92 Am. Bankr. L.J. 335

American Bankruptcy Law Journal
Summer, 2018

Article
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*335 AVOIDING THE UNAVOIDABLE: A PRACTITIONER'S GUIDE TO FEDERAL GOVERNMENTAL CREDITOR FRAUDULENT CONVEYANCE ACTIONS

I. INTRODUCTION

Fraudulent conveyance litigation in bankruptcy cases has intensified in recent years. As part of an enhanced focus on avoidance recoveries, trustees and other estate representatives argue that they should be permitted to avoid transfers that otherwise would be unavoidable under applicable state law by relying on the United States government as an unsecured creditor. This Article analyzes this growing trend and evaluates defenses that may be available to targets of these avoidance actions.

II. FRAUDULENT CONVEYANCE ACTIONS UNDER THE BANKRUPTCY CODE

Section 548 of the bankruptcy code permits a trustee to avoid an actual or constructive fraudulent conveyance if the transfer was "made or incurred on or within 2 years before the date of the filing of the petition."[1] Given the relatively short look-back period[2] under § 548, trustees typically look to § 544(b) to bring fraudulent conveyance actions under state law. Section 544(b) permits a trustee to "avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable only ***336** under § 502(e) of this title."[3]

Most states permit fraudulent conveyance actions under their enactments of the Uniform Fraudulent Transfers Act ("UFTA") or its predecessor, the Uniform Fraudulent Conveyances Act.[4] Typically, state law provides a statute of limitations of four to six years on fraudulent transfer claims, which effectively allows a trustee to reach back up to six years to avoid transfers.[5] Regardless of the applicable look-back period under state law, a trustee may be able to reach back even further in cases where the federal government is an unsecured creditor of the debtor.

III. FRAUDULENT CONVEYANCE ACTIONS BY FEDERAL GOVERNMENT CREDITORS

Not surprisingly, the United States government has special collection powers that provide it with broader, more powerful remedies than those typically afforded nongovernmental creditors. Bankruptcy trustees find these enhanced powers particularly appealing and will often seek to step into the shoes of federal governmental creditors under § 544(b) of the bankruptcy code to assert these powers for the benefit of the debtor's estate. Before turning to the propriety of § 544(b) actions, this Article discusses the framework for two common sources of enhanced federal governmental powers to avoid transfers.[6]

*337 A. THE FEDERAL DEBT COLLECTIONS PRACTICES ACT

The first avenue potentially available to trustees is to use § 544(b) to step into the shoes of a federal government creditor under Subtitle A of the Federal Debt Collection Procedures Act of 1990 ("FDCPA"). The FDCPA was enacted by Title XXXVI of the Crime Control Act of 1990, and is codified at 28 U.S.C. §§ 3001-3308. It provides the exclusive civil procedure for the United States government to recover a judgment on a debt, except where another federal statute expressly provides for a different period to recover a specific type of debt.[7] The FDCPA also provides for the general preemption of conflicting state law,[8] but it does not "supersede or modify the operation of title 11" and certain other laws.[9]

The fraudulent conveyance provisions of the FDCPA begin at 28 U.S.C. § 3301. Like UFTA, the FDCPA provides causes of action for both constructive and intentional fraudulent conveyances.[10] Indeed, the FDCPA is essentially the federal codification of UFTA.[11] The FDCPA, however, provides a six-year limitations period for fraudulent conveyance actions, which may be extended up to two years after the transfer could have been discovered by the claimant in the case of intentional fraud.[12] Conversely, most state law limitations periods only provide a four-year period with a possible extension of one year following discovery in the case of intentional fraud.[13] Thus, with the possible exception of California,[14] New York[15] and Virginia, whose time to bring a fraudulent conveyance action is bounded only by the doctrine of laches,[16] the FDCPA provides the federal government with a longer period to bring fraudulent conveyance actions than would otherwise be available to traditional creditors under state law. The FDCPA also generally provides an additional year to bring so-called "insider preference" actions.[17]

*338 B. THE IRS'S SPECIAL LIMITATIONS PERIOD

A trustee may also use § 544(b) to step into the shoes of the Internal Revenue Service (the "IRS") to invoke its ten-year limitations period under 26 U.S.C. § 6502(a)(1). That section of the Internal Revenue Code permits the IRS to collect a tax by court proceeding, so long as that proceeding is begun "within 10 years after the assessment of the tax."[18] Once a timely proceeding is commenced, "the period during which such tax may be collected by levy shall be extended and shall not expire until the liability for the tax (or a judgment against the taxpayer arising from such liability) is satisfied or becomes unenforceable."[19]

Generally, the IRS must assess taxes on a taxpayer within three years after the tax return is filed.[20] If no tax return is filed, the IRS may assess the tax at any time.[21] A number of statutory exceptions to this general rule apply.[22] For example, if the taxpayer files a false or fraudulent return with intent to evade tax or to willfully attempt to evade the tax, the IRS may assess the tax at any time.[23] Likewise, the IRS and the taxpayer may consensually agree to an extension of the assessment period.[24] If the taxpayer improperly omits more than 25% of its gross income from the tax return, the IRS is granted six years to issue an assessment.[25]

Although 26 U.S.C. § 6502(a)(1) does not expressly authorize the filing of a fraudulent conveyance action, 26 U.S.C. § 6901(a)(1)(A) provides the authority for the IRS to bring avoidance actions against transferees of a taxpayer's property.[26] Courts have held, however, that this provision does not establish transferee liability and that the IRS must rely on applicable state law for that purpose.[27] Indeed, the IRS has been permitted to use state law ***339** fraudulent conveyance provisions, such as UFTA, to bring fraudulent conveyance actions stretching back ten years or more.[28] This conclusion is based on the common law doctrine of *nullum tempus occurrit regi* ("no time runs against the king"). Under this doctrine, federal governmental entities are not bound by state statutes of limitations.

In *United States v. Summerlin*, the United States Supreme Court impliedly acknowledged the *nullum tempus occurrit regi* doctrine: "[i]t is well settled that the United States is not bound by state statutes of limitations or subject to the defense of laches in enforcing its rights."[29] Most courts that have considered the issue have found that the rule in *Summerlin* applies with equal force to both statutes of limitation and statutes of repose.[30] Nevertheless, the rule in *Summerlin* is not absolute. In *United States v. California*, the Supreme Court held that there are two functional limitations on the rule: *Summerlin* only applies when (1) "the right at issue was obtained by the government through, or created by, a federal statute," and (2) "the government was proceeding in its sovereign capacity."[31] *Nullum tempus* also does not operate to revive a claim that has otherwise lapsed simply by assigning the claim to the United States.[32] Notwithstanding these limitations, courts have consistently held that the IRS is entitled to the benefit of its ten-year limitation period when pursuing fraudulent conveyance actions under UFTA.[33]

*340 IV. DEFENSES TO FEDERAL GOVERNMENTAL CREDITOR FRAUDULENT CONVEYANCE ACTIONS

Although courts routinely permit the federal government to avoid state law limitation periods when pursuing actions under UFTA, a bankruptcy trustee's ability to pursue such actions has not been universally accepted. While some courts have found that certain defenses are available to transferees of alleged fraudulent conveyances, other courts have considered and rejected those same defenses. Moreover, the cases that have permitted a trustee to bring these actions have largely avoided any analysis as to whether these actions have merit under applicable law. Starting with the defenses recognized by some courts, this Section evaluates the propriety of permitting a trustee to bring federal governmental creditor fraudulent conveyance actions under § 544(b).

A. DEFENSES BASED ON § 544(B)

Any defense to a fraudulent conveyance action under § 544(b) necessarily begins with the language of the statute itself. Section 544(b)(1) provides:

> Except as otherwise provided in paragraph (2), the trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is avoidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.[34]

Courts have examined three primary questions in attempting to determine whether a fraudulent conveyance action involving a federal governmental creditor is permissible under § 544(b): (1) whether the special rights bestowed upon the federal government constitutes "applicable law," (2) whether the trustee is authorized to assert its sovereign power,[35] and (3) whether the federal governmental creditor's claim is "allowable" under § 502. Each of these questions is addressed in turn below.

1. *Does the FDCPA Constitute Applicable Law?*[36]

Recent discourse surrounding a trustee's ability to pursue claims of a federal ***341** governmental creditor under the FDCPA has focused on whether the FDCPA constitutes applicable law for purposes of § 544(b). Earlier cases to address this issue summarily decided that it did.[37] That all changed, however, with a series of decisions arising from the bankruptcy of Mirant Corporation and its affiliates.

In *MC Asset Recovery, LLC v. The Southern Company*,[38] the District Court for the Northern District of Georgia found that the FDCPA was not applicable law because it was a remedy exclusively available to the United States. The court held that permitting a trustee to use the FDCPA would greatly expand the reach of § 544(b). In a subsequent decision, Judge Nelms of the Northern District of Texas disagreed with the Georgia court's second conclusion, finding that permitting a trustee to utilize the provisions of the FDCPA would not modify the operation of the Bankruptcy Code,[39] especially given the trustee's ability to utilize state law to avoid transfers.[40] Ultimately, District Judge Nelms concluded that the FDCPA was not applicable law for purposes of § 544(b) because it would permit a trustee to utilize a power intended to benefit the United States to the detriment of the United States.[41] By usurping the federal government's power, the trustee recovers property for the benefit of the entire estate, of which the United States is only one creditor. The United States loses its ability to recover the same property for its sole benefit.

