recovered it from her. But she in turn conveyed the property less than a month later to the Dr.
Some cases following Durrett adopted the so-called Durrett rule, finding that whether a property was sold for at least seventy percent of its fair market value was the test of whether reasonably equivalent value had been provided for purposes of fraudulent transfer law. Other courts, following the analysis by the Seventh Circuit in Bundles v. Baker, rejected a bright line standard, concluding that the determination of whether reasonably equivalent value had been provided must be made on a case by case basis taking into account the totality of the circumstancses. Still others adopted the approach of the Ninth Circuit Bankruptcy Appellate Panel in Lawyers Title Ins. Corp. v. Madrid which concluded that the price received at a regularly-conducted non-collusive foreclosure sale always constitutes reasonably equivalent value and that such sales cannot be challenged as fraudulent transfers.

Hammond, a friend of her son's, for $2,000 down and a note for $8,000. The note and receipt for the downpayment were backdated to shortly before the bankruptcy filing. The lower court concluded that Dr. Hammond was not a bona fide purchaser. Because of that finding, the court could clearly recover the property from Dr. Hammond based on the fraudulent transfer to Mrs. Richards, but the court also mentioned (unnecessarily) that "the $10,000 which Dr. Hammond agreed to pay for the ... property was not a fair consideration in light of the assessed value of $18,000." Because the court had already determined that Dr. Hammond was not a bona fide purchaser, that statement was dictum. The actual sale that was avoidable was the private sale to the insider. The case is therefore not a good precedent for fraudulent transfer challenges to public foreclosure sales.

In his dissent in BFP v. Resolution Trust Corp., 511 U.S. 531 (1994), Justice Souter described the Durrett rule as "a 'safe harbor' or affirmative defense for bidding mortgagees or other transferees who paid 70% or more of a property's appraised value at the time of sale." Id. at 561 n.13.


836 F.2d 815 (7th Cir. 1988).


21 B.R. 424 (B.A.P. 9th Cir. 1982), aff'd on other grounds, 725 F.2d 1197 (9th Cir. 1984).

See, e.g., In re BFP, 132 B.R. 748 (B.A.P. 9th Cir. 1991), aff'd, 974 F.2d 1144, 1148-49 (9th Cir. 1992), aff'd, 511 U.S. 331 (1984); In re Winshall Settlor's Trust, 758 F.2d 1136 (6th Cir. 1985); Bennett v. Genoa AG Center, Inc. (In re Bennett), 154 B.R. 140 (Bankr. N.D.N.Y. 1992); In re Upham, 48 B.R. 695...
The Supreme Court resolved the controversy in *BFP v. Resolution Trust Corp.*,\(^27\) at least with respect to mortgage foreclosure sales. BFP was a partnership which purchased a home in Newport Beach, California, granting a first priority deed of trust to Imperial Savings Association to secure a $356,250 loan.\(^{28}\) When BFP defaulted on the loan payments, Imperial Savings conducted a foreclosure sale at which the home was purchased for $433,000.\(^{29}\) BFP subsequently filed for chapter 11 bankruptcy protection, and (acting as debtor in possession) sought to set aside the foreclosure sale as a fraudulent transfer under § 548 of the Code, alleging that the home was worth more than $725,000 at the time of the sale and therefore there was not reasonably equivalent value obtained.\(^{30}\) The bankruptcy court refused to avoid the sale, and the bankruptcy appellate panel affirmed, holding that the consideration received at a “non-collusive and regularly conducted nonjudicial foreclosure sale” constitutes reasonably equivalent value “as a matter of law.”\(^{31}\) The Ninth Circuit affirmed,\(^{32}\) and the Supreme Court granted certiorari.\(^{33}\)

The Court first noted that the courts of appeals had adopted differing interpretations of the term “reasonably equivalent value” used in § 548, describing the *Durrett* rule and the case-by-case approach.\(^{34}\) The flaw in these interpretations, the Court stated, was that each began with the premise that fair market value of the property was the benchmark against which the amount received from the sale should be compared. The Court said, “In the context of an otherwise lawful mortgage foreclosure sale of real estate,\(^3\) such reference is in our opinion not consistent with the text of the Bankruptcy Code.”\(^{35}\) This is the sentence that includes footnote 3, which reads “We emphasize that our opinion today covers only mortgage foreclosures of real estate. The considerations bearing upon other foreclosures and forced sales (to satisfy tax liens, for example) may be different.”\(^{36}\)

The “text of the Bankruptcy Code” to which the Court referred was the absence of the term “fair market value” in § 548, despite its usage in other
sections of the Code. Its absence in § 548 was understandable because
property subject to a judicial foreclosure was a forced sale, and "'fair market
value' presumes market conditions that, by definition, simply do not obtain in
the context of a forced sale." Therefore, it would be inappropriate to com-
pare the price obtained at a foreclosure sale with a value for the property
that would be obtainable in a different marketplace. The Court concluded:

[F]oreclosure has the effect of completely redefining the
market in which the property is offered for sale; normal free-
market rules of exchange are replaced by the far more restric-
tive rules governing forced sales. Given this altered reality,
and the concomitant inutility of the normal tool for deter-
mining what property is worth (fair market value), the only
legitimate evidence of the property's value at the time it is
sold is the foreclosure-sale price itself.2

The Court supported its textual analysis with policy justifications. The
Court noted that the terms applicable to foreclosure sales are established by
state law and vary from state to state. The Court described some alterna-
tive state mechanisms, including judicial foreclosure, foreclosure by private
power of sale, foreclosure requiring the auction be conducted by a govern-
ment official, and auctions setting a minimum bid price based on a presale fair-
market appraisal. Typically, the Court noted, state foreclosure statutes "re-
quire notice to the defaulting borrower, a substantial lead time before the
commencement of foreclosure proceedings, publication of a notice of sale, and
strict adherence to prescribed bidding rules and auction procedures." But
compliance with the state's procedures protects the sale from attack based on
the inadequacy of the purchase price unless the state allows the sale to be set
aside because the price is so low as to "shock the conscience."4

Were the Court to adopt an interpretation of § 548 that mandated a
certain minimum price for foreclosures, it stated that it would be "dis-
rupt[ing] the ancient harmony that foreclosure law and fraudulent convey-
ance law, those two pillars of debtor-creditor jurisprudence, have heretofore
enjoyed." It would also place "title of every piece of realty purchased at

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2The Court mentioned § 522(a)(2) (defining "value" for purposes of the exemption statute) and for-
mer § 346(j)(7)(B) (dealing with forgiveness of indebtedness for tax purposes). Id. at 537.
3Id. at 538.
4Id. at 540-549.
5Id. at 540.
6Id. at 542.
7Id.
8Id. at 542, citing G. Osborne, G. Nelson, & D. Whitman, Real Estate Finance Law 469 (1979).
9Id. at 543.
foreclosure . . . under a federally created cloud.” The Court suggested that more explicit evidence (“clear and manifest”) of Congressional intent to interfere with the “essential state interest” at issue in titles to real estate would be necessary before the Court would interpret § 548 in a way that would displace state law.

II.

Notwithstanding a footnote in an early post-BFP case questioning whether its analysis would apply to a fraudulent transfer challenge to a tax sale, the first cases presented with the issue all concluded that BFP applied to tax sales to the same extent as it applied to mortgage foreclosures.

In McGrath v. Simon, chapter 13 debtors sought to avoid the tax foreclosure sale of their home as a fraudulent transfer. Unlike a mortgage foreclosure proceeding, the tax foreclosure proceeding in New Jersey took place in two stages. First, the municipality with a lien on property for assessed and unpaid taxes would, after publication and posting of notice, conduct a public sale of a tax certificate, representing a lien on the property to secure the amount of the taxes that were owing. The owner of the property could redeem its interest in the property from a non-municipal purchaser any time within two years after the sale of the tax certificate. If the owner did not do so, the purchaser could foreclose the owner’s right of redemption by bring-

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45Id. at 544.
46Id.
47Butler v. Lejcar (In re Butler), 171 B.R. 321, 326 n.6 (Bankr. N.D. Ill. 1994). The debtor filed an adversary proceeding to avoid the transfer of her home to the holder of a tax certificate after expiration of the redemption period following the sale of the tax certificate by Cook County to the purchaser. The purchaser of a tax certificate argued that the relevant “transfer” took place at the time of that purchase, not when the tax deed transferred ownership of the home to the purchaser. Because the tax sale auction took place outside the period for avoidance of fraudulent transfers, the purchaser moved for summary judgment. The court denied the motion, concluding that “[t]he end of the redemption period represents the legal moment following which a debtor is unable under Illinois law to prevent the future loss of property” and therefore constitutes the date of the transfer of the debtor’s interest in the property under § 548. Because no other evidence had been presented with respect to the elements of § 548, the court did not determine whether the particular transfer was fraudulent. However, in the cited footnote the court said that BFP did not foreclose the issue of whether reasonably equivalent value had been obtained for the transfer. After quoting footnote 3 from the BFP opinion, 511 U.S. 531, 537 n.3, the court stated that “[u]nlike a foreclosure sale, [bids at a tax sale] are in no way based on the value of the subject property . . . Therefore, the rationale applied in BFP may not be applicable with respect to tax sales in Illinois. However, this question can be revisited at and following trial.” 171 B.R. at 326 n.6.
49Id. at 81 (citing N.J. Stat. Ann. §§ 54.5-19, 25-26, 46). Bidders would seek to acquire the certificate by bidding an interest rate that would be payable on the principal amount of the taxes due by the taxpayer if the taxpayer were to redeem the property. The lowest interest rate bid would be the winning bid. If there were no bids for the certificate, the municipality automatically acquired it. See N.J. Stat. Ann. § 54.5-34.
50Id. (citing N.J. Stat. Ann. § 54.5-54).
After examining the differences between the mortgage foreclosure process and that applicable to tax foreclosures, the bankruptcy court concluded that both procedures are forced sales and that the reasoning of BFP applies with equal force to tax sales and the price paid by the purchaser for the tax sale certificate was “reasonably equivalent value” for the debtors’ interest in the property for purposes of § 548.52

