

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: BFP, Petitioner v. RESOLUTION TRUST
CORPORATION, AS A RECEIVER OF IMPERIAL FEDERAL
SAVINGS ASSOCIATION, ET AL.

CASE NO: 92-1370

PLACE: Washington, D.C.

DATE: Tuesday, December 7, 1993

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IN THE SUPREME COURT OF THE UNITED STATES

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BFP, :
Petitioner :
v. : No. 92-1370
RESOLUTION TRUST CORPORATION, AS :
A RECEIVER OF IMPERIAL FEDERAL :
SAVINGS ASSOCIATION, ET AL. :

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Washington, D.C.
Tuesday, December 7, 1993

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
11:02 a.m.

APPEARANCES:

ROY B. WOOLSEY, ESQ., Newport Beach, California; on behalf
of the Petitioner.

RONALD J. MANN, ESQ., Assistant to the Solicitor
General, Department of Justice, Washington, D.C.; on
behalf of the Federal Respondent.

MICHAEL R. SMENT, ESQ., Los Angeles, California; on behalf
of the Respondents Paul Osborne, et al.

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1 P R O C E E D I N G S

2 (11:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 92,1370, BFP v. Resolution Trust
5 Corporation. Mr. Woolsey, you may proceed.

6 ORAL ARGUMENT OF ROY B. WOOLSEY

7 ON BEHALF OF THE PETITIONER

8 MR. WOOLSEY: Mr. Chief Justice, Justices, may
9 it please the Court:

10 In this case, the Ninth Circuit court ruled that
11 in the cases where there is no fraud or collusion in a
12 foreclosure sale, the high bid irrebuttably presumes -- is
13 presumed to be, irrebuttably, the reasonably equivalent
14 value. This proposition, Your Honors, is preposterous.
15 We must look at actual values and compare them.

16 Now, counsel have agreed with me on
17 interpretation of statutes that we first look to the
18 statute. There, our agreement ends, however. From there
19 on, we disagree violently.

20 I say that section 548(a)(2) of the Bankruptcy
21 Code, which uses the language, and I quote, omitting a few
22 irrelevant words, "The Trustee may avoid any transfer of
23 an interest of debtor in property if the debtor
24 voluntarily or involuntarily received less than the
25 reasonably equivalent value and the transfer occurred in

1 the year before the filing of the bankruptcy."

2 Now, equivalent value has got to mean equal
3 value -- equivalent means equal. We're not talking about
4 a peppercorn that would support -- as consideration,
5 support a contract. We're talking about a comparison of
6 values. The only way you can compare --

7 QUESTION: Mr. Woolsey --

8 MR. WOOLSEY: Pardon me.

9 QUESTION: -- may I deflect you for a moment
10 just to clarify for me, what is the end result that you're
11 seeking? Now, you're not seeking any more to avoid this
12 transfer, but you are seeking what and from whom?

13 MR. WOOLSEY: Oh, under 550 of the United States
14 Code, under the Bankruptcy Code we are entitled either to
15 rescind, which we can't do because it's gone to innocent
16 third-party transferees, or recover the value of the
17 property. In this case, the recovery I think would be
18 limited to the difference between what the buyers put into
19 the property and what they got out of it on their resale.
20 If they hadn't resold and we were to avoid the transfer
21 and get it back into the estate of the bankruptcy, then,
22 of course, they would have a lien for their expenditures
23 on the property.

24 QUESTION: And you are seeking this from
25 Osborne, or who are you seeking it from?

1 MR. WOOLSEY: Well, from Osborne and the other
2 buyers we are entitled to that. Now, from the Imperial
3 Savings and Loan we have a different matter. They were
4 the holding company that held the trustee under the deed
5 of trust, and they benefited by getting a trustee's fees.
6 There may have been other benefits. We didn't go into the
7 facts of the other benefits in the case because as a
8 matter of fact the judge sustained their motion for
9 failure to state a cause of action, so there was no fact
10 hearing on the measure of damages.

11 The judge in the bankruptcy case that we take
12 the appeals from and this cert is from held that he was
13 bound by the then, he thought in effect, bankruptcy
14 appellate panel decision in Madrid, the 1981 or '2 case,
15 and he felt that controlled him. He had written the
16 decision cited by my opponents in that Kachanizadeh case
17 where he said if he had this to decide initially he would
18 come to a different result, but he felt bound by the
19 bankruptcy appellate panel and on that basis and one other
20 basis affirmed -- I mean --

21 QUESTION: If you were just to put --

22 MR. WOOLSEY: Pardon --

23 QUESTION: -- in a nutshell what relief you
24 think you qualify for, and I understand what you said
25 about Osborne and the other buyers. Anything against the

1 Federal Respondent?

2 MR. WOOLSEY: The Federal Respondent would only
3 be to the extent of the benefits to the Federal Respondent
4 under section 550. They might be limited to the trustee's
5 fee that they got part of. There might be other benefits.

6 QUESTION: But you're not sure about what relief
7 you're seeking, other than the difference between what the
8 buyer put in and what it got on resale?

9 MR. WOOLSEY: I'm sure of that against the
10 buyers, and of course if that makes us whole, maybe we
11 couldn't get anything against the Imperial Savings.

12 QUESTION: Okay. Thank you.

13 MR. WOOLSEY: Thank you. Now, in statute -- in
14 this case where the code says that he can avoid any
15 transfer, it doesn't have to do with the type of transfer.
16 It doesn't go into whether it's a foreclosure transfer or
17 some other type of transfer. The question is one of
18 comparing value, and equivalent value has got to mean
19 equal value.

20 The word "reasonably" before it has to change
21 that. It modifies "equivalent," so perhaps it means
22 approximately, or nearly equivalent value, but surely we
23 have to have that, or else the sale can be set aside.

24 QUESTION: Well, that depends on how you define
25 the property, doesn't it? What is your proposal? Would

1 you accept a rule that says if it's 70 percent of what it
2 would have received in an ordinary real estate
3 transaction, that that's close enough?

4 MR. WOOLSEY: I would think that it would be and
5 that guidelines such as that might be appropriate for this
6 Court.

7 QUESTION: Well, now that means that you're
8 willing to accept some individuation of the property in
9 order to determine what its reasonably equivalent value
10 is. That is, you're willing to say, this is property that
11 is being sold at a foreclosure sale, right?

12 MR. WOOLSEY: Mm-hmm.

13 QUESTION: And property that's being sold at a
14 foreclosure sale is only worth 70 percent of what other
15 property is, is that not right, why you're willing to say
16 70 percent?

17 MR. WOOLSEY: Well, no, I wouldn't say that it
18 has to do with the type of sale, I would say that the word
19 "reasonably" has modified "equivalent," and the only thing
20 I could think of is Congress meant something like
21 approximately, or nearly, rather than absolutely
22 equivalent value.

23 QUESTION: If you're willing to individuate it
24 to that extent, why not go all the way and say, this is
25 not only property of a sort that's being sold at a

1 foreclosure sale, but it is property that's being sold on
2 a rainy Tuesday when some of the best buyers in town are
3 on summer vacation? Once you agree to individuate, why
4 don't you individuate all the way, and so whatever --

5 MR. WOOLSEY: That would defeat Congress'
6 intent. Congress didn't intend to let a sale, no matter
7 how small -- there are some foreclosure sales have gone
8 for 5 percent of value. It seems to me we cannot say that
9 such a sale meets the standard set forth in section 548.

