

DEC 28 2006

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT**

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

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In re:)
)
JILL C. DEUEL,)
)
Debtor.)
)
_____)
HAROLD S. TAXEL, Chapter 7)
Trustee,)
)
Appellant,)
)
v.)
)
CHASE MANHATTAN BANK, USA,)
N.A.; JILL C. DEUEL; WILL T.)
DEUEL; and LAKE VIEW CARLTON)
HILLS HOMEOWNERS ASSOCIATION,)
)
Appellees.)
_____)

BAP Nos. SC-06-1132-MoSnK
SC-06-1063-MoSnK
(Consolidated)
Bk. No. 04-02787
Adv. No. 06-90460

O P I N I O N

Argued and Submitted on September 22, 2006
at Pasadena, California

Filed - December 28, 2006

Appeal from the United States Bankruptcy Court
for the Southern District of California

Honorable John J. Hargrove, Bankruptcy Judge, Presiding.

Before: MONTALI, SNYDER,¹ and KLEIN, Bankruptcy Judges.

¹ Hon. Paul B. Snyder, Bankruptcy Judge for the Western
District of Washington, sitting by designation.

1 MONTALI, Bankruptcy Judge:

2

3 One of the most powerful weapons in a bankruptcy trustee's
4 arsenal is the "strong arm" power of Section 544(a)(3)² to recover
5 real property, subject to the same limitations that a bona fide
6 purchaser would have when acquiring that property from the debtor
7 outside of bankruptcy. Trustees for decades have defeated
8 unperfected liens and unrecorded transfers, all to the benefit of
9 unsecured creditors in bankruptcy.

10 The bankruptcy court rejected a trustee's attempt to exercise
11 that power, relying on a Ninth Circuit decision holding that a
12 petitioning creditor's unrecorded lien that is described in an
13 involuntary bankruptcy petition operates as constructive notice
14 sufficient to defeat the trustee. In re Professional Investment
15 Properties of America, 955 F.2d 623 (9th Cir. 1992) ("Professional
16 Investment"). But the court of appeals carefully limited its
17 decision to the effect of the petition in the involuntary case, as
18 distinguished from the schedules. Id. at 628 n.3, citing with
19 approval, In re Gurs, 27 B.R. 163, 165 (9th Cir. BAP 1983)³.

20

21 ² Unless otherwise indicated, all chapter, section and rule
22 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and
23 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as
24 enacted and promulgated prior to the effective date of The
25 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,
26 Pub. L. 109-8, 119 Stat. 23, because the case from which this
27 appeal arises was filed before its effective date (generally
28 October 17, 2005).

29 ³ Responding to the trustee's argument that information
30 received after the filing of the involuntary petition could not
31 affect his status, the court responded (in footnote 3):

32 This is true. In re Gurs, 27 B.R. 163 (9th Cir. BAP
33 1983) defined a § 544(a)(3) hypothetical bona fide
34 purchaser as one who is without actual knowledge "at the
35 instant the petition is filed," and purchases property
36 from the debtor for value and in good faith.

(continued...)

1 Today we confirm that the trustee still has that powerful
2 weapon, concluding that information contained in schedules and the
3 statement of financial affairs filed in a voluntary bankruptcy
4 case is not subject to the Professional Investment rule, and
5 therefore is insufficient to defeat the trustee's power,
6 regardless of notice. Thus we reject the bankruptcy court's
7 contrary holding, which could operate to eviscerate a well-
8 established avoiding power.

9 We also reject the bankruptcy court's alternative use of
10 equitable subrogation to rescue a creditor that voluntarily
11 released its previous lien on the debtor's property but neglected
12 to record its new lien. Equitable subrogation would unduly
13 prejudice the debtor's other creditors and the bankruptcy estate
14 and cannot override the trustee's statutory strong arm power.