The bankruptcy court reached the same conclusion in Comis v. Bromka.53 Debtors’ property, on which the debtors owed the County $383.22 in delinquent sewer taxes, was sold to the County Commissioner of Finance for the amount of the taxes, and then sold to the County Board of Legislators, in each case subject to debtors’ right to redeem the property prior to May 12, 1993. When the debtors failed to redeem the property, it was sold for $6,250 at an open, competitive, non-collusive public auction.54 After the debtors filed for chapter 7 bankruptcy protection, they sought to avoid both the transfer of the property to the County and the transfer to the purchaser at the auction, claiming that the involuntary transfer of property in which they claimed a homestead exemption should not be governed by the BFP standard. The court disagreed, concluding that footnote 3 of the BFP opinion “was intended to make clear that the majority of the court chose to narrow its focus to interpreting the law as it applied to the facts before it” and did not prevent the court from adopting the same approach to tax sales.55 Emphasizing the policy reasons underlying the BFP opinion, the court concluded that the bankruptcy system should show deference to state regulation of taxes and therefore the amount obtained at a forced tax foreclosure sale should be “reasonably equivalent value” for the property.

Most subsequent cases presenting the question of whether tax proceedings were protected from avoidance under § 548 as fraudulent transfers under the BFP rule have concluded that they were, but they often did so by comparing the applicable state mortgage foreclosure laws to the state tax foreclosure laws, highlighting (but minimizing) any differences.56 This analyt-

51Id. (citing N.J. STAT. ANN. § 54.5-86).
52Id. at 82-83. The reasoning in McGrath has been rejected by all later cases in New Jersey presented with similar facts. See cases cited at note 89 infra.
54Id. at 146.
55Id. at 149-150.
ical approach became more problematic when the mortgage foreclosure laws provided for a public auction of the property itself, while the tax foreclosure laws provided an auction only of a tax lien certificate or no auction at all.\textsuperscript{57}

In \textit{Wentworth v. Town of Acton},\textsuperscript{58} the bankruptcy court was faced with a fraudulent transfer challenge to a tax foreclosure under Maine law which the court said had been characterized by the Maine Supreme Court as a non-judicial "strict foreclosure" mechanism.\textsuperscript{59} Under Maine law, the debtor's failure to pay property taxes in the amount of $248.40 resulted in recordation of a tax collector's lien on the property and, after an eighteen month redemption period (during which the tax debt grew to $1,515.63 and the taxpayer failed to redeem the property), the lien was deemed to have been foreclosed and the municipality received title to the property, which had been appraised at $20,700. The court distinguished this "tax forfeiture" process from the "tax foreclosure" laws at issue in the prior cases, noting that the Maine law used in the case had no "sale involving competitive bidding."\textsuperscript{60} "Maine's forfeiture procedure eliminates rather than redefines the market. While the forced sale

\textsuperscript{57}The Colorado law mentioned in \textit{Grandote}, the New Jersey law discussed in \textit{McGrath} and the Illinois law involved in \textit{Murray} all involved sale of a tax certificate. Missouri law discussed in \textit{Russell-Polk} and Iowa law applicable in \textit{Johnson} characterize the procedure as a sale of the property, but in fact provide for the issuance of a "certificate of purchase" to the purchaser, who can acquire a deed to the property only after expiration of the redemption period. The laws at issue in \textit{Tracht Gut} (Cal. law); \textit{Daniel} (N.C. law); \textit{Crespo} (Pa. law); \textit{Jacobson} (Conn. law); \textit{Hemstreet} (Pa. law); \textit{Washington} (Virginia law); \textit{Samaniego} (Washington law); \textit{Turner} (Internal Revenue Code); \textit{Golden} (Pa. law); \textit{Hollar} (Internal Revenue Code); and \textit{Lord} (Pa. law) all involved state tax foreclosure proceedings that provided for sale by auction of the entire property just as did mortgage foreclosures. The Michigan statute at issue in \textit{Fisher} provided for forfeiture of the property by entry of an uncontested judgment of foreclosure if the property was not redeemed, comparable to those used in New York, Wisconsin and New Jersey with respect to which other courts have found BFP inapplicable. See discussion at notes 65-88 infra.

\textsuperscript{58}221 B.R. 316 (Bankr. D. Conn. 1998).

\textsuperscript{59}Id. at 318.

\textsuperscript{60}Id. at 319. The court noted that Maine statutes also provided for enforcement of tax liens by foreclosure sales, not the method used in the case. Id. at 320 n.3.
price may be legitimate evidence of the property's value, the amount of a tax lien is no evidence whatsoever of the property's value." As a result, the transfer of the property to the municipality was found voidable under § 548.

Maine law was unlike that of other states in that a tax forfeiture could be accomplished with no judicial involvement. Nevertheless, other courts, most of them in New York, have extended the Wentworth analysis in declining to apply BFP to an in rem tax forfeiture of property to a municipality accomplished even though the transfer is made by court judgment after a foreclosure action is concluded because the process does not include a public auction. The most recent case in New York demonstrates the typical analysis.

Bankruptcy Judge Paul R. Warren of the Western District of New York had previously held in Canandaigua Land Development, LLC that taxing authorities “are not entitled to a conclusive presumption of having provided reasonably equivalent value when taking title to a debtor’s property - petition - as a result of an in rem or strict tax foreclosure conducted in full compliance with” New York law. However, when asked in Gunsalus v. Ontario County to reconsider his decision, Judge Warren concluded that “a judicially supervised tax foreclosure action conducted by the County in full compliance with [New York law] is entitled to the presumption of having provided reasonably equivalent value.” In a well-reasoned opinion, Judge

61Id. at 320.
63Under the New York law, applied in the cases cited in note 62 supra, the county began the tax lien process by listing the delinquent property in a list filed in the County Clerk's Office, N.Y. Real Property Tax Law § 1122. The county was then required to wait 21 months from the date the taxes first became due before commencing a tax foreclosure action in court. Id. § 1123. The taxpayer then was given an additional period to answer the petition for foreclosure or redeem the property. Id. § 1125(1)(a). Once the judgment of foreclosure was entered, the county became the owner of the property. Id. § 1136. The public auction of the property occurred after title had transferred, so any amount bid in excess of the taxes owed accrued to the benefit of the county.
65Id. at 476.
67Id. at 304.
Warren attributed his prior conclusion to the "shiny object" of the "huge disparity between the fair market value of the property in Canandaigua ($300,000-$425,000) and the amount of delinquent taxes ($16,594.99)." When there is such a disparity, Judge Warren suggested, courts are motivated to conclude that the presence of competitive bidding (which would, presumably, increase the price offered for the property) is essential to the applicability of BFP to the state tax procedures.

However, Judge Warren opined that "the presence or absence of 'competitive bidding' was not the keystone to the BFP majority's holding." He quoted from the BFP opinion where the Court emphasized that "the terms for foreclosure sale are not standard. They vary considerably from State to State, depending upon . . . how the particular State values the divergent interests of debtor and creditor." Although the Supreme Court in BFP stated that "[f]oreclosure laws typically require notice to the defaulting borrower, a substantial lead time before the commencement of foreclosure proceedings, publication of a notice of sale, and strict adherence to prescribed bidding rules and auction procedures," Judge Warren interpreted this language as descriptive rather than prescriptive, based on the use of the phrase "typically require" rather than "must require." Instead, Judge Warren identified "three essential and necessary key protections common to all state foreclosure statutes: (1) notice; (2) ample opportunity to cure; and (3) strict adherence to the requirements of those state statutes." Judge Warren concluded that the New York tax foreclosure laws met all three of these requirements, and the sale in Gunsalus was non-collusive and conducted in strict compliance with those laws. Moreover, because Judge Warren found no "manifest and clear federal statutory purpose upon which the Bankruptcy Code should be construed or applied to interfere with property tax lien foreclosures conducted by the government" under state tax foreclosure laws, "the County is entitled

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68 Id. at 309.
69 Id.
70 Id.
71 BFP, 511 U.S. at 540 (emphasis in original), quoted in Gunsalus, 576 B.R. at 309.
72 Id. at 542, quoted in Gunsalus, 576 B.R. at 309-310.
73 Gunsalus, 576 B.R. at 310. Indeed, the sentence in BFP that follows that quoted by Judge Warren supports his conclusion. The Supreme Court continued, "Many States require that the auction be conducted by a government official, and some forbid the property to be sold for less than a specified fraction of a mandatory presale fair-market-value appraisal." BFP, 511 U.S. at 542. All of these examples of state statutory provisions protecting debtors were listed in the law review article to which the Supreme Court cited, R. Zinman, J. Houle, & A. Weiss, Fraudulent Transfers According to Alden, Gross & Borowitz: A Tale of Two Circuits, 39 BUS. LAW. 977, 1006-1009 (1984), which argued that Durrett should be overruled. Yet no one has argued that a state tax foreclosure sale is not governed by BFP if it is not conducted by a government official, or fails to have a mandatory minimum bid based on a pre-sale appraisal.
74 Gunsalus, 576 B.R. at 310.
75 Id.
to a conclusive presumption of having provided reasonably equivalent value" under BFP.\textsuperscript{76}

