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Golden Creditors, Copper Rules: An Analysis of Avoidance Actions Under Section 544(b) of the Bankruptcy Code in Cases Where a Federal Creditor Holds a Claim

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AVOIDANCE ACTIONS UNDER SECTION 544(b) OF THE BANKRUPTCY CODE IN CASES WHERE A FEDERAL CREDITOR HOLDS A CLAIM

INTRODUCTION

Generally, when a debtor files a bankruptcy petition, the property owned by the debtor at the time of filing becomes property of the bankruptcy estate,[1] and this estate property is used to pay all or part of creditors' claims. In a Chapter 7 liquidation case, for example, a bankruptcy trustee will liquidate the estate and distribute the proceeds to creditors. In some cases, prior to the commencement of the case, a debtor may transfer assets to others in an effort to put those assets out of the reach of the trustee and creditors. Transfers of property that are made "with actual intent to hinder, delay, or defraud" creditors or transfers for less than fair value constitute fraudulent transfers and may be unwound pursuant to the trustee's avoidance powers.[2]

In order to avoid such transfers, the trustee may invoke the Bankruptcy Code's internal fraudulent conveyance provision, which is codified in Section 548. Alternatively, the trustee may invoke Section 544(b), which enables the trustee to step into the shoes of a creditor and exercise the rights of that creditor to avoid fraudulent conveyances pursuant to nonbankruptcy law. Section 544(b) provides that "the trustee may 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."[3] When the bankruptcy trustee avoids a fraudulent transfer of property pursuant to Section 548, the property or the value of the property is returned to the estate. The same is true of transfers avoided pursuant to Section 544(b). Although the trustee steps into the shoes of an existing creditor, the transfer is not avoided for the benefit of that creditor specifically; rather the

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1 *See* 11 U.S.C. § 541(a) (2012).
2 *Id.* § 548.
3 *Id.* § 544(b).

property (or its value) is clawed back into the estate for the benefit of all creditors.[4]

Since most states have adopted uniform fraudulent conveyance statutes that provide four-year statutes of limitation,[5] a key feature of Section 544(b) is that it allows the trustee to take advantage of these longer statutes of limitation rather than the two-year statute of limitations provided by Section 548.[6] Moreover, there are other statutes that provide longer limitation periods on actions brought by government agencies. An action brought by the Internal Revenue Service (IRS) to recover a fraudulent transfer, for example, "is subject to the limitations periods set out in the Internal Revenue Code, not the statute of limitations set forth in the state fraudulent-transfers law," and the IRS, therefore, has ten years to recover under Section 6502 of the Internal Revenue Code (IRC).[7] Similarly, fraudulent transfer actions brought by federal creditors pursuant to the Federal Debt Collection Procedures Act (FDCPA) are subject to a six-year statute of limitations.[8]

Courts have disagreed about whether the IRC and the FDCPA constitute "applicable law" under Section 544(b), such that a claim held by a government creditor under the fraudulent transfer provisions of those statutes could be derivatively asserted by a trustee.[9] For example, in *In re Mirant Corp.*, the Court of Appeals for the Fifth Circuit held that the FDCPA did not constitute applicable law under Section 544(b),[10] while in *In re Tronox Inc.*, the Bankruptcy Court for the Southern District of New York reached the opposite conclusion, holding that the FDCPA was, in fact, applicable law.[11] These cases illustrate "that there is no judicial consensus concerning the issue," but rather "ongoing judicial disagreement."[12]

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[4] *See In re* Equip. Acquisition Res., Inc., 742 F.3d 743, 746 (7th Cir. 2014); *In re* Moore, 608 F.3d 253, 260 (5th Cir. 2010).

[5] *In re Equip. Acquisition*, 742 F.3d at 745 (citing 740 ILL. COMP. STAT. 160/5(a)(2), 160/10 (2016)).

[6] *See, e.g.*, *In re* Tronox Inc., 503 B.R. 239, 266–67 (Bankr. S.D.N.Y. 2013).

[7] *In re* Kaiser, 525 B.R. 697, 710 (Bankr. N.D. Ill. 2014) (applying 26 U.S.C. § 6502 (2012)).

[8] 28 U.S.C. § 3306 (2012); *see also In re Tronox*, 503 B.R. at 272 ("[T]he FDCPA provides . . . a six-year statute of limitations from the date of the challenged transfer . . . .").

[9] *See* Steven J. Boyajian, *Continued Disagreement: Use of Federal Debt Collection Laws to Expand Fraudulent Transfer Look-Back Periods*, 34 AM. BANKR. INST. J., 30, 30–31 (2015); Robert W. Miller, *Overtime for Estate Representatives Stepping into the Shoes of the U.S.*, 33 AM. BANKR. INST. J. 24, 24–25 (2014).

[10] *In re* Mirant Corp., 675 F.3d 530, 535 (5th Cir. 2012).

[11] *In re Tronox*, 503 B.R. at 273–74.

[12] Boyajian, *supra* note 9, at 31, 87.

This note will examine the ongoing conflict over whether Section 544(b) of the Bankruptcy Code permits the trustee to take advantage of the extended statute of limitations available to federal creditors under the FDCPA and IRC. Part I will discuss the nature of fraudulent conveyances, the derivative powers of the trustee under Section 544(b), the statutory remedies available to private and government creditors, and provide an overview of the relevant cannons of construction. Part II will examine the facts and reasoning employed by courts that have refused to allow the trustee to step into the government creditor's shoes under Section 544(b). Part III will examine cases in which courts have opted to allow the trustee to step into the government creditor's shoes. Finally, Part IV will analyze the results produced by these two divergent lines of cases and evaluate which approach is superior. This note will argue that the expansive nature of the plain text of Section 544(b) creates a powerful presumption in favor of treating the FDCPA and IRC as applicable law and that the evidence typically used to discourage courts from treating Section 544(b) as such is insufficient to overcome this presumption.

I. STATUTORY BACKGROUND

Before undertaking a detailed analysis of whether or not the IRC and the FDCPA constitute applicable law under Section 544(b) of the Bankruptcy Code, an examination of the statutes at issue is necessary. Specifically, a measure of background information on the nature of fraudulent transfers and state law means of redressing them outside of bankruptcy is essential, as is an understanding of how and why, in bankruptcy, Section 544(b) endows the trustee with the power to claw back the fraudulent transfers a private creditor could have avoided outside of bankruptcy pursuant to those state statutes. It is also helpful to understand the more expansive statutory fraudulent conveyance remedies that are available to certain government creditors under the IRC and FDCPA. Finally, since the question posed by this note is, at root, a question of statutory interpretation, it is necessary to review the relevant cannons of construction.

A. Fraudulent Conveyances, the UFTA, and UFCA

Legislative concern with those who seek to frustrate the collection efforts of creditors by transferring their assets to friendly third parties is hardly a new phenomenon; transferring your beach house to your uncle for mere pennies on the eve of bankruptcy has always been illegal. And, in fact, laws designed to target and unwind suspicious conveyances have a rich statutory history, dating back[13] to the 1571 Statute of Elizabeth, which was enacted to combat "a common practice where a debtor would transfer property to a friend or other reliable third party and seek sanctuary in a church or other protected place where creditors could not enter."[14] After retreating to sanctuary, the unscrupulous "debtor would live there, continuing to enjoy the income from the transferred property until creditors agreed to accept a discounted settlement."[15] The final step of the scheme would be effectuated after settlement, when "the transferee would reconvey the property back to the debtor, who would, now debt-free, live happily ever after."[16] The Statute of Elizabeth gave creditors the ability to petition a court to unwind transfers made with intent[17] to "hinder, delay or defraud creditors."[18]

The modern statutory framework for addressing fraudulent transfers is embodied in the Uniform Fraudulent Transfer Act (UFTA) and the Uniform Fraudulent Conveyance Act (UFCA), "which are uniform statutes proposed by the National Conference of Commissioners on Uniform State Laws and recommended for state adoption."[19] These model statutes have been tremendously influential; in fact, "[t]he majority of states have enacted the UFTA. A minority of states, including New York and Maryland, still follow the . . . UFCA."[20] Although the vast majority of creditors in the United States will thus be

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[13] As Jon Travis Powers notes, even the Statute of Elizabeth simply restated Roman common law principles: "If a debtor during the times of the Roman Empire committed an act or forbearance that diminished his assets such that his creditors would not receive their due, the debtor was deemed to have committed a fraud upon those creditors and the transaction was avoidable." Jon Travis Powers, *Fraudulent Transfer Liability under the Uniform Fraudulent Transfer Act: For Statute of Limitations Purposes, Is Such Liability Grounded in Fraud or Created by Statute*?, 20 NORTON J. BANKR. L. & PRAC. 563, 566 (2011).