15 Accordingly, we REVERSE.

16 **I. FACTS**

17 There are no material facts in dispute. In 1999 debtor Jill
18 C. Deuel ("Debtor") and her former spouse Will T. Deuel
19 (collectively, the "Deuels") purchased a residence in Santee,
20 California (the "Property"). In 2001 they refinanced the Property
21 with a \$122,400.00 loan secured by a recorded deed of trust that
22 was assigned to an affiliate of Chase Manhattan Bank USA, N.A.
23 ("Chase") (the "Prior Deed of Trust"). On September 4, 2002, the
24 Deuels refinanced this debt with a new \$136,000.00 loan from Chase
25 secured by a new deed of trust against the Property which by
26

27 ³(...continued)

28 Consequently, we will only discuss the ramifications of
the petition itself.

1 mistake was not recorded (the "Unrecorded Deed of Trust"). The
2 Deuels used \$121,170.79 of the new loan to pay off the balance of
3 the 2001 loan. The Prior Deed of Trust was reconveyed by an
4 instrument recorded on September 26, 2002.

5 Debtor filed her voluntary Chapter 7 bankruptcy petition that
6 commenced this case on March 26, 2004 (the "Petition Date").
7 Harold S. Taxel was appointed as Chapter 7 trustee ("Trustee").

8 With her bankruptcy petition Debtor filed her bankruptcy
9 schedules and statement of financial affairs ("SFA") which
10 mentioned Chase's claim and alleged lien in several places. In
11 Schedule A (Real Property), she listed a "secured claim" of
12 \$134,740.00 against the Property. In Schedule D (Creditors
13 Holding Secured Claims), she listed a claim held by Chase with a
14 balance of \$134,165.00, and stated: "Incurred: 2002, Lien: deed
15 of trust, Security: [the Property]." In SFA item 3, she listed
16 prepetition payments of \$1000 per month to Chase. Attached to her
17 SFA is a copy of her 2003 mortgage interest statement from Chase.

18 On October 26, 2004, Chase filed in the bankruptcy court a
19 Complaint to Quiet Title to Deed of Trust Against Real Property,
20 naming as defendants the Deuels, Trustee, and Lake View Carlton
21 Hills Homeowners Association (the "HOA"). Trustee filed a motion
22 to dismiss the complaint and in the alternative for summary
23 judgment. The Deuels filed joinders. Chase filed an opposition
24 and a cross-motion for summary judgment.

25 On January 5, 2005, the bankruptcy court held a hearing on
26 these various motions and stated:

27 . . . the schedules filed with the petition . . .
28 provide constructive notice to the trustee as a
bona fide purchaser of real property, that there

1 was a secured claim out there

2 So it appears that, under the law of the Ninth
3 Circuit -- and I guess most specifically the
4 circuit case is [In re Professional Investment
5 Properties of America [955 F.2d 623 (9th Cir.
6 1992)] -- that the trustee in this case was on
7 constructive notice that this security interest
8 existed; and therefore under the law of the
9 circuit, he is unable to set aside the lien, so to
10 speak, or take priority over the bank under Section
11 544(a)(3).

12 Transcript Jan. 5, 2005, pp. 3:22-4:15.

13 The bankruptcy court also ruled in favor of Chase on grounds
14 of equitable subrogation, Chase's alternative basis for relief.
15 Chase argued that it was equitably subrogated to the (released)
16 lien created by the Prior Deed of Trust. The bankruptcy court
17 stated that all the elements of equitable subrogation appeared to
18 be satisfied. Among other things:

19 [T]here is case law out there . . . I think it was
20 a case out of Hawaii that was cited by the
21 [T]rustee [In re Christie-Pequignot, 2003 WL
22 22945921 (Bankr. D. Hi. October 24, 2003), aff'd
23 BAP No. HI-03-1563-KMoB (9th Cir. BAP August 11,
24 2004)], showing that even if there is neglect, as
25 long as there is no injustice to the [T]rustee or
26 the other creditors -- in other words, they're not
27 worse off -- then the equitable subrogation would
28 apply.

. . . .

29 As the bank points out, under equitable
30 subrogation the [T]rustee and the creditors would
31 be better off to the tune, I think, of about
32 \$15,000, because the bank would only step into the
33 shoes, so as to speak, of the original Chase loan,
34 and as I recall, that was about \$15,000 less than
35 the loan which is the subject of this adversary
36 proceeding. I guess there were some additional
37 charges.

