

Bankruptcy in the Seventh Circuit: 1992

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The Seventh Circuit continues to hear and decide a substantial number of bankruptcy appeals. In 1992, as contrasted with the preceding two years, there were fewer noteworthy opinions. However, among this smaller number of decisions were several of great importance. This Article surveys all decisions released on or before December 27, 1992, and addresses the following topics: (1) Exemptions, (2) Estate Property, (3) Avoiding Powers, (4) Chapter 13, (5) Conversion, and (6) Procedure.

I. EXEMPTIONS

Indiana is one of twenty-five American jurisdictions¹ that recognize the existence of a special form of joint property ownership, the tenancy by the entirety, available only to married couples. Property held in this form of joint ownership is, in Indiana and some other jurisdictions,² immune to collection activity pursued by creditors of either individual spouse. The entirety estate is, however, always subject to being taken in satisfaction of the claims of joint creditors.

While the Bankruptcy Act of 1898 was in force, an individual spouse's interest in the entirety asset did not become part of the bankruptcy estate. Since its value could not be distributed to creditors, the protection of this asset from creditors of only one spouse continued during bankruptcy. Joint creditors were in a better position. Those with a lien on the entirety estate could enforce the lien after bankruptcy. Unsecured joint creditors were protected either by allowing them to reduce their claims to judgment prior to discharge³ or by creating a separate marital unit liability that could not be discharged during the course of a single spouse bankruptcy.⁴

Passage of the 1988 Bankruptcy Code appeared to change the legal status of entirety assets in two ways: It provided that the individual spouse's interest was property of the estate under 11 U.S.C. § 541(a)(2),

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1. 7 COLLIER ON BANKRUPTCY (MC) ¶ 801 - 814.1 (15th ed. 1992).

2. Some jurisdictions that recognize tenancy by the entirety allow individual creditors to reach the entirety estate.

3. This practice originated in the Fourth Circuit. See *Phillips v. Krakower*, 46 F.2d 764, 766 (4th Cir. 1931).

4. *Smith v. Beneficial Fin. Co.*, 218 N.E.2d 921 (Ind. Ct. App. 1966).

and it allowed exemption of the entirety interest pursuant to 11 U.S.C. § 522(b)(2)(B). Notwithstanding this new statutory language, courts continued to protect the interest of joint creditors either by holding that the entirety interest did not become part of the bankruptcy estate⁵ or by disallowing the exemption claim when a joint creditor existed.⁶ Now, in two decisions, the Seventh Circuit has ruled that past practices cannot continue in Indiana bankruptcies. Entirety interests are completely exempt when only one spouse files for bankruptcy.

In *In re Hunter*,⁷ a joint creditor sought to obtain a judicial lien on the entirety estate so that the *in rem* right thus created would protect it following bankruptcy. There was authority for this action in other circuits.⁸ However, Judge Ripple emphatically rejected a similar approach for Indiana debtors. He relied heavily on the provisions of Indiana Code section 34-2-28-1(a)(5), which transforms Indiana's common law entirety immunity into an express statutory exemption.

In a state such as Indiana, whose common law grants entirety property immunity from creditors of one spouse alone, the effect of section 522(b)(2)(B) — standing alone and without any reference to state statutory exemptions — is partially to exempt entirety property: the property is subject to sale and distribution to joint creditors, but exempted from claims of individual creditors.

. . . By allowing the debtor to completely exempt his interest in entirety property from the bankruptcy estate, Indiana has not preserved the amenability of that property to creditors but shielded it from all creditors, including joint creditors.⁹

5. *In re Jeffers*, 3 B.R. 49, 56 (Bankr. N.D. Ind. 1980). Since the entirety interest did not enter the bankruptcy estate, it could not be exempted pursuant to § 522(b)(2)(B). *Jeffers* also permitted the trustee to administer this asset for the benefit of joint creditors. *Id.* at 57.