10 QUESTION: Suppose I say, I'm going to give you
11 a gift. I am the creditor, foreclosing on a piece of
12 property. I've already foreclosed. The property is going
13 to be sold tomorrow morning at 10:00, and I'm making you a
14 gift of that. How much is that gift worth that I have to
15 pay gift tax on? How much is it worth?

16 MR. WOOLSEY: Now, I don't understand the
17 question. The Court is asking if the creditor is going to
18 bid it in and make a gift back?

19 QUESTION: No, no, no, no. I'm making you a
20 gift of property that is going to be -- of the income from
21 property that is going to be sold at a foreclosure sale
22 tomorrow at 10:00. How would you evaluate the value of
23 that gift? Wouldn't you --

24 MR. WOOLSEY: Oh --

25 QUESTION: -- go back, after the sale occurs,

1 and if the sale under these State conditions which are
2 prescribed by law derives \$10,000, you'd say the gift was
3 worth \$10,000, wouldn't you?

4 MR. WOOLSEY: Well --

5 QUESTION: It is property that is subject to
6 foreclosure under certain State rules --

7 MR. WOOLSEY: Well, of course --

8 QUESTION: -- and whatever it fetches under
9 those rules has to be the fair value of that particularly
10 individuated property.

11 MR. WOOLSEY: No, I don't think that's the case.
12 That argument would destroy the application of 548 to any
13 transaction, it seems to me.

14 QUESTION: Oh, no, if you didn't follow the
15 State rules, if it were a collusive sale, then 548 would
16 continue to apply, wouldn't it?

17 MR. WOOLSEY: Well, I think 548 applies to
18 foreclosures as it does any other sale, because the
19 foreclosure market is not a market that is designed to
20 determine accurate value, and some of the cases we cited
21 say it doesn't evidence value. The foreclosure price may
22 be any price. It doesn't relate to value, and the
23 Congress has said, if it doesn't -- if it isn't at least
24 the reasonably equivalent value, it can be set aside.
25 Reasonably equivalent can't be based on the transaction

1 following State law. This is based on an act of Congress
2 that has set forth a Federal statute and a Federal
3 standard.

4 As said in the Butner case in the footnotes, and
5 said in some of the other cases, 547, on prepetition
6 preferences, 548 on prepetition sales, 549 on postpetition
7 sales, all have to meet a standard, and it's a Federal
8 standard, and the State standard doesn't determine it. I
9 don't think the State standard here, the fact that you
10 comply with the State standard doesn't determine value.
11 The State has a foreclosure system in order to protect a
12 creditor who can foreclose.

13 QUESTION: Of course, your answer, I take it,
14 would be different if the State system imposed a fiduciary
15 duty on the foreclosing mortgagee, because in that case
16 the mortgagee would be bound to take whatever steps would
17 be necessary to realize the highest possible value, and I
18 think your argument is that the State systems
19 characteristically don't impose any such requirement.

20 MR. WOOLSEY: That is true of State systems
21 characteristically. I must confess, there's one case
22 cited by my adversary, the Bank of Seoul v. Marcione,
23 which held that the trustee does have some duties in that
24 respect, and for violation of that duty a sale could be
25 set aside under State law, but I don't think the State law

1 is the test here. The test here is Federal law and what
2 happened in this particular transaction, and in this
3 particular transaction, a sale of less than 70 percent was
4 not a reasonably equivalent value, is our position.

5 QUESTION: But if you had a -- we'll call it a
6 fiduciary State, and the fiduciary standard was in fact
7 satisfied, then it would be odd to construe the Federal
8 statute to require any different obligation. Wouldn't
9 that be fair to say?

10 MR. WOOLSEY: I don't think that is, Your Honor.
11 I think the Federal Government has set forth a standard
12 that applies in bankruptcy.

13 QUESTION: No, but the is reasonably equivalent
14 value --

15 MR. WOOLSEY: Yes.

16 QUESTION: -- and I take it that you're ready to
17 admit that what is reasonably equivalent takes into
18 consideration the circumstances of the sale, not only the
19 fact that it's a foreclosure sale, but the fact that the
20 foreclosing party may or may not make efforts to get in
21 real buyers, there may or may not be a real market for
22 this property, and so on.

23 All I was suggesting was that given the scope of
24 what the term reasonable implies here, if we were dealing
25 with a State that did impose a fiduciary duty, an

1 obligation to get top dollar and to take whatever steps
2 were necessary to take top dollar, isn't it likely to be
3 the case that satisfying that standard would also satisfy
4 the standard in the Federal act of obtaining what is
5 reasonably equivalent?

6 MR. WOOLSEY: No. I think the answer to that is
7 no. The primary consideration here is comparing this,
8 equivalent value -- we're comparing. We're comparing the
9 value, not the circumstances. The circumstances are
10 secondary to comparing the value.

11 It is true that cases do dwell on the
12 circumstances -- the Bundles case, the --

13 QUESTION: Well, if you're going to -- if you're
14 going to construe the statute as implying simply a
15 comparison of values, why do you accept 70 percent?

16 MR. WOOLSEY: Well, I don't know that --

17 QUESTION: If I lend Justice Scalia \$1 and he
18 says I'll give you 70 cents back, I'm going to squawk.
19 I'm going to say, that's not reasonably equivalent. Why
20 are you willing to take 70 percent if you're not willing
21 to lose your 30 percent in view of the circumstances that
22 as a practical matter would prevent you from ever
23 realizing the 30 percent.

24 MR. WOOLSEY: Well, I would rather the standard
25 be higher than the 70 percent. I think the words do mean

1 that.

2 QUESTION: Are you willing to take 70?

3 MR. WOOLSEY: 70 percent will cover us in this
4 case. We're willing to take 70. But I don't think that
5 means that 70 percent is what Congress meant, particularly
6 when you take into account other circumstances such as
7 that in these sales we have advertising in compliance with
8 the State law about a little notice, not advertising the
9 type of property --

10 QUESTION: Mr. Woolsey, do you agree that
11 interpreting the phrase, reasonably equivalent value, the
12 circumstances of the sale can be taken into consideration,
13 a foreclosure sale on the one hand as opposed to an arm's
14 length transaction where the property is finally found a
15 buyer after 2 or 3 years?

16 MR. WOOLSEY: Well, many of the cases -- most of
17 the cases say we can take into account --

18 QUESTION: I didn't ask you what most of the
19 cases said. I asked you what your position is in the
20 matter.

21 MR. WOOLSEY: Well, I think the circumstances
22 can be considered, but I don't know that that means the
23 type of sale. For instance, take this, Your Honor. If a
24 person has 1,000 units of something that a family needs
25 only one of, obviously we're talking about the price level

1 at wholesale rather than the price level at retail.
2 Certainly the reasonably equivalent value is affected by
3 the economic law of supply and demand, but I don't think
4 it is affected by the type of sale. I think if the sale
5 is a foreclosure sale and the cases --

6 QUESTION: Why isn't it effective? You have to
7 put the thing together rather quickly. It doesn't --
8 isn't it common knowledge that if you can hold a property
9 on the market for several years and wait for a buyer,
10 you're going to get a much better price than if you have
11 to sell it quite rapidly at what is in effect a forced
12 sale?

13 MR. WOOLSEY: That is certainly true, Your
14 Honor, yes.

15 QUESTION: Well, why shouldn't you be able to
16 take that into consideration in determining reasonably
17 equivalent?

18 MR. WOOLSEY: Well, it seems to me that that
19 violates reasonably equivalent if the value has to be low.
20 We have a situation here --

21 QUESTION: But then you are disagreeing even
22 with the Seventh Circuit, with Judge Ripple, who rejected
23 the Ninth Circuit's view but did seem to think the
24 circumstances of the sale, including the foreclosure sale,
25 was a relevant factor.

