American University Business Law Review

Volume 13 | Issue 1 Article 2

2024

Foreclosure Sales as Fraudulent Transfers

David gray Carlson
Benjamin N. Cardozo School of Law, dcarlson@yu.edu

FORECLOSURE SALES AS FRAUDULENT TRANSFERS

DAVID GRAY CARLSON*

The Supreme Court has declared that noncollusive, regularly conducted foreclosure sales are not "constructive" fraudulent transfers voidable by a bankruptcy trustee. Uniform state legislation ratifies this instinct for private creditor enforcements. But collusive or irregular foreclosure sales or sales that are intended to hinder, delay, or defraud creditors are subject to creditor attack, even though unsecured creditors are not proper parties to the foreclosure process. In such cases, unsecured creditors can cloud the title obtained from foreclosure in the cases of collusion, irregularity or fraudulent intent. This article examines precisely when foreclosure sales can be avoided by unsecured creditors of a debtor who has granted a mortgage or security interest in real or personal property.

* Carlson has been a professor at the Benjamin N. Cardozo School of Law since 1982 and has authored over 130 articles on bankruptcy, jurisprudence and post-modern philosophy.

I. INTRODUCTION

In *KIND Operations, Inc. v. Cadence Bank (In re PA Co-Man, Inc.*),[1] the unsecured creditors awoke on the morning on June 8, 2019, to find that all the assets of their corporate debtor were gone.[2] The assets had been sold in a private Article 9 foreclosure to a corporate buyer financed by the foreclosing secured party.[3] The buyer employed the chief executive officer and all other employees of the corporation.[4] The business continued on without the public ever being aware that something cataclysmic had occurred.[5] The debtor corporation had become an empty shell and the unsecured creditors lost (they allege) $30 million in assets.[6]

In the seller's ensuing bankruptcy, one of the creditors (KIND) bought from the seller's bankruptcy trustee all claims against the participants in the scheme, sounding mainly in fraudulent transfer.[7] Every conceivable defendant was joined in the suit — the CEO of the defaulting debtor corporation, the corporate buyer, and the foreclosing banks.[8] In an encyclopedic opinion covering over 100 pages in the *Bankruptcy Reporter*, Judge Jeffrey Deller concluded that the plaintiffs had mostly stated valid causes of action.[9]

But wait! Did not the Supreme Court thirty years ago rule that foreclosures cannot be fraudulent transfers? In *BFP v. Resolution Trust*

1. 644 B.R. 553 (Bankr. W.D. Pa. 2022).
2. *Id.* at 574, 579.
3. *Id.* at 579.
4. *Id.* 578, 581.
5. *See id.* at 580.
6. *Id.*
7. *Id.* at 571.
8. *Id.*
9. *See generally id*. (exploring the many facets of the sale through one hundred pages of opinion).

Corp.,[10] the Supreme Court ruled that the buyer at a mortgage sale is never the recipient of a so-called *constructive* fraudulent transfer[11] because whatever the buyer paid equals the value of what the buyer received.[12] Per Justice Scalia, "We deem, as the law has always deemed, that a fair and proper price, or a 'reasonably equivalent value,' for foreclosed property, is the price in fact received at the foreclosure sale, so long as the requirements of the State's foreclosure law have been complied with."[13]

But an exception is made for *irregularly conducted* and/or *collusive* foreclosures:

> Although collusive foreclosure sales are likely subject to attack under § 548(a)(1)[(A)], which authorizes the trustee to avoid transfers "made with actual intent to hinder, delay, or defraud" creditors, that provision may not reach foreclosure sales that, while not intentionally fraudulent, nevertheless fail to comply with all governing state laws. Any irregularity in the conduct of the sale that would permit judicial invalidation of the sale under applicable state law deprives the sale price of its conclusive force under § 548(a)[(1)(B)(ii)(I)], and the transfer may be avoided if the price received was not reasonably equivalent to the property's actual value at the time of the sale (which we think would be the price that would have been received if the foreclosure sale had proceeded according to law).[14]

Thus, irregularly conducted foreclosures might be constructive fraudulent transfers.

How odd this is! Regularity of foreclosure procedure turns on respecting the property right of the mortgagor and of other parties whose property interests are foreclosed. The mortgagor's unsecured creditors have no interest whatever in the foreclosed property. Irregularity does not concern unsecured creditor rights and yet irregularity toward some foreclosed property owner revives the constructive fraudulent transfer for the mortgagor's unsecured creditors. The buyer may be unaware of the irregularity, but her title is destroyed if she pays too little, because the unsecured creditors can rise up and smash her title to pieces.

There is a decisive argument against this result, at least in cases like

---

10. 511 U.S. 531 (1994).

11. *Id.* at 535.

12. *See* 11 U.S.C. § 548(a)(1) (stating that the trustee may avoid transfer if the debtor "(B)(i) received less than a reasonably equivalent value in exchange for such transfer . . . and (ii)(I) was insolvent on the date such transfer was made").

13. *BFP*, 511 U.S. at 545.

14. *Id.* at 545–46. In 1994, Congress amended § 548. I have changed the references in this quote to match current subparagraph numbers.

Kind, which is governed by Article 9 of the Uniform Commercial Code.[15] Suppose a secured party (*SP*) claims $60 against collateral worth $100. *SP* sells to a buyer (*B*), for $60. The case against *B* for fraudulent transfer says that *B* has received assets for an unreasonable equivalent value.[16] The creditors of the debtor (*D*) have a nonrecourse claim against the asset *B* bought. This result entails a comparison between the $60 *B* paid and the $100 value *B* received. One is tempted to conclude that $60 is not a reasonably equivalent value of $60.

But this overlooks a key artifact of Article 9. *SP*'s incentive to market the collateral runs out after $60. If *SP* follows this incentive, *SP* has conducted a commercially unreasonable sale. For this, *SP* owes *D* damages, amounting to $40.[17] So *D* has received $100 from *SP*. *D* has received $60 in debt cancelation[18] and $40 in the form of a payment intangible, thanks to Article 9. Since *D* gave $100 and received $100, the creditors of *D* have not been defrauded. I will refer to this concept as "tort compensation." I will be using it many times.

So much for the irregularly conducted sale (when Article 9 applies). What is a collusive sale? On this last point, the Supreme Court did not provide a definition. Elsewhere,[19] I induce a definition from another Supreme Court classic, *Northern Pacific Railway Corp. v. Boyd*[20] — said to be the birth of the absolute priority rule in chapter 11 cases.[21] *Boyd* is in fact a mortgage foreclosure case that pre-exists bankruptcy reorganizations under chapter 11 and its predecessors.

15. *See, e.g.*, Kind Operations, Inc. v. Cadence Bank (*In re* PA Co-Man Inc.), 644 B.R. 553, 595 (Bankr. W.D. Pa. 2022) (holding that because the case arises from Pennsylvanian jurisdiction, Article 9 is controlling due to state's adoption of UCC).

16. Uniform Fraudulent Transfer Act (U.F.T.A.) §§ 4(a)(2)(i), 5(a) (Unif. L. Comm'n 1984).

17. *See* U.C.C. § 9-625(b) (AM. L. INST. & UNIF. L. COMM'N 2022).

18. *See* U.F.T.A. § 3(a) ("Value is given for a transfer . . . if, in exchange for the transfer . . . , antecedent debt is . . . satisfied.").

19. *See generally* David Gray Carlson, *Collusive Foreclosure Sales: The Forgotten Legacy of* Northern Pacific v. Boyd, 98 AM. BANKR. L. REV. 174 (2024).

20. 228 U.S. 482 (1913).

21. *See id.* at 500; *see also* John D. Ayer, *Rethinking Absolute Priority After Ahlers*, 87 MICH. L. REV. 963, 970–72 (1989).

According to this induced definition, a collusive mortgage foreclosure sale is one in which the corporate buyer (*B Corp*.) has the same shareholders (*SH*) as the defaulting corporation (*D Corp*.). In a collusive foreclosure sale, we have this structure:

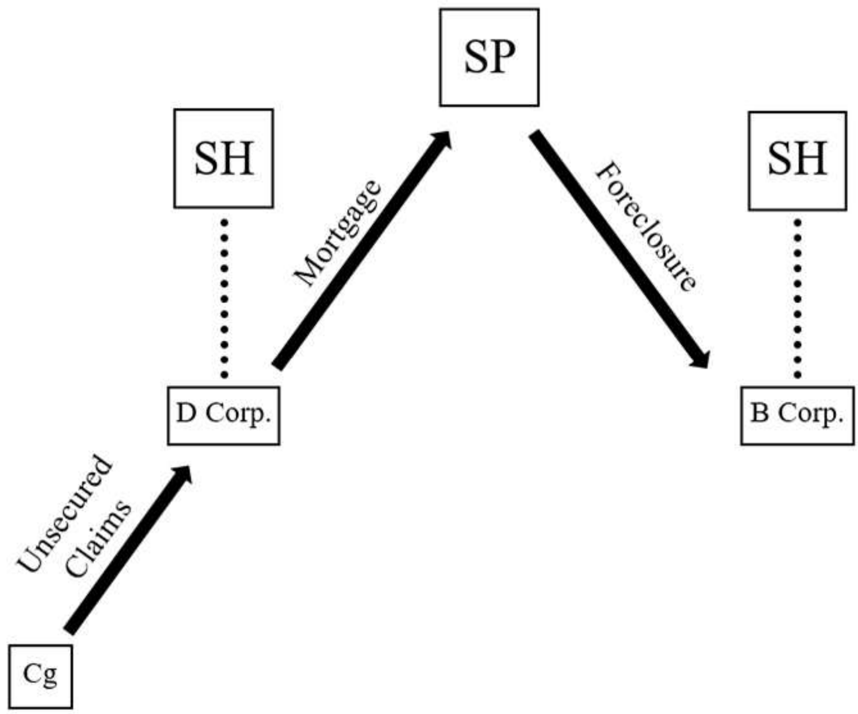

Figure 1: Collusive Mortgage Foreclosure Sale

In Figure One, *D Corp*. is insolvent. *D Corp*. has unsecured creditors (collectively, the C_g). *D Corp*. is in default to a secured creditor (*SP*). If *SH* can incorporate *B Corp*. and foreclose for a low price, *SH* can steal valuable equity from *D*'s creditors (the C_g, for general unsecured creditors; $C_g=\{C_1, C_2, C_3 \ldots, C_n\}$). For this reason, the *BFP* presumption is repealed in the case of collusive mortgage foreclosure sales.

In the case of a collusive foreclosure, the same decisive argument applies when Article 9 governs. If the foreclosure is collusive but regularly conducted, then by definition *B Corp.* has paid a reasonably equivalent value. *B Corp*. has not defrauded the C_g. If the sale is collusive *and* irregularly conducted, *D Corp*. is fully compensated because *D Corp.* has a payment intangible[22] against *SP* defined as the difference between what *B*

22. A payment intangible is "a general intangible under which the account debtor's

Corp. paid and the fair market value of the assets *B Corp*. received. Tort compensation prevents the foreclosure sale from being a fraudulent transfer.

The purpose of this article is to describe, in light of *BFP*, exactly when a foreclosure sale can constitute a fraudulent transfer from *D Corp*. to *B Corp*., and when can C_1, or a bankruptcy trustee representing the C_g, pin liability on *SP* for conducting the irregular or collusive mortgage foreclosure sale.

Part I of the article sets forth a brief account of fraudulent transfer law — just enough to allow the neophyte to follow the analysis of mortgage foreclosures. Part II briefly describes foreclosure procedure and what happens when the procedure is not followed. Part III discusses "constructive" fraudulent transfers — transfers for no consideration when *D Corp*. is insolvent. Such transactions are ineligible for *BFP* protection when foreclosure procedure is violated. Part IV considers the intentional fraud cases. Such cases are also ineligible for *BFP* protection, regardless of whether they followed the required procedure. Finally, Part V discusses *SP*'s liability for being in the middle of this sordid mess. There is considerable reason for *SP* to worry that it too will be liable. Obtaining a release from *D Corp*. is no solution, if *KIND* is right.[23] Part V also discusses *SH*'s liability for helping the collusive sale to fruition and tentatively suggests that *SH* ought not to be liable where, in a collusive sale, *B Corp*. has paid too little for *D Corp*.'s assets.

II. FRAUDULENT TRANSFERS IN A NUTSHELL

Fraudulent transfer is a concept that is not well understood.[24] Classically, a transfer made by a debtor (*D*) to a third party (*X*) is fraudulent if it hinders, delays, or defrauds the C_g. Suppose *D* owns a gold brick. *D* is about to lose a money judgment to C_1, one of the C_g. To prevent C_1 from levying the brick after judgment, *D* gives it to *X*. Upon reducing her claim to judgment, C_1 is entitled to a writ of execution, under which a sheriff or marshal must seize and sell *D*'s property for C_1's benefit. The problem is that *D* no longer owns the gold brick. *D* gave it away to *X*.

Fraudulent transfer comes to the rescue. It says that the sheriff can levy

principal obligation is a monetary obligation," U.C.C. § 9-102(a)(61) (AM. L. INST. & UNIF. L. COMM'N 2022).

23. *See generally* Kind Operations, Inc. v. Cadence Bank (*In re* PA Co-Man, Inc.), 644 B.R. 553 (Bankr. W.D. Pa. 2022).

24. I attempt to clarify matters in David Gray Carlson, *Fraudulent Transfer as a Tort*, 2021 MICH. ST. L. REV. 1093 (2021) [hereinafter Carlson, *Tort*]; David Gray Carlson, *Fraudulent Transfers: Void and Voidable*, 29 AM. BANKR. INST. L. REV. 1 (2021) [hereinafter Carlson, *Void and Voidable*].

X's brick to pay C_1's judgment against *D*. According to the first generation of uniform laws, the Uniform Fraudulent Conveyance Act (UFCA), C_1 could "[d]isregard the conveyance and attach or levy execution upon the property conveyed."[25]

The sheriff was in a tough spot, however. If the sheriff wrongfully seized *X*'s brick, the sheriff committed the tort of conversion — wrongful interference with the property of another. C_1 could therefore sue the sheriff for money damages. Whether the sheriff rightfully or wrongfully seized *X*'s brick basically depended on *D*'s intent when *D* gave the brick to *X*. If *D*'s intent was to hinder C_1, the sheriff rightfully levied. If *D* had a benevolent intent, such as love and concern for *X* — the levy was wrongful.[26] Because they were not always sure of what mischief dwelt in *D*'s heart at the crucial moment of transfer, sheriffs often declined to enforce C_1's execution against *X*'s brick. These sheriffs would return the writ to the court whence it came on the ground that it was *nulla bona*.

If the sheriff did indeed return the execution *nulla bona*, C_1 could bring a creditor's bill in equity against *X*.[27] Equity gave no remedy when there was an adequate remedy at law, and the writ of execution was the legal remedy for money judgment's fitful fever.[28] Return of the execution stood for the failure of the legal remedy. Under a creditor's bill in equity, C_1 could seek a declaratory judgment proclaiming that C_1 could sell *X*'s brick. This became known colloquially as "setting aside"[29] or "avoiding"[30] *D*'s conveyance of the brick to *X*. These terms are perniciously misleading. They imply that what once was *D*'s property is now *D*'s property again, thereby allowing C_1 to levy the brick as if it were *D*'s brick, not *X*'s brick. But it *is* *X*'s brick. *X* has legal title to the brick and *D* has no title at all. Equity insisted, however, that *X* held the legal title in trust for the benefit of the C_g.[31] Furthermore, since C_1 had commenced an equity action against *X*,

25. UNIF. FRAUDULENT CONVEYANCE ACT § 9(1)(b)((UNIF. L. COMM'N 1918). I question the constitutionality of this practice in Carlson, *Void and Voidable*, *supra* note 24, at 28–30.

26. Sheriffs used to insist on an indemnity against such liability before levying *X*'s property, Am. Surety Co. v. Conner, 166 N.E. 783, 784 (N.Y. 1929).

27. Feldstein v. Fusco, 143 N.E. 790, 791–92 (N.Y. 1924) ("If [the transfer] were made with intent to hinder . . . , then it could be set aside in a judgment creditor's action. In such an action a judgment not only had to be recovered, but an execution issued and returned unsatisfied before the action could be maintained.").