6. *Napotnik v. Equibank and Parkvale Sav. Ass'n*, 679 F.2d 316 (3d Cir. 1982). *Napotnik* involved a debtor's unsuccessful attempt to avoid a joint creditor's judgment lien on an entirety estate pursuant to 11 U.S.C. § 522(f). The court held that the judgment lien could not be avoided since the property was not exempt. *Id.* at 320. The property was not exempt since state law permitted the creditor to obtain a judgment lien. Despite this circular reasoning, *Napotnik* is often cited and has influenced the treatment of entirety estates in three other circuits. See *In re Garner*, 952 F.2d 232 (8th Cir. 1991); *Sumy v. Schlossberg*, 777 F.2d 921 (4th Cir. 1985); *In re Grosslight*, 757 F.2d 773 (6th Cir. 1985). However, *Owen v. Owen*, 111 S. Ct. 1833 (1991), overrules these four cases by implication. See Douglass G. Boshkoff, *Entireties Estates in Individual Bankruptcies After Owen v. Owen*, Norton Bankr. Law Adviser 12 (Jan. 1993).

7. 970 F.2d 299 (7th Cir. 1992).

8. See cases cited *supra* note 6.

9. 970 F.2d at 307-08.

Hunter's sharp break with past practice was confirmed shortly thereafter when a second panel reached exactly the same conclusion in *In re Paeplow*.¹⁰

We also reject the creditors' suggestion that the Indiana legislature intended § 34-2-28-1(a)(5) to merely codify the Indiana common law practice of immunizing entirety property from execution by individual creditors (but not joint creditors). . . . Most significantly, this interpretation violates the plain meaning of the Indiana statute, which reflects an intent to create a blanket exemption for entirety property in the bankruptcy context. Thus, we conclude that the Indiana legislature intended § 34-2-28-1(a)(5) to shield the entirety property of a debtor in bankruptcy from the claims of creditors — including joint creditors — to the greatest degree possible.

. . .

We acknowledge that this interpretation may create the same potential for legal fraud available to unscrupulous debtors under the Act. (citation omitted) However, that result stems from Indiana's decision to grant its residents such sweeping protection of entirety property from the claims of creditors in bankruptcy. Given the strong fresh start policy embodied in the Code, we are hesitant to subvert that policy by crafting judicial exceptions to discharge. (citations omitted).¹¹

Following *Hunter* and *Paeplow*, the strategy for both debtors and creditors is well-defined. Since the Indiana exemption is not available in joint or consolidated cases, married couples seeking to protect property held as tenants by the entirety should never file jointly.¹² One spouse's individual case should be closed before the second spouse's case is commenced so that consolidation of the two individual cases is not possible. Creditors, on the other hand, should attempt to force consolidation. An involuntary case should be filed for the second spouse, if possible, and should be followed by a motion for consolidation.¹³

10. 972 F.2d 730 (7th Cir. 1992).

11. *Id.* at 737.

12. The special immunity for entireties interests exists because joint creditors have different rights than creditors of an individual spouse. This difference disappears when consolidation occurs. Even if the Indiana statute did not refer to joint or consolidated cases, it is quite likely that the immunity would cease to exist in a consolidated case. *Cf.* HENRY J. SOMMER, CONSUMER BANKRUPTCY LAW AND PRACTICE § 6.4 (3d ed. 1988) (advising against the filing of a joint case when entirety property exists).

13. *Hunter* refused to consider whether the Indiana statute was preempted by federal law because it purported to control the bankruptcy consequences of a joint filing

II. PROPERTY OF THE ESTATE

The status of pension plans in bankruptcy has been sharply debated in recent years. Now that the United States Supreme Court has ruled that Employee Retirement Income Security Act (ERISA)-qualified plans are not property of the estate,¹⁴ attention will shift to the trustee's rights with regard to those remaining plans which do enter the estate. *In re Lyons*¹⁵ reminds us of a basic principle of bankruptcy law. The trustee's right to an asset under 11 U.S.C. § 541(a)(1)¹⁶ is no greater than the right of the debtor. In *Lyons*, the nonexempt asset was a fund on deposit in a retirement fund. The debtor was not entitled to the funds unless she retired, became disabled, or terminated her employment. Since none of these events had occurred at the date of the petition, the Seventh Circuit decided that the trustee was not entitled to a turnover order.¹⁷

The trustee now has three options when the debtor does not have a present right to an asset. The trustee may:

- (1) keep the estate open until the debtor becomes entitled to the asset,
- (2) attempt to sell the asset, or
- (3) abandon the asset.