On appeal, the district court reversed.\textsuperscript{77} Noting that the Supreme Court in BFP had described state foreclosure laws as evolving to “avoid the draco-nian consequences of strict foreclosure,”\textsuperscript{78} the court found that the New York statutes were not comparable to the state laws described by the Supreme Court because they do “not provide for a pre-seizure auction whereby the debtor may recover equity.”\textsuperscript{79} The court adopted the rationale of Wentworth\textsuperscript{80} and those cases in the Northern District of New York that had previously followed Wentworth\textsuperscript{81} to conclude that the absence of a public sale meant that there was no market-determined reasonably equivalent value received for the property, and therefore BFP was inapplicable.\textsuperscript{82}

A bankruptcy judge in the Eastern District of Wisconsin,\textsuperscript{83} interpreting a similar tax forfeiture statute,\textsuperscript{84} also held that BFP was not applicable when there was no public sale of the property to satisfy the tax obligation.\textsuperscript{85} On appeal, the district court agreed, holding that “a judgment of foreclosure, based solely upon delinquent taxes in a non-sale foreclosure proceeding, does not necessarily provide a property owner ‘reasonably equivalent value’ for real estate without a public sale offering.”\textsuperscript{86}

As previously discussed, New Jersey law differs from that of New York and Wisconsin in that it provides a public auction of a tax lien certificate, followed by a foreclosure on the property by the certificate holder in a judi-

\textsuperscript{76}Id. at 312-313.
\textsuperscript{77}Hampton v. Ontario County, 588 B.R. 671 (W.D.N.Y. 2018).
\textsuperscript{78}Hampton, 588 B.R. at 676 (quoting BFP, 511 U.S. at 541).
\textsuperscript{79}Hampton, 588 B.R. at 676.
\textsuperscript{80}See supra note 58.
\textsuperscript{81}See cases cited supra note 62.
\textsuperscript{82}Hampton, 588 B.R. at 677. The court also dismissed the argument that its decision would frustrate the interest of the county in timely collecting taxes and ensuring that clear title was conveyed pursuant to tax foreclosures. It stated that, even if it did, the county’s interest must give way to the policy underlying the Bankruptcy Code favoring equal treatment of creditors. Id. at 677-678. And given the fact that the bidders at the public sale of the property by the County (after it obtained title by strict foreclosure) were aware of the litigation when they bid, they were not misled into thinking the title offered was free from doubt. Id. at 678. The court made no mention of the fact that the risk of a fraudulent transfer challenge to the purchase at auction might depress the purchase price. Nor did the court note that the taxpayers had failed either to challenge the forfeiture of their title in the tax foreclosure proceeding before the state court judge, or to redeem the property during the lengthy redemption period prior to that proceeding.
\textsuperscript{84}Under Wis. STAT. ANN. § 75.521, if the taxpayer failed to answer the foreclosure action or redeem the property, the court would enter a judgment pursuant to which the municipality would take title to the property.
\textsuperscript{85}Williams, 473 B.R. at 317.
\textsuperscript{86}City of Milwaukee v. Gillespie, 487 B.R. 916, 920 (E.D. Wis. 2013).
cial proceeding. Although a bankruptcy judge in New Jersey initially applied BFP to tax foreclosures under New Jersey law, subsequent cases in New Jersey consistently rejected that conclusion and held that the price received at the tax certificate foreclosure sale under New Jersey law is not entitled to the conclusive presumption created by BFP.

The Wyoming tax foreclosure proceedings at issue in In re Sherman also were by public sale, but to a person selected randomly in a lottery who was willing to acquire the property for the amount of the outstanding tax debt (in this case less than $500). The bankruptcy appellate panel held that only a public sale with competitive bidding sufficed under BFP to produce reasonably equivalent value for purposes of § 548.

Finally, the Seventh Circuit has also concluded that a prepetition transfer of property to the holder of a tax lien certificate in compliance with Illinois tax foreclosure law was not immunized from fraudulent transfer attack by BFP. Affirming the decision of the bankruptcy court, and rejecting the decision of the district court, the court noted that the debtors surrendered property worth between $50,000 and $110,000 for the amount of the tax debt, $4,046.26. Because the Illinois procedures do not include competitive bidding for the property itself (as opposed to bidding on the penalty interest rate to be borne by the tax certificate), BFP was not applicable.

It seems likely that bankruptcy courts considering whether BFP applies to tax foreclosure proceedings in those jurisdictions that do not have public, competitive bidding for the property itself are now almost assured to find that it does not.

In the next section I will examine which jurisdictions are

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87 See discussion of McGrath supra notes 48-52.
88 McGrath, supra note 48.
90 Sherman v. Rose (In re Sherman), 223 B.R. 555 (B.A.P. 10th Cir. 1998).
91 Id. at 559.
92 Smith v. SIPI, LLC (In re Smith), 811 F.3d 228 (7th Cir. 2016).
94 526 B.R. 737 (N.D. Ill. 2014).
95 811 F.3d at 238.
96 Id. Although the court never mentioned In re Murray, 276 B.R. 869, 878 (Bankr. N.D. Ill. 2002) (finding BFP applicable to Illinois tax foreclosure proceeding), it presumably overruled that case.
97 See generally Gregg, supra note 56 (suggesting that state tax forfeiture laws that lack competitive bidding at a public sale are not likely to be protected by BFP). Courts have also declined to apply BFP in other contexts of strict foreclosure, such as strict foreclosure of a mortgage in a “title” state (where the
likely to be affected.

III.

Although the Supreme Court in *BFP* identified certain typical attributes of state foreclosure laws, state tax foreclosure statutes are anything but uniform. One commentator has said:

[T]here are over 150 different systems in the United States for collecting the property tax. Most states have at least two entirely different approaches for enforcing payment of the property tax, with one procedure having its origins in the mid-nineteenth century and an alternative second procedure, equally available for use by local governments, having been developed in the middle of the twentieth century. Other states leave the enforcement of the property tax to local governments, with little consistency in procedures as one moves from city to city and from county to county across a state.

Many of those tax procedures were modified in response to the Supreme Court's 1983 decision in *Mennonite Board of Missions v. Adams*, in which the Court held that, as a matter of due process, a party holding a "legally protected property interest" in tax-delinquent property is entitled to notice that is "reasonably calculated" to inform it of the foreclosure if that party's name and address were "reasonably ascertainable" based upon "reasonably equivalent value" and "reasonably equivalent value" law provides procedural safeguards comparable to mortgage foreclosure law and *BFP* is applicable; forfeitures of pawned personal property that is not timely redeemed, see *Carter v. H & B Jewelry & Loan (In re Carter)*, 209 B.R. 732, 735 (Bankr. D. Or. 1997); consensual sale to secured party in lieu of foreclosure on certain personal property collateral, see *Case v. TBAC-Prince Gardner, Inc. (In re Prince Gardner, Inc.)*, 220 B.R. 63, 66 (Bankr. E.D. Mo. 1998); and foreclosures of land contracts, see, e.g., *Dunbar v. Johnson (In re Grady)*, 202 B.R. 120, 126 (Bankr. N.D. Iowa 1996); but see *Vermillion v. Scarbrough (In re Vermillion)*, 176 B.R. 563, 570 (Bankr. D. Or. 1994) (applying *BFP* to land contract forfeiture proceeding under Oregon law). See generally Marie T. Reilly, *A Search for Reason in"Reasonably Equivalent Value" after BFP v. Resolution Trust Corp.*, 13 Am. Bankr. Inst. L. Rev. 261, 277-280 (Spring 2003) (discussing applicability of *BFP* to land contracts and strict foreclosure).

98 111 U.S. at 542.


101 Id. at 798.

102 Id.

103 Id. at 800.
In all states, property taxes generate a significant percentage of local tax revenue. In 2016, local governments collected $487 billion in property taxes, representing nearly half of their own-source general revenues, and about 30% of total general revenue. Nationwide, 21.6% of all state and local own-source general revenue was generated by property taxes that year, with individual states ranging from 47% in New Hampshire to ten percent in Alabama. Local governments in Connecticut, Maine, Massachusetts, New Hampshire, New Jersey and Rhode Island received more than three-fourths of their own-source general revenue from property taxes in 2016.

If BFP is interpreted to exclude from its safe-harbor any tax foreclosure process that does not include auction proceedings comparable to those employed for mortgage foreclosures, many of the transfers made pursuant to state law will potentially be avoidable as fraudulent transfers because only about half of the states have a state tax foreclosure mechanism that parallels the provisions of private (or judicial) foreclosures.

State tax foreclosure statutes generally fall into one of four different structures (with some states providing multiple options to municipalities within their boundaries for collecting defaulted taxes).