38 . . . So if the doctrine of equitable
39 subrogation applies, Chase is only subrogated to
40 the amount of 122,400 and not the new amount of a
41 hundred and thirty-six. So there clearly is

1 § 157(b) (2) (K). We have jurisdiction under 28 U.S.C. § 158(c).

2 **IV. STANDARDS OF REVIEW**

3 We review de novo the bankruptcy court's rulings on the
4 cross-motions for summary judgment and the motion to dismiss. In
5 re Garske, 287 B.R. 537, 541 (9th Cir. BAP 2002) (summary
6 judgment); In re Laizure, 349 B.R. 604, 606 (9th Cir. BAP 2006)
7 (motion to dismiss complaint).

8 Although there is usually a factual question whether a
9 purchaser has inquiry or constructive notice (Professional
10 Investment, 955 F.2d at 626) we believe that the bankruptcy court
11 properly treated as a legal question whether a debtor's bankruptcy
12 schedules impart constructive or inquiry notice. Cf. In re Kim,
13 161 B.R. 831, 836-37 (9th Cir. BAP 1993) (whether legally
14 defective abstract of judgment gave constructive or inquiry notice
15 was not a factual issue precluding summary judgment).

16 In the circumstances of this case, whether to apply the
17 doctrine of equitable subrogation may also be an issue of law that
18 we review de novo. See Mort v. U.S., 86 F.3d 890, 893 (9th Cir.
19 1996) (deciding equitable subrogation issue, which district court
20 had declined to decide, when "facts are undisputed and further
21 factfinding is unnecessary"). We do not decide the proper
22 standard of review because we would reach the same result on the
23 equitable subrogation issue were we to review it for abuse of
24 discretion. See U.S. v. Avila, 88 F.3d 229, 239 n. 12 (3d Cir.
25 1996) (assuming without deciding that application of equitable
26 subrogation doctrine is reviewed for abuse of discretion). See
27 also Dieden v. Schmidt, 128 Cal.Rptr.2d 365, 372 (2002) (stating,
28 in a case involving equitable subrogation, "Summary judgment

1 motions usually raise matters of law, but not when the trial court
2 grants or denies such a motion on the basis of equitable
3 determinations. The matter then becomes one of discretion, which
4 this court reviews under the abuse of discretion standard.")
5 (citation omitted).

6 V. DISCUSSION

7 A. Trustee's strong arm power arises "as of the
8 commencement of the case," before there can be any
9 constructive notice from Debtor's bankruptcy schedules

10 Chase makes no arguments against Trustee's strong arm power
11 other than its reliance on Professional Investment and on
12 equitable subrogation. The single question presented in this
13 section of our discussion, therefore, is whether Professional
14 Investment compels us to affirm.

15 Professional Investment acknowledges both the power of and
16 limitations on the trustee's strong arm power. On the one hand,
17 the trustee's status as a hypothetical bona fide purchaser is
18 "without regard to" any actual knowledge of the trustee or of any
19 creditor. 11 U.S.C. § 544(a)(3). On the other hand, the trustee
20 only obtains those rights that a hypothetical purchaser without
21 actual knowledge could have obtained under applicable law at the
22 time the bankruptcy is commenced. Professional Investment, 955
23 F.2d at 627 (following McCannon v. Marston, 679 F.2d 13, 17 (3d
24 Cir. 1982)); In re Weisman, 5 F.3d 417, 420-21 (9th Cir. 1993).
25 Thus "[a] trustee does not become a hypothetical bona fide
26 purchaser if she [or he] has been put on constructive or inquiry
27 notice." Professional Investment, 955 F.2d at 627. See also 5 A.
28 Resnick & H. Sommer, Collier on Bankruptcy ¶¶ 544.03, 544.08,

1 pp. 544-9 et seq ("Collier") (trustee deemed to have conducted
2 title search and is subject to constructive or inquiry notice).⁵

3 In this case the timing of any constructive or inquiry notice
4 is critical. The bankruptcy court held that Trustee had
5 constructive notice of Chase's Unrecorded Deed of Trust from
6 Debtor's bankruptcy schedules. We hold that whatever the Trustee
7 learned from the schedules and SFA came too late and is
8 irrelevant.