None of these options holds much promise. It is not practical to keep the estate open except in unusual circumstances.¹⁸ Any attempt to sell will probably not attract much interest. As soon as the property is abandoned, the debtor may decide to quit her employment and withdraw her contributions. Although this is a troubling possibility, it is a risk accompanying any abandonment decision.

[T]here is always the possibility that the debtor will gain a great windfall by quitting her state job and getting the contributions

or consolidation. This issue was not properly raised in the court below. *See* 970 F.2d at 306 nn.9-11. It is unlikely that a court will find that this statute has been pre-empted by any provision in § 522. *Cf. In re Ondras*, 846 F.2d 33 (7th Cir. 1988); *Stevens v. Pike County Bank*, 829 F.2d 693 (8th Cir. 1987).

14. *Patterson v. Shumate*, 112 S. Ct. 2242 (1992).

15. 957 F.2d 444 (7th Cir. 1992). *Accord In re Sanders*, 969 F.2d 591 (7th Cir. 1992).

16. 11 U.S.C. § 541(a)(1) (1988).

17. 957 F.2d at 446.

18. The difficulty of keeping the estate open for a substantial period of time to administer an asset is noted in *Segal v. Rochelle*, 382 U.S. 375, 380-81 (1966). Courts have, however, required that the estate be kept open when the benefit to the estate is substantial. *See, e.g., In re Schauer*, 62 B.R. 526 (Bankr. Minn. 1986). *Cf. In re William Rakestraw Co.*, 450 F.2d 6 (9th Cir. 1971) (deciding that a claim comprising 20% of all claims cannot be disallowed simply because process of allowance would prolong administration of the estate).

back the day after the trustee abandons the contingent right to recover the SERS contributions. However, the risk is no greater than the risk that attends any decision by a Chapter 7 trustee to seek court authority to abandon property of the estate. Events can always happen that would make the value of the abandoned property increase after abandonment.¹⁹

III. AVOIDING POWERS

In theory, the core concept of a preference is easily stated. A debtor should not be able to favor a particular unsecured claimant on the eve of bankruptcy. In practice, application of the six-part statutory definition of a preference can be extraordinarily difficult, as illustrated in *In re Smith*.²⁰ In *Smith*, the debtor paid a creditor by check number one and deposited check number two in his account. Until check number two cleared, the debtor's account did not have a balance adequate to cover check number one. Nonetheless, the bank provisionally credited the debtor's account and paid check number one. Check number two bounced. The bank then charged back the provisional credit. The debtor filed for bankruptcy, and the trustee sought to recover the amount of check number one from the creditor pursuant to 11 U.S.C. § 547(b). The only issue on appeal was whether there had been a "transfer of an interest of the debtor in property."²¹

It is well-established that the transfer of an asset owned by a third party does not violate 11 U.S.C. § 547(b). If A satisfies the debtor's obligation with A's separate property, there is no preference.²² In *Smith*, the crucial issue was the nature of the bank's provisional credit. Was this credit something which belonged to the debtor or did it belong to the bank? Although Judges Cudahy and Fairchild thought that the credit represented something of value, they stopped short of finding that the credit created a property interest. However, when the bank honored check number one, "the provisional credit ripened into an interest in property of the debtor,"²³ and the payment by check was avoidable.

The majority's reasoning is unpersuasive. It ignores the distinction between property transfers achieved through the exercise of power (when

19. *In re Groves*, 120 B.R. 956, 966 (Bankr. N.D. Ill. 1990).

20. 966 F.2d 1527 (7th Cir. 1992).

