

The Internal Revenue Service as the “Golden Creditor”

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I. Introduction

Section 544(b) of the Bankruptcy Code permits the Trustee to stand in the shoes of an actual creditor and bring any action it may bring on behalf of the estate to recover funds or property for the benefit of creditors and parties in interest. First, I will review Section 544 and explore the Trustee’s rights. Second, I will consider the benefits of using the Internal Revenue Service as a Golden Creditor. Third, I will consider possible objections raised to so using the Government. Fourth, I will provide a selected bibliography of articles and cases to give the practitioner a start on his research into this problem.

II. Section 544 of the Bankruptcy Code

Section 544(a) provides as follows:

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

- (1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;
- (2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists; or
- (3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

11 U.S.C.A. § 544.

Subsection 544(a) is far more commonly used of the two subsections in Section 544, so it is of benefit to briefly review it before turning to Section 544(b). Under Section 544(a) the Trustee has the rights of a hypothetical creditor who extends credit, takes a judgment, gets a judgment lien as of the date of the petition. What is important here is that the Trustee need not identify any specific creditor. Indeed, there may not actually be a creditor who has all of the Section 544(a) attributes. Nevertheless, we pretend as if there were and permit the Trustee to proceed.

Section 548 provides that the Trustee may bring a fraudulent conveyance suit for transfers made by the debtor within **two** years before the date of the petition. Section 548 includes “constructively” fraudulent transfers, that is, those made without reasonably equivalent value. Section 548 is used for the vast majority of transfers made within 2 years. The question then becomes what is to be done when a fraudulent transfer is made more than two years prior to the date of the petition.

Section 544(b) provides as follows:

(b)(1) Except as provided in paragraph (2), the trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.

(2) Paragraph (1) shall not apply to a transfer of a charitable contribution (as that term is defined in section 548(d)(3)) that is not covered under section 548(a)(1)(B), by reason of section 548(a)(2). Any claim by any person to recover a transferred contribution described in the preceding sentence under Federal or State law in a Federal or State court shall be preempted by the commencement of the case.

11 U.S.C.A. § 544.

The elements of a Section 544(b) cause of action, are as follows:

- (1) a transfer of an interest of the debtor,
- (2) voidable under applicable law,
- (3) by a creditor holding an unsecured claim that is allowable
Under Section 502. . .

Section 544(b) differs from 544(a) in that subsection (b) requires that the Trustee identify an actual creditor. This actual creditor is frequently called “a golden creditor” in literature and in some cases. The term “golden creditor” is not contained in Section 544(b) or elsewhere in the Bankruptcy Code. Under the Uniform Fraudulent Transfer Act, transfers made within 4 years of the date of the petition may be set aside. In Alabama, the applicable period is between 1 and 10 years, depending upon several factors, such as whether real property was involved, whether actual or constructive fraud is involved, and whether the claim arose before or after the date of the transfer.

III. The Internal Revenue Service as a Golden Creditor

There is some case law supporting the proposition that the Internal Revenue Service, or the United States, may be selected as the Golden Creditor under Section 544(b). *Gordon v. Webster (In re Webster)*, 629 B.R. 654 (Bankr. N.D. Ga. 2021) (holding that the Trustee may use the Internal Revenue Service as a Golden Creditor, dismissing the complaint, without prejudice to amend); *Ebner v. Kaiser (In re Kaiser)*, 525 B.R. 697 (Bankr. N.D. Ill. 2015) (holding that the Trustee may use the Internal Revenue Service as the Golden Creditor).

The Internal Revenue Service may collect on assessment for a period of ten years after the date of the assessment. The question of how far back the Trustee may reach has not been determined with any degree of certainty. The general rule that statutes of limitation do not run against the Government, where the Government is using state law to establish a claim, suggests that there is no limit how far back a Trustee may go. While there is case law suggesting this, when those rule are applied in this context, such a result beggars belief.

IV Objections to Use of the Internal Revenue Service as a Golden Creditor

Challenges to the Trustee's use of the Internal Revenue Service as the Golden Creditor generally fall into one of three types. First, focusing on the plain language of Section 544(b), they argue that the Internal Revenue Code is not "applicable law." They argue that Congress intended Trustees to use private creditors rather than the Government. Proponents of that view cannot point to anything in the Bankruptcy Code supporting that view. Second, they argue the policy that a private party may not exercise Sovereign power. The problem here is that there is nothing in the language of Section 544(b), or elsewhere, that appears to preclude it. Third, proponents argue that it is inequitable for a Trustee to avoid a large transfer based upon on only a small tax debt. Again, the Code does not support such an argument.

V. Selected Readings

1. The Hon. Donald R. Cassling, United States Bankruptcy Judge for the Northern District of Illinois, David Holtkamp, Ronald Peterson, Jenner & Block. *In re Kaiser: A Study of Advanced Fraudulent Transfer Issues*. American Bankruptcy Institute. (2015).
2. John F. Rabe, Jr., *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*, 82 Brook. L. Rev. (2017).