[14] *Id.* at 566 (quoting Lee B. Shepard, *Beyond Moody: A Re-Examination of Unreasonably Small Capital*, 57 Hastings L.J. 891, 897–98 (2005–06)).

[15] *Id.* (quoting Shephard, *supra* note 14, at 898).

[16] *Id.* (quoting Shephard, *supra* note 14, at 898).

[17] Interestingly, the intent requirement of the statute rendered it somewhat ineffectual, necessitating the development of the common law badges of fraud doctrine. *Id.* at 565. For additional information on badges of fraud, see *infra* note 25.

[18] Powers, *supra* note 13, at 565 (quoting *In re* Madrid, 725 F.2d 1197, 1199–200 (9th Cir. 1984)).

[19] Alan N. Resnick, *Finding the Shoes That Fit: How Derivative Is the Trustee's Power to Avoid Fraudulent Conveyances Under Section 544(b) of the Bankruptcy Code?*, 31 CARDOZO L. REV. 205, 207–08 (2009).

[20] *Id.* at 208 (footnotes omitted).

able to pursue remedies under one of these uniform statutes, it is worth noting that "a few states have non-uniform statutes."[21]

The UFTA and UFCA operate in a manner much like the Statute of Elizabeth. Under these modern uniform statutory schemes, fraudulent transfers are divided into two broad categories: actual and constructive.[22] Under the UFTA and UFCA, actual fraudulent transfers occur when "a transfer or obligation . . . is made or incurred with 'actual intent' to 'hinder, delay or defraud' creditors of the debtor."[23] As under the common law doctrine employed by courts to increase the efficacy of the Statute of Elizabeth,[24] actual intent to defraud can be inferred from "badges of fraud."[25] Even when badges of fraud are taken into account, however, the evidentiary bar for demonstrating actual intent to defraud creditors is rather high. Accordingly, the modern statutory schemes go even further than the expansive construction given to the Statute of

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[21] *Id.*

[22] *See id.* at 208–09; U.F.T.A. § 4 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 1984); U.F.C.A. §§ 4–7 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 1918).

[23] Resnick, *supra* note 19, at 208 (citing U.F.T.A. § 4 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 1984); U.F.C.A. § 7 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 1918)).

[24] *See supra* note 17.

[25] Resnick, *supra* note 19, at 208. Badges of fraud include whether:

> (1) the transfer or obligation was to an insider;
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> (2) the debtor retained possession or control of the property transferred after the transfer;
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> (3) the transfer or obligation was disclosed or concealed;
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> (4) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
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> (5) the transfer was of substantially all the debtor's assets;
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> (6) the debtor absconded;
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> (7) the debtor removed or concealed assets;
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> (8) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
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> (9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
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> (10) the transfer occurred shortly before or shortly after a substantial debt was incurred; and
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> (11) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

Id. at 208–09 (citing U.F.T.A. § 4(b) & cmt. 5).

Elizabeth[26] by including provisions that address constructive fraudulent conveyance. In essence, "[a] constructive fraudulent conveyance is one that is not predicated on the debtor's intentions or motivations, but is based on the debtor's transfer of assets for less than reasonably equivalent value while experiencing a poor financial condition."[27] Thus, conveyances made in exchange for less-than-reasonable value will generally be deemed fraudulent under the statutes when "the debtor was insolvent at the time of the transfer."[28] Furthermore, such exchanges are considered fraudulent if they occur when a debtor undertakes or prepares to undertake a venture that could not reasonably be supported by his remaining assets, or when "the debtor intended[,] . . . believed or reasonably should have believed that it would incur[] debts beyond its ability to pay as such debts become due."[29] These provisions sweep broadly, enveloping debtor conduct that, while perhaps overambitious or imprudent, may be free of any nefarious intent—such as that of the cash-strapped merchant who sells an asset cheaply and quickly to cover key operating expenses that are coming due while he waits for his business prospects to improve.

State fraudulent transfer schemes typically provide four-year statutes of limitation.[30] However, the limitation period can be longer in some states; New York's version of the statute, for example, provides a six-year statute of limitations.[31] In total, "80 percent of the states use four-year statutes of limitations, [while] four [states] use six-year statutes of limitations."[32] Six years appears to be the outer boundary of limitations periods under pure statutory schemes, as "only Virginia has a potentially longer statute of limitations, as it only limits fraudulent conveyance actions by using the

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[26] Note that while the original Statute of Elizabeth did not contain a description of constructive fraudulent conveyance, American statutes adopting the same name sometimes did. *See, e.g.*, *In re* Pfister, No. 09-05670-HB, 2012 WL 1144540, at *6 (Bankr. D.S.C. Apr. 4, 2012) (noting that "an action lies for constructive fraudulent transfer [under the Statute of Elizabeth] if (1) debtor makes a transfer but does not receive 'valuable consideration' in return; (2) debtor was indebted to [creditor] at the time of transfer; and (3) debtor does not have sufficient property to pay his debt to [creditor] in full") (quoting *In re* S. Textile Knitters, 65 F. App'x 426, 435 (4th Cir. 2003), *rev'd*, No. 7:2-1825-HMH (D.S.C. Oct. 31, 2012), *rev'd*, 749 F.3d 294 (4th Cir. 2014)).

[27] Resnick, *supra* note 19, at 209.

[28] *Id.*

[29] *Id.*

[30] *See, e.g.*, *In re* Equip. Acquisition Res., Inc., 742 F.3d 743, 745 (7th Cir. 2014) (citing 740 ILL. COMP. STAT. 160/5(a)(2), 160/10 (2016)).

[31] Resnick, *supra* note 19, at 213.

[32] Miller, *supra* note 9, at 24.

equitable doctrine of *laches*."[33] Thus, as demonstrated by the foregoing, a creditor seeking to increase his recovery may unwind actually or constructively fraudulent conveyances under a state's version of the UFCA or UFTA—but only if he brings an action within four, or in rarer cases, six, years.

B. The Derivative Power of the Trustee Under Section 544(b)

When a debtor files a bankruptcy petition, most judicial proceedings against the debtor and property of the debtor are automatically stayed.[34] Thus, creditors are stayed from bringing or continuing actions to recover property that was fraudulently transferred by the debtor pre-petition. The standing to bring fraudulent transfer actions passes to the trustee, pursuant to Bankruptcy Code Sections 548 and 544(b).[35] Section 544(b) endows the trustee with the power 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 under section 502 . . . or that is not allowable only under section 502(e)."[36] This provision, in short, allows the trustee "to 'stand in the shoes' and assert the rights of the particular unsecured creditor."[37]

However, while the cause of action belonged to a single creditor, "any property the trustee recovers becomes estate property and is divided *pro rata* among all general creditors."[38] Thus, Section 544(b) is "derivative of state law" and "enables the trustee to do in a bankruptcy proceeding what a creditor would have been able to do outside of bankruptcy—except the trustee will recover the property for the benefit of the estate."[39] The creditor in whose shoes the trustee stands is "sometimes referred to as a triggering or golden creditor," and the nature of that creditor's identity "has important implications for a trustee's cause of action because the trustee becomes subject to the same defenses that a [transferee] defendant could have raised against the triggering creditor, including the expiration of a

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[33] *Id.* (emphasis omitted) (citing *In re* Porter, 37 B.R. 56, 66 (Bankr. E.D. Va. 1984)).

[34] *See* 11 U.S.C. § 362(a) (2012).

[35] As noted previously, Section 548, the Bankruptcy Code's internal fraudulent conveyance provision, is subject to a two-year statute of limitations. *See id.* § 548(a)(1).

[36] *Id.* § 544(b)(1).

[37] Resnick, *supra* note 19, at 205.

[38] *In re* Moore, 608 F.3d 253, 260 (5th Cir. 2010).