The first option is the foreclosure sale, a public auction of the entire property subject to the delinquent taxes comparable to a mortgage foreclosure with the equity (if any) returned to the debtor. This is the type of foreclosure described by the Supreme Court as typical of private foreclosure actions, and BFP would certainly protect such sales from avoidance. It is important to recognize that all public auctions are not comparable to a mortgage foreclosure. In a mortgage foreclosure, the successful bidder obtains title to the property, free of the lien of the mortgage holder (and any junior liens). Therefore, I define a foreclosure sale for the purpose of a tax foreclosure as one at which the purchaser receives a deed to the property, whether or not the owner can subsequently redeem the property from the purchaser. I do not include states in which there is a public auction of a tax certificate or certificate of purchase representing the right to acquire the property after a redemption period, which is described below, unless the holder of a tax certificate can obtain title to the property only through a public auction of the

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104 Id. at 798 n.4.
108 Id.
property at the conclusion of the redemption period. About half the states have statutory tax foreclosure proceedings that include public auctions of the property with competitive bidding, but even those are not universally applicable or used to the exclusion of other methods.\textsuperscript{109} 

A second option also involves a sale of the property, but only the portion of the property necessary to satisfy the unpaid taxes, so there is no possibility of excess proceeds reflecting the debtor’s equity in the property. Eight states have public sale procedures that limit the public auction of property to that portion of the property necessary to pay the delinquencies.\textsuperscript{110} To the extent that sale of the entire property is necessary to satisfy the outstanding tax

\textsuperscript{109}See, e.g., CAL. REV. & TAX CODE § 3693 & § 3708 (West 2009) (public auction after which tax collector delivers deed to purchaser); CONN. GEN. STAT. ANN. § 12-157 (West 2019) (sale to highest bidder pursuant to levy on tax warrants, but deed is not delivered for six months after sale); DEL. CODE ANN. tit. 9, § 8725 (West 2019) (monition sales); DEL. CODE ANN. tit. 9, § 8749 (West 2019) (sales to satisfy judgment after attachment in New Castle County); FLA. STAT. ANN. § 197.502(d) & § 197.542 (West 2019) (purchaser of tax certificate may initiate public sale of property two years after April 1 of the year of issuance of tax certificate, whereupon property is sold at public auction); GA. CODE ANN. § 48-4-1 (West 1999) (sale of property in same manner as for execution and judicial sales); HAW. REV. STAT. ANN. § 231-63 (West 2019) (sale of property subject to tax lien after three years of delinquency); KAN. STAT. ANN. § 79-2804 (West 2019) (sale pursuant to judicial foreclosure proceeding); KY. REV. STAT. ANN. § 134.546 (West 2019) (allowing holder of certificate of delinquency to bring action to collect debt and enforce lien by sale of property at public auction); KY. REV. STAT. ANN. § 91.4885 (West 2019) (enforcement of city taxes by sale of property); MASS. GEN. LAWS ANN. ch. 60, § 79 (West 2019) (public auctions only for property that commissioner determines is worth less than delinquent taxes owed); MISS. CODE ANN. §§ 27-41-61 (West 2019) (sales in cities, towns, or villages by lot or subdivision); [2019 Mont. SB 253, 66th Legislature, § 2] (requiring public auction of residential property within sixty days after receipt of application for tax deed at the end of redemption period); NEB. REV. STAT. ANN. § 77-1902 (West 2019) (holder of tax sale certificate may foreclose lien by commencing judicial foreclosure action to sell property nine months after three years after date of sale); N.M. STAT. ANN. § 7-38-65 (West 2019) (sale may be held not later than three years after first date taxes become delinquent); N.C. GEN. STAT. ANN. § 105-374 (West 2019) (sale is made after judgment of sale obtained in a foreclosure action instituted by the municipality) or § 105-375 (West 2019) (execution sale made on docketed certificate of taxes constituting in rem judgment against the real property); OHIO REV. CODE ANN. § 5721.19 (West 2019) (in judgment of foreclosure, court must order property to be sold for not less than fair market value plus costs or total amount owing); 68 OKLA. STAT. ANN. tit. 68 § 3105, § 3525 (West 2019) (public auction); 72 PA. STAT. AND CONS. STAT. ANN. § 5860.610 (West 2019) (judicial sale free and clear of claims) or § 5860.605 (West 2019) (upset sale for a minimum bid equal to the amount of the tax claims plus costs subject to all other claims); S.C. CODE ANN. § 12-51-50 (West 2019) (property is sold at public auction); TENN. CODE ANN. § 67-5-2501 (West 2019) (property sold with tax entity required to make a minimum bid for the amount due); TEX. TAX CODE ANN. § 33.53, 34.01 (West 2019) (court must order sale of property to satisfy tax lien, with bid off to taxing unit if bid does not cover amount due); VA. CODE ANN. § 58.1-3969 (West 2019) (court may order sale of property by public auction); WASH. REV. CODE ANN. § 84.64.080 (West 2019) (court in foreclosure action gives judgment for delinquent taxes and orders sale of property); WIS. STAT. ANN. § 75.19 (West 2019) (county holding tax certificate may foreclose by action as for a mortgage on real property); WYO. STAT. ANN. § 39-13-108(d)(ii) (West 2019) (court enforcing tax lien may order sale of property at public auction). Cf. UTAH CODE ANN. § 59-2-1351.1 (West 2019) (judicial sale, but any excess proceeds are treated as unclaimed property).

\textsuperscript{110}See ALA. CODE § 40-10-16 (West 2019); LA. CONST. ANN. art. VII § 25(A)(1) (2019); LA. STAT. ANN. § 47:2154 (West 2019); ME. REV. STAT. ANN. tit. 36, § 1071 (West 2019); MASS. GEN. LAWS ANN. ch. 60, § 43 (West 2019); MISS. CODE ANN. § 27-41-59 (West 2019); N.H. REV. STAT. ANN.
obligations, the option is the same as the first. Again, BFP should protect these sales, because a market-based auction occurs that theoretically protects the debtor’s equity in the property.

A third option is two-step process under which the first step is a public sale of a tax lien or tax sale certificate (even if the state characterizes the transaction as a sale of the property), and the second step is acquisition of title to the property. I include in this category those states in which the party purchasing a certificate at a public sale obtains not only the right to any redemption payments, but also the right to obtain title to the property at the end of the redemption period without another public auction.\footnote{I exclude Florida because, although the state sells tax certificates for delinquent taxes, tax deeds can be obtained only after a second public auction of the property itself at which the tax certificate holder bids the amount paid for the tax certificate. See \textit{ Fla. Stat. Ann. § 197.432 & § 197.542 (West 2019). See also Neb. Rev. Stat. Ann. § 77-1902 (West 2019) (holder of tax certificate may elect to foreclose); Wis. Stat. Ann. § 75.19 (West 2019) (county holding tax certificate may foreclose by action as for a mortgage on real property).}} Nine states and the District of Columbia provide for sale of the certificate by public bid.\footnote{See, e.g., \textit{ Colo. Rev. Stat. § 39-11-108 & § 39-11-117 (West 2019); Del. Code Ann. tit. 9, § 8771 (West 2019) (applicable to sales in Kent or Essex County); D.C. Code Ann. § 47-1346 (West 2019); 35 Ill. Comp. Stat. § 200/21-205 & § 200/21-250 (West 2019); Ind. Code Ann. § 6-1.1-24-5 & § 6-1.1-24-9 (West 2019); Iowa Code Ann. § 446.7, § 446.18 & § 447.29 (West 2019); Mo. Code Ann., Tax-Property § 14-817 & § 14-820 (West 2019); Mo. Ann. Stat. § 140.150 & § 140.190 (West 2019); W. Va. Code Ann. § 11A-3-5 (West 2019). Cf. Neb. Rev. Stat. Ann. § 77-1807 (West 2019) (county treasurer pulls numbers out of receptacle to permit bidders to acquire property for amount of delinquencies).} The purchaser acquires a certificate which can be turned into title to the property if the owner fails to redeem the property before the public bid.\footnote{See \textit{ Colo. Rev. Stat. § 39-11-120 (West 2019) (holder of certificate of purchase may receive deed after redemption period); Del. Code Ann. tit. 9, § 8773 & 8776 (West 2019) (Superior Court must approve sale and direct issuance of deed at end of redemption period); 35 Ill. Comp. Stat. § 200/22-40 (West 2019) (upon petition by holder of certificate of purchase, circuit court orders issuance of deed at end of redemption period); Ind. Code Ann. § 6-1.1-25.4 (West 2019) (purchaser can get tax deed after redemption period); Iowa Code Ann. § 448.1 (West 2019) (purchaser receives treasurer’s deed at expiration of two-year redemption period); Mo. Code Ann., Tax-Property § 14-933 (West 2019) (purchaser of tax certificate can file complaint to foreclose right to redeem six months after purchase); W. Va. Code Ann. § 11A-3-19 (West 2019) (purchaser must prepare list of those to be served with notice to redeem and request service of notice of redemption and if property is not redeemed, State Auditor delivers quit-claim deed to the property if requested within 18 months after issuance of tax lien certificate).} Some other states provide for sales of tax lien certificates by interest rate bidding,\footnote{See \textit{ Ala. Code § 40-10-184(b) (West 2019); Ariz. Rev. Stat. Ann. § 42-18112 (West 2019); N.J. Stat. Ann. § 54.5-32 & § 54.5-46 (West 2019); Ohio Rev. Code Ann. § 5721.30-43 (West 2019); S.D. Codified Laws § 10-23-8 (West 2019).} in which the winning bidder agrees to accept the lowest interest rate which would have to be paid by the taxpayer on the delinquent taxes to redeem the property. In that case as

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well, if the taxpayer fails to redeem the tax lien certificate during the redemption period, the tax lien certificate can be foreclosed and become full title to the property.  