21. *Id.* at 1529.

22. JAMES ANGELL MACLACHLAN, *HANDBOOK OF THE LAW OF BANKRUPTCY* 288 (1956). Recent decisions are collected and discussed in 4 *COLLIER ON BANKRUPTCY* (MB) ¶ 547.03(2) (15th ed. 1992).

23. 966 F.2d at 1535.

the asset belongs to the debtor) and property transfers achieved through the exercise of persuasion (when the asset belongs to someone else). Only the existence of a property transfer achieved by the exercise of power satisfies the requirement that the debtor's property be involved in the transaction.²⁴

Judge Flaum, in dissent, correctly focused "upon the degree to which the Debtor, as opposed to the Bank, had control over the funds at issue."²⁵ He pointed out that, up to the very moment of transfer, the debtor lacked the power to compel the bank to transfer the provisionally credited funds to the creditor:

The Debtor could *request*, but not *direct*, the Bank to honor its check . . . because the check was written on insufficient funds. That the Bank complied with the Debtor's request by transferring funds . . . was a matter of grace extended the Debtor by the Bank. This is all a way of saying that the Debtor never had dispositive control over the provisional credit.²⁶

Despite the cogent reasoning contained in Judge Flaum's dissent, other recent decisions are in accord with the majority's position.²⁷ In a

24. The majority's blurring of the difference between power and persuasion can also be seen in an analogy used to bolster its conclusion:

Still, our discussion of the Indiana Commercial Code is not entirely satisfying, since it fails to answer all of the questions definitively. One is still left pondering the conundrum: How is it possible that property of the Debtor appeared out of thin air, only to disappear in a matter of days? And if it disappeared on its own, how could its transfer have diminished the Debtor's estate? . . . [T]he Debtor never had more than \$164 in actual funds, so how could the payment . . . have been from the Debtor's property?

We think that some answers to these difficult questions may lie in considering the economic substance of the transaction at issue. In effect, the Debtor here obtained a loan from the Bank (through the check-kiting scheme) and used the loan proceeds to pay his debt We might say that the loan was unauthorized or obtained by fraud, but it was nevertheless in economic reality a loan. That is the best explanation for the Debtor's sudden acquisition of control over \$125,000 despite his previous actual wealth of only \$164, and of his ability to direct a valid \$121,000 payment The situation is the same as if the Debtor had gone to the Bank, taken out a five-day loan in cash and used the cash to pay his creditor

Id. at 1532.

In referring to a completed loan, the court did not choose the right analogy. The bank's provisional credit was not the equivalent of a loan. It was only a nonbinding commitment to extend credit. The debtor was able to pay the creditor only because the bank was willing to honor this commitment.

25. *Id.* at 1537 (Flaum, J., dissenting).

26. *Id.* at 1539 (emphasis in original) (Flaum, J., dissenting).

27. See, e.g., *In re Bohlen Enterprises*, 859 F.2d 561 (8th Cir. 1988) (2-1 decision); *In re Montgomery*, 136 B.R. 727 (M.D. Tenn. 1992).

check-kiting situation, the creditor does not present a strong case for retention of the funds since it received them only because of the bank's unwise decision to honor the overdraft. The most equitable resolution of the three party transaction would be to reject the preference challenge but allow the bank to recover the funds mistakenly paid to the creditor. Since this is not possible under existing law,²⁸ the recovery under 11 U.S.C. § 547(b) may be appealing as a second best alternative, even though it creates an anomaly in preference law.