[39] *In re* Equip. Acquisition Res., Inc., 742 F.3d 743, 746 (7th Cir. 2014).

statute of limitations."[40] Thus, inside bankruptcy, the trustee has the power to bring any fraudulent transfer actions that an unsecured creditor could have commenced outside bankruptcy and—provided that the trustee can overcome any defenses to which the triggering unsecured creditor would have been subject—may recover the value of the transferred property for the benefit of the estate.

C. The Rights of Government Creditors Under the FDCPA and IRC

Because the trustee is subject to all defenses that a transferee defendant could have raised against the triggering creditor,[41] the trustee is generally forced to rely upon the limitations periods available to creditors as of the petition date in order to avoid fraudulent transfers.[42] This can create complications in certain cases, for while most creditors are subject to a four-year statute of limitations under the relevant state's version of the UFTA or UFCA,[43] a select group of creditors, including—most notably—the federal government, have the benefit of statutes of limitation that are longer than those provided under the UFTA and UFCA.

For example, "[t]he IRS has at least a ten year lookback period and its rights supersede any statute of limitations under state law."[44] This power originates in Section 6502 of the Internal Revenue Code,[45] which states, in relevant part, that

> [w]here the assessment of any tax imposed by this title has been made within the period of limitation properly applicable thereto, such tax may be collected by levy or by a proceeding in court, but only if the levy is made or the proceeding begun . . . within 10 years after the assessment of the tax.[46]

[40] Boyajian, *supra* note 9, at 30.

[41] *See id.*

[42] *In re* Polichuk, No. 08-10783ELF, 2010 WL 4878789, at *3 n.9 (Bankr. E.D. Pa. Nov. 23, 2010).

[43] *See, e.g.*, *In re Equip. Acquisition*, 742 F.3d at 745 (citing 740 ILL. COMP. STAT. 160/5(a)(2), 160/10 (2016)); Miller, *supra* note 9, at 24. For further discussion of statutory limitations periods under the UFCA and UFTA, see *supra* Section I.A.

[44] *In re Polichuk*, 2010 WL 4878789, at *3 n.9 (internal citation omitted) (citing 26 U.S.C. §§ 6501, 6502 (2012)).

[45] *See In re* Vaughan Co., 498 B.R. 297, 303 (Bankr. D.N.M. 2013) (noting that "Section 6502 of the Internal Revenue Code . . . provides a ten-year statute of limitations for collection of taxes by the IRS").

[46] 26 U.S.C. § 6502(a). Note that the statute provides a number of qualified exceptions to this general rule, however, none these exceptions are relevant to the present discussion, and so they are accordingly omitted.

The result is that the IRS enjoys "a 10-year statute of limitations to collect taxes that have already been assessed" and may, "following an assessment, . . . employ state law, including its fraudulent transfer law, to avoid a transfer within 10 years."[47]

The federal government enjoys a similarly extended limitations period on fraudulent conveyance actions brought under the Federal Debt Collection Procedures Act. The FDCPA is a "fraudulent conveyance statute . . . under which the United States can pursue its claims."[48] This statute provides, in relevant part, that "[a] claim for relief with respect to a fraudulent transfer or obligation . . . is extinguished unless action is brought . . . within 6 years after the transfer was made or the obligation was incurred."[49] The FDCPA is substantially similar to the UFTA[50] and allows the government to unwind conveyances that are actually fraudulent (i.e., made "with actual intent to hinder, delay, or defraud a creditor")[51] or constructively fraudulent (i.e., made "without receiving a reasonably equivalent value in exchange for the transfer . . . [when] the debtor is insolvent at that time [of the transfer] or the debtor becomes insolvent as a result of the transfer").[52] Thus, taken as a whole, "[t]he FDCPA regulates the ability of the federal government to pursue debts and provides a public right of action to avoid fraudulent conveyances, which incorporates the UFTA almost verbatim," but which provides a six-year, rather than four-year, limitations period.[53]

The net result is that since "neither the U.S. nor the IRS is bound by state law statutes of limitations when pursuing fraudulent transfers," nor is the government "subject to the defense of *laches* when enforcing its rights,"[54] government creditors have access to extended limitations periods, regardless of what remedies would be available to similarly-situated private creditors. Thus, when a government creditor seeks to unwind an actually or constructively fraudulent

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47 Miller, *supra* note 9, at 24.

48 *In re* Tronox Inc., 503 B.R. 239, 272 (Bankr. S.D.N.Y. 2013). The FDCPA defines the United States as "a Federal corporation; . . . an agency, department, commission, board, or other entity of the United States; or . . . an instrumentality of the United States." 28 U.S.C. § 3002(15)(A)–(C) (2012).

49 28 U.S.C. § 3306(b). Note that, like 26 U.S.C § 6502(a), this statute includes a number of exceptions which are omitted here because they are not relevant to the current discussion.

50 *See In re Tronox*, 503 B.R. at 272.

51 *In re* Pfister, 2012 WL 1144540, at *5 (Bankr. D.S.C. Apr. 4, 2012) (quoting 28 U.S.C. § 3304(b)(1)(A)), *aff'd*, 749 F.3d 294 (4th Cir. 2014).

52 *Id.* at *5 (quoting 28 U.S.C. § 3304(a)(1)).

53 Miller, *supra* note 9, at 24 (footnote omitted).

54 *Id.*

conveyance, the action will be subject to a six- or ten-year statute of limitations—meaning that the government creditor will generally have more time to claw back the transferred property than a private creditor, who, in eighty percent of states, will be constrained by a four-year statute of limitations.[55]

Government creditors' access to longer limitations periods than those available to their private counterparts finds its root in the common law doctrine generally styled as *nullum tempus occurrit regi*, or "no time runs against the king."[56] The *nullum tempus* doctrine "has been used to refer to a sovereign's immunity from statutes of limitation."[57] This broad principle "finds its modern justification in the policy that public rights, revenues, and property should not be forfeited due to the negligence of public officials."[58] The doctrine is most clearly articulated, at least as far as the federal court system is concerned, in *United States v. Summerlin*, wherein the Court stated that "[i]t is well settled that the United States is not bound by state statutes of limitation or subject to the defense of laches in enforcing its rights."[59] This is the case "whether the United States brings its suit in its own courts or in a state court."[60]

While powerful and well established, the *nullum tempus* doctrine is subject to a key limitation: "when not enforcing a public right or a public interest, the sovereign is not shielded by *nullum tempus occurrit regi*."[61] Thus, "if an action brought in the name of the United States does not involve public rights or interests, state statutes of limitation typically apply."[62] In such instances, "the federal government functions as a mere conduit for the enforcement of private rights which could have been enforced by the private parties themselves."[63] As is so often the case in matters of law, this seemingly discrete and tidy exception is not unqualified; instead, there are certain conditions, the fulfillment of which takes a case outside of the public right exception—that is to say, there are exceptions to the exception. Most significantly, private government action can still be

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55 *See id.*

56 *In re* Vaughan Co., 498 B.R. 297, 304 (Bankr. D.N.M. 2013) (citing S.E.C. v. Rind, 991 F.2d 1486, 1491 (9th Cir. 1993)).

57 Romualdo P. Eclavea et al., *Doctrine of Governmental Immunity*, *in* 51 AM. JUR. 2d LIMITATION OF ACTIONS § 63 (2017).

58 *In re Vaughan*, 498 B.R. at 304 (internal quotations omitted) (quoting *Rind*, 991 F.2d at 1491).

59 United States v. Summerlin, 310 U.S. 414, 416 (1940).

60 *Id.*

61 Miller, *supra* note 9, at 25.

62 *In re Vaughan*, 498 B.R. at 304 (citing Marshall v. Intermountain Elec. Co., 614 F.2d 260, 262 n.3 (10th Cir. 1980)).

63 *Id.* (internal quotations omitted) (citing *Marshall*, 614 F.2d at 262 n.3).

shielded from state statutes of limitation in cases where Congress so intended; as one court put it, "a state's statute of limitations does not apply 'to an action brought by the federal government to vindicate public rights or public interests, absent a clear showing of contrary congressional intent.'"[64] Thus, even where a government actor attempts to enforce a private right, he may properly avail himself of the government's sovereign power and shield himself from state statutes of limitation, so long as Congress intentionally authorized him to do so. In short, federal access to extended statutes of limitation finds its historical root in the *nullum tempus* doctrine; while generally this doctrine only shields government creditors when they are enforcing public rights, it also shields them when they enforce private rights with clear congressional authorization.