28. Fed. Housing Fin. Agency v. Nomura Holding Am., Inc., 873 F.3d 85, 137 n.52 (2d Cir. 2017).

29. UNIF. FRAUDULENT CONVEYANCE ACT § 9(1)(a) (UNIF. L. COMM'N 1918).

30. UNIF. FRAUDULENT TRANSFER ACT § 7(a)(1) (UNIF. L. COMM'N 1984).

31. As a Wisconsin court put it:

the court took the brick *in custodia legis* the moment C_1 commenced the action. By being the first to seek the brick, C_1 established priority over C_2 or C_3, who might file separate creditor bills.[32]

X was viewed as the constructive trustee of the brick on behalf of the C_g. The C_g classically had no *in personam* right against *X*. *X*'s liability was "non-recourse" — the C_g could get the brick but could not sue *X* personally. *X* is a fiduciary for the C_g, and any C_g (such as C_1) could bring an accounting action against *X*. In this action, *X* was called upon to produce the trust property. If *X* could not account for the trust property (or the traceable proceeds of the trust property), a court of equity was prepared to issue a money judgment against *X*. Thus, C_1 *might* become an unsecured creditor of *X*, but only where *X* could not account for the actual gold brick or its proceeds. This implies that the fraudulent transfer itself was not a tort that generates the right to a money judgment. Dissipation of the trust property by *X* was the tort.[33]

In the early twentieth century, the courts grew bone weary of hearing *X*'s story that *D* had no intent to hinder his creditors when he off-loaded the brick. The Uniform Fraudulent Conveyance Act (1918) therefore established the concept of "fraud in law."[34] If *D* was insolvent at the time *D* gave the brick to *X* and if *X* paid no fair consideration to *D* for the brick, the transfer was deemed fraudulent, without any inquiry into what *D* actually intended. This "new" idea[35] came to be known as a constructive fraudulent transfer.

The foregoing describes classic fraudulent transfer law as it existed circa 1920. Since then, there have been innovations, some of them unfortunate.

> [T]he fraudulent conveyance is not to be set aside to all intents and purposes. Instead, there is to be established in effect a lien against the property for the benefit of creditors, which will be prior and superior to the rights of the grantee, and the fraudulent conveyance to the latter is void only so far as to permit such lien of the creditors to be established as prior and superior to the rights of such grantee.

Campbell v. Drozdowicz, 10 N.W.2d 158, 160 (Wis. 1943).

32. Cassaday v. Anderson, 53 Tex. 527, 537 (1880) ("As between two creditors, if one has already obtained his judgment and instituted proceedings to set aside the fraudulent conveyance, this will give him priority of right to first have his debt satisfied out of the property . . . .").

33. A tort is the right to a money judgment for some wrong, with damages assessed at the time of the wrong. *See* Stephen A. Smith, *Duties, Liabilities, and Damages*, 125 HARV. L. REV. 1727, 1728 (2012) ("And what damage awards represent is the law's recognition that the plaintiff was wronged by the defendant.").

34. Husky Int'l Elecs. v. Ritz, 578 U.S. 355, 361 (2016).

35. On the pre-1918 history of the constructive fraudulent transfer, *see generally* John C. McCoid II, *Constructively Fraudulent Conveyances: Transfers for Inadequate Consideration*, 62 TEX. L. REV. 639 (1983).

The Bankruptcy Act of 1898 had already invited a bankruptcy trustee (*T*) to subrogate herself to the right of a C_g to avoid a fraudulent transfer.[36] Since 1934, the Bankruptcy Act and now the Bankruptcy Code has awarded to *T* her own right to sue *X* for the fraudulently received gold brick, without the need to subrogate to the rights of an existing creditor. At first, under the Chandler Act of 1934, *T*'s right was copied from the UFCA.[37] In 1978, Congress poured old wine into new bottles by enacting Bankruptcy Code § 548(a). The section departs from the antique language of the UFCA to re-phrase the same ideas in slightly different language. Thus, the constructive fraudulent transfer originally entailed a lack of "fair consideration." Today, we speak of the absence of "reasonably equivalent value."

The Bankruptcy Code also added a regrettable omnibus section covering all T's avoidance rights, not just the fraudulent transfer right of § 544. According to Bankruptcy Code § 550(a):

> to the extent that a transfer is avoided under section 544 [or] 548 . . . the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from — (1) the initial transferee of such transfer or *the entity for whose benefit such transfer was made*; or (2) any immediate or mediate transferee of such initial transferee.[38]

No one really knows what the emphasized language means when *D* has fraudulently transferred the gold brick to *X* prior to bankruptcy.[39] We shall have cause to speculate on some interpretations in the course of investigating our current topic — fraudulent foreclosure sales. For the

36. Bankruptcy Act of 1898 § 70(e), 30 Stat. 565.

37. *Id*. § 67(d).

38. Suhar v. Burns (*In re* Burns), 322 F.3d 421, 426 (6th Cir. 2003) (emphasis added). Section 550(a) only "semi-mediates." It is generally recognized that § 548(a) "avoids" without any reference to § 550, *see id*. On the somewhat mysterious function of § 550(a), *see* Steve H. Nickles, Deprizio *Dead Yet? Birth, Wounding, and Another Attempt to Kill the Case*, 22 CARDOZO L. REV. 1251 (2001).

39. Its principal use is to solve this problem: *SH* owes *C* a debt. *SH* causes insolvent *D Corp*. to pay *C*. *C* is seen as the initial transferee of a fraudulent transfer. *SH*, however, is liable as the "entity for whose benefit such transfer was made," Rupp v. Markgraf, 95 F.3d 936, 938–43 (10th Cir. 1996) (quoting 11 U.S.C. § 550(a)(1)). The problem with this view is that *C* is the initial transferee of the fraudulent transfer and thus has no good faith transfer defense, which, under § 550(b), is available only to transferee of a transferees. Accordingly, the scenario is better analyzed as follows: When *D Corp*. paid *C*, *D Corp*. became subrogated to *C*'s right against *SH*. *D Corp*. subsequently "forgives" its claim against *SH*. Debt forgiveness, it turns out, is a fraudulent transfer, if the forgiver is insolvent, *see infra* p. 46. *SH* is therefore the initial transferee of the fraudulent transfer, not the beneficiary. *C* was a bona fide purchaser for value of the cash *D Corp*. paid *C*, *see* David Gray Carlson, *Mere Conduit*, 93 AM. BANKR. L.J. 475, 516, 537–38 (2019).

moment, we note that, if someone other than *X* has benefited because *D* fraudulently transferred to *X*, it must be the case that the beneficiary has an *in personam* liability. Only *X* has the *in rem* liability, since *X* has legal title to the brick.

Since the enactment of the Bankruptcy Code, the Commission on Uniform Laws decided that state law should ape the new-age language of the Bankruptcy Code. The UFTA (and the largely identical Uniform Voidable Transactions Act (UVTA)) can be read to create an *in personam* right of *T* to recover damages from *X*. Perhaps fraudulent transfer law is no longer an *in rem* theory. Perhaps it has become a tort.[40] This shadowy possibility will cause us grief before we are done with irregular or collusive foreclosure sales.

For the moment, note that *BFP* is an interpretation of constructive fraudulent transfers under § 548(a)(2), governing *T*'s right against *X* and beneficiaries thereof. Under state law, we apply the UFTA or UVTA. Occasional differences between federal and state law will pop up.

III. FORECLOSURES AS CONSTRUCTIVE FRAUDULENT TRANSFERS

In bankruptcy, *BFP* states the rule — for constructive fraudulent transfer cases only, within the meaning of Bankruptcy Code 548(a)(1)(A).[41] The *BFP* opinion forswears applicability to intentional frauds governed by § 548(a)(1)(B). We therefore limit ourselves, for the moment, to foreclosures that are constructive fraudulent transfers. Later, we turn to foreclosures that are actual frauds.

I introduce a super-simple set of hypothetical facts to render analysis more intuitive. Suppose insolvent *D* owns a gold brick worth $100. *D* conveys a perfected security interest to a secured party (*SP*) in the brick in exchange for a $60 advance. *SP*'s security interest is not itself a fraudulent transfer. We assume that *SP* in good faith conveyed $60 to *D* and has obtained a security interest in the brick in return.[42]

Suppose now that *D* is in default to *SP*. If *SP* forecloses and sells to a buyer (*B*) for $100, *SP* may retain enough cash to pay *SP*'s secured claim.

40. *See generally* Carlson, *Tort*, *supra* note 24.

41. *See generally* BFP v. Resolution Trust Corp., 511 U.S. 531 (1994).

42. If *SP* knows that *D* always did intend to abscond with the $60, the C_g can establish that the purpose of the security interest was to hinder the C_g. Since *SP* knew this, *SP* was a bad faith purchaser. Equity courts would "avoid" such a security interest. Leveraged buyouts (when they are fraudulent) are an example, *see* United States v. Tabor Ct. Realty Corp., 803 F.2d 1288, 1292 (3d Cir. 1986). But here, we will assume that *SP* is a good faith purchaser for value, so the security interest cannot be avoided.

SP must remit the surplus to *D*.[43] Once C_1 has a judgment, C_1 may levy upon the $40 surplus.

When *SP* forecloses, *SP*'s motive is to recover $60. If *SP* engaged in aggressive marketing, *SP* could realize $100. That much is baked into the hypothetical. But foreclosure law requires only a minimal "commercially reasonable" sales effort. With regard to personal property, the Uniform Commercial Code (UCC) explicitly says that it is reasonable for *SP* to sell for less than $100.[44] Accordingly, in our hypothetical, *SP* lines up a buyer *B* who pays $60 for property worth $100. For the moment, we assume that *SP* has conducted a commercially reasonable sale in spite of the mediocre price.

Ere *BFP* purged the commonweal, some courts thought that a foreclosure sale could be a constructive fraudulent transfer. The story opens with the 1977 foreclosure of a mortgage on real property in Texas. In *Durrett v. Washington National Insurance Co.*,[45] *D* had defaulted, and *SP* held a foreclosure sale under a deed of trust that authorized *SP* to sell *D*'s equity at auction.[46] *SP*'s claim was for, we shall say, $60 and the appraised value of the collateral was $100. *B* won the auction for $60. *D* then filed for bankruptcy under the Bankruptcy Act of 1898, where *T*[47] claimed that *B* had received a fraudulent conveyance because *B* did not pay a "fair consideration."

The lower courts ruled that *B* did indeed pay a fair consideration. The court of appeals reversed. Said the court:

> We have 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 [Bankruptcy] Act, which has approved the

---

43. U.C.C. § 9-615(d)(1) (AM. L. INST. & UNIF. L. COMM'N 2023).

44. According to U.C.C. § 9-627(a):

> The fact that a greater amount could have been obtained by a . . . disposition . . . at a different time or in a different method by that selected by the secured party is not of itself sufficient to preclude the secured party from establishing that the . . . disposition . . . was made in a commercially reasonable manner.

45. 621 F.2d 201 (5th Cir. 1980).

46. *Id.* at 202–03; *see* Lawrence Ponoroff, *Non-Collusive Foreclosure Sales and the Limits of the Preference Law: Please, Sir, I want Some More*, 97 TUL. L. REV. 519, 528–31 (2023).

47. Since *D* filed in chapter XI under the old Bankruptcy Act of 1898. *D* was a "debtor-in-possession." But we shall refer to *D* as T to emphasize that *D*'s fiduciary was to the unsecured creditors of *D*. Only creditors can bring a fraudulent transfer action. *D* as debtor-in-possession represents the creditors. *D* as private citizen could never have brought this action.

> transfer for less than 70 percent of the market value of the property.[48]

Because *B* paid less than 70% (60% on our hypothetical facts, 57.7% under the real facts of the case), *B* had not paid a fair consideration.

B had objected that it was *SP*, not *D*, that made the transfer. But the *Durrett* court quoted the Bankruptcy Act's definition of "transfer":

> "Transfer" shall include the sale and every other and different mode, direct or indirect, of disposing of or parting with property or with an interest therein or with possession thereof or of fixing a lien upon property or upon an interest therein, absolutely or conditionally, voluntarily or involuntarily, by or without judicial proceedings, as a conveyance, sale, assignment, payment, pledge, mortgage, lien, encumbrance, gift, security, or otherwise; the retention of a security title to property delivered to a debtor shall be deemed a transfer suffered by such debtor.[49]

Said the *Durrett* court:

> The comprehensive character of this definition leads us to conclude that the transfer of title to the real property of [D] by a trustee[50] on foreclosure of a deed of trust, to a purchaser at the same constitutes a "transfer" by [D] within the purview of section 67(d). The actual transfer of title was made by [D] to [*SP*] via the deed of trust,[51] executed April 7, 1969, to secure an indebtedness then owing to [*SP*]. Possession of the property was retained by [D] subject to the power of the trustee to sell and deliver possession of the property, on default, at a foreclosure sale. While the actual conveyance of title by [D] was made on April 7, 1969, possession was retained until foreclosure of the deed of trust. The "transfer" within the contemplation of the Act, was not final until the day of the foreclosure sale, January 4, 1977. This was accomplished within the one-year period provided by section 67(d)(2).[52]

Following the foreclosure sale in *Durrett*, Congress enacted § 548(a) and in 1984 it added the words "voluntary or involuntary" to modify "transfer."[53] This was thought by some[54] (including the dissenters in

---

48. *Durrett*, 621 F.2d at 203.

49. *Id.* at 204.

50. Here, the court means a private trustee of *SP* appointed under a deed of trust.

51. In Texas, a deed of mortgage transfers legal title to *SP*, while borrower (D) retains equitable title. In "lien theory" states, D retains equitable title and conveys a lien to *SP*, RESTATEMENT (THIRD) OF PROP. § 4.1 (AM. L. INST. 1996). Title theory versus lien theory probably makes no difference and certainly makes no difference for the purposes of this article.

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

53. 11 U.S.C. § 548(a)(1)(2023) ("The trustee may avoid any transfer . . . if the debtor voluntarily or involuntarily . . . .").

54. *See* Frank R. Kennedy, *Involuntary Fraudulent Transfers*, 9 CARDOZO L. REV. 531, 565–75 (1987).

BFP)[55] to vindicate the *Durrett* holding. Writing for the majority, Justice Scalia thought otherwise.

Durrett created a stir in the world of secured lending.[56] *Durrett* implied that, if *D* went bankrupt after foreclosure, *T* could undo the sale. Bankruptcy, via fraudulent transfer law, now constituted a post-sale redemption regime: if *T* were to refund $60 to *B*, *T* could recapture the $40 profit for the benefit of the unsecured creditors.[57]

A point should be clarified about *Durrett*. In the case, *B* bought Blackacre for $60, knowing that Blackacre was worth $100 and that paying 60% is obviously not fair consideration. Under Bankruptcy Act § 67(d)(6):

> A transfer made . . . by a debtor . . . which is fraudulent . . . against creditors . . . shall be null and void against the trustee, except as to a bona fide purchaser . . . for a present fair equivalent value: *And provided further*, That such purchaser . . . who without actual fraudulent intent has given consideration less than fair . . . for such transfer . . . may retain the property . . . as security for repayment.[58]

Can *T* claim that, since *B* knew she was paying too little, she is not a good faith purchaser, and so forfeits the $60?[59] If so, *B* has not only coughed up the $40 profit but has forfeited the $60 that *B* paid to *SP*.

B may indeed be in bad faith, but it does not matter. *B* is not at risk for the $60 paid to *SP*. We observe that *B* is buying two things at the foreclosure sale. First, *D* buys *SP*'s security interest. By stipulation, this security interest is not a fraudulent conveyance. When *SP* sells the security interest to *B*, *D* is not even the transferor. Therefore, *B* buys the security interest free and clear of the C_g of *D*. Second, *B* buys *D*'s equity, worth

---

55. 511 U.S. 531, 554–55 (1993) (Souter, J., dissenting).