IV. CHAPTER 13

Congress, believing that increased use of Chapter 13 would produce greater total bankruptcy distributions for unsecured creditors, sought to divert debtors from liquidation bankruptcy by making an adjustment of debts a more attractive option. For example, the discharge authorized by 11 U.S.C. § 1328(a)²⁹ following a successful completion of the plan is available to all debtors, without regard to whether they are eligible for a Chapter 7 discharge. Furthermore, as originally structured, this discharge was vastly superior to the one that could be obtained through Chapter 7 proceedings. It discharged all but one of the obligations excepted from discharge in 11 U.S.C. § 523.³⁰

Perhaps, Congress' original proposal was too generous. In any event, it seems that public support for a liberal discharge policy has lessened since 1979. Not surprisingly then, legislative activity and judicial decisions have combined to erode some of the pro-debtor features of Chapter 13. There now are three additional exceptions to the discharge authorized by § 1328(a).³¹ Furthermore, courts are restricting access to Chapter 13 through use of good faith concepts with regard both to the proposal of the plan and, more basically, the initiation of Chapter 13 proceedings. *In re Love*³² is an important decision because it is the Seventh Circuit's first consideration of the good faith requirement for initiation of Chapter 13 proceedings.

Robert Love was a tax protestor for five years before he filed for protection under Chapter 13 in late 1986. His proposed plan dealt with

28. *Demos v. Lyons*, 376 A.2d 1352 (N.J. Super. Ct. Law. Div. 1977). The *Demos* decision is discussed in 3 GEORGE E. PALMER, *THE LAW OF RESTITUTION* ¶ 14.24(e) (1992 Supp.) and JAMES J. WHITE & ROBERT S. SOMMERS, *UNIFORM COMMERCIAL CODE* § 17-2 (3d. ed. 1988).

29. 11 U.S.C. § 1328(a) (1988 & Supp. III 1991).

30. *Id.* § 523 (1988 & Supp. III 1991). Alimony and support claims remain excepted from discharge under § 523(a)(5).

31. Criminal restitution obligations and debts referred to in § 523(a)(8) and (9) were later added to the list of excepted obligations.

32. 957 F.2d 1350 (7th Cir. 1992).

only two debts, \$1,600 owed to an unsecured creditor, and a substantially larger tax obligation, some of which was a priority claim. The Chapter 13 case was dismissed pursuant to 11 U.S.C. § 1307(c) after the IRS objected that it had not been commenced in good faith. In affirming the action below, the court offered a number of observations concerning the good faith standard.

First, it decided that the burden of proof varies with the context in which the good faith issue is raised.³³ The plan proponent has the burden of demonstrating that good faith is present when the issue arises at confirmation. But when dismissal is sought, the objector must show that the bankruptcy has not been commenced in good faith.

Second, in each instance, good faith is to be determined by the totality of the circumstances.

[T]he focus of the good faith inquiry under both Section 1307 and Section 1325 is often whether the filing is fundamentally fair to creditors and more generally, is the filing fundamentally fair in a manner that complies with the spirit of the Bankruptcy Code's provisions.

...

We realize that the standard of fundamental fairness does not provide a great deal of needed guidance. Unfortunately, however, we cannot completely alleviate the confusion and at the same time retain the advantages of the totality of circumstances test. This is because as our definition of good faith becomes more precise, the bankruptcy court has less discretion to weigh the evidence first hand in making good faith evaluations. In short, the down side of the totality of circumstances test is a degree of uncertainty.³⁴

The court then went on to offer a nonexhaustive list of factors to be considered in assessing a totality of the circumstances. Included in this list was "how the debt arose."³⁵ The court agreed with the bankruptcy judge's conclusion that bad faith was present in this case (1) because the debtor had not been forthright in presenting information to the court, and (2) because the bankruptcy was attributable to the debtor's prepetition misconduct in conducting a multiyear tax protest.³⁶

The court's willingness to use prebankruptcy misconduct as a justification for denial of access to Chapter 13 is quite troubling.

37. *Id.* at 1355.

34. *Id.* at 1357.

35. *Id.*

36. *Id.* at 1358.