1 MR. WOOLSEY: I've got to admit that it might be
2 relevant, but how persuasive can it be when the sale price
3 is less than 70 percent? I think that's my distinction.

4 QUESTION: In response to Justice Scalia before,
5 you were making the point that unless "reasonably
6 equivalent value" means something more than whatever you
7 get at a foreclosure sale that meets the State law
8 requirements, 458(a)(2) would be meaningless. Is that
9 because other provisions of the Bankruptcy Act -- not
10 simply State law, but the Bankruptcy Act, will take care
11 of the collusive sale and the sale that does not meet the
12 formalities and the procedures required under State law?

13 MR. WOOLSEY: That is certainly true. In
14 548(a)(1) the -- if there's actual fraud we can set it
15 aside, and the other section is a way of setting it aside
16 based on the objective standard of reasonably equivalent
17 price rather than having to go into whether or not there
18 was collusion or fraud.

19 QUESTION: And the irregularities under State
20 law, there was another section under the Bankruptcy Code
21 itself, I think, that would address that, so your point is
22 that this has to have a different office than to deal with
23 those situations.

24 MR. WOOLSEY: I didn't hear Your Honor's last
25 comment.

1 QUESTION: Your point about 548(a)(2) is that it
2 would be meaningless unless it had to do with something
3 other than the formalities of State law and whether it was
4 collusive.

5 MR. WOOLSEY: Yes, Your Honor, that is correct.
6 That's true.

7 Now, in this matter, my adversaries have gone
8 into the purposes of the statute, policies, and
9 legislative history. I think where a statute is clear, we
10 look at the statute. We don't need to go into the purpose
11 of the statute. If we do consider the purpose here, we've
12 got to consider this: 548 itself is a way of bringing
13 property back into the estate so that it will be there to
14 be -- so that all other creditors can share in it, and 547
15 is a way of bringing property back into the estate.

16 We're in a subsection -- that is, subchapter (3)
17 of chapter 5 of the Bankruptcy Act, which provides what
18 the estate is. 541 defines the estate, and gives you --
19 all of the property that a person owns under State law
20 comes into the estate, and then it contains these
21 avoidance powers, and then the Bankruptcy Act itself has
22 two purposes, of course, to bring property in for the
23 creditors, let creditors share in the property, and give
24 the debtor a fresh start after his discharge and have the
25 exempt property. I think the purpose of the act is

1 clearly supported by, in this case, having the property
2 brought back in the estate.

3 Now, they talk about presumptions. Presumptions
4 should exist only if there's a logical nexus between the
5 proven fact and the presumed fact. I've gone into that in
6 the brief, and I don't have to say much more about it,
7 but I think here you have a situation at a foreclosure
8 sale, where some of the courts that are on my side say
9 there's no conclusive presumption, say that we get less
10 money at a foreclosure sale than at other sales, therefore
11 we can tolerate less, but I don't think that that is true
12 at all. I think that that just proves that we should look
13 with suspicion on a foreclosure sale.

14 The history of the law they go into, in '38 the
15 Bankruptcy Act got with it the power to invalidate
16 involuntary transfers. In 1978 we changed to include --

17 QUESTION: Mr. Woolsey --

18 MR. WOOLSEY: Pardon.

19 QUESTION: -- if we accept your condition --
20 position, wouldn't one of the practical effects be to mean
21 that you could get -- a seller could get still less at a
22 foreclosure sale because it would be relatively more easy
23 to upset the result of a foreclosure sale --

24 MR. WOOLSEY: Well, that argument had been
25 considered by several of the text writers, and it is of

1 some concern. I think here, however, if the person knows
2 that he's going to have the sale set aside if he bids less
3 than the reasonably equivalent value, he's more likely to
4 bid what is a reasonably equivalent value, particularly if
5 the Court used guidelines such as in Durrett. I think
6 that we're not going to have a situation where there's
7 going to be any calamity.

8 For instance, Texas has the rule that you can
9 set aside the sale. The Ninth Circuit, including
10 California, does not. What are real estate values doing
11 in Texas today and what are they doing in California?
12 They've been going up in the last few months in Texas and
13 they continue to go down in California. There are
14 certainly other factors that are more important in
15 determining values than the possibility that a sale which
16 results in a windfall to the buyer could be set aside.

17 This statute comes into play only when there's a
18 windfall. It doesn't come into play in most foreclosure
19 cases. In many foreclosure cases, it will come into
20 effect, of course, and it should. I don't think there
21 should be any attempt to harmonize State law with Federal
22 law in this case. I think the Butner case made that
23 clear, a case by this Court. There's no financial
24 calamity, and I think that on the fairness issue in this
25 case, this is a special case in this one, because remember

1 the second deedholder had cured a prior default, said he
2 would cure the default again, asked for notice of the
3 continuances, and it wasn't give to us. The debtor asked
4 for notices of the continuances. They thought they were
5 going to be informed as to when the sale was, and the only
6 reason for the delay in curing the default was that they
7 didn't know about title to the third person not here
8 involved, and we won that quiet title suit.

9 I think I better save the rest of my time for
10 rebuttal, unless there are more questions.

11 QUESTION: Very well, Mr. Woolsey. Mr. Mann,
12 we'll hear from you.

13 ORAL ARGUMENT OF RONALD J. MANN

14 ON BEHALF OF THE FEDERAL RESPONDENT

15 MR. MANN: Thank you, Mr. Chief Justice, and may
16 it please the Court:

17 The issue in this case is whether a bankruptcy
18 court may invalidate a real property foreclosure sale that
19 was properly conducted under State law and held before the
20 bankruptcy proceeding began on the theory that the
21 consideration received at that sale was not a reasonably
22 equivalent value for purposes of section 548.

23 I would like to focus here on two points.
24 First, that the language of the statute, taken in context,
25 does not require the result petitioner seeks, and second,

1 that a rule permitting invalidation of such a sale is
2 inconsistent with the principles this Court has
3 articulated for construing the Bankruptcy Code.

4 First, the language. The key statutory phrase
5 is the reference to reasonably equivalent value in section
6 548, and in our view the key consideration in interpreting
7 that phrase is the difference between that phrase and the
8 phrases that Congress used in other places where it
9 confronted valuation questions in the Bankruptcy Code.
10 Most commonly, it used the unqualified term, value. In
11 several places it referred to fair market value.

12 QUESTION: Well, Mr. Mann, I think, you know,
13 it's pretty easy to conclude that reasonably equivalent
14 value means something other than market value, but does it
15 also mean, we accept as a per se rule that a foreclosure
16 sale yields reasonably equivalent value, or is it a
17 case -- is it open to a case-by-case inquiry, or is it
18 only a presumption? The cases are all over the ball park
19 in how to deal with this.

20 MR. MANN: Yes, they are, Justice O'Connor, and
21 I think the way to go about it is to try and ascertain why
22 Congress would have chosen the particular words that they
23 used and then look at them through the lens that the Court
24 has used for evaluating other similar problems the Court
25 has faced under the Bankruptcy Code where you could

1 interpret language in a way that would disrupt systems
2 that the States have carefully put together for dealing
3 with difficult policy questions.

4 When Congress said the value needed only to be
5 reasonably equivalent, as you noted, it must mean that it
6 could be something less than market value, but it seems to
7 me that it also must have meant that the set of
8 considerations that are relevant are going to be different
9 than the ones that would have been relevant if you were
10 just trying to ascertain fair market value.