56. *Compare* Robert. M. Zinman, *Fraudulent Transfers According to Alden, Gross, and Borowitz: A Tale of Two Circuits*, 39 BUS. LAW. 977 (1984), *with* Steven M. Alden et al., *Real Property Foreclosure as a Fraudulent Conveyance: Proposals for Solving the* Durrett *Problem*, 38 BUS. LAW. 1605 (1983).

57. Madrid v. Laws. Title Ins. (*In re* Madrid), 725 F.2d 1197, 1202 (9th Cir. 1984), *cert. denied*, 469 U.S. 833 (1984) ("[A] *de facto* redemption right to obtain real property previously sold at foreclosure proceedings."). Professor Kennedy objected to this analogy:

> A redemption statute, however, is designed only for protecting the debtor and creditors . . . who have no interests in the transferred property. Moreover, the statutory right of redemption is not dependent on a showing of the debtor's insolvency, inadequacy of consideration, or intent to defeat the rights of any party to the agreement enforced by the sale or by any third party.

Kennedy*, supra* note 54, at 575.

58. Durrett v. Washington Nat'l Ins., 621 F.2d 201, 202 n.3 (5th Cir. 1980).

59. *See* Consove v. Cohen (*In re* Roco Corp.), 7701 F.2d 978, 984 (1st Cir. 1983) (bad faith purchaser denied a defense under Bankruptcy Code § 548(c)).

$40. This *B* buys for nothing. *B* may indeed be in bad faith as to the equity, but *B* is the honest owner of the honest security interest for $60, and this *T* must honor, even if *B* is in *mauvais foi* as to the equity.[60]

When state law governs, an additional point can be made. Under the UFTA, "asset" is defined as "property of a debtor, but the term does not include: property to the extent it is encumbered by a valid lien."[61] Thus, the "asset" that *D* involuntarily transfers to *B* (via *SP*) is the $40 equity, not the $100 thing. Therefore, *B* may be in bad faith when she paid $60 to obtain a $100 thing, but what *D* transferred was the $40 "asset" — not the $100 thing. *B*'s liability to C_1 is therefore limited to $40. In no way is *B* required to be a *good faith* purchaser to the extent that *B* paid $60.[62]

Soon after *Durrett*, the drafters of the Uniform Fraudulent Transfer Act moved to overrule it at least insofar as state law was concerned. According to § 3(b):

> For the purposes of Sections 4(a)(2) and 5, a person gives a reasonably equivalent value if the person acquires an interest of the debtor in an asset pursuant to a regularly conducted, noncollusive foreclosure sale or execution of a power of sale for the acquisition or disposition of the interest of the debtor upon default under a mortgage, deed of trust, or security agreement.[63]

The prior UFCA had no such provision. In *Voest-Alpine Trading USA*

---

60. *See* Hamilton Natl. Bank v. Halstead, 31 N.E. 900, 901 (N.Y. 1892) ("Should A. convey his farm to B. subject to a valid pre-existing mortgage of five thousand dollars held by a third party, and B. subsequently dispose of it for a larger sum, out of the proceeds of which he pays the mortgage, he cannot be required to pay to the creditors the full value of the farm without deducting the amount due on the mortgage, for as to that sum the creditors have no equity. If the fraud had not been consummated, only the value of the property in excess of the mortgage could have been made available in payment of the claim of the creditors. As to that interest secured by the mortgage, no wrong was done [to] them. Having no right to such interest, no principle of equity exists on which to found a claim for an appropriation of any benefit, on account of it, from a fraudulent transfer grantee of the equity of redemption.").

61. UFTA § 1(2)(i).

62. Admittedly, the UFTA provisions that establish *B*'s liability do not use the word "asset." For instance, according to § 5(a):

> A transfer made . . . .by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made . . . if the debtor made the transfer . . . without receiving a reasonably equivalent value in exchange for the transfer . . . and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer . . . .

Id. § 5(a).

The word "asset" never appears, but it does refer to "transfer." "Transfer" is defined as "every mode . . . of disposing of or parting with an *asset* or an interest in an *asset*," UFTA § 6(12). Thus, *B* owes $40, not $100.

63. UFTA § 3(b).

Corp. v. Vantage Steel Corp.,[64] the Third Circuit, applying the soon-to-be-outmoded UFCA, found that an Article 9 sale was constructively fraudulent.[65] Under the UFTA, it would be incumbent upon C_1 to show that the Article 9 sale was irregular before the foreclosure could be a fraudulent transfer.[66]

Fifteen years later, the Supreme Court in *BFP v. Resolution Trust Corp.* borrowed this UFTA principle to overrule *Durrett*.[67] Sticking with our illustrative numbers, *SP* in *BFP* claimed $60 against property worth $100. In foreclosure, *B* bought for $60, and *T* sued *B* for fraudulent transfer. By 1994, "fair consideration" of the Bankruptcy Act had become "reasonably equivalent value" in the Bankruptcy Code.[68]

In his opinion, Justice Scalia criticized *Durrett* for referring to "fair market value." "Reasonably equivalent value" had become the statutory phrase *du jour* — not "fair consideration."[69] There is a "glaring discrepancy between the factors relevant to an appraisal of a property's market value, on the one hand, and the strictures of the foreclosure process on the other."[70]

Justice Scalia observed that, before *Durrett*, there was twice-blessed harmony between fraudulent transfer law and the law of mortgage foreclosure. "[A]bsent clearer textual guidance than the phrase 'reasonably equivalent value' — a phrase entirely compatible with preexisting practice — we will not presume such a radical departure."[71] "[W]e deem, as the law has always deemed, that a fair and proper price, or a 'reasonably equivalent value,' for foreclosed property, is the price in fact received at the foreclosure sale, *so long as all the requirements of the State's foreclosure law have been complied with*."[72] The key language is italicized. The statutory requirements of foreclosures must be complied with. The assumption is that the equation of what *B* paid with what *B* received depends on procedural regularity.

64. 919 F.2d 206 (3d Cir. 1990).

65. *See id.* at 213.

66. *Voest* was also a collusive foreclosure sale and an intentional fraud on creditors. But the court also insisted that it qualified as a constructive fraudulent transfer as well. In the course of so ruling, it missed the tort compensation concept defined earlier, *see supra* text accompanying note 14.

67. *See* BFP v. Resolution Trust Corp., 511 U.S. 531, 546 (1994). *See generally* Durrett v. Washington Nat'l Ins. Co., 621 F.2d 201 (5th Cir. 1980).

68. National Bankruptcy Act, § 70(e), July 1, 1898, c.541, 30 Stat. 565.

69. *BFP*, 511 U.S. at 540.

70. *Id*. at 538.

71. *Id*. at 543.

72. *Id*. at 545 (emphasis added).

"Collusion" — a word that appears in the UFTA's definition of reasonably equivalent value — properly belongs to the category of actual fraudulent transfer.[73] We therefore leave it aside for the moment. We focus now on constructive fraudulent transfers and the UFTA's requirement that the foreclosure sale must be "regularly conducted." If regularly conducted, we are to equate the price paid with the value received. Otherwise not.

A. Irregular Mortgage Foreclosures

Real estate foreclosure sales are carefully regulated by the courts. In most states, only a court can proclaim that a default has occurred. A court officer conducts a sale by auction. The court approves the terms of the sale. When a court is involved, the "necessary parties" must be joined in the foreclosure action. Necessary parties are those with property rights deriving from *D* but which are junior to *SP*'s mortgage. These are the parties who, along with *D*, are foreclosed.[74]

Suppose *D* has granted a mortgage to SP_1 and a second mortgage to SP_2. If SP_1 forecloses, SP_2 is a necessary party. If SP_1 neglects to join SP_2, where SP_1 is on notice that SP_2 exists, SP_2 is not foreclosed. The sale, however, is otherwise valid. Suppose *B* wins the auction that SP_1 foments. If the sale had been regularly conducted, *B* would have bought fee simple absolute. Just prior to the auction, *D* owned the equity and $SP_{1\text{-}2}$ had mortgages. After the sale, *B* has fee simple. Since fee simple is the totality, *B* has it all; *D* and $SP_{1\text{-}2}$ have nothing. *B*'s fee simple is therefore made up of three pieces: SP_1's senior mortgage, SP_2's junior mortgage and *D*'s equity. Where, however, SP_1 neglected to make SP_2 a party to the foreclosure proceeding, SP_2 is not foreclosed. *B* buys only two pieces of the puzzle — SP_1's senior mortgage and *D*'s equity. SP_2 survives for the moment but is still doomed. Because *B* owns SP_1's senior mortgage, *B* can foreclose again, thereby dispatching SP_2 unto the kingdom of perpetual night. Omitting SP_2 creates extra red tape for *B*, but *B*'s title can be re-established by properly foreclosing against SP_2.

Junior lien creditors and other junior transferees are necessary parties.[75]

---

73. UFTA § 5(a).

74. In a minority of states, a private sale may occur. But typically, a court must award a judgment on the debt D owes *SP*. Once that judgment is issued, *SP* (or, in a deed of trust, a private trustee appointed by contract) holds a public sale. Statutes often prescribe the time and place and advertisement of the sale. Courts of equity will enjoin the sale if D, in advance of the sale, claims the sale is unfair or unlawful. In these private sales, the junior claimants are not necessarily entitled to notice of the sale. They are expected to monitor D's situation to make sure D is not in default to *SP*.

75. N.Y. REAL PROP. LAW § 1311 (Consol. 2023).

Significantly, the C_g of *D* are not. In fact, if C_1 (without a judicial lien) tries to intervene in the foreclosure proceeding, the motion will be sternly denied. The C_g are "improper parties."[76] At the time of foreclosure, the C_g have no property in the collateral. They are "general creditors," not property claimants.

BFP indicates that, when the mortgage foreclosure sale is irregular, *T* (on behalf of the C_g) may, after the fact, claim that *B* has received *D*'s property for no reasonably equivalent value. If SP_2 is made a party to the foreclosure proceeding, *B* is entitled to *BFP* protection. But where SP_2 is not made a party, then SP_1's sale is not properly conducted. Ironically, no C_g had standing to be heard in the foreclosure proceeding. Yet the error in not joining SP_2 signifies that C_1 can challenge *B*'s title by asserting constructive fraudulent transfer. The fault involved omitting SP_2, whom *B* can later foreclose. But because SP_1 neglected a procedural duty to SP_2, *B*'s title is ruined. C_1 can slap a lien on *B*'s property, and there's nothing *B* can do about it.

B. Commercially Reasonable Sales Under Article 9

Article 9 foreclosures differ from mortgage foreclosure because Article 9 authorizes private sales without an auction. Article 9, however, requires that all aspects of a foreclosure sale be reasonable.[77] *SP* may sell at auction, but if *SP* chooses to sell privately, it suffices that *SP* notify *D* that a private sale would occur after some stipulated date.[78]

When *SP* conducts a private sale, does *BFP* apply? Arguably not. When Justice Scalia discussed the nature of foreclosure sales, he emphasized the quick and artless nature of the marketing under such conditions.[79] *B* should be protected when *SP* follows the rules with regard to a public sale. But in a private Article 9 sale, *SP* is under no time pressure and should be able to achieve the fair market value that Justice Scalia said was not available in a foreclosure by auction. If this is correct, *BFP* never applies to private Article 9 foreclosure sales.

In *Case v. TBAC-Prince Radner (In re Price Gardner, Inc.)*,[80] a bankruptcy court so held.[81] The court quoted this sentence from *BFP*, "We

---

76. Stout v. Lye, 103 U.S. 66, 70 (1880) (explaining that unsecured creditors cannot contest the validity of a mortgage foreclosure, but a creditor with a judicial lien may do so).

77. U.C.C. § 9-610(b) (AM. L. INST. & UNIF. L. COMM'N 2023).

78. U.C.C. § 9-613(1)(E).

79. *See* BFP v. Resolution Trust Corp., 511 U.S. 531, 539 (1994).

80. 220 B.R. 63 (Bankr. E.D. Mo. 1998).

81. *See id.*; *accord* KIND Operations, Inc. v. Cadence Bank (*In re* PA Co-Man, Inc.), 644 B.R. 553, 629–30 (Bankr. E.D. Pa. 2022).

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."[82]

But this conclusion about the scope of *BFP* is limited to *T*, proceeding under Bankruptcy Code § 548(a)(2). Where C_1 proceeds under the UFTA, *B* is protected by UFTA § 3(b):

> For the purposes of Sections 4(a)(2) and 5, a person gives a reasonably equivalent value if the person acquires an interest of the debtor in an asset pursuant to a regularly conducted, noncollusive foreclosure sale or execution of a power of sale for the acquisition or disposition of the interest of the debtor upon default under a mortgage, deed of trust, or security agreement.[83]

A commercially reasonable *private* sale is regularly conducted; therefore, C_1 has no grounds under state law to challenge *B*'s title. Sections 4(a)(2) and 5 describe constructive fraudulent transfers. The assumption of reasonably equivalent value falls away, however, when *D* affirmatively intends to hinder the C_g within the meaning of UFTA § 4(a)(1).[84]

To make assurance double sure, UFTA § 8(e) separately provides, "A transfer is not voidable under Section 4(a)(2) or Section 5 if the transfer results from: . . . (2) enforcement of a security interest in compliance with Article 9 of the Uniform Commercial Code . . . ."[85] Sections 4(a)(2) and 5 describe constructive fraudulent transfers. The reference is designed to deny the defense in cases where the theory is actual fraud. The defense only applies in constructive fraudulent transfer cases where the sale "complies" with Article 9's command that sales be reasonable.

Although the UVTA rarely makes changes in the substance of the UFTA, it does so with regard to Section 8(e). Here is § 8(e) of the UVTA:

> A transfer is not voidable under Section 4(a)(2) or Section 5 if the transfer results from: . . . (2) enforcement of a security interest in compliance with Article 9 of the Uniform Commercial Code, *other than*

82. *BFP*, 511 U.S. at 537 n.3. There is also a series of cases proclaiming that *BFP* does not apply to strict foreclosure tax procedures, on the ground that, in such a procedure, there is no competitive bidding as attends a mortgage foreclosure *sale*, *see, e.g.,* Gunsalus v. County of Ontario, 37 F.4th 859, 865 (2d Cir. 2022). *See generally* Laura B. Bartell, *Tax Foreclosures as Fraudulent Transfers ¾ Are Auctions Really Necessary*, 93 Am. Bank. L.J. 681 (2019) (gathering the cases but expressing skepticism as to whether fraudulent transfer law should be used to attack tax foreclosures). These tax cases also support the notion that *BFP* does not apply in private UCC sales, precisely because there is no overt competitive bidding, *see* KIND Operations, Inc., 644 B.R. at 629.

83. UFTA § 3(b).

84. UFTA § 4(a)(1).

85. UVTA § 8(e).

> *acceptance of collateral in full or partial satisfaction of the obligation it secures*.[86]

Article 9 provides *SP* with a strict foreclosure remedy, which it awkwardly calls "acceptance of collateral."[87] The idea is that *SP* may propose that *SP* keep the collateral instead of selling it, in exchange for which *D*'s obligation is forgiven in whole or part. *D* must consent to this.[88] Otherwise, *SP* must foreclose by sale.

Suppose SP proposes to accept the collateral in exchange for discharge of the secured claim and *D* consents. Thus, SP receives $100 in value in exchange for $60 in discharged debt. Is this a fraudulent transfer?

If we read § 3(b) in isolation, SP has received a constructive fraudulent transfer. Section 3(b) applies to equate value given and value received in a foreclosure "sale," or an "execution of a power of sale . . . under a . . . security agreement."[89] Acceptance of collateral is no sale (supposedly).[90] But § 8(e) of the UFTA comes to the rescue. *B* is defended under the UFTA if acceptance of collateral is "in compliance with Article 9."[91] The UVTA reverses this result. Even if acceptance is regular and valid under the UFCA, *SP* has nevertheless received a fraudulent transfer.

These issues arose in *Huntsman Packaging Corp. v. Kerry Packaging Corp.*,[92] a UFTA case. Judge G. Kendall Sharp ruled that *SP*'s acceptance of collateral was both a constructive and actual fraudulent transfer. To the

---

86. UVTA § 8(e) (emphasis added). This change accords with a non-uniform amendment to the UFTA enacted in California, *see* Kennedy, *supra* note 54 at 567.

