In re Kaiser: A Study of Advanced Fraudulent Transfer Issues

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IN RE KAISER

A Study of Advanced Fraudulent Transfer Issues

All attorneys who regularly practice in the field of bankruptcy law know—or should know—the basic ins-and-outs of § 544 of the Bankruptcy Code.[1] While trustees and debtors counsel have become accustomed to looking at § 544 as simply § 548 with a 4 year look back period, that is a dangerous generalization to make. Section 544 may allow a trustee to go back much further than 4 years if the IRS is a creditor, as provided in the recent case *Ebner v. Kaiser (In re Kaiser)*, 525 B.R. 697, 713 (Bankr. N.D. Ill. 2014), or use the six year statute of limitations when any federal government entity is a creditor under the Federal Debt Collections Procedures Act, 28 U.S. Code § 3306(b). And in Illinois, the section may be used in conjunction with § 9 of the Rights of Married Persons Act, 750 ILCS 65/9, to avoid all unrecorded transfers of "goods or chattels" from a debtor to his or her non-debtor spouse back to the date of matrimony without any showing of fraud at all. Attorneys and trustees need to be aware of the full power of § 544.

I. Overview of Section 544.

Generally, § 544 provides trustees with a powerful tool to supplement the federally granted avoiding powers under § 548 of the Code. Under § 544(a), the trustee is able to trump any unperfected lien or unrecorded transfers as a hypothetical judicial lien creditor and bona fide purchaser.[2] This allows the trustee to avoid purported liens against a debtor's property and purported transfer of the debtor's property when those liens and transfer do not comply with the applicable recording requirements.

Under § 544(b), the trustee may also step into the shoes of a general

[1] "Code" or "Bankruptcy Code" refers to title 11 of the Unites States Code, 11 U.S.C. 101, *et seq*., unless otherwise stated.
[2] *See* 11 U.S.C. § 544(a)(1), (3).

unsecured creditor—*i.e.*, a "golden creditor"—and may avoid any transfers or obligations of the debtor that are voidable under applicable law by that golden creditor.[3] Section 544(b) is most commonly used by trustees in conjunction with the applicable state version the Uniform Fraudulent Transfer Act ("***UFTA***")[4] to avoid transfers or obligations of the debtor.

The common knowledge and misconception among bankruptcy attorneys and non-bankruptcy attorneys alike is that § 544 is merely § 548 with a 4 year reach back period as opposed to the 2 years provided under § 548. While this is not entirely untrue in practice, it is a dangerous assumption to make. Under § 544 the rights of the general unsecured creditor—the golden creditor—matter. Under § 548, the rights of any particular creditor do not. Thus, under § 544, particular attention must be paid to the chosen golden creditor.[5]

Section 548 allows the trustee to avoid fraudulent transfers for either actual fraud (§ 548(a)(1)(A)) or constructive fraud (§ 548(a)(1)(B)) occurring within the two years preceding the petition date, regardless of whether there exists an actual creditor with the right to do so. In short, § 548 provides a 2 year reach back period measured back from the petition date and not a statute of limitations measured forward from the date of the complained of transfer. The statute of limitation for bringing such action is found in § 546.

Conversely the UFTA does not provide a reach back period from any set date—*e.g.*, the petition date—but instead contains a statute of limitations measured forward from the complained of event—*i.e.*, the fraudulent transfer. In the hands of a chapter 7 trustee, this statute of limitations of 4

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[3] *See* 11. U.S.C § 544(b)(1).

[4] All states in the Seventh Circuit have adopted a form of the UFTA. *See* Illinois Uniform Fraudulent Transfer Act, 740 ILCS 160/1, *et seq*.; Wisconsin Uniform Fraudulent Transfer Act, Wis. Stat. § 242.01, *et seq*.; Indiana Uniform Fraudulent Transfer Act, Ind. Code § 32-18-2-1, *et seq*.

[5] In the Seventh Circuit the name of the golden creditor does not need to be pleaded in the complaint. There just needs to be a creditor that has the rights asserted.

years from the date of the transfer works much the same as the reach back period in § 548. Under § 544(b) the trustee picks up the rights of any particular creditor as of the petition date, and if an actual creditor has a claim to avoid a transfer—that is, a claim that has not already expired under the UFTA statute of limitations—the trustee can step into that creditor's shoes to assert that right on behalf of the estate. As the rights of the creditors are measured as of the petition date, the trustee essentially gets to look back 4 years under the UFTA statute of limitations.