The issuance of a tax lien certificate does nothing more than replace the municipality to which the taxes were originally owed (and which obtained the tax lien upon their assessment) with a private party who assumes the position of lienholder. The disposition of the tax lien by the municipality does not transfer any interest of the owner in property; it transfers the interest of the municipality in the property (the tax lien). During the period of redemption, the property owner continues to hold title to the property and is generally entitled to remain in possession. Therefore, focus on the procedures by which that tax lien is conveyed to a third party for purposes of fraudulent transfer law would be misguided. Instead, the relevant transfer is the time at which the debtor's interest in the property is extinguished.

Despite some early cases that adopted the argument that the "transfer" for purposes of § 548 occurred at the time the owner conveyed an interest in property pursuant to a mortgage or deed of trust, Congress implicitly rejected that analysis when in the Bankruptcy Amendments and Federal Judgeship Act of 1984 it amended the definition of "transfer" in § 101 to include "foreclosure of the debtor's equity of redemption," and amended § 548(a) to allow avoidance of both voluntary and involuntary transfers. The amendments make clear that, although the initial transfer by the owner/debtor to a mortgagee/trustee under a deed of trust constitutes a (voluntary) transfer, the transaction by which ownership of the property vests in a party other than the debtor/owner is also a transfer which is potentially avoidable.

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115 See Ala. Code § 40-10-197 (West 2019) (holder of tax lien certificate may bring action to foreclose right to redeem at end of redemption period); Ariz. Rev. Stat. Ann. § 42-18201 (West 2019) (holder of tax lien may bring action to foreclose right to redeem after end of redemption period); N.J. Stat. Ann. § 54:5-86 & § 54:5-87 (West 2019) (purchaser of tax lien certificate files complaint to foreclose right of redemption, and judgment vests absolute fee simple ownership in purchaser); Ohio Rev. Code Ann. § 5721.37, 39 (West 2019) (purchaser may institute foreclosure proceeding in which court may order property sold or, if value of property is less than the amount of the redemption price, may transfer property to certificate holder).


119 The definition of transfer is currently in 11 U.S.C. § 101(54).

120 Id. § 421(i).

121 Id. § 463(a)(1).
under § 548. By analogy, although the creation of a lien on property to secure the obligation to pay assessed and unpaid taxes constitutes a transfer of an interest of the owner in the property, so does the action by which the owner's interest in the property is terminated after the period of redemption. It is this second transfer that is generally challenged by a debtor in bankruptcy (the first transfer having almost invariably occurred more than two years before the date of the filing of the bankruptcy petition, as required for avoidance under § 548). If that second transfer is made without a public auction of the property, the consideration given to the debtor is limited to relief from the obligation for the taxes and related charges for which the tax lien was imposed and may not constitute reasonably equivalent value under a reading of BFP that requires competitive bidding at a public auction to immunize the transfer from attack.

The final option is a form of strict foreclosure, under which the municipality which has the tax lien, or its assignee, can (either through a court proceeding or simply by recordation) become the owner of the property after expiration of the applicable redemption period. There is no public sale of any kind involved in this type of tax forfeiture prior to the transfer of title to the holder of the tax lien. Sixteen states have a form of strict foreclosure (or forfeiture) with respect to tax collection. All of these transfers would be

122 11 U.S.C. § 548(a)(1) (allowing the trustee to avoid any transfer that was made on or within two years before the date of the filing of the petition that meets the statutory requirements).

123 Cf. ALASKA STAT. ANN. § 29-45-480(b) (West 2019) (if tax-foreclosed property that was held by the municipality for less than ten years after the close of the redemption period is sold, former record owner is entitled to proceeds in excess of amount needed to pay state obligations); ARK. CODE ANN. § 26-37-205 (West 2019) (although property is owned by State of Arkansas at time of public sale, “former owner” may apply for proceeds in excess of amounts necessary to pay state obligations).

124 See ALASKA STAT. ANN. § 29-45-390 (West 2019) (property transferred by foreclosure proceeding to municipality for lien amount); ARK. CODE ANN. § 26-37-101 (West 2019) (property forfeited to State if taxes not paid for one year after due date and not redeemed by July 1 of following year when property is certified to Commissioner of State Lands for sale); CONN. GEN. STAT. ANN. § 12-182 & § 12-189 (West 2019) (for property with fair market value (determined by appraisal) less than total amount owed for taxes and other encumbrances, summary proceeding for transfer of title without public sale if property is not redeemed); IDAHO CODE ANN. § 63-1005 (West 2019) (if property is not redeemed within three years from date of delinquency, county tax collector must make tax deed in favor of county for property after hearing before county commissioners); ME. REV. STAT. ANN. tit. 36, § 946 (West. 2019) (court may confirm title in owner of tax lien after redemption period expires); MASS. GEN. LAWS ch. 60, § 53 (West 2019) (collector may take land for the town if tax not paid within fourteen days after demand therefor); MICH. COMP. LAWS ANN. § 211.78g & § 211.78k (West 2019) (taxpayer forfeits property to county treasurer on March 1 in second year after delinquency, and property is foreclosed in court proceeding if not redeemed); MINN. STAT. ANN. § 280.01 & § 280.41 (West 2019) (county auditor bids in for delinquent parcels in the amount of delinquent amounts owed, and property is forfeited to the state after redemption period); MONT. CODE ANN. § 15-18-211 (West 2019) (if property is not redeemed, holder of tax lien may receive tax deed for property); 2019 Neb. Laws 463 (holder of tax sale certificate can apply for tax deed no earlier than three months after sending notice to owner to permit redemption); NEV. REV. STAT. ANN. § 361.585 (West 2019) (after time for redemption, tax receiver who issued tax certificate executes deed to property to county to be held in trust pending sale of the property); N.H. REV.
subject to potential avoidance as fraudulent transfers if, under BFP, a public auction is required to protect such transfers from challenge.

In all types of tax forfeitures or foreclosures, the delinquent taxpayer has the opportunity to prevent the final transfer of the property by payment of the amounts owed (whether or not that is characterized as a redemption of the property) during the period following the attachment of the tax lien and before the transfer is finalized.125 In the following section, I set forth the

