

Clawback Periods May Extend to Six or Ten Years

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Trustees litigation counsel must be concerned about two things when lawsuits arise: (a) until when can the lawsuit be filed; and, (b) how far back can the clawback¹ of the avoidance action reach? The former question is relatively simple with statutory guidance making the deadlines effectively well known. The latter is a disputed issue; and, a recent decision in the Southern District of Florida Bankruptcy Court alerted practitioners. This article will review both concepts and outline the associated statutory framework. In addition, this article will discuss the many layered analysis given by numerous courts which deliver reasonable differences of opinion about the clawback period jurisdictionally differing.

When to File

The Bankruptcy Code addresses

the avoidance actions= limitations period in 11 U.S.C. ' 546² for avoidable transfers under 11 U.S.C. " 544, 547 or 548.³ Such actions are not recovery. Recovery is handled under 11 U.S.C. ' 550. Adversary proceedings, in essence, must follow two steps: (a) avoidance actions; and (b) recovery actions. A Congress dealt separately with the concepts of avoidance and recovery in a number of ways.⁴ Among those actions are two different time frames.

Under 11 U.S.C. ' 546(a), an adversary proceeding may not be commenced after the earlier of two years from the petition date or one year after the commencement or appointment of the trustee *so long as the appointment occurs prior to the expiration of the previously referenced two-year period.*⁵ Based upon this fact, trustees essentially know that they have two years from the filing date (the date



relief is entered for a voluntary bankruptcy) to commence an action. If the trustee is appointed after the filing date, the two-year period could be extended if the trustee=s appointment was *before the expiration of the two-year period and more than a year after the petition date.*⁶ The box below shows hypothetical dates to better explain this calculation.

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Box 1

Hypothetical	Petition	Trustee Appointment	546 Deadline
Regular Chapter 7	01/02/2016	N/A	01/01/2018 ⁷
Converted 11 to 7	01/02/2016	12/31/2016	01/01/2018
Convert 11 to 7 (2)	01/02/2016	01/15/2017	01/14/2018
Convert 11 to 7 (3)	01/02/2016	01/03/2018	No action B time barred

What is Recovery?

Recovery is guided by 11 U.S.C. ' 550. Often, when filing an action under the preference or fraudulent transfer statutes, the trustee includes a wherefore clause seeking recovery under 11 U.S.C. ' 550 and the two matters are therefore heard Aat once.@ However, if the same is not included in the complaint, the

period for recovery actually is extended for one year after the avoidance.⁸

Based upon this fact, if the trustee successfully avoids a particular matter under 11 U.S.C. ' 544, 547 or 548, the trustee may thereafter B so long as the recovery is sought within a year of the avoidance B file an action against the same party or another affiliated with the same asset for recovery. In short, a period greater than three years may occur for recovery of an asset regarding a preferential or fraudulent transfer.

How Far Back Can the Action AClawback?@

Understanding that the trustee=s lawsuits may be filed as late as two years from the bankruptcy filing, and recovery for the same may extend for more time, the remaining issue of concern to most creditors is how far back in time can the trustee Aclawback.@ If focusing exclusively upon the federal Bankruptcy Code, that particular period of time would first expire at 90 days for a noninsider preference or one year for an insider preference. Alternatively, the trustee has up to two years to avoid fraudulent transfers to insiders or noninsiders. A basic outline of those common actions is displayed in the Box 2 below.

Box 2

Avoidance Action	Clawback Period	Time for Filing Action/ Right to File
Avoid Statutory Lien	By insolvency	Later of 2 years from order for relief or 1 year from trustee appointment. (A546(a)(1)@)/545
Preference Noninsider	90 days	546(a)(1)/547(b)(4)(A)
Preference Insider	1 year	546(a)(1)/547(b)(4)(B)
Fraudulent Transfer Federal Insider	2 years	546(a)(1)/548(a)(1)
Fraudulent Transfer Federal Noninsider	2 years	546(a)(1)/548(a)(1)
Fraudulent Transfer Federal Partner	2 years	546(a)(1)/548(b)/544(b)
Fraudulent Transfer to Self Settled Trust	10 years ⁹	546(a)(1)/548(e)(1)/544(b)