This distinction between § 544 and § 548 is important in both asserting claims as the trustee and defending claims brought by the trustee. The trustee generally takes the golden creditor's rights as they were on the petition date. Thus, if there is a defense that could be asserted against the golden creditor if it brought the claim, that same defense could also be used to defend against the trustee. The most notable exception to this defense rule is that because the trustee recovers for the benefit of the entire estate, the recovery is not limited to the claim of the golden creditor. The trustee may avoid the entire transfer even if the golden creditor has a claim for $1 and the value of the transfer is $1,000,000.

In asserting claims the trustee also needs to pay attention to when the golden creditor's claim arose. While both present and future creditors may avoid transfers of actual fraud, the most common species of constructive fraud is only available to creditors that had a claim at the time of the transfer. Thus, to take advantage of the full 4 years statute of limitations, or more, under constructive fraud, the trustee needs to be able to identify a creditor that had a claim on the date of the transfer back to the first alleged fraudulent transfer.

When the IRS or some other federal government entity files a claim in your case this can all fly out the window. These entities have statute of limitations periods that extend beyond 4 years and a majority of cases, including *Kaiser, supra,* from the Bankruptcy Court for the Northern District

of Illinois, have held under § 544 the trustee may take advantage of that governmental creditor's extended limitations period.

II. *In re Kaiser* and the Trustee's Ability to Step into the Shoes of the IRS.

In *Ebner v. Kaiser (In re Kaiser)*, 525 B.R. 697 (Bankr. N.D. Ill. 2014), the trustee filed a complaint against a number of defendants alleging a scheme to defraud the debtor's creditors and also alleging a large number of fraudulent transfers to the given defendants. A good portion of the alleged fraudulent transfers occurred outside the normal 4 years period prior to the petition date, and therefore, the trustee alleged in the complaint that the IRS was a creditor, and asserted its rights to go back further than the 4 years under the UFTA. Seven motions to dismiss were filed by nine defendants all asserting that the trustee was barred from avoiding a vast majority of the alleged fraudulent transfers because they occurred more than 4 years prior to the petition date and because the extended period for the IRS could not be used by the trustee.

After extensive briefing and argument on the issue, the Court issued an opinion holding that when the IRS is a creditor, the trustee may step into its shoes and may take advantage of all of those rights of the IRS in avoiding fraudulent transfers, including the extended statute of limitations. The Court stated:

> Within section 544, there are no conditions on which unsecured creditor a trustee may choose as the golden creditor. In fact the law is clear that by choosing poorly, the trustee will be subject to the defenses that such creditor would also be subject to.
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> Why then, would the trustee be forced to do anything other than choose the optimal creditor for such purposes? To hold otherwise would be to set policy contrary to law; to force the trustee to do something other than what the plain language of the statute

provides.[6]

The Court went on to aptly note that § 544(b) "is simply an enabling formula. What variables are input into section 544 will always change the result, but that is not a modification of either section 544's operation or of the operation of Title 11 as a whole."[7] Thus, under the plain text of § 544, the trustee could plug in the IRS numbers and the result was that the trustee's claims were not time barred.

In applying the IRS statute of limitations, the Court provided that "[i]n general, the IRS is subject to a ten-year statute of limitations for collection, measured from the time of assessment. Assessment of liability is, in turn, subject to varying time limitations."[8] Nearly every case that has taken up this issue has held the same way.[9]

There appears to be only one published opinion, *Wagner v. Ultima Homes, Inc. (In re Vaughban Co., Realtors)*, 498 B.R. 297, 305-306 (Bankr. D.N.M. 2013), holding that the trustee may not use the IRS statute of limitations. The Court in *Kaiser* made short work of the *Vaughban* opinion. The *Kaiser* Court held:

> Another court has analyzed at length the issue, and concluded that it "[did] not believe that Congress, by enacting Section 544(b), intended to vest sovereign powers in a bankruptcy trustee and thereby immunize her from strictures of state law in the pursuit of her private interests." *Wagner v. Ultima Homes, Inc. (In re Vaughban Co., Realtors)*, 498 B.R. 297, 305-306

