THE PRACTICAL CONSEQUENCES OF METAPHYSICS: WHO OWNS A FRAUDULENT-TRANSFER CLAIM IN BANKRUPTCY?

by

Alec G. Schwartz*

This article seeks to answer the deceptively complex question: in bankruptcy, who "owns" a fraudulent-transfer cause of action? Termed the "metaphysical issue" by the Second Circuit, courts and practitioners have reached a variety of conclusions to this question, mostly rooted in statute taken out of context and oblivious to both the history and purpose underlying such text and the immense practical consequences of getting it wrong. Though the text of the Bankruptcy Code makes it clear that the trustee can bring certain fraudulent-transfer claims, the Code does not address what happens to the state law causes of action which, prior to bankruptcy, belong to the creditors and which, after bankruptcy, shape the claims brought by the trustee pursuant to 11 U.S.C. § 544(b). This leaves the question of whether the bankruptcy trustee, upon the filing of a bankruptcy petition, fully owns the fraudulent-transfer claims or whether the creditors retain some rights to these claims—rights which, if not fully disposed of by the trustee due to practical or statutory limitations, may rear their head once more. The article evaluates four possible outcomes of ownership: the trustee owning nothing, the trustee holding a duplicate claim, partial ownership vesting in the trustee with a remainder interest for creditors, and full preemption of state-law claims by the federal Bankruptcy Code (with full ownership by the trustee). By delving into the history of both bankruptcy and fraudulent-transfer law, the purpose of bankruptcy law, and the various ways in which the Bankruptcy Code modifies fraudulent-transfer claims, the article provides fresh arguments that anything less than the trustee's full and preempting ownership of federal fraudulent-transfer claims would undermine Congressional intent. In addition to legal analysis, the article highlights the practical implications of determining claim ownership, emphasizing the trustee's need for clarity to maximize the value of the bankruptcy estate and the role a coherent understanding of fraudulent-transfer claims plays in

* Law Clerk on the U.S. Court of Appeals for the D.C. Circuit. J.D. and John Ordronaux Prize winner, Columbia Law School, 2022; M.A. with honors, American Military University, 2017; B.S., U.S. Air Force Academy, 2010. The author is grateful for the input from the editorial team of the *American Bankruptcy Law Journal*, especially Judge Craig Gargotta. He would also like to thank Marc Tobak and David Carlson for their helpful comments and suggestions.

courts' determination of what constitutes property of the estate. The conclusion offers insights for practitioners, including strategies to mitigate risks associated with creditors using tort claims to bypass the bankruptcy process.

Table of Contents

I. Introduction

A. Overview of Fraudulent-Transfer Law

The scene is typical. Business leadership sits down with private equity types to discuss the purchase of their company with other people's money. The debt load will skyrocket, but the shareholders can sell high, private equity types get to buy in at a discount, and everyone gets nice fees for their efforts. If the business does well for a couple of years, those profits distribute across a smaller shareholder pool. If the debt proves too much, the company files for bankruptcy: the creditors get paid a fraction of the debt's face value and any remaining shareholders are wiped out. But the past shareholders, the ones who cashed out with the deal, might walk away with the cash; or they might get sued to give it all back.[1]

This is the story of a fraudulent transfer, and it is played out around the country on various scales in nearly every bankruptcy.[2] Sometimes, when intent is not clear, the debtor is accused of constructive fraud. The archetypal image provided above is of the more dramatic leveraged buyout scenario—should the increased debt drive the company to insolvency, the dividends and buybacks to shareholders made concurrent with and after the deal are subject to claims that they were a constructively fraudulent transaction and must be returned regardless of whether the debtor intended to evade its creditors. Other times, the debtor may be accused of actual fraud. An indebted husband, for example, may gift his Lamborghini to his wife in an intentional effort to keep it from his creditors. Fraudulent transfers, of both the constructive and actual fraud varieties, are subject to lawsuits designed to help the defrauded creditors regain some or all the lost value.[3]

Before the debtor declares bankruptcy, creditors can bring a fraudulent-transfer claim at state law and obtain some form of remedy for themselves.[4] After the debtor files for bankruptcy, and the debtor's assets are

---

[1] *See, e.g.,* MAX FRUMES & SUJEET INDAP, THE CEASARS PALACE COUP: HOW A BILLIONAIRE BRAWL OVER THE FAMOUS CASINO EXPOSED THE POWER AND GREED OF WALL STREET (2021) (describing the leveraged buyout and ultimate bankruptcy around the Caesars Palace casino and related companies).

[2] The success of fraudulent transfer suits, however, have varied over time. *See, e.g.*, Jonathan M. Landers & Sandra Anita Riemer, *A New Look at Fraudulent Transfer Liability in High Risk Transactions*, AM. BAR ASS'N: BUS. L. TODAY (Dec. 20, 2016), https://www.americanbar.org/groups/business_law/resources/business-law-today/2016-december/a-new-look-at-fraudulent-transfer-liability.

[3] *See* 11 U.S.C. (the "Bankruptcy Code," or merely "Code") §§ 544(b), 548 (1998).

[4] *See infra* text accompanying note 15.

moved into the care of the trustee[5] (or the debtor in possession)[6] as part of the bankruptcy estate,[7] the trustee is empowered to bring fraudulent-transfer claims for the benefit of that estate—ultimately to be distributed amongst unsecured creditors.[8] But is the trustee bringing the *same* fraudulent-transfer claim as that held by the creditors under state law before bankruptcy? Did the creditors lose their claims against the transferee or are they merely suspended for the duration of the bankruptcy? If the trustee drops the ball, makes the value determination that the claim is not worth pursuing, or sells the fraudulent-transfer claim to a third party, what is the effect on the state-law claims clearly held by creditors prior to bankruptcy? In short, who ultimately "owns" a fraudulent-transfer claim in bankruptcy?

The Second Circuit deemed this question a "metaphysical issue."[9] But their use of this colorful term overestimates the profundity of the question. As will be shown here, fraudulent-transfer claims have only incrementally evolved since their origins over four hundred years ago in the Statute of 13 Elizabeth in 1571.[10] The merger of the courts of equity and common law may have obscured some of the finer points, and the impact of federal bankruptcy law preempting state-law claims may have added a new dimension to the analysis in bankruptcy,[11] but the evolution of fraudulent-transfer claims never attempted a radical break with the past. As a result, the Supreme Court's

[5] *See* 11 U.S.C. § 323 (designating the trustee as "representative of the estate").

[6] *See* 11 U.S.C. § 1107 (granting the debtor in possession, in all respects relevant for our purposes, the rights, powers, functions, and duties of the trustee). Unless a distinction is necessary and explicit, the term "trustee" is used throughout this article and should be understood as synonymous with "debtor in possession."

[7] 11 U.S.C. § 541 states that the "commencement of a case under . . . this title creates an estate. Such estate is comprised of . . . [a]ll legal or equitable interests of the debtor in property as of the commencement of the case [and] . . . [a]ny interest in property that the trustee recovers under section . . . 550 . . . of this title."

[8] 11 U.S.C. § 726 requires that after certain administrative and congressionally favored expenses, property of the estate is distributed "in payment of any allowed unsecured claim" subject to timely filing requirements.

[9] *In re* Tribune Co. Fraudulent Conv. Litig., 946 F.3d 66, 88 (2d Cir. 2019) ("*Tribune*"). A subsequent opinion has clearly established fraudulent-transfer claims as "property of the estate" in the Second Circuit in accordance with § 541(a), but this only partly answers the question; it says nothing as to the extent of this ownership vis-à-vis the creditors' almost identical underlying state-law claims. *See* Stadtmauer v. Tulis (*In re* Nordlicht), 115 F.4th 90, 99–105 (2d Cir. 2024).

[10] Vern L. Countryman, *The Concept of a Voidable Preference in Bankruptcy*, 38 VAND. L. REV. 713, 714 (1985).

[11] *See* discussion *infra* Sections III.A, V.

holding almost 150 years ago "that such claims were property of the debtor's estate"[12] rings just as true today. Those changes that have occurred are a result of Congress expressing their policy preferences in the Bankruptcy Code. Such changes mean that the most faithful way to interpret the Bankruptcy Code, in line with both the history of fraudulent-transfer law and Congressional policy, is that the Code not only removes ownership of the claims from the creditors but that it fully preempts their state law fraudulent-transfer claims.

B. Possible Outcomes to the Ownership Question

"Ownership" of a fraudulent-transfer claim is itself an elusive term. For purposes of this article, "ownership" means the right of "the owner to choose among any uses, known or unknown, of the thing," including the right to exclude others from its use.[13] In the context of a cause of action, this includes the right to pursue or finally settle the claim. When applied to fraudulent transfers in bankruptcy, some points are beyond contention. First, prior to bankruptcy the creditors "own" their fraudulent-transfer claims as a matter of state law.[14] The nature of these claims is generally consistent. Though there is some variation across the country, 45 states adhere to some form of the Uniform Voidable Transactions Act (the "UVTA") or its predecessors, the Uniform Fraudulent Transfer Act (the "UFTA"), and the Uniform Fraudulent Conveyance Act (the "UFCA").[15] Second, after

---

[12] *Tribune*, 946 F.3d at 88 (citing Trimble v. Woodhead, 102 U.S. 647, 649 (1880)).

[13] Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1754–55 (2004).

[14] *See, e.g.*, *In re* Cybergenics Corp., 226 F.3d 237, 242 (3d Cir. 2000) ("Thus, at least outside of the context of bankruptcy, it is clear that a fraudulent-transfer claim arising from Cybergenics' transfers and obligations belongs to Cybergenics' creditors, not to Cybergenics.").

[15] *See Voidable Transactions Act*, UNIFORM LAW COMMISSION, https://www.uniformlaws.org/committees/community-home?CommunityKey=64ee1ccc-a3ae-4a5e-a18f-a5ba8206bf49 (last visited May 15, 2024). *See also* UNIF. VOIDABLE TRANSACTIONS ACT (NAT'L. CONF. OF COMM'RS ON UNIF. STATE L. 2014); UNIF. FRAUDULENT TRANSFER ACT (NAT'L. CONF. OF COMM'RS ON UNIF. STATE L. 1984); UNIF. FRAUDULENT CONV. ACT (NAT'L. CONF. OF COMM'RS ON UNIF. STATE L. 1918). The Official Comments to the Uniform Voidable Transactions Act explain the name change away from any reference to "fraudulent" as clarifying a misnomer associated with the word "fraud." "Fraud is not, and never has been, a necessary element of a claim for relief under the Act." UVTA § 15 cmt. Despite this adjustment, the reference to this brand of voidable transfers as being a "fraudulent transfer" remains ubiquitous in the literature and this article is no different. Where it is necessary to distinguish a transfer as free of any inference of fraud the reference

bankruptcy the trustee has the power to bring a fraudulent-transfer claim via either § 548 or § 544(b) under title 11 of the United States Code (the "Bankruptcy Code" or "Code"). The former provides the trustee with the power to "avoid any transfer . . . of an interest of the debtor in property . . . that was made or incurred on or within 2 years before the date of the filing of the petition" and meets certain conditions.[16] Though separate sections of the Code further expand and restrict the trustee's powers,[17] § 548 parallels the UFCA and UFTA. Section 548 includes powers to avoid both transfers made or incurred "with actual intent to hinder, delay, or defraud any entity to which the debtor was or became . . . indebted" (i.e., actual fraud), and powers to avoid transfers where the debtor "received less than a reasonably equivalent value in exchange" and was insolvent or rendered insolvent by the transfer (i.e., constructive fraud).[18] More relevant to the question at hand, however, is § 544(b)(1), which provides that:

> Except as provided in paragraph (2) [regarding charitable contributions], 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.[19]

Courts often describe § 544(b) as allowing the trustee to "step[] into creditors' shoes for purposes of asserting state law causes of action on their behalf."[20] Though useful in describing how this section incorporates the various defenses and limits of state-law fraudulent-transfer claims (including, most critically, the statute of limitations therein), this strained analogy fails to account for the various ways the Bankruptcy Code changes said shoes and does nothing to clarify who owns the shoes or what happens to them when the trustee is done with them. To those questions, there are four possible

will be explicit.

[16] 11 U.S.C. § 548(a)(1).

[17] *See* discussion *infra* Section V.

[18] 11 U.S.C. § 548(a)(1). The statute offers several additional circumstances where the trustee may avoid a transaction not relevant to our discussion here; these also closely parallel the uniform statutes at state law. *Compare* § 548(a)(1)(B), *with* UFTA §§ 4, 5.

[19] 11 U.S.C. § 544(b)(1). Section 544(b)(2) further restricts the voidability of certain charitable contributions. Section 502(e) addresses disallowed and contingent creditor claims.

[20] Am. Nat'l Bank of Austin v. MortgageAmerica Corp. (*In re* MortgageAmerica Corp.), 714 F.2d 1266, 1272 (5th Cir. 1983).

outcomes, each considered below, for what ownership over the underlying state-law claims § 544(b) may impart upon the trustee: (1) nothing, (2) ownership of a duplicate of the underlying claims, (3) partial ownership of the original underlying claim with a remainder in the creditors, or (4) full ownership.

Though odd, considering § 544(b) clearly grants the trustee the right to pursue certain property, some courts have postulated that the trustee may not *own* these claims after all. "The fact that section 544(b) authorizes a debtor in possession . . . to avoid a transfer using a creditor's fraudulent transfer action does not mean that the fraudulent transfer action is actually an asset of the debtor in possession[.]"[21] In other words, the trustee may act on the fraudulent-transfer claim merely because it serves "in the overshoes of a creditor," but can only do so on behalf of, and to the benefit of, the creditors, whose prebankruptcy direct claims remain fully their "property."[22]

Alternatively, § 544(b) may duplicate the underlying state-law claim and grant this duplicate to the trustee. The duplicate may be subsequently modified by the Bankruptcy Code, but the original is left in the hands of the creditors—who remain barred from action only by the automatic stay.[23] Under this theory, upon lifting of the automatic stay (generally after the bankruptcy), to the extent the transferred property remains in the hands of the transferee and subject to a valid fraudulent-transfer claim, the creditors would be able to act upon their state-law claims in their original form, unaltered by the Bankruptcy Code.[24]

A slight variation on the above, § 544(b) may grant the trustee ownership of the underlying fraudulent transfer state-law claim but leave the creditors a remainder interest should the trustee abandon its claim under § 554. In practice, the distinction between this possibility and the duplication possibility discussed above would be minimal. Under the duplication theory, the creditors are barred by the automatic stay, while under the partial ownership theory, the creditors also lack sufficient ownership interest to pursue the fraudulent-transfer claim while it is "owned" by the trustee. In

[21] *In re* Cybergenics Corp., 226 F.3d 237, 243 (3d Cir. 2000).

[22] *Id.* at 244 (citations removed).

[23] The "automatic stay" refers to the stay barring certain causes of action against the debtor or its property which the Bankruptcy Code automatically applies at the commencement of the bankruptcy. 11 U.S.C. § 362.

[24] *See, e.g.*, *In re* Tribune Co. Fraudulent Conv. Litig., 946 F.3d 66, 84–85 (2d Cir. 2019) (describing, and rejecting, the appellant's argument that upon expiration of the automatic stay their full state-law fraudulent-transfer claims were actionable and unimpeded by § 546(e) of the Code).

both cases, should the trustee abandon a fraudulent-transfer claim, the creditors would be free to pursue their own.[25] But if the trustee were to settle a fraudulent-transfer claim for less than the full value of the transferred property, the resolution of a mere duplicate claim would not inherently impact the right of the creditors to pursue their own claims on the rest of the property after the bankruptcy's resolution. If, however, this remainder interest applied and the trustee owned and finally settled the claim before the vestment of the creditors' remainder interest,[26] the creditors would not inherit any further right to pursue some portion of the transferred property left in the hands of the transferee.[27]

A final possibility is that § 544(b) may fully preempt the underlying state-law claim, leaving the creditor, at the moment the debtor files a bankruptcy petition, without any interest in the fraudulent-transfer claims at all. The test for preemption is not rigid, but instead looks to "[t]he nature of the power exerted by Congress, the object sought to be attained, and the character of the obligations imposed by the law" to determine whether state law is in conflict with federal statute.[28] "Such a conflict occurs . . . when [state] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[29] "What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects[.]"[30] The scope of the federal displacement of state law is also a matter of judgment, but full

---

[25] Modifications to the trustee's claim by the Bankruptcy Code may or may not alter the claim inherited by the creditors based on their remainder interest depending upon whether courts interpret the Code's language applying such modifications expressly to "the trustee" as similarly applying to creditors after reversion. *See, e.g.*, 11 U.S.C. § 546(e).