87. Acceptance of collateral is "strict foreclosure, a procedure by which the secured party acquires the debtors' interest in the collateral without the need for a sale or other disposition under Section 9-610," U.C.C. § 9-620 cmt, 2 (AM. L. INST. & UNIF. COMM'N 2010). According to U.C.C. § 9-620(a): "a secured party may accept collateral in full . . . satisfaction of the obligation it secures only if: (1) the debtor consents to the acceptance under subsection (c) . . . ." And according to U.C.C. § 9-620(c)(2): "a debtor consents to an acceptance of collateral in full satisfaction of the obligation it secures only if the debtor agrees to the terms of the acceptance . . . ." Section 9-620(b) makes clear that *D* may be the one who initiates the acceptance of collateral. *See* U.C.C. § 9-620(b) ("A purported or apparent acceptance of collateral under this section is ineffective unless: (1) the secured party consents to the acceptance in an authenticated record . . . .").

88. U.C.C. § 9-620.

89. UVTA § 3(b).

90. A U.C.C. Comment denies "acceptance of collateral" is a sale, U.C.C. § 9-610 cmt. 2. One could disagree. "A 'sale' consists in passing of title from the seller to the buyer for a price," U.C.C. § 2-106(1) (third sentence). *D* has title, *SP* has power to transfer that title, and, utilizing that power, *SP* transfers title to *SP* for a price. Seems like a sale to me!

91. UVTA § 8(e).

92. 992 F. Supp. 1439 (M.D. Fla. 1998), *aff'd sub nom*, Huntsman Packaging v. Kerry, 172 F.3d 882 (11th Cir. 1999).

extent it was an actual fraud, § 8(e) did not apply. But Judge Sharpe was keen to find the transfer was *also* a constructive fraud. He therefore had to account for UFTA's version of § 8(e).

In *Hunstman*, *D Corp*. had granted to *SP* a security interest on all assets.[93] When *D Corp*. became financially distressed, *D Corp*. conveyed all of the assets to *SP* in exchange for cancelling the secured claim of $60.[94] *SP* then conveyed the assets to *B*, who paid *SP* $60. The fair market value of the property was $100. C_1 sued *B* on a constructive fraudulent transfer theory.

According to the structure of the transaction, *D Corp.* conveyed all encumbered assets to *SP* in exchange for satisfaction of *SP*'s secured claim. This acceptance of collateral was in compliance with Article 9 and *B* could defend under UFTA § 8(e). In order to skirt the defense in § 8(e), the *Huntsman* court "collapsed" the transaction: "[T]he transaction was a single, consensual, and voluntary transaction intended to convey the [*D Corp*] assets to [*B*] free of any liabilities."[95] Thus, the court declined to treat *SP* as the initial transferee in a collateral acceptance. It rewrote history so that *D Corp.* transferred equity (via *SP*) directly to *B*. *SP* was rendered into a "mere conduit."[96]

The court held that C_1 had made out a case of constructive fraud against *B*. Given UFTA § 3(b), this implies that the court viewed the "sale" as not regularly conducted. Indeed, there was no shopping for buyers, no investment bankers hired, no advertising, and *B* paid the shareholder (*SH*) of *D Corp.* a kickback to allow the sale to go through.

Properly, *SP* had a defense under UFTA § 8(e) because *SP* was enforcing "a security interest in compliance with Article 9 of the Uniform Commercial Code."[97] *D Corp*. had proposed to *SP* an acceptance of collateral. *SP* agreed to it. Under § 9-620, *D* can propose an acceptance of collateral and *SP* may consent to it.[98] *SP* did not receive an objection from "a person to which the secured party was required to send a proposal under

93. *Id.* at 1443.

94. SP and D Corp "executed a document entitled Agreement Regarding Conditional Release of Indebtedness . . . . Therein, [SP] agreed to accept [D Corp.'s] assets in exchange for forgiveness of [D Corp.'s] obligations to [SP], provided a third party purchased the assets from [SP] for an amount equal to the outstanding balance of [D Corp.'s] obligations to [SP]," *id*.

95. *Id*. at 1444.

96. For criticism of the legal fiction "mere conduit," *see generally* David Gray Carlson, *Mere Conduit*, 93 AM. BANKR. L.J. 475(2019).

97. *See, e.g.*, FLA. STAT. § 726.109(5)(b).

98. U.C.C. § 9-620(b)(1) (AM. L. INST. & UNIF. L. COMM'N 2022).

section 9-621 . . . ."[99] Indeed, there were no such persons.[100] The acceptance of collateral was in fact regularly conducted.

In fact, the § 8(e) defense did not apply. Independently, the court found that *D* intended to hinder C_1 under UFTA § 4(a)(1). The defense only applies to constructive fraudulent transfers voidable under § 4(a)(2) or § 5. But wishing not to rely on actual fraud and determined to make the constructive fraud theory work, Judge Sharpe, as we have said, collapsed the transaction. According to the court, the defense did not apply because, "the sale of [*D Corp.*'s] assets first to [*SP*] and then to [*B*] was not a regularly conducted, noncollusive foreclosure sale within the meaning of the Act. As such, [§ 8(e)] is of no defensive value to [*SP* or *B*] in the case at bar."[101]

In short, the *Huntsman* court took two transactions — *D* to *SP* via acceptance of collateral and *SP* to *B* in an Article 2 sale — and collapsed them into one — an Article 9 foreclosure where *B* bought from *D*, not from *SP*. Once collapse was imposed on the transaction, what was structured as a collateral acceptance was viewed as a commercially unreasonable foreclosure sale.[102]

The UVTA makes this artful maneuver unnecessary. Since *SP* does not have the § 8(e) defense under the UVTA, *SP* would have been liable as the initial transferee of a constructive fraudulent transfer.[103] *B* would be liable as the transferee of a transferee (if *B* was not a *bona fide* transferee for value given to *SP*).[104] To be noted is the fact that under the *Huntsman* collapse, *SP* is viewed as a "mere conduit" and not a transferee at all. Only *B* is a defendant. Under the UVTA, *SP* is liable as the initial transferee and *B* is liable as transferee of a transferee. Both *SP* and *B* are fraudulent transfer defendants.

---

99. *See id.* § 9-620(a)(2)(A).

100. Section 9-621 requires SP to send a proposal for acceptance of collateral to:

> (1) any person from which the secured party has received, before the debtor consented to the acceptance, an authenticated notification of a claim of an interest in the collateral;
>
> (2) any other secured party or lienholder that, 10 days before the debtor consented to the acceptance, hold a security interest in or other lien on the collateral perfected by the filing of a financing statement . . . ,

U.C.C. § 9-621(a)(1). No such persons existed.

101. Huntsman Packaging Corp. v. Kerry Packaging Corp., 992 F. Supp. 1439, 1447 (M.D. Fla. 1998).

102. *See id.*

103. *See* U.V.T.A. § 8(b)(1) (UNIF. L. COMM'N 2014).

104. *See id.* § 8(b)(2).

To recapitulate, if we have a commercially unreasonable sale, *BFP* does not apply in federal cases, and the above-quoted passages from the UFTA do not shield *B*. But even so, there may be no fraudulent transfer theory. In an Article 9 case, tort compensation implies reasonably equivalent exchange.

Suspending the tort compensation point for a moment, the most common type of commercial unreason is failure to send *D* or a surety of *D* a timely notice of the sale.[105] Even if *D* knew of the sale, failure to mail the right document makes the sale commercially unreasonable. Although C_1 is excluded from the Article 9 sale or strict foreclosure procedure, C_1 can challenge *B*'s title by claiming the foreclosure sale was commercially unreasonable as to some other party such as *D* or a surety of *D*. C_1 is not entitled to notice. But because some *other* party received a defective notice, C_1 gets to upset the apple cart of *B*'s title. This is especially ironic because *B* is promised good title by U.C.C. § 9-617(b) if *B* in good faith buys from *SP* without knowledge of the commercial unreason. According to § 9-617(a):

A secured party's disposition of collateral after default:

> (1) transfers to a transferee for value all of the debtor's rights in the collateral;
> (2) discharges the security interest under which the disposition is made;
> (3) discharges any subordinate security interest or other subordinate lien [other than liens created under [cites acts or statutes providing for liens, if any, that are not to be discharged].[106]

Subparagraphs (2) and (3) describe the "necessary parties" in an Article 9 foreclosure. Note that the C_g are not inscribed there.

Section 9-617(b) in turn provides, "A transferee that acts in good faith takes free of the rights and interests described in subsection (a) of this section, even if the secured party fails to comply with this article or the requirements of any judicial proceeding."[107] Thus, assuming *B* has acted in good faith, *B* takes free of C_1's *in rem* rights in the assets bought if C_1's right is described in U.C.C. § 9-619(a).

But this protection works only against "interests described in subsection (a)." Is C_1 described by (a)(3)? The answer is certainly yes if C_1 has, prior to foreclosure, "become[] a lien creditor"[108] on *D*'s equity in the collateral. In that case, C_1 has a "subordinate lien" which is foreclosed, if *B* does not

105. *See* U.C.C. §§ 9-611 to -614. *See generally* David Gray Carlson, *Commercially Reasonable Sales in the 21st Century*, 50 OHIO N.U. L. REV. 47 (2023).

106. U.C.C. § 9-617(a).

107. *Id.* § 9-617(b).

108. U.C.C. § 9-317(a)(2); *see also id.* § 9-102(a)(52) (defining "lien creditor").

know that *SP*'s sale lacked commercial reason.

Section 9-617(b) says that *B* has bought free and clear of C_1's judicial lien. But may C_1 turn around and claim an equitable lien on *B*'s property because the foreclosure sale was a constructive fraudulent transfer from *D* to *B* (via the intercession of *SP*)? The answer is probably yes. Without a judgment against *D*, C_1 is an unsecured creditor of *D*. An unsecured creditor has no property interest in *D*'s property. But once *D* fraudulently transfers to *B* (via *SP*), *B* takes the property in trust for C_1, and C_1 has an equitable lien on *B*'s property. C_1 has no lien against *D* but does have a lien against *B*. C_1's fraudulent transfer right therefore does not seem to be "described in subsection (a)," and therefore *B* does not take free and clear of C_1's right (even if C_1's preexisting judicial lien is wiped out).

The UFTA and Article 9, it seems, fit poorly together. Coming into the Article 9 environment, *B* may expect that her title derived from an apparently regular Article 9 sale is free and clear of constructive fraudulent transfer theory. A close reading of the UFTA and the UCC does not justify any such expectation. Our tort compensation theory, however, may smooth over these rough spots.

A further paradox comes from the *BFP* opinion, which governs in bankruptcy cases. Recall this sentence from the *BFP* opinion:

> Any irregularity in the conduct of the sale *that would permit judicial invalidation of the sale under applicable state law* deprives the sale price of its conclusive force under § 548(a)(2)(A), and the transfer may be avoided if the price received was not reasonably equivalent to the property's actual value at the time of the sale (which we think would be the price that would have been received if the foreclosure sale had proceeded according to law).[109]

Where § 9-617(b) applies (*i.e.*, *B* has no knowledge of *SP*'s commercial unreason), the UCC does not permit the invalidation of the sale. Judicial invalidation is not possible, but this does not help *B*. We have already decided that, when C_1 has a lien prior to foreclosure, § 9-317(b) applies. But where C_1 has no lien prior to foreclosure or has lost the lien under § 9-617(a)(3), § 9-317(b) does not apply.

But the above-quoted sentence from *BFP* applies regardless of the meaning of § 9-617(b). To see why, we note that the C_g are not parties in interest in *SP*'s foreclosure. The C_g have no right to intervene to cancel a foreclosure sale. Rather, only *D* or a foreclosed junior lienor may challenge the sale. Nevertheless, the sentence from *BFP* presupposes that a mere hypothetical right of a party in interest to challenge the validity of the sale authorizes *T* (on behalf of *D*'s unsecured creditors) to allege that a

109. BFP v. Resolution Trust Corp., 511 U.S. 531, 545–46 (1994) (emphasis added).

foreclosure sale is a fraudulent transfer. But, where *B* is ignorant of the commercial unreason, no party may challenge the validity of the sale; the above sentence from *BFP* cannot be fulfilled. Even if the sale was irregular, *T* may not assert an avoidance right under § 548(a) because *no one* can set aside the sale.

Therefore, the dictum from *BFP* opens a gap between state law and bankruptcy. Under the UFTA, where *B* has no knowledge of the commercial unreason, C_1 may nevertheless recover a fraudulent transfer from *B*. Under the *BFP* dictum, *T* may not recover, because no court can cancel the foreclosure sale. But no worries! *T* cannot sue under § 548(a)(2). But *T* can subrogate to the rights of some C_g under the UFTA and accomplish the same thing. As always, in an Article 9 cases, tort compensation implies equivalence of exchange.

IV. INTENTIONAL FRAUD

The UFTA (state law) and the *BFP* opinion (governing Bankruptcy Code § 548(a)(1)) absolve *B* from liability for constructive fraudulent transfer when the foreclosure sale is regularly conducted and not collusive. But where the transfer is intended by *D* to hinder the C_g or is collusive, *B* loses the regularity defense in the UFTA, and the *BFP* opinion by its terms does not apply. According to UFTA § 4(a), "[a] transfer made . . . by a debtor is voidable as to a creditor . . . if the debtor made the transfer . . . (1) with actual intent to hinder, delay, or defraud any creditor of the debtor . . . ."[110]

But *B* has a defense if *B* paid *SP* at the foreclosure sale in good faith without knowledge of *D*'s bad intent. According to UFTA § 8(a), [a] transfer . . . is not voidable under Section 4(a)(1) against a person that took in good faith and for a reasonably equivalent value given the debtor . . . ."[111]

We assume that *B* is in bad faith — *B* knows *D* intended (via *SP*'s power of sale) to hinder the C_g. In such cases, reasonably equivalent exchange plays no role. All that matters is that the C_g were hindered and *D* so intended.

Whose intent counts? Section 4(a) clearly specifies that *D*'s intent is the *desideratum*. But *SP* has a lawful right of sale upon default. Does *SP* rightful intent to foreclose erase *D*'s passive delight in seeing *B* take value from *D*'s C_g? Apparently not.

110. UVTA § 4 (UNIF. L. COMM'N 2014).
111. *Id.* § 8(a).

A. At the Behest of the Debtor

Courts have held that, where *D* suggests that *SP* foreclose and *SP* obliges *D*, *D* has the requisite intent to hinder.[112] In *Voest-Alpine Trading USA Corp. v. Vantage Steel Corp.*,[113] *SH* owned the shares of insolvent *D Corp*.[114] *SH* formed a new corporation (*B Corp*.), of which *SH* was the only shareholder. *SP* foreclosed "at the request of [*SH*]."[115] In a private sale, *SP* sold *D Corp*.'s inventory to *B Corp*. *B Corp*. borrowed the purchase price from *SP*, so that, seemingly, *B Corp*'s assets were encumbered by *SP*'s "new" security interest.

C_1 sued *B Corp*. under Pennsylvania's and New Jersey's version of the UFCA. *B Corp*. responded by seeking sanctuary in bankruptcy. C_1 obtained relief from the automatic stay and continued the lawsuit. The district court awarded a money judgment against *B Corp*. for the benefit of C_1.[116]

It was doubtful this money judgment had much utility for C_1, as *B Corp*. was bankrupt, and *SP* had a security interest on all of *B Corp*.'s assets. For some reason, C_1 did not join *SP* in its fraudulent transfer action against *B Corp*. If *B Corp*. was the initial bad faith transferee of *D Corp*.'s fraudulent transfer, *SP* was the bad faith transferee of the initial transferee. To be precise, as the foreclosing secured party, *SP* was not the initial transferee of *D Corp*.'s fraudulent transfer. *SP* had power to sell *D*'s equity, but the sale was by *D Corp*. *B Corp*. was the initial transferee of *D*

112. Voest-Alpine Trading USA Corp. v. Vantage Steel Corp., 919 F.2d 206, 213 (3d Cir. 1990); Huntsman Packaging Corp. v. Kerry Packaging Corp., 992 F. Supp. 1439, 1444 (M.D. Fla. 1998).