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Nonbankruptcy Concept

Unfortunately, applicable nonbankruptcy law does exist in the Bankruptcy Code and alters the clawback periods. The Bankruptcy Code provides that A . . . 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 . . .¹⁰ Often, this provision was used for fraudulent transfer actions under state law¹¹ because many states incorporate the Uniform Fraudulent Transfer Act=s (UFTA@) four-year clawback which is significantly greater than the two-year clawback provided by the Bankruptcy Code.¹² And, with the state=s clawback period being a greater time period, the recovery should increase with the possible inclusion of more transfers B making it even more worthwhile to the trustee and the estate

In years past, the creditors may have lifted their phones and called their attorney and asked how far back a trustee may sue on behalf of the estate against avoidable transferees, and the simplest answer would have been essentially two years under the federal law and as many as four (or more)¹³ years under state law if there was a fraudulent transfer. But, even four years was not enough. Now, the time frame for a clawback has been extended to six or even 10 years.

Expanded Clawback Provisions

Trustees have filed numerous lawsuits and expanded the same. Some of those expansions are listed in Box 3 below. These are the statutes to which disputes arise.

Box 3

Avoidance Action	Clawback Period	Time for Filing Action/ Right to File
Fraudulent Transfer UFTA if State is creditor	10 years, but states may vary	546(a)(1)/ 544
Fraudulent Transfer if USA is creditor	6 years	546(a)(1)/ 544
Fair Debt Collections Practices Act (AFDCPA@) Insolvent and no equivalent value	28 USC ' 3306(b)(2)	28 USC ' 3304(a)(1)
Fraudulent Transfer if USA is creditor	6 years	546(a)(1)/ 544
Fair Debt Collections Practices Act (AFDCPA@) Became insolvent <u>or</u> could not pay debts after transfer	28 USC ' 3306(b)(2)	28 USC ' 3304(b)(1)(B)

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Fraudulent Transfer if USA is creditor Fair Debt Collections Practices Act (AFDCPA@) Actual Intent	6 years or 2 years from reasonable discovery 28 USC ' 3306(b)(1)	546(a)(1)/ 544 28 USC ' 3304(b)(1)(A)
Fraudulent Transfer if USA is creditor Fair Debt Collections Practices Act (AFDCPA@) To Insider	2 years 28 USC ' 3306(b)(3)	546(a)(1)/ 544 28 USC ' 3304(b)(2)
Fraudulent Transfer if USA is creditor B specifically IRS	10 years 26 USC ' 6502 ¹⁴	546(a)(1)/ 544(b) 26 USC ' 6501
Action for CERCLA damages	3 years for most 42 USC ' 9601 et seq	546(a)(1)/ 544 42 USC ' 9613(g)

FDCPA

The Federal Debt Collection Practices Act (AFDCPA@) is defined under 28 U.S.C. ' 3304. Trustees have read the FDCPA and discovered that it has a six-year Areach back@ or clawback period.¹⁵ Under the Bankruptcy Code, trustees incorporate the FDCPA with the Bankruptcy Codes ' 544(b) provision so that they may avoid transfers Aunder applicable [federal] law@ which includes the FDCPA=s 28 U.S.C. 3306; and, then avoid transfers occurring six years prior to the petition date.

When receiving an action utilizing the FDCPA=s six-year clawback period, the courts are split. Section 3306¹⁶ of title 28 provides that, A . . . the United States . . . may obtain (1) avoidance of the transfer obligation to the extent necessary to satisfy the debt to the United States . . .@¹⁷ When reviewing that language, one court wrote, AThe FDCPA does not contain a private right of action . . .[and] is a remedy for the exclusive use of the United States.@¹⁸

Another Argument Prohibiting Trustees to Use FDCPA

Interestingly, when the FDCPA was enacted, it did include a provision that stated that the chapter A . . . should not be construed to supersede or modify the operation of (1) title XI¹⁹ . . .@²⁰ No one can find legislative history to guide what it means not to Asupersede or modify@ bankruptcy. But, some courts conclude that the incorporation of the FDCPA into bankruptcy avoidance actions is Amodifying@ the Bankruptcy Code. Those courts conclude that 11 U.S.C. ' 544(b)=s utilization of the FDCPA=s ' 3303 is Amodifying@ the Bankruptcy Code²¹ and therefore violative of the purpose of the FDCPA.