9 Section 544(a)(3) provides:

10 (a) The trustee shall have, as of the commencement
11 of the case, and without regard to any knowledge of
12 the trustee or of any creditor, the rights and
13 powers of, or may avoid any transfer of property of
14 the debtor or any obligation incurred by the debtor
15 that is voidable by --

16 * * *

17 (3) A bona fide purchaser of real property,
18 other than fixtures, from the debtor, against
19 whom applicable law permits such transfer to
20 be perfected, that obtains the status of a
21 bona fide purchaser and has perfected such
22 transfer at the time of the commencement of
23 the case, whether or not such a purchaser
24 exists.

25 11 U.S.C. § 544(a)(3) (emphasis added).

26 A case is "commenced" by the filing of a petition. 11 U.S.C.
27 §§ 301(a), 302(a), 303(b); Fed. R. Bankr. P. 1002(a). Thus the
28 bankruptcy trustee has the status of a bona fide purchaser "at the
instant the petition is filed." Professional Investment, 955 F.2d
at 628 n. 3 (quoting In re Gurs, 27 B.R. 163, 165 (9th Cir. BAP
1983)). As the Ninth Circuit recognized in Professional
Investment, "any information or notice which [the trustee]

⁵ This discussion will refer to constructive or inquiry notice interchangeably. No party has suggested that there is any difference for purposes of this appeal.

1 attained after that period [i.e., after the filing of the
2 petition] did not bear on his status as a bona fide purchaser at
3 the time of filing." Professional Investment, 955 F.2d at 628 and
4 n. 3 (emphasis added).⁶

5 The bankruptcy schedules, SFA, and other required documents
6 cannot be filed until there is a case in which to file them. As
7 the applicable rules state, they must be filed "[i]n" a case.
8 Fed. R. Bankr. P. 1007(a)-(c). See In re Castro, 158 B.R. 180,
9 183 (Bankr. C.D. Cal. 1993) ("The filing of a voluntary petition,
10 not the schedules, commences the case."). See also Harvey, 222
11 B.R. at 895 nn. 11-12 (noting trustee's argument that bankruptcy
12 schedules "are deemed filed after the filing of the petition that
13 commences a bankruptcy case," but not deciding issue because other
14 argument was dispositive) (emphasis in original).

15 In some cases (including this one) the bankruptcy schedules
16 and other documents are presented for filing with the petition.
17 That does not make them the same document, as evidenced by the
18 separate Official Forms for each of them. Compare Official Forms
19 1 (voluntary petition) and 5 (involuntary petition) with, e.g.,
20 Official Forms 6, 6A through 6J, and 7 (bankruptcy schedules and
21 SFA). See also Castro, 158 B.R. at 183 ("[T]he petition and the
22 schedules are separate documents."). Indeed, the Federal Rules of
23

24 ⁶ The Ninth Circuit was applying Washington state law and
25 this case involves California law but no party has cited any
26 authority that this makes any difference or that notice after the
27 filing of the petition would be sufficient to defeat Trustee's
28 status as a bona fide purchaser in this case. See Professional
Investment, 955 F.2d at 627 (bona fide purchaser must be without
notice "prior to his acquisition of title") (emphasis added,
citation omitted); Wash. Rev. Code § 65.08.070 (race notice
statute); In re Harvey, 222 B.R. 888, 893 (9th Cir. BAP 1998)
(applying California law); Cal. Civ. Code §§ 19 (constructive
notice generally), 1213 (constructive notice re real property),
and 1214 (race notice statute).

1 Bankruptcy Procedure specifically provide that most required
2 documents can be filed up to 15 days after the petition. See Fed.
3 R. Bankr. P. 1007(b) and (c).