D. Cannons of Construction

As discussed above, Section 544(b) of the Bankruptcy Code allows the trustee to step into the shoes of an unsecured creditor, bring any fraudulent transfer actions that the creditor may have had prior to the petition date, and claw back that property (or its value) into the estate. Furthermore, as explained in Sections I.B and I.C, most private creditors who seek to unwind fraudulent conveyances are bound by a four-year statute of limitations under state versions of the UFTA or UFCA, while federal creditors have access to six- and ten-year statutes of limitation under the FDCPA and IRC. Taking all this in sum, the question that arises is whether the FDCPA and IRC—statutes that originate in a uniquely governmental power—constitute applicable law under Section 544(b) such that the trustee would be able to step into the shoes of the triggering government creditor for the purpose of unwinding a fraudulent transfer that occurred outside the statute of limitations provided by state fraudulent conveyance law. Since government creditors, particularly the IRS, appear in bankruptcy proceedings with great frequency,[65] this question has a great deal of practical import: "[T]he 10-year statute of limitations . . . might be available in any case where the IRS has already assessed taxes against the debtor,"[66] enabling the trustee to claw back any property fraudulently conveyed within the last ten years for the benefit of the estate, thus resulting in

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[64] Bd. of Cty. Comm'rs for Garfield Cty., Colo. v. W.H.I., Inc., 992 F.2d 1061, 1065 (10th Cir. 1993) (quoting *Marshall*, 614 F.2d at 262).

[65] *See, e.g.*, Miller, *supra* note 9, at 24.

[66] *Id.*

increased recoveries for all unsecured creditors. This question is, at a very fundamental level, one of statutory interpretation and requires an examination of the basic cannons of construction that courts employ to discern congressional meaning and intent.

The Supreme Court has noted that "canons of construction are . . . rules of thumb that help courts determine the meaning of legislation."[67] These canons are not all created equal. Rather, courts must look first to the plain meaning of the text, operating with the presumption "that a legislature says in a statute what it means and means in a statute what it says there."[68] Courts may "properly assume, absent sufficient indication to the contrary, that Congress intends the words in its enactments to carry 'their ordinary, contemporary, common meaning.'"[69] Plain text analysis can—and, at times, should—be dispositive, for when statutory text lacks facial ambiguity, the "judicial inquiry is complete."[70]

Courts are loath to depart from literal application of the plain meaning of a statute,[71] even in cases when failing to do so produces strange results, for the mere "fact that Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to [the statute's] plain meaning."[72] Thus, the Supreme Court has held that

> [t]he plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its

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[67] Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253 (1992).

[68] *Id.* at 253–54.

[69] Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 388 (1993) (quoting Perrin v. United States, 444 U.S. 37, 42 (1979)).

[70] *Germain*, 503 U.S. at 254 (internal quotations omitted) (quoting Rubin v. United States, 449 U.S. 424, 430 (1981)). The full quote from *Rubin* is, "When . . . the terms of a statute [are] unambiguous, judicial inquiry is complete, except 'in "rare and exceptional circumstances"'[;] . . . [n]o such circumstances are present here . . . ." *Rubin*, 449 U.S. at 430 (internal citations omitted). The court does not, in that opinion, specify the exceptional circumstances that would generally be required to trigger further review. For more information on circumstances that require the court to look beyond the terms of the statute, see *infra* note 73 and accompanying text.

[71] This sentiment is articulated well by the *In re Kane* court:

> Courts find it easiest to reform a statute when the suspect text makes no sense whatever. It is somewhat harder when the text makes literal sense but it is absurd, or when applying it would lead to an absurd result. It is hardest to do when . . . the text makes sense but yields a perverse result. The more substantive the change, the more wary a court must be about making it.

In re Kane, 336 B.R. 477, 486 (Bankr. D. Nev. 2006) (footnotes omitted).

[72] Union Bank v. Wolas, 502 U.S. 151, 158 (1991).

> drafters.' . . . In such cases, the intention of the drafters, rather than the strict language, controls.[73]

In keeping with this notion that the statute may not be given literal effect when doing so would produce a result demonstrably at odds with the intentions of the drafters, courts are required—for example—"to interpret the words of a statute in context. . . . 'A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.'"[74]

When the plain meaning of the statutory language is unclear or would produce a result at odds with the intention of the law, courts often seek guidance from the legislative history. However, "[r]eliance on legislative history in divining the intent of Congress is, as has often been observed, a step to be taken cautiously."[75] Thus, courts "must be wary against interpolating [their] notions of policy in the interstices of legislative provisions."[76] This strong legal tradition of generally avoiding searching inquiries of the legislative record in order to discern intent exists because, as "Oliver Wendell Holmes, Jr. wrote more than 100 years ago, '[W]e do not inquire what the legislature meant; we ask only what the statute means.'"[77] Thus, as always, "[w]hether or not legislative history is ever relevant, it need not be consulted when . . . the statutory text is unambiguous."[78] Any analysis of Section 544(b), the IRC, or the FDCPA therefore, should lend great weight to the plain words of the statutory text and accord only subordinate value to legislative history.

Before concluding this section, it is important to note that one of the two candidates for "applicable law" examined in this note contains an intratextual cannon of construction that restricts the manner in which it is to be read and qualifies its provisions. Section 3003 of the FDCPA, entitled "[r]ules of construction," declares that "[t]his chapter shall not be construed to supersede or modify the operation of . . . title 11."[79] Thus, any

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[73] United States v. Ron Pair Enters., Inc., 489 U.S. 235, 242 (1989) (second alteration in original) (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982)).

[74] Hibbs v. Winn, 542 U.S. 88, 101 (2004) (quoting 2A N. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46.06, at 181–86 (rev. 6th ed. 2000)).

[75] Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 26 (1977).

[76] Scripps-Howard Radio, Inc. v. F.C.C., 316 U.S. 4, 11 (1942).

[77] *In re* Kane, 336 B.R. 477, 485–86 (Bankr. D. Nev. 2006) (alteration in original) (quoting Oliver Wendell Holmes, Jr., *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899)).

[78] United States v. Woods, 134 S. Ct. 557, 567 n.5 (2013).

[79] 28 U.S.C. § 3003(c)(1) (2012).

reading of the FDCPA that causes it to supersede or modify the Bankruptcy Code will be invalid, as it will plainly contradict both the clear textual constraints of the statute and the intentions of its drafters.

Determining whether the FDCPA and the IRC constitute applicable law within the meaning of Section 544(b) is, at root, an exercise in statuary interpretation. In engaging in such interpretation, the primary focus should be on the plain meaning of the statutory texts at issue. While legislative intent might, at times, shed light on the meaning of those texts, such evidence should be viewed with a degree of skepticism and should be used only to illumine—rather than contravene—the plain meaning of the text. Finally, when examining the FDCPA, it is essential to refrain from construing the text in a manner that would cause it to supersede or modify the operation of the Bankruptcy Code.

II. *MIRANT*, *VAUGHAN*, AND THE CASE AGAINST APPLICABLE LAW

Section 544(b) of the Bankruptcy code empowers the trustee to unwind any fraudulent transfer that an unsecured creditor would have been able to unwind pursuant to a claim under applicable law. As discussed previously, fraudulent conveyance claims of this sort will typically be subject to a four-year statute of limitations under the relevant state's version of the UFTA or UFCA. Government creditors, however, have access to six- or ten-year statutes of limitation under the FDCPA and IRC, creating a question as to whether the FDCPA and IRC constitute applicable law under Section 544(b) of the Bankruptcy Code such that the trustee would have access to the extended limitation periods provided by those statutes. Some courts have argued that the FDCPA and IRC should not be treated as applicable law under Section 544(b). This section will analyze two major decisions holding the FDCPA and/or IRC inapplicable law: *In re Mirant*[80] and *In re Vaughan*.[81]

A. In re Mirant

In re Mirant arose after Mirant, an energy company, attempted to acquire nine power islands by acting through a subsidiary in an effort to expand its European operations.[82]

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[80] *In re* Mirant Corp., 675 F.3d 530 (5th Cir. 2012).