113. 919 F.2d 206 (3d Cir. 1990).

114. *See id.* at 213.

115. *Id*.

116. *See id.* The dissent justly complains that C_1's money judgment exceeded the value of the equity *D Corp*. sold (via *SP*) to *B Corp*., *id*. at 223. The district court also ruled that *SH* held its shares in *D Corp*. in trust for the benefit of C_1. This was upheld by the Third Circuit over a dissent. This holding is questionable. Constructive trust is a remedy in which some seller has been defrauded out of legal title by some buyer. If C_1 had owned the *B Corp.* shares and had been fraudulently induced to sell them to SH, constructive trust might be justifiable. But here C_1 owned nothing and had no rescission right. Rather, *B Corp*. issued the shares directly to SH. Be that as it may, since *B Corp*. was insolvent, shares in *B Corp*. would avail C_1 of little or nothing, *id.* at 218. The Third Circuit thought that *SH* had been unjustly enriched by the C_i of *D Corp*. In contrast, the court in *Huntsman Packaging Corp.*, rejected the theory that receiving a fraudulent transfer is an unjust enrichment, *Huntsman Packaging Corp.*, 992 F. Supp. at 1447. In an unjust enrichment case, a victim has given something directly to a transferee, whose retention of that thing is considered unjust. The classic case is when a plaintiff has mistakenly paid the defendant. It would be unjust to let the defendant keep the payment, Citibank, N.A. v. Brigade Cap. Mgmt., 49 F.4th 42, 60 (2d Cir. 2022). But with a fraudulent transfer, C_1 has given nothing to *B Corp*. or to *SH*.

Corp.'s equity. But *B Corp*. granted a new security interest to *SP*, and as to this new security interest, *SP* was the bad faith transferee of a transferee. That *SP* was not joined by C_1 in the action is inexplicable.[117]

So far, the cases considering *D Corp*.'s bad intent have emphasized that *D Corp*. originated the scheme. May *D Corp*. passively default, force *SP* to foreclose, and then cause *B Corp*. to appear as high bidder at the auction? So far that case has not arisen. Affirmative suggestion, not manipulative acquiescence, describes the cases to date.

Acquiescence seems to have been present in *Balding v. Moog, Inc. (In re Comprehensive Power, Inc.)*,[118] where the court denied *B*'s motion to dismiss a complaint.[119] In this case, *B* was also *SP*.[120] In a public sale, and using our hypothetical values, *SP* bid in its claim against *D Corp.* for $60 and obtained assets worth $100.[121] *T* claimed that the transfer of the $40 in equity from *D Corp.* to *SP* (via sale by *SP*) was an intentional fraud.[122] As for *D*'s intent *T* alleged that *SP* dominated the affairs of *D Corp.*, that *SP* was *D Corp.*, and *SP*'s intent to expropriate $40 in value from the C_g was *D Corp*.'s intent.[123]

It may be observed that where *SP* has sold to *SP* in a commercially unreasonable sale, *D Corp*. is graced with tort compensation by UCC § 9-625(b). *D Corp*. gave up assets worth $100, but *D Corp*. received cancelation of $60 in debt plus a cause of action worth $40, for a total value of $100. It is hard to see how the C_g were harmed by the transaction. Still, *D Corp.* intended to hinder the C_g, and *SP* was a bad faith buyer. It is hard to say, however, that the C_g were hindered when they could garnish *SP* for the payment intangible it owes.

---

117. *See Voest*, 919 F.2d at 208 (noting the Bankruptcy Court granted relief from the stay petitions). An unresolved issue was whether, after avoiding *SP*'s "new" security interest, C_1 might *subsequently* intervene in the *B Corp*. bankruptcy to claim a subrogation to *SP*'s lien on *B Corp*.'s assets. In order to answer that, we need to know about why the bankruptcy court lifted the stay to permit C_1 to bring an action against *B Corp*., when C_1's cause of action was actually property of the bankruptcy estate. 11 U.S.C. §§ 541(a)(3), 544(b)(1), 550(a). If the trustee abandoned the fraudulent transfer action against *B Corp* and *SP*, it reverts back to C_1, Artesanias Hacienda Real S.A. de C.V. v. N. Mill Cap., LLC (*In re* Wilton Armetale, Inc.), 968 F.3d 273, 285 (3d Cir. 2020). In that case, C_1 should be able to avoid *SP*'s security interest and then intervene in the bankruptcy to assert *SP*'s security interest against *T*. But if the stay was lifted over the bankruptcy trustee's opposition, the bankruptcy estate would still seem to own rights against *SP*, where the stay was lifted as to *B Corp*. only.

118. 578 B.R. 14 (Bankr. D. Mass. 2017).

119. *Id.* at 43.

120. *Id*. at 22–23.

121. *Id.* at 24.

122. *Id.* at 30.

123. *Id.* at 34.

B. Collapse

Another way in which a bad intent may be attributed to *D*, even though *SP* willed the lawful foreclosure, is for the court to "collapse the transactions." In *Voest*,[124] *D Corp*. had previously granted a quite valid security interest to *SP*.[125] *SP* subsequently foreclosed and sold to *B Corp*.[126] Thus, we had two transactions at different time periods. The court chose to collapse these transactions into one.[127] What *really* happened, in the Argus eyes of equity, was that *D* conveyed directly to *B Corp*. *SP* was a mere conduit. *SP* was erased from the picture. Being erased, *SP* had no will. *D*'s will governed by default, and *D*'s intent was to hinder the C_g.[128]

I am not sure that "collapse" adds anything to the point that *D Corp*. suggested foreclosure to *SP*. But the Third Circuit found that the District Court was within its discretion to collapse the transaction.[129]

The District Court relied on *United States v. Tabor Court Realty Corp*.,[130] which performed a collapse in a leveraged buyout (LBO).[131] In *Tabor*, *SP* lent to *D Corp*., knowing that the proceeds would be upstreamed to *D Corp.*'s shareholder *SH*.[132] The lower court ruled that *SP* received the transfer, but *SH* received the value.[133] *D Corp*. never received anything.

124. Voest-Alpine Trading USA Corp. v. Vantage Steel Corp., 919 F.2d 206 (3d Cir. 1990).

125. *Id.* at 209.

126. *Id.*

127. *Id.* at 213.

128. *Id.* at 214.

129. *Id.* at 212–13. In *Voest*, the district court had found:

> 58. Each portion of the [foreclosure transaction] was dependent upon the occurrence of the other. For, example [*SH*] would not have permitted [*SP*] to foreclose on the [*D Corp*.] assets if [*SP*] had not simultaneously agreed to sell them to [*B Corp*.] and to extend [*B Corp*.] a credit facility which could be used to purchase them.
>
> . . .
>
> 67. The efforts to conceal the . . . transaction and the structure of the transaction itself establish that [*SH*] intended to hinder and delay collection by, and to defraud [*D Corp*.'s] unsecured creditors, including [C_1].

Id. at 212. It is not *SH*'s intent that we care about. *SH* was not the transferor. *D Corp*. was. But *D Corp.*, being a fictitious person, must rely on agents to form its will. Therefore, *SH*'s intent counts as *D Corp.*'s intent.

130. 803 F.2d 1288 (3d Cir. 1986).

131. *Id.* at 1297.

132. *Id.* at 1293–94.

133. *Id.* at 1300.

Therefore, the intentional fraud was converted to a constructive fraud. *SP* could not claim to be a good faith purchaser for value of the mortgage.[134] It was a purchaser, but for no value. This obviated any need to investigate *D Corp*.'s intent. An intentional fraudulent transfer was thus transformed into a constructive fraudulent transfer. As a recipient of value, *D Corp*. was erased.

In *Tabor*, collapse erased *D Corp.* from the scene.[135] In *Voest*, collapse erased *SP* from the scene; *D Corp.* conveyed directly to *B Corp*., with the intent to hinder C_1.[136] Said the Third Circuit, the facts in *Voest* were "much the same"[137] as in *Tabor*, though different entities were canceled by the notion of collapse.

C. Badges of Fraud

When courts try to figure out whether *D* intended to hinder C_1, courts consult the so-called "badges of fraud." Bad intent is not directly observable.[138] Therefore, borrowing from the case law, UFTA § 4(b) sets forth 11 circumstances from which *D*'s bad intent may be inferred:

In determining actual intent under subsection (a)(1), consideration may be given, among other facts, to whether:

> (1) the transfer . . . was to an insider;
> (2) the debtor retained possession or control of the property transferred after the transfer;
> (3) The transfer . . . was disclosed or concealed;
> (4) before the transfer was made . . . , the debtor had been sued or threatened with suit;
> (5) the transfer was of substantially all the debtor's assets;
> (6) the debtor absconded;
> (7) the debtor removed or concealed assets;
> (8) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred . . . :
> (9) the debtor was insolvent or became insolvent after the transfer was made . . . ;
> (10) the transfer occurred shortly before or shortly after a substantial debt was incurred; and
> (11) the debtor transferred the essential assets of the business to a lienor

134. *Id.* at 1294.

135. *Id.* at 1292.

136. Voest-Alpine Trading USA Corp. v. Vantage Steel Corp., 919 F.2d 206, 210 (3d Cir. 1990).

137. 919 F.2d at 213.

138. *See* Consove v. Cohen (*In re* Roco Corp.), 701 F.2d 978, 984 (1st Cir. 1983) ("[D]irect proof of the transferor's fraudulent intent will rarely be available.").

who transferred the assets to an insider of the debtor.[139]

Several of these badges are relevant to foreclosure sales.

Consider Badge (1): if *B* is an insider of *D*, then we may infer *D*'s bad intent from *B*'s relation to *D*. UFTA § 1(7) is a non-inclusive definition of insider. According to § 1(7)(iv), *B* is an insider if they are "an affiliate . . . ."[140] In *Voest*, *B Corp*. (the buyer) and *D Corp*. (the seller) were affiliates because the same *SH* was the sole shareholder of both corporations.[141]

In *KIND Operations, Inc. v. Cadence Bank (In re PA Co-Man, Inc.)*,[142] the concept of insider was stretched.[143] In *KIND*, *SH* owned the shares of *D Corp*. but not of *B Corp*.[144] In a "friendly foreclosure,"[145] *B Corp*. was the buyer. *B Corp*. then hired *SH* to manage *B Corp*.'s business. On this basis, the court implied that *B Corp*. was an insider of *D Corp*. But according to the statutory definition in UFTA § 1(7), where the debtor is a corporation, an insider is a director, officer, control person or partner of *D Corp*.[146] *B Corp*. was none of those things. Nevertheless, the statutory definition "includes" the enumerated eleven items. Courts are invited to go beyond the designated list. In *KIND*, Judge Deller took the invitation to extend the notion of insiderhood.[147]

Badge (3) names concealment of the transfer as evidence of bad intent. This is particularly important for Article 9 sales, which may be private sales as to which the C_g never (and are not entitled to) receive notice.[148]

Badge (5) — all assets were conveyed — figures in the discussion to follow. In the collusive foreclosures that we shall consider, *SP* sells substantially all of *D*'s assets.

According to Badge (8), if *B* did not pay a reasonably equivalent value, this is evidence that *D* intended to hinder the C_g. This badge reflects the fact that transfers for no reasonably equivalent value are presumed in law to be fraudulent. A constructive fraudulent transfer may also be an actual

---

139. UFTA § 4(b) (UNIF. L. COMM'N 1984).

140. The full quote is "(iv) an affiliate, or an insider of an affiliate as if the affiliate were the debtor . . . ," *id.* § 1(7)(iv). I cannot figure what the last few words are supposed to mean.

141. 919 F.2d at 208.

142. 644 B.R. 553, 553 (Bankr. W.D. Pa. 2022).

143. *Id.* at 609 n.36 (outlining what kind of party would be a "non-statutory insider").

144. *Id.* at 569–70.

145. *Id*. at 609.

146. UFTA § 1(7) (UNIF. L. COMM'N 1984).

147. *Kind*, 644 B.R. at 609 n.36.

148. *Id*.

fraud. So, the disparity of values is evidence of *D*'s fraudulent intent.

Badge (8) points to a contradiction in the *BFP* opinion. *BFP* maintains that (1) regularly conducted mortgage foreclosure sales are always for reasonably equivalent value. But (2), according to the UFTA, a lack of reasonably equivalent value is evidence of bad intent. Finally, (3) *BFP* does not apply if there is bad intent. If we start with (1) and move forward to (3), we conclude that Badge (8) never applies to a mortgage foreclosure sale. We may not refer to disparity of values in considering *D*'s bad intent. But if we examine (3) first, we may infer that *D* is in bad faith. In that case, *BFP* never applies to protect *B*.[149]

Badge (9) will figure in our discussion. In the collusive foreclosures, *SP*'s under water security interest over-encumbers all the assets and *D* is insolvent.

Badge (11) refers directly to *SP*. In an honest transaction, *D* had previously granted a security interest to *SP*, and now *SP* sells to an insider of *D*. The UFTA presumes that such a transfer, mediated by *SP*, can be fraudulent. This is powerful statutory evidence that *D* may intend to defraud C_1 when *SP*, in its discretion, chooses to foreclose.

D. Collusive Sales

BFP states that collusive mortgage foreclosure sales are intentional frauds, and *B* is liable for having received a fraudulent transfer. But *BFP* never defines collusion.

I have already proposed a definition of collusion, drawn from *Northern Pacific Railway Corp. v. Boyd*.[150] According to the definition, a collusive foreclosure sale involves the foreclosure by *SP* of *D Corp*.'s assets and a sale to *B Corp*., where the shareholder of *D Corp*. is also the shareholder of *B Corp*.[151]

A collusive foreclosure might possibly be a fraudulent transfer. But it is not one, whenever *SP*'s secured claim exceeds the value of *D Corp*.'s assets.[152] Suppose, prior to the collusive foreclosure sale, C_1 emerges to levy on *D Corp*'s asset. The only asset is over-encumbered. C_1 realizes nothing from an execution sale because the sheriff must sell the asset

149. In *KIND*, Judge Deller did not hesitate to use disparity of values as a badge of fraud, *id.* at 610–11.

150. 228 U.S. 482, 563 (1913) (affirming lower court decisions).

151. *See, e.g.*, Voest-Alpine Trading USA Corp. v. Vantage Steel Corp., 919 F.2d 206, 213 (3d Cir. 1990).

152. Miller v. Forge Mench P'ship, No. 00 Civ. 4313(MBM), 2005 WL 267551, at *1, *4 (S.D.N.Y. Feb. 2, 2005).

subject to *SP*'s senior security interest.[153] Since *D Corp*.'s equity is worth nothing, C_1 can get nothing. Hence, when *SP* conveys *D Corp*.'s equity to *B Corp*., C_1 is not hindered or delayed or defrauded. When *SP*'s secured claim exceeds the value of what *B Corp*. pays, C_1 is not harmed.[154]

This point is especially clear under the UFTA. Suppose *D Corp*. is under water to *SP*'s blanket lien. *SH*, who owns *D Corp*., incorporates *B Corp*. and provokes *SP* to foreclose. *B Corp*. wins the auction by virtue of bidding the amount of *SP*'s secured claim (or less). Under UFTA § 1(2)(i), "asset" is defined to exclude "property to the extent it is encumbered by a valid lien." Therefore, in the collusive foreclosure sale, *D Corp*. transfers zero assets to *B Corp*., and so there is no transfer at all — and hence no fraudulent transfer.[155]

Nevertheless, the collusive foreclosure doctrine as promulgated by *Northern Pacific Railway Corp. v. Boyd* promises C_1 a judicial lien on what *D Corp*. conveyed (via *SP*) to *B Corp*. The doctrine is founded on a theory much different from and flatly contradictory to the theory of fraudulent transfer. Collusive foreclosure doctrine is based on piercing corporate veils. *D Corp*. and *B Corp*. are declared to be the same person. Without any assistance from fraudulent transfer law, C_1 is entitled to a lien on any *B Corp*. property because that property is *D Corp*.'s property. Whether *Boyd* is still good law in foreclosure sales has been relegated to a separate paper.[156]

We have defined a collusive foreclosure sale as one in which *D Corp*. conveys all assets (via *SP*) to an affiliate. When the sale filches value from the C_g, the C_g can attack the transfer to *B Corp*. as fraudulent. Badge 11 from UFTA § 4(b) directly refers to collusive foreclosures as evidence of actual fraud. The *BFP* opinion therefore invites *T*, on behalf of the C_g, to

153. David Gray Carlson, *Critique of Money Judgment (Part Two: Liens on New York Personal Property)*, 83 ST. JOHNS L. REV. 43, 142–43 (2009).