Despite District Judge Nelms's well-reasoned decision, on appeal, the Fifth Circuit reverted to the much simpler rationale used by the Northern District of Georgia. It held that "[b]oth the statutory language and the legislative history of the FDCPA indicate that it is not applicable law under § 544(b)."[42] First, the Fifth Circuit ascribed significant weight to the FDCPA's language that "this chapter shall not be construed to *supersede or* ***342** *modify* the operation of title 11."[43] Next, the Fifth Circuit found comfort in a statement in the legislative history of the FDCPA from Committee Chairman Brooks that the

FDCPA should be read as though the Bankruptcy Code did not exist.[44]

Notwithstanding the Fifth Circuit's decision in *MC Asset Recovery*, other courts have held that the FDCPA constitutes applicable law under § 544(b).[45] The most prominent of these decisions is *In re Tronox*.[46] In *Tronox*, the court reasoned that the *Mirant* decisions failed to give enough weight to the language and purpose of § 544(b).[47] It noted that, much like the FDCPA, Oklahoma's version of UFTA was also an exclusive use remedy.[48] Section 544(b) incorporates Oklahoma law into the Bankruptcy Code, and there is no reason why the FDCPA should be treated differently.[49] Moreover, even if the FDCPA were unavailable, the court found that a trustee may still pursue fraudulent conveyance actions held by a federal governmental creditor under state law subject to the general 6-year limitations period applicable to the United States.[50]

Taking a different analytical approach, Bankruptcy Judge Pappas, in the most recently published decision on this subject, found that a broad reading of the phrase "applicable law" falls in line with the United States Supreme Court's interpretation of the phrase "applicable nonbankruptcy law" in *Pat-* ***343** *terson v. Shumate*.[51] While the two terms are not identical, the court noted that the phrase at issue in *Patterson* was even more limited than the phrase used in § 544(b)(1).[52] Thus, he had no trouble concluding that "had Congress intended to restrict the reach of 'applicable law' in § 544(b)(1), it would have done so expressly."[53]

As is often the case with splits of authority, whether the FDCPA constitutes applicable law under § 544 appears to turn on how much the court is influenced by policy arguments. The majority view among bankruptcy courts is that the FDCPA constitutes applicable law, but the only circuit level decision on the issue has gone the other way. Regardless of the ultimate outcome on this debate, Bankruptcy Judge Gropper's suggestion in *Tronox*[54] that federal governmental creditors can simply pursue fraudulent conveyance actions under state law subject to the general six-year statute of limitations period of 28 U.S.C. § 2415(a) could ultimately render this issue moot for most cases.[55]

2. ***Can the Trustee Exercise the Sovereign Power of the Federal Government?***

As noted above, a trustee's ability to take advantage of the IRS's ten-year statute of limitation depends on its ability to invoke the *nullum tempus* doctrine. Since that doctrine relies upon the sovereign power of the United States as a justification for bypassing state statutes of limitation, defendants have argued that § 544(b) does not authorize the trustee to exercise the sovereign power of the federal government to avoid an otherwise applicable statute of limitation. The leading case adopting this position is *In re Vaughan Co*.[56]

In *Vaughan*, the trustee sought to amend its complaint to add a fraudulent conveyance action against Ultima Homes, Inc. under state law.[57] Ultima responded that the proposed amendments would be futile because the transfers at issue could not be avoided based on the applicable statute of limitation under New Mexico's version of UFTA.[58] The trustee responded that the ***344** claims were not time-barred because of the IRS's ten-year look-back period.[59]

While acknowledging prior cases supporting the trustee's position, the court ultimately agreed with Ultima that the IRS's limitations period was not available to the trustee under § 544(b).[60] He first noted that the sovereign power of the United States is only available to enforce public rights and protect public interests and, if such rights and interests were not at issue, the state statute of limitation typically applied.[61] Next, the court expressed doubt that Congress would have enacted the Bankruptcy Code to delegate federal power to a trustee.[62] Even if that was Congress's intent, however, the court found that the argument still fails because "the IRS is only permitted to use a ten-year lookback period in order to perform a government function, [so] the Trustee is likewise limited under § 544(b)."[63] In short, "Section 544(b) 'confers upon the trustee no greater rights of avoidance than a creditor would have if it were asserting invalidity on its own behalf.'"[64] Moreover, since the IRS holds claims in a significant number of bankruptcy cases, the court cautioned that a trustee's ability to utilize the IRS's ten-year look-back period would "eviscerate the UFTA's four-year lookback period in most bankruptcy cases."[65]

Despite the *Vaughan* court's cogent arguments, subsequent courts have generally declined to follow its analysis. For example, in *In re Kaiser*, the court expressly disagreed with *Vaughan*'s analysis, finding it misplaced.[66] Instead, *Kaiser* applied a plain meaning analysis and found that the language of § 544(b) clearly permitted a trustee to step into the shoes of any creditor.[67] *Kaiser* held that the focus was not on whether the trustee was performing a public or private function but whether the IRS would have been performing a public function if it pursued its avoidance rights under applicable law.[68] Indeed, relying on an early expression of the majority view on this subject, *Kaiser* found that "[t]he unsecured creditor's ability to trump the applicable state statute of limitations might derive from its sovereign immunity, ... [but] the estate representative's ability to override that same limitation derives ***345** from § 544(b)."[69]

In *In re Kipnis*, Bankruptcy Judge Mark, sitting in the Southern District of Florida, also found *Vaughan*'s analysis to be flawed because it "fail[ed] to start where courts must start in interpreting statutes and that is to look at the statute's plain meaning."[70] Finding the facts of *Kaiser* to be "substantially similar," Judge Mark largely agreed with its analysis.[71]

Kaiser and *Kipnis*, however, diverge on one critical issue--the validity of the policy concerns identified in *Vaughan*. The court in *Kaiser* reasoned that § 544 places no restrictions on who the trustee may choose as the triggering creditor and it would punish the trustee for choosing poorly because the trustee remains subject to any applicable defenses that may have been asserted against the triggering creditor.[72] The court further found that, even if policy concerns were appropriate to consider, the slippery slope argument raised by the defendants is "a logical fallacy that actual experience has disproven."[73] In *Kipnis*, Bankruptcy Judge Mark offered, as an alternative explanation for the "paucity of decisions," that perhaps "bankruptcy trustees have not generally realized that this longer reach-back weapon is in their arsenal."[74] If so, the widespread use of the IRS's look-back period may begin to occur, resulting in a significant change to existing practice.[75] Nevertheless, if *Vaughan*'s policy concerns are justified, Judge Mark found that he was not permitted to read the limitation advanced by the defendant into the plain language of § 544(b).[76]

Even more recently, Bankruptcy Judge Pappas followed the reasoning of *Kaiser* and *Kipnis* in *In re CVAH, Inc.*, holding that the "Trustee, standing in the shoes of [the] IRS, is immune from the Idaho four-year extinguishment period for fraudulent transfers in this case."[77] He also criticized the *Vaughan* court's holding that the trustee's recovery efforts did not involve matters of public interest. Rather than an effort to enforce private rights, a trustee's efforts to enforce "the equitable operation of the bankruptcy laws is a matter of critical public interest."[78] He found that this interest in ensuring the fairness of the bankruptcy process supported the application of *nullum tempus* to ***346** a trustee stepping into the shoes of the IRS.[79] "Put another way, in this setting, the focus of the Court is not on whether Trustee is acting in a governmental capacity to promote public interests, but on whether IRS is doing so."[80]

The three most recent decisions on this subject permit a trustee to utilize the IRS's longer look-back period. While the policy concerns raised by *Vaughan* may be legitimate, and even ultimately correct, courts have declined to read these concerns into the statute. Moreover, the plain language of § 544(b) appears to permit the trustee to utilize the IRS's expanded power. Indeed, even the IRS has advocated for the trustee's use of its expanded powers,[81] so any limitations on § 544(b) likely will need to be crafted by Congress, not the courts.

3. *Should Policy Concerns Limit the Trustee's Ability to Recover the Entire Transfer?*

Before proceeding to a discussion on the allowance of a federal governmental creditor's claim, one other issue of federal sovereignty must be addressed. Is it inequitable to permit a trustee to expand the sovereign power of the federal government by permitting the trustee to recover more than the amount of the federal governmental creditor's claim? Courts have long established that when a trustee avoids a transfer under § 544(b), the trustee avoids the entire transfer notwithstanding the amount of the triggering creditor's claim.[82] This rationale carries special importance when the triggering creditor is a federal governmental creditor for at least two reasons: (a) a federal governmental creditor's ability to avoid the state law statute of limitations is based on its sovereign power, and (b) the avoidance of a transfer using those special powers may result in a less than full recovery on the creditor's claim after a pro rata distribution.[83]

A trustee's ability to exercise the sovereign power of the federal government is discussed above.[84] Even assuming the trustee may properly exercise ***347** that power under § 544(b), permitting the trustee to use its avoidance powers to recover the entire transfer effects an expansion of the sovereign power of the federal government, at least where the value of the transfer exceeds the federal governmental creditor's claim. Whether this was Congress's intent, the plain reading of § 544(b) combined with the well-established *Moore v. Bay*[85] doctrine would seem to permit a trustee to exercise broader powers than the government itself.[86]

Likewise, the fact that a federal governmental creditor will likely recover less than the full amount of its claim is also of little relevance to the analysis. The limitation on the recovery to an unsecured creditor is the product of the distribution provisions of the Bankruptcy Code, not § 544(b).[87] More importantly, the longer limitations period is of little use to a federal governmental creditor as long as the automatic stay is in effect, as the proceeds of avoidance actions are property of the estate.[88] Since a federal governmental creditor may not pursue its rights against the recipient of an alleged fraudulent conveyance without relief from stay, permitting a trustee to pursue such actions can only enhance the recovery available to a federal governmental creditor in bankruptcy.[89] Arguably, the tradeoff for this increased distribution is that the creditor must share the recoveries from the fraudulent conveyance action pro rata with all other unsecured creditors.