[81] *In re* Vaughan Co., 498 B.R. 297 (Bankr. D.N.M. 2013).

[82] *In re Mirant*, 675 F.3d at 532.

Commerzbank financed the transaction by providing a loan to the subsidiary and required Mirant to guarantee the loan.[83] Shortly thereafter, the power island deal fell through, and Mirant—after making payments on the loan pursuant to the guarantee—filed a Chapter 11 petition.[84]

Mirant, now acting as debtor-in-possession,[85] sued Commerzbank in an effort "to avoid the Guaranty and to recover the funds Mirant paid pursuant to the Guaranty."[86] Commerzbank responded to the suit by filing a motion for dismissal, arguing that Mirant[87] lacked standing and failed to state a claim because it could not avail itself of the FDCPA under Section 544(b).[88] The bankruptcy court converted the motion to one for summary judgment.[89] Thereafter, the bankruptcy court issued proposed findings of fact and conclusions of law to the district court, which found that, while Mirant possessed standing, summary judgment was appropriate because the FDCPA was not applicable law under Section 544(b).[90]

On appeal, the Fifth Circuit affirmed the trial court's ruling that the FDCPA did not constitute applicable law under

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[83] *Id.*

[84] *Id.*

[85] The court noted that, while Mirant was a debtor-in-possession rather than a trustee, the distinction was irrelevant for purposes of its eventual 544(b) analysis. *Id.* at 532 n.1 ("Although Mirant was a debtor-in-possession, the issues in this case focus primarily on the powers of a bankruptcy trustee. This is because a debtor-in-possession has many of the powers of a bankruptcy trustee."); *see also* 11 U.S.C. § 1107(a) (2012) ("Subject to any limitations on a trustee serving in a case under this chapter, and to such limitations or conditions as the court prescribes, a debtor in possession shall have all the rights, other than the right to compensation under section 330 of this title, and powers, and shall perform all the functions and duties, except the duties specified in sections 1106(a)(2), (3), and (4) of this title, of a trustee serving in a case under this chapter.").

[86] *In re Mirant*, 675 F.3d at 532.

[87] Mirant's Bankruptcy plan resulted in "the creation of a special litigation entity" called MC Asset Recovery, LLC (MCAR), which was "substituted into the case for Mirant." *Id.* Since the distinction is not relevant to the current discussion, this note will refer to both Mirant and MCAR as "Mirant."

[88] *Id.*

[89] *Id.*

[90] *Id.* Boyjian provides more information on the reasoning employed by the bankruptcy court:

> [T]he U.S. Bankruptcy Court for the Northern District of Texas held that the FDCPA was not applicable law under § 544(b)(1) because, the court believed, the FDCPA evinces a congressional intent that it should be employed solely for the benefit of the U.S. The bankruptcy court based its reasoning on the fact that under "section 3306 of the FDCPA, transfers may be avoided 'to the extent [that is] necessary to satisfy the debt to the United States.'"

Boyajian, *supra* note 9, at 31 (second alteration in original) (footnote omitted) (quoting *In re* Mirant Corp., No. 03-046590 (DML), 2010 Bankr. LEXIS 6389, at *43 (Bankr. N.D. Tex. Apr. 22, 2010)).

Section 544(b).[91] The decision hinged, in part, on an application of Section 3003 of the FDCPA, which provides that "[t]his chapter shall not be construed to *supersede or modify* the operation of . . . title 11."[92] Mirant argued that "[Section] 3003(c)'s mandate that the FDCPA not modify or supersede Title 11 is only fulfilled by seamlessly incorporating the FDCPA into the [B]ankruptcy [C]ode," while Commerzbank "argue[d] that allowing the trustee to use the FDCPA as 'applicable law' under § 544(b) will necessarily 'modify' Title 11."[93] The court looked to a previous case, which had held that similar antimodification language in the Employee Retirement Income Security Act (ERISA) prevented it from preempting a state property law because such preemption would modify the operation of the Bankruptcy Code's exemption provisions.[94] The court analogized the FDCPA to ERISA, ultimately siding with Commerzbank and concluding that "treating the FDCPA as applicable law under 544(b) would impermissibly modify the operation of Title 11."[95]

The court buttressed this opinion by "rel[ying] on the FDCPA's legislative history as a further indicator that the FDCPA should not be considered 'applicable law.'"[96] Particularly, the court drew attention to a remark by Committee Chairman Brooks:

> As the author of the final version of the Federal Debt Collection Procedures Act, to which the Senate has now formally agreed, I want to discuss some aspects of the legislation to make sure they are fully understood . . . . The act makes several clarifications to resolve potential ambiguities in its application or in its effect on other laws. One of those clarifications is that the act "shall not be construed to supersede or modify the operation of * * * title 11," United States Code—the Bankruptcy Code. 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. The only exception is the provision in section 201 of the act, which amends a specific provision of the Bankruptcy Code.[97]

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[91] *In re Mirant*, 675 F.3d at 536.

[92] *Id.* at 535 (alteration in original) (quoting 28 U.S.C. § 3003 (2012)).

[93] *Id.*

[94] *Id.* (citing Matter of Volpe, 943 F.2d 1451, 1451–53 (5th Cir. 1991)). The specific antimodification provision at issue in *Volpe* was 29 U.S.C. § 1144(d) (1988). *In re Mirant*, 675 F.3d at 535.

[95] *In re Mirant*, 675 F.3d at 535.

[96] Miller, *supra* note 9, at 25.

[97] *In re Mirant*, 675 F.3d at 535–36 (quoting 136 Cong. Rec. H13288 (daily ed. Oct. 27, 1990) (statement of Rep. Jack Brooks)).

The court observed that this remark "is not dispositive, [but] it does support the Court's determination that the FDCPA is not applicable law under 11 U.S.C. § 544(b)."[98]

B. In re Vaughan

In re Vaughan centered on a realty company that Douglas Vaughan had operated as a Ponzi scheme.[99] After the Vaughan Company Realtors filed a bankruptcy petition, the trustee endeavored to recover funds that had been transferred from the Vaughan Company to Ultima Homes, Inc. for the purpose of financing the construction of Douglas Vaughan's personal residence.[100] When Ultima contended that fraudulent transfer actions would be time-barred, the trustee "assert[ed] that she [was] immune from the four-year statute of limitations that ordinarily applies to state law fraudulent transfer claims because Section 544(b) permit[ted] her to use the ten-year look back period available to the IRS."[101]

The bankruptcy court was highly skeptical of the trustee's argument. The court began by declaring that "[i]n expounding a statute, [the Court] must not be guided by a single sentence or member of a sentence, but [must] look to the provisions of the whole law, and to its object and policy."[102] The court then noted that the IRS's immunity from the state statute of limitations derived from the *nullum tempus occurit regi* doctrine, before observing that

> [t]he application of *nullum tempus* is not without limits. . . . Such power may only be used to enforce public rights and protect public interests. . . . Therefore, if an action brought in the name of the United States does not involve public rights or interests, state statutes of limitation typically apply.[103]

The court then concluded that Congress did not intend Section 544(b) "to vest sovereign powers in a bankruptcy trustee and

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[98] *In re Mirant*, 675 F.3d at 535.

[99] *In re* Vaughan Co., 498 B.R. 297, 300–01 (Bankr. D.N.M. 2013).

[100] *See id.* at 301.

[101] *Id.* at 302.

[102] *Id.* at 304 (quoting United States v. Lamirand, 669 F.3d 1091, 1096 (10th Cir. 2012)).