11 Along those lines, it seems to me you have to
12 realize that the question of value is not an objective,
13 perfect question. Everyone talks about how, well, he
14 should just bid 70 percent of the fair market value. A
15 person bidding at a foreclosure sale can't know exactly
16 what the value will be determined by a judge several years
17 later. He's going to bid the amount that he believes the
18 property is worth to him, and then the bankruptcy judge
19 task later is to determine -- try to recreate a market
20 transaction and to ascertain what would have happened if
21 the property had been sold in a market transaction.

22 In our view, when the property, as it has at a
23 foreclosure sale, has already been sold at a market
24 transaction, there's no reason to believe, absent Congress
25 telling us that the Court should do that, that Congress

1 intended for the judge to attempt to do a better job of
2 pricing the property than the market.

3 QUESTION: Well, what if it had been a private
4 sale and not a foreclosure sale.

5 MR. MANN: The --

6 QUESTION: How would your rule play out there?

7 MR. MANN: The rule that we seek rests on
8 several features that are really unique, I think, to real
9 property foreclosure sales. You start from the premise
10 that --

11 QUESTION: In other words, to help me out, you
12 would not make the same argument as applied to a voluntary
13 sale?

14 MR. MANN: I think that the -- I'm -- that's
15 right. The rule we seek rests sort of on a combination of
16 two factors: 1) you have a market transaction that's a
17 public auction.

18 Almost all State foreclosure sales are going to
19 bear four features. There's going to be a public notice.
20 There's going to be a notice to the debtor so he'll know
21 the sale will occur. There'll be a substantial waiting
22 period, and then the property will be sold at an auction
23 that is open to members of the public at which they can
24 purchase it and it will be sold to the highest bidder.
25 When a State sets a --

1 QUESTION: Well, but there's another important
2 feature, too, and in most States there's a redemption
3 period.

4 MR. MANN: I think it's -- I'm less willing to
5 sort of agree with that type of a generalization, because
6 redemption --

7 QUESTION: Well, there is in California.

8 MR. MANN: There is in California, but it ends
9 at the date of the foreclosure sale.

10 QUESTION: Right.

11 MR. MANN: I mean, you have a provision for
12 redemption, but foreclosure --

13 QUESTION: Don't you think that has some
14 chilling effect on the price that you get at a foreclosure
15 sale?

16 MR. MANN: No, because the redemption ends at
17 the foreclosure sale. If you purchase at the foreclosure
18 sale, there is no further right of redemption and you own
19 the property free and clear, subject to the chance --

20 QUESTION: Well, what is the right of
21 redemption, if it isn't the right to redeem within 3
22 months or 6 months after the sale.

23 MR. MANN: In some States there is a -- it's
24 actually an anomaly to refer to a right of redemption that
25 continues after foreclosure, because foreclosure typically

1 is the foreclosing of the debtor's rights --

2 QUESTION: No, but the --

3 MR. MANN: -- but in some --

4 QUESTION: -- transaction at which the price is
5 determined is subject to a postponement for closing the
6 deal until the redemption period has expired.

7 MR. MANN: In some States -- in some States that
8 does occur.

9 QUESTION: In most States.

10 MR. MANN: I --

11 QUESTION: I didn't practice in all States, I
12 have to admit.

13 MR. MANN: Right, I mean I --

14 QUESTION: Maybe the law's changed a lot.

15 (Laughter.)

16 MR. MANN: I think actually that there's a
17 tendency for there not to be redemption periods that
18 continue after foreclosure sales that are privately
19 conducted under a power of sale, and given -- of course,
20 some States have those rules, though, and in a State that
21 does have such a rule, I agree the redemption period would
22 chill the bidding some, but you have to realize --

23 QUESTION: Isn't that an explanation of why so
24 often in these sales the mortgagee bids in the price of
25 the indebtedness and that's about what the price normally

1 is, or at least, very frequently is? It was in this case,
2 for example, just a few thousand dollars over the
3 indebtedness.

4 MR. MANN: Well, actually, this case is --
5 suggests something contrary to what you're suggesting,
6 because the mortgagor -- the foreclosing lender actually
7 bid more than the amount of the indebtedness, which it
8 certainly had no reason to do.

9 QUESTION: \$11,000 more on a \$500,000 house, or
10 something like that?

11 MR. MANN: Well, the question remains whether
12 it's a \$500,000 house, but the point I guess I would make
13 is that the redemption period would chill the bidding a
14 little bit, but a redemption period at least has a
15 specific period of time that once it passes, everything is
16 over. The rule that is sought in this case would not work
17 that way, because it would be a much longer period of
18 time.

19 QUESTION: How much longer?

20 MR. MANN: Well, any bankruptcy proceeding
21 that's filed within 1 year of the sale, then, anytime
22 within the bankruptcy period proceeding until a trustee is
23 appointed -- in this case, for example, a trustee was
24 never appointed, then 2 years beyond that. This can even
25 go beyond the confirmation of a plan in a Chapter 11

1 proceeding.

2 Until all the payments have been made someone
3 can come back in and file such an action, and then the
4 worst thing, from the perspective of a person who's trying
5 to purchase, is that if the transaction is invalidated,
6 unlike a redemption period, the person doesn't get their
7 money back.

8 When a redemption thing happens, the borrower
9 comes in, he pays off the loan, and the person has their
10 money and they can walk away. What happens here is, all
11 you have to get is a lien on the property of indefinite
12 duration, and if the property has increased in value,
13 whether because the market has changed or because you have
14 improved it, you cannot profit from this investment, so
15 it's a powerful incentive not to purchase property and not
16 to develop the property after you've purchased it.

17 In a redemption period, we really have none of
18 those truly severe and constrictive effects, and I think
19 that's what makes this type of thing so troubling to
20 commerce in land.

21 QUESTION: Mr. Mann, I have difficulty squaring
22 your argument, I admit, with the language of the statute,
23 but we have an easier way to assess it, and that is, the
24 parade of horrors that you suggest should have happened
25 in the Fifth Circuit, and yet the Fifth Circuit has had

1 Durrett for, what is it, 12 or 13 years now, and I haven't
2 heard anything in any of the briefs about the destruction
3 of the market for mortgages in the fifth Circuit.

4 MR. MANN: The Fifth Circuit has had Durrett for
5 quite some time, and it is -- it's my personal experience
6 that third parties very rarely bid at foreclosure sales
7 that are conducted in the States.

8 I've practiced in Texas. I haven't conducted
9 foreclosure sales on other sales in the Fifth Circuit, but
10 at least in Texas, third parties rarely bid, and one of
11 the main problems is they cannot, under any circumstances,
12 acquire title insurance because of the effect of Durrett.

13 Absent Durrett, you would be able to purchase a
14 title insurance policy, the title insurance company would
15 carefully peruse the foreclosure documents, make sure the
16 lawyers had filed everything in the right place and said
17 the magic words, and then if you bought it at the sale,
18 you could have a title policy and you would know you would
19 own the property, but you can't -- you get a policy that
20 has an exception, so you really can't buy the property,
21 and no one would be willing to make a significant
22 commercial investment because of the risk of it being
23 overturned, and I would submit that --

24 QUESTION: Well, I think you're saying that in
25 effect Durrett has not had the effect of markedly

1 increasing the amounts that are paid on foreclosure, but I
2 take it by the same token that you don't touch this other
3 subject that Durrett has not had an effect on the market,
4 on the mortgage lending market.