[26] Even the nature of the claim brought by the trustee, i.e., whether it is brought under § 544(b) or § 548, may matter under this theory. If the trustee settles a claim under § 548 but "abandons" any cause of action under § 544(b), a creditor under this remainder interest theory would arguably still inherit their remaining interest in the state cause of action.

[27] In *Tribune*, the court explained that the duplication theory, with the "reversion in an unaltered form" to the creditors of the fraudulent-transfer claims altered in the hands of the trustee "might seem counterintuitive." *Tribune*, 946 F.3d at 88. The court did not refer to the various possible outcomes in the terms used here, but nevertheless addressed and disregarded both the "nothing" and "duplication" theories addressed above, while intentionally leaving undecided whether the full preemption or a partial ownership approach may be appropriate. *Id.* at 90.

[28] Hines v. Davidowitz, 312 U.S. 52, 70 (1941); *see also id.* at 67 (eschewing any preemption test offering a "rigid formula or rule").

[29] Hillman v. Maretta, 569 U.S. 483, 490 (2013) (quoting *Hines*, 312 U.S. at 67).

[30] Crosby v. Nat'l Foreign Trace Council, 530 U.S. 363, 373 (2000).

preemption can be inferred where, as here, there exists a framework of regulation "so pervasive . . . that Congress left no room for the States to supplement it" or where there is a "federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."[31] If federal bankruptcy law fully preempts state fraudulent-transfer law, then the trustee owns all fraudulent-transfer claims in their entirety; the creditors would be unable to pursue a fraudulent-transfer claim except to the extent that such claims, as they existed in the hands of the trustee, are passed to the creditors in accordance with the bankruptcy Plan—mere abandonment by the trustee would not suffice because the state-law claims which may otherwise entitle the creditors to a remainder interest have been fully displaced.

C. Structure of the Article

This article argues that the best understanding of § 544(b) is that it fully preempts the underlying state-law fraudulent-transfer claims previously held by creditors and grants full ownership of those claims in the trustee. Section II lays out the significance of this issue and why the distinction between the various possible outcomes outlined above matters, not merely as an academic curiosity, but as a determinative factor in several common scenarios and a key underlying presumption in modern bankruptcy practice.

Section III presents the historic foundations of both fraudulent transfer and bankruptcy law to show that, upon filing for bankruptcy, the fraudulent transfer is traditionally understood to be null and void as between the trustee and transferee. The adjustments in language between the Bankruptcy Code and its historical analogues suggest no Congressional intent to belie this foundational understanding. By rendering the transfer void at law, the transferred property becomes property of the estate subject to an equitable cloud over the title which the trustee must clear. Because the trustee, as the fiduciary of the estate, "owns" the transferred property, he certainly "owns" the cause of action to clear the title. While this does not by itself preclude the possibility that someone else may also own some aspect of the claim, it does disprove the possibility that the trustee owns nothing at all.

Section IV then demonstrates that Congress intended the modern Bankruptcy Code to build upon the long-held understanding that the trustee is subrogated to the creditors' fraudulent-transfer claims. The trustee

[31] Arizona v. United States, 567 U.S. 387, 399 (2012) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

therefore does not hold a mere duplicate claim, but instead takes the claims once held by the creditors. This understanding aligns with the broader purpose of bankruptcy law to "harmonize all of the creditors' interests with one another" by consolidating all assets and claims into one estate, thereby "prevent[ing] a chaotic and uncontrolled scramble for the debtor's assets."[32]

Having established both Congressional intent and the purpose behind bankruptcy law, as well as eliminating the likelihood that the trustee owns nothing or a mere duplicate, Section V shows that the conflict between federal and state law is such that preemption is the only viable outcome. Section V addresses how the Bankruptcy Code both expands and restricts the trustee's right to recover a fraudulent transfer as compared with the creditors' state-law claims. Each adjustment represents a policy choice by Congress in an area that is both Constitutionally established as the proper place for federal regulation and has historically been governed by a pervasive statutory scheme. Any remainder interest left in the hands of the creditors would conflict with Congressional policy. As a result, one must conclude that the Bankruptcy Code fully preempts state-law fraudulent-transfer claims in the hands of creditors. By addressing preemption last, this article hopes to show that, although the incorporation of preemption in this context is new, the intellectual leap to this conclusion is small and holds deep historical roots.

The courts are far from a consensus on who owns a fraudulent-transfer claim, what the creditors can still claim during and after bankruptcy, and the constitutional limits of fraudulent-transfer law. Section VI therefore addresses some particularly problematic opinions coming out of the Second and Third Circuits as well as the deleterious consequences of these holdings. It concludes that these opinions are likely wrongfully decided from both a legal and practical standpoint. It also suggests that the constitutional concerns hinted at by some courts and academics over rendering a fraudulent transfer void upon bankruptcy may be overblown.

The article concludes with some parting thoughts for the practitioner, including the risk that defrauded creditors may circumvent the bankruptcy process by bringing a tort claim against the transferee. Though strong arguments have already been made by other authors that fraudulent-transfer claims exist in equity and not in tort law, some jurisdictions continue to

---

[32] Fed. Deposit Ins. Co. v. Hirsch (*In re* Colonial Realty Co.), 980 F.2d 125, 133 (2d Cir. 1992) (quoting Fidelity Mortgage Invs. v. Camelia Builders, Inc. (*In re* Fidelity Mortgage Invs.), 550 F.2d 47, 55 (2d Cir.1976)).

entertain the idea.[33] A few alternative approaches are recommended to mitigate the risk that such litigation might undermine the trustee's ability to maximize the value of the estate.

II. Why it Matters Who Owns the Claim

The most intuitive reason for why identifying the owner of a fraudulent-transfer claim in bankruptcy is so important is that the trustee must know what they have so that they know what they may settle or sell. Any uncertainty here undermines the trustee's ability to maximize the value of the estate.[34] If the trustee cannot be certain of ownership over the claim, any sale may be contested.[35] Similarly, if the trustee is unable to bring a claim due to provisions unique to the Code, some creditors may be able to circumvent the bankruptcy process to obtain more than they would otherwise be entitled to—potentially resulting in a race amongst creditors.[36] Or if the trustee aims to settle a claim which *may* be blocked by the Code, but whose status is unclear, uncertainty about the subsequent actions of other creditors may undermine the value the estate gains in settlement.

To be sure, no court has held that a creditor can bring a fraudulent-transfer claim against a transferee while the automatic stay of the debtor's bankruptcy is in force (the precise source of the authority by which the automatic stay is extended to cover fraudulent transfers, however, is not settled).[37] After emergence from bankruptcy, when most creditor claims are generally discharged by the bankruptcy Plan, a fraudulent-transfer claimant must generally still have a "claim" against the debtor in order to be considered a valid "creditor" for purposes of bringing a state-law fraudulent-transfer claim.[38] But while the debtor may generally obtain a discharge following

---

[33] *See* cases cited *infra* note 242.

[34] *See In re* Tribune Co. Fraudulent Conv. Litig., 946 F.3d 66, 87 (2d Cir. 2019) ("Any trustee would have grave difficulty negotiating more than a nominal settlement in the federal action if it cannot preclude state claims attacking the same transfers but not requiring a showing of actual fraudulent intent.").

[35] *See, e.g., In re* Cybergenics Corp., 226 F.3d 237, 239 (3d Cir. 2000) (holding that because fraudulent-transfer claims are not property of the debtor in possession, they were not sold as part of the general sale of the debtor's "assets").

[36] *See infra* text accompanying notes 192–201.

[37] *Compare In re* MortgageAmerica Corp., 714 F.2d 1266, 1277 (5th Cir. 1983) (holding that the automatic stay applies to fraudulent conveyance actions due to § 362(a)(3)), *with* FDIC v. Hirsch (*In re* Colonial Realty Co.), 980 F.2d at 125, 132 (holding that the automatic stay applies to similar actions due to § 362(a)(1)).

[38] The UVTA defines a "Creditor" as "a person that has a claim." UVTA §1(3). Only a

bankruptcy, exceptions are made when the debtor is accused of an actual (as opposed to constructive) fraudulent transfer.[39] Any effort by the transferee to settle claims with the trustee must therefore account for the risk that a creditor will, after bankruptcy, seek to bring their own state-law fraudulent-transfer claim arguing that their claim was not properly or fully discharged. Only by clarifying the extent to which the trustee owns fraudulent-transfer claims, and by extension the extent to which creditors are barred from future claims, can the trustee confidently settle fraudulent transfer actions for maximum value.

Beyond this more obvious explanation, a clarification of ownership is also in order because of the way courts have extrapolated from fraudulent-transfer claims to determine which other claims are brought within the purview of the estate. Many circuits, including the Second, Third, Fifth, and Seventh, consider derivative claims to be property of the estate properly brought by the trustee while direct claims are properly brought by creditors.[40] "Whereas a derivative injury [to the creditor] 'is based upon a secondary effect from harm done to [the debtor], an injury is said to be 'particularized' [and therefore direct] when it can be directly traced to [the third party's] conduct.' Non-derivative [i.e., direct] claims are personal to the individual creditor and of no interest to the other[] [creditors or the estate]."[41] Furthermore, a claim "based on rights 'derivative' of, or 'derived' from, the debtor's" typically involves "property of the estate."[42]

Almost interchangeably, courts refer to general claims as inherently derivative in the hands of creditors.[43] General claims are defined as claims

---

creditor is subject to remedy for the fraudulent transfer. UVTA § 7(a).

[39] *See* 11 U.S.C. § 727(a)(2) (requiring the court to not grant the debtor a discharge where "the debtor, with intent to hinder, delay or defraud a creditor . . . has transferred . . . property of the debtor, within one year before the date of the filing of the petition"); Husky Int'l Elec. v. Ritz,, 578 U.S. 355, 359 (2016) (holding that "[t]he term 'actual fraud' in § 523(a)(2)(A) encompasses forms of fraud, like fraudulent conveyance schemes, that can be effected without a false representation" and therefore prevents discharge of debts obtained by such debtor's participation in the fraud).

[40] *See, e.g.*, Tronox Worldwide LLC v. KerrMcGee Corp. (*In re* Tronox Inc.), 855 F.3d 84, 99 (2d Cir. 2017); Artesanias Hacienda Real S.A. de C.V. v. N. Mill Cap., LLC (*In re* Wilton Armetale), 968 F.3d 273, 282–83 (3d Cir. 2020); Highland Capital Mgmt. LP v. Chesapeake Energy Corp. (*In re* Seven Seas Petroleum, Inc.), 522 F.3d 575, 589 n.9 (5th Cir. 2008); Steinberg v. Buczynski, 40 F.3d 890, 893 (7th Cir. 1994).

[41] *In re* Tronox Inc., 855 F.3d at 100 (quoting *In re* Bernard Madoff Inv. Sec. LLC, 740 F.3d 81, 89 (2d Cir. 2014) (alterations in original)).

[42] *Id.* at 99 (quoting *In re* Bernard Madoff Inv. Sec. LLC, 740 F.3d at 88).

[43] *See, e.g.*, *In re* Wilton Armetale, 968 F.3d at 283 ("So harm done mainly to the debtor can indirectly injure the creditors, making the claim a general one."); Jeanne Schroeder &

that "are not tied to the harm done to the creditor by the debtor, but rather are based on an injury to the debtor's estate that creates a secondary harm to all creditors regardless of the nature of their underlying claim against the debtor."[44] Fraudulent-transfer claims are often considered the "paradigm" of a claim "general" to all creditors "because the claim is really seeking to recover property of the estate" and is therefore properly brought by the trustee.[45] In other words, fraudulent-transfer claims often serve as the cornerstone example of a claim that is both general and derivative from the perspective of the creditors. As a result, any loss of certainty regarding this cornerstone could cloud a far wider swathe of valuable claims than just fraudulent transfers.

The direct/derivative logic is threatened when courts refuse to acknowledge that fraudulently transferred property is "property of the estate."[46] That refusal has led to much confusion.[47] If fraudulent-transfer claims are not owned by the trustee, it follows that these claims are not necessarily general to all creditors. For example, outside of the hands of the trustee, constructive fraud at state law typically only creates a claim for prior, not subsequent creditors.[48] Because the only creditors who are harmed are those whose claims arose *prior* to the act of constructive fraud, there is no guarantee that *all* creditors suffered a secondary harm. Nor are creditors necessarily limited to a derivative theory of recovery—historically, creditors

---

David Gray Carlson, *Generalized Creditors and Particularized Creditors: Against a Unified Theory of Standing in Bankruptcy*, 96 AM. BANKR. L.J. 505, 507 (2022) (defining "generalized" and "derivative" creditor rights as one and the same).

[44] *In re* Tronox, 855 F.3d at 103–04; *see also In re* Seven Seas Petroleum, Inc., 522 F.3d at 589 ("It is '[a]ctions by individual creditors asserting a generalized injury *to the debtor's estate*, which ultimately affects all creditors[,]' that can be said to raise a 'generalized grievance,' not actions by creditors that are merely common to a number of them.") (citing Schimmelpenninck v. Byrne (*In re* Schimmelpenninck), 183 F.3d 246, 360 (5th Cir. 1999)) (emphasis added).

[45] *In re* Bernard Madoff, 740 F.3d at 91 (quoting *In re* Seven Seas Petroleum, Inc., 522 F.3d at 589 n.9); *see also* Stadtmauer v. Tulis (*In re* Nordlicht), 115 F.4th 90, 105–06 (2d Cir. 2024).

[46] *See* 11 U.S.C. § 362(a)(3) (using term "property of the estate").

[47] *See, e.g.*, Fed. Deposit Ins. Co. v. Hirsch (*In re* Colonial Realty Co.), 980 F.2d 125, 132 (2d Cir. 1992) (holding that fraudulent transfer actions are not acts "'to obtain possession of property of the estate' within the meaning of § 362(a)(3)"); Rajala v. Gardner, 709 F.3d 1031, 1037–39 (10th Cir. 2013) (same); *In re* Allen, 768 F.3d 274, 281–83 (3d Cir. 2014) (holding that fraudulently transferred property subject to a recovery order is property of the estate despite the transferee still maintaining possession).

[48] *See* UVTA § 5(a); Schroeder & Carlson, *supra* note 43, at 518 ("The appearance of a proper subset means that fraudulent transfer theory is a particularized creditor right.").

could *only* bring claims directly against the transferred property based on their secured interest. Prior to passage of the UFCA, a fraudulent-transfer claim brought by a creditor lacked jurisdiction absent the creditor's interest in the transferred property.[49] But afterward, even unsecured creditors could sustain direct claims against the transferee.[50] Some courts have even found that, because fraudulent-transfer claims aim to recover property for the creditors, such claims are necessarily direct, not derivative, when pursued for the benefit of creditors.[51] If in bringing a § 544(b) claim the trustee is merely viewed as standing "in the overshoes of a creditor," as some courts have claimed,[52] then it is not clear why the claim would be either general or derivative from the perspective of the creditor, as is commonly understood to be the case in this paradigmatic example of a general and derivative claim.

The purpose of this article is not to adjust the direct/derivative test utilized by courts to determine which claims properly belong to the estate, but instead to illuminate the relationship between this test and courts' understanding of § 544(b) and to remove any cloud over this critical cornerstone in modern courts' analysis of claim ownership in bankruptcy. While the answer reached by this article is consistent with the answer reached by the direct/derivative analysis already done by courts, in that it affirms that fraudulent-transfer claims in bankruptcy are both general and derivative with respect to the creditors, it takes a step back to justify this conclusion with a more historically informed and logically consistent approach. It ultimately concludes that fraudulent-transfer claims are both general and derivative from the perspective of creditors because the trustee, and *not* the creditors, owns the claims.