Although established precedent in the fraudulent conveyance context would indicate that a trustee's avoidance powers are stronger than the triggering creditor's powers, a bankruptcy court could determine that policy considerations produce a different result when dealing with the enhanced ***348** avoidance powers of a federal governmental creditor. While such an argument is another variation of the "sovereign power" argument that has been largely rejected by courts applying the plain meaning of § 544(b), these additional considerations could sway an otherwise policy-minded judge to limit a trustee's recovery in these circumstances. Accordingly, the target of an avoidance action should raise these policy concerns as an additional defense.

4. *Is the Federal Governmental Creditor's Claim Allowable?*

The final hurdle that a trustee must clear is to establish that the claim is "allowable under Section 502 of this title or ... not allowable only under section 502(e)."[90] Although this requirement is not unique to federal governmental creditors, it is particularly important in this context because eliminating the claim of the federal government will eliminate the expanded powers associated with its claim. These potential defenses are discussed in detail below.

One potential strategy for the defendant is to object to the claim of the triggering creditor. Section 502(a) provides that a proof of claim is "deemed allowed, unless a party in interest ... objects."[91] Thus, the claim of a federal governmental creditor loses its prima facie allowance when a party in interest objects to the claim. To successfully challenge the claim of a federal governmental creditor, however, the defendant must establish that it is a party in interest.

The term "party in interest" is not defined in the Bankruptcy Code, but most courts have defined it to be a person or entity with a pecuniary interest that could be affected by the bankruptcy.[92] Barring unusual facts, a creditor is almost always a party in interest.[93] If the target of a fraudulent conveyance action is not a creditor, however, its interest as a defendant, by itself, would likely not qualify it as a party in interest.[94] While not every fraudulent conveyance defendant will be a creditor of the estate, those that are creditors may consider filing an objection to the federal governmental creditor's claim to avoid the application of the longer look-back period. Of course, ***349** the simple filing of an objection will not be enough to cause the disallowance of the claim; the claim must be subject to disallowance for one of the reasons set forth in § 502(b).[95]

Another related defense is whether the trustee may still pursue a fraudulent conveyance action when the claim of the federal governmental creditor has been satisfied during the bankruptcy. In *Kaiser*, for example, the defendants argued that the IRS no longer held an allowable claim because the debtor's tax debt had been satisfied by his widow.[96] Indeed, the IRS had filed an amended proof of claim to reflect a liability of $0.00, following the repayment.[97] Relying on three circuit-level decisions, the court found that "later satisfaction of a claim will not defeat a trustee's right to use a creditor as the golden creditor."[98] The court, however, found that the effect, if any, of the IRS's subsequent amendment to its claim on the trustee's ability to select the IRS as the triggering creditor turned on an issue of fact, so it was not appropriate for consideration in connection with a motion to dismiss.[99]

Finally, the court in *In re Republic Windows & Doors, LLC*[100] had to address the fact that the IRS had not yet filed a claim in the chapter 7 case. In analyzing this issue, the *Republic Windows* court first agreed with the trustee that the IRS could assert a late-filed claim and still receive a distribution, at least in a chapter 7 bankruptcy.[101] Second, the court noted that ***350** Bankruptcy Rule 3002(c)[102] generally provides a governmental creditor, such as the IRS, with 180 days to file a proof of claim.[103] Third, the court found that the debtor or trustee may file a proof of claim on behalf of a creditor pursuant to Bankruptcy Rule 3004 if the creditor fails to timely file a proof of claim.[104] Ultimately, however, the court found that the trustee could not pursue a fraudulent conveyance action on behalf of the IRS unless either the IRS or the trustee had filed a claim on the IRS's behalf.[105]

The court in *In re Polichuk* disagreed with this analysis, finding "that a proof of claim is not a prerequisite to the Trustee's exercise of the § 544(b) avoidance power."[106] For support, the court relied on the distinction between the terms "allowed" and "allowable," noting that "'a creditor might fail to have an allowed claim for reasons that have nothing to do with whether it was owed money by the debtor ..., including the failure to file."'[107] The court further noted that "a creditor's failure to file a proof of claim does not necessarily disrupt its standing for other purposes within the bankruptcy scheme."[108] Indeed, in chapter 11 and chapter 13 cases, the failure to timely file a proof of claim only eliminates the creditor's rights to a distribution; it does not extinguish the creditor's status.[109] As for chapter 7 cases, the court agreed with the analysis set forth in *Republic Windows* regarding the ability of the IRS to file a late claim.[110]

Following *Republic Windows* and *Polichuk*, the issue of whether the IRS must file a proof of claim for the trustee to rely on it as the triggering creditor remains unclear. At a minimum, in a chapter 7 case, the IRS's ability to file a claim late preserves the possibility that the longer statute of limitations period may be available to the trustee in the future, but if the IRS fails to file a timely claim, the chapter 7 trustee--or potentially the debtor itself--should take care to file a claim on behalf of the IRS to preserve the ability to pursue fraudulent conveyances that fall within the longer look-back period. In a chapter 11 case, the trustee will likely not be so limited because (1) the debtor could schedule the IRS's claim, which would be treated as prima facie ***351** valid[111] and (2) the 180-day bar date for governmental creditors does not apply in chapter 11 cases.[112] While a debtor can easily reserve a longer statute of limitation by scheduling the IRS (or another federal governmental unit) as a creditor in a chapter 11 case, the shorter bar date may bar such claims where the debtor fails to schedule them, if the rationale of *Republic Windows* is followed. Regardless of the approach ultimately followed, targets of fraudulent conveyance litigation should be aware of the bar date and the existence of the federal governmental creditor's claim when analyzing potential defenses.

B. DEFENSES BASED ON "APPLICABLE LAW"

Before a trustee can utilize § 544(b), he or she must demonstrate the existence of a creditor holding a claim as of the petition date. Many commentators and courts have described this requirement as the "triggering creditor" or "golden creditor" requirement, and it is ultimately an issue of non-bankruptcy law. While a trustee typically need not identify the triggering creditor when seeking to use routine state law avoidance actions,[113] the identification of a federal governmental creditor should be required to establish a trustee's entitlement to the longer statute of limitation period. Indeed, the failure to identify the federal governmental creditor may be grounds for dismissal of a complaint for failure to state a claim.[114] Nevertheless, opinions on these potential defenses with respect to triggering federal governmental creditors are scarce, likely because they tend to involve factual issues that cannot be resolved on a motion to dismiss. This section proposes potential defenses that may be utilized by fraudulent conveyance defendants to dispute the existence of a triggering federal governmental creditor.

1. *Requirements to Bring a Claim under the FDCPA*

The fraudulent conveyance provisions of the FDCPA are nearly identical to the provisions of UFTA. Indeed, much like its state law counterparts under UFTA, the relief available under the FDCPA depends on whether the debt to the federal government arose before or after the allegedly fraudulent transfer. If the government's claim predates the transfer at issue, the transfer is fraudulent if the debtor was insolvent and did not receive reasonably ***352** equivalent value in exchange for the transfer.[115] The FDCPA generally considers a debtor to be insolvent where the sum of its debts exceed the sum of its assets at a fair valuation.[116]

If the transfer predates the claim, then the government must prove the more difficult "actual" fraudulent conveyance claim.[117] This claim requires the government to establish that the transfer was made "with actual intent to hinder, delay, or defraud a creditor" as determined by the so-called "badges of fraud" set forth in § 3304(b)(2).[118] A subsequent creditor may also establish a fraudulent conveyance by demonstrating that the debtor did not receive reasonably equivalent value and either (a) was about to engage in a transaction that would leave it with unreasonably small assets or (b) intended to incur or believed it would incur debts that it would not be able to pay when they came due.[119]

Also, like UFTA, the FDCPA provides certain statutory defenses that may be asserted by defendants in a fraudulent conveyance action. In particular, a fraudulent conveyance may not be recovered from a subsequent transferee who took in good faith and for reasonably equivalent value.[120] The FDCPA also provides that a transfer is not avoidable if it results from (a) the "termination of a lease upon default by the debtor when the termination is pursuant to the lease and applicable law," or (b) the enforcement of a security interest under Article 9 of the Uniform Commercial Code or its equivalent.[121] Most importantly, if the *Moore v. Bay* doctrine is found not to extend to fraudulent conveyance actions under federal law, the FDCPA limits the monetary recovery to the lesser of the value of the asset transferred or the judgment on the debt.[122]

Given the similarities between UFTA and the FDCPA, any defense that a defendant could raise to a fraudulent conveyance action under UFTA is likely available to the defendant under the FDCPA as well. In addition to those standard requirements, the trustee must also identify the specific federal governmental creditor at issue and establish that this creditor has a claim ***353** that otherwise qualifies it to bring a fraudulent conveyance action under the FDCPA.

2. *Requirements to Establish the IRS as a Creditor*

To take advantage of the longer statute of limitations available to the IRS, the trustee must establish that the IRS is a creditor that satisfies the requirements for seeking a fraudulent conveyance under the applicable state-law version of UFTA.[123] The critical questions in this analysis are whether the IRS has a claim at all and whether the time periods to assess and collect that claim have passed. To fully answer these questions, a discussion of the IRS's ability to issue an assessment is necessary.