Nullum Tempus Occurrit Regi

One court, when receiving a 10-year look back action by a trustee who stepped into the shoes of the IRS, reviewed the doctrine known as *nullum tempus occurrit regi*.²² The doctrine is derived from an ancient principle that Ano time runs against the king@, which effectively means the crown is not

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subject to the commoner=s statute of limitations. Understanding that the federal government should not be restricted by a state statute of limitations, this doctrine provides that the government may have expanded limitations. But, one court determined that a trustee is not the federal government; and, concluded that the trustee would not be similarly immune to the state=s statute of limitations.²³ After reviewing the doctrine, and cases recited on the same, the court concluded that, ASection 544(b) is meant to incorporate state law not subordinate it.@²⁴ And, under a policy standpoint, the court further concluded that if a trustee or debtor in possession could recover transfers 10 years prior to the petition, the four-year look back period of the UFTA would be eviscerated.²⁵

Golden Creditor

Courts, understanding all of the above recited reasons denying the expansion of clawback provisions, nevertheless have allowed 11 U.S.C. ' 544(b)=s Aavoidable under applicable law@ clause to be incorporated by panel trustees for unsecured United States creditors, even the IRS.

The courts initially require the trustee to find the Agolden creditor@, which is the United States. Interestingly, finding the United States creditor often is not difficult. In most cases, the IRS makes this discovery relatively easy. The United States Treasury is extremely resourceful in filing proofs of claim for tax debt in a bankruptcy estate.²⁶ Upon that proof of claim being filed, the trustee will have received the Agolden creditor@ and proof that a debt is owed to the United States.

Once proof is provided to show that there is a debt to the United States, the trustee is permitted to file actions seeking recovery of fraudulent transfers dating back six years. The trustee is commencing a Aderivative@ action by stepping into the shoes of a creditor B the United States. In short, as long as the United States is a creditor, actions avoiding fraudulent transfers may be permitted under 11 U.S.C. 544(b)(1) by incorporating 28 U.S.C. ' 3306.²⁷

The IRS isn=t the only federal creditor which may trigger the FDCPA. Alternative unsecured United States creditors may include the Small Business Administration²⁸ or debts associated with environmental violations.²⁹ Because of such, review of federal liabilities become important for expanding a panel trustee=s avoidance powers. The difference between the Bankruptcy Code=s clawback of two years³⁰ or the state limitations clawback of (usually) four years³¹ as opposed the FDCPA six-year limitations is significant.

How About Ten Years?

The IRS, unlike the rest of the United States, has a 10-year statute of limitations B for assessment collection.³² In fact, that 10-year period can actually be extended if various arrangements have been made prior in time by the taxpayer with the IRS which included installments or other releases or concessions by the Internal Revenue Service.³³

Trustees have found success in incorporating the IRS=s ten-year period under ' 544(b).³⁴ Presently, the majority of trustees are prevailing on the issue of statute of limitations.³⁵ And, one court advises trustees to look into this issue. AThe IRS is a creditor in a significant percentage of bankruptcy cases. The paucity of decisions on the issue may simply be because bankruptcy trustees have not generally realized that this longer reach-back weapon is in their arsenal. If so, widespread use of '544(b) to avoid state statutes of limitations may occur and this would be a major change in existing practice.@³⁶

The Burden of Proof Remains

Once the United States creditor exists, life is not necessarily easy. The trustee still must prove that the transfer was without value or that there was a lack of solvency at the time of the transfer. With the expanded time periods afforded by the FDCPA, evidentiary documents to establish proof become less available. And, abstract concepts such as proving whether the debtor was engaged or was about to engage in a business transactions which made payment to creditors implausible or whether the business or transactions of the debtor made the debtor unable to pay debts when they became due³⁷ B could become oppressively burdensome to prove without the readily available documents.⁰⁰