125See, e.g., ALA. CODE § 40-10-120 & § 40-10-197 (West 2019) (taxpayer may redeem property from sale or from tax lien certificate within three years after sale); ALASKA STAT. ANN. § 29-45-400 (West 2019) (one-year period of redemption after transfer of property to municipality); ARIZ. REV. STAT. § 42-18152 (West 2019) (taxpayer may redeem property for three years after sale of tax lien certificate); ARIZ. REV. STAT. ANN. § 42-18261 (West 2019) (taxpayer may redeem from state for five years if county treasurer is unable to sell tax lien and transfers lien to state); ARK. CODE ANN. § 26-37-101 & § 26-37-301 (West 2019) (taxpayer may redeem before property vests in State on July 1 following forfeiture, and prior to date of public sale by state not earlier than one year after certification to state); CAL. REV. & TAX CODE § 3691(a)(1)(A) & § 3707 (West 2019) (sale may not be scheduled until five years or more after tax default (three years or more for commercial property), and taxpayer may redeem until close of last business day before commencement of tax sale); COLO. REV. STAT. § 39-11-120 (West 2019) (certificate of purchase can be presented for deed after three years from date of purchase); CONN. GEN. STAT. ANN. § 12-183 (West 2019) (can redeem before last day of fourth month following after month in which property is listed with court); DEL. CODE ANN. tit. 9, § 8776 (West 2019) (deed in Kent or Essex County may not be issued to purchaser of certificate of sale prior to one year from time of sale); DEL. CODE ANN. tit. 9, § 8723 (West 2019) (notice provides 20 days to satisfy taxes to avoid sale); DEL. CODE ANN. tit. 9, § 8748 (West 2019) (taxpayer may post bond to discharge property from attachment in New Castle County); D.C. CODE ANN. § 47-1360 (West 2019) (may redeem until court orders foreclosure of right of redemption in an action brought by holder of certificate of sale at least six months after date of tax sale); FLA. STAT. ANN. § 197.472 & § 197.502 (West 2019) (redemption before tax deed is issued, and holder of tax certificate can initiate auction for tax deed two years after the April 1 of the year the tax certificate is issued); GA. CODE ANN § 48-3-3, § 48-3-9, § 48-4-1 (West 2019) (sale does not occur until taxpayer has received a 30-day notice of delinquency, a 20-day notice of intent to sell property, and a 10-day notice before the sale); HAW. REV. STAT. ANN. § 231-65 (West 2019) (tax sale occurs unless amounts due are paid before advertised date); IDAHO CODE ANN. § 63-1005 (West 2019) (county not entitled to tax deed until three years after date of delinquency); 35 ILL. COMP. STAT. § 200/21-165 (West 2019) (payment of delinquent amounts prior to sale); 35 ILL. COMP. STAT. § 200/21-350 (West 2019) (right of redemption for two years (2 1/2 years for property with 1-6 dwelling units on it) after date of sale); IND. CODE ANN. § 6-1.1-1.2 (West 2019) (sale can be stopped by payment of delinquent amounts); IND. CODE ANN. § 6-1.1-25.1 & § 6-1.1-25.4 (West 2019) (right to redeem for one year after date of sale); IOWA CODE ANN. § 447.1 (West 2019) (redemption before right of redemption expires generally two years after sale of tax
to redeem for one year after certificate of purchase acquired at first or second annual auction, period is generally three years from time property is bid in for property in third year of delinquency); expire on the March 6 months after sale, or nine months after sale of owner-occupied property in Baltimore City); MASS. (right to redeem at any time before right of redemption foreclosed by taxpayer can redeem tax sale title for three years after the date the tax sale certificate is recorded); W. KANS. REV. STAT. ANN. tit. 36, § 1074 (West 2019) (person whose property is levied upon may redeem by paying amount owed prior to sale); MD. CODE ANN., TAX-PROPERTY § 14-833 (West 2019) (right to redeem at any time before right of redemption foreclosed by court action which can be filed after six months after sale, or nine months after sale of owner-occupied property in Baltimore City); MASS. GEN. LAWS ANN. ch. 60, § 62 & § 65 (West 2019) (any person with interest in land taken or sold for nonpayment of taxes may redeem at any time prior to the filing of petition for foreclosure, which can happen after six months after sale or taking); MICH. COMP. LAWS ANN. § 211.78k (West 2019) (rights of redemption expire on the March 31 immediately succeeding entry in an uncontested case of judgment foreclosing property in third year of delinquency); M.NN. STAT. ANN. § 281.01 & § 281.17 (West 2019) (redemption period is generally three years from time property is bid in for state); MISS. CODE ANN. § 27-41-63 (West 2019) (sale made after taxes paid is invalid); MO. ANN. STAT. § 140.340 & § 140.250 (West 2019) (right to redeem for one year after certificate of purchase acquired at first or second annual auction, 90 days after third annual auction); MONT. CODE ANN. § 15-18-111 (West 2019) (generally interested party may redeem property tax lien by first working day in August three years after attachment of tax lien); NEB. REV. STAT. ANN. § 77-1824 & § 77-1917 (West 2019) (redemption prior to close of business on day application for tax deed filed, or prior to institution of foreclosure proceeding); NEV. REV. STAT. ANN. § 361.5648 & § 361.585 (West 2019) (two-year redemption period after issuance of tax certificate before deed issued, and property can be reconveyed to taxpayer if delinquency paid not later than 5 p.m. on third business day prior to sale); N.H. REV. STAT. ANN. § 80:32 (West 2019) (redemption before deed is given, which can happen not earlier than two years after sale); N.H. REV. STAT. ANN. § 80:69 & § 80:76 (West 2019) (right to redeem before tax deed is delivered, which can happen only after two years after lien attached); N.J. STAT. ANN. § 34:5-86 (West 2019) (right of redemption for six months after purchase of tax sale certificate by municipality, and for two years after sale of tax sale certificate to other party); N.M. STAT. ANN. §§ 738-66 (West 2019) (payment must be made by 5:00 p.m. the day prior to the sale); N.Y. REAL PROP. TAX LAW § 1110 (McKinney 2019) (redemption period is generally two years after lien date); N.C. GEN. STAT. ANN. § 105-374 (West 2019) (for a mortgage-type foreclosure tax sale, taxpayer may redeem property at any time prior to confirmation of the sale by the court); N.C. GEN. STAT. ANN. § 105-375 (West 2019) (for in rem tax foreclosure, taxpayer may redeem property before execution sale occurs, not less than three months after indexing of the docketing of the certificate of taxes); N.D. CENT. CODE ANN. § 57-28-08 (West 2019) (taxpayer may satisfy the lien before the foreclosure date); OHI. REV. CODE ANN. § 5721.25 (West 2019) (taxpayer may redeem before entry of confirmation of sale in a foreclosure proceeding initiated by county treasurer); OHIO REV. CODE ANN. § 5721.37-38 (West 2019) (taxpayer may redeem at any time before confirmation of sale if a certificate holder initiates foreclosure proceedings, which cannot occur until one year after date tax certificate was sold); 68 OKLA. STAT. ANN. tit. 68, § 3113 (West 2019) (property can be redeemed before execution of deed of conveyance); 72 PA. STAT. AND CONS. STAT. ANN. § 5860.501 (West 2019) (taxpayer may cause discharge of tax claims and liens until property has been sold); OR. REV. STAT. ANN. § 312.110 (West 2019) (property may be removed from foreclosure proceeding at any time prior to judgment transferring it to county upon payment of delinquent taxes plus interest and penalties); 44 R.I. GEN. LAWS ANN. § 44-9-19 & 21 (West 2019) (owner may redeem before purchaser files petition for foreclosure of redemption right after one year after sale); S.C. CODE ANN. § 12-51-40 (2019) (taxpayer may avoid foreclosure sale by paying delinquent taxes, penalties and costs before sale date); S.D. CODIFIED LAWS § 10-24-1 & § 10-25-1 (West 2019) (right to redeem tax certificate before issuance of tax deed, which happens at least three years after tax certificate sale); TENN. CODE ANN. § 67-5-2411 (West 2019) (suit for unpaid taxes will be dismissed upon payment of taxes, interest and penalties at any time before entry of judgment); TEX. TAX CODE ANN. § 33.53
reasons why I believe the right of redemption is the critical factor that should protect these transfers from characterization as fraudulent transfers even were some sort of access to public valuation of the property necessary under BFP.

IV.

As discussed above, all courts agree that a tax foreclosure that employs a public auction of the property with the proceeds applied to pay the taxes owing and any excess amounts payable to the taxpayer is entitled to the benefit of the BFP per se rule – whatever amount is realized upon the sale is, by definition, reasonably equivalent value for purposes of § 548. But courts seem to struggle with foreclosures that are not public auctions with competitive bidding. The emphasis placed by these courts on the existence of a public auction as determinative of whether the owner has the ability to realize the market value of the property both overestimates the effectiveness of auctions and underestimates the rights retained by the owner during any redemption

(West 2019) (taxpayer can cure delinquency at any time prior to tax sale); VT. STAT. ANN. tit. 32, § 5254(a) (West 2019) (taxpayer may prevent sale by paying delinquent taxes with costs the day before the sale); UTAH CODE ANN. § 59-2-1346 (West 2019) (property may be redeemed before tax sale, which is held four years after taxes became delinquent); VA. CODE ANN. § 58.1-3974 (West 2019) (owner may redeem property prior to date set for judicial sale); WASH. REV. CODE ANN. § 84.64.070 (property may be redeemed at any time before close of business before day before the day of sale); W. VA. CODE ANN. § 11A-3-23 (West 2019) (after sale of tax lien, owner may redeem at any time before tax deed is issued, which cannot happen until April 1 of the second year following the tax lien sale); WIS. STAT. ANN. § 75.01 & § 74.59 (West 2019) (any person may redeem property described in tax certificate before recording of tax deed, which cannot occur before two years after issuance of tax certificate); WYO. STAT. ANN. § 39-13-108(d)(iii) (West 2019) (any person with interest in real property may redeem prior to confirmation of the sale by the court).

Some states also have statutory redemption provisions allowing the taxpayer to recover the property after the tax sale or forfeiture. See, e.g., ARK. CODE ANN. § 26-37-202(e)(1) (West 2019) (taxpayer can redeem within ten days after the sale); CONN. GEN. STAT. ANN. § 12-157(f) (redemption period for most property is six months after the sale); DEL. CODE ANN. tit. 9, § 8729 & § 8758 (West 2019) (sixty days after sale of property is confirmed by Superior Court); GA. CODE ANN. § 48-4-40 & § 48-4-45 (West 2019) (redemption within twelve months from date of sale and until purchaser terminates right to redeem by serving and publishing notice); HAW. REV. STAT. ANN. § 231-67 (West 2019) (property may be redeemed within one year after date of tax deed); IDAHO CODE ANN. § 63-1007 (West 2019) (taxpayer may redeem property until county commissioners have entered into contract of sale or transferred property, but in no event later than fourteen months after issuance of tax deed); KY. REV. STAT. ANN. § 426.530 (West 2019) (redemption within six months after property sold for less than two-thirds appraised value); MISS. CODE ANN. § 21-44-61 (West 2019) (two years after tax sale); PA. REV. STATS. § 7293 (West 2019) (taxpayer who occupied property for 90 days prior to sale has nine months after sheriff's sale to redeem property); OR. REV. STAT. ANN. § 312.120 (West 2019) (property may be redeemed at any time while property is held by county, generally two years); S.C. CODE ANN. § 12-51-90 (2019) (defaulting taxpayer may redeem property within twelve months after tax sale); TENN. CODE ANN. § 67-5-2701 (West 2019) (taxpayer can redeem property within one year after court confirms tax sale); TEX. TAX CODE ANN. § 34.21 (West 2019) (redemption available for two years after tax deed is filed following sale); VT. STAT. ANN. tit. 32, § 5260 (West 2019) (property may be redeemed within one year after the sale).
period, namely, to exercise the right of redemption, and to sell that right as part of a private sale of the property itself, a mechanism far more likely to realize a higher price.

There has been little empirical data developed on public dispositions of real property. However, what little there is confirms the views of many commentators that at most foreclosure sales, the mortgagee is the successful bidder. In a study made by Prof. Steven Wechsler of Syracuse University College of Law, the results of which he published in 1985, he examined all 118 completed mortgage foreclosures in Onondaga County, New York during 1979. He found that mortgagees (as opposed to third parties) purchased the property in 77% of all sales. A study by Professor Debra Pogrund Stark of The John Marshall Law School of foreclosure complaints filed in July 1993 and July 1994 in Chancery Court in Cook County, Illinois found even more dramatic figures — third parties successfully bid in only 11.2% of the 1993 judicial sales cases and only 9.6% of the 1994 judicial sales.