[103] *Id.* at 303–04 (internal citations omitted). The court supports this proposition by citing *Marshall v. Intermountain Electric Co.*, 614 F.2d 260, 262–63, 262 n.3 (10th Cir. 1980) ("An action which, although brought in the name of the United States, involves no public rights or interests may be subject to a state statute of limitations. In such a case the federal government functions as a mere conduit for the enforcement of private rights which could have been enforced by the private parties themselves."), and *S.E.C. v. Calvo*, 378 F.3d 1211, 1218 (11th Cir. 2004) ("Where . . . the government's action vindicates a private interest, the [state statute of limitations] defense is typically available.").

thereby immunize her from the strictures of state law in the pursuit of her private interests."[104] Such a policy would be impermissible, the court suggested, for "[i]f the federal government were to delegate the exercise of its sovereign powers in such circumstances, it would pervert the purpose of *nullum tempus*, which is to immunize the *federal government* from certain state laws."[105] Furthermore, the court reasoned, even assuming, arguendo, that Congress did intend to delegate sovereign powers to the trustee, the trustee would still be unable to exercise said power to vindicate a private right.[106]

The court declared that this conclusion would effectuate Congress's intent, noting that because "[t]he IRS holds an unsecured claim in a substantial portion of bankruptcy cases," allowing the "trustee or debtor in possession [to] recover transfers made within ten years before the petition date . . . would eviscerate the UFTA's four-year look back period in most bankruptcy cases," thereby subordinating, rather than incorporating, state law.[107] Ultimately, the court was "unwilling to draw an inference that Congress intended such a dramatic change in the law,"[108] and so justified its holding.

III. *TRONOX*, *KAISER*, AND THE CASE FOR APPLICABLE LAW

Part II of this note explored the dispute over whether the IRC and FDCPA constitute applicable law under the meaning of Section 544(b) and examined two key cases articulating rationales for *not* treating these statutes as applicable law. This part turns, in sequence, to the opposite side of the coin, examining two major decisions holding that these statutory schemes *are*, in fact, applicable law under Section 544(b)—*In re Tronox*[109] and *In re Kaiser*.[110]

A. In re Tronox

In *In re Tronox*, the Bankruptcy Court for the Southern District of New York concluded that the FDCPA constituted applicable law under Section 544(b), explicitly rejecting the Fifth Circuit's holding in *Mirant*. The case arose from a rather convoluted factual background, but can be—for purposes of this

[104] *In re Vaughan*, 498 B.R. at 304.
[105] *Id.* at 304-05.
[106] *Id.* at 305.
[107] *Id.*
[108] *Id.* at 306.
[109] *In re* Tronox Inc., 503 B.R. 239 (Bankr. S.D.N.Y. 2013).
[110] *In re* Kaiser, 525 B.R. 697 (Bankr. N.D. Ill. 2014).

note—sufficiently summarized as follows: "the debtors sought to avoid, as a fraudulent transfer, a spinoff transaction through which they were left with minimal assets and substantial environmental and tort liabilities."[111] After defendants raised a statute of limitations defense, "the debtors argued that their claims were viable due to the six-year look-back period provided under the FDCPA. The defendants, relying on *Mirant*, responded that the FDCPA was not applicable law under § 544(b)."[112] The *Tronox* court, rejecting *Mirant*'s persuasive authority, determined that "[t]reating the FDCPA as 'applicable law' does not 'modify' or 'supercede' 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."[113]

The court further rejected the *Mirant* court's assertion that the FDCPA existed for the exclusive use of the federal government, noting that like the FDCPA, the

> UFTA is also a remedy for the "exclusive use" of creditors who can sue under that statute. It is incorporated in Federal law because of the operation of § 544(b), not because of anything contained in its own text, and there is no reason to treat the FDCPA any differently.[114]

In short, while the UFTA is a remedy for a particular kind of creditor *outside* bankruptcy, the Code clearly lets the trustee bring those creditors' claims on behalf of the estate once a petition has been filed. It follows that the mere fact that the FDCPA is a remedy for a particular type of creditor *outside* bankruptcy forms no basis for assuming the trustee's use of its provisions *within* bankruptcy is impermissible.[115]

B. In Re Kaiser

In re Kaiser arose from circumstances in which a businessman who possessed ownership interests in many corporations made "a series of transfers benefiting his relatives" before filing a Chapter 7 petition.[116] The court noted the policy concerns defendant raised when faced with the threat of the trustee stepping into the shoes of the IRS pursuant to Section

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111 Boyajian, *supra* note 9, at 87.

112 *Id.*

113 *In re Tronox*, 503 B.R. at 273.

114 Boyajian, *supra* note 9, at 87 (quoting *In re Tronox*, 503 B.R. at 274).

115 The *nullum tempus* argument appears to be a more robust variation on the "exclusive use" argument addressed here—one that posits that private and government creditors are qualitatively different, and so *should* be treated differently inside bankruptcy. This argument was articulated by the *Vaughan* Court and is discussed *supra* Section II.B. and *infra* Section IV.A.

116 *In re* Kaiser, 525 B.R. 697, 702 (Bankr. N.D. Ill. 2014).

544(b): "this would make the 'normal' statute of limitations meaningless as every case potentially involves IRS claims, and . . . [that] there may exist a disproportionate ratio between the small amounts owed to the IRS and the potentially large amounts sought to be recovered for creditors."[117] The court then addressed these concerns, and rejected them:

> With respect to the concern that the use of the FDCPA would modify the operation of the Bankruptcy Code, the court responded that "[s]ection 544 is simply an enabling formula. What variables are input into section 544 will always change the result, but that is not a modification of either section 544's operation or the operation of Title 11 as a whole." Finally, with respect to the concerns that incorporation of the government's advantageous look-back periods would vest sovereign powers in a bankruptcy trustee, the court responded that although the government "creditor's ability to trump the applicable state statute of limitations might derive from its sovereign immunity . . . the estate representative's ability to override that same limitation derives from § 544(b)."[118]

Ultimately, "[t]he court decided that these policy concerns were irrelevant given § 544(b)'s lack of ambiguity, and further, that the concerns were misplaced."[119]

IV. Analysis

Thus far, this note has discussed the derivative power that Section 544(b) confers on the trustee, and examined cases that present arguments for why this provision should or should not be read as empowering the trustee to take advantage of the extended statutes of limitation available to federal creditors under the FDCPA and IRC. The sharp judicial disagreement on this topic indicates that the question is a rather close one. Assuredly, courts on both sides of the issue have fairly compelling arguments, and there appears to be room for legitimate disagreement about the true meaning of Section 544(b).

The cases discussed in Part II advance a limited number of discrete arguments for holding the IRC and FDCPA inapplicable law under Section 544(b), each of which is summarized and addressed below. The first argument, advanced by the *Vaughan* Court, is that (1) Congress did not intend Section 544(b) to "vest [the] sovereign powers [of the *nullum tempus* doctrine] in a bankruptcy trustee and thereby immunize her

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[117] *Id.* at 711.

[118] Boyajian, *supra* note 9, at 87 (footnotes omitted) (quoting *In re Tronox*, 503 B.R. at 274).

[119] *Id.*

from the strictures of state law in the pursuit of her private interests,"[120] and (2) even if Congress did intend to delegate sovereign powers to the trustee, the trustee would still be unable to exercise derivative *nullum tempus* powers to vindicate a private right.[121] The second argument, advanced by the *Mirant* Court, is that "treating the FDCPA as applicable law under 544(b) would impermissibly modify the operation of Title 11,"[122] in violation of 28 U.S.C. § 3003(c)(1)—a conclusion buttressed by a belief that "the FDCPA's legislative history [is] a further indicator that the FDCPA should not be considered 'applicable law.'"[123] The final argument, raised by the defendants in *In re Kaiser*, is that treating the IRC—and, presumably the FDCPA—as applicable law "would make the 'normal' statute of limitations meaningless as every case potentially involves IRS [or other governmental] claims, and . . . [that] there may exist a disproportionate ratio between the small amounts owed to the IRS [or other government creditors] and the potentially large amounts sought to be recovered for creditors."[124] Ultimately, as this section will explain, these arguments lack sufficiently persuasive power and are unavailing.

A. *The* Nullum Tempus *Argument*

The *Vaughan* Court noted that that the IRS's immunity from the state statutes of limitation derives from the *nullum tempus occurit regi* doctrine, a doctrine rooted in the inherent powers of the sovereign.[125] The court employed strong language to highlight its belief that this power belonged exclusively to the sovereign, and was—essentially—nontransferable. Quoting a District of Nebraska case, the court suggested that "[t]he maxim *nullum tempus occurrit regi* . . . only applies in favor of the sovereign power, and has no application to municipal corporations deriving their powers from the sovereign, although their powers, in a limited sense, are governmental,"[126]—with the obvious implication being that the same constraints apply to individuals who act in quasi-governmental roles, such as trustees who step into the shoes of government creditors. The court pushed this point further still, noting that "[i]f the federal

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[120] *In re* Vaughan Co., 498 B.R. 297, 304 (Bankr. D.N.M. 2013).