Generally, the Internal Revenue Code requires the IRS to assess a tax within three years of the filing of the return, regardless of whether that return was timely filed.[124] The general rule is subject to a number of exceptions, several of which may provide an unlimited amount of time for the IRS to assess the tax.[125] While the assessment period is potentially unlimited in certain circumstances, the IRS's status as a creditor of the debtor is not dependent on the assessment of the tax.[126] Indeed, the Internal Revenue Code expressly permits the IRS, at least in certain circumstances, to proceed in court to collect a tax without the need for an assessment.[127] Reading all of these provisions together suggests that the IRS need not assess the tax to qualify as a triggering creditor for purposes of § 544(b).

This analysis, however, is not as straightforward as the statutory language suggests. As noted in *CVAH*, a distinction exists between the assessment of a tax against a taxpayer and the assessment of a tax against a transferee of the taxpayer,[128] which is the real question at issue in a fraudulent ***354** conveyance action.[129] Outside of the fraudulent conveyance context, when considering whether an assessment must be made against a transferee before the IRS may commence a collection action, courts have reached conflicting decisions.[130] At least two circuit courts have held that an assessment is not a prerequisite to a collection action in those circumstances.[131] Ultimately, Judge Pappas held that because "assessment pursuant to IRS § 6901 is but one path to collection by [the] IRS from a transferee ... assessment cannot be a condition precedent to other methods of collection, like bringing a direct suit against the transferee."[132]

The best judicial discussion of the interplay between the assessment of a tax and the IRS's eligibility to serve as a triggering creditor under § 544(b) is found in *In re Polichuk*.[133] In that case, the targets of the fraudulent conveyance action argued that the IRS was not a creditor of the debtor because it had not assessed any prepetition tax and the assessment deadline had expired.[134] The court disagreed, finding that the tax liability was not dependent on the assessment.[135] Rather, assessment was required "before the Service may use its lien and levy powers to collect the tax ...."[136] Having found that the IRS was eligible to serve as the triggering creditor, the court next addressed the defendants' argument that the three-year assessment period had expired.[137] Once again, the court found that the limited evidence provided in the summary judgment record was insufficient to establish that the tax returns at issue were timely filed and that no exception to the general rule was applicable.[138] Accordingly, the existence of a material issue of fact mandated that the trustee be given an opportunity to prove the legitimacy of the IRS's claim at a trial on the merits.[139]

The trickier question is whether the IRS must assess the tax to trigger the application of the ten-year limitation period. On its face, § 6502(a) of the Internal Revenue Code provides:

> [w]here *the assessment of any tax* imposed by this title has been made within the period of limitation properly applicable ***355** hereto, such tax may be collected by levy or by a proceeding in court, but only if the levy is made or the proceeding begun--(1) within 10 years *after the assessment of the tax*.[140]

While the plain language of the statute seems to require an assessment before the trustee can take advantage of the ten-year limitation period, this particular argument has not been raised by a defendant in any published decision known to the author. For courts that adhere to a plain meaning analysis, this argument may offer the best hope of successfully defeating the application of the IRS's ten-year statute of limitation, at least where the time for assessment has lapsed.[141]

Another argument in support of requiring an assessment to trigger the ten-year statute of limitation is that the time period cannot be determined with specificity if the assessment is not required. For example, if the tax was not assessed before the petition date, would the ten-year period begin upon the expiration of the assessment period or upon some earlier date, such as the date the tax was incurred or the date of filing the return? The answer to this question could alter the look-back period at least three years and potentially for an even longer period of time if one of the exceptions to the general assessment rule applies. The confusion that would be engendered by a court's failure to require an assessment provides additional support for applying the plain meaning of § 6502(a)(1) and holding that an assessment is required.

Even if the tax was properly assessed prior to the petition date, another question that must be answered is how the limitations period of § 6502(a)(1) can be reconciled with the look-back period under UFTA. In other words, because the IRS has ten years from the date of assessment to pursue a fraudulent conveyance action under UFTA, but UFTA only contemplates the avoidance of *transfers* during the preceding four years, how should transfers made between the four and ten years preceding the fraudulent conveyance action be treated? A period measured ten years *going forward* from a date certain is obviously a different measure than a period *looking back* ten years from a future date. Since § 6502(a)(1) measures the time from the date of the assessment of the tax and not the date of the transfer sought to be avoided, this difference in measuring periods must be reconciled.[142]

One approach to resolve this question would be to permit the trustee to only avoid transfers that have occurred during the ten years following the ***356** assessment. In this way, the trustee could still utilize the extended limitation period available to the IRS, but the look-back period would be the shorter of ten years or the date of assessment. Thus, any transfers occurring prior to the date of assessment would not be subject to avoidance by the trustee, even if such transfers occurred within ten years of the petition date. Such a reading would also help quell the slippery slope concerns raised by many courts because the trustee would only seek to use the IRS as a creditor in scenarios where an assessment was issued between six and ten years before the petition date--due to the availability of the FDCPA for transfers less than six years old--and the alleged fraudulent transfer that occurred after the date of the assessment.

Despite the practicality of this approach, it appears to be inconsistent with § 6502(a)(1), as written. Moreover, bankruptcy law, especially § 544(b), was not written on a blank slate. Courts have long held that the IRS is not so limited in its efforts to collect taxes through state law fraudulent conveyance actions.[143] Instead, it appears that as long as the IRS was a creditor at the time of the alleged fraudulent transfer, the IRS may recover the transfer even if it was made prior to the date of assessment, even where the transfer at issue is more than ten years old.[144] Accordingly, absent some legal or equitable reason to limit the powers of a trustee under § 544(b), these cases could be read to authorize a trustee to pursue the avoidance of any alleged fraudulent conveyance that occurred after the debtor incurred a tax debt to the IRS, as long as the IRS timely assessed the tax and the time period for pursuing the collection of that tax had not expired by the petition date. This conclusion would also hold where the time to issue the assessment had not lapsed as of the petition date.

To fully appreciate the breadth of the IRS's, and potentially the trustee's powers, consider the following hypothetical: (a) the debtor fails to file its 1995 tax return until 2004, (b) the debtor makes a fraudulent conveyance in 1998; (c) the IRS assesses the tax in 2007; and (d) the debtor files for bankruptcy in 2016. Since the IRS is not required to assess the 1995 taxes until ***357** three years after the tax return is filed, the assessment in 2007 was timely under 26 U.S.C. § 6501(a). The IRS's deadline to file a collection action would not run until 2017 under 26 U.S.C. § 6502(a). Since the debtor filed for bankruptcy prior to the expiration of the IRS's limitations period, and because the IRS was a creditor of the debtor as of the end of 1995 when the tax was due, the trustee could theoretically step into the shoes of the IRS to avoid the 1998 fraudulent conveyance, which occurred nineteen years before the bankruptcy.

Even if the debtor timely files all tax returns, exceptions to the general rule may apply, as discussed above.[145] Moreover, other events may suspend the running of the statutes of limitation for assessment and collection. For example, if the IRS has issued a deficiency notice to the debtor, the statute of limitation to assess the tax will be "suspended" for at least 150 days.[146] If the debtor commences a proceeding before the tax court following the receipt of the deficiency notice, the limitation period will be extended until 60 days following a final order by the tax court.[147] The filing of a bankruptcy petition also suspends the limitation period to collect during the automatic stay,[148] but does not prohibit the IRS from issuing a deficiency letter or assessing any tax.[149] All of these provisions should be investigated by the trustee prior to commencing a fraudulent conveyance. Likewise, given the large number of potential exceptions and extensions, a target of a fraudulent conveyance action based on a claim by the IRS should investigate these potential facts in search of a defense. But resolution of this issue is unlikely to occur in the context of a dispositive motion.

C. PRACTICAL LIMITATIONS

Notwithstanding the potentially unlimited power of a trustee to avoid transactions when the IRS is a creditor of the debtor,[150] a number of practical ***358** limitations on this power exist. First, regardless of the type of fraudulent conveyance claim, successful avoidance of the transfer will depend on establishing either fraudulent intent or that the debtor was insolvent at the time of the transfer or became insolvent as a result of the transfer.[151] In addition to the inherent difficulties in proving intent, the evidence necessary to establish fraud and insolvency becomes more elusive with each passing year.[152] Moreover, arguing that a ten-plus year old transfer rendered a company insolvent, but not yet bankrupt for another ten years or more should prove exceedingly difficult.