4 For these reasons we hold that the bankruptcy schedules, SFA,
5 and other required documents can only be filed after the petition,
6 even if all these documents are physically presented to the clerk
7 for filing together or if, as in this case, they are
8 electronically combined into a single electronic file and
9 transmitted onto the bankruptcy court's docket as such. All the
10 pages of the documents might reach the court at essentially the
11 same instant, but conceptually the case must be commenced before
12 the bankruptcy schedules, SFA, and other required documents can be
13 filed in that case. Therefore, by definition, these documents
14 cannot provide constructive notice "as of the commencement of the
15 case." Any constructive or inquiry notice from Debtor's
16 bankruptcy schedules and SFA came too late to defeat Trustee's
17 strong arm power under Section 544(a)(3).

18 Nothing in Professional Investment holds otherwise. The
19 Ninth Circuit stated, "This case turns on whether the petition
20 itself put the trustee on sufficient inquiry or constructive
21 notice of [the creditors'] prior security interest" and "we will
22 only discuss the ramifications of the petition itself."
23 Professional Investment, 955 F.2d at 627 and 628 n.3 (emphasis
24 added). In that case the petition itself did give notice: it was
25 an involuntary petition and in the space provided for describing
26 his claim one of the petitioners stated that his claims were
27 "supposedly secured by assignments of Deeds of Trust . . . in the
28 aggregate amount of approximately \$137,500." Id. at 628 (quoting

1 involuntary petition). In this case the petition is voluntary and
2 there is not even a space on the form to give any notice of
3 Chase's Unrecorded Deed of Trust. See Official Form 1 (voluntary
4 petition). Trustee had no constructive or inquiry notice of
5 Chase's purported lien from the voluntary petition. Accordingly,
6 Professional Investment does not compel us to defeat Trustee's
7 strong arm power. See In re Thomas, 147 B.R. 526, 531 n. 8 (9th
8 Cir. BAP 1992) ("In this case, unlike Professional Investment
9 Properties, the petition made no mention of [the alleged
10 constructive trust interest] in the property"), aff'd, 32 F.3d 572
11 (9th Cir. 1994) (table).⁷

12 Our holding is reinforced by the fact that Chase's reading of
13 Professional Investment could lead to arbitrary results or abuse.
14 If a debtor's bankruptcy schedules happen to be filed after the
15 trustee is appointed -- as often occurs in voluntary Chapter 7
16 cases because of the 15 day grace period for filing bankruptcy

17 _____
18 ⁷ Trustee argues that Professional Investment is contrary to
19 the plain meaning of the statute. It is true that much of the
20 Ninth Circuit's discussion focused on the time at which the
21 trustee in that case was appointed, and that appears to be
22 irrelevant under the statute which focuses on the time of
23 "commencement of the case." 11 U.S.C. § 544. Perhaps the court
24 did not focus on the fact that a hypothetical bona fide purchaser
25 is just that -- hypothetical -- so the time of his actual
26 appointment is irrelevant. See Professional Investment, 955 F.2d
27 at 628 ("A trustee who has not yet been appointed can hardly argue
28 that he has been prejudiced by being charged with notice by the
petition") and 629 ("the trustee had a duty to inquire as to the
nature of the [creditors'] claim once he was appointed") (emphasis
added). See also In re Wohlfeil, 322 B.R. 302, 305-06 (Bankr.
E.D. Mich. 2005) (criticizing Professional Investment as contrary
to plain meaning of statute). We do not ignore binding precedent
nor do we speculate further. We simply construe Professional
Investment to be limited in its application to an involuntary
petition wherein the petitioning creditor asserts its lien. We
express no opinion as to the outcome in any future case wherein a
voluntary petitioner departs from Official Form 1 and inserts
information about a creditor.

1 schedules in Fed. R. Bankr. P. 1007(c) -- then presumably there is
2 no constructive notice. See Castro, 158 B.R. 180 (no constructive
3 notice when trustee was appointed before schedules were filed).
4 Likewise, if the bankruptcy schedules happen not to describe the
5 unperfected claim adequately then there is no constructive notice.
6 See Harvey, 222 B.R. at 895 (vague and inconsistent bankruptcy
7 schedules "did not necessarily imply" ownership interest and
8 therefore did not impart constructive notice). A debtor might
9 even take advantage of the situation to favor or disfavor one
10 creditor over others by adjusting the content of the bankruptcy
11 schedules or the time when they are filed.