There are many reasons why independent third parties tend not to bid for foreclosed properties and, if they do, tend to lose out to the mortgagee. First, notice of such sales, while sufficient as a matter of state law, is not disseminated in a way that would promote wide attendance. Second, the prospective purchasers generally have limited opportunity to inspect the property prior to the sale, meaning they are unable to make an independent, informed judgment about its condition and value. Third, independent purchasers are not likely to obtain financing for their purchase, because pro-

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126See, e.g., William B. Brueggeman & Jeffrey D. Fisher, REAL ESTATE FINANCE AND INVESTMENTS, at 32 (16th ed. McGraw-Hill 2018) ("[I]n most cases only the mortgagee or the mortgagee and a small number of bidders appear at the foreclosure sale and, as a result, the mortgagee is usually the successful bidder. . ."); Ann M. Burkhart, Fixing Foreclosure, 36 YALE L. & POL’Y REV. 315, 337 (2018) ("[T]he foreclosing mortgagee normally is the only bidder at the sale, and it normally bids only the outstanding debt amount."); Georgina W. Kwan, Mortgage Protection Laws: A Proposal for Mortgage Foreclosure Reform in Hawaii, 24 U. HAW. L. REV. 245, 247 (2001) (mortgagee is "usually the only bidder at the auction sale"); Frank A. St. Claire, Wraparound Mortgage Problems in Nonjudicial Foreclosures, 20 REAL EST. L.J. 221, 229 (1992) (mortgagee "is often the only bidder"); Johnny L. Woodruff, Certiorari to In re BFP: The Eve of Decision to a Dozen Years of Durrett Conflict – Will Resolution of the Issue Solve the Real Problem?, 24 MEMPHIS ST. U. L. REV. 773, 778 (1994) ("Due to inadequate notice, the mortgagee is often the only bidder at the sale."); James S. Hering, Real Property Foreclosure in Texas: What Is Deficient About the Texas Deficiency Statute?, 37 S. TEX. L. REV. 377, 403 (1996) ("[M]ortgagees are usually the only bidders at foreclosure sales. . .").


128Id. at 875.


130See Grant S. Nelson & Dale A. Whitman, REAL ESTATE FINANCE LAW § 8.8 (6th ed. Thomson West 2014); Burkhart, supra note 126, at 326; Wechsler, supra note 127, at 891.

131See Nelson & Whitman, supra note 130, at § 8.8; Burkhart, supra note 126, at 326; Wechsler, supra note 127, at 891-892.
pective financers will not make commitments until the purchaser makes a successful bid.\footnote{32} Fourth, in many states the owner of the property has the right to redeem the property from the successful bidder within a certain period after the foreclosure sale, which means the purchaser has no assurance that the purchaser will be able to keep the property purchased.\footnote{133} Therefore, third party purchasers are less likely to bid on foreclosed property, and if they do bid, they are not likely to bid the full market value of the property.

Not only are the mortgagees most often the only bidder, the amount they bid is usually not more than the amount of the debt owed to them by the mortgagor.\footnote{134} The reason for this is simple; so long as it does not bid more than the debt owed, the mortgagee need not come out of pocket for the purchase price, that is, it can place a “credit bid” (a non-cash bid that is credited against the debt).\footnote{135} In sum, the so-called public auction method for foreclosing on a mortgage on real property is not likely to attract interested bidders, and is not likely to result in bids that are reflective of the value of the property rather than the amount of the owner’s debt.\footnote{136} Elevating the public auction to the position of a transfer unassailable under § 548 by labeling the price obtained as “reasonably equivalent value” ignores the many deficiencies of that method of disposition of real property.

Tax foreclosure laws, even if they provide for public auctions of the property, explicitly recognize this reality in that they often specify that the minimum bid for tax-delinquent property is the amount of the delinquencies, and that if that minimum amount is not bid, the property will not be sold to a private purchaser.\footnote{137}

A public auction of tax-delinquent property is as likely (or unlikely) to generate a reasonably equivalent value for the property as is a mortgage fore-

\begin{footnotes}
\footnote{132}{See Wechsler, supra note 127, at 891.}
\footnote{133}{See Nelson & Whitman, supra note 130, at § 8.4 & § 8.8; Burkhart, supra note 126, at 326.}
\footnote{134}{See Stark, supra note 129, at 664 (finding that in most cases the lenders bid the exact amount of the debt); Wechsler, supra note 127, at 876 (finding that in 92% of sales to the mortgagee, the sale price was for less than the amount of the debt).}
\footnote{136}{One commentator characterized foreclosure by sale as often functioning “as a meaningless ceremony whereby the mortgagee exchanges the property for the debt, then retains any surplus generated through a profitable resale, takes any loss on an unprofitable disposal of the property, or if the property is not resold, absorbs the deficiency owed by the mortgagor.” Wechsler, supra note 127, at 884.}
\footnote{137}{See, e.g., ALA. CODE § 40-10-16 (West 2019); CAL. REV. & TAX CODE § 3698.5 (West 2009); CONN. GEN. STAT. ANN. § 12-157(c) (West 2019); HAW. REV. STAT. ANN. § 231-66 (West 2019); IND. CODE ANN. § 6-1.1-24-5 & § 6-1.1-24-9 (West 2019); [2019 Mont. SB 253, 66th Legislature, § 2(a)]; N.M. STAT. ANN. § 7-38-67 (West 2019); 72 PA. STAT. AND CONS. STAT. ANN. § 5860.605 (West 2019); S.C. CODE ANN. § 12-51-55 (West 2019); TENN. CODE ANN. § 67-5-2501(a)(2) (West 2019); TEX. TAX CODE ANN. § 34.01 (West 2019); WASH. REV. CODE ANN. § 84.64.080(4) (West 2019).}
\end{footnotes}
closure sale. To say that such a sale is necessary to establish reasonably equivalent value for purposes of § 548 in the tax foreclosure context merely because it is sufficient to do so represents a logical fallacy.

So what kind of process is required to immunize a transfer of property pursuant to state tax foreclosure laws from ex post facto invalidation as a fraudulent conveyance? Let us put aside transfers by public auction—which all courts agree are protected from avoidance by BFP—and turn to transfers made to the holder of a tax lien (either the municipality itself through forfeiture of the property or to an assignee of the tax lien who acquires the tax lien certificate at a public auction). I suggest that such transfers should be avoidable only if the applicable state law fails to provide the owner of the property an opportunity for a market-tested valuation of the property in which the equity of the owner (if any) would be realizable. All states provide such an opportunity in the form of the right to redeem the property before the transfer is finalized and give the owner a significant period in which to exercise such right.

At first blush, one might assume that redemption is a meaningless right. The owner has been unable to pay the taxes as they became due and is therefore unlikely to have the resources to pay the entire amount of the arrearages in order to recover the property from the lienholder, even if given several years to do so. But redemption is a right that is itself transferable with the ownership of the property. Indeed, if the property owner files for bankruptcy protection before expiration of the period for redemption, the right to redeem becomes an asset of the estate and the trustee in bankruptcy may exercise the right on behalf of the estate or may sell the property to a third party who would be entitled to exercise such right. If the redemption period expires before the (former) property owner files for bankruptcy protection, not only is the right of redemption not a part of the bankruptcy estate, but the underlying property is also not included because the debtor no longer has any legal or equitable interest in the property.

Courts and commentators have long recognized that the right of redemption may be exercised by anyone who has an interest in the property subject to the lien in privity of title with the original obligor. See generally George E. Osborne, Handbook on the Law of Mortgages § 304 at 627 (2d ed. West Pub. Co. 1970) (citing cases); Garrad Glenn, Mortgages, Deeds of Trust, and Other Security Devices as to Land, Vol. II § 234 (Michie Co. 1943).


See, e.g., U.S. V. Aldrich (In re Rigden), 795 F.2d 727, 731 (9th Cir. 1986); Martin v. USDA Rural Housing Serv. (In re Martin), 276 B.R. 552 (Bankr. N.D. Miss. 2001).

See, e.g., TD Bank, N.A. v. LaPointe (In re LaPointe), 505 B.R.889 (B.A.P. 1st Cir. 2014); In re Catalano, 510 B.R. 654 (Bankr. M.D. Fla. 2014); City of Roanoke v. Whitley (In re Whitley), 410 B.R.
If the property owner is concerned that the tax foreclosure process (whether an auction or a foreclosure of the owner's equity of redemption) will fail to credit the owner for the value of the property in excess of the taxes that are owed, the property owner has the right to place the property on the market himself or herself and conduct a private sale that may generate enough proceeds to pay the taxes in full and provide the owner any extant equity. In other words, the right of redemption provides to the owner of the property the opportunity to realize the full fair market value of the property, less the amount of taxes owed (and the costs of the sale), a price probably not obtainable in a foreclosure sale. Commentators seeking reform of the mortgage foreclosure process also propose that private sales are far superior to public auctions as a way to maximize the sale price.\textsuperscript{142}

Why do most courts seem to ignore the possibility of a private sale during the redemption period when they suggest that state foreclosure laws do not protect the debtor's equity in the property?\textsuperscript{143} Probably, their lack of attention to the protections afforded by redemption is motivated by the fact that most debtors do not exercise their right to redeem the property.\textsuperscript{144} But if debtors essentially waive their right to test the value of the property against the market, there is no reason for a bankruptcy court to allow those debtors to challenge the transfer after the fact through fraudulent transfer.

\textsuperscript{142}See, e.g., Nelson & Whitman, supra note 130, at § 8.8; Burkhart, supra note 126, at 318-19.