Second, realizing the power of the IRS, a debtor is unlikely to allow an old claim of the IRS to linger for longer than a decade. The IRS has the power to issue fines and collect interest, and these amounts often exceed the amount of tax owed to the IRS. Thus, a debtor who is properly advised might pay its oldest taxes first to avoid the continuing accrual of interest and fees.[153] Moreover, the IRS has the added ability to assert the debtor's tax debt directly against a transferee under certain circumstances, and the transferee's payment to the IRS will satisfy the debtor's debt as well.[154]

Third, fraudulent conveyance actions under § 544(b)(1) are only available to unsecured creditors.[155] Many governmental creditors, including the IRS, hold claims that are secured by consensual or statutory liens.[156] The IRS often has claims entitled to priority under § 507(a)(8) as well, but the relative priority of the unsecured claim is not relevant to the analysis.[157]

Finally, a trustee need not undertake the effort to establish all the requirements of using the IRS as a triggering creditor if the transfer at issue is less than six years prior to the petition date. As discussed previously, the trustee typically has at least four years to pursue fraudulent conveyance actions ***359** under UFTA with respect to any creditor and the existence of the IRS as a creditor will make the provisions of the FDCPA available to the trustee, at least in jurisdictions that recognize the FDCPA as applicable law. The availability of these alternatives, combined with the evidentiary difficulties inherent in establishing the merits of a fraudulent transfer claim for older transactions, provides a viable explanation for why the feared flood of cases from trustees attempting to utilize the IRS limitation period has not occurred.[158]

V. A BRIEF WORD ON STATE-LAW "INSIDER PREFERENCE" ACTIONS

Although nearly every case on the subject of permitting a trustee to utilize a longer statute of limitation period has focused on fraudulent conveyance actions, the rationale for permitting the trustee to use the powers of the IRS should apply equally to so-called insider preference actions under UFTA.[159] These claims allow a creditor to recover payments to insiders on account of antecedent debt where the debtor is insolvent and the insider reasonably should have believed the debtor was insolvent.[160] The state-law codifications of UFTA require these actions to be filed within one year of the transfer, but the FDCPA provides two years for the federal government to pursue the same claims.[161] Despite the decision in *Alpha Protective Services*,[162] where the court found that the trustee could not equate the IRS's ten-year limitation period with the FDCPA's two-year look-back period, a plain meaning interpretation of these statutes would seem to permit a trustee to extend the one-year limitation period under UFTA where the IRS is a creditor of the debtor.[163] Moreover, there is no principled reason to distinguish between a trustee's ability to utilize the IRS's ten-year limitation period in ***360** connection with fraudulent conveyance actions and insider preference actions.

Insider preference actions are often easier to prove than a fraudulent conveyance action. They do not require proof of intent and there is no reasonably equivalent value defense. A trustee may prefer to utilize the longer limitations period to pursue payments made to insiders. An insider preference action under state law, however, still has an insolvency requirement, so many of the same practical difficulties previously discussed remain. Nevertheless, extending the trustee's ability to recover payments to insiders from one year to ten or more years would constitute a significant expansion of the trustee's powers. While a court may ultimately decline to expand the trustee's powers in this fashion, those expanded powers would nevertheless remain subject to the additional defenses provided by UFTA.[164] Any trustee seeking to take advantage of the IRS's expanded powers would be wise to investigate this potential theory of recovery.

VI. CONCLUSION

The development of case law surrounding a trustee's ability to step into the shoes of a federal governmental creditor to take advantage of a longer limitation period is in its infancy. Defendants in these actions have raised a number of defenses, but most courts have applied the "plain meaning" of § 544(b) to permit the trustee to exercise the expanded powers of the federal government. Fraudulent conveyance defendants have had moderate success in challenging the trustee's power to pursue claims under the FDCPA, primarily in convincing the Fifth Circuit in *Mirant* that the FDCPA does not constitute "applicable law" under § 544(b). Nevertheless, most other courts, including those following *Mirant*, have disagreed with its reasoning.

Defendants have been even less successful in challenging the trustee's ability to rely on state law under UFTA and the *nullum tempus* doctrine to utilize the IRS's ten-year limitations period. While a few courts have raised significant policy concerns regarding a trustee's exercise of the sovereign power of the IRS, all but one have agreed that the plain language of § 544(b) permits such a result until Congress acts to modify the statute. This Article has identified a number of other potential arguments that transferees may use to defend against the applicability of the IRS's limitation period, but these defenses are highly fact driven and will not be available to all defendants in all circumstances. Nevertheless, if the trustee's ability to utilize this expanded power is limited in the same way that the IRS is limited by the Internal Revenue Code, the practical realities of those limitations should ***361** serve to impede the potential "flood" of additional litigation that some courts fear.

Footnotes

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[1] 11 U.S.C. § 548(a)(1) (2012).

[2] Although Section 548 provides a true look-back period, the other time periods discussed in this Article are generally written as statutes of limitation or statutes of repose. Except where expressly noted, this Article uses the terms "statute of limitation," "limitations period," and "look-back period" interchangeably.

[3] 11 U.S.C. § 544(b)(1).

[4] On July 14, 2014, the Uniform Law Commission adopted a series of amendments to UFTA and renamed it the Uniform Voidable Transactions Act ("UVTA"). *See generally* Jonathan Korman & Laura Amato, *Noteworthy Changes to the Uniform Fraudulent Transfer Act*, Law360 (Aug. 28, 2014, 9:44 AM), https://www.law360.com/articles/571663/noteworthy-changes-to-the-uniform-fraudulent-transfer-act. The proposed changes in the UVTA should not affect the issues discussed in this Article. If anything, the adoption of the UVTA could make it easier for a trustee to establish a fraudulent conveyance action. *Id*. ("The UVTA now explicitly states that the creditor-claimant has the burden to establish the elements of its claim by a preponderance of the evidence, and not the higher clear and convincing standard.").

[5] *See, e.g.*, DEL. CODE ANN. tit. 6, §1309 (2018) (four years); ME. REV. STAT. tit. 14, § 3580 (2018) (six years); IOWA CODE § 684.9 (West 2018) (four years); *but see* MISS. CODE ANN. § 15-3-115 (West 2018) (three-year limit).

[6] While there are other statutes of limitation applicable only to the federal government, such as the general statute of limitation for collecting money damages on contract claims under 28 U.S.C. § 2415(a), the rationale for using those statutes to extend the look-back period under Section 544(b) is not unique to federal government creditors. *See* Tronox, Inc. v. Kerr McGee Corp. (*In re* Tronox, Inc.), 503 B.R. 239, 275 (Bankr. S.D.N.Y. 2013) (noting that 28 U.S.C. §§ 2415(a) and 2416(c) provide an alternative

limitations period). *See also* United States v. Moore, 968 F.2d 1099, 1101 (11th Cir. 1992) (stating that the district court properly found that a fraudulent conveyance action is a "quasi-contractual claim, and therefore subject to the six-year statute of limitations set forth in § 2415(a)") (citing case). If fraudulent conveyance actions can be pursued under a breach of contract theory, traditional creditors in other states could have six years or longer to pursue those claims as well. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-548 (2018) (establishing a six-year statute of limitations on written contract claims); MO. REV. STAT. § 516.110(1) (West 2017) (establishing a ten-year statute of limitations to recover money on a written contract claim). The potential assertion of fraudulent conveyance actions under a breach of contract theory is beyond the scope of this Article.

7 28 U.S.C. § 3001(a)(1), (b) (2012).

8 *Id.* § 3003(d).

9 *Id.* § 3003(b),(c), (e).

10 *See id.* § 3304 (providing claims for both types of fraudulent conveyance).

11 *Compare, e.g.*, 28 U.S.C. §§ 3301-3308 *with* DEL. CODE Ann. Tit. 6, §§ 1301-1311 (2018).

12 *See* 28 U.S.C. §§ 3304(b)(1)(A), 3306(b)(1), (2).

13 *See, e.g.*, DEL. CODE ANN. tit. 6, § 1309(1), (2) (2018).

14 CAL. CIV. CODE § 3439.09(c) (West 2016) (seven-year maximum regardless of discovery).

15 N.Y. C.P.L.R. § 213(8) (McKinney 2018) (providing for a limitation period of six years or two years after discovery in intentional fraudulent conveyance cases); N.Y. C.P.L.R. § 213 practice commentary C213:8.

16 *See* VA. CODE ANN. § 55-80 (West 2018).

17 28 U.S.C. § 3306(b)(3) (providing two years to bring such claims). An insider preference action permits an existing creditor to recover a transfer to an insider for an antecedent debt when the debtor was insolvent and the insider has reason to believe that the debtor was insolvent. *Id.* § 3304(a)(2). State laws adopting UFTA have typically provided only one year to bring these actions. *See, e.g.*, DEL. CODE ANN. tit. 6, §§ 1305(b), 1309(3).

18 26 U.S.C. § 6502(a)(1) (2012).

19 *Id.* § 6502(a).

20 *Id.* § 6501(a).

21 *Id.* § 6501(c)(3).

22 *Id.* § 6501(c).

23 *Id.* § 6501(c)(1), (2).

24 *Id*. § 6501(c)(4).

25 *Id*. § 6501(e).

26 Section 6901(a)(1)(A) provides, in relevant part, that

The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, paid, and collected in the same manner and subject to the same provisions and limitations as in the case of the taxes with respect to which the liabilities were incurred: (1) The liability, at law or in equity, of a transferee of property ....

Id.

27 *See* Frank Sawyer Trust of May 1992 v. Comm'r, 712 F.3d 597, 602-03 (1st Cir. 2013) ("[T]he federal statute authorizing the collection of taxes from transferees, 26 U.S.C. § 6901(a)(1), provides only a procedural remedy against an alleged transferee; substantive state law controls whether a transferee is liable for a transferor's tax liabilities.") (citing cases); *see also* Berliant v. Comm'r, 729 F.2d 496, 499 (7th Cir. 1984).

28 *See* United States v. Bacon, 82 F.3d 822, 825 (9th Cir. 1996) ("Because the state statute of limitations under [UFTA] does not apply to the federal government, the applicable limitation is the ten-year federal statute of limitation governing tax assessment collection actions.") (citation omitted); United States v. Bushlow, 832 F. Supp. 574, 581 (E.D.N.Y. 1993) (finding that the statute of limitation in 26 U.S.C. § 6502(a) applies to the government's fraudulent conveyance actions).