---

[49] *See, e.g.*, Cates v. Allen, 149 U.S. 451, 458 (1893) ("The mere fact that a party is a creditor is not enough. He must be a creditor with a specific right or equity in the property; and this is the foundation of the jurisdiction in chancery, because jurisdiction on account of the alleged fraud of the debtor does not attach as against the immediate parties to the impugued [*sic*] transfer, except in aid of the legal right.").

[50] *See infra* text accompanying notes 83–88.

[51] *See In re* Fairpoint Ins. Coverage Appeals, 311 A.3d 760, 773 (Del. 2023), *as revised* (Dec. 19, 2023) (holding that a litigation trust which received a fraudulent-transfer claim from the bankruptcy estate brings such claims directly for the benefit of the creditors and therefore the litigation is not derivative).

[52] *In re* Cybergenics Corp., 226 F.3d 237, 244 (3d Cir. 2000) (citing BENJAMIN WEINTRAUB AND ALAN N. RESNICK, BANKRUPTCY LAW MANUAL ¶ 7.04, 7–15 (3d Ed. 1992)) (quoting Schneider v. O'Neal, 243 F.2d 914, 918 (8th Cir. 1957)).

III. The Historic Consistency of the "Void" Theory of Fraudulent Transfers

Fraudulent-transfer law has been long understood to void, with respect to the creditors, transfers the debtor made with the intent of hindering creditors' efforts at collection, while leaving the transfer valid with respect to the debtor.[53] This allowed the creditors to recover on the property with a judgment against the debtor even as the debtor, as party to the fraud, could not lawfully void the transfer themselves due to their "unclean hands." "Unclean hands," also knowns as the doctrine of *in pari delicto*, is "a state law equitable defense . . . rooted in the common-law notion that a plaintiff's recovery may be barred by his own wrongful conduct." [54] Bankruptcy law, however, developed in parallel with fraudulent-transfer law to ensure that, unlike the debtor, the trustee could reach the entirety of transferred property (so long as some creditor could have brought a valid fraudulent-transfer claim) in order to distribute such property *pro rata* to all creditors of the estate.[55] But the trustee was always left with their own judgment as to whether the property would benefit the estate.[56] The creditors were therefore barred from bringing their own state law actions against the property even when the trustee elected to bring no recovery action at all.[57] The transferred property was now part of the bankrupt estate; any creditor remedies were "absorbed in the great and comprehensive remedy under the commission by virtue of which the assignee [as the trustee was historically called] is to collect and distribute among them the property of their debtor to which they are justly and legally entitled."[58] As this section will show, an unbroken string of underlying assumptions between such earlier decisions and the modern era suggests this arrangement remains essentially unchanged—the fraudulent

---

[53] *See, e.g.*, Twyne's Case, 76 Eng. Rep. 809, 816 (Star Chamber 1601); *see also* Carr v. Hilton, 5 F. Cas 134, 135 (C.C. Me. 1852) (observing that a "fraudulent conveyance is no effectual conveyance, as against the interest intended to be defrauded").

[54] Richard J. Mason & Patricia K. Smoots, *When Do the Creditors' Shoes Fit: A Bankruptcy Estate's Power to Assert the Rights of a Hypothetical Judgment Creditor*, 91 AM. BANKR. L.J. 435, 455 (2017) (citing *In re* Food Mgmt. Group, LLC, 380 B.R. 677, 693 (Bankr. S.D.N.Y. 2008)).

[55] *See infra* text accompanying notes 118–124.

[56] Glenny v. Langdon, 98 U.S. 20, 31 (1878) ("It has long been a recognized principle of the bankrupt law . . . that the assignees of a bankrupt are not, in certain cases, bound to take property of an onerous or unprofitable character, which would burden instead of benefiting the estate.").

[57] *Id.* at 28 ("They can have no remedy which will reach such property except through the assignee.").

[58] *Id.* (quoting *Carr*, 5 F. Cas. at 135).

transfer is void at law with respect to the creditors but equally void in the hands of the trustee, leaving the creditors' sole remedy dependent upon the trustee's recovery and distribution of the property.

A. Origins of Fraudulent-Transfer Law

Conventional wisdom points to the statute of 13 Elizabeth chap. 5, enacted in 1570, as the statutory origins of fraudulent-transfer law.[59] That statute "declared all gifts or conveyances of goods and chattels as well as of lands and tenements made in fraud of creditors to be void as against them."[60] Beginning as a criminal statute, whereby the debtor was jailed for six months and one-half of the recovered property was forfeited to the crown,[61] the King's Bench at common law soon "concluded that, under this statute, a judgment creditor could treat a fraudulent conveyance as void and levy execution on the property as if the conveyance had not been made."[62] The founding generation broadly incorporated this common law concept into American law.[63]

To bring a fraudulent-transfer claim, a creditor had to first initiate actions to become a judgment creditor. By obtaining a judgment against the debtor in a court of law, a judgment creditor held an interest in the transferred property sufficient to bring a fraudulent-transfer claim.[64] For real property (with slight variation in certain states), entry of the judgment established a lien; while for chattel, the creditor had to first deliver an execution order to the sheriff to obtain a property interest.[65] "It is only by these liens that a

---

[59] FRANK LOVELAND, LAW AND PROCEEDINGS IN BANKRUPTCY 467–68 (3d. Ed. 1907).

[60] *Id.* (quoting Drake v. Rice, 130 Mass. 410, 412 (1881)); *see also* Twyne's Case, 76 Eng. Rep. 809, 810 n.(B) (Star Chamber 1601) (holding "that all and every feoffment, gift, grant, alienation, &c. and all suit, judgment, and execution, for any intent or purpose before declared, shall be utterly void" unless transferred for good consideration to a bona fide purchaser).

[61] Jay Adkisson, *Statute of 13 Elizabeth Translated to Contemporary Legal English*, FORBES (Jul. 8, 2019, 10:32 a.m.), https: //www.forbes.com/sites/jayadkisson/2019/07/08 /fraudulent-transfers-and-the-statute-of-13-elizabeth-translated-to-contemporary-legal-english/?sh=20c4222c78d1.

[62] Vern L. Countryman, *The Concept of a Voidable Preference in Bankruptcy*, 38 VAND. L. REV. 713, 714 (1985).

[63] LOVELAND, *supra* note 59, at 468.

[64] David Gray Carlson & Paul M. Shupack, *Judicial Lien Priorities under Article 9 of the Uniform Commercial Code: Part 1,* 5 CARDOZO L. REV. 287, 291–92 (1984).

[65] Alder v. Fenton, 65 U.S. 407, 411 (1861). The precise timing for when that execution was sufficient to vest the creditor with a property interest varies by state, but the specifics

creditor ha[d] any vested or specific right in the property of his debtor."[66] Absent a preexisting lien, creditors prior to the UFCA could not sustain a suit for fraudulent transfer, even if the transfer was intentionally fraudulent, because the creditor had "lost no claim upon, or interest in the property; for he never acquired either."[67] But if the debtor had alienated itself of tangible property (land or chattel) following the creation of the creditor's interest, the creditor could "treat the conveyance as a nullity, and levy his attachment or execution in spite of it."[68] The transfer was, for the creditor's legal purposes, void.

This still required the sheriff to execute the levy. Even if the creditor raised fraudulent transfer accusations, the sheriff would often elect to *not* execute on property allegedly belonging to the debtor but in the possession of the transferee, particularly if the sheriff was not indemnified by the creditor, for fear that he would be exposed to conversion claims; often the sheriff would execute only against the debtor and return the order *nulla bona*—i.e., empty-handed.[69] But with the *nulla bona* order, the creditor could establish that the remedy at law was inadequate and bring fraudulent-transfer claims before the courts of equity.[70] If the creditor was successful, the equity court could issue a lien on the transferred property in the hands of the transferee or order the sheriff to execute on the transferred property with its fraudulent transfer status now a legal certainty.[71]

This "avoiding" of the fraudulent transfer eliminated the problem of the creditor having to indemnify the sheriff for the sheriff to execute on the

---

are irrelevant for our purposes. *See* Carlson & Shupack, *supra* note 64, at 291–97.

[66] *Id.*

[67] *Alder*, 65 U.S. 412–13.

[68] Am. Sur. Co. of N.Y. v. Conner, 251 N.Y. 1, 2 (N.Y. 1929) (citations omitted).

[69] *Nulla bona* "supposedly signaled no leviable land or chattels," but this requirement soon became merely procedural, and the sheriff produced the writ *nulla bona* "on the spot." David Gray Carlson, *Fraudulent Transfers: Void and Voidable*, 29 AM. BANKR. INST. L. REV. 1, 10 (2021) (citing GARRARD GLENN, FRAUDULENT CONVEYANCES AND CREDITORS' BILLS § 87 (3d. ed. 1897)).

[70] *See* Painters Dist. Council No. 2 v. Sustainable Constr., Grp., LLC, No. 4:12-CV-00492, 2016 WL 4124110, at *2 (E.D. Mo. Aug. 3, 2016) ("A creditor must exhaust her legal remedies before proceeding in equity to pierce the corporate veil. A return of *nulla bona* upon execution, is evidence of the exhaustion of remedies.") (citation omitted); Carlson, *supra* note 69, at 40 ("[I]n ancient times and often in modern times, the execution *nulla bona* is a prerequisite to the commencement of a creditor's bill.").

[71] David Gray Carlson, *Fraudulent Transfer as a Tort*, 2021 MICH. ST. L. REV. 1093, 1111–12 (2021).

transferred property.[72] In this way, the transfer itself was deemed void and disregarded at law (at least, to the extent necessary to satisfy the creditor's claim), but merely voidable in courts of equity.[73] "The jurisdiction of equity to entertain suits in aid of creditors, in such cases, had its origin in the narrowness of the common law remedies by writs of execution."[74] In other words, equity picked up where the law left off. Some of this distinction between void and voidable transfers, depending upon the nature of the court hearing the claim, may have been lost in modern courts following the merger of courts of law and equity[75] and the somewhat concurrent spread of uniform fraudulent transfer statutes.[76] But the distinction shaped the presumptions of courts and legislatures and is critical to bear in mind when interpreting the evolution of bankruptcy and fraudulent-transfer law.

B. Fraudulent Transfer as Statute

In 1918, the Commissioners on Uniform State Laws finalized their draft Uniform Fraudulent Conveyance Act, the UFCA.[77] The proposed act was not intended to alter the "general conceptions" of fraudulent-transfer law or usurp the law's development.[78] Rather, it was intended to "give a known certainty to the law which it [did not] possess."[79] The UFCA was swiftly embraced by the states.[80]

But though the Act was not intended to be revolutionary, it had two prominent influences on the development of fraudulent-transfer law, one

---

[72] Am. Sur. Co., 251 N.Y. at 2.

[73] *See* Carlson, *supra* note 69, at 5.

[74] Blumenthal v. Blumenthal, 35 A.2d 831, 833–34 (Del. Ch. 1944).

[75] The "Federal Rules of Civil Procedure in 1938 merged law and equity into a single civil jurisdiction and established uniform rules of procedure." *See The Continuing Law-Equity Distinction*, JUSTIA US LAW https://law.justia.com/constitution/us/amendment-07/06-continuing-law-equity-distinction.html#:~:text=Adoption%20of%20the%20Federal%20Rules,established%20uniform%20rules%20of%20procedure (last visited June 9, 2024) (citing J. MOORE, FEDERAL PRACTICE §§ 38.01–38.05 (2d ed. 1971)).

[76] *See* discussion *infra* Section III.B.

[77] Charles Ascher & James Wolf, *Current Legislation*, 20 COLUM. L. REV. 339, 339 (1920).

[78] *Id.*

[79] *Id.* (quoting Proceedings, Twenty-eighth Annual Meeting, Commissioners on Uniform State Laws (1918), 350).

[80] Eight states adopted it within the first two years. *Id.* Today, 45 states have adopted the UFCA or its subsequent versions. *See supra* text accompanying note 15.

clearly intentional and one whose consequences may not have been clear at the time of drafting. First, the draftsmen removed the rebuttable presumption of fraud which had worked its way into the law as part of the "judicial attempts to stretch the original English fraudulent conveyance statute."[81] This amounted to an embrace of constructive fraud and the further separation of fraudulent-transfer law from more traditional notions of common-law fraud as understood in tort and other areas of the law.[82]

Second, the UFCA's § 10 granted some remedy for a fraudulent transfer to creditors whose claims had *not* yet matured and who otherwise lacked court judgment or interest in the transferred property.[83] Early commentators saw this change as too "dangerous" to be read literally and speculated that courts would restrain its effect.[84] They were mistaken. With his typical flair for the dramatic, Judge Benjamin N. Cardozo declared that the UFCA did "abrogate the ancient rule whereby a judgment and a lien were essential preliminaries to equitable relief against a fraudulent conveyance."[85] Though the UFCA did not explicitly state "that judgment and a lien should no longer be essential" to sustain a fraudulent conveyance action, the court found that the Act still "said as much . . . by fair and natural implication."[86] The result was to expand the creditor's rights by creating a cause of action no longer dependent upon a property interest.[87] Instead, by statute both secured and unsecured creditors could sustain a direct cause of action against the transferee.[88]

[81] Carlson, *supra* note 71, at 1099 n.24 (quoting Marine Midland Bank v. Murkoff, 508 N.Y.S. 2d 17, 21 (App. Dev. 1986)).

[82] *See* UVTA § 4 cmt. 10 ("By its terms, § 4(a)(1) applies to a transaction that 'hinders' or 'delays' a creditor even if it does not 'defraud,' and a transaction to which § 4(a)(1) applies need not bear any resemblance to common-law fraud.").

[83] The remedies for such unmatured creditors differ notably from those of matured creditors; specifically, the matured creditor can elect to have the conveyance set aside or disregarded to the extent necessary to satisfy their claim, while the unmatured creditor must turn to the court's judgment as to the appropriately narrow remedy, which need not (but could) include avoidance of the transfer. *Compare* UFCA § 9, *with* § 10.

[84] *See* Ascher & Wolf, *supra* note 77, at 341.

[85] Am. Sur. Co. of N.Y. v. Conner, 251 N.Y. 1, 7 (1929). *See generally* Garrard Glenn, *The Uniform Fraudulent Conveyance Act; Rights of Creditor without Judgment*, 30 COLUM. L. REV. 202 (1930) (detailing the immediate and wide-ranging impact of Judge Cardozo's decision on fraudulent-transfer law).

[86] Am. Sur. Co., 251 N.Y. at 7.

[87] *See generally* Carlson, *supra* note 69, at 45–81.

[88] Caselaw is sparse on this point, but it is likely that the creditor who lacked judgment against the debtor still could not sue the transferee directly without also joining the debtor to the suit. *Id.* at 57 ("[I]t is arguably the case that [the debtor] is necessary and indispensable.

The UFTA and UVTA continued and cemented this line of thinking by defining "claim" to include any right to payment regardless of whether or not that right "is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured."[89] Additionally, the UFTA/UVTA assert that a transfer is fraudulent as to *future* creditors when it was made (1) "with actual intent to hinder, delay, or defraud any creditor of the debtor" or (2) made without receiving reasonably equivalent value and either leaving the debtor with unreasonably small assets or where the debtor believed or should have believed that he would be unable to pay his debts as they became due (i.e., actual fraud).[90] In contrast, only a current creditor could sue to void a transfer that merely did not receive "reasonably equivalent value in exchange" and during which the debtor was insolvent or made insolvent by the transfer (i.e., constructive fraud).[91] Such transactions are not "general" claims available to all creditors because not all creditors can recover (unless no further creditors were created following the transfer).