Prebankruptcy misbehavior often creates an obligation that will be non-dischargeable in a Chapter 7 proceeding. At the same time, Congress' use of discharge incentives to attract debtors to Chapter 13 makes it likely that some plan proponents will have engaged in questionable prebankruptcy conduct. Denying such debtors access to Chapter 13 because of such prebankruptcy behavior is inconsistent with the legislative reliance on discharge incentives to attract debtors to this form of bankruptcy. Tax protestors, no less than other wrongdoers, are entitled to respond to the offer of a better discharge. Misconduct should not be used to support a finding of bad faith unless it is possible to identify misconduct related to concrete abuse of the bankruptcy process.³⁷

V. CONVERSION

Do postpetition, preconversion assets become property of the bankruptcy estate when a Chapter 13 debtor converts to Chapter 7? Although 11 U.S.C. § 348(a) provides that the date of case commencement remains unchanged upon conversion, it does not specify whether 11 U.S.C. §§ 541³⁸ or § 1306³⁹ defines the property of the estate in the converted case. In *In re Lybrook*,⁴⁰ the choice of section was critical since the debtor had inherited an asset more than 180 days after the commencement of a Chapter 13 case, but prior to conversion. If § 541 defined the estate following conversion, the inherited asset would not have been property of the estate. The trustee, however, successfully argued that this asset was part of the converted estate because § 1306 includes within the bankruptcy estate assets acquired during the course of the Chapter 13 proceeding.

No clear rule can be derived from the statutory language.⁴¹ Judge Posner, therefore, looked to the incentives he thought might be present in situations like this. He concluded that the inheritance should be part of the bankruptcy estate in order "to discourage strategic, opportunistic behavior that hurts creditors without advancing any legitimate interest of debtors."⁴² No doubt, inclusion of postpetition, preconversion assets

37. In Love's case, there was misconduct—failure to schedule assets and a failure to provide a realistic projection of disposable income. *Id.* "One of the surest ways for a Chapter 13 debtor to get into good faith problems is to misrepresent income, expenses, assets, or other matters." 1 KEITH M. LUNDIN, CHAPTER 13 BANKRUPTCY § 5.17 (1992).

38. 11 U.S.C. § 541 (1988).

39. *Id.* § 1306 (1988).

40. 951 F.2d 136 (7th Cir. 1991).

41. See Robert J. Volpi, *Property of the Bankruptcy Estate After a Conversion from Chapter 13 to Chapter 7: The Need for a Definite Answer*, 68 IND. L.J. 489, 496-504 (1993).

42. 951 F.2d at 137.

in the converted estate eliminates an incentive to convert in a situation such as this. It also creates a powerful disincentive to starting out in Chapter 13. After *Lybrook*, any debtor aware of the possibility of an inheritance should pass up Chapter 13 and file immediately under Chapter 7. Then, when 180 days passes, there will be no further risk of losing the inheritance.

The net impact of these various incentives is unclear and the jurisprudence of conversion is a collection of confusing, and often conflicting, authorities.⁴³ For example, one Eighth Circuit opinion cited by Judge Posner in support of his position is one which permits opportunistic behavior by a debtor in the context of a different legal controversy.⁴⁴ Confusion is present in this area of the law for several reasons. First, there is judicial disagreement over whether and when debtors ought to be permitted to gain an advantage by moving between chapters. Second, given the variety of issues which can arise upon conversion, and the conflicting policy considerations presented by various fact patterns, it is unlikely that one or two simple rules will ever be sufficient to spell out all the consequences of conversion in a satisfactory fashion.⁴⁵

Let us assume that it is necessary to regulate movement between chapters. There are two ways to deal with the problem of opportunistic change: (1) assign consequences to the act of conversion which limit the potential for gain through inter-chapter movement, or (2) restrict the situations in which conversion can take place. The former approach affects all converting debtors including those who do not have an opportunistic motivation.⁴⁶ *Lybrook*, for example, attempts to control the problem of opportunistic conversion by adopting a uniform rule that property of the estate is defined by § 1306. Another, and possibly superior, approach to the problem of opportunistic movement between chapters may eventually be found in rules limiting the debtor's unrestricted right to convert from Chapter 13 to Chapter 7.⁴⁷

43. See generally 2 COLLIER ON BANKRUPTCY (MB) ¶ 348.01-07 (15th ed. 1992).

44. *In re Lindberg*, 735 F.2d 1087 (8th Cir. 1984) (allowing a different homestead exemption at the time of conversion than the one the debtors designated at the commencement of their bankruptcy proceedings).