29 United States v. Summerlin, 310 U.S. 414, 416 (1940) (citing cases).

30 *See, e.g.*, United States v. Evans, 340 F. App'x 990, 993 (5th Cir. 2009) (finding that the logic of *Summerlin* applies equally to statutes of repose); Bresson v. Comm'r, 213 F.3d 1173, 1179 (9th Cir. 2000) ("To allow states to evade the *Summerlin* rule by the simple expedient of renaming their statutes of limitation is inconsistent with the core teaching of *Summerlin*--namely, that states 'transgress the limits of state power' when they attempt to set limitation periods on claims acquired by the United States in its governmental capacity."); United States v. Thornburg, 82 F.3d 886, 893-94 (9th Cir. 1996) (holding that *Summerlin* applies to claim-extinguishment provisions); Finkel v. Polichuk (*In re* Polichuk), 506 B.R. 405, 420 (Bankr. E.D. Pa. 2014) (following the "apparent judicial consensus" that *Summerlin* applies to statutes of repose as well); Alberts v. HCA Inc. (*In re* Greater Se. Cmty. Hosp. Corp.), 365 B.R. 293, 302 (Bankr. D.D.C. 2006) (listing cases that have applied *Summerlin* to statutes of repose).

31 United States v. California, 507 U.S. 746, 757 (1993). *See also* Guaranty Trust Co. of N.Y. v. United States, 304 U.S. 126, 141-42 (1938) (finding that a claim assigned to the United States government that had previously lapsed under an applicable statute of limitation was not revived by its assignment to the United States).

32 *Guaranty Trust*, 304 U.S. at 141-42.

33 *See, e.g.*, *Bresson*, 213 F.3d at 1178 (finding that the government was acting in its sovereign capacity to enforce rights grounded in federal law when pursuing a claim under California's version of UFTA); United States v. Zuhone, No. 96-1078, 1996 WL 437509, at *3 (C.D. Ill. May 29, 1996) (finding that the ten-year limitations period applied to tax claims brought under Illinois law).

34 11 U.S.C. § 544(b) (2012).

35 This question also includes the related issue of whether it is equitable to permit the trustee to exercise sovereign power even greater than that of the United States pursuant to the *Moore v. Bay* doctrine. *See* Moore v. Bay, 284 U.S. 4, 5 (1931) (holding that when a transfer is avoided, it is avoided for the benefit of all creditors, even if such creditors could not have otherwise avoided the transfer).

36 The special limitations period afforded the IRS under 26 U.S.C. § 6502 simply serves to put an outside date on the IRS's ability to pursue a fraudulent conveyance under applicable state law. Since UFTA and other related statutes are unquestionably "applicable law" under § 544(b), this subsection focuses exclusively on the remedies available under the FDCPA.

37 *See* Anderson v. Architectural Glass Const., Inc. (*In re* Pfister), Adv. No. 10-80162-HB, 2012 WL 1144540, at *5 (Bankr. D.S.C. Apr. 4, 2012) (holding transfers were avoidable pursuant to § 544(b)(1) and the FDCPA where the IRS was a creditor); Sergeant v. OneWest Bank, FSB (*In re* Walter), 462 B.R. 698, 704-05, 712 (Bankr. N.D. Iowa 2011) (holding that the trustee sufficiently pled a claim under § 544(b)(1) and the FDCPA); Allred v. Porter (*In re* Porter), Adv. No. 07-1012, 2009 WL 902662, at *20-21 (Bankr. D.S.D. Mar. 13, 2009) (holding that a trustee could step into the shoes of the Small Business Administration and assert fraudulent conveyance actions under the FDCPA and its six-year statute of limitation); Gurley v. Mills (*In re* Gurley), 222 B.R. 124, 132 (Bankr. W.D. Tenn. 1998) (applying FDCPA and its "reach-back period").

38 No. 1:06-CV-0417-BBM, 2008 WL 8832805, at *4 (N.D. Ga. July 7, 2008).

39 MC Asset Recovery LLC v. Commerzbank AG (*In re* Mirant Corp.), Adv. No. 05-04142, 2010 WL 8708772, at *13 (Bankr. N.D. Tex. Apr. 22, 2010).

40 *Commerzbank*, 2010 WL 8708772, at *13-14.

41 *See* *Commerzbank*, 2010 WL 8708772, at *14-15.

42 MC Asset Recovery, LLC v. Commerzbank A.G., 675 F.3d 530, 535 (5th Cir. 2012).

43 *Id*. at 535 (quoting 28 U.S.C. § 3003(c)).

44 *See id*. ("This provision was carefully worded to make clear that the act would have absolutely no effect on the Bankruptcy Code; even provisions of the Bankruptcy Code making reference to nonbankruptcy law are to be read as if this act did not exist."). *But see* Hillen v. City of Many Trees, LLC (*In re* CVAH, Inc.), 570 B.R. 816, 830 (Bankr. D. Idaho 2017) ("A court must be cautious in relying on a single comment made by an individual congressman in the process of enacting legislation in Congress.") (citations omitted).

45 *See, e.g.*, *CVAH, Inc.*, 570 B.R. at 825 (finding that a broad reading of "applicable law" is "consistent with the Supreme Court's interpretation of the very similar phrase 'applicable nonbankruptcy law' found elsewhere in the Code"); Gordon v. Harrison (*In re* Alpha Protective Servs., Inc.), 531 B.R. 889, 906 (Bankr. M.D. Ga. 2015) ("The clear language of § 544 does not place a limit on which unsecured creditor the trustee may choose, so long as the chosen creditor holds a claim that is allowable under § 502. Therefore, § 544 allows a trustee to step into the shoes of a governmental creditor."); Ebner v. Kaiser (*In re* Kaiser), 525 B.R. 697, 713 (Bankr. N.D. Ill. 2014) (expressly disagreeing with the reasoning in *Mirant*); Tronox, Inc. v. Kerr McGee Corp. (*In re* Tronox, Inc.), 503 B.R. 239, 273 (Bankr. S.D.N.Y. 2013) ("Treating the FDCPA as 'applicable law' does not 'modify' or 'supersede' the operation of the Bankruptcy Code, and a holding that the Code 'should be read as if the FDCPA did not exist' gives too much weight to a comment in the legislative history.").

46 *Tronox*, 503 B.R. at 273.

47 *Id.*; *see also* *CVAH*, 570 B.R. at 829 ("[W]hether the look-back period for avoidance of a fraudulent transfer is six-years under the FDCPA, rather than four or two-years under other laws, in no way impacts or changes the operation of § 544(b)(2), or any other provisions of Title 11, for that matter.").

48 *Tronox*, 503 B.R. at 274.

49 *Id*.

50 *See id*. (noting that 28 U.S.C. §§ 2415(a) and 2416(c) provide an alternative limitation period). *See also* United States v. Moore, 968 F.2d 1099, 1101 (11th Cir. 1992) (finding that 28 U.S.C. §§ 2415, 2416 apply to the federal government's claim).

51 Hillen v. City of Many Trees, LLC (*In re* CVAH, Inc.), 570 B.R. 816, 825 (Bankr. D. Idaho 2017) (citing Patterson v. Shumate, 504 U.S 753, 758 (1992) (explaining that because Congress knew how to limit "applicable law" to "state law" when it desired, the broader term "applicable nonbankruptcy law" must include any nonbankruptcy law including federal law).

52 *CVAH*, 570 B.R. at 826.

53 *Id*.

54 *See Tronox*, 503 B.R. at 274 (noting that 28 U.S.C. §§ 2415(a) and 2416(c) provide an alternative limitation period).

55 See note 6, *supra*, for more discussion on the potential treatment of fraudulent conveyance actions as contractual claims.

56 Wagner v. Ultima Homes, Inc. (*In re* Vaughan Co.), 498 B.R. 297 (Bankr. D.N.M. 2013).

57 *Vaughan*, 498 B.R. at 302.

58 *Id*.

59 *Id*. at 302-03.

60 *See id*. at 303-06.

61 *Id*. at 304 (citing Marshall v. Intermountain Elec. Co., 614 F.2d 260, 263 n.3 (10th Cir. 1980) and S.E.C. v. Calvo, 378 F.3d 1211, 1218 (11th Cir. 2004)).

62 *Id*. at 304.

63 *Id*. at 305.

64 *Id*. at 305 (quoting Redmond v. NCMIC Fin. Corp. (*In re* Brooke Corp.), 485 B.R. 650, 665 (Bankr. D. Kan. 2013)).

65 *Id*. at 305 (citation omitted).

66 Ebner v. Kaiser (*In re* Kaiser), 525 B.R. 697, 713 (Bankr N.D. Ill. 2014).

67 *Id*. at 711-14; *see also* Gordon v. Harrison (*In re* Alpha Protective Servs., Inc.), 531 B.R. 889, 906 (Bankr. M.D. Ga. 2015) (agreeing with cases such as *Kaiser* that rely on the plain language of § 544).

68 *Kaiser*, 525 B.R. at 713.

69 *Id*. at 713 (quoting Alberts v. HCA Inc. (*In re* Greater Se. Cmty. Hosp. Corp.), 365 B.R. 293, 304 (Bankr. D.D.C 2006)).

70 Mukamal v. Citibank N.A. (*In re* Kipnis), 555 B.R. 877, 882 (Bankr. S.D. Fla. 2016).

71 *See id*. at 882-83.

72 *See Kaiser*, 525 B.R. at 711 (citing *In re* Equip. Acquisition Res., Inc., 742 F.3d 743, 751 (7th Cir. 2014).

73 *Id*. at 712.

74 *Kipnis*, 555 B.R. at 883.

75 *See id*. at 883.

76 *See id*.

77 Hillen v. City of Many Trees, LLC (*In re* CVAH, Inc.), 570 B.R. 816, 834 (Bankr. D. Idaho 2017).

78 *Id*. at 835.