In short, the shift from common law to statute left a mark on fraudulent-transfer claims that courts have not always considered when speaking of such claims as "derivative" or "general."[92] Fraudulent-transfer claims can be brought directly by creditors even without a property interest and the expansion into constructive fraud means that not all fraudulent-transfer claims are general claims necessarily available to the entire creditor pool. The next section addresses how bankruptcy law nevertheless developed with an early understanding that the transferred property was indeed property of the estate properly pursued by the trustee for the benefit of all creditors.

C. Fraudulent Transfer through the Development of the Bankruptcy Code

The Constitution grants Congress the power "To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."[93] This power was wielded only intermittently prior to 1898: from 1800 until 1803,

---

Without joinder, [the transferee] is entitled to a dismissal, after which [the transferee] is at liberty to abscond.").

[89] *See* UFTA § 1(3); UVTA § 1(3).

[90] UFTA § 4(a); *see also* UVTA § 4(a).

[91] UFTA § 5(a); *see also* UVTA § 5(a).

[92] *See supra* text accompanying notes 42–45.

[93] U.S. CONST. art. I, § 8, cl. 4 (the "Bankruptcy Clause").

1841 until 1843, and 1867 until 1878.[94] From 1867 onward, regardless of the specific federal bankruptcy statute considered, certain features remain consistent:

> The debtor's assets pass into the hands of the court for distribution, and it is considered that among those assets are the items of property that the debtor may, within a reasonable time previously, have fraudulently conveyed. The liquidating officer, being vested by statute with the title to the debtor's effects, takes title also to property fraudulently transferred, and hence he can maintain a plenary suit for the recovery of that property or its value. How all of this came to pass is part of the history of bankruptcy, but it is clear beyond the need of words today.[95]

Referring specifically to the bankruptcy process laid out in the Bankruptcy Act of 1898, the above quote describes how the liquidating officer, what today is the trustee, takes title to the transferred property as part of the overall transfer of the debtor's property interests to the estate. This feature was consistent with the previous Bankruptcy Act of 1867 and, as will be seen, should be read into the modern Bankruptcy Code enacted in 1978.

Outside of bankruptcy, the debtor could not sustain a fraudulent-transfer claim even as it was considered void with respect to the creditors.[96] But as far back as the Bankruptcy Act of 1867, the trustee, who inherited all assets of the debtor, was charged with recovering fraudulently transferred property for the benefit of creditors.[97] Once the trustee was appointed, the debtor's unclean hands were no longer considered an impediment, and the trustee could clear the cloud over the debtor's title created by the transfer.[98] As one modern court put it, "[w]hen the perpetrators are removed and a

---

[94] ArtI.S.8.C4.2.6 Restrictions on State Bankruptcy Power, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artI-S8-C4-2-6/ALDE_00013185/ (last visited May 28, 2024).

[95] Ascher & Wolf, *supra* note 77, at 340–41.

[96] *See supra* text accompanying note 54.

[97] Act of March 2, 1867, ch. 176, 14 Stat. 517 (amended 1874, repealed 1878) (the "Bankruptcy Act of 1867"), § 35.

[98] *See* Carr v. Hilton, 5 F. Cas 134, 135 (C.C. Me. 1852) ("[T]here is a very broad distinction between a bill by the bankrupt, the author of the fraud, and one by the assignee, who seeks to recover the property, for the benefit of the very interest sought to be defrauded. . . . The case of the assignee is, therefore, that the lands in question are the property of the debtor, and that he prays the aid of this court to remove an apparent cloud upon the title, which, though void, interferes with the discharge of his official duty."); *see also* Glenny v. Langdon, 98 U.S. 20, 28 (1878) (quoting *Carr* for the same holding).

receiver is appointed in their place, the corporate structures are no longer the 'evil zombies' of the perpetrator; they are '[f]reed from his spell' and regain standing to sue for the return of money fraudulently transferred."[99] Some modern courts have drawn a distinction between imparting unclean hands to the trustee as a successor to the debtor's interests under § 541, which they find also imparts unclean hands (thus allowing for the *in pari delicto* defense), and to the trustee as the party empowered with avoidance powers (including § 544(b)), which they find remove the unclean hands barricade.[100] This line of analysis is a troubling break from how the role of the trustee developed out of the role of the assignee, but because it is expressly inapplicable to fraudulent transfers it need not derail the analysis here.

The Bankruptcy Act of 1867 vested fraudulently transferred property in the trustee through two methods, first, it simply declared that "all the property conveyed by the bankrupt in fraud of his creditors [presumably, by the standards set at state law] . . . shall . . . be at once vested in such assignee [i.e., the trustee]."[101] Second, the 1867 Act declared that transfers made in contemplation of insolvency within six months of the bankruptcy filing and with the intent to impede the distribution to creditors "shall be void," with such property subject to recovery by the trustee.[102] The 1867 Act thus showed the same approach as what is seen in the modern Code in coupling its own explicit baseline fraudulent-transfer law[103] with the incorporation of state law to determine what would constitute fraudulently transferred property and to

[99] Wiand v. ATC Brokers Ltd., 96 F.4th 1303, 1309 (11th Cir. 2024) (quoting Scholes v. Lehmann, 56 F.3d 750, 754 (7th Cir. 1995)). While replacement of the debtor through appointment of the trustee relaxes the weight of the unclean-hands argument, the trustee does not get a clean slate. Outside of fraudulent transfers, modern courts assert that "[t]he debtor's misconduct is imputed to the trustee because, innocent as he may be, he acts as the debtor's representative." Picard v. JPMorgan Chase Bank & Co. (*In re* Bernard L. Madoff Inv. Sec. LLC) 721 F.3d 54 (2d Cir. 2013) (citing Wight v. BankAmerica Corp., 219 F.3d 79, 87 (2d Cir. 2000)). The Second Circuit refers to this limitation of the trustee as the "Wagoner rule." "[B]ecause a trustee stands in the shoes of the corporation, the Wagoner rule bars a trustee from suing to recover for a wrong that he himself essentially took part in." *Wight*, 219 F.3d at 87. The Wagoner rule joins a long list of errors courts have made by relying on the debtor's shoes analogy as a source of law, but because it does not apply to fraudulent transfers it is outside the scope of this article.

[100] Off. Comm. of Unsecured Creditors v. R.F. Lafferty & Co., Inc., 267 F.3d 340, 356 (3d Cir. 2001); *see also* Grassmueck v. Am. Shorthorn Ass'n, 402 F.3d 833, 836 (8th Cir. 2005).

[101] Bankruptcy Act of 1867 § 13.

[102] *Id.* § 35.

[103] *Compare* Bankruptcy Act of 1867 § 13, *with* 11 U.S.C. § 548.

render property fraudulently conveyed at state law as property of the estate.[104] In either case, the 1867 Act deemed fraudulent transfers to be void in their entirety—not merely void with respect to creditors—and vested in the trustee.

By "vesting" in the trustee, the 1867 Act did not grant the trustee an unchallengeable right to possess property on the mere accusation of fraudulent transfer. The trustee still had to evaluate whether the property would be beneficial to the estate and, if so, bring suit to possess and sell said property.[105] But that suit was his alone to bring. The Supreme Court interpreted the Act as blocking any remedy to creditors "except through the assignee, for two reasons: 1. Because all such property, by the express words of the Bankrupt Act, vest in the assignee by virtue of the adjudication in bankruptcy and of his appointment [; and] 2. Because they cannot sustain any suit against the bankrupt."[106] The first element here is a direct result of the text in §§ 13 and 35 of the 1867 Act. The second element relates to how fraudulent-transfer law worked before the merger of courts at law and equity. As discussed, to sustain an action for fraudulent conveyance in a court of equity, the creditor first had to obtain judgment at law against the debtor (and, generally, have the sheriff return such execution *nulla bona*).[107] Unable to obtain such judgment following appointment of the trustee, the creditors after bankruptcy could have "no remedy which will reach such property except through the [trustee] . . . because their remedies are absorbed in the great and comprehensive remedy under the commission by virtue of which the assignee is to collect and distribute among them the property of their debtor, to which they are justly and legally entitled."[108] Thus, the 1867 Act expressly voided the transfer and vested clouded title over the transferred property solely in the hands of the trustee for his recovery and subsequent distribution to creditors.

The Bankruptcy Act of 1867 was repealed in 1878.[109] It took twenty years for Congress to replace it with the Bankruptcy Act of 1898,[110] but from this period forward federal bankruptcy law at last persisted. Like its predecessor, fraudulent transfers after 1898 continued to be seen as void, with

---

[104] *Compare* Bankruptcy Act of 1867 § 35, *with* 11 U.S.C. § 544(b).

[105] *See, e.g.*, Glenny v. Langdon, 98 U.S. 20, 28 (1878).

[106] *Id.*

[107] *See supra* text accompanying notes 64–70.

[108] *Glenny*, 98 U.S. at 28 (citation omitted); *see also* Trimble v. Woodhead, 102 U.S. 647, 649 (1880) (noting that *Glenny* "conclusively establishes the proposition that the rights asserted in this bill passed to the assignee in bankruptcy, and that a creditor [of the debtor] cannot assert them in his own name").

[109] *See* ArtI.S.8.C4.2.6 Restrictions on State Bankruptcy Power, *supra* note 94.

[110] Act of July 1, 1898, ch. 541, 30 Stat. 544 (repealed 1978) (the "Bankruptcy Act").

title to the transferred property vested in the trustee. Also as before, fraudulent transfers were defined both within the federal bankruptcy statute and by incorporating applicable state law. Section 67(e) of the 1898 Act defines federal fraudulent transfers and asserts that the transferred property shall "be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee . . . ." Section 67(e) separately allowed the trustee to avoid and recover under the laws of the State, but both types of avoidance were limited to a four-month statute of limitations. Under § 70(e), however, the trustee could also recover property, or its value, to the extent "any creditor of such bankrupt might have avoided" the transfer (except for when such transfers were subsequently acquired by a bona fide purchaser for value). This section had no statute of limitations. Legislative history for the 1938 amendments clarified that the intent of providing for recovery both under state law and with a standard federal fraudulent transfer statute was to provide for some uniform floor applicable across the states.[111]

In 1938, the Chandler Act made several amendments to the Bankruptcy Act including the removal of some duplication between §§ 67 and 70; in particular, the second portion of § 67(e), which incorporated state law, was considered duplicative of § 70(e) but for the four-month statute of limitations. A new § 70(e) was proposed and passed that blended these provisions while the duplicative language in § 67(e) was removed. The new §§ 67(d) and 70(e) continued to correspond closely with the prior §§ 67(e) and 70(e), respectively, but where the prior version of § 70(e) merely allowed the trustee to "avoid any transfer," the revised version expressly stated that where a transfer is fraudulent or otherwise voidable by any creditor of the debtor "under any Federal or State law applicable thereto" it "shall be *null and void* as against the trustee of the debtor."[112] Almost as if to hammer the point home, the next clause expressly states that property affected by such transfers "shall be and remain a part of [the trustee's] assets and estate."[113] Subsequent amendments in 1952 did not materially alter this language. As a result, on the eve of passage of the modern Bankruptcy Code, it was understood that fraudulent transfers were null and void as against the trustee,

[111] The Congressional Report states that "[s]ince such uniformity is equally desirable under the Bankruptcy Act in respect to [fraudulent-transfer law], it is deemed advisable to set up here [in the Bankruptcy Act] the essential provisions of this uniform State law dealing with such subject." ALAN N. RESNICK & EUGENE M. WYPYSKI, BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY, Doc. 32 at 705 (1979).

[112] Bankruptcy Act (as amended 1938) § 70(e)(1) (emphasis added).

[113] *Id.* § 70(e)(2).

as had been the case since at least 1867, with the property deemed part of the estate subject only to the trustee suing to remove the cloud over the title.

The modern Bankruptcy Code passed in 1978.[114] As before, it has both a federal fraudulent transfer provision in § 548 and one that relies upon state law in § 544(b). Section 544(b) is derived from § 70(e) of the Bankruptcy Act.[115] While it does not repeat the language asserting that such fraudulent transfers are "null and void," or expressly state that such property is automatically a part of the estate subject to disbursement to creditors, the Senate Report gives no indication that these omissions were intended to be material.[116] To the contrary, the Report's express embrace of the Supreme Court's opinion in *Moore v. Bay*[117] suggests that Congress intended continuity.

Moore v. Bay held that a mortgage voidable by certain creditors was, under § 70 of the Bankruptcy Act, similarly void against creditors who lent to the debtor after the mortgage was effective (irrespective of whether the debtor committed actual or constructive fraud).[118] Such later creditors could not necessarily void the mortgage directly and, outside of bankruptcy, would not have been in a position to levy the mortgage as a fraudulent transfer or otherwise. Nevertheless, the Court reasoned that, because the trustee in bankruptcy gets title to all such voidably-transferred property, such title becomes property of the estate subject to equal distribution to all like-priority creditors.[119] In other words, the transfer is unwound and the property is returned in full to the estate for distribution to all creditors, even those intervening creditors who may not have been harmed by the transfer in the first place. By embracing *Moore*, the Senate Report suggests that § 544(b) continues the long tradition of a fraudulent transfer being rendered null and void *ab initio*. If the trustee had merely filled the shoes of the creditors, *Moore* could not have extended the trustee's recovery to the whole of the transferred property regardless of whether the whole property was subject to valid fraudulent-transfer claims by the creditors. As it stands, the trustee gets back

---

[114] Bankruptcy Reform Act of 1978, Pub. L. 95-598, 92 Stat. 2549 (Nov. 6, 1978) (codified, as amended, at 11 U.S.C.).

[115] S. REP. NO. 95-989 at 85 (1978).

[116] The report states merely that "Subsection (b) is derived from current section 70e . . . It gives the trustee the rights of actual unsecured creditors under applicable law to void transfers. It follows Moore v. Bay, 284 U.S. 4 (1931), and overrules those cases that hold section 70e gives the trustee the rights of secured creditors." *Id.*

[117] *Id.* (citing Moore v. Bay, 284 U.S. 4 (1931)).

[118] *Moore*, 284 U.S. at 4.

[119] *Id.* at 5.

everything that the debtor transferred, subject to defenses for *bona fide* purchasers and the like which may be raised under state and federal law.

Professor David Carlson, who has published extensively in this area, described the Court's expansive holding in *Moore* "as driven by metaphorical confusion as to the nature of avoidance theory."[120] *Moore*, he explains, "converts fraudulent transfer theory into general rescission in a bankruptcy proceeding."[121] Professor Carlson may be right as to the Court's confusion regarding avoidance theory, but the decision was not a bolt from the blue. As described above, the language in the Bankruptcy Acts of both 1867 and 1898 (as later clarified and amended by the Chandler Act) expressly referred to fraudulent transfers as "void."[122] Frank Loveland's foundational bankruptcy treatise from 1907 (predating *Moore* by over two decades) similarly referred to the fraudulently transferred property as being "set aside" and "turned over to the trustee in bankruptcy," suggesting that the intuition at the time of *Moore* was that the bankruptcy trustee received title to the transferred property and did not merely assume the creditors' rights to recover against the transferred property to the extent of their claims.[123] Given the clear indication in *Moore* that such an assumption underlies the holding, coupled with historical precedent that for over a century viewed fraudulent transfers as void with respect to the trustee (subject only to suit against the transferee to clean the title), one can only assume from the scant Congressional record on this point that Congress had no intention of changing these foundational assumptions in passing the Bankruptcy Code. Instead, by basing § 544(b) on its historical analogues and the *Moore* opinion, the Senate Report suggests an approach consistent with the history of bankruptcy—i.e., the transfer is void as a matter of law, and, as stated at the start of this section, the trustee "takes title [] to property fraudulently transferred, and hence he can maintain a plenary suit for the recovery of that property or its value."[124]

To clarify, the statutory language in the Bankruptcy Acts of 1898 and 1867, as well as the logic of *Moore*, indicate only that the proper way to read the Bankruptcy Code is that the transfer is void with respect to the trustee and that such property "shall be and remain" an asset of the estate.[125] This

[120] David Gray Carlson, *The Logical Structure of Fraudulent Transfers and Equitable Subordination*, 45 WM. & MARY L. REV. 157, 162 (2003).
[121] *Id.* at 195.
[122] *See supra* text accompanying notes 101–113.
[123] LOVELAND, *supra* note 59, at 470.
[124] Ascher & Wolf, *supra* note 77, at 340–41.
[125] *See supra* text accompanying note 113.

suggests one of two possibilities: either the statute itself renders the transaction null and void upon the appointment of the trustee, or the statute merely curtails the unclean hands defense that previously barred the debtor from recovery of the transferred property.[126] If the former, the transfer is void by statute at the moment the debtor files for bankruptcy. If the latter, the transfer would be recognized as void as a matter of common law *prior to the bankruptcy* due to the inability of the debtor to transfer valid title through fraud (but at equity fraudulent transfers are merely voidable, thereby giving the transferee a valid right to possession).[127] This timing matters in the modern context because it determines when the transferred property is considered part of the estate and subject to the automatic stay. For reasons discussed in Section VI, the purpose of bankruptcy is undermined if such property is not protected by the automatic stay upon filing, which, because of how § 541 is written, requires that it belong to the debtor *prior* to filing.[128] Additionally, rescission, which, as professor Carlson suggests is the closest analogue to what the Supreme Court applies in *Moore*, unwinds a transaction *back to the beginning* to restore the parties to the status quo ante.[129] For these reasons, the modern Code and its historical analogues should be understood as recognizing the transfer as void *ab initio* to the extent it is fraudulent and only now recoverable by the appointment of the clean-handed trustee, rather than rendering the transfer null and void only as of the filing for bankruptcy.