[121] *Id.* at 305.

[122] *In re* Mirant Corp., 675 F.3d 530, 535 (5th Cir. 2012).

[123] Miller, *supra* note 9, at 25.

[124] *In re* Kaiser, 525 B.R. 697, 711 (Bankr. N.D. Ill. 2014).

[125] *In re Vaughan*, 498 B.R. at 304–05.

[126] *Id.* at 305 (quoting City of Lincoln, Neb. v. Windstream Neb., Inc., 800 F. Supp. 2d 1030, 1035 (D. Neb. 2011)).

government were to delegate the exercise of its sovereign powers in such circumstances, it would pervert the purpose of *nullum tempus*, which is to immunize the *federal government* from certain state laws."[127]

This strong language works to cloak what is, essentially, a convoluted legislative intent argument as the straightforward application of a settled rule. In reality, it is quite clear that the *nullum tempus* doctrine does not circumscribe Congress's ability to specifically legislate beyond the traditional bounds of the doctrine. For example, while the doctrine generally precludes avoidance of a state's statute of limitations when enforcing purely private rights, it can be invoked in such a manner so long as the government can make a clear showing of congressional intent.[128] Even the government actor requirement can be contravened by Congress: as Miller notes, "[a]lthough other cases of entities stepping into the shoes of the U.S. and wielding its sovereign immunity are sparse, American Indian Tribes may step into the shoes of the U.S. and use *nullum tempus occurrit regi* to the same extent as the U.S."[129]

Thus, a mere finding that allowing the trustee to step into the shoes of the government creditor violates traditional principles of the *nullum tempus* doctrine does not resolve the question before us. Instead, it simply creates a soft inference or presumption that this is not what Congress intended to do. In the instant case, the statute's sweeping reference to applicable law—a reference made without qualification—is sufficient to overcome that inference. After all, "a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."[130] The mere "fact that Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to [the statute's] plain meaning."[131] The end result is that the *Vaughan* Court's argument—that a settled tenant of the *nullum tempus* doctrine evinces general congressional intent to place additional

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[127] *Id.* at 304–05.

[128] *See* Bd. of Cty. Comm'rs for Garfield Cty., Colo. v. W.H.I., Inc., 992 F.2d 1061, 1065 (10th Cir. 1993) (noting that "a state's statute of limitations does not apply 'to an action brought by the federal government to vindicate public rights or public interests, absent a clear showing of contrary congressional intent'" (quoting Marshall v. Intermountain Elec. Co., 614 F.2d 260, 262 (10th Cir. 1980))).

[129] Miller, *supra* note 9, at 51.

[130] Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992).

[131] Union Bank v. Wolas, 502 U.S. 151, 158 (1991) (citing Toibb v. Radloff, 501 U.S. 157, 164 (1991)).

restrictions on the effect of the statute beyond those limitations enumerated by the statutory text—is unavailing. In short, the doctrine finds its expression in statute and so nothing prevents the government from, by statute, specifically extending that right to others—such as the trustee in a bankruptcy proceeding—and thereby partially preempting state law; where the text appears to do so on its face, it is improper to restrict the effect of the statute by piling inference upon inference.

The *Vaughan* Court also noted that

> [t]he application of *nullum tempus* is not without limits. . . . Such power may only be used to enforce public rights and protect public interests. . . . Therefore, if an action brought in the name of the United States does not involve public rights or interests, state statutes of limitation typically apply.[132]

This fact led the court to conclude that even if Congress did intend to delegate sovereign powers to the trustee, the trustee would still be unable to exercise said power to vindicate a private right.[133] This argument is misguided in two respects.

First, it assumes that Congress lacks the ability to statutorily convene the public right requirement of the *nullum tempus* doctrine. However, as was explained above,[134] while the doctrine generally precludes avoidance of a state statute of limitations when enforcing purely private rights, it can be employed in such a manner so long as the government can make a clear showing of congressional intent.[135] Thus, even where a government actor attempts to enforce a private right, he may properly avail himself of the government's sovereign power and shield himself from state statutes of limitations, so long as Congress intentionally[136] authorized him to do so. The unqualified, sweeping language of Section 544(b) suggests that Congress both intended to and actually did create such an exception to the doctrine.[137]

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[132] *In re Vaughan*, 498 B.R. at 304 (internal citations omitted).

[133] *Id.* at 305.

[134] *See supra* Section I.C.

[135] *See* Bd. of Cty. Comm'rs for Garfield Cty., Colo. v. W.H.I., Inc., 992 F.2d 1061, 1065 (10th Cir. 1993) (noting that "a state's statute of limitations does not apply 'to an action brought by the federal government to vindicate public rights or public interests, absent a clear showing of contrary congressional intent'" (quoting Marshall v. Intermountain Elec. Co., 614 F.2d 260, 262 (10th Cir. 1980))).

[136] Or, perhaps, if we accept Holmes's view that "[w]e do not inquire what the legislature meant; we ask only what the statute means," Holmes, *supra* note 77, at 419, perhaps unintentional, but textual, authorization is sufficient.

[137] Or, at least, such would be the case if the trustee's use of the IRC or FDCPA constituted enforcement of a strictly private right, which—it will be argued *infra*—it does not.

Second, the argument is misguided because it assumes that by stepping into the shoes of the government creditor, the trustee seeks enforcement of a purely private right. This is not the case. As Miller noted "[c]ourts have held that the mere potential for money to flow to the U.S. Treasury, even if it is unlikely, is sufficient to constitute a public right."[138] When the trustee seeks to unwind a fraudulent conveyance under the IRC or FDCPA, he is not "function[ing] as a mere conduit for the enforcement of private rights which could have been enforced by the private parties themselves."[139] Rather, he, by unwinding fraudulent transfers, concurrently enforces public rights and private rights by increasing the pool of assets that can be used to pay the claims of government and private creditors. Thus, "[a]n action to recover a fraudulent transfer for the benefit of all creditors, including the U.S., constitutes a hybrid case of both private and public interest, subject to *laches* but not state statutes of limitations."[140] In short, the *nullum tempus* argument is flawed both because the text of Section 544(b) appears to suggest that Congress intended to allow the trustee to avail himself of government sovereignty and because, by unwinding fraudulent conveyances, the trustee enforces what is—at least in part—a public right.

B. The Impermissible Modification Argument

The *Mirant* Court suggested that "treating the FDCPA as applicable law under 544(b) would impermissibly modify the operation of Title 11,"[141] in violation of 28 U.S.C. § 3003(c)(1), the FDCPA's internal cannon of construction. It based its conclusion on (1) analogizing Section 3003(c)(1)'s antimodification provision to a similar ERISA provision, and citing a previous holding that allowing ERISA to preempt a state property law would produce just such impermissible modification of the Bankruptcy Code's exemption provisions,[142] and (2) inferring legislative intent from Chairman Brooks's statement that "even provisions of the Bankruptcy Code making reference to nonbankruptcy law are to be read as if [the FDCPA] did not exist."[143] Ultimately, these arguments rely on a strained construction of the term "modify,"

[138] Miller, *supra* note 9, at 51.

[139] *In re* Vaughan Co., 498 B.R. 297, 303–04 (Bankr. D.N.M. 2013) (internal quotations omitted) (quoting *Marshall*, 614 F.2d at 262 n.3).

[140] Miller, *supra* note 9, at 51.

[141] *In re* Mirant Corp., 675 F.3d 530, 535 (5th Cir. 2012).

[142] *See id.* (citing *In re* Volpe, 943 F.2d 1451, 1451–53 (5th Cir. 1991)).

[143] *Id.* (quoting 136 Cong. Rec. H13288 (daily ed. Oct. 27, 1990) (statement of Rep. Jack Brooks)).

and a haphazard comparison to a poor analog, and are not sufficiently persuasive to justify excluding the FDCPA from the category of applicable law defined by Section 544(b).