5 MR. MANN: Well, I think that's hard to tell.
6 There's a footnote in our brief --

7 QUESTION: But we just don't have anything in
8 the record, do we?

9 MR. MANN: The information of the people that
10 have conducted empirical studies, there are articles that
11 go both ways on that particular point.

12 There's a very good article that we cite in our
13 brief -- I think it's by Professor Schill -- that points
14 out the fact that the relation between mortgagee
15 protection laws and actual rates of lending is likely to
16 be very small because such a small percentage of laws go
17 into default. There would have to be a truly dramatic
18 difference to actually affect the rate of lending, but
19 that's not to suggest that the market for foreclosed
20 property is not important.

21 QUESTION: But if that is the case, your
22 strongest argument, or your strongest empirical argument
23 seems to be that if you accept the petitioner's position
24 you're still not going to do very much as a practical
25 matter to benefit either mortgagors or unsecured

1 creditors.

2 MR. MANN: Oh, I disagree with that strongly.

3 QUESTION: Then I misunderstand you.

4 MR. MANN: My point is simply that if you accept
5 petitioner's position, I don't think you can say that
6 insurance companies are going to decline to extend loans
7 for homes in Texas. I don't think it will have a
8 significant effect on the market for origination of loans.
9 It probably will have some effect, but for empirical
10 reasons the number of defaulting loans is not that
11 significant, but it will have a dramatic effect, I think,
12 on the market for foreclosed property, and in Texas at
13 least that's a very significant market. The Resolution
14 Trust Corporation --

15 QUESTION: Do we have empirical data from the
16 Fifth Circuit to the effect that this has happened in the
17 last 12 years, that in fact the bid price has gone down
18 rather than gone up as a result of the Durrett rule?

19 MR. MANN: No, but it's also by its nature the
20 type of thing that you can't really have empirical data
21 because the only way to get empirical data, you'd have to
22 sort out the effect of this particular rule from the
23 effects of all sorts of other things going on in the real
24 estate market, and as you know from -- I think the Court
25 knows the real estate market in major cities in Texas has

1 been going up and down a lot during the --

2 QUESTION: But what it boils down to is, you in
3 effect are saying to us that we've got to rely on our
4 intuitive judgment that despite 13 years in the Fifth
5 Circuit there, there isn't any hard data to go on on that
6 point.

7 MR. MANN: No, what my point -- my principle
8 point isn't that you should rely on your intuitive
9 judgment, it's that the States have made a judgment, the
10 States have addressed this problem --

11 QUESTION: Well, that -- I don't see that at
12 all. The States have made judgments about, in effect, due
13 process requirements.

14 Some States have made judgments about fiduciary
15 responsibilities, but not all States have, and I gather
16 that that in fact is not even the majority rule, so that a
17 State that requires nothing more than the printing of a
18 notice in fine print in the legal notice section of a
19 newspaper for 3 successive weeks is certainly not a State
20 which is showing any concern to maximize the amounts of
21 money realized on foreclosure sales.

22 And under your rule, whether we had a fiduciary
23 State or a 3-week notice State, the result would be
24 exactly the same. Whatever was realized would be
25 reasonable equivalent, and yet the States are not all

1 addressing the problem that we're addressing.

2 MR. MANN: I think the States have all addressed
3 the problem one way or another, and I guess I would like
4 to point out that this is in fact a fiduciary duty
5 State -- the case before the Court. As we cite in the
6 brief a case, there is a fiduciary duty imposed on the
7 foreclosing trustee under California law.

8 QUESTION: Why isn't your response, Mr. Mann,
9 that a State that has such a law that does not impose
10 fiduciary duty is a State that has by its laws reduced the
11 value of property that is brought into foreclosure, and
12 just as State zoning laws can reduce the value of property
13 and cause the property to fetch less on the market, so
14 also States that have such foreclosure laws have reduced
15 the value of that property, and so you are getting
16 equivalent value. One of the factors affecting the value
17 of property is State law.

18 MR. MANN: I guess I would have made a slightly
19 different point, which is that I don't think you can tell,
20 necessarily, that imposition of a fiduciary duty in this
21 context is a good thing in the sense that it will increase
22 values. When you impose a fiduciary duty, people are
23 subject to suit, people may not wish to undertake the
24 duty, and therefore you may have less competent people
25 performing the sale.

1 I think this is the type of decision, it's not
2 all that clear which set of rules is likely to produce the
3 most effective overall benefit for all of the parties
4 involved, and the states have got different rules. The
5 rules in California are one thing, the rules in Texas are
6 different, but I don't think it's particularly easy to say
7 that one set of rules is necessarily more protective than
8 the other.

9 But I do agree with your point that the value of
10 property must take -- that is sold by foreclosure, a
11 reasonably equivalent value, must take into account the
12 fact that the property in question was subject to a lien
13 where the parties agreed that this was the way that the
14 value would be determined and that the property would be
15 transferred.

16 QUESTION: Well, except that that assumes the --
17 I guess that assumes the answer. You say the parties have
18 agreed. It seems to me that if all that Congress wanted
19 to get at was a requirement that the value that is
20 received be received after compliance with State law, they
21 took a very obtuse way to require that, because it would
22 have been far simpler to provide precisely that, and we
23 wouldn't have this question before us.

24 MR. MANN: Well, I think if you take a step back
25 and look at section 548 as a whole it becomes clear what's

1 going on.

2 Section 548 is designed to recover fraudulent
3 conveyances, and the reason that we're worried about
4 fraudulent conveyances is that when borrowers become
5 insolvent, they don't have any incentive to seek a
6 reasonably equivalent value for their property because
7 it's all going to go to their creditors anyway, and so
8 Congress passed a statute, like the overwhelming majority
9 of the States, that would allow a representative of the
10 creditors to recover the property if it was transferred
11 for less than a reasonably equivalent value.

12 Now, in order to do that, someone is going to
13 have to look and determine what the actual value of the
14 property is, because you can't tell if you didn't get
15 enough until you determine what the value is, and if the
16 property has been transferred in a voluntary sale such as
17 the one to which Justice O'Connor referred, the only way
18 that the judge can evaluate the sale is by attempting to
19 recreate a market transaction.

20 But if the transaction that has already occurred
21 was one in which anyone who wished to purchase the
22 property was free to show up and purchase it and the
23 highest bidder purchased the property, it would seem
24 unlikely that a judge would be systemically placed to make
25 a better determination of value after the fact than the

1 market made at the time, and I think if you take that
2 point and add to it the point that this is area in which
3 the States have traditionally been responsible for, the
4 Court has been reluctant to interfere with the --

5 QUESTION: Mr. Mann, but the Seventh Circuit in
6 the Bundles case, in dealing with that issue, said that
7 the State has one concern, and that's the security of
8 these mortgage foreclosures, the procedure has occurred,
9 it's done and finished, where the bankruptcy law is
10 designed to preserve the assets of the State and to see
11 that what -- the debtor receives something fairly
12 equivalent to what he surrendered.

13 So the notion of the Seventh Circuit at least
14 was that the Bankruptcy Code provisions must be
15 interpreted in light of what is a driving force of the
16 Bankruptcy Code, which is different from the driving force
17 of the State law provisions dealing with foreclosure.