This section has shown that the proper way to understand the Bankruptcy Code is as building upon the long judicial and statutory history of viewing the transfer as null and void at common law,[130] thereby leaving the debtor with "a legal or equitable interest"[131] in the fraudulently transferred property; albeit an interest unactionable prior to bankruptcy due to the debtor's unclean hands, but still sufficient an interest to render such property

---

[126] *See supra* text accompanying notes 96–99.

[127] *See supra* text accompanying note 73.

[128] *See infra* text accompanying notes 192–204; *see also* 11 U.S.C. § 541(a)(1) (property of the estate generally consists of only property in which debtor previously had an interest and property actually recovered by the trustee).

[129] *See, e.g.*, Andrew Kull, *Rescission and Restitution*, 61 BUS. L. 569, 576 (2006) (summarizing rescission as allowing the parties "to unwind the transaction and return to the status quo ante"); *see also* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 37 (2011).

[130] The Supreme Court has repeatedly accepted the use of "pre-code practice" to "inform the meaning of the code's more 'ambiguous' provisions." Harrington v. Purdue Pharma L.P., 603 U.S. 204, 223 (2024) (citing RadLAX Gateway Hotel v. Amalgamated Bank, 566 U.S. 639, 649 (2012)).

[131] 11 U.S.C. § 541(a)(1).

part of the estate in bankruptcy. The transferee is left with only a right to possession—a cloud on the debtor's title which a trustee must clear in a proceeding at equity.[132] Because the property itself is already part of the estate, the right to clear that cloud must therefore be a cause of action in the control of, and owned by, the trustee, as representative of the estate.

Under this void theory of fraudulent-transfer law, the trustee acts to clean the title to property of the estate and therefore brings these claims on a direct, not derivative basis—rendering such claims derivative in the hands of the creditors. This is not because the debtor could have brought such claims directly prior to bankruptcy, but instead because statute has removed the debtor's impediment so that the trustee, on behalf of the estate, has the direct authority to bring such claims for the benefit of the estate. Because all creditors benefit from the enlarged estate, the fraudulent-transfer claims are also general to all creditors, regardless of whether such creditors incurred obligations from the debtor before or after the transfer and therefore regardless of whether all creditors could have brought a similar claim prior to bankruptcy. But while this theory accomplishes much of the work of clearing up the logic behind why fraudulent-transfer claims are the "paradigm" example of a derivative (with respect to the creditors) and general claim,[133] it does nothing to suggest what happens to the creditor's direct claims at state law upon filing for bankruptcy. We turn to that point next.

IV. The Alignment between Subrogation and the Bankruptcy Code's Purpose

Bankruptcy is meant to protect persons from the sharper corners of capitalism. The "honest but unfortunate debtor" receives "a new opportunity in life and a clear field for future effort,"[134] while creditors receive "a ratable

[132] The Supreme Court's holding in *Granfinanciera, S.A. v. Nordberg, Creditor Trustee for the Estate of Chase & Sanborn Corp.*, 492 U.S. 33, 36 (1989), which determined that a fraudulent transfer defendant was entitled to a jury trial because the claim would have traditionally been brought in a court of law and not equity, is best understood as narrowly applying only to fraudulent claims seeking an explicitly monetary remedy without an equitable accounting. *See* David Gray Carlson, *Fraudulent Transfers and Juries: Was Granfinanciera Rightly Decided?*, 95 AM. BANKR. L.J. 209, 211 (2021). As Professor Carlson and other have ably argued, to see *Granfinanciera* in any broader terms runs counter to the history of fraudulent-transfer law. *Id.* at 210.

[133] *In re* Bernard Madoff Inv. Sec. LLC, 740 F.3d 81, 91 (2d Cir. 2014).

[134] Loc. Loan Co. v. Hunt, 292 U.S. 234, 244 (1932).

distribution . . . of a bankrupt's assets" and protection "from one another."[135] "This [] purpose requires that property, which belonged to the bankrupt, at the time of the bankruptcy, should be distributed among his creditors who prove their claims; it further requires that property, attempted to be conveyed by him to defraud those creditors, should be treated as his property."[136] Put differently, all assets and claims are channeled through the estate. "The whole point of channeling claims through bankruptcy is to avoid creditors getting ahead of others in line of preference and to promote an equitable distribution of the debtor's assets."[137] To accomplish this, bankruptcy has long been understood as not merely empowering the trustee with a duplicate claim, but as taking certain rights away from creditors and consolidating them in the hands of the trustee.[138] The Supreme Court described this process as one of subrogation, even while acknowledging that the trustee's powers extend beyond mere subrogation.

As noted above, the Supreme Court's holding in *Moore v. Bay* was directly acknowledged by the Senate report as being ratified into the Bankruptcy Code.[139] Thus, despite this case having directly ruled on the Bankruptcy Act, it is generally considered good law with respect to the Code.[140] In *Moore*, the Supreme Court asserted that in bankruptcy "[t]he rights of the trustee by *subrogation* are to be enforced for the benefit of the estate."[141] But as noted above, *Moore* stands for the idea that fraudulent transfer theory amounts to *rescission*, not subrogation.[142] Why then does it refer to subrogation?

"'Subrogation' is another word for 'substitution.'"[143] "When one party is subrogated to another or one party is substituted for another, the

---

135 Young v. Higbee Co., 324 U.S. 204, 210 (1945) ("[Historically one of the prime purposes of the bankruptcy law has been to bring about a ratable distribution among creditors of a bankrupt's assets; to protect the creditors from one another.").

136 Carr v. Hilton, 5 F. Cas 134, 136 (C.C. Me. 1852). In *Carr*, the court described the "two great objects of the bankrupt law" as "the equal distribution of all property of the debtor among those justly entitled to it, and the relief of honest debtors, who should conform to its provisions, from the burden of their debts." *Id.* at 135.

137 Tronox Worldwide LLC v. KerrMcGee Corp. (*In re* Tronox Inc.), 855 F.3d 84, 106 (2d Cir. 2017) (citations omitted).

138 *See, e.g.*, *supra* text accompanying note 58.

139 *See supra* text accompanying note 117.

140 *See, e.g.*, Carlson, *supra* note 120.

141 Moore v. Bay, 284 U.S. 4, 5 (1931) (emphasis added).

142 *See supra* text accompanying note 121.

143 Michael Sean Quinn, *Subrogation, Restitution, and Indemnity*, 74 TEX. L. REV. 1361, 1363 (1996).

former enforces rights of the latter against a third-party for its own benefit."[144] In simple subrogation, the original rights holder maintains their rights even after the subrogee obtains the ability to enforce those rights directly. In reviving subrogation, on the other hand, the original rights holder loses their rights entirely, leaving the subrogee as the sole holder of those rights and sole beneficiary of any related outstanding liability.[145] Simple subrogation is more common in insurance cases, while reviving subrogation is most commonly associated with the rights of suretyship.[146] Suretyship means a "contractual relationship in which a surety engages to answer for the debt or default of a principal to a third party."[147]

While the appointment of a trustee is not a contractual relationship, the role of bankruptcy to consolidate all claims and assets in the hands of the estate more closely aligns with suretyship and reviving subrogation rather than insurance law. Applied to a fraudulent transfer, one can think of the trustee in reviving subrogation as one who is engaged to answer for the debt of the bankrupt to its creditors. Subrogated to the creditors, the trustee is also the sole rights holder and sole beneficiary of any outstanding liability between the transferee and the original rights holders, the creditors. The trustee does not, therefore, receive a mere duplicate claim and leave the creditors' prebankruptcy fraudulent-transfer claims unimpeded.

This sentiment is echoed in Frank Loveland's 1907 bankruptcy treatise, which emphasized that in bankruptcy "the right[s] which before the adjudication in bankruptcy belonged to the creditors was taken from them and given to the trustee."[148] In referring to subrogation but holding that a fraudulent transfer is effectively rescinded (i.e., unwound to the status quo ante), *Moore* stands not for the narrow idea that bankruptcy is *merely* subrogation (which would limit the trustee's rights to only those of the collective creditor body), but instead for the more general observation that upon appointment of the trustee the right to bring a fraudulent-transfer claim no longer exists in the hands of creditors—these rights have been subsumed by the trustee, as representative of the estate, in the manner most commonly associated with reviving subrogation.

---

[144] *Id.*

[145] *Id.* at 1364.

[146] *Id.*

[147] *Suretyship*, MERRIAM-WEBSTER, www.merriam-webster.com/legal/suretyship (last visited June 3, 2024).

[148] LOVELAND, *supra* note 59, at 469.

The history of fraudulent-transfer law both in and out of bankruptcy therefore suggests a long-held understanding that the trustee has a property interest in fraudulently transferred property and, at least during the pendency of the bankruptcy case, is the sole owner of fraudulent-transfer claims aimed at clearing the cloud over the title to such property. Fraudulent-transfer claims held by the creditors prebankruptcy are subrogated by the estate, and therefore the trustee does *not* hold a mere duplicate of the creditors' claims. But must *all* the creditors' rights to the transferred property be subject to subrogation? Some courts have asserted that the creditors continue to hold a remainder interest in the fraudulent-transfer claims which can be revived upon emergence should the claims be abandoned by the trustee.[149] Such arguments fail to account for the full scope of the Bankruptcy Code and the more likely conclusion that the Code does not merely subrogate some portion of creditor rights, but instead preempts all state-law fraudulent-transfer claims. This is the focus of Section V.

V. The Case for Full Preemption

If one accepts the more historically-consistent view that upon bankruptcy a fraudulent transfer itself is rendered void *ab initio*, with the fraudulent-transfer claims previously held by the creditors subrogated by the trustee, then the argument still remains that if the trustee takes no action and abandons the claim, whether by negligence or because the trustee is statutorily barred under the circumstances, then the creditors gain full ownership on account of their remainder interest (the "partial ownership" theory). This argument must fail. The state-law-rooted fraudulent-transfer claims no longer exist when preempted by the federal Bankruptcy Code. Section 544(b) may incorporate state law as the basis for its rule of decision, but it stands apart from state law as a unique federal provision. Congress's extensive legislation and adjustment of specific rights in bankruptcy generally, and regarding fraudulent transfers specifically, indicate a framework of regulation "so pervasive . . . that Congress left no room for the States to supplement it."[150] The modifications made by the Code to the trustee's ability to prosecute fraudulent-transfer claims incorporated into the estate by § 544(b) demonstrate clear Congressional policy objectives. If these

[149] Artesanias Hacienda Real S.A. de C.V. v. N. Mill Cap., LLC (*In re* Wilton Armetale), 968 F.3d 273, 284 (3d Cir. 2020) (holding that abandoned fraudulent-transfer claims flow back to the creditors) (citing COLLIER ON BANKR. ¶ 554.02[3] (16th ed. 2020)).

[150] Arizona v. United States, 567 U.S. 387, 399 (2012) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

changes should fall away after emergence from bankruptcy, then state law would present the opportunity to navigate around these purposes and "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[151] Instead, § 544(b) and the related Code provisions modifying such cause of action (e.g., §§ 106 and 546(e)) should be understood as fully preempting state law and any associated interest the creditors may have in the fraudulent-transfer claims.

The preemption of bankruptcy law over creditor's rights has deep historical roots. The Supreme Court's holding in *Glenny v. Langdon*, which asserted that creditors could *only* seek remedy through the trustee, applied "even if the [trustee] should erroneously or unwisely fail to take such possession, as the creditors may, by petition, apply to the court of original jurisdiction to compel him to carry out their wishes."[152] There was no time table or statute of limitations after which the creditor's rights were reincarnated; they were, for all relevant purposes, cut off. Modern day practitioners debate whether *Glenny*, which ruled on the Bankruptcy Act of 1867, would still structure the Supreme Court's interpretation of the modern Code.[153] But to hold otherwise would undermine Congress's policy decisions regarding the extent and scope of fraudulent-transfer law. To be sure, § 544(b) minimizes the distinction between federal and state fraudulent-transfer law by incorporating many of the rights and limitations found at state law,[154] but the Code nevertheless modifies these rights and limitations by restricting and expanding trustee power in other sections. Two such modifications that have presented challenging issues in recent years include §§ 546(e) and 106(a).

One of the more obvious accounts of how the Code's modifications to the fraudulent transfer power at federal law may run into conflict with state law can be seen in the recent *Tribune* case on its second trip before the Second Circuit.[155] In 2007, a private investor acquired Tribune Company through a

[151] Hillman v. Maretta, 569 U.S. 483, 483 (2013) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

[152] Glenny v. Langdon, 98 U.S. 20, 31 (1878).

[153] *Compare* Brief in Opposition at 28, Deutsche Bank Tr. Co. Ams. v. Robert R. McCormik Found. (2020) (No. 20-8) ("*In re Tribune Cert Petition*") ("Congress has revised the bankruptcy law several times since *Glenny* . . . but it has never displaced those decisions or altered the fundamental principle they articulate."), *with* Reply Brief for Petitioners at 7, *In re Tribune Cert Petition* ("Congress has long since repealed [the statute at issue in *Glenny*], making irrelevant the cases construing it.").

[154] 11 U.S.C. § 544(b) (allowing the trustee to avoid any transfer "that is voidable under applicable law . . .").