The court's reading of Section 3003 is an odd one. It seems inconceivable that in writing a statute for a real world of interconnected events, Congress would include a provision that would render the statute ineffectual whenever it interacted, in any meaningful way, with one of the enumerated statutory schemes. It appears far more likely that Congress employed the term "modify" in a more limited manner. As the *Kaiser* Court posited, "[s]ection 544 is simply an enabling formula. What variables are input into section 544 will always change the result, but that is not a modification of either section 544's operation or the operation of Title 11 as a whole."[144] Furthermore, with respect to Chairman Brooks's remark, it must be remembered that "[r]eliance on legislative history in divining the intent of Congress is, as has often been observed, a step to be taken cautiously."[145] A stray remark on the legislative record should not be employed to circumvent the clear meaning of the text, for "[w]hether or not legislative history is ever relevant, it need not be consulted when, as here, the statutory text is unambiguous."[146] In sum, it seems unlikely that allowing the trustee to step into the shoes of the government creditor would truly modify or supersede Title 11. A conclusion to the contrary, such as that advanced by the *Mirant* Court, must be built upon a very weak foundation—a stray remark in the legislative record and a rough analogy to the construction of a different statute.

C. Policy Arguments

The defendants in *In re Kaiser* raised two key policy arguments against broad construction of Section 544(b). First, that treating the IRC—and, presumably the FDCPA—as applicable law "would make the 'normal' statute of limitations meaningless as every case potentially involves IRS [or other governmental] claims," and, second, that "there may exist a disproportionate ratio between the small amounts owed to the IRS [or other government creditor] and the potentially large amounts sought to be recovered for creditors."[147] At the outset, it should be noted that "such policy concerns are secondary to

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[144] *In re* Kaiser, 525 B.R. 697, 713 n.11 (Bankr. N.D. Ill. 2014).
[145] Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 26 (1977).
[146] United States v. Woods, 134 S. Ct. 557, 567 n.5 (2013).
[147] *In re Kaiser*, 525 B.R. at 711.

the plain language of the applicable statutes."[148] After all, the mere "fact that Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to [the statute's] plain meaning."[149]

The state of the law would be in no way unsettled by allowing the trustee to unwind large fraudulent conveyances because of de minimis government interests. Under the doctrine developed in *Moore v. Bay*, "the trustee may recover the entire . . . fraudulent conveyance notwithstanding that the only creditor with standing to prosecute a fraudulent conveyance action outside of bankruptcy is owed only" a lesser sum.[150] Section 544(b), thus, allows the creditor to "stand in the 'overshoes' of the actual creditor,"[151] and the policy incentives at issue here do not shift simply because the government, rather than a private party, is the creditor.

It is true that in bankruptcy proceedings in which the government is a creditor, the extended statute of limitations would supersede the statute of limitations provided by the relevant state's version of the UFTA or UFCA. However, the "trustee's statutory duties would prevent" him from "overlooking valid objections to IRS claims,"[152] giving debtors a possibility of escaping liability and somewhat mitigating the effect of the policy consequences. If this policy result is truly egregious, and "if 'applicable law' only truly means private law, congressional intervention is necessary."[153]

What is more, holding that the FDCPA and IRC constitute applicable law under Section 544(b) would incentivize Congress to write comprehensible laws by holding it to the plain meaning of the statute it enacted. Such a holding is consistent with the notion that "[t]he task of resolving a dispute over the meaning of a statute begins where all such inquiries must begin: with the language of the statute itself,"[154] and that "[w]here the language of the statute is unambiguous, no further inquiry is necessary or appropriate."[155] Furthermore, incentivizing Congress to act in this manner presents policy benefits—such as improving

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[148] *Id.* at 705 n.6.

[149] Union Bank v. Wolas, 502 U.S. 151, 158 (1991) (citing Toibb v. Radloff, 501 U.S. 157, 164 (1991)).

[150] Resnick, *supra* note 19, at 214.

[151] *Id.*

[152] Boyajian, *supra* note 9, at 87 (quotations omitted) (citing *In re* Tronox Inc., 503 B.R. 239, 274 (Bankr. S.D.N.Y. 2013)).

[153] Miller, *supra* note 9, at 51.

[154] United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989).

[155] *In re Kaiser*, 525 B.R. at 697, 711 (Bankr. N.D. Ill. 2014) (citing Sebelius v. Cloer, 133 S. Ct. 1886, 1895 (2013)).

judicial economy and increasing statutory predictability—that far outweigh the policy consequences of regularly allowing federal statutes of limitation to supersede state fraudulent conveyance statutes of limitation.

CONCLUSION

There has been sharp disagreement among courts about whether the IRC and FDCPA constitute applicable law under Section 544(b) of the Bankruptcy Code, such that the creditor would possess the right to step into the shoes of government creditors and take advantage of the extended statute of limitations available to them in fraudulent conveyance actions. An examination of the body of relevant jurisprudence suggests that the case against treating the FDCPA and IRC as applicable law under Section 544(b) boils down to three essential arguments—none of which carries enough persuasive weight to justify excluding these legislative schemes from the realm of applicable law described by Section 544(b). The first argument, advanced by the *Vaughan* Court, is that (1) Congress did not intend Section 544(b) to endow the trustee with powers that typically belong only to the sovereign[156] and (2) even if congress did intend to delegate sovereign powers to the trustee, the trustee would still be unable to exercise such *nullum tempus* powers to vindicate a private right.[157] The second argument, advanced by the *Mirant* Court, is that construing the FDCPA as applicable law would contravene Section 3003's antimodification provision,[158] an argument buttressed by reliance on Chairman Brooks's remark in the legislative record.[159] The final argument, raised by the defendants in *Kaiser*, is that treating the IRC—and, presumably the FDCPA—as applicable law could have undesirable policy consequences, such as effectively nullifying traditional statutes of limitations or allowing private creditors to recover disproportionately large sums as a result of de minimis government claims.[160]

Each of these three arguments is critically flawed. The *nullum tempus* argument is flawed because it fails to acknowledge that while such powers may typically belong

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[156] *In re* Vaughan Co., 498 B.R. 297, 304 (Bankr. D.N.M. 2013).

[157] *Id.* at 305.

[158] *In re* Mirant Corp., 675 F.3d 530, 535 (5th Cir. 2012).

[159] *See* Boyajian, *supra* note 9, at 86–87; *see also In re Mirant*, 675 F.3d at 535–36 (quoting 136 Cong. Rec. H13288 (daily ed. Oct. 27, 1990) (statement of Rep. Jack Brooks)).

[160] *In re Kaiser*, 525 B.R. at 711.

exclusively to the sovereign, Congress possesses plenary power to legislate beyond the traditional bounds of the vague legal doctrine. While the doctrine might create a soft presumption regarding congressional intent, the clear language of Section 544(b) is sufficient to overcome that presumption. Furthermore, the argument fails to acknowledge that a creditor who unwinds a fraudulent transaction in a Bankruptcy proceeding to which the government is a party increases the pool of assets from which the government may make its recovery, and therefore is not enforcing a purely private right, but rather a mixed public-private right. The impermissible modification argument is flawed, because it embraces a strained interpretation of the term "modify," and places undue weight on a stray remark in the legislative record. Finally, the policy arguments fail to acknowledge that (1) given the doctrine of *Moore v. Bay*, the state of the law would be in no way unsettled by the mere fact that creditors may unwind large fraudulent conveyances because of de minimis government interests, and (2) the "trustee's statutory duties would prevent" him from "overlooking valid objections to IRS claims,"[161] giving debtors a possibility of escaping liability, and somewhat mitigating the effect of any policy consequences.

Ultimately, the sweeping nature of the plain text of Section 544(b) creates a clear presumption that the FDCPA and IRC constitute applicable law under the meaning of the statute. All arguments to the contrary rest upon convoluted appeals to legislative intent, undue emphasis on stray remarks in the legislative record, and unjustified concern with relatively minor policy consequences. If Congress failed to foresee the full effects of the law it enacted, it is free to amend the statute as it desires—but in the interim, it is not the place of the courts to amend the statute for Congress through reliance on such a chain of questionable inferences.

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[161] Boyajian, *supra* note 9, at 87 (quotations omitted) (quoting *In re* Tronox Inc., 503 B.R. 239, 274 (Bankr. S.D.N.Y. 2013)).

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