12 In sum, Debtor's bankruptcy schedules and SFA have no bearing
13 on Trustee's strong arm power. They were filed after "the
14 commencement of the case" so any constructive or inquiry notice of
15 Chase's Unrecorded Deed of Trust came too late to defeat Trustee's
16 statutory power as a hypothetical bona fide purchaser under
17 Section 544(a)(3).

18 B. Equitable subrogation

19 The bankruptcy court held in the alternative that Chase could
20 defeat Trustee's strong arm power under Section 544(a)(3) using
21 the doctrine of equitable subrogation, up to the dollar amount of
22 the lien under its released Prior Deed of Trust. The bankruptcy
23 court held that Trustee and Debtor's creditors would not be "worse
24 off" and there was no "injustice" from applying the doctrine.
25 Again, we disagree.

26 Subrogation is a derivative right whereby one party is
27 substituted in the place of another with reference to a lawful
28 claim, demand, or right. In re Hamada, 291 F.3d 645, 649 (9th

1 Cir. 2002). Equitable subrogation is a legal fiction and because
2 it is a creature of equity it "is enforced solely for the purpose
3 of accomplishing the ends of substantial justice." Hamada, 291
4 F.3d at 649 (citation omitted). The doctrine is governed by state
5 law and one of the requirements of California law is that its
6 application must "not work an injustice to the rights of others."
7 Golden Eagle Ins. Co. v. First Nationwide Fin. Corp., 31
8 Cal.Rptr.2d 815, 821 (1994); Hamada, 291 F.3d at 651 (same); M.
9 Lilly, Subrogation of Mortgages in California: a Comparison with
10 the Restatement and Proposals for Change, 48 UCLA L. Rev. 1633,
11 1660-61 at n. 120 and accompanying text (2001).

12 Equitable subrogation "allows a person who pays off an
13 encumbrance to assume the same priority position as the holder of
14 the previous encumbrance." Mort, 86 F.3d at 893. Even a canceled
15 lien can be revived, but not if "the superior or equal equities of
16 others would be prejudiced thereby." Lawyers Title Ins. Corp. v.
17 Feldsher, 49 Cal.Rptr.2d 542, 546 (2d Dist. 1996) (citation and
18 italics omitted). For example, the holder of a junior lien or
19 interest is generally put in no worse situation if a third party
20 who pays off the senior debt is equitably subrogated to the senior
21 lien's priority. The junior lien or interest holder did not rely
22 on the absence of the senior lien when it first extended credit or
23 transferred value, and would receive a windfall if the doctrine
24 were not applied. Mort, 86 F.3d at 895.

25 This case is different. Trustee as a hypothetical bona fide
26 purchaser is deemed to have given value for the Property without
27 any knowledge of Chase's Unrecorded Deed of Trust and in reliance
28 on the real estate records. Gurs, 27 B.R. at 165; 5 Collier

1 ¶ 544.08, text accompanying n. 5, p. 544-16.2. As established in
2 the previous section of our discussion Trustee had no constructive
3 or inquiry notice of the Unrecorded Deed of Trust. Moreover,
4 Chase had recorded a reconveyance of its Prior Deed of Trust and
5 Trustee is deemed to have relied on that reconveyance. See First
6 Fidelity Thrift & Loan v. Alliance Bank, 71 Cal.Rptr.2d 295 (1998)
7 (subsequent mortgagee could rely on mistakenly recorded release).

8 California courts have held that the equities favor a bona
9 fide purchaser over one asserting equitable subrogation. See J.
10 G. Boswell Co. v. W. D. Felder & Co., 230 P.2d 386, 389 (1951)
11 (rejecting application of equitable subrogation as against bona
12 fide purchaser); 58 Cal. Jur. 3d, Subrogation § 7 (2006), text
13 accompanying nn. 10-13 ("subrogation will not be allowed where it
14 would work an injustice to the rights of others and does not lie
15 against an innocent person, as where it would jeopardize or defeat
16 intervening rights, including those of bona fide purchasers
17 without notice") (emphasis added).