18 MR. MANN: I think there's three points I'd like
19 to make in response to that, if I have time. The first
20 point is not necessarily in response to your question, but
21 I want to mention the Seventh Circuit rule. It may seem
22 initially attractive to have some sort of rebuttable
23 presumption to allow things to be considered, but from our
24 view the real problem with such rule is that it doesn't
25 really do much better than a 70 percent rule, because it

1 leads people who would wish to purchase at a foreclosure
2 sale in the predicament of not knowing for sure that they
3 actually are purchasing anything.

4 With respect to your question, I think that the
5 purpose of section 548, as I was trying to explain to
6 Justice Souter, it really hinges on the notion that the
7 debtor doesn't have any incentive to secure an appropriate
8 value for the property. When it's sold by a foreclosure
9 sale, the debtor is not in a position to be attempting to
10 dissipate the assets of the State. He has no choice in
11 the matter. The creditor is doing it.

12 And moreover, at least in this case, and I think
13 that under State law it's generally true, although it's
14 not that clear, the sale is conducted by a third party who
15 is charged under State law with a fiduciary duty to obtain
16 the highest possible price for the property, and I think
17 in those circumstance it's quite difficult to see that
18 there really is a separate bankruptcy policy to which the
19 State has not attended.

20 QUESTION: Well, if you were correct that every
21 State was a fiduciary State, you'd have a stronger
22 argument, but every State isn't, and I suspect most are
23 not.

24 MR. MANN: I think in most States it is true
25 that the foreclosure sale -- that if there's not a

1 fiduciary duty there are other ways to which -- that a
2 trustee is in substance held to the fact that if he does
3 not comply with those procedures he will be effectively
4 harmed in the sense that --

5 QUESTION: There may or may not be -- there may
6 or may not be, but I would have supposed the language of
7 this statute made it clear that Congress wanted some way
8 to subject this person to a higher duty than merely
9 publishing a notice three times, 3 weeks in succession.

10 MR. MANN: Well, for one thing, obviously the
11 statute in California does impose considerably more
12 obligations than that, but I don't think it's clear that
13 Congress intended to have judges attempt to recreate the
14 market and get a better value than the market did, and I
15 guess that's the point I would make on that.

16 One last point I wanted to make about --

17 QUESTION: What provision -- what would the
18 provision be addressed to? What is your response to the
19 question that Justice Ginsburg asked?

20 MR. MANN: Oh, I -- that's a good point.

21 QUESTION: Taking into account 544, 548(1), what
22 is the independent office of 548(a)(2)?

23 MR. MANN: The situation here is not one that
24 would be covered by section 548(a)(1) because there would
25 not be any fraud by the debtor.

1 Any fraud that would have occurred in a sale
2 like this would be if the lender was doing something
3 wrong, and it would not be addressed by any provision
4 other than 548(a)(2).

5 If this provision were not here, and if the
6 voluntary and involuntary language that was added by the
7 amendments were not there, then a completely collusive
8 foreclosure sale, as long as the debtor didn't have any --
9 wasn't a part of the collusion, which is entirely
10 possible -- for example, a sale at which a foreclosing
11 lender sold it to a related company for a peppercorn --
12 would be immune from invalidation under the Bankruptcy
13 Act, and that would be something that Congress would be
14 concerned about.

15 QUESTION: Thank you, Mr. Mann. Mr. Sment,
16 we'll hear from you.

17 ORAL ARGUMENT OF MICHAEL R. SMENT

18 ON BEHALF OF RESPONDENTS PAUL OSBORNE, ET AL.

19 MR. SMENT: Thank you, Mr. Chief Justice, and
20 may it please the Court:

21 I think we're here today to hopefully promote
22 the established doctrine of federalism and the continuing
23 validity of State foreclosure law. I think we're also
24 here today to provide some protection for innocent third
25 party purchasers who purchase at real estate sales

1 conducted pursuant to foreclosure laws, exactly like my
2 clients.

3 QUESTION: Well, excuse me, Mr. Sment, I think
4 we're here today to interpret the Federal bankruptcy
5 statute and determine what that language means.

6 MR. SMENT: That's correct, Justice O'Connor,
7 and in order to do that we need to focus on the key term,
8 reasonably, and I think on focusing on that term, as the
9 counsel for the petitioner admits, we have to look at the
10 circumstances in the sale. I think in order to look at
11 that statute and that term, we have to look at the intent
12 of Congress to determine --

13 QUESTION: Well then, why do you need a per se
14 rule if you want to look at the circumstances of the sale?

15 MR. SMENT: The per se rule does look at most of
16 the circumstances of the sale, and I think that's
17 something that the petitioner seems to overlook, that in
18 order to reach the conclusive presumption that the Ninth
19 Circuit allows, we do have to look at the circumstances in
20 a number of factors at the sale, with one exception.

21 QUESTION: But the circumstance you look at is
22 whether it was conducted in accordance with State law.

23 MR. SMENT: No, we look to see if it was
24 noncollusive, which doesn't necessarily mean State law --

25

1 QUESTION: Well, two circumstances: 1) was it
2 noncollusive, 2) did they comply with State law?

3 MR. SMENT: And the third one --

4 QUESTION: That's the end of the ball game,
5 isn't it?

6 MR. SMENT: Well, but in looking in that, Your
7 Honor, the third one is, was it a fraudulent sale?

8 QUESTION: Well, that's the same as
9 noncollusive, really. Well, assume it's an honorable sale
10 and compliance with State law. That's the end of the ball
11 game. You don't care how many dollars they got --

12 MR. SMENT: In order to look at that, Your
13 Honors, we have to look at the parties involved, we have
14 to look at the facts and circumstances --

15 QUESTION: The lender puts the property in for
16 the mortgage indebtedness, is what normally happens.
17 That's the normal circum -- a frequent circumstance --

18 MR. SMENT: That isn't what happened here, Your
19 Honor, and keep --

20 QUESTION: Well, \$11,000-plus.

21 MR. SMENT: Well, keep in mind here, Your Honor,
22 under California law and under most foreclosure laws, \$1
23 bid over the credit price for the loan is sufficient to
24 buy the property, and there's no investor that would
25 necessarily spend more than the \$1 if he didn't have to,

1 so the implication from the \$11,000 --

2 QUESTION: No one would spend \$1 if he could get
3 it for nothing. No one would -- no one would buy if he
4 could steal. I mean, I don't know where that gets you.

5 MR. SMENT: Well, I don't think the foreclosure
6 laws deal with stealing, Justice Souter, and I would be --

7 QUESTION: No, but the trouble, it seems to me,
8 with your argument is that if the phrase in question,
9 reasonably equivalent value, means nothing more than you
10 say it does and imposes no more of a duty than you say it
11 imposes, it would have been infinitely simpler for
12 Congress simply to say that a bona fide sale conducted in
13 accordance with the requirements of State statutory or
14 common law will be conclusively presumed to realize a fair
15 or sufficient value, and it would avoid all of the
16 interpretive problems that we've got. It didn't take that
17 simple course, and because it didn't, it seems to me that
18 on the face of it it must have meant something more.

19 MR. SMENT: But Your Honor, doesn't the term,
20 reasonably, suggest that the Court has to conduct its
21 evaluation under the circumstances it faces?

22 QUESTION: I think it does, and it certainly
23 precludes the -- it seems to me, the application of a --
24 in effect a per se rule that once there is a noncollusive,
25 nonfraudulent sale in accordance with state statutory

1 requirements, that's the end of the issue.

