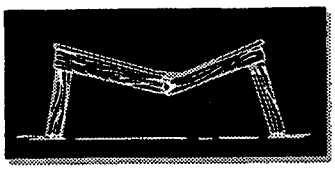

The Cram-Down

VOL. 5 NO. 1 Tampa Bay Bankruptcy Bar Association Newsletter September 1994

Supreme Court Grants Certiorari in "Edwards Appeal" Relating to Collateral Attack of Bankruptcy Supersedeas Bond Injunction

On May 23, 1994, the United States Supreme Court granted a Petition for a Writ of Certiorari in The Celotex Corporation v. Bennie and JoAnn Edwards. The Celotex Corporation requests that the Supreme Court reverse the judgment of the United States Court of Appeals for the Fifth Circuit in Edwards v. Armstrong World Industries, Inc., 6 F.3d 312 (1993), which failed to defer to an injunction issued by Judge Baynes pursuant to 11 U.S.C. §105(a). The injunction stayed the respondents Bennie and JoAnn Edwards from collecting their pre-petition judgment against Celotex by executing upon a supersedeas bond procured by Celotex.

The Fifth Circuit's decision, refusing deference to the bankruptcy court's order, was in direct conflict with the decision of the United States Court of Appeals for the Fourth Circuit in Willis v. Celotex Corp., 978 F.3d 146 (1992), cert. denied, 113 S.Ct. 1846 (1993).

Celotex contends that in enacting 11 U.S.C. §105(a) Congress expressly granted bankruptcy courts the power to issue injunctions where necessary or appropriate and that the Texas courts departed radically from the accepted and usual course of judicial proceedings when they reviewed the merits of the bankruptcy court's §105(a) injunction via a collateral attack and permitted execution against the surety.

— Jeffrey W. Warren

Law Clerk Profile: Joyce Anderson Stephens

As a regular feature of The Cram-Down, the Judicial Liaison Committee will provide a profile with respect to each of the law clerks assisting our bankruptcy judges. For this issue, we will feature Joyce Anderson Stephens.

Joyce is presently the law clerk of Judge Paul M. Glenn. Joyce is a graduate of Emory University School of Law in 1991. She received a Bachelor of Arts in english and a minor in economics from Vanderbilt University in 1987. She is a member of The Florida Bar and the State Bar of Georgia. She began her legal career as a bankruptcy/litigation associate in Atlanta with the firm of Hicks, Maloof & Campbell. In December of 1992, she moved to Florida and spent one year as the law clerk to Chief Bankruptcy Judge Alexander L. Paskay.

Joyce lives in St. Petersburg and is married to Brit Stephens, who works at the Corporate Syndication Department of Raymond James.

Joyce encourages anyone who has a question regarding practice and procedures before Judge Glenn to please feel free to call her at 225-7810.

— Jeffrey W. Warren

INSIDE

NEWS AND ANNOUNCEMENTS

September In Budapest

The TBBBA has joined with the International Association of Insolvency Judges, the Hungarian Ministry of Finance, Stetson University College of Law, the Central Florida Bankruptcy Bar Association, and the Jacksonville Bankruptcy Bar Association in sponsoring the International Bankruptcy Symposium to be held in Budapest, Hungary. The symposium is taking place on September 19, 20, and 21, 1994. The purpose of the symposium will be to exchange ideas, especially directed to the reorganizational process of privatized businesses. Judge Paskay is participating in the symposium as chairman and moderator, and will be joined by American and Hungarian panelists. TBBBA members Leonard H. Gilbert and Lynn Ramey will participate as U.S. panelists. We will report on the symposium events in the next issue of The Cram-Down.

Views From The Bench

On September 29, 1994, The Florida Bar's Continuing Legal Education Committee and the Business Law Section will present the annual "View From The Florida Bench" seminar and luncheon. This year's presentation will feature a record number of fourteen judge participants and should therefore provide for a lively exchange of ideas and perspectives. The TBBBA will sponsor a special judicial reception the night before the seminar. For more information contact The Florida Bar, CLE Programs, at (904) 561-5831.

Bankruptcy Skills Workshop For Southern District

A video tape entitled Bankruptcy Skills Workshop IV has been approved by the United States Bankruptcy Court for the Southern District of Florida to meet its requirements for lawyers wishing to practice before that court. Copies of the video tape and accompanying printed materials may be obtained by TBBBA members by sending a written request, along with a check made payable to the University of Miami Law School in the amount of $159.75, to the following address:

University of Miami
School of Law
Post Office Box 248087
Coral Gables, Florida 33124
Attn: Ruth Martin (305) 284-2339

Your written request should specifically reference video tape and printed materials entitled Bankruptcy Skills Workshop IV. For more information, contact Sharon Zuch at (813) 273-5000.