154. *Voest-Alpine Trading USA Corp.*, 919 F.2d at 214 ("The third requirement for finding a fraudulent conveyance is that creditors have been prejudiced by the transaction in question."); Richman v. Leiser, 465 N.E.2d 796, 798 (Mass. App. Ct. 1984) ("A conveyance is not established as a fraudulent conveyance upon showing of a fraudulent intention alone; there must also be a resulting diminution in the assets of the debtor available to creditors.").

155. *See* Wells Fargo Vendor Fin. Servs. v. Nationwide Learning, LLC, 429 P.3d 221, 239 (Kan. Ct. App. 2018); Bd. Of Cnty. Comm'ns of the Cnty. of Part v. Park Cnty Sportsmen's Ranch, LLP, 271 P.3d 562, 571 (Colo. App. 2011).

156. *See* 228 U.S. 482, 563 (1913). *See generally* Carlson, *supra* note 19. In *Kind*, Judge Deller ruled that Pennsylvania law imposes successor liability even in the absence of a loss of value to the creditors, *see generally* Kind Operations, Inc. v. Cadence Bank (*In re* PA Co-Man, Inc.), 644 B.R. 553 (Bankr. W.D. Pa. 2022). *Boyd* is still good law in Pennsylvania, or so Judge Deller *Erie*-guesses.

compare value received by *D Corp*. with value received by *B Corp*. If they are not reasonably equivalent, *T* may avoid the transfer to *B Corp*. pursuant to Bankruptcy Code § 548(a)(1).

V. LIABILITY OF THE FORECLOSING SECURED PARTY

A. Under Fraudulent Transfer Law

Where *B* buys in foreclosure and obtains an unreasonable bargain, C_1 has a fraudulent transfer claim against *B* when the sale is irregular or collusive. A sale is irregular when *SP* sells in a commercially unreasonable fashion. A sale is collusive when the shareholder of *D Corp*. is the shareholder of *B Corp*.

May C_1, in the alternative recover from *SP*, as well as from *B Corp.*? Insofar as fraudulent transfer law is concerned, the answer should be no. Classically, fraudulent transfer law authorizes C_1 to levy on the property received by *B Corp*. *SP* is not a fraudulent transferee. True, *SP* received a security interest on *D Corp*'s assets. But we have stipulated that *SP*'s security interest is an honest transfer. What has been fraudulently transferred is *D Corp*'s equity, and *B Corp*. is the initial transferee of this equity. The involuntary transferee is *D Corp*., not *SP*. *D Corp*. is the entity that made an involuntary fraudulent transfer. *SP* is only the auctioneer — the agent-who-can't-be-fired of *D Corp*.[157] So *SP* is neither the transferee nor the transferor of a fraudulent transfer.

This is the classical answer. The world, however, has grown complicated. Wrens prey where eagles dare not perch.

i. Benefit

Suppose *SP* has a security interest in *D*'s gold brick worth $60. *SP* forecloses in a commercially unreasonable sale and sells to B for $100. *SP* is neither the transferor of the gold brick nor the initial transferee.

Contrary to the classic tradition, both Bankruptcy Code § 550(a) and the UFTA have expanded beyond the *in rem* liability of fraudulent transferees. Bankruptcy Code § 550(a) invites *T* to obtain a money judgment against persons *benefited* by the constructive fraudulent transfer. Did *SP* benefit? *SP* conducted a commercially unreasonable sale and recovered $60. I would argue this is no benefit. If *SP* had been not chewed upon the insane root that takes commercial reason prisoner, *SP* would have sold for $100 but still receives only $60. *SP*'s stake is not increased because B received a

157. *See* Janet A. Flaccus, *Pre-Petition and Post-Petition Mortgage Foreclosures and Tax Sales and the Faulty Reasoning of the Supreme Court*, 51 ARK. L. REV. 25, 37 (1998).

fraudulent transfer. Therefore, *SP* did not benefit from the fraudulent transfer.

In *KIND Operations, Inc. v. Cadence Bank (In re PA Co-Man, Inc.*), Judge Deller held otherwise.[158] *SP* was benefited because the foreclosure sale allowed *SP* to recover its $60 secured claim against *D*.[159] This makes *SP* liable for the value ($40) of *B Corp*.'s fraudulent transfer. Section 550(a) does not say that the person benefitted is liable for the amount by which it was benefited (which properly is zero). *SP* must pay the entire value of the assets *B Corp.* received. *KIND*, therefore, stands for the extraordinary proposition that, if *B Corp.* has received a fraudulent transfer in a commercially unreasonable sale, C_1 is entitled to a money judgment against *SP* as well.

The entire notion of adding recoveries from "the entity for whose benefit such transfer was made" is misguided. This language "for whose benefit" comes from the voidable preference provision in § 60(b) of the old Bankruptcy Act. According to § 60(b):

> Any such preference may be avoided by the trustee if the creditor receiving it or *to be benefited thereby* or his agent acting with reference thereto has, at the time when the transfer is made, reasonable cause to believe that the debtor is insolvent. Where the preference is voidable, the trustee may recover the property or, if it has been converted, its value from any person who has received or converted such property, except a bona fide purchaser form or lienor of the debtor's transferee for a present fair equivalent value . . . .[160]

"Benefited thereby" was added in 1938.[161] It codified the thinking in *National Bank of Newport, New York v. National Herkimer County Bank of Little Falls*[162] that nontransferees might be liable for a transfer received by someone else.[163] The idea of it was to sweep in sureties that had

158. *See generally* 644 B.R. 553 (Bankr. W.D. Pa. 2022).

159. *Id.* at 573, 575, 626. The numbers alleged by *T* were roughly proportional. *SP* claimed $36 million. Unsecured creditors claimed $30, *D Corp*.'s equity was worth between at least $42 million, enough to pay unsecured claims in full, *id.* at 573.

160. Chandler Act, ch. 575, § 60(b), 52 Stat. 840, 870 (1938) (repealed 1978) (emphasis added).

161. *Id.*

162. 225 U.S. 178 (1912).

163. According to Justice Hughes:

> To constitute a preference, it is not necessary that the transfer be made directly to the creditor. It may be made to another for hit benefit. If the bankrupt has made a transfer of his property, the effect of which is to enable one of his creditors to obtain a greater percentage of his debt than another creditor of the same class, circuity of arrangement will not avail to save it. . . . It is not the mere form or method of the transaction that the act condemns, but

guaranteed claims against a bankrupt debtor.[164]

To make this concrete, suppose *D* borrows from *C*. *S*, a surety, guarantees that *D* will pay. Commonly *S* is a relative or insider of *D*. Suppose, in order to save *S* from the guaranty, *D* pays *C* just before bankruptcy. Voidable preference law provides that, where *D* was insolvent at the time of the payment, *T* can "avoid the transfer of an interest of the debtor in property (1) to . . . a creditor . . . ."[165]

But what about *S*? *S* never received a payment. Yet *S* benefited. *S* had guaranteed insolvent *D*'s payment. If *D* had not paid, then *S* would have had to pay *C* in whole dollars. *S* is subrogated to *C*'s rights against *D*. But this subrogation right is against insolvent *D*. *S* can only recover partial dollars from *D*. But for *D*'s payment, *S* therefore would have to pay *C* 100 cents on the dollar and, as subrogee, collect a pro rata share of *D*'s bankruptcy estate, based on *C*'s claim against *D*. Thus, *S* is benefited when *D* pays *C*.[166] *S* is made liable to *T* by Bankruptcy Code § 547(b)(1).

The Bankruptcy Act's voidable preference provision was drafted in vague terms, and courts had to invent a great many legal fictions to make it work. The problem was that old § 60(b) allowed the bankruptcy trustee to recover *transfers*.[167] But what *property* had *S*, the surety, received from *D*?

> the appropriation by the insolvent debtor of a portion of his property to the payment of a creditor's claim, so that thereby the estate is depleted and the creditor obtains an advantage over other creditors.

id. at 184. *See generally* David Gray Carlson, *Tripartite Voidable Preferences*, 11 BANKR. DEV. J. 219, 300–05 (1995) [hereinafter Carlson, *Tripartite*].

164. *See* Reilly v. Kapila (*In re* International Mgmt. Assoc.), 399 F.3d 1288, 1292 (11th Cir. 2005) (asserting that the benefit of a guarantor is the "paradigm case of a benefit under § 550(a)").

165. 11 U.S.C. § 547(b).

166. This feature of voidable preference spawned the famous *Deprizio* controversy. *See generally* Nickles, *supra* note 38. In *Levit v. Ingersoll Rand Financial Corp.*, *D* borrowed from *C* on *S*'s guaranty, 874 F.2d 1186, 1187–88 (7th Cir. 1989). *D* paid *C* 100 days before bankruptcy. *S*, however, was subject to the one-year insider preference period, *see* 11 U.S.C. § 547(b)(4)(B). *C* was the initial transferee of *S*'s voidable preference, and so *C* had to cough up, even though *C* had been paid more than 90 days before bankruptcy, *see* Carlson, *Tripartite*, *supra* note 163, at 303–05. The reign of *Deprizio* finally ended in 2005, with the enactment of the Bankruptcy Code, 11 U.S.C. § 547(i) ("If the trustee avoids under subsection (b) a transfer made between 90 days and 1 year before the date of the filing of the petition, by the debtor to an entity that is not an insider for the benefit of a creditor that is an insider, such transfer shall be considered to be avoided under this section only with respect to the creditor that is an insider.").

167. According to Section 60(b), the trustee can recover from a creditor "benefited thereby," Chandler Act, ch. 575, § 60(b), 52 Stat. 840, 870 (1938) (repealed 1978). But the statute went on to state that, if the preference is voidable, "the trustee may recover the property or, if it has been converted, its value *from any person who has received or converted such property* . . . ," *id.* (emphasis added). This statute implies that the

Courts responded unconvincingly that "benefit" was somehow a transfer of property. Since *S* had converted this fictional property to her own use, *D*'s bankruptcy trustee (*T*) could have a money judgment against *S*. Thus, it was said, in the case of a transfer to *C*, there were *two* transfers — one to *C* and a quite separate one to *S*, the beneficiary.[168] Of course, *T* could have only one recovery between *S* and *C* put together.[169] If *T* recovered from *C*, then *C*'s claim against *D* (and against *S*) revived. *S* had to pay *C* and approach *D*'s bankruptcy as a mere unsecured creditor, lucky to get pennies on the dollar. Or the trustee could sue *S* for the value of the voidable preference received by *C*.

In 1978, Congress borrowed "or for the benefit" from § 60(b) and placed it, not only in § 547(b)(1), but in § 550(a)(1). Putting this language in § 550(a)(1) was an attempt to make § 550(a) an omnibus recovery provision that governed *all* the avoidance powers, not just voidable preferences. As a result, we have to figure out what those words mean in the context of fraudulent transfer law.

One utility is that "benefit" constitutes a surreptitious mode of piercing the corporate veil. To illustrate, suppose *D* conveys a gold brick to *X Corp*. Suppose *X* is the 100% shareholder of *X Corp*. *X* is not a transferee of the brick. But the value of *X*'s shares in *X Corp*. is enhanced because *X Corp*. received the brick. Therefore, *T* could recover from *X* (the person benefited) as well as from *X Corp*. (the initial transferee). *T* has effectively pierced the *X Corp*. veil.[170]

T cannot recover the brick from *X* because *X* has no property interest in it. Of necessity, *T* gets a money judgment only against *X*, a nontransferee, even though *T could* have recovered the brick *in specie* from *X Corp*. For example, in *Boyer v. Belavilas*,[171] insolvent *D Corp*. transferred funds to the deposit accounts of *SH*'s children.[172] *SH* then abused her fiduciary duty

trustee could only recover from a "transferee" of property.

168. *See* T.B. Westex Foods, Inc. v. Federal Deposit Ins. Corp. (*In re* T.B. Westex Foods, Inc.), 950 F.2d 1187, 1193 (5th Cir. 1992) ("Under this theory, only the second transfer is an avoidable preference under section 547(b) because the first transfer, once separated from the second, does not itself benefit the insider guarantor."); *see also Levit*, 874 F.2d at 1196 n.6 (stating that the two-transfer theory was "an heuristic device to explain how recoveries could be had from indirect beneficiaries under the 1898 Act").

169. The modern citation is 11 U.S.C. § 550(d).

170. *See* Tavormina v. Weiss (*In re* Behr Contracting, Inc.), 79 B.R. 84, 87 (Bankr. S.D. Fla. 1987); *see also* Ossen v. Bernatovich (*In re* Nat'l Safe Northeast, Inc.), 76 B.R. 896, 902 (Bankr. D. Conn. 1987); Periera v. Checkmate Comms. Co. (*In re* Checkmate Stereo & Elecs. Ltd., 9 B.R. 585, 621–22 (Bankr. E.D.N.Y. 1981).

171. 474 F.3d 375 (7th Cir. 2007).

172. *See id.* at 376–78.

by looting the deposit accounts and moving the funds on to *X Corp*., of which *SH* was also the shareholder. *SH* was held to be the entity for whose benefit the transfer by *D Corp*. was made.

Cases in which nontransferees are held liable for a fraudulent transfer received by someone else are very rare. Its use in *KIND* shows how dangerous it is, and how bystanders can be swept up in fraudulent transfers they did not even receive.

ii. Conspiracy

Some cases hold that non-transferees (such as *SP*) can be liable as a co-conspirator with *D* and *B* to achieve a fraudulent transfer.

Classically, this would never have been allowed. In the forgotten case of *Adler v. Fenton*,[173] the Supreme Court denied that *D*'s fraudulent transfer was even a wrong.[174] In the Supreme Court's view, *D* has a *right* to make a fraudulent transfer. *SP* may be in cahoots with *D* and *B*, but conspiracy to do a lawful act is not actionable.[175]

Starting in the middle of the 20th century, courts began to hold that, when *D* intentionally hinders the C_g by transferring the gold brick to *X*, *D*'s act is a wrong, and *D* has tort liability for this. This turns on making *D Corp*. a tortfeasor *vis-à-vis* its unsecured creditors. As a result, *D* has a double liability. First, *D* is liable to C_1 on a judgment. Second, *D* is independently liable for the wrong of fraudulently transferring the brick to *X*.[176]

Such a theory is untenable. *D* is liable on the judgment and that's it. To say *D* did wrong by conveying the brick to *X* is to make *D* liable a second time, this time for the value of the brick that *D* fraudulently transferred.

If fraudulent transfers are torts, not only does *X* hold the brick in trust for C_1, but C_1 is a general creditor of *X* because *X* conspired with *D*. This is contrary to the history of fraudulent transfer. But the Supreme Court confirmed in *Husky International Electronics, Inc. v. Ritz*[177] that *X* is a tortfeasor.[178]

The *Husky* opinion is a masterpiece of confusion.[179] *D* filed for

173. 65 U.S. 407 (1861).

174. *See id.* at 411. *C*'s claim "was not yet due at the time of bringing the action," according to the syllabus accompanying the opinion, *id*. at 407.

175. Carlson, *Tort*, *supra* note 24, at 1113–17.

176. *See generally* Suvicmon Dev., Inc. v. Morrison, 991 F.3d 1213 (11th Cir. 2021). On this case, *see generally* David Gray Carlson, *The Eleventh Circuit and the "Tort" of Making a Fraudulent Transfer*, BANKR. L. LETTER, June 2021.

177. 578 U.S. 355 (2016).

178. *See id.* at 359.