2 MR. SMENT: I disagree in part, Justice Souter,
3 and only because I think in the analysis for determining
4 the reasonable equivalent value, the Court has to consider
5 the State law. I mean, it has to consider the effect of
6 that and whether Congress could have --

7 QUESTION: But there's one Bankruptcy Code and
8 there's a variety of State laws, and some are more
9 protective, some have -- require more in the way of
10 advertising -- do some require an appraisal before there's
11 a sale, and some don't. So there'd be such a lack of
12 uniformity, if your position is correct, whereas if you
13 take the position of the Seventh Circuit, the foreclosure
14 sale price means quite a lot, but it's not the be-all and
15 end-all because of the tremendous varieties in what the
16 State law requires.

17 MR. SMENT: And it's the very fact of that
18 variety that precludes an application of the Bundles
19 decision. For example, Bundles talks about appraisals of
20 the property. That is not required in most States. It's
21 not required in California for foreclosure.

22 Bundles talks about additional advertising or
23 broker involvement. That is not only not required under
24 California law, it's assumably not permitted by the
25 California statutes. I think that again, in considering

1 the term "reasonably," could Congress have said something
2 different? Yes. There's implications that it may have
3 tried to do that. We don't have anything different. But
4 to the contrary, it hasn't prohibited a conclusive
5 presumption. It hasn't prohibited the circuits or the
6 bankruptcy courts from interpreting and looking at State
7 law.

8 QUESTION: Well, because satisfying the
9 requirements of State law and noncollusive, those are
10 independently taken care of by the act without regard to
11 548(a)(2), what does 548(a)(2) do?

12 MR. SMENT: I disagree in part, Your Honor. I
13 think that a collusive sale could possibly be attacked
14 under Section 548, but when you have an elaborate,
15 statutory scheme like you have in California, and a sale
16 is conducted pursuant to that scheme, if you then step in
17 and allow a bankruptcy to create a collateral attack on
18 that sale that would not be available in State court, then
19 you're undoing the State foreclosure laws.

20 QUESTION: I understand that argument. I'm
21 asking you what 548(a)(2) then does. That's a good
22 argument for saying it does nothing. It doesn't need to
23 do anything, and it shouldn't do anything. But you don't
24 need that provision in the bankruptcy law if all that's
25 required is you meet the requirements of State law and

1 you're not collusive.

2 MR. SMENT: Section 548 is not limited to
3 foreclosure sales, so if we had a nonjudicial -- or a
4 nonforeclosure sale sale, the Court would have to look at
5 all of those circumstances under section 548.

6 I think that the Ninth Circuit's point of view,
7 and the reason for their opinion, is we need a rule of
8 certainty here, and at least in the context of a
9 foreclosure sale that has intricate statutory provisions,
10 that provides sufficient notice not only to the borrower
11 but to the public, and under a scheme that we've indicated
12 is intended to protect not just the borrower but he
13 lender, third-party purchasers like my clients, and the
14 public at large, those are the interests that are balanced
15 by the foreclosure statute.

16 And Congress hasn't said that in interpreting or
17 looking at a case under the term "reasonably" you can't
18 consider all those factors, nor that you can't have a
19 conclusive presumption. This Court made it quite clear in
20 the Arizona v. Maricopa County case that a per se rule
21 could be valid to provide certainty, to reduce complex
22 litigation, to provide some business reasons here for why
23 opportunities ought to go forward. That's why the Ninth
24 Circuit ruled the way it did.

25 We have a complex sale. If we had a sale that

1 wasn't a foreclosure sale and didn't have to comply with
2 all of this checklist of noticing, published notices,
3 recorded notices, actual bidding, auctioning, all these
4 different requirements, then there might not be a basis to
5 establish a conclusive presumption because you haven't
6 jumped through all the hurdles to get to that sale, and
7 keep in mind --

8 QUESTION: Why isn't the better rule, even under
9 your own argument, simply that there is no conclusive
10 presumption, but that in California -- and I don't know
11 whether this is true or not. I'll just accept this. But
12 in California, you have done all, in fact -- by complying
13 with State law you have done all that would be
14 commercially reasonable, and that when this case in fact
15 goes to trial, you ought to win it, and we'll assume you
16 will win it.

17 But in a State which requires nothing but, in
18 effect, legal publication for a certain number of weeks,
19 you wouldn't win it, and that's why we should not have an
20 across-the-board conclusive presumption.

21 MR. SMENT: Your Honor, I think in a State where
22 there is a law, you do need that presumption. I think you
23 need that --

24 QUESTION: Well, we've got to interpret the
25 statute for the whole country, not just for California.

1 MR. SMENT: I understand, Your Honor, but we
2 also have to interpret it based on the facts that are
3 before us, and the stats --

4 QUESTION: No, but you're not asking it to be
5 interpreted based on the facts that are before us. You're
6 asking for the conclusive presumption, and yet your own
7 argument about the ingredients of reasonableness suggest
8 that you in fact are not really justifying a conclusive
9 presumption, and in this case you take the position, and
10 it may be a quite sound position, that you would win even
11 without the conclusive presumption.

12 MR. SMENT: If that's the case, Your Honor,
13 where you would win without the presumption, isn't that a
14 basis for applying the presumption? Isn't that what this
15 Court said in the Maricopa County --

16 QUESTION: Not if we're going to have -- not if
17 we're going to have one rule for 50 States.

18 MR. SMENT: Well, I think, Your Honor, if we
19 have one rule --

20 QUESTION: I mean, the statute doesn't mean
21 something different in California from what it means in
22 Vermont.

23 MR. SMENT: But if it means that under your law
24 you've satisfied all the tests in our State to determine
25 whether you've done what the statutes require, you've

1 obtained the value that you can, you've protected all of
2 these parties, isn't that a basis --

3 QUESTION: Well, you -- you make very easy to
4 answer when you say you've obtained the value that you
5 can, and some State laws require you to obtain -- or to do
6 everything reasonably possible to obtain that value.
7 Other State laws don't, and because they don't, it seems
8 to me there is an argument, and I thought you were
9 accepting it, for a -- not for a conclusive presumption,
10 but for a reasonableness analysis of the facts of the
11 individual case.

12 MR. SMENT: I was trying to respond to your
13 question, Justice. Thank you.

14 QUESTION: Thank you, Mr. Sment. Mr. Woolsey,
15 you have 10 minutes remaining.

16 REBUTTAL ARGUMENT OF ROY B. WOOLSEY
17 ON BEHALF OF THE PETITIONER

18 MR. WOOLSEY: May it please the Court, Mr. Chief
19 Justice:

20 I think that we've got to keep the primary focus
21 on the words, reasonably equivalent value. We're
22 comparing values, and the other circumstances play a part,
23 but not the important part that the first thing is
24 comparing reasonably equivalent values.

25 QUESTION: But you're not really doing that,

1 because you come before us and say, well, two-thirds is
2 close enough. You think that's reasonable? I'll buy
3 everything you have for two-thirds of what it's worth. Is
4 that reasonably --

5 MR. WOOLSEY: I don't think it is, Your Honor.

6 QUESTION: But you're saying 70 -- well, you're
7 saying 70 percent is close --

8 MR. WOOLSEY: I said I would settle for
9 70 percent, because we would win under that. I'm not sure
10 that that's the proper rule. I think that perhaps it
11 should be --

12 QUESTION: I'm not sure, either, and the logic
13 of what you're arguing is that it should be 100 percent,
14 and that makes it a lot more difficult.

15 MR. WOOLSEY: No, it -- no, reasonably
16 equivalent can't mean 100 percent of equivalent value.
17 It's got to be something different.