DURRETT RULE "OVERRULED"

Since 1980, Florida's foreclosing creditors have become increasingly accustomed to adjusting their foreclosure sale bids upwards in proper deference to the so-called "Durrett rule" relating to constructively fraudulent foreclosure sales under Bankruptcy Code § 548(a)(2). But the Durrett rule has recently been "overruled" in a 5 to 4 Supreme Court opinion greeted with enthusiasm by the mortgage-based lending industry. See BFP vs. Resolution Trust Corp., 511 U.S. -, 114 S.Ct. 1757, 128 L.Ed.2d 556 (1994). This article discusses historical development of the Durrett rule and identifies remaining issues to be resolved in the aftermath of BFP.

The Durrett rule first appeared in the Fifth Circuit's opinion in Durrett vs. Washington Nat'l Ins. Co. (In re Durrett), 621 F.2d 201 (5th Cir. 1980). In Durrett, the Fifth Circuit held that a non-collusive, regularly conducted foreclosure sale which brought only 57.7% of the property's fair market value was avoidable pursuant to Bankruptcy Code § 548(a)(2). The Durrett court observed in dicta that no reported opinion existed in which a transfer for less than 70% of the fair market value had been permitted to stand. Id. at 203-204. From this dicta, the Durrett rule evolved into an inflexible benchmark rendering avoidable any pre-petition foreclosure sale for less than 70% of the property's fair market value. As other courts adopted the Durrett rule, sophisticated lenders implemented costly institutional safeguards while unsophisticated lenders suffered in costly litigation.

In 1982, the Ninth Circuit departed from the Durrett analysis. See Lawyers Title Insurance Corp. vs. Madrid (In re Madrid), 21 B.R. 424 (B.A.P. 9th Cir. 1982), aff'd on other grounds, 725 F.2d 1197 (9th Cir. 1983), cert. denied, 469 U.S. 833, 83 L.Ed.2d 66, 105 S.Ct. 125 (1984). In Madrid, the Ninth Circuit held that the successful bid at a non-collusive real property foreclosure sale is itself conclusively determinative of "reasonably equivalent value" under Bankruptcy Code § 548(a)(2), regardless of fair market value. But the Madrid opinion and other cases rejecting Durrett did little to comfort Florida's creditors. Durrett became binding precedent in the Eleventh Circuit when it was formed in 1981. See Bonner vs. City of Pritchard, 661 F.2d 1206, 1207 (11th Cir. 1981).

Shortly after the Durrett decision was issued, Judge Thomas Britton concluded that the Durrett rule did not apply to Florida judicial foreclosure sales. See In re Perdido Bay Country Club Estates, Inc., 23 B.R. 36 (Bankr. S.D. Fla. 1982). However, the Eleventh Circuit's opinion in Walker vs. Littleton (In re Littleton), 888 F.2d 90, 92 (11th Cir. 1989), essentially left the Durrett rule intact. In re Littleton, at 92 n.5. The Durrett rule was subsequently embraced in at least three other opinions. Roy vs. Federal Nat'l Mortgage Assoc., 76 B.R. 188, 190 (Bankr. M.D. Fla. 1987); In re Winters, 119 B.R. 283 (Bankr. M.D. Fla. 1990); In re Smith, 21 B.R. 345 (Bankr. M.D. Fla. 1982).

Ultimately, the Eleventh Circuit mollified its application of the Durrett rule to avoid harsh consequences. See Grissom vs. Johnson (In re Grissom), 955 F.2d 1440, 1445-1446 (11th Cir. 1992). In Grissom, the Eleventh Circuit rejected the mechanical 70% benchmark in favor of a case-by-case "all facts and circumstances" approach to determining "reasonably equivalent value." Id. at 1445-1446. However, this amorphous new approach only further muddled the issue, particularly for Florida's foreclosure and bankruptcy community. See P. Scott, Dealing with Durrett: Mortgage Foreclosures as Fraudulent Transfers, LXV No. 9, Fla. B.J. 13 (Nov. 1991).