Conclusion

When planning for litigation, an exclusive review of 11 U.S.C. ' 546 leaves one to conclude that an action must be filed within two years, and that the avoidable actions under 11 U.S.C. ' 547 or 548 would be limited to 90 days, one year or two years. However, alternative limitations= periods are provided by 11 U.S.C. ' 544(b) which incorporates applicable law. Some courts have determined 544(b)=s Applicable law@ to include federal law. There is a split among courts as to whether or not the Applicable law of 544(b) includes the six-year look back period under the FDCPA or the 10-year period of 26 U.S.C. ' 6502(a)(1). One group of courts hold that the FDCPA is an exclusive remedy to a governmental unit or implement doctrines regarding sovereigns having exclusive rights to trump state statute of limitations; and, do not permit trustees to use the six-year look back of FDCPA or the 10-year look back period afforded to the IRS under 28 U.S.C. ' 6502. Other courts openly allow the extended deadlines under the federal statutes as they look upon a trustee=s action as being Aderivative.@ If a trustee=s actions are perceived as derivative, courts permit the trustee=s stepping into the shoes of the creditor B including the United States B and enforce the rights of the creditor by using whatever laws would otherwise be ordinarily exclusive to federal creditors. When the actions incorporate federal statutes for trustee avoidance actions, the statutory analysis has a reduced focus B by reviewing 11 U.S.C. ' 544(b)=s simple term of Aapplicable law@³⁸ to include the FDCPA or the IRS=s 26 U.S.C. ' 6502. By doing such, the courts assert that there is no need to look to the other issues about Amodifying@ the Bankruptcy Code or *nullum tempus occurrit regi*.

(Endnotes)

- 1 . The recovery of money already disbursed.
- 2 . Limitation on avoiding powers.
- 3 . The author recognizes other areas, but for purposes of this article the review is limited to the sections recited.
- 4 . *Eisen v Allied Bancshares Mortg. Corp. LLC (In re Priest)*, 268 B.R. 135, 138 (Bankr. N.D. Ohio 2000)
- 5 . Actually, reading of this particular statute can be mind boggling. The statute states Aan action . . . may not be commenced after the earlier of B (1) the later of . . .@
- 6 . See calculations of 11 U.S.C. ' 546 pursuant to the following hypotheticals
- 7 . Some confusion exists about filing *on or before* the anniversary or *before* the anniversary, therefore the deadlines in the box are one day prior to the anniversary to avoid any arguments relying upon the cases demanding that the action be filed *before* the anniversary.
- 8 . 11 U.S.C. ' 550(f) states as follows:

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(f) An action or proceeding under this section may not be commenced after the earlier of

- (1) one year after the avoidance of the transfer on account of which recovery under this section is sought; or
- (2) the time the case is closed or dismissed.

9 . This is a unique issue which will not be addressed herein.

10 . See 11 U.S.C. ' 544(b)(1).

11 . One court wrote, ASection 544(b) of the Bankruptcy Code provides that Aa trustee may avoid any transfer of an interest of the debtor in property . . . that is voidable under applicable [state] law by a creditor.@ *Schmidt v. Domit (In re Ocean Tower LP)*, 2014 Bankr. LEXIS 4848 (Bankr. S.D. Tex. Nov. 25, 2014) Notice how the word Astate@ is plugged in before Aapplicable@ when quoting section 544(b). Many jurists interpreting this statute may have reactively included the term Astate@ even though the clause clearly is devoid of such reductive language.

12 . See 11 U.S.C. 548.

13

. Some states have greater than four-year limitations for fraudulent transfers.

14 . ' **6502. Collection after assessment.**

(a) Length of period. Where 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

(1) within 10 years after the assessment of the tax, or

(2) if B

(A) there is an installment agreement between the taxpayer and the Secretary, prior to the date which is 90 days after the expiration of any period for collection agreed upon in writing by the Secretary and the taxpayer at the time the installment agreement was entered into; or

(B) there is a release of levy under section 6343 after such 10-year period, prior to the expiration of any period for collection agreed upon in writing by the Secretary and the taxpayer before such release

15 . See 28 U.S.C. ' 3306.

16 . 28 U.S.C. ' 3306 is specifically entitled ARemedies of the United States.@

17 . See 28 U.S.C. ' 3306(a)(1).