18 QUESTION: Reasonably close to 100 percent.

19 MR. WOOLSEY: Yes, I think that's right, Your
20 Honor, and what that means is difficult, and it leaves
21 open for the Court a lot of discretion on the facts, but
22 there shouldn't be a conclusive presumption that they
23 throw us out of Court on a motion for summary judgment or
24 a motion for a dismissal for failure to state a cause of
25 action at all.

1 Now, in California, I want to call the
2 attention -- one thing to the Court. The California law
3 recognizes that we don't get the best price at a
4 foreclosure sale. They recognize it in two ways. First,
5 if you use the private power of sale that people use for
6 the most part, you can't get a deficiency judgment. If,
7 to get a deficiency judgment, you resort to the judicial
8 foreclosure, then to get a deficiency judgment you have to
9 have a hearing on the fairness. You have to have a
10 hearing on price and values.

11 Now, mention was made about mortgagees and trust
12 deed holders, and California law, we use mortgages
13 occasionally, but generally deeds of trust, and there we
14 have a third-party trustee who does have fiduciary duties
15 to trustor and beneficiaries of the trust deed. In the
16 mortgage States, where they don't use trust deeds, I doubt
17 that that is present. I doubt that requirement's there at
18 all in some of them.

19 A flat out, conclusive presumption will prevent
20 questioning the reasonably equivalent value in a case
21 where there's 2 or 3 percent bid at a sale, and there are
22 sales that happen like that, and certainly we should leave
23 the door open to question those sales.

24 Now, to review what the circuits have done, we
25 have circuit courts in five circuits that have definitely

1 decided that there's no conclusive presumption. Third
2 Circuit, Barrett was decided. Fifth Circuit, Durrett and
3 Abramson under the old law, and Dessing under the new
4 statute. Seventh Circuit, Bundles, Eighth Circuit, Hulm,
5 Eleventh Circuit, Littleton and Grissom, cited in our
6 briefs.

7 The Fourth Circuit is covered by the Morris
8 case, which didn't really arise as a foreclosure case, but
9 applies the rule and sets forth the standards.

10 In the First Circuit, we have a hopeless
11 conflict. I call the Court's attention to a case I didn't
12 cite, National Environmental Systems in 111, Bankruptcy
13 Reports 4, a New Hampshire case, which I think gives the
14 better view in that circuit.

15 In the Second Circuit, we have the Saklin
16 Mortgage case. The citation on that, I have the LEXIS
17 citation, 1993 Bankruptcy LEXIS 1187.

18 In the Fourth Circuit we have Springfield
19 Furniture, 145 Bankruptcy Reports 520. That --

20 QUESTION: Mr. Woolsey, suppose you have someone
21 who's on the verge of bankruptcy and, realizing that, has
22 a going-out-of-business sale, sells all the stuff in the
23 store not at 70 percent but at 20 percent of what it's
24 really worth. Is he getting fair value, or reasonably
25 equivalent value?

1 MR. WOOLSEY: Your Honor, that comes down the
2 wholesale question. Where a retailer is selling in bulk
3 to close out, he's selling on a liquidation basis for what
4 he can get.

5 QUESTION: It's sort of a distressed basis, and
6 he only gets -- you know, he says 20 percent is the only
7 thing that will clear it, so he asks 20 percent.

8 MR. WOOLSEY: Well, he -- at least it's a
9 voluntary sale and it's not taken from him, and he makes
10 the decision that it's best to sell it, and he can sell it
11 at a wholesale price.

12 Now, we have one case I cited in the brief, and
13 I forget the name of it, where someone failed to get a
14 markup. He got a -- the Bankruptcy Court held there
15 should be a 20 or 30 percent markup, and the court of
16 appeals said it could be a little less than that, but set
17 aside the sale unless the difference in value is paid by
18 the transferee.

19 So we can have situations where we could set
20 aside sales that are liquidation sales, or sales that
21 are -- that are below retail value but above wholesale
22 value.

23 I think that Congress wanted us to look at the
24 foreclosure situation and especially said so after the
25 Durrett decision was rendered and the Congress has an

1 amendment to the statute proposed that will adopt the
2 Madrid conclusive presumption rule. Instead of adopting
3 that, they didn't adopt that amendment, and they did put
4 in section 101 of the Bankruptcy Act, in the definition of
5 transfers, specifically the foreclosure of an equity of
6 redemption is a transfer.

7 Now, what does that mean? That's the
8 foreclosure situation. Congress wants this to apply to a
9 foreclosure situation. That was a clear --

10 QUESTION: Don't you think Congress had some
11 obligation to be clearer about that point if it expects us
12 to set aside the foreclosure laws of 50 States, which
13 until now have been assumed to transfer good title, and in
14 the future they won't? Don't you think Congress had some
15 obligation to be clear about that?

16 MR. WOOLSEY: Well, Congress -- of course, the
17 Court would find it -- the clearer the language of
18 Congress, the easier the job for the Court, and the more
19 consistent throughout the country --

20 QUESTION: I'm just asking, where do you think
21 the burden of clarity in this case ought to be? It's
22 unclear. I think both sides acknowledge that to some
23 extent, but where's the burden of clarity?

24 MR. WOOLSEY: Where it's unclear, of course the
25 Court can take into account extraneous things other than

1 the face of the statute to try to interpret them. The
2 Court has to make a determination where Congress has made
3 a statute that's not clear.

4 But I think they've said, reasonably equivalent
5 value, which means something like market value -- it's a
6 comparison, a relationship.

7 QUESTION: It doesn't mean anything at all.
8 Doesn't mean anything for sure at all, does it?

9 MR. WOOLSEY: Well, I think it does. I think
10 the words "equivalent value" are very clear, and
11 "reasonably" makes it a little uncertain and puts the
12 burden on the Court to make some decision about it, but
13 certainly not as the type of sale. It's mainly a
14 comparison of value.

15 QUESTION: It could mean something different in
16 the bankruptcy context than it means -- and I think
17 Mr. Mann was talking about the application of 548(a)(2)
18 outside the bankruptcy context.

19 MR. WOOLSEY: Well, there may be a difference.
20 Now --

21 QUESTION: Outside the foreclosure. I'm
22 sorry -- outside the foreclosure sale.

23 MR. WOOLSEY: Oh, yes.

24 QUESTION: So that in answer my question, what
25 good does this section do, he said that there are sales

1 other than foreclosure sales, I believe.

2 MR. WOOLSEY: Well, I think that it applies to
3 foreclosures as well as other transactions, yes, and what
4 would it do if it doesn't apply to foreclosure, it could
5 apply to other transactions, that's clear, but here we
6 have, in 101, the Congress specifically saying the
7 foreclosure of an equity of redemption is a transfer, so
8 it seems to me that we've got to say that foreclosures can
9 be reviewed by the Court.

10 QUESTION: And if under State law a bid simply
11 for the amount of the debt is always going to be
12 conclusively deemed to be sufficient, the equity of
13 redemption is always going to be worth zero, right?

14 MR. WOOLSEY: That is correct. That's correct.

15 QUESTION: Presumably Congress didn't mean that.

16 MR. WOOLSEY: I don't think so. Thank you, Your
17 Honor.

18 Are there any other questions?

19 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
20 Woolsey.

21 MR. WOOLSEY: Thank you.

22 CHIEF JUSTICE REHNQUIST: The case is submitted.

23 (Whereupon, at 12:00 noon, the case in the
24 above-entitled matter was submitted.)

25

CERTIFICATION

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The United States in the Matter of:

BFP V. RESOLUTION TRUST CORPORATION

CASE 92-1370

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