# THE ENFORCER

BY DAVID FINDLING
*The Findling Law Firm*

*www.findlinglaw.com*
*www.courtappointedreceiver.com*

*With special thanks to Robert A. Dubin, Esq., Erica J. Ehrlichman, Esq., and Andrew Littman, Esq. for their invaluable assistance in preparation.*

## *Suhar v. Bruno:* Does The Division Of Liabilities Matter In Determining Reasonable Equivalency

Practitioners must wrestle with various financial considerations in attempting to fashion a divorce settlement. Division of assets, payment of debts and support must all be addressed. Due to the issues raised in *Estes v. Titus*[1], a spouse may be later forced to explain to a creditor (or a bankruptcy trustee) why their settlement should not be construed as a fraudulent transfer. In the negotiation of a separation agreement, it could be important to consider the liabilities of either one or both of the parties, as well as their assets.

Whether or not the division of the parties' liabilities should be taken into account was at issue in the recent case of *Suhar v. Bruno*. In that case, the United States Bankruptcy Court for the Northern District of Ohio[2] and the Bankruptcy Appellate Panel of the Sixth Circuit (BAP)[3] reached diametrically opposite conclusions. This article will discuss the reasonable equivalency test under §548(a)(1)(B) of the United States Bankruptcy Code and its applicability to divorce settlements.

### Factual Background

Debtor, Karen Neal ("Debtor") and Defendant, Craig Bruno ("Bruno") were married for thirteen years. Eight months prior to Debtor filing for Chapter 7 bankruptcy, they entered into a separation agreement that was subsequently incorporated into their divorce decree. Under this settlement agreement, Debtor transferred her one-half interest in the marital residence to Bruno.

At the time of the settlement agreement, the marital residence was upside down. It was subject to a first mortgage and a home equity line of credit ("HELOC"). valued at $77,500 and subject to a $50,000 mortgage, leaving the residence $27,500 of equity. Prior to the bankruptcy, Debtor borrowed from her parents to pay off the HELOC. Accordingly, the Debtor's loan from her parents and the payoff of the HELOC created the positive equity in the marital home.

Debtor agreed to assume liability for credit card debt incurred for their mutual living expenses during their marriage. The settlement agreement also provided for Debtor to receive other personal property. A nine-year old vehicle, including personal property, unspecified bank accounts, and included a retirement account from her former employer (UPS). The trustee filed an adversary complaint against Bruno alleging that Debtor received less than reasonably equivalent value under the settlement agreement. The action sought the difference between what was awarded and what was claimed to be the Debtor's share of the marital estate.

### Determining Reasonably Equivalent Value

Section 548(a)(1)(B) of the U.S. Bankruptcy Code provides that "the trustee may avoid any transfer . . . of an interest of the debtor in property, or any obligation . . . incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily . . . (i) received less than a reasonably equivalent value in exchange for such transfer or obligation...".

In calculating reasonably equivalent value, the United States Bankruptcy Court for the Northern District of Ohio took into account the Debtor's substantial liabilities, as well as the value of the transferred assets. It determined that if the equity in the marital home and the present value of Debtor's UPS pension were evenly split, Debtor and Bruno would each have $22,967.02 in assets; and if they evenly split the credit card debt and the loan from Debtor's parents, they would each have $43,102.29 in liabilities. This would have resulted in a negative figure of $20,135.27 for each of them. However, under the separation agreement Bruno received various assets, without any obligation for these liabilities. The Bankruptcy Court calculated the difference between the $27,500 Bruno received and the negative $20,135.27 for which he should have been obligated, resulting in a difference of $47,635.27. Accordingly, the Bankruptcy Court held that the trustee was entitled to recover $47,635.27 from Bruno.

On appeal, the BAP took a completely different approach. It examined the statutory meaning of "value." Under §548, "value" is defined as "property, or satisfaction or securing of a present or antecedent debt of the debtor. . . ."[4] The BAP determined that liabilities are not covered by this definition, and accordingly framed the exchange as merely the transfer of two assets. It supported this conclusion by stating that "debt is not an asset and, as such, it has no inherent value."[5] The BAP therefore simply concluded that Debtor transferred her one-half interest in the equity in the marital residence (worth $13,750),. In return, Bruno transferred his one-half interest in the UPS pension (worth $9,217.02), and to achieve reasonable equivalence, the trustee was entitled to recover $4,532.98 ($13,750 - $9,217.02), instead of $47,635.27.

Bankruptcy and divorce go hand and hand. It is important to consider the prospect of your client being brought into their former spouse's bankruptcy based on their property settlement. If the parties have significant debt, you should consider requesting an evidentiary hearing before the state court to determine an equitable division of assets. This would insulate your client from a claim of cherry picking assets and indebtedness. Additionally, it is recommended that bankruptcy counsel be consulted to determine the potential impact of a future filing.

**Endnote**

1. 481 Mich. 573 (2008).
2. 461 B.R. 426 (Bankr. N.D. Ohio 2011).
3. 2012 WL 4479113 (6th Cir.BAP (Ohio)).
4. 11 U.S.C. §548(d)(2)(A).
5. 2012 WL 4479113*10