79 *Id*. at 835-36.

80 *Id*. at 835 (citing case).

81 *See* Osherow v. Porras (*In re* Porras), 312 B.R. 81, 96 (Bankr. W.D. Tex. 2004) ("The Trust and the IRS argue that under § 544(b) of the Bankruptcy Code, the Trustee is entitled to 'stand in the shoes' of the IRS and use 'applicable non-bankruptcy law"--in this case, § 6502--to bring an action under TUFTA as a 'proceeding in court' to collect the taxes owed by the Debtor.").

82 5 COLLIER ON BANKRUPTCY § 544.06[4], at 544-29 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2017) ("[T]he right of the trustee to recover is dependent upon just one creditor with a cause of action and [is] not dependent at all upon the size of that creditor's claim against the debtor.").

83 Outside of bankruptcy, the federal governmental creditor could pursue a fraudulent conveyance action against the debtor for its sole benefit, but its recovery would be limited to the amount of its claim. Conversely, in bankruptcy, the trustee utilizing the federal governmental creditor's special powers could recover the entire amount of the transfer, but the recovery would be distributed pro rata to all unsecured creditors.

84 See text accompanying notes 56-81 *supra*.

85 *See* Moore v. Bay, 284 U.S. 4, 5 (1931) (holding that when a transfer is avoided, it is avoided for the benefit of all creditors, even if such creditors could not have otherwise avoided the transfer).

86 Note that where the trustee elects to pursue a fraudulent conveyance under the provisions of the FDCPA rather than pursuant to UFTA, the doctrine of *Moore v. Bay* may not apply because the bankruptcy code does not automatically pre-empt other federal law. *See* MC Asset Recovery LLC v. Commerzbank AG (*In re* Mirant Corp.), Adv. No. 05-04142, 2010 WL 8708772, at *15 (Bankr. N.D. Tex. Apr. 22, 2010) ("[W]hile section 550 of the Bankruptcy Code may have this preemptive effect when a trustee avoids transfers pursuant to state law under section 544(b), it is quite another thing for section 550 of the Bankruptcy Code to preempt section 3306(a)(1) of the FDCPA.").

87 *See, e.g.*, 11 U.S.C. § 1129(a)(7) (2012) (requiring a nonconsenting creditor in an impaired class to receive only as much as it would receive under a chapter 7 liquidation); *id*. § 1129(b)(2)(B) (providing that, under certain circumstances, an unsecured creditor may be paid less than the full amount of its claim provided that no claim or interest in a junior class receives a distribution).

88 *See* Osherow v. Porras (*In re* Porras), 312 B.R. 81, 94 (Bankr. W.D. Tex. 2004) (distinguishing between proceeds of fraudulent conveyance actions, which are property of the estate, and the cause of action itself, which is simply barred by the automatic stay). *See also* 11 U.S.C. § 362(a)(3) (2012) (barring any act to obtain possession of property of the estate).

89 *See* Hillen v. City of Many Trees, LLC (*In re* CVAH, Inc.), 570 B.R. 816, 838 (Bankr. D. Idaho 2017) (finding that, because the IRS is barred by the automatic stay from pursuing its rights, the trustee as the statutory representative for the IRS should be permitted to exercise the same rights available to the IRS).

90 11 U.S.C. § 544(b)(1) (2012).

91 *Id*. § 502(a).

92 *See, e.g.*, Cult Awareness Network, Inc. v. Martino (*In re* Cult Awareness Network, Inc.), 151 F.3d 605, 607 (7th Cir. 1998) ("To have standing to object to a bankruptcy order, a person must have a pecuniary interest in the outcome of the bankruptcy proceedings.").

93 *See, e.g.*, *In re* The C.P. Hall Co., 513 B.R. 540, 543 (Bankr. N.D. Ill. 2014) ("A creditor's interest in a bankruptcy case is pecuniary, and so a creditor is a 'party in interest' with standing to object to the claims of other creditors.") (citing cases).

94 *See* *In re* FBN Food Servs., Inc., No. 93C6347, 1995 WL 230958, at **1, 2 (N.D. Ill. Apr. 17, 1995) (holding that a defendant in a fraudulent conveyance action who is not a creditor had no direct interest in the number or amount of claims against the bankruptcy estate); *In re* E.S. Bankest, L.C., 321 B.R. 590, 596-98 (Bankr. S.D. Fla. 2005) (finding that such defendants are actually opposed to the interests of other creditors because they are acting in their own best interest, not the estate's best interests).

95 While the allowance or disallowance of a claim under § 502 is beyond the scope of this article, the author notes that even a contingent or unliquidated claim of a governmental creditor could serve as the basis for the application of the expanded look-back periods discussed herein if the claim is subject to estimation under § 502(c)(1). 11 U.S.C. § 502(c) (2012) (permitting the estimation of a contingent or unliquidated claim where the fixing or liquidation of the claim would unduly delay the administration of the case).

96 Ebner v. Kaiser (*In re* Kaiser), 525 B.R. 697, 715 (Bankr. N.D. Ill. 2014).

97 *Id*. at 715.

98 *Id*. The three circuit court decisions relied upon by the court were MC Asset Recovery, LLC v. Commerzbank A.G. (*In re* Mirant Corp.), 675 F.3d 530, 534 (5th Cir. 2012) (finding that postpetition settlement of claims did not affect trustee's standing under § 544(b); Stalnaker v. DLC, Ltd. (*In re* DLC, Ltd.), 295 B.R. 593, 605 (8th Cir. BAP 2003), *aff'd sub nom* Stalnaker v. DLC, Ltd.,

376 F.3d 819 (8th Cir. 2004) ("It is inconsistent with the Bankruptcy Code to allow a transferee of a fraudulent transfer to defeat the bankruptcy trustee by paying a couple of creditors. The potential for abuse is obvious."); and Acequia, Inc. v. Clinton (*In re* Acequia, Inc.), 34 F.3d 800, 807 (9th Cir. 1994) (rejecting defendant's argument that plan's payment of all claims mooted the section 544(b) action). *But see* MC Asset Recovery LLC v. Commerzbank AG (*In re* Mirant Corp.), Adv. No. 05-04142, 2010 WL 8708772, at *9 (Bankr. N.D. Tex. Apr. 22, 2010). ("If Mirant's creditors have been paid in full, there is no federal jurisdiction in this adversary proceeding.").

99 *See Kaiser*, 525 B.R. at 715.

100 Levey v. Gillman (*In re* Republic Windows & Doors, LLC), Adv. No. 10-2513, 2011 WL 5975256 (Bankr. N.D. Ill. Oct. 17, 2011) (citing cases).

101 *See Republic Windows*, 2011 WL 5975256, at *10 (citing cases). *See also* IRS v. Century Boat Co. (*In re* Century Boat Co.), 986 F.2d 154, 158 (6th Cir. 1993) ("An untimely priority claim filed by the IRS may be entitled to a distribution under Section 726(a)(1) even though the claimant had notice of the bankruptcy petition in time to permit the filing of a timely proof of claim."); *See* 11 U.S.C. § 726(a)(1) (2012) (noting that estate property shall be distributed in the order of priority specified in § 507 to claims that are timely filed or late-filed on or before ten days after the mailing of the trustee's final report or the trustee's commencement of the final distribution).

102 All references to "Bankruptcy Rule" or "Rule" in this article refer to the Federal Rules of Bankruptcy Procedure, unless expressly noted otherwise.

103 FED. R. BANKR. P. 3002(c)(1).

104 *Republic Windows*, 2011 WL 5975256, at *10.

105 *See Id*. at *11.

106 Finkel v. Polichuk (*In re* Polichuk), 506 B.R. 405, 430 (Bankr. E.D. Pa. 2014).

107 *Id*. at 430-31 (quoting *In re* Crown Unlimited Mach., Inc., 2005 Bankr. LEXIS 3073, at *3 n.2 (Bankr. N.D. Ind. Nov. 4, 2005)).

108 *Id*. at 431.

109 *Id*. (quoting Gaudio v. Stamford Color Photo, Inc. (*In re* Stamford Color Photo, Inc.), 105 B.R. 204, 206 (Bankr. D. Conn. 1989)).

110 *Id*. at 431-32.

111 *See* FED. R. BANKR. P. 3003(b)(1) (providing that the debtor's schedule of liabilities "shall constitute prima facie evidence of the validity and amount of the claims of creditors, unless they are scheduled as disputed, contingent or unliquidated.")

112 *See* FED. R. BANKR. P. 3003(c)(3) (providing that the court may set the bar date).

113 *See, e.g.*, Leibowitz v. Parkway Bank & Trust Co. (*In re* Image Worldwide, Ltd.), 139 F.3d 574, 576 (7th Cir. 1998) ("The trustee need not identify the creditor, so long as the unsecured creditor exists.") (citing case).

114 *See* Levey v. Gillman (*In re* Republic Windows & Doors, LLC), Adv. No. 10-2513, 2011 WL 5975256, at *11 (Bankr. N.D. Ill. Oct. 17, 2011) (granting defendants' statute of limitation defense because no claim had been filed on behalf of the IRS in the bankruptcy case).

115 28 U.S.C. § 3304(a)(1) (2012). There is a presumption that a debtor generally not paying its debts as they become due is insolvent. *Id*. §3302(b). *See also* Belfance v. Bushey (*In re* Bushey), 210 B.R. 95, 101-03 (6th Cir. B.A.P. 1997) (finding that a continuous open account between a debtor and creditor satisfied the existing creditor requirement even though the outstanding balance fluctuates through zero).