45. For example, the Tenth Circuit has recently indicated that different rules will control the consequences of conversion from Chapters 13 and 11 to Chapter 7. See *In re Calder*, 973 F.2d 862, 866 n.5 (10th Cir. 1992).

46. Assume that a Chapter 13 debtor inherits property as in *Lybrook*. He also becomes disabled, loses his job, no longer has sufficient regular income to fund his plan, and converts to Chapter 7. *Lybrook* calls for inclusion of the inheritance in his converted Chapter 7 estate even though the conversion is not opportunistic.

47. See Volpi *supra* note 41, at 519-22.

VI. PROCEDURE

The post-*Northern Pipeline Co. v. Marathon Pipeline Co.*⁴⁸ bifurcation of authority⁴⁹ to adjudicate continues to provide litigants with the opportunity to delay decision making by forcing withdrawal of controversies from the bankruptcy judge. One possible strategy is to demand a jury trial. If the demand is well-founded, *In re Grabill Corp.*⁵⁰ now aligns the Seventh Circuit with the majority view that withdrawal is mandatory. The bankruptcy judge is not authorized to conduct a jury trial.

*In re Edwards*⁵¹ is the other notable procedural decision. In this case, a mortgagee had not received notice of a sale free of lien authorized under 11 U.S.C. § 363(f). It sought postjudgment relief pursuant to Federal Rule of Civil Procedure 60(b).⁵² Because more than one year had passed since the sale, the mortgagee was forced to argue that, absent proper notice, the sale was void.⁵³

Judge Posner, writing for the court, refused to adopt the view that lack of notice alone warranted vacating the sale.

We are left with the practical question, in what circumstances can a civil judgment be set aside without limit of time and without regard to the harm of innocent third parties? (citation omitted) The answer requires a consideration of competing interests rather than a formula.

To take away a person's property—and a lien is property—without compensation or even notice is pretty shocking, but we have property rights on both sides of the equation here, since Guernsey wants to take away property that Noble bought and Northwest financed, without compensating them for their loss. As we said before, the liquidation of bankrupt estates will be impeded if the bonafide purchaser cannot obtain a good title, and creditors will suffer. The strong policy of finality of bankruptcy sales embodied in section 363(m) provides, in turn, strong support for the principle that a bona fide purchaser at a bankruptcy sale gets good title (citations omitted) even if the section

48. 458 U.S. 50 (1982).

49. 28 U.S.C. § 157 (1988).

50. 976 F.2d 1126 (7th Cir. 1992).

51. 962 F.2d 641 (7th Cir. 1992).

52. Bankruptcy Rule 9024 provides (with three exceptions) that Federal Rule of Civil Procedure 60(b) governs requests for postjudgment relief in bankruptcy proceedings.

53. There is no specific time limit on an application for relief from a "void" judgment. FED. R. Civ. P. 60(b)(4).

does not of its own force preclude collateral attack on such sales. . . . Rule 60(b) must be interpreted in light of this policy. The policy would mean rather little if years after the sale a secured creditor could undo it by showing that through some slip-up he hadn't got notice of it.⁵⁴

There is Seventh Circuit authority both supporting⁵⁵ and opposing⁵⁶ the view that failure to give notice results in a "void" judgment. The court in this instance opted to sustain the sale because (1) it thought that the policy of finality was the most important consideration, and (2) it doubted that the objecting creditor had been damaged by the failure to give proper notice.⁵⁷

54. 962 F.2d at 644-45.

55. *Rodd v. Region Constr. Co.*, 783 F.2d 89 (7th Cir. 1986) (improper service of process).

56. *In re Whitney-Forbes, Inc.*, 770 F.2d 692 (7th Cir. 1985) (failure to give notice of bankruptcy sale).

57. 962 F.2d at 645-46.