\textsuperscript{143}The bankruptcy court in Comis v. Bromka (In re Comis), 181 B.R. 145, 130 (Bankr. N.D.N.Y. 1994) understood the role of redemption as a mechanism for protecting the debtors' equity. The court noted that "the Debtors had three years [the redemption period] in which to protect their equity in the Premises. Having failed to exercise their right of redemption over a period of three years, they should not now be allowed to exercise their right to a homestead exemption under the auspices of the Bankruptcy Code." See also Talbot v. Fed. Home Loan Mort. Corp. (In re Talbot), 254 B.R. 63, 70 (Bankr. D. Conn. 2000) (identifying the redemption period as one of the procedural safeguards that "permit market factors to operate to the debtor's advantage" and finding BFP applicable to Connecticut strict foreclosures).

By contrast, the court in Churches v. Fleet Mortgage Corp. (In re Fitzgerald), 255 B.R. 807 (Bankr. D. Conn. 2000) rejected the idea that the failure of the debtor to arrange a sale or refinance the property during the redemption period provides legitimate evidence that the mortgage debt constituted reasonably equivalent value for the property, but did so in large measure because the Connecticut fraudulent transfer law did not include strict foreclosure in its provision specifying that a person acquiring an interest in property pursuant to a "regularly conducted, noncollusive foreclosure sale or execution of a power of sale" provides reasonably equivalent value. Id. at 812 (citing Conn. Gen. Stat. § 52-552d(b) (West 2000)).

\textsuperscript{144}Professor Patrick Bauer conducted an empirical study of exercise of the statutory right of redemption in two counties in Iowa from 1881 to 1980 and found that 10.4% of properties were redeemed after foreclosure. See Patrick B. Bauer, Statutory Redemption Reconsidered: The Operation of Iowa's Redemption Statute in Two Counties Between 1881 and 1980, 70 IOWA L. REV. 343, 350 (1985). The study has been cited in subsequent scholarly work as one of the few empirical studies on redemption available. See C. Barrett Pasquini, The Tax Consequences of the Statutory Right of Redemption in Property Foreclosures, 48 WM. & MARY L. REV. 1497, 1509 (2007); Stark, supra note 129, 30 U. MICH. J. L. REV. 659, at 640 & n.3.
law. The debtors have, by their inaction, agreed that the price obtained by the state foreclosure process (generally the amount of their unpaid taxes and related interest and other charges) represents the "reasonably equivalent value" of their property interests. If they did not think that was true, they would take action to sell the property on the open market and permit the purchaser to redeem.

V.

Although the Court stated in footnote 3 of BFP that its opinion applied only to mortgage foreclosures of real property and that "[t]he considerations bearing upon other foreclosures and forced sales (to satisfy tax liens, for example) may be different,"145 neither of the reasons proffered for the decision the Court reached would be analyzed any differently with respect to a foreclosure pursuant to a tax lien. The language of § 548 still does not include the words "fair market value" and, insofar as a tax lien foreclosure is a forced sale in the same sense that a mortgage foreclosure is a forced sale, market value should continue to be an inappropriate measuring stick against which to judge reasonably equivalent value.146

Indeed, the empirical studies on mortgage foreclosure have shown that public sales of property at auction usually generate sale prices that do not exceed the amount of debt secured by the mortgage.147 There is no reason to believe that a tax foreclosure process that employs a public sale of the property would have a different result. Unless one returns to the Durrett approach of judging the amount received pursuant to a regularly-conducted state court proceeding against some true market value of the property (an approach expressly rejected in BFP with respect to foreclosures), there is no basis for analyzing tax sales that lack public auctions differently from those that use them.

Contrast two different tax foreclosure scenarios involving property having the same value and (for purposes of this hypothetical) the same amount of

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145BFP, 511 U.S. at 537 n.3.

146As one commentator aptly put it,

The important aspect of a foreclosure transfer is not how the state regulates it, but rather that the state regulates it. The fact that a transfer occurs pursuant to a properly conducted, state-regulated foreclosure process fully accounts for the difference between the value that the debtor receives (debt forgiveness) and the hypothetical fair market value of the property. The difference is reasonable for fraudulent transfer purposes under bankruptcy law because the state-regulated foreclosure process is entitled to respect in bankruptcy without regard to whether the state regulated processes themselves are reasonably calculated to return the highest possible value to the debtor.”


147See citations supra note 134.
delinquent taxes. In State A, the tax-delinquent property is sold at a public auction to the highest bidder, who is likely to be the holder of the tax lien, and who is likely to bid the amount of the tax arrearages. Under BFP, that bid constitutes reasonably equivalent value and the transfer is not avoidable under § 548. In State B, the state sells a tax lien certificate to a private party for the amount of the arrearages and at the end of the redemption period the holder of the certificate receives title to the property. Both transfers are "forced sales" and involuntary transfers. Exactly the same value was provided to the property owner by the transferee of the property in each state. Both states have an equal interest in the administration of their systems for tax collection. It seems unlikely that one of these transfers is potentially fraudulent because the debtor failed to receive "reasonably equivalent value" while the other is not.

The concern about disrupting state real estate procedures applies perhaps even more patently in the context of tax lien foreclosures than in mortgage foreclosures, in that the unpaid debt that gives rise to the foreclosure is owed to the state or a municipality of the state. State foreclosure laws have been developed through the political process in each state to balance the interests of the state and its municipalities in receiving tax revenues against the interest of the property owners (both residential and commercial) in avoiding loss of their property. As one commentator wrote,

> State and local governments need a foreclosure process that creates a strong incentive for the debtor and mortgagees to pay property tax even as property values decline. They need a swift way to pass clear and final title to tax delinquent and abandoned property to purchasers who will occupy the property and stem the tide of urban blight.148

If the Court were to require property tax foreclosures to meet a federal standard of reasonably equivalent value, the states would find themselves unable to pursue their state-created remedies for non-payment of taxes but would instead have to implement federal provisions to immunize their sales from potential fraudulent transfer attack. It seems unlikely that the Court would interpret the language of § 548 differently in this context than it did in BFP for private mortgage foreclosures given the consequences of such an interpretation.

It is difficult to imagine that Congress ever envisioned the use of fraudulent transfer law to negate a transfer of real property made in compliance with the tax foreclosure laws of a state. The history of fraudulent transfer law demonstrates that it was intended to protect unsecured creditors from

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148 Reilly, supra note 146.
actions taken (or allowed to be taken) by the debtor to defraud them.\textsuperscript{149} The concept of constructive fraud allowing avoidance of transfers for less than reasonably equivalent value was intended to provide an objective means of determining which transactions were unfair to creditors because of action or inaction by the debtor, not to eliminate from the calculation the debtor's wrongful intent.\textsuperscript{150} A transfer pursuant to a duly-enacted state law governing remedies for failure to pay property taxes has none of the hallmarks of an action by the debtor to defraud unsecured creditors.

Even if the Supreme Court was indicating in \textit{BFP} that the touchstone of "reasonably equivalent value" is adherence to a state procedure that theoretically protects the debtor's equity by access to market forces, all state tax foreclosure mechanisms should satisfy this requirement. Even those tax foreclosure laws that provide for strict foreclosure or forfeiture of the property to the holder of a tax lien certificate afford every property owner the opportunity during the redemption period to put the property up for sale, thereby realizing the true market value of the property and transferring to the purchaser the right to redeem. The fact that these state tax laws shift to the property owner the burden to initiate a public sale of the property rather than placing the burden on the state authorities does not mean that a market-tested valuation of the property is not available.

Assume that the tax-delinquent property owner did in fact put the property up for private sale during the redemption period, advertised it appropriately and accepted a bid for the property that was lower than the appraised fair market value of the property. Absent collusion between seller and purchaser (or the holder of the tax lien and the purchaser), such a purchase would never be challenged as a fraudulent transfer because the property owner received an amount that constituted reasonably equivalent value as determined by the market.

By declining to put the property up for private sale during the redemption period, the property owner is implicitly accepting a bid for the property on the part of the lien holder, agreeing that the amount that the property owner will be receiving in exchange for the transfer of the property at the end of the redemption period pursuant to state law constitutes reasonably equivalent value. Even if the transferee receives property with a fair market value in excess of the value provided in exchange, so long as there is no collusion between the property owner and the transferee, the transfer should not be avoidable.

As one commentator suggested before \textit{BFP} was decided:


\textsuperscript{150}Id. at 584.
It is not . . . the function of the federal Bankruptcy Code to attack collaterally what one does not like in state law. Using the Bankruptcy Code for something it was not intended to do can only result in adverse consequences to the well-ordered administration of bankruptcy and the smooth functioning of the economy of the nation.\textsuperscript{151}

When a noncollusive transfer of property conducted in accordance with state tax foreclosure laws is avoided as a fraudulent transfer under § 548, the Bankruptcy Code is being used in a way that Congress never intended and BFP did not require. There is nothing magical about a public auction of real property to satisfy unpaid taxes. It is likely to result in the same purchase price as a transfer of the property without an auction – the amount of the delinquency. Although the property owner can potentially obtain more by selling the property during the redemption period, the owner's failure to do so should not make the transfer avoidable. The amount received for a transfer of tax-delinquent property under any state tax law is reasonably equivalent value because, as the Supreme Court said in BFP with respect to amounts received in a regularly-conducted mortgage foreclosure sale, in this non-free-market transfer, that amount is "the only legitimate evidence of the property's value at the time it is sold."\textsuperscript{152} Courts should not wield § 548 as a weapon to require something more of state tax foreclosures.

\textsuperscript{151} Id. at 603.
\textsuperscript{152} BFP, 511 U.S. at 549.