[155] *See In re* Tribune Co. Fraudulent Conv. Litig., 946 F.3d. 66 (2d Cir. 2019).

leveraged buyout. In consummating the buyout, Tribune borrowed over $11 billion; that amount, combined with the investor's equity contribution, was used to refinance some of Tribune's pre-existing debt and to acquire Tribune's equity from its existing shareholders.[156] When Tribune later filed for bankruptcy, certain creditors wished to pursue these payments to shareholders as actual or constructive fraudulent transfers. They argued that any limitations imposed by the Bankruptcy Code upon constructively fraudulent-transfer claims brought by the trustee under § 544(b) would not impact the creditors' ability to bring corresponding constructive fraud claims at state law. The limitation the trustee encountered came from § 546(e), which states that: "the trustee may not avoid a transfer that is a . . . settlement payment . . . made by or to (or for the benefit of) a . . . financial institution . . . or that is a transfer made by or to (or for the benefit of) a . . . financial institution in connection with a securities contract."[157] As the Second Circuit explained, "Section 546(e) thus expressly prohibits trustees et al. from using their Section 544(b) avoidance powers and (generally) Section 548 against the transfers specified in Section 546(e)."[158] The Second Circuit held that Tribune was a "financial institution" and therefore covered by the protections of § 546(e), placing transfers through Tribune to the previous equity holders beyond the reach of the trustee.[159] Undeterred, the appellant creditors argued that, even if the trustee could not bring a fraudulent-transfer claim in light of § 546(e), they could bring such claims under state fraudulent-transfer law. The states at issue had no comparable limitation for voiding transactions through financial institutions; creditor rights, they argued, should return "full flower after the bankruptcy ends" or after the trustee hits the statute of limitations to bring a fraudulent-transfer claim for the estate.[160] Critically, the bankruptcy court had granted the appellants relief from the automatic stay after the two-year statute of limitations for § 544(b) had run and, in any event, by the time of the Second Circuit's hearing the reorganization plan had been confirmed resulting in the lifting of the stay.[161]

After a thorough review of preemption law, the Second Circuit concluded that the creditors' state-law fraudulent-transfer claims were preempted by § 546(e).[162] The court noted the Constitution's explicit

[156] *Id.* at 72–73.
[157] 11 U.S.C. § 546(e).
[158] *Tribune*, 946 F.3d at 84.
[159] *Id.* at 77–78.
[160] *Id.* at 74, 85.
[161] *Id.* at 76–77.
[162] *Id.* at 97.

empowerment of Congress to enact bankruptcy laws, the "history of significant federal presence" in bankruptcy regulation, and the relationship between § 546(e) and the securities markets—another area "subject to extensive federal regulation"—to find that "there is no measurable concern about federal intrusion into traditional state domains."[163] Ultimately, the court concluded that "[t]he purposes and history of [§ 546(e)] necessarily reflect an intent to preempt the claims before us."[164]

Despite holding that state-law fraudulent-transfer claims that run counter to § 546(e) were preempted to the extent of the conflict, the court refused to address whether creditors could bring "claims not limited in the hands of a trustee *et al.* by Code Section 546(e) or by similar provisions such as Section 546(g)[.]"[165] In other words, the court refused to address whether the Code *fully* preempted the state-law claims or only partially preempted them, and therefore did not rule on the ultimate question of ownership and the nagging concern of creditors inheriting abandoned fraudulent-transfer claims. As noted previously, the court chalked this question up as a "metaphysical issue" and complained about the lack of clarity regarding "[w]hether, and to what degree, fraudulent conveyance claims become the property of a bankrupt estate."[166] That gap is precisely what this article aims to fill. Nevertheless, by holding that § 546(e) necessarily preempts certain state-law fraudulent-transfer claims to the extent of any conflict, the Second Circuit demonstrated the potential issues with a creditor's claim reverting to creditors unchanged following the debtor's entry into bankruptcy.

The Second Circuit's narrow reasoning may have in part been motivated by the desire to leave the holding in *Colonial Realty* intact. If the *Tribune* court had found for full preemption, it would have clashed with the Second Circuit's earlier holding in *Colonial Realty* on two fronts. First,

---

[163] *Id.* at 82–83 (citing United States v. Locke, 529 U.S. 89, 90 (2000)).

[164] *In re* Tribune Co. Fraudulent Conv. Litig., 946 F.3d. 66, 90 (2d Cir. 2019).

[165] *Id.* at 97. The Southern District of New York similarly ruled that § 546(g), which limits the trustee's ability to avoid transfers made "by or to a swap participant or financial participant, under or in connection with any swap agreement," must apply even to a litigation trust created for the benefit of creditors upon emergence from bankruptcy. *See generally* Whyte v. Barclays Bank PLC, 494 B.R. 196 (S.D.N.Y. 2013). The court found that allowing the litigation trust to circumvent this section would render it "a nullity." *Id.* at 199. Instead, the court found that § 546(g) preempts state law because "state law is an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 199–200.

[166] *Tribune*, 946 F.3d at 88; *see also supra* text accompanying note 9.

Colonial Realty held that the automatic stay applied to creditors' fraudulent-transfer claims as an "'action . . . to recover a claim against the debtor' within the meaning of § 362(a)(1)."[167] Put differently, creditors were barred postbankruptcy from pursuing their fraudulent-transfer claims because such claims were claims against the debtor. If *Tribune* would have found full preemption of creditors' state-law claims, then the creditors would no longer have any postbankruptcy interest in the claims and would be barred from bringing them by lack of standing. Such claims would have been supplanted by federal law and granted in full to the trustee. The referenced section of the Code's automatic stay provision would therefore be doing no work—the "action" barred by the automatic stay would cease to exist and therefore require no stay.

Second, if the *Tribune* court had held in favor of the full preemption theory without overturning *Colonial Realty*, then there would have been no statutory basis by which the fraudulent-transfer claims could be owned by the estate. This even though the trustee would be the sole party with any interest in such claims after the claims at state law are preempted. The statutory hook is lost because finding full ownership over the claims by the estate runs counter to the *Colonial Realty* court's conclusion that the prepetition debtor has no "legal or equitable interest" in the transferred property. According to this conclusion, the claims for recovery of such property are not brought into the estate via § 541(a)(1)—the provision which brings in "all legal or equitable interests of the debtor in property as of the commencement of the case."[168] But while fraudulently transferred property can become part of the estate once recovered under § 541(a)(3), other than § 541(a)(1), no provision in the Code provides a clear textual mechanism for the trustee to assert ownership over the claims themselves. In other words, the full preemption theory necessitates estate ownership of the fraudulent-transfer claims (because all other interests are preempted upon the bankruptcy filing), while *Colonial Realty* expressly removes the most appropriate statutory hook (§ 541(a)(1)) for such claims to be brought into the estate via § 541 (designating what constitutes property of the estate).[169] While it may make some policy sense for the estate to own such claims without a statutory hook, it is understandable that a modern court would prefer to avoid so blatantly

[167] Fed. Deposit Ins. Co. v. Hirsch (*In re* Colonial Realty Co.), 980 F.2d 125, 132 (2d Cir. 1992).

[168] 11 U.S.C. § 541(a)(1).

[169] *In re* Colonial Realty Co., 980 F.2d at 131.

cutting the tethers of textualism.[170] By narrowing their holding, the *Tribune* court avoided such statutory quandaries and the likely need to overturn *Colonial Realty*.

The next area where courts have found that the Code modifies the trustee's fraudulent transfer powers is § 106(a). While § 546(e) limits the trustee's powers as compared with state law creditors, § 106(a) expands them. Section 106(a) provides that "sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to . . . § 544."[171] In turn, § 544(b)(1) allows a trustee to avoid any transfer "that is voidable under applicable law by a creditor holding an unsecured claim . . . ." This incorporation of § 544(b)(1) into § 106(a) has led to multiple instances of appeals courts weighing in on whether a transfer to an entity with sovereign immunity, and against whom for that reason no unsecured creditor can sustain a fraudulent-transfer claim at state law, can still be brought by the trustee through a combination of § 544(b) and § 106(a). Most courts have concluded that the effect of § 106(a) is to broaden the powers of the trustee beyond what creditors could have brought at state law.[172] This expansion is understood as a deliberate policy choice by Congress made in response to two Supreme Court decisions finding that prior versions of § 106 did *not* abrogate sovereign immunity.[173] The Supreme Court is expected to weigh in on this issue in the 2024 term.[174]

---

[170] Nevertheless, the Second Circuit may have recently done just that. In *In re Nordlicht*, the Second Circuit found that fraudulent-transfer claims are property of the estate (though the court does not address whether this is full/preemptive ownership or the status of the creditor's underlying state-law claims). Stadtmauer v. Tulis (*In re* Nordlicht),115 F.4th 90, 104 (2d Cir. 2024). The court starts its analysis at § 541(a)(1) before seamlessly pivoting to a holding rooted in the supposed "general" nature of fraudulent-transfer claims. *Id.* at 22.

[171] 11 U.S.C. § 106(a).

[172] *Compare* Miller v. United States, 71 F.4th 1247, 1253 (10th Cir. 2023), *cert. granted*, 144 S. Ct. 2678 (June 24, 2024) (No. 23-824) (holding that Congress intended to "abolish the Government's sovereign immunity in an avoidance proceeding arising under § 544(b)(1), regardless of the context in which the defense arises"), Cook v. United States (*In re* Yahweh Ctr., Inc.), 27 F.4th 960 (4th Cir. 2022) (same), *and In re* DBSI, Inc., 869 F.3d 1004 (9th Cir. 2017) (same), *with In re* Equip. Acquisition Res. Inc., 742 F.3d 743, 747 (7th Cir. 2014) (holding that, because under Illinois fraudulent-transfer law no unsecured creditor could recover payments the debtor made to the IRS, neither could the trustee apply § 544(b) to bring a similar claim despite the existence of § 106(a)).

[173] *Miller*, 71 F.4th at 1253 (citing Cent. Virginia Cmty. Coll. v. Katz, 546 U.S. 356, 261 n.2 (2006) and United States v. Nordic Vill., Inc., 503 U.S. 30 (1992)).

[174] *See Miller*, *cert. granted*, 144 S. Ct. 2678 (June 24, 2024) (No. 23-824).

The Code therefore does more than merely "place[] the [trustee or] debtor in possession in the shoes of its creditors," as the Third Circuit popularly claimed in *In re PWS Holding Corp.*;[175] it both contracts and expands upon the rights of the trustee as compared with the state law creditor claims from which it draws the outline of its rule of decision. These alterations were each made by Congress in support of distinct policy preferences as part of a comprehensive regulatory scheme. The question then is, what happens to these policy preferences if the trustee abandons the claim?

If the creditor maintains an interest in the fraudulent-transfer claim following subrogation by the trustee, then, should such claims be abandoned by the trustee, they would revert to the creditors. "An abandoned claim, like abandoned property in general, flows to someone else. The abandoned property can flow back 'to any party with a possessory interest in it.'"[176] This means that if any party has a possessory interest in a fraudulent-transfer claim, then upon abandonment by the trustee that party should inherit the claim. The Third Circuit believed such claims should go "back to the creditors who had them before the bankruptcy."[177] But while the trustee's § 544(b) claim is derived in large part from the contours of what unsecured creditors can bring at state law, the alterations made by the Code mean that the creditors cannot inherit the same state-law claims that they originally lost upon filing without undermining Congressional policymaking. As the Second Circuit noted, it is simply "counterintuitive" for such claims to revert in an "unaltered form"[178]—logic dictates that the trustee cannot give what the trustee does not have. Instead, "[t]he nature of the power exerted by Congress, the object sought to be attained, and the character of the obligations imposed by the law"[179] all suggest full preemption of the state-law claims such that the creditors would have insufficient interest in the trustee's fraudulent-transfer claims to receive anything upon abandonment. This is true not merely because of the several policy preferences established by Congress in the Code, but also because of the historical understanding that the transfers themselves are rendered void upon bankruptcy and considering the purpose of the Code to consolidate all assets within the estate for equitable distribution (with any related claims subrogated by the trustee).

---

[175] 303 F.3d 308, 314 (3d Cir. 2002).

[176] Artesanias Hacienda Real S.A. de C.V. v. N. Mill Cap., LLC (*In re* Wilton Armetale), 968 F.3d 273, 284 (3d Cir. 2020) (citing COLLIER ON BANKR. ¶ 554.02[3] (16th ed. 2020)).

[177] *In re* Wilton Armetale, 968 F.3d at 285.

[178] *In re* Tribune Co. Fraudulent Conv. Litig., 946 F.3d 66, 88 (2d Cir. 2019).

[179] Hillman v. Maretta, 569 U.S. 483, 483 (2013) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

While it is conceivable from a policy perspective that state-law fraudulent-transfer claims have *only* been preempted in part, such that upon abandonment by the trustee the creditors may inherit their claims to the extent they conflict with *neither* federal nor state law, such an approach still runs counter to both the void theory of fraudulent transfers and the idea of subrogation of creditor claims to the trustee. As established by *Glenny* almost 150 years ago, the purposes of bankruptcy are best furthered when the trustee has sole and exclusive power to act upon or abandon fraudulent-transfer claims.[180] Under the void and subrogation theories advocated for herein, the trustee receives *all* fraudulently transferred property and takes *all* rights to clear the cloud over such property away from the creditors, leaving nothing in the hands of creditors. There is also a significant risk that partial preemption may still undermine Congressional policymaking. In key Code sections limiting the powers of the trustee, the text refers only to the "trustee" and not the holder of the fraudulent-transfer claim more generally. Any strict textualist read on a partial preemption theory must contend with the possibility that the creditors could achieve an end-run around Congressional intent after emergence due to the fact that the Code does not expressly apply the trustee's limitations to the creditors.[181] Therefore, interpreting the Code as granting any remainder interest to the creditors, even if partially preempted, circumvents the clear policy preferences of Congress and undermines their efforts to regulate in an area long-subject to federal control and constitutionally established as an area of federal power.

If a trustee cannot or will not monetize certain fraudulent transfer claims—through judgment, settlement, or sale[182]—then rather than affirmatively abandon these claims and expect them to revert to their creditors,[183] a trustee should instead allocate such claims to creditors, likely

[180] As that court noted, "if one creditor may sue in such a case [when the trustee fails to properly pursue a fraudulent transfer action], then all may sue, and the result might be that the proceedings in bankruptcy would be transferred not only to the Circuit Court, but to every State court within whose jurisdiction a defendant may reside." Glenny v. Langdon, 98 U.S. 20, 30 (1878). The implied result of such disjointed bankruptcy proceedings would be to undermine efforts to consolidate the debtor's assets for fair distribution to all creditors.

[181] *See, e.g.*, 11 U.S.C. §§ 546(e), 546(g).

[182] The sale of avoidance actions, including fraudulent transfer claims, has been approved in a handful of circuits. *See, e.g.*, Briar Cap. Working Fund LLC v. Remmert (*In re* S. Coast Supply Co.), 91 F.4th 376, 381 (5th Cir. 2024); Farms v. ARKK Food Co. (*In re* Simply Essentials), 78 F.4th 1006, 1011 (8th Cir. 2023); Simantob v. Claims Prosecutor, LLC (*In re* Lahijani), 325 B.R. 282, 288 (9th Cir. BAP 2005).

[183] *See In re* Wilton Armetale, 968 F.3d at 284 (noting that "if the trustee wants to

as part of a litigation trust, within the distributions under the Plan.[184] Such claims could only be distributed within the ambit of the Code's waterfall requirements[185] and would not provide the creditors with any greater or lesser power to bring such claims than what the trustee already held. The creditors would effectively be receiving new federal-law claims under the Plan in recognition that their state-law claims against the transferees no longer exist once the debtor enters bankruptcy; this ensures that Congress's policy preferences as expressed in the federal Bankruptcy Code are respected and prevents any end-runs around the bankruptcy process.

VI. Countering the Alternative

A. Problems with Rejecting the Void Theory of Fraudulent Transfers

No modern court has explicitly held that bankruptcy law fully preempts creditors' state-law fraudulent-transfer claims. But some courts, most explicitly the Fifth Circuit in *In re MortgageAmerica Corp.*, have embraced the void theory of fraudulent transfers and found that prebankruptcy fraudulently transferred property is rendered part of the bankrupt's estate upon filing due to some continuing interest of the debtor in said property. As that court put it in their application of § 544(b) to actions under the Texas Fraudulent Transfers Act (which mirrors the UFCA in all relevant respects):

> An action under the Fraudulent Transfers Act is essentially one for property that properly belongs to the debtor and which the debtor has fraudulently transferred in an effort to put it out of the reach of creditors. The transferee may have colorable title to the property, but the equitable interest—at least as far as the creditors (but not the debtor) are concerned—is considered to remain in the debtor so that creditors may attach

---

abandon any property during the bankruptcy, he must do so overtly") (citations removed).

[184] A trustee may have insufficient assets to pursue a valid avoidance action claim to judgment or may make the value determination that a de minimis claim cannot justify the expense of litigation. In such circumstances, sale of the claims for fair market value may provide the best recovery for creditors. But in circuits where the ability of the trustee to sell such claims is itself contested, or where the fair market valuation of the claims is contested by creditors, affirmative distribution under the Plan is preferable to abandonment.

[185] *See* 11 U.S.C. §§ 1129, 726 (requiring that higher priority classes of creditors either accept the Plan or be paid in full before lower priority creditors can receive anything under the Plan).