18 The same result has been reached under the laws of other
19 states. See In re Zaptocky, 250 F.3d 1020, 1028 (6th Cir. 2001)
20 (under Ohio law, "the doctrine of equitable subrogation does not
21 apply against a bona fide purchaser without knowledge"); In re
22 Bridge, 18 F.3d 195, 204 (3d Cir. 1994) (trustee prevailed over
23 creditor who was attempting to rely on its own previously released
24 lien under equitable subrogation doctrine, applying New Jersey
25 law).

26 We can conceive of circumstances in which the equities might
27 favor application of the doctrine of equitable subrogation, but
28 Chase has alleged no such circumstances. See In re Reasonover,

1 236 B.R. 219, 225-233 (Bankr. E.D. Va. 1999) (under Virginia law,
2 when deed of trust had not yet been released as of petition date,
3 trustee as bona fide purchaser took property subject to mortgage
4 company's equitable subrogation claim), remand after appeal, 238
5 F.3d 414 (4th Cir. 2000) (table), on remand, 2001 WL 1168181
6 (Bankr. E.D.Va. 2001).

7 Trustee's status as a bona fide purchaser is not simply a
8 legal technicality. It serves "one of the strongest policies
9 behind the bankruptcy laws" -- the policy of ratable distribution
10 among all creditors. In re Seaway Exp. Corp., 912 F.2d 1125, 1129
11 (9th Cir. 1990) (citation omitted) (avoiding creditor's inchoate
12 equitable interest in real property when creditor had taken no
13 steps to provide actual or constructive notice to subsequent bona
14 fide purchasers). As stated in Christie-Pequignot, 2003 WL
15 22945921 at *5, a creditor holding a valid and perfected lien is
16 entitled to preferential treatment but granting such treatment to
17 an unperfected lien "would come at the expense of other creditors
18 and would be unjust to the other creditors." See also Hamada, 291
19 F.3d at 653 (rejecting equitable subrogation as applied to
20 nondischargeability judgment because creditor seeking subrogation
21 made "no claim that [debtor] committed fraud against [creditor]
22 that would entitle it to preferential treatment over other
23 creditors to whom [debtor] owes money").

24 It would be inequitable to apply the legal fiction that Chase
25 had never released its Prior Deed of Trust, thereby giving it
26 nearly the full value of the Property and depriving Debtor's other
27 creditors of a pro rata share of that value. Congress has
28 determined as much by giving Trustee the status of a bona fide

1 purchaser under Section 544(a)(3). Chase cannot defeat Trustee's
2 statutory strong arm power based on equitable subrogation.⁸

3 **VI. CONCLUSION**

4 Section 544(a)(3) grants the bankruptcy trustee for the
5 benefit of all creditors the rights of a bona fide purchaser of
6 the real property "as of the commencement of the case." A
7 debtor's bankruptcy schedules and other required documents cannot
8 be filed until there is a case in which to file them, so by
9 definition they cannot impart any constructive or inquiry notice
10 until after commencement of the case. Nothing in Debtor's
11 bankruptcy schedules or SFA has any bearing on Trustee's statutory
12 strong arm power to avoid Chase's Unrecorded Deed of Trust.

13 Nor is Trustee's statutory strong arm power defeated by the
14 doctrine of equitable subrogation. That doctrine is only applied
15 when it will not work an injustice to the rights of others, and if
16 Chase received the entire value of the Property based on its
17 released Prior Deed of Trust rather than sharing pro rata with
18 other creditors that would work an injustice.

19 The judgment in favor of Chase is REVERSED and the case is
20 REMANDED with directions to grant Trustee's motion for summary
21 judgment and enter a judgment in favor of Trustee.

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27 ⁸ We do not address the other elements of equitable
28 subrogation because Trustee has not argued that those elements are
unsatisfied.