Even before the Supreme Court's opinion was announced, the Fifth Circuit itself had begun its retreat from the inflexible 70% benchmark that its Durrett dicta had produced. See Besing vs. Hawthorne (In re Besing), 981 F.2d 1488, 1495 (11th Cir. 1993). However, the fate of the Durrett rule was ultimately determined in BFP. BFP involved a properly noticed non-collusive foreclosure sale. The foreclosed residence was sold for $433,000, although it was determined to have had a fair market value of $725,000. The debtor filed its chapter 11 petition within a year after the foreclosure, and initiated an adversary proceeding pursuant to Bankruptcy Code § 548(a)(2) to recover the difference. On motion of the defending creditor, the Bankruptcy Court granted summary judgment in accord with Madrid. The District Court affirmed, as did the Ninth Circuit's Bankruptcy Appellate Panel. On certiorari, the Supreme Court affirmed.

Writing for the majority, Justice Scalia identified at least five distinct bases for rejecting the Durrett rule. First, the use in Bankruptcy Code § 548(a)(2)(A) of the undefined neologism ("reasonably equivalent value") rather than the defined term ("fair market value") indicates that Congress never intended for the two terms to be equated for purposes of fraudulent transfer analysis. Second, the term "fair market value," by definition, has no application to forced sales. It is universally recognized that property sold at foreclosure generally brings far less than fair market value. Accordingly, requiring fair market value to pass fraudulent transfer muster would be tantamount to requiring more than "reasonably equivalent value". Third, the application of an artificial 70% benchmark reflects an arbitrary percentage based upon unauthorized judicial policy determinations. Fourth, the adoption of some sort of federal "reasonable" foreclosure-sale price would extend federal bankruptcy law well beyond the traditional field of fraudulent transfers, and would thereby limit state's rights to maintain judicially and legislatively crafted rules governing foreclosure. Finally, even a modified Durrett rule would disturb the "ancient harmony that foreclosure law and fraudulent-conveyance law ... have heretofore enjoyed." Id. at 567. Accordingly, the BFP Court held that the "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. Id. at 569.

In response to the majority opinion, a four-justice dissent focused upon many persuasive statutory and policy considerations favoring application of a modified Durrett rule. The dissenters even ironically urged Justice Scalia to adopt a "plain meaning" approach to the issue. To better appreciate the dissenters' sarcasm, see W. Effross, Grammarians at the Gate: The Rehnquist Court's Evolving "Plain Meaning" Approach to Bankruptcy Jurisprudence, 23 Seton Hall L.Rev. 1636-1762 (1993). Although the Durrett era has ended, the majority opinion's caveats combine with the thrust of the four-justice dissent to raise some new issues for future cases. The BFP holding is limited to real property mortgage foreclosures. It does not apply to other foreclosures and judicial sales. Non-judicial UCC personal property sales are probably not sheltered from Bankruptcy Code § 548(a)(2) analysis, nor are sales to enforce tax liens. Additionally, real property foreclosures that are defective in any way will probably continue to be closely scrutinized pursuant to Bankruptcy Code § 548(a)(2). Accordingly, much still remains to be determined even in the aftermath of Durrett.

— John A. Anthony

MOVERS AND SHAKERS

Russell S. Bogue, III (Rusty) will imminently relocate from the Tampa office of Holland & Knight to its new offices in Atlanta.

W. Gray Dunlap, Jr., formerly of de la Parte, Gilbert & Bales, P.A., has now joined the firm of Frank, Schabacker, Gramling, Simmons & Dunlap.

Richard B. Feinberg, formerly of Rydberg, Goldstein & Bolves, P.A., has left that firm to acquire the Debt Relief Legal Centers, P.A.

Ian A. Horn has left the law firm of David W. Steen, P.A. to become a sole practitioner.

Gayle S. Millison, formerly of Massari, Bell, Jacobs, Forlizzo & Neal, has left that firm to form Millison & Millison, P.A. with her husband, Theodore S. Millison.

William S. Porter, formerly of Stichter, Riedel, Blain & Prosser, P.A., has left that firm to relocate to Ocala for the practice of law.

T. Patrick Tinker has joined the office of the United States Trustee here in Tampa, coming from headquarters in Washington, D.C.

Meredith Wester, formerly of the law firm of Trenam, Simmons, et al., has left that firm to join the firm of Robbins, Gaynor & Bronstein, P.A.

TBBBA Membership Renewal

On July 1, 1994, the TBBBA entered its seventh year, the 1994-1995 year. A renewal membership application was mailed to you last month. Membership dues are $50 per year, with computer access program fees costing $250 for firms with four or more attorneys, and $100 for firms with three or fewer attorneys. Committee memberships are open to all TBBBA members, and include the following committees:

CLE/Programs

Community Service

Computer

Judicial Liaison

Long-Range Planning

Membership

Newsletter

To find out more about the TBBBA, To obtain additional membership information contact Membership Chair, Dennis LeVine, at 876-8320.

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