18 . *MC Asset Recovery, LLC v Southern Co.*, 2008 U.S. Dist. LEXIS 123608, 2008 W.L. 8832805 (N.D. Ga. 2008)

19 . The Bankruptcy Code is title 11 or Title XI..

20 . 28 U.S.C. ' 3003(c)(1)

21 . See *In re Mirant Corp.*, 675 F.3d 530, 535 (5th Cir. 2012)

- 22 . As cited in *U.S. v Summerlin*, 310 U.S.413, 416 (1940)
- 23 . *Wagner v Ultima Homes, Inc. (In re Vaughn Co., Realtors)*, 498 B.R. 297, 304 (Bankr. D.N.M. 2013)
- 24 . *Wagner* at 305.
- 25 . *Wagner* at 305 citing *In re Solomon*, 299 B.R. 626, 632 (BAP 10th Cir. 2003)
- 26 . The SBA is also known to file claims.
- 27 . *In re Pfister*, 2012 Bankr. LEXIS 1456, 2012 W.L. 114454 at *5 (Bankr. D.S.C. Apr. 4, 2012), *Ebner v. Kaiser (In re Kaiser)*, 525 B.R. 697 (Bankr. N.D. Ill. 2014)
- 28 . *In re Porter*, 209 Bankr. LEXIS 1119, 2009 W.L. at 902662 (Bankr. D.S.C. March 13, 2009),
- 29 . *In re G-I Holdings, Inc.* 313 B.R. 612, 635 (Bankr. D.N. June 3, 2004)
- 30 . See 11 U.S.C. ' 548(a)
- 31 . Some states have fraudulent transfer limitations periods exceeding four years.
- 32 . See 26 U.S.C. ' 6502(a)(1)
- 33 . See 26 U.S.C. 6502(a)(2)
- 34 . See *Alberts v. HCA, Inc. (In re Greater Southeast Community Hosp. Corp. I)*, 365 B.R. 293, 301-304 (Bankr. D. D.C. 2006), *United States v. Krause (In re Krause)*, 2007 Bankr. LEXIS 4068 (Bankr. Kansas 2007)
- 35 . AThere is a split of authority on whether a trustee can step into the shoes of the IRS under '544(b) and utilize the IRS tenyear collection window. Several courts have concluded that '544(b) is clear and trustees have the right to step into the shoes of the IRS and take advantage of the longer limitations period. *Kaiser* (cited earlier); *Finkel v. Polichuk (In re Polichuk)*, No. 10-003ELD, 2010 Bankr. LEXIS 4345, 2010 WL 4878789, at *3 (Bankr. E.D. Pa. Nov. 23, 2010) ; *Alberts v. HCA Inc. (In re Greater Southeast Cmty. Hosp. Corp. I)*, 365 B.R. 293, 299-306 (Bankr. D.D.C. 2006); *Shearer v. Tepsic (In re Emergency Monitoring Technologies, Inc.)*, 347 B.R. 17, 19 (Bankr. W.D. Pa. 2006); *Osherow v. Porras (In re Porras)*, 312 B.R. 81, 97 (Bankr. W.D. Tex. 2004) . . . Only one court has reached the opposite conclusion. *Wagner v. Ultima Holmes, Inc. (In re Vaughan Co.)* 498 B.R. 297 (Bankr. D.N.M. 2013) (>Vaughan=).@
- Mukamal v. Citibank N.A. (In re Kipnis)*, 2016 Bankr. LEXIS 3197, 9-10 (Bankr. S.D. Fla. Aug. 31, 2016)
- 36 . *Mukamal v. Citibank N.A. (In re Kipnis)*, 2016 Bankr. LEXIS 3197 (Bankr. S.D. Fla. Aug. 31, 2016)
- 37 . See 28 U.S.C ' 3304(b)(1) which follows the language of the UFTA and states:
- (B) without receiving a reasonably equivalent value in exchange for the transfer or obligation if the debtorC
- (i) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
- (ii) intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due.
- 38 . *In re Tronox Inc.*, 503 B.R. 239 (noting that decisions such that in *In re Mirant* Afail to give sufficient weight to the language and purpose of ' 544(b)@)