179. *See* David Gray Carlson, *The Supreme Court, Dischargeability and Actual*

bankruptcy and *X* later did so also. In *X*'s bankruptcy, *D*'s bankruptcy trustee (*T*) supposedly had a cause of action against *X* for fraudulent transfer. A creditor of *D* (C_1) brought a claim for breach of contract against *D* and for fraudulent transfer against *X*. It eluded the Supreme Court that C_1 was violating the automatic stay by pursuing a cause of action against *X* that belonged to *T*. In *X*'s bankruptcy, C_1 sought to deny *X* a discharge because *X* had received a fraudulent transfer. The lower courts denied this relief, but the Supreme Court reversed, finding that *X* had received property by means of fraud, within the meaning of § 523(a)(2)(A). In short, the Supreme Court assumed that *X* was a tortfeasor. If this is right, fraudulent transfers are torts. Anyone conspiring with *D* can be charged with conspiracy. This includes *SP*.

I pause to observe that the Supreme Court based its opinion on the Texas law of torts. Accordingly, the Supreme Court made an "*Erie* guess."[180] It is open for state courts to find that fraudulent transfers are not torts. If so, conspiracy allegations fade away.

A third problem in asserting that fraudulent transfers are torts is that *T* is subrogated to the avoidance right of unsecured creditors against the brick. According to Bankruptcy Code § 544(b)(1):

> the trustee may avoid a transfer of an interest of the debtor in property . . . that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.[181]

If *T* is subrogated to C_1's *avoidance right* against the brick, it does not appear that *T* is subrogated to C_1's tort action against *X*. If not, *T* cannot offer *X* a settlement of *T*'s 544(a) action against *X*, because *T* cannot promise that the settlement includes a bar of tort actions against *X* by the C_g.

The better view is that fraudulent transfers are not torts. If not, *SP* cannot be dunned for conspiring with *D Corp*. and *B Corp*. for hindering the C_g of *D Corp*. The jury is still out whether fraudulent transfers are torts. The Supreme Court is on both sides of this question. Ultimately, however, the question can only be answered by state law.[182]

Fraud, 28 AM. BANKR. INST. L. REV. 205, 147–50 (2020). For starters, the Supreme Court thought that *X* had received a fraudulent transfer from *D* when in fact *X* simply took the money without authority from *D Corp*. (*i.e.*, embezzlement).

180. That is, not binding on Texas state courts under *Erie Railroad v. Thompkins*, 304 U.S. 64 (1938).

181. 11 U.S.C. § 544(b)(1) (2023).

182. Carlson, *Tort*, *supra* note 24, at 1098, 1190.

B. Article 9 Liability

If a foreclosure sale is not regularly conducted, and if *B Corp*. receives assets for an inequivalent value, *B Corp*. has received a fraudulent transfer. C_1 can obtain an equitable lien on the purchased assets.

Article 9 of the UCC requires foreclosure sales to be commercially reasonable.[183] A collusive sale may well be commercially reasonable, if *SP* sends the proper notices to the persons who deserve them and if *SP* reasonably marketed the assets to buyers before selling to *B Corp*. The defense in the UFTA, however, is unavailable if the foreclosure sale was collusive. The *BFP* opinion reiterates the point as a matter of federal law.[184]

Suppose the foreclosure sale is commercially unreasonable. Low price alone does not establish commercial unreason.[185] There must be some aggravating factor.[186] If that extra irritant exists, a commercially unreasonable sale creates a cause of action in *D Corp.* against *SP* to recover the difference between fair value ($100) and price realized ($60). *D Corp.* therefore has a cause of action against *SP* for damages under UCC § 9-625(b) — a "payment intangible," in Article 9 parlance.[187]

As to the right to sue *SP* for commercially unreasonable sale, this right belongs to *D Corp.* So long as C_1 is a general unsecured creditor of *D Corp.*, C_1 has no property right in *D Corp.*'s assets, including *D Corp*.'s payment intangible against *SP*. But if C_1 has a judgment against *D Corp.*, C_1 may levy on *D Corp.*'s property by garnishing *SP*. *D Corp.*'s property

183. *See* U.C.C. § 9-627 (AM. L. INST. & UNIF. L. COMM'N 2023).

184. *See generally* BFP v. Resolution Trust Corp., 511 U.S. 531 (1994).

185. U.C.C. § 9-627(a) (AM. L. INST. & UNIF. L. COMM'N. 2023).

186. FDIC v. Lanier, 926 F.2d 462, 467 (5th Cir. 1991) (holding that the defendant loses because the defendant could show no procedural irregularity); Nadler v. Baybank Merrimack Valley, N.A., 733 F.2d 182, 184 (1st Cir. 1984) (holding that plaintiff must identify specific deficiencies in the sale for it to be commercially unreasonable); *see* Michael Korybut, *Searching for Commercial Reasonableness Under the Revised Article 9*, 87 IOWA L. REV. 1383, 1398–1400 (2002).

187. "'Payment intangible' means a general intangible under which the account debtor's principal obligation is a monetary obligation," U.C.C § 9-102(a)(61) (AM. L. INST. & UNIF. L. COMM'N 2023). There is also an argument that *D Corp.* has an *in rem* claim to *B*'s property. Where *B* had notice of the commercial unreason at the time *B* bought, the sale fails under Article 9. All that *B* takes from such a sale is an assignment of *SP*'s security interest. *D Corp.*'s equity survives. Of course, *D Corp.* is in default under the security agreement and *B* now owns the security interest. *B*'s right of possession is better than *D Corp.*'s right. *B* may retain the property and hold a commercially reasonable sale to recover the amount of *SP*'s secured claim — here $100. If *B* were to sell to B_2 for the fair price of $100, *B* could only retain $60 (the price *B* paid *SP*). The $40 surplus belongs to *D Corp, see* David Gray Carlson, *Article 9 Foreclosures: When Is a Sale Not a Sale?*, 85 U. PITT. L. REV. 67, 122 (2022).

includes the payment intangible as to which *SP* is the account debtor. C_1's right, however, is strictly derivative. It is *D Corp.* who has the right to sue *SP*, not C_1. If *SP* has a defense to assert against *D Corp.*, *SP* may assert this defense in the garnishment action that C_1 brings against *D Corp.*

C. Release of the Article 9 Claim

i. Its Effect on Fraudulent Transfer Theory

In a collusive sale, *D Corp*. has probably released *SP* from all claims arising from violations of Article 9 duties. When C_1 attempts to garnish *SP* for its Article 9 liability to *D Corp*., *SP* can assert the release as a defense to liability.

Although we are presently concerned with C_1's rights against *SP* for conducting an irregular Article 9 sale, we pause to consider whether the release of *SP* affects C_1's fraudulent transfer right against *B*, where the sale is not collusive. In such a case, C_1's claim against *B* turns on the irregularity of the sale conducted by *SP*. *D Corp.*'s release establishes that *D Corp.*, at least, will not assert a claim of commercial unreason against *SP*. Is C_1 estopped by *D Corp.*'s position?

The clear answer is that *D Corp.*'s release cannot prejudice the rights of C_1 against *B* under the UFTA.[188] It is the UFTA that makes Article 9 compliance relevant. C_1 has no avoidance rights *unless* the Article 9 sale was irregular. That *D Corp.* has settled its cause of action against *SP* under Article 9 cannot deprive C_1 of the right to show that B paid less than a reasonably equivalent value in an irregular sale, and this in turn depends on the commercial unreasonableness of the sale.[189]

ii. Its Effect on the Secured Party's Liability

We now return to *SP*'s liability to *D Corp.*, where *SP* conducted a commercially unreasonable sale. *D Corp.*, however, released *SP* from liability of the sale as part of the collusion of which *D Corp.* and *B* are

---

188. DeGiacomo v. Tobins (*In re* Upper Crust, LLC), 554 B.R. 23, 34 (Bankr. D. Mass. 2016).

189. As Judge Deller saw in *KIND*:

> To be clear . . . none of the Defendants have argued that the Consent and Release impair the ability of [*T*] to pursue fraudulent transfer claims against any of the Defendant under [UFTA] and section 548 . . . .To the extent any of the Defendants do assert such a defense, the Court rejects it because fraudulent conveyance actions are brought for the benefit of creditors, and neither the creditors nor the bankruptcy estate are parties to the Consent and Release.

KIND Operations, Inc. v. Cadence Bank (*In re* PA Co-Man, Inc.), 644 B.R. 553, 622–23 (Bankr. W.D. Pa. 2022).

guilty. The court in *KIND Operations, Inc. v. Cadence Bank, N.A. (In re Pa Co-Man, Inc.)* ruled that the release is void against public policy.[190] If correct, then *SP* must pay *D Corp.*, in spite of the release. Where *D Corp.* is bankrupt, *T* inherits this right and can collect $40 from *SP* in spite of the release. In the absence of bankruptcy, C_1 may levy *D Corp.*'s right to sue *SP*, even though *D Corp.* has consensually released it. According to the *KIND* court, it is legally impossible for *D Corp.* ever to release *SP* from liability for the commercially unreasonable sale.

Delving a bit deeper into the facts in *KIND*, *D Corp*., in exchange for a $60 loan, had granted a blanket lien on all its assets (valued at $100) to *SP* (a loan syndicate represented by an agent). In what Judge Decker called a "friendly foreclosure,"[191] *D Corp*. consented to *SP*'s sale of the business to *B Corp*. *B Corp*. promised in advance to hire *SH* (*D Corp*.'s shareholder) as *B Corp*.'s manager after the sale. Unlike in *Voest*, *SH* took no shares in *B Corp*. as compensation.

But was this really a foreclosure sale at all? In anticipation of the sale to *B Corp*., all the parties signed a "consent and release" agreement, in which *D Corp*. released *SP* from liability for holding a commercially unreasonable sale. According to one clause in the Consent and Release agreement:

> In furtherance and in facilitation of (i) Agent's and Lenders' exercise of their respective remedies under the UCC, and (ii) the Agent's consummation of the Specified Sale, Borrower hereby *voluntarily surrenders all of its rights, title and interests in and to the Collateral of the Borrower to Agent for the benefit of itself and the Lenders*, in accordance with the terms of the UCC and this Agreement.[192]

"Agent" is a reference to *SP*.

Arguably, there was no foreclosure sale in this case. Rather, it was a consensual "acceptance of collateral"[193] coupled with an Article 2 sale from *SP* to *B Corp*. The requirement of commercial reasonableness adheres to foreclosure sales.[194] When it comes to "acceptance of collateral," commercial reasonableness is irrelevant, precisely because acceptance requires the consent of *D Corp*.

Recall that, in *Huntsman Packaging Corp. v. Kerry Packaging Corp*., the

---

190. *Id.* at 623.

191. *Id*. at 609. Later, I question whether there was actually a foreclosure sale at all in *KIND*, *see* discussion *infra* Section VII

192. *KIND Operations, Inc.*, 644 B.R. at 614–15 (emphasis added).

193. U.C.C. § 9-620 (AM. L. INST. & UNIF. L. COMM'N 2023).

194. *Id*. § 9-610(b).

parties had used this very structure to deprive the C_g of value.[195] Keen to make the case fit Procrustes-style into the iron bed of constructive fraudulent transfer, and wishing to de-fang the defense of UFTA § 8(e), protecting any transaction in compliance with Article 9, Judge Sharp "collapsed" the transaction eliminating *SP* as a transferee. The regularly conducted acceptance of collateral was transformed into a commercially unreasonable foreclosure sale, for the purpose of rendering *B Corp*. liable for paying too little for *D Corp*.'s assets.

In *KIND*, Judge Deller *sub silentio* also collapsed the transaction. Judge Deller assumed that *SP* conducted a foreclosure sale, which triggered *SP*'s duty to hold a commercially reasonable sale. "Collapsing" in *Huntsman* erased *SP* from the scene. But collapsing in *KIND* did not erase *SP*. Rather, it triggered a duty to hold a commercially reasonable sale, which *SP* violated. But for the collapse, *SP* had no such duty.

In connection with the sale, *D Corp*. purported to release *SP* of any claims based on commercial unreason. Soon after the "sale" was completed, *D Corp*. filed for Chapter 7 bankruptcy. In the bankruptcy, *T* negotiated with C_1 (KIND) to take over all the bankruptcy estate's causes of action against *B Corp*., *SP*, and *SH* in exchange for a cash payment which *T* distributed to the C_g. Therefore, C_1 conducted the litigation in *T*'s name. I will refer to the plaintiff as *T*, since *T*'s rights are at stake, not the rights of C_1 as the unsecured creditor of *D Corp*. *T* was entitled to pursue the defendants under fraudulent transfer theories, but *T* also inherited *D Corp*.'s tort actions against *SP*.

T succeeded to *D Corp*.'s cause of action against *SP* for commercially unreasonable sale. The problem *T* faced was that *D Corp*. had released *SP* from liability prior to the bankruptcy. Since *T* inherited the rights of *D Corp*., *T* was seemingly disabled by the defense of release.

> Facially [the release] appears to be an agreement by the Debtor providing for the collateral to be surrendered for the sale to [*B*] in satisfaction of the secured debt owed to [*SP*], and the Debtor can interpose no challenge of any sort to the commercial reasonableness of the Pre-Bankruptcy Foreclosure Sale.[196]

Here is where Judge Deller collapses the two transactions. The surrender of collateral was not an acceptance of collateral in exchange for the discharge of *D Corp*.'s $60 debt to *SP*. The surrender was a repossession by *SP* in anticipation of a foreclosure sale to *B Corp*.

According to Judge Deller, *D*'s release of *SP* from liability is a void

195. *See generally* 992 F. Supp. 1439 (M.D. Fla. 1998), *aff'd*, 172 F.2d 882 (11th Cir. 1999).

196. *KIND*, 644 B.R. at 620–21 (footnote omitted).

agreement. It constituted a waiver by *D Corp*. of its right to a commercially reasonable sale.

> [T]he substance of the transaction is such that the advance blanket waivers and releases contained in the Consent and Release are unenforceable as to prohibit review of the Article 9 sale for the same reason courts routinely void waiver clauses in loan documents entered into by parties at the beginning of the lending relationship that effectively grant the lender the right to dispose of the collateral as it deems fit.[197]

Thus, *D Corp*. could not possibly release *SP* from liability for conducting a commercially unreasonable sale. Because this was so, *T*, as successor to *D Corp*., could still sue *SP* on its payment intangible.

Judge Deller's conclusion reveals a drafting glitch in revised Article 9. According to § 9-602, *D* "may not waive or vary the rules stated in the following listed sections . . . ." One of the rules listed is the rule of § 9-610(b): "Every aspect of a disposition of collateral . . . must be commercially reasonable."[198]

This anti-waiver rule is itself overruled by § 9-624. Section 9-624(a) permits limited waivers, but only waiver of the right to notification under § 9-611 and only the waiver of a mandatory foreclosure sale in consumer cases.[199] Here, we find no mention of § 9-610(b). Therefore, even a post-default agreement that *SP* may sell unreasonably is against public policy.

Does this mean that, after the sale, claims based on unreasonable disposition may never be settled? According to comment 3 of § 9-602:

> This section provides generally that the specified rights and duties "may not be waived or varied." However, it does not restrict the ability of parties to agree to settle, compromise, or renounce claims for past conduct that may have constituted a violation or breach of those rights and duties, even if the settlement involves an express "waiver."[200]

In *Kind*, *SP* had pointed out that *D Corp*. had executed the release of *SP* after *SP* completed the sale to *B Corp*. Judge Deller pronounced this argument "Orwellian."[201] Although the release was executed after the sale, negotiations for the release were conducted before the sale. Therefore, the release does not fall under Comment 3 to § 9-602.

It is true that the release was negotiated prior to the sale. Pre-sale

197. *Id*. at 620.

198. U.C.C. § 9-610(b) (AM. L. INST. & UNIF. L. COMM'N 2023).

199. *Id.* § 9-624(b).

200. *Id.* § 9-602 cmt. 3.