116 28 U.S.C. § 3302(a).

117 *Id*. § 3304(b)(1).

118 *Id*. §§ 3304(b)(1)(A), (b)(2).

119 *Id*. § 3304(b)(1)(B).

120 *Id*. § 3307(a).

121 *Id*. § 3307(e).

122 *Id*. § 3307(b). As discussed above, the court in *Mirant* questioned whether the *Moore v. Bay* doctrine could be extended to the FDCPA because it is rooted in the doctrine of preemption. See *supra* note 86. Notably, UFTA contains a similar limitation on the amount that can be recovered. *See, e.g.*, DEL. CODE ANN. tit. 6, § 1308(b) (2018).

123 This subsection discusses Delaware's version of UFTA only.

124 26 U.S.C. § 6501(a) (2012). Technically, the assessment period expires three years following either the due date of the return or the date the return is filed, whichever is later. A return that is filed early is treated as having been filed on the due date. *See id*. § 6501(b)(1).

125 *See, e.g*. 26 U.S.C. § 6501(c)(1) (false or fraudulent return); *id*. § (c)(2) (willful attempt to evade tax); and *id*. § (c)(3) (no return filed).

126 *See* United States v. Green, 201 F.3d 251, 257 (3d Cir. 2000) ("The United States is considered a creditor 'from the date when the obligation to pay income taxes accrues,' essentially on April 15 of the year following the tax year in question.") (citing case); United States v. Evans, 513 F. Supp. 2d 825, 834 (W.D. Tex. 2007) ("The Government is a creditor of a taxpayer as of the date the obligation to pay income taxes accrues.") (citing cases); Finkel v. Polichuk (*In re* Polichuk), 506 B.R. 405, 426 (Bankr. E.D. Pa. 2014) ("Federal income taxes, assessed or not, that are due and owing fall within the concept of a 'claim' in bankruptcy.") (citing cases).

127 *See, e.g.*, 26 U.S.C. § 6501(c)(1)-(3) (permitting the IRS to assess the tax or proceed in court to collect the tax without assessment).

128 *See* Hall v. United States, 403 F.2d 344, 347 (5th Cir. 1968) (distinguishing between suits to collect a tax from a taxpayer's successor in interest and suits in aid of collecting a judgment against a taxpayer). If the rationale in *Hall* remains valid, even the current ten-year limitations period in 26 U.S.C. § 6502 may not apply to fraudulent conveyance actions filed by the IRS.

129 *See* Hillen v. City of Many Trees, LLC (*In re* CVAH, Inc.), 570 B.R. 816, 836-37 (Bankr. D. Idaho 2017).

130 *See Id*. at 837 (collecting cases).

131 *See Id*. (citing United States v. Geniviva, 16 F.3d 522, 524 (3d Cir. 1994) and United States v. Russell, 461 F.2d 605, 608 (10th Cir. 1972)).

132 *Id*.

133 Finkel v. Polichuk (*In re* Polichuk), 506 B.R. 405 (Bankr. E.D. Pa. 2014).

134 *Id*. at 427.

135 *See id*. at 427-28.

136 *Id*. at 427 (citation omitted).

137 *See id*. at 428.

138 *See id*. at 427-29.

139 *See id*. at 428-30.

140 26 U.S.C. § 6502(a) (2012) (emphasis added).

141 For the reasons discussed below, if the time to assess the tax has not run, the IRS, and therefore the trustee, could most likely pursue avoidance of any transfer made after the tax is due.

142 *See* Hillen v. City of Many Trees, LLC (*In re* CVAH, Inc.), 570 B.R. 816, 839 n.19 (Bankr. D. Idaho 2017) (expressing "concern at how this 10-year period translates into a 'look-back' period, since it is measured from the date of an assessment rather than the date of the transfer ...").

143 *See, e.g.*, United States v. Halpern, No. 15-CV-0025-(SJF)(AKT), 2015 WL 5821620, at *1-*2 (E.D.N.Y. Oct. 5, 2015) (denying a motion to dismiss an IRS complaint seeking to avoid a 2004 transfer in 2015); United States v. Bodwell, No. 95-1906, 1996 WL 757285, at *1, *6 (E.D. Cal. July 26, 1996) (denying a motion to dismiss an IRS complaint seeking to avoid a 1983 transfer in 1996); United States v. Tranakos, 778 F. Supp. 1220, 1224-25 (N.D. Ga. 1991) (denying a motion for summary judgment asserting that the IRS could not avoid transfers made between 1980 and 1985 through the complaint filed in 1988 under the predecessor to § 6502, which provided the IRS a six-year period to collect a tax following assessment).

144 *See, e.g.*, *Halpern*, 2015 WL 5821620, at *1 (taxes owed between 2000 and 2002, transfer in 2004, and assessment in 2005); *Bodwell*, 1996 WL 757285, at *1,*6 (taxes owed from 1979-1981, transfer in 1983, assessment in 1985); *Tranakos*, 778 F. Supp. at 1224-25 (taxes owed from 1975-1978, transfers made between 1980 and 1985, assessment in 1986).

145 See *supra* text accompanying notes 22-25.

[146] *See* 26 U.S.C. § 6503(a) (2012) (providing for suspension of the limitation period by 60 days following any period where the IRS is barred from assessment or collection); *id*. § 6213(a) (providing the taxpayer with ninety days to petition the tax court for a redetermination of the deficiency following the receipt of notice and forbidding the IRS from assessing a tax or commencing a proceeding during this time frame).

[147] *Id*. § 6503(a).

[148] *Id*. § 6503(h)(2) (providing for suspension until six months following the termination of the automatic stay).

[149] 11 U.S.C. §§ 362(b)(9)(B),(D) (2012).

[150] *See generally* Peter Russin & Meaghan Murphy, *An Unlimited Reach-Back Period When IRS is Triggering Creditor?*, AM. BANKR. INST. J., Jan. 2017, at 22 (arguing that the IRS's ability to avoid fraudulent transfers may be unlimited). *But see* Ebner v. Kaiser (*In re* Kaiser), 525 B.R. 697, 710 (Bankr N.D. Ill. 2014) (arguing that the IRS's avoidance powers are not unlimited because "the IRS generally has three years from the filing of a tax return to assess tax liability against a taxpayer and one year thereafter to assess tax liability against a transferee. Thereafter, the IRS has ten years to collect.").

[151] *See* 28 U.S.C. § 3304(b) (2012) (requiring fraudulent intent or an inability to pay debts as they become due); DEL. CODE ANN. tit. 6, § 1304(a) (2018) (same); 28 U.S.C. § 3304(a) (requiring insolvency or becoming insolvent following the transaction); DEL. CODE ANN. tit. 6, § 1305 (2018) (same).

[152] *See* Hillen v. City of Many Trees, LLC (*In re* CVAH, Inc.), 570 B.R. 816, 839 (Bankr. D. Idaho 2017) ("Practically speaking, the burden of proving these elements would seem more onerous, and success less likely, the further back in time the transfer occurred from the bankruptcy petition date.").

[153] Whether such payments can be avoided as preferential under 11 U.S.C. § 547 is beyond the scope of this article.

[154] *See generally* 26 U.S.C. § 6901(a)(1)(A) (2012).

[155] *See* 11 U.S.C. § 544(b)(1) (2012) (permitting the trustee to avoid transfers that are "voidable under applicable law by a creditor holding an unsecured claim ....").

[156] *See In re CVAH, Inc.*, 570 B.R. at 839 n.20 ("In this Court's experience, in many bankruptcy cases, the claims of the government are secured by either consensual or statutory liens."). Theoretically, the IRS, working with the trustee, could waive or release its security interest to facilitate the filing of a fraudulent conveyance action. However, if satisfaction of the IRS's claim does not bar the filing of the fraudulent conveyance action, it would be inequitable to permit the IRS to waive its security interest to create such an action. *See* notes 96-98 *supra*.

[157] *In re CVAH, Inc.*, 570 B.R. at 825 n.7 (noting that Section 544(b)(1) "does not distinguish between priority and nonpriority unsecured claims").

[158] The unknown availability of this power likely also contributes to the relative paucity of cases on the subject. *See* Mukamal v. Citibank N.A. (*In re* Kipnis), 555 B.R. 877, 883 (Bankr. S.D. Fla. 2016).

[159] *See, e.g.*, DEL. CODE ANN. tit. 6, § 1305(b) (2018) ("A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made ... if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time and the insider had reasonable cause to believe that the debtor was insolvent.").

160 *Id*.

161 *Compare id*. § 1309(3) *with* 28 U.S.C. § 3306(b)(3) (2012).

162 Gordon v. Harrison (*In re* Alpha Protective Servs., Inc.) 531 B.R. 889, 908 (Bankr. M.D. Ga. 2015). It is unclear why the trustee elected to pursue insider preference claims under the FDCPA provision rather than the Georgia state law equivalent given the open issue surrounding the effectiveness of the federal law limitation period in the FDCPA with respect to the IRS.

163 *Compare* DEL. CODE ANN. tit. 6, § 1309(3) (2018) (finding the insider preference claim extinguished unless brought "within 1 year after the transfer was made or the obligation was incurred") *with id*. § 1309(1) (finding the fraudulent conveyance action extinguished unless brought "within 4 years after the transfer was made or the obligation was incurred") *and* 28 U.S.C. § 3306(b)(1) (finding the fraudulent conveyance action extinguished unless brought "within 6 years after the transfer was made or the obligation was incurred").

164 *See, e.g.*, DEL. CODE ANN. tit. 6, §§ 1308(f)(1)-(3) (2018).

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