> or execute judgment upon it as though the debtor had never transferred it. We think that when such a debtor is forced into bankruptcy, it makes the most sense to consider the debtor as continuing to have a "legal or equitable interest[ ]" in the property fraudulently transferred within the meaning of section 541(a)(1) of the Bankruptcy Code. The automatic stay under section 362(a) thus applies and prevents a creditor from continuing to pursue a cause of action under the Texas Fraudulent Transfers Act after a petition for bankruptcy has been filed.[186]

Other courts, however, including the Second and Third Circuits, have reached different conclusions. Because the void theory of fraudulent transfers is a threshold issue to the theory of full preemption laid out here, this section aims to address their concerns and point out the incongruous and problematic consequences of such views. Afterward, this section addresses how the constitutional due process concerns that have arisen in some literature in connection with the void theory are likely overblown in the context of bankruptcy.[187]

In *In re Colonial Realty Co.* the Second Circuit, relying heavily on *In re Saunders*,[188] refuted the logic of the Fifth Circuit in *MortgageAmerica*.[189] The Second Circuit determined that an avoidance action brought by the FDIC, who was essentially a creditor, to recover fraudulently transferred property was barred by the automatic stay in accordance with § 362(a)(1) as an "action . . . to recover a claim against the debtor," and *not*, as the Fifth Circuit concluded, an "act to obtain possession of property of the estate" in accordance with § 362(a)(3).[190] Regardless of whether § 362(a)(1) applies to

---

[186] *In re* MortgageAmerica Corp., 714 F.2d 1266, 1275 (5th Cir. 1983) (citing COLLIER ON BANKR., p 70.14, at 130–31 (14th ed. 1978)).

[187] *See* Carlson, *supra* note 69, at 81 (opining "that the 'void' theory of fraudulent transfer is probably unconstitutional"). Professor Carlson's concern stems from the possibility of creditors acting upon a void transfer by seizing the property in the hands of the transferee without the transferee having the opportunity to refute claims of a fraudulent transfer in court. Similar concerns exist if the automatic stay restricts the transferee's right to alienation upon filing for bankruptcy. *See infra* text accompanying notes 217–225.

[188] 101 B.R. 303 (Bankr. N.D. Fla. 1989).

[189] Fed. Deposit Ins. Co. v. Hirsch (*In re* Colonial Realty Co.), 980 F.2d 125, 131 (2d Cir. 1992).

[190] *Compare In re Colonial Realty Co.*, 980 F.2d at 132, *with In re MortgageAmerica Corp.*, 714 F.2d at 1275. The Second Circuit recently made unequivocally clear that fraudulent-transfer claim*s* are property of the estate, but this says nothing as to the transferred

fraudulent transfers, if § 362(a)(3) does *not* apply to fraudulent transfers, then the transferee, who need not be a creditor, is not necessarily barred from disposing of the property immediately upon hearing of the debtor's bankruptcy petition. Such an action would not violate the automatic stay because the transferred property would not constitute property of the estate. If the transferee sells said property to a good-faith purchaser for value, such property would be unrecoverable by the trustee.[191]

While it is true that the value obtained from any sale to a good-faith purchaser for value may be reached by the trustee under § 550,[192] this does not adequately protect the creditors or ensure maximization of the estate. The right to recover the value of transferred property need not result in cash recovery, particularly where the transferee is an insider of the bankrupt entity and facing the prospect of bankruptcy themselves. In the bankruptcy of the transferee, the unsecured fraudulent-transfer claim brought by the original transferor's estate may be worth mere pennies on the dollar in terms of actual cash recovered. Nor can the trustee necessarily recover the proceeds of the transferred property if, for example, the transferee sold the fraudulently transferred property and gifted the proceeds (even if the gift recipient was an insider). Bankruptcy Code § 541(a)(6) states that proceeds of property of the estate also constitute property of the estate; but if the transferred property is not property of the estate until it is recovered, as was found to be the case in *Colonial Realty*, then proceeds of the transferred property would not be rendered property of the estate either and so would not be recoverable absent some other claim.

The Bankruptcy Code does not provide a claim which necessarily tracks proceeds from the sale of fraudulently transferred property. The most obvious place to check, § 550(a) (the section granting the trustee recovery rights for fraudulent transfer claims under §§ 544 and 548), is no solution. Section 550(a) grants the trustee the right to recover the "value" of transferred property from the initial and certain subsequent transferees but not to trace the property's "proceeds." Some courts have been loath to equate the two terms. According to the Tenth Circuit, "§ 541 demonstrates that when Congress intended to include proceeds, it knew how to do so. . . . If [§ 550's] intent was to provide the trustee the power to trace proceeds derived from the property against any person who received those proceeds as payment for

---

property itself. *See* Stadtmauer v. Tulis (*In re* Nordlicht), 115 F.4th 90, 93 (2d Cir. 2024).

[191] *See* 11 U.S.C. § 550(b).

[192] The trustee can recover such value, if the court so orders, from the initial transferee, or "any immediate or mediate transferee of such initial transferee." *Id.* § 550(a).

goods or services, Congress could have said so."[193] That court concluded that the trustee *lacks* the separate power to trace and recover the proceeds from a fraudulent transfer.[194] In reaching this conclusion, the Tenth Circuit impliedly agreed with the Second Circuit's position in *Colonial Realty* that fraudulently transferred property is not property of the estate; if they had disagreed, then the proceeds of such property would have necessarily been part of the estate as well.[195] The resultant gap in a trustee's ability to trace proceeds can prove problematic.

For example, in *In re Giant Gray Inc.*, a CEO obtained convertible preferred stock from his distressed company and sold it for fifteen million dollars to a single purchaser.[196] He then transferred, as part of a referral agreement, five million in proceeds from the stock sale to an insider of the entity that purchased the stock.[197] The court found that the stock had been fraudulently transferred by the debtor company to the CEO but that the cash from the sale was merely proceeds of fraudulently transferred property.[198] Splitting from the Tenth Circuit, the court in *Giant Gray* concluded that the debtor had an interest in the fraudulently transferred stock *prior* to the bankruptcy and therefore had an interest in the stock's proceeds, rendering such proceeds part of the estate and allowing for recovery of the five million dollars from the insider—in other words, *Giant Gray* accepted the void theory of fraudulent transfers advocated here.[199]

But if a similar fact pattern to the *Giant Gray* case were to play out in the Second or Tenth Circuits, in accordance with the logic of *Colonial Realty*,

---

[193] Rajala v. Spencer Fane LLP (*In re* Generation Res. Holding Co.), 964 F.3d 958, 968 (10th Cir. 2020).

[194] *Id.* at 968.

[195] *See* 11 U.S.C. § 541(a)(6).

[196] Cage v. Davis (*In re* Giant Gray, Inc.), 629 B.R. 814, 826 (Bankr. S.D. Tex. 2020).

[197] *Id.*

[198] *Id.* at 843–44.

[199] *In re* Giant Gray, Inc., 629 B.R. at 843. Much of this is implied by the court's read of two cases from within the Fifth Circuit (*In re* Wiggains, 848 F.3d 655 (5th Cir. 2017) and Village Ridge Roofing and Constr., LLC v. Silver State Holdings (*In re* Silver State Holdings), No. 19-41579, 2020 WL 7414434 (Bankr. N.D. Tex. Dec. 17, 2020)), which viewed proceeds as property of the estate. *Id.* at 844. The court also based its holding on a unique read of § 550(a)(2), diverging once more from *In re Generation Resources Holding Co.*, that the "immediate and mediate transferees of such initial transferee" from whom the trustee may recover need not be recipients of the fraudulently transferred property but could be recipients of the value of such fraudulently transferred property—including cash proceeds. This is a somewhat contorted read of the statute but beyond the scope of this article.

a court would struggle to recognize how the proceeds of transferred property, property which per their reasoning does not constitute property of the estate and whose proceeds are therefore also not property of the estate, could ever be traced by the trustee. The trustee's ability to trace the *value* of transferred property is limited to the initial, immediate, or mediate transferees *of the avoidable transfer*;[200] the transfer of proceeds to some separate entity is not the transfer to be avoided by the trustee in accordance with § 550. When the initial, immediate, or mediate transferee of the fraudulently transferred property no longer has sufficient value to resolve a fraudulent-transfer claim, or when the fraudulently transferred property or its value is otherwise unrecoverable, this inability to reach any proceeds of the fraudulent transfer once they have been transferred to some third party can leave a gaping hole in the estate.

Applying the Second and Tenth Circuits' logic to the *Giant Gray* fact scenario, the trustee would have no means of recovering the full value of the fraudulently transferred stock. Neither the stock nor its value was recoverable from any subsequent transferee after having been sold through a financial institution (which, due to § 546(e), renders such transactions unavoidable). Any proceeds from such sale still in the hands of the CEO would be "value" recoverable by the trustee, but the five million dollars delivered in accordance with the "referral agreement" to an insider of the stock purchaser would no longer be recoverable value. The insider would not be an initial, immediate, or mediate transferee *of the fraudulently transferred stock* because the five million is merely proceeds of that stock. As a result, the estate would be left with a five-million-dollar deficit (less any amount that could be recovered from the CEO). This example need not be capped at five million. A devious CEO playing out the *Giant Gray* scenario in the Second or Tenth Circuits could pass *all* the proceeds from a fraudulent transfer to some separate entity and, under similar circumstances, siphon the entirety of the stock's value (or the value of any other fraudulently transferred property which may be rendered unrecoverable for one reason or another) away from the estate.

In short, by holding that fraudulently transferred property is *not* subject to the automatic stay as property of the estate, *Colonial Realty* created a scenario where certain interested parties may race to dispose of fraudulently transferred property—potentially depositing the proceeds of such property with an insider—before the trustee can file suit to bring said property or its value into the estate. If such deposit can occur at any time before the trustee sues, even *after* the filing of bankruptcy and imposition of the automatic stay,

[200] 11 U.S.C. § 550(a)(1)–(2).

then the full value of the fraudulently transferred property could slip away from the estate. This runs counter to the purpose of the automatic stay acknowledged by the court in *Colonial Realty* of preventing "a chaotic and uncontrolled scramble for the debtor's assets in a variety of uncoordinated proceedings in different courts."[201]

In support of this odd conclusion, *Colonial Realty* notes that "[i]f property that has been fraudulently transferred is included in the § 541(a)(1) definition of property of the estate, then § 541(a)(3) is rendered meaningless with respect to property recovered pursuant to fraudulent transfer actions."[202] Statutory redundancy applicable only to a specific subset of the broad sweep of property subject to these provisions is likely not reason enough to ignore hundreds of years of consistent statutory interpretation and the functional inconsistencies that result from an opposite finding. But in any event, even this alleged inconsistency can be resolved by acknowledging the full breadth of § 550, to which § 541(a)(3) refers. As alluded to above, § 550(a) allows the trustee to recover "the property transferred, or, if the court so orders, the value of such property." Value is different from proceeds.[203] And so recouping the value of fraudulently transferred property is a special remedy available to the courts that exceeds the property interests of the debtor rendered property of the estate by either § 541(a)(1) or (a)(6).[204] As a result, when viewed in light of the void theory of fraudulent transfers, § 541(a)(3) is not meaningless with respect to all property subject to recovery pursuant to fraudulent transfer actions, but is instead redundant only to the extent that the trustee recovers the property actually transferred or its proceeds—recovered value is only property of the estate due to the existence of § 541(a)(3).

---

[201] Fed. Deposit Ins. Co. v. Hirsch (*In re* Colonial Realty Co.), 980 F.2d 125, 133 (2d Cir. 1992).

[202] *Id*. at 131 (quoting *Saunders*, 101 B.R. at 305). 11 U.S.C. § 541 states that property of the estate includes:

> (a)(1) . . . all legal or equitable interests of the debtor in property as of the commencement of the case.
>
> . . . .
>
> (3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550 [including property recovered pursuant to sections 544 and 548], 553, or 723 of this title.

[203] *See supra* text accompanying note 193.

[204] This recovery ability is not unique to bankruptcy. Creditors in UFTA/UVTA states can also recover the value of the asset transferred, distinct from its proceeds, in accordance with Section 8(b) of the same.

Unlike the Second Circuit in *Colonial Realty*, which focused upon the transferred property, the Third Circuit in *Cybergenics* focused upon whether the claim itself was subrogated by the trustee for the benefit of the estate or remained an asset of the creditors.[205] In *Cybergenics*, the court evaluated whether asset sale language, which included the sale of all assets of the debtor in both its prepetition and debtor-in-possession capacity, included the sale of fraudulent-transfer claims pursuant to § 544(b).[206] The court first notes that prepetition fraudulent-transfer claims were assets of the creditors and never assets of the prepetition debtor.[207] The opinion then concludes that "[t]he avoidance power itself, which we have analogized to the power of a public official to carry out various responsibilities in a representative capacity, was likewise not an asset of [the debtor in its capacity as debtor in possession]."[208] The court viewed § 544(b) as allowing the trustee to bring fraudulent-transfer claims on behalf of, and for the benefit of, the creditors but without any designation of ownership over the claim.[209] The court did not even go so far

[205] A more recent case ruled that fraudulent-transfer claims are general claims and therefore property of the estate. Artesanias Hacienda Real S.A. de C.V. v. N. Mill Cap., LLC (*In re* Wilton Armetale), 968 F.3d 273, 282–83 (3d Cir. 2020); *see also supra* text accompanying notes 40–42. But because that court declined to overrule *In re* Cybergenics Corp., 226 F.3d 237 (3d Cir. 2000), the inconsistencies in *Cybergenics* are addressed here.

[206] *In re Cybergenics*, 226 F.3d at 241.

[207] *Id.* at 245.

[208] *Id.*

[209] *Id.* at 244 (holding that the debtor's ability to act "in the overshoes" of a creditor pursuant to § 544(b) "is no more an asset of Cybergenics as debtor in possession than it would be a personal asset of a trustee"). An alternative read of the opinion could be that the court intended to distinguish between what a trustee owns and what is owned by the estate. If so, that effort is mistaken. Bankruptcy Code § 323, which designates the trustee as "the representative of the estate," suggests that, for purposes of contract interpretation, there should be no distinction between the two. True, a trustee, as the estate's representative, cannot use the property in violation of their fiduciary duties to the estate. Similar restrictions apply to a debtor in possession, which the Code makes equivalent to the trustee in all relevant respects via § 1107. But to make this an impediment to ownership for purposes of contract interpretation is to render meaningless any contract provision regarding property of the trustee or debtor in possession because, excepting their role as representative of the estate, these entities serve no purpose and own nothing. Therefore, when a contract includes the sale of all property of the debtor in possession for purposes of maximizing the value of the estate, courts should view such provisions as aligning with the debtor in possession's role as representative of the estate and not render the statement meaningless by stressing the restrained nature of that role. Giving credit to the court that this strained form of contract interpretation was not their intent, that leaves only the conclusion that they intended to interpret § 544(b) as providing no ownership of the fraudulent-transfer claim to the *estate* because such ownership is retained by creditors.

as to conclude that the trustee owned a duplicate claim, but instead found that *no* fraudulent-transfer claims were owned by the estate.

In support of the conclusion that creditors retain the ultimate ownership over fraudulent transfer actions, *Cybergenics* points out how previous courts have limited a debtor's exercise of avoidance powers when the action would benefit the debtor and *not* the creditors. The court cites two examples; first, *In re Wellman*, in which the court held that a debtor in possession could not bring a fraudulent-transfer claim under § 548 to void a prebankruptcy sale of stock that skyrocketed in value shortly after the sale.[210] Such recovery would have exceeded the claims of creditors and resulted in a boon to the postpetition debtor.[211] The *Wellman* holding is based in large part upon § 550, which "limits the trustee by permitting recovery only for the benefit of the estate."[212] In the second case, *In re Vintero Corp.*, the court held that a debtor in possession could not use the powers of a judgment lien creditor (under the Bankruptcy Act, but with similar effect as the present § 544(a) of the Code) to void an unperfected lien securing a creditor's nonrecourse claim in order to reap a windfall for the debtor.[213] Unlike the *Wellman* court, the *Vintero* court based its holding on principles of equity, concluding that the security interest may have been void with respect to other creditors, but was valid as between the debtor and the secured nonrecourse creditor.[214]

In both *Wellman* and *Vintero*, the courts were concerned with a debtor in possession exercising their powers to increase the estate beyond what third-party creditors needed to recover on their claims and then inheriting the surplus upon emergence from bankruptcy at the expense of the transferee. In *Cybergenics*, however, the Third Circuit stretches this concern too far when it concludes that therefore such claims cannot be property of the trustee or debtor in possession in their capacity as representatives of the estate.[215] The trustee or debtor in possession may only "own" claims, or anything else, to

---

[210] Wellman v. Wellman (*In re* Wellman), 933 F.2d 215, 218 (4th Cir. 1991).