201. 644 B.R. at 619. I assume that by "Orwellian," Judge Deller means that *SP*'s argument is a perversion of logic.

negotiations are not the contract. The contract was not a contract until the sale was concluded. But even if the release was executed before the sale, it is hard to believe that *SP* may not solicit *D Corp*.'s agreement that a contemplated foreclosure sale is proper.[202] If error this be, it was harmless error, as the next section reveals.

ii. Release as a Fraudulent Transfer

If the release in *KIND* had been a binding contract on *D*, *T*, as successor of *D*, would have been bound it. But *T* was not merely the successor to *D Corp*. *T* also subrogated to the rights of the C_g to avoid transfers. Standing in *D Corp*.'s shoes, *T* was hobbled by the release (if binding on *D Corp*.). *T* could cast aside those ineffective shoes and instead don the reinforced boots of the C_g, who could claim that *D Corp*'s release of *SP* was itself a fraudulent transfer. According to Judge Deller, *T* could therefore "avoid" the release and reinstate *D Corp*.'s tort action against *SP*.[203]

How can the *release* of a payment intangible be the transfer of property? In our typical fraudulent transfer, involving tangible personal property, *D Corp.* owns a gold brick. To hinder a creditor (C_1), *D Corp.* conveys the brick to *X*. Fraudulent transfer law invites C_1 to levy on *X*'s brick to pay C_1's judgment against *D Corp.* More precisely, *X* holds the brick in trust for C_1's equitable lien. From the moment the fraudulent transfer is made (and not before), C_1 and *X* are co-owners of the brick.

All of this is very coherent with regard to the brick. But how is *D Corp.*'s release of the Article 9 claim against *SP* comparable to *X*'s brick?

The analogy is somewhat easier to fathom when *SP*'s debt is reified in a promissory note. Suppose *SP* confesses Article 9 liability and, to replace *D Corp.*'s payment intangible, executes a promissory note payable to the order of *D Corp.* While insolvent, *D Corp.* gives the promissory note to *SP* so that the C_g cannot get it. Is not the note itself is like the gold brick? C_1 can claim it is a fraudulent transfer and may levy on the note.

According to UCC § 3-604:

> A person entitled to enforce an instrument, with or without consideration, may discharge the obligation of a party to pay the instrument (i) by an intentional voluntary act, such as surrender of the instrument to the party, destruction, mutilation, or cancellation of the instrument . . . indicating discharge, or (ii) by agreeing not to sue or

202. Judge Deller briefly considers whether the release must be upheld under UCC § 9-603, which permits parties to agree in advance on standards of commercial reason, *see id*. at 620. But in the consent and release agreement, "there really are no agreed upon standards, just a waiver and release . . . ," *id*. at 621.

203. *KIND*, 644 B.R. at 622.

otherwise renouncing rights against the party by a signed record.[204]

Let's revisit the transaction in slow motion. Before *D* gives the note to *SP*, C_1 has no interest in it because C_1 has no interest in *any* of *D*'s property. But the minute *D* fraudulently transfers the note to *SP=X*, *SP* obtains mere legal title and the C_g obtain an equitable interest. There are *two* transferees of the note — *SP* and the creditors of *D Corp*. Only bare legal title to the note passes to *SP*. The equitable interest is in the C_g. As a fiduciary, *SP* cannot use the note to cancel out *SP*'s obligation to pay the note because, retrospectively, *D* was not a "person entitled to enforce the instrument" within the meaning of § 3-604.[205] Only C_1 was such a person.[206]

The matter is metaphysically challenging, even when *SP*'s obligation to *D* is reified in commercial paper.[207] The release seems to be some sort of antimatter which, when exposed to *D*'s payment intangible, destroys the payment intangible. When *D* released this claim, *D* gave the anti-property to *SP=X*. Without fraudulent transfer law, these two claims would cancel each out in a cataclysm of recoupment. But the instant *D* gave back *SP* the claim, C_1's equitable lien attached to it. At that moment, recoupment falls apart. The setoff has become triangular.[208] *SP* owes *D Corp*. for the commercially unreasonable sale and C_1 owns *D Corp*.'s right to release *SP*'s debt. Thus, *SP* was not entitled to recoupment.

Perhaps the best we can do is to say that, for magic reasons, fraudulent transfer law prevents *D* from releasing *SP* from liability. In *KIND*, Judge Deller so ruled and provided a modest number of precedents,[209] none of which adequately works out the metaphysics attendant to fraudulent

---

204. U.C.C. § 3-604(a) (AM. L. INST. & UNIF. L. COMM'N 2023).

205. *See id.*

206. U.C.C. § 3-604.

207. On these metaphysics, *see* Carlson, *supra* note 214, at 516, 537–38.

208. "That is to say, there were no longer mutual debts owing to the debtor of [*SP*]," *see* Jeanne L. Schroeder & David Gray Carlson, *Three Against Two: On the Difference Between Property and Contract*, 35 EMORY BANKR. DEV. J. 417, 492 (2019).

209. *See, e.g.*, Blixseth v. Kirschner (*In re* Yellowstone Mountain Club, LLC), 436 B.R. 598, 661 (Bankr. D. Mont. 2010) ("The Release was clearly a 'transfer' as contemplated under [the UFTA]."); Savage & Assocs., P.C. v. Mandl (*In re* Teligent, Inc.), 325 B.R. 81, 86 (Bankr. S.D.N.Y. 2005) ("The right to collect a debt is 'property or . . . an interest in property,' and the release disposes of or parts with it." (quoting e2 Creditors' Trust v. Farris (*In re* e2 Communications, Inc.), 320 B.R. 849, 856 (Bankr. N.D. Tex. 2004)); e2 Creditors' Trust v. Farris (*In re* e2 Communications, Inc.), 320 B.R. 849 (Bankr. N.D. Tex. 2004) ("Common sense suggests that a release of claims is a 'transfer' of property — *i.e.*, a method of 'disposing of or parting with' property, as the releasing party gives up the right to assert the claims in the future."); *see also* Grochocinsky v. Reliant Interactive Media Corp. (*In re* General Search.com), 322 B.R. 836, 842–43 (Bankr. N.D. Ill. 2005).

releases. The word "release," however, appears in the UFTA's definition of "transfer." According to UFTA § 1(12), "'[t]ransfer' means every mode, direct or indirect, absolute or condition, voluntary or involuntary, of disposing of or parting with an asset . . . and includes payment of money, *release*, lease, and creation of a lien or other encumbrance."[210]

So far, C_1's equitable lien encumbers *D*'s power to release. C_1 has no lien on *D*'s payment intangible against *SP*. For this C_1 must proceed to garnishment. In the garnishment proceeding, *SP* has lost the defense of release because the right to release belongs to C_1. Thus, fraudulent transfer law interferes with *D*'s release of *SP*, and *SP*'s liability is not discharged. C_1 is free to levy on it. Nevertheless, *D Corp*. is bound by the release, even if C_1 is not.

But just because C_1 can levy on *SP*'s obligation to *D*, does that mean that *T* can levy, where *D* has no longer has a connection with *SP*'s obligation? It does indeed. The right to collect from *SP* exclusively belongs to C_1 and is proceeds of C_1's right to avoid the release. *T* is subrogated to this right,[211] and so the chose in action is property of the bankruptcy estate via § 541(a)(3),[212] rather than § 541(a)(1).[213]

V. SHAREHOLDER LIABILITY

In a collusive mortgage foreclosure, *SP* forces the sale of *D Corp.*'s assets to *B Corp.,* where *SH* is the shareholder of both *D Corp.* and *B Corp.* There are two possible routes to holding *SH* liable in a collusive foreclosure sale: breach of *SH*'s fiduciary duty to *D Corp*. and fraudulent transfer, conceiving *SH* as "the entity for whose benefit the transfer was made."[214] I find both of these theories flawed because of tort compensation.

A. Fiduciary Duty

In *KIND*, *T* sued *SH* for breach of his fiduciary duty to *D Corp*. Such a suit belongs to *T* as successor to *D Corp*. The individual C_g could not assert this claim.[215]

---

210. UFTA § 1(12) (NAT'L CONF. OF COMM'R ON UNIF. STATE L. 1984) (emphasis added).

211. *See* 11 U.S.C. § 544(b)(1).

212. *See id.* § 541(a)(3). This subsection brings into the bankruptcy estate all recoveries by *T* under § 550.

213. *See id.* § 541(a)(1). This provision brings into the bankruptcy estate "all legal and equitable interests of the debtor in property as of the commencement of the case," *id.*

214. *Id.* § 550(a)(1).

215. Jeanne L. Schroeder & David Gray Carlson, *Generalized Creditors and*

The suit is based on Delaware law, which says that officers and directors of an insolvent *D Corp*. still have fiduciary duties. "The directors of an insolvent firm do not owe any particular duties to creditors. They continue to owe fiduciary duties to the corporation for the benefit of all of its residual claimants, a category which now includes creditors."[216] What is the duty that *SH* owed to *D Corp*.? *SH* had the duty to get a fair price for any asset sold. A fair price is $100, of which $60 goes to *SP*. Yet under the presumed facts, *D Corp*. received a cause of action for $40 against *SP* for holding a commercially reasonable sale. This cause of action fully compensates *D Corp*. for the supposed loss of $40 to *B Corp*. It seems to me that the Article 9 tort theory means that *D Corp*. has not lost value, thus absolving *SH* from breach of fiduciary duty. Of course, *SH*, acting for *D Corp*., released *SP* from that cause of action, but Judge Deller (on two grounds one of which we have questioned) ruled that the release was not binding on *D Corp*. It is hard to see how *D Corp*. was damaged.

The same point can be replicated with the use of *T*'s fraudulent transfer remedy against *B Corp*. The C_g are the residual claimants of insolvent *D Corp*. *T* is poised to recover the $40 from *B Corp*. and perhaps others. This $40 compensates the C_g. To say that *D Corp*. *also* recovers $40 gives rise to a double recovery. If the C_g gets $40 from the fraudulent transfer theories, it is hard to say that *D Corp*. has been damaged, where insolvent *D Corp. is* the C_g.

For these reasons, it would appear *D Corp*. has not been damaged by *SH*'s participation in the collusive foreclosure sale.

B. Beneficiary of the Fraudulent Transfer

In *KIND*, Judge Deller sustained *T*'s complaint against *SH* as beneficiary of *B Corp*'s fraudulent transfer. Only two items of benefit were mentioned.

First, *SH* had guaranties to *SP* which were wiped out. Wipeout of guaranties are indeed the most common type of benefit — of voidable preferences.[217] Recall that "the entity for whose benefit the transfer was made"[218] was inadvisedly lifted from voidable preference law and made applicable to fraudulent transfer by incorporating it into § 550(a)(1).[219] But

---

Particularized Creditors: Against a Unified Theory of Standing in Bankruptcy, 96 AM. BANKR. L.J. 505, 526–27 (2022).

216. Quadrant Structured Products Co. v. Vertin, 115 A.3d 535, 546–47 (Del. Ch. 2015) (footnotes omitted).

217. *See e.g.*, Kind Operations, Inc. v. Cadence Bank, N.A. (*In re* PA Co-Man), 644 B.R. 553, 604 (Bankr. W.D. Pa. 2022).

218. 11 U.S.C. § 550(a)(1).

219. *See supra* text accompanying note 38.s

release of *SH*'s guaranties to *SP* cannot possibly be a side benefit from *D Corp*.'s fraudulent transfer to *B Corp*. *SP* claimed $60 from *D Corp*. This was the debt that *SH* had guaranteed. That $60 was paid to *SP* by *B Corp*. The reason *SH*'s guaranties vanished was because *SP* was *paid*. Section 550(a)(1) requires that *SH* be benefited by enrichment of *B Corp*. But all we have here is payment of *SP*'s secured claim from collateral. Payment of *SP*, not enrichment of *B Corp*., made the guaranties go away.

The Third Circuit actually rejected such a claim in *Voest-Alpine Trading USA Corp. v. Vantage Steel Corp*., the collusive foreclosure case we have often visited.[220] In that case, *D Corp*. had borrowed from *SP* on *SH*'s guaranty. In the global settlement of the *D Corp*.-*B Corp*. transfer, *SP* released *SH* from the guaranty. The trial court revived the guaranty and awarded it to C_1, as if the guaranty were itself a fraudulently transferred thing. If this had held up, C_1 would have had an *in personam* right to pursue *SH* for the amount of *SP*'s loan to *D Corp*.

The District Court went too far for the Third Circuit in this one respect. Said the Third Circuit:

> Notwithstanding the actions and the culpability of [*SH*], which resulted in the district court's findings of actual fraud, repeated perjury, and unjust enrichment — findings which we have sustained — we can find no basis on which we could uphold paragraph 3 of the district court's Order. Our difficulty with this portion of the district court's order stems from the circumstance that [*SH*'s] guarantees in every instance ran in favor of [*SP*] and to no other party.[221]

This seems tantamount to a holding that *SH* was not benefited when its guaranty obligations disappeared upon payment of *SP* in the collusive sale. They are not "preserved" for the C_g of *D Corp*.

The second thing mentioned in the *KIND* complaint was that *SH* received "other consideration."[222] Presumably this refers to the compensation package that *SH* received from *B Corp*. for continuing to operate the business.[223] One may question, however, that *SH* was hired *because* he arranged for *B Corp*. to receive a fraudulent transfer. It might be the case that *SH* had "firm-specific skills."[224] If so, *SH* power in the

---

220. *See* 919 F.2d 206, 213 (3d Cir. 1990).

221. *Id.* at 219–22.

222. *See* Kind Operations, Inc. v. Cadence Bank, N.A. (*In re* PA Co-Man), 644 B.R. 553, 588 (Bankr. W.D. Pa. 2022).

223. The complaint alleged that *SH* "remained in charge as [*B Corp*.'s] CEO and acquired equity in [*B Corp*.] as part of his employment arrangement . . . ," *id*. at 578. *SH*'s story was that the arrangement saved employees from layoffs, *see id* at 646.

224. *See* Douglas G. Baird & Thomas H. Jackson, *Bargaining After the Fall and the Contours of the Absolute Priority Rule*, 55 U CHI. L. REV. 738, 751–52 (1988).

employment market caused his continued employment, not the fraudulent transfer to *B Corp*. But, unfortunately for *SH*, this is a question for the trier of fact. If *SH* benefited even just a tad from the enrichment of *B Corp*., *SH* becomes liable for the value of the entire fraudulent transfer to *B Corp*. This testifies to the unwisdom of adding the concept of benefit to the text of Bankruptcy Code § 550(a)(1).

VI. CONCLUSION

BFP v. Resolution Trust Corp. means that in *some* constructive fraudulent transfer cases, a buyer at a foreclosure sale cannot be attacked by the general creditors of the debtor on the theory that the buyer paid too little.[225] But the Supreme Court limited its holding to (a) constructive frauds, (b) regularly conducted foreclosure sales, and (c) noncollusive sales. That means the buyer can be targeted if (w) the debtor is guilty of intentional fraudulent transfer, (x) the debtor has made a constructive fraudulent transfer, but the secured party has not followed foreclosure procedures, or (y) the debtor has colluded with the buyer to deprive the unsecured creditors of valuable debtor equity. Each of these items presents analytical peculiarities which this article has discussed. *KIND Operations, Inc. v. Cadence Bank (In re PA Co-Man, Inc.*) emphasizes a fourth exception: (z) *BFP* does not apply to private Article 9 foreclosure sales.[226] It only applies to public auctions.

KIND reveals that, in a collusive foreclosure sale, the foreclosing secured party must worry whether it will be sucked in when the buyer is charged with receiving a fraudulent transfer. Under Bankruptcy Code § 551(a)(1), "the entity for whose benefit [a fraudulent] transfer was made" is liable because someone else received the transfer. In *KIND*, the foreclosing secured party was held to have benefited because it received payment of its secured claim from a foreclosure sale in which the unsecured creditors allegedly lost value. In modern times, many courts think intentional fraudulent transfers are torts. If so, the foreclosing secured party might be a conspirator in helping the debtor do a wrong thing — robbing creditors of value through a collusive foreclosure sale. A foreclosing secured party may try to obtain a release from liability from the debtor, but the release itself is a fraudulent transfer, if the debtor signing the release was insolvent. The ground-breaking *KIND* case even suggests that release of the secured party by the debtor is void as contrary to public policy. Although I have criticized this last holding, the alternate theory, using fraudulent transfer to

225. *See* 511 U.S. 531, 546 (1994).
226. *See* 644 B.R. at 595.

cancel the release, is well grounded and becomes a reason to doubt that the release will be honored.