[211] *Id.* at 217.

[212] *Id.* at 218.

[213] Vintero Corp. v. Corporacion Venezolana De Fomento (*In re* Vintero Corp.), 735 F.2d 740 (2d Cir. 1984).

[214] *Id.* at 742 ("[The debtor] suffered no prejudice because of the lapse in filing, and we see no reason why it should benefit from such lapse. To the extent that other creditors of [the debtor] are not affected adversely by enforcement of [the nonrecourse creditor's] security interest, there is no reason why such interest should not be enforced.") (citations removed).

[215] *See supra* note 209.

the extent they act in line with their fiduciary duties to the estate. As claimants upon the estate, this generally benefits the creditors. Issues arise only when the distinct legal entity of the debtor in possession ceases to exist upon emergence, and the postpetition debtor resumes their ownership of any remaining assets. These cases suggest that courts anticipate this event and preemptively apply the *in pari delicto* defense to bar the debtor in possession from recovering property not for the benefit of the estate, but for the benefit of the debtor postemergence. Arguably, when the debtor in possession acts in this capacity, they are violating (or at least exceeding) their role per § 323 (applied to the debtor in possession via § 1107) to act as a representative of the estate. Likely the proper place for this principle is in the realm of equity, as held by the *Vintero* court. When this principle is worked into § 550, as done by the *Wellman* court, it can create unintended confusion that impairs the trustee or debtor in possession's ability to maximize the value of the estate by disposing of fraudulent-transfer claims in line with their best (and sole) judgment—a principle which the Supreme Court found to be most aligned with the purposes of bankruptcy 150 years ago in *Glenny*.[216] The Third Circuit in *Cybergenics* is guilty of this confusion.

A. Due Process Concerns

What of constitutional due process concerns limiting the ability of the trustee to impair the transferee's property interest prior to a court hearing? "The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions."[217] As stated previously, under the "void" theory of fraudulent transfers, a fraudulent transfer is void at law and voidable in equity.[218] Some scholars and courts have argued that, at least prior to bankruptcy, creditors cannot act on a void theory and levy directly against the transferred property without the transferee receiving the opportunity to be heard in court.[219] This explains in part why, even after filing for bankruptcy, a transferee retains their possessory interest in the property, clouding the title until it is cleared by the trustee. Meanwhile, the trustee obtains sufficient legal interest in the conveyed property for it to be covered by the automatic stay as property of the estate pursuant to § 362(a)(3). When the trustee moves to strip

[216] *See supra* text accompanying note 106.
[217] Fuentes v. Shevin, 407 U.S. 67, 80 (1972).
[218] *See supra* text accompanying note 73.
[219] *See* Carlson, *supra* note 69, at 28–30.

the transferee of their possessory interest in the property, or to otherwise recover the value of the property, the transferee will have their day in court. Therefore, prior to the transferee losing their possessory interest, they have an opportunity to be heard in satisfaction of constitutional due process.

But issues still arise if we consider the possibility that the transfer may not have been fraudulent, and the transferee may have more than a mere possessory interest. They may also have a right to transfer the property that is then infringed upon by the automatic stay. At the least, a transferee who asserts that the property was not fraudulently transferred will also argue that any restriction on their right to alienation affects their property interest and therefore cannot occur automatically, as by the automatic stay, but will necessitate an opportunity to be heard. Though due process concerns are always a balancing act,[220] the Supreme Court has held that similar restrictions on alienation, such as "attachments, liens and similar encumbrances . . . are sufficient to merit due process protection."[221] But the Supreme Court has also restrained itself with respect to infringing upon the automatic stay.[222] In *Wright v. Vinton Branch of the Mountain Trust Bank of Roanoke*, the Supreme Court offered a narrow holding on a similar issue; because it applied to the Bankruptcy Act and not the Bankruptcy Code, its holding may no longer be binding. Nevertheless, the Court's reasoning is directly applicable to the present discussion and likely provides a strong bellwether for how the Court may reason through a similar case under the Code.

In *Wright*, the Court upheld a stay relatively specific to the rights of secured lenders to an agricultural debtor under the Bankruptcy Act, but they applied a general reasoning as to why the stay did not constitute a due process violation. The Court's holding leaned in large part on the relative balancing of the degree of impairment of secured creditors' property rights—in this case, weighing a three-year moratorium on their right to foreclose on the

---

[220] *See* Connecticut v. Doehr, 501 U.S. 1, 10 (1991) (A determination of whether due process concerns arise necessitates a "threefold inquiry requiring consideration of 'the private interest that will be affected by the official action'; 'the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute safeguards'; and lastly 'the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.'") (citing Mathews v. Eldridge, 424 U.S. 334, 335 (1976)).

[221] *Connecticut*, 501 U.S. at 12.

[222] Wright v. Vinton Branch of the Mountain Tr. Bank of Roanoke, 300 U.S. 440, 470 (1937) (upholding against due-process challenges the Bankruptcy Act's three-year stay of foreclosure of certain farm property).

property against the broad Bankruptcy powers conferred to Congress via the Constitution's Bankruptcy Clause.[223] In light of the broad powers of Congress and the bankruptcy courts to impair property rights generally, and the sweep of the Bankruptcy Clause specifically, the Court concluded that no "unreasonable modification" of creditor rights was present to uphold a Fifth Amendment due process challenge.[224] The broad Constitutional, historic, and statutory powers of the Bankruptcy Clause and bankruptcy courts persist today under the Bankruptcy Code just as strongly as under the Bankruptcy Act at issue in *Wright*. Compared to the impairment before the Court in *Wright*, the impairment of a transferee's right to alienation of the fraudulently conveyed property—a right which can be reclaimed by seeking relief from the automatic stay pursuant to § 362(d)—seems minimal. The three-year impairment in *Wright* is certainly *more* significant than the 30-day delay for a preliminary hearing that a transferee faces today, particularly when the infringed right still leaves the transferee in possession of the property.[225]

Given the conclusions the Supreme Court reached in *Wright* that a stay may not be a due process violation if it is sufficiently narrow and provides for timely access to judicial review, it is likely the Court would reach similar conclusions with respect to the automatic stay infringing upon a transferee's right to alienate themselves from, or otherwise dispose of, what is at least allegedly the debtor's property.[226] And so while it is an open point whether due process concerns should limit the application of the automatic stay to the transferee, these concerns are not so great as to necessitate courts like that in *Colonial Realty* to embrace the chaos inherent in the alternative reading that fraudulently transferred property is subject to immediate and unconstrained disposal by the transferee.

---

[223] *Id.* at 460; *see also supra* text accompanying note 93. The Court also utilized the canon of constitutional avoidance to interpret the statute in a way that minimized the infringement of creditor rights; but in any event, the Court still allowed for the automatic imposition of the three-year moratorium and required a court hearing to shorten this period. *Wright*, 300 U.S. at 461.

[224] *Id.* at 470.

[225] 11 U.S.C. § 362(e) (granting relief from the automatic stay within 30 days of a request under § 362(d) unless the court, after notice and hearing, orders its continuation).

[226] *But see* Rajala v. Gardner, 709 F.3d 1031, 1039 (10th Cir. 2013) (noting that due process concerns reinforced their conclusion that the fraudulently transferred property, as distinct from fraudulent-transfer claims, cannot be part of the estate).

VII. Conclusion

Almost 150 years ago, the Supreme Court understood that "[p]roperty fraudulently conveyed vests in the [trustee], who may recover the same and distribute its proceeds" to the estate's creditors.[227] If the trustee should fail to act, the creditors could not pursue their own claims independently at state law.[228] There was no mention of a remainder interest springing to life in the hands of the creditors after the bankruptcy, but nor was there any mention of federal bankruptcy law preempting state fraudulent-transfer law. At the time, the more explicit language in the Bankruptcy Act of 1867 reinforced the Court's understanding of fraudulent transfers being void at law even as they were voidable in equity. Consistent language in the Bankruptcy Act of 1898 and its subsequent amendments built on this foundation but did not change it. Then the Bankruptcy Code inexplicably altered key language by describing fraudulent transfers as "avoid[able] by the trustee" rather than "null and void" upon filing.[229] Congress provided no discernible justification for this change; rather, the only clues to the alteration—a direct reference to the preceding Bankruptcy Act and incorporation of the holding in *Moore v. Bay*—suggest that Congress had no intention of overturning over 100 years of precedent.[230] Significant practical consequences result from any other read of § 544(b). Such interpretations collectively undermine the value of the estate and the broader purposes of bankruptcy law by threatening to pitch the creditors against one another.[231] Additionally, by embracing alternative reads of §§ 548 and 544(b) and finding fraudulently transferred property as beyond the estate or fraudulent-transfer claims as property of the creditors, courts risk straining the logic behind whether a claim constitutes a derivative/general claim owned by the estate or a direct/particular claim properly pursued by creditors outside of bankruptcy court. This court-created method of determining the scope of estate claims is dependent upon fraudulent-transfer law as the "paradigm"

---

[227] Glenny v. Langdon, 98 U.S. 20, 28 (1878).

[228] *Id.* at 29–30 ("*Prima facie* the bankrupt is divested of the whole estate, nor have the creditors any right to sue; but if it be represented that the assignees will not sue, the court having jurisdiction of the matter may direct the recusant assignees to proceed, or may give the bankrupt or a creditor the right to institute the suit in the name of the assignee.").

[229] *Compare* 11 U.S.C. § 544(b), *with* Bankruptcy Act of 1867 § 13, *and* Bankruptcy Act (as amended 1938) § 70(e).

[230] *See supra* text accompanying notes 114–124.

[231] *See supra* Section VI.

example of a derivative/general claim and demands a more coherent logical foundation.[232]

By suggesting that the Bankruptcy Code preempts state fraudulent-transfer law, this article has no intention of revolutionizing the relationship between federal and state law in this space. Rather, preemption is the best way to maintain the historical relationship between the trustee and creditors while also incorporating the several policy preferences brought by Congress to the Bankruptcy Code.[233] Preemption also makes the Second Circuit's "metaphysical issue"[234] clear: the trustee, as representative of the estate, is the sole owner of a fraudulent-transfer claim. Moreover, when owned entirely by the trustee, fraudulent-transfer claims are unquestionably both general and derivative with respect to the creditors.

Does this settle things for the practitioner? Not quite. If a fraudulent transfer can be brought as a claim in tort, the assertion made here that the trustee owns a fraudulent-transfer claim in equity is of little consequence. If a creditor can ignore the debtor's bankruptcy and sue the transferee for conspiracy to commit the tort of fraud, then it matters little that their state-law fraudulent-transfer claims in equity have been preempted by the Code.[235] The argument that § 544(b) preempts state fraudulent-transfer claims relies in large part upon the property transfer being deemed null and void. This is an equitable concept derived from the equitable roots of fraudulent-transfer law.[236] Tort does not arise in equity, and it is not concerned about returning property. Instead, tort focuses upon the damages a party suffers because of another party's wrongful act.[237] While a trustee can arguably bring *some* fraudulent-transfer claims in tort (in jurisdictions that recognize such a claim) under § 544(a),[238] these would likely be limited to claims of actual fraud. This is because, in states that have enacted the UFTA or its progeny, future creditors cannot bring a fraudulent-transfer claim because of constructive

---

[232] *See supra* text accompanying notes 44–45.

[233] *See, e.g.*, 11 U.S.C. §§ 546(e), 106(a), 546(g).

[234] *In re* Tribune Co. Fraudulent Conv. Litig., 946 F.3d 66, 88 (2d Cir. 2019).

[235] *See* Carlson, *supra* note 71, at 1097 ("If fraudulent transfer is a tort, then conspiracy to commit that tort is also a tort.").

[236] *See supra* text accompanying notes 59–74.

[237] *See* Carlson, *supra* note 71, at 1186 (noting that arguments for avoidance are an equitable remedy not relevant in tort law).

[238] *See* Mason & Smoots, *supra* note 54, at 459 ("[Section] 544(a) arguably affords an estate representative authority to bring [a tort claim on aiding and abetting a fraudulent transfer] provided that it is a recognized cause of action under applicable non-bankruptcy law and would be available under that applicable law to every Judgment Lien Creditor of the debtor.").

fraud. Therefore, a trustee empowered with the ability to bring any claim that a judgment lien creditor could bring on the eve of bankruptcy, as established by § 544(a), may not be able to reach tort claims rooted in constructive fraud that occurred prior to bankruptcy.[239] Nor is it clear that if the trustee brought a fraudulent-transfer claim in tort on behalf of the estate that it would subrogate the creditor's own tortious claims—if fraudulent transfers are a tort then the trustee may be forced to fight for value against the creditors themselves.[240]

Prior to the Supreme Court's decision in *Granfinanciera*, this concern would have been unfounded.[241] A cursory list of the few courts who have entertained the idea of a fraudulent transfer tort could be readily dismissed.[242] But in holding that a creditor not only could bring a claim for money damages resulting from a fraudulent transfer, but that such a claim was established at common law as far back as 1791—thereby requiring a jury trial—the Supreme Court lent credence to the assertion that fraudulent-transfer claims can be brought at common law under a tort theory. If this assertion applies to creditors as well, then a host of "paradoxes and puzzles" arise to limit the ability of the trustee to consolidate and address creditor claims in the bankruptcy proceeding.[243] While further research is encouraged on this front, the answer is already clear: for bankruptcy to continue to bring peace to

---

[239] *See* UFTA § 4. This is not meant to infer that constructive fraud claims can necessarily be brought in tort, which may not be the case but is beyond the scope of this article.

[240] *See* Carlson, *supra* note 71, at 1188.

[241] *See supra* note 132.

[242] *See, e.g.*, Hoskins v. Citigroup, Inc. (*In re* Viola), 469 B.R. 1, 7 (9th Cir. B.A.P. 2012), *aff'd*, 583 Fed. App'x 669 (9th Cir. 2014) (observing that in California the rights of an execution lien creditor "include standing to bring a claim for relief for aiding and abetting fraudulent transfers against a third party"); Paoian v. Greenfield (*In re* Restaurant Dev. Group, Inc.), 397 B.R. 891, 897–98 (Bankr. N.D. Ill. 2008) (finding Illinois law recognizes actions for both aiding and abetting and civil conspiracy to commit a fraudulent transfer); Summers v. Hagen, 852 P. 2d 1165, 1169 (Alaska 1993) (finding Alaska law "allows one who has been legally harmed [by a fraudulent transfer] to recover damages from the party causing the harm [i.e., the transferee] where the existing equitable remedy of voiding the transfer is inadequate").

[243] Carlson, *supra* note 71, at 1195. A full account of these concerns is beyond the scope of this article, but the wary practitioner should review Professor Carlson's summary of such concerns in his articles: *Fraudulent Transfer as a Tort*, 2021 MICH. ST. L. REV. 1093 (2021), and *Fraudulent Transfers and Juries: Was Granfinanciera Rightly Decided?*, 95 AM. BANKR. L.J. 209 (2021).

creditors and a new opportunity to the "honest but unfortunate" debtor,[244] it must consolidate all value related to fraudulent transfers within the body of the estate. This is true whether the claim is at equity and tied to the debtor's property or arising in tort. While some further justification of the latter may be necessary, at least for the former, this article hopes to have made some headway as to the intellectual foundations of this principle and the problems that arise when courts go awry.

***

[244] *See supra* text accompanying notes 134–135.