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[6] *Kaiser*, 525 B.R. at 711.
[7] *Id* at 713, n. 11.
[8] *Id* at 710.
[9] *See Alberts v. HCA Inc. (In re Greater Southeast Cmty. Hosp. Corp. I)*, 365 B.R. 293, 302 (Bankr. D.D.C. 2006); *Osherow v. Porras (In re Porras)*, 312 B.R. 81, 97 (Bankr. W.D. Tex. 2004); *Finkel v. Polichuk (In re Polichuk)*, 506 B.R. 405, 419 (Bankr. E.D. Pa. 2014); *Levey v. Gillman (In re Republic Windows & Doors, LLC)*, 2011 Bankr. LEXIS 3936 (Bankr. N.D. Ill. Oct. 12, 2011); *United States v. Krause (In re Krause)*, 2007 Bankr. LEXIS 4068 (Bankr. D. Kan. Nov. 13, 2007); Gordon v. Harrison (In re Alpha Protective Servs.), 531 B.R. 889, 905 (Bankr. M.D. Ga. 2015).

> (Bankr. D.N.M. 2013). The *Vaughn* [sic] court went to great lengths to analyze the sovereign powers of the government and how the pursuit of public rights or interests renders state statutes of limitation inapplicable.
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> In this court's view, that analysis — though undoubtedly correct in most instances — is simply misplaced here. The view that the statute of limitations available to the IRS may not be invoked by a bankruptcy trustee has no basis in the plain language of section 544(b). It is well established that suits by the Trustee under section 544(b) are derivative; the Trustee steps into the shoes of a creditor and enforces the rights of that creditor for the benefit of the bankruptcy estate. So while "[t]he unsecured creditor's ability to trump the applicable state statute of limitations might derive from its sovereign immunity, ... the estate representative's ability to override that same limitation derives from § 544(b)." Accordingly, "[t]he focus of the court in determining who is acting in a 'governmental capacity' is the unsecured creditor, not the estate representative."[10]

Therefore, under the majority approach, if the IRS is a creditor on the petition date, the trustee steps into its shoes and takes its rights as of that date. If the IRS could have brought an action on that date to avoid a transfer so may the trustee within the period allowed under § 546.

III. So What Exactly Are the Rights of the IRS that the Trustee May Use?

A. *THE IRS STATUTE OF LIMITATIONS.*

The IRS has the option to institute a suit under the applicable state UFTA to collect a debt.[11] The UFTA contains a statute of limitations that

[10] *Kaiser*, 525 B.R. at 713 (internal citations omitted).

[11] The IRS has two options when pursuing a fraudulent transfer made by a tax payer. *See* Internal Revenue Manual (the "***IRS Manual***"), 5.17.14.4, available at: http://www.irs.gov/irm/part5/irm_05-017-014.html#d0e212. IRS Manual 5.17.14.4.4, 6. First, the IRS may administratively impose the tax payer's liability on a transferee under the IRC § 6901. *Id* at 5.17.14.4.1-3; *see also, United States v. Perrina,* 877 F. Supp. 215, 217 (D.N.J. 1994). Second, in my file a suit under the UFTA or possibly the Federal Debt Collections Act in District Court.

generally purports to "extinguish" any claim to avoid any fraudulent transfer if not brought within 4 years of the complained of transfer. Every single circuit court that has taken up the issue of whether this extinguishment provisions of the UFTA bars the IRS from pursuing its fraudulent transfer claim after the limitations period has run has held that it does not.[12] This includes the Seventh Circuit, although in an unpublished opinion,[13] and a large number of District Courts within this Circuit.[14] With this overwhelming authority, pursuing such a defense against the IRS could be fruitless.[15]

The doctrine that the IRS may use a state law to recover without having to abide by its statute of limitations is founded in the Supreme Court decision in *United States v. Summerlin*, 310 U.S. 414, 84 L. Ed. 1283, 60 S. Ct. 1019 (1940). The general rule under *Summerlin* is that "if the United States comes into possession of a valid claim, that claim cannot be 'cut off' later by a state statute of limitations." *Bresson*, 213 F.3d at 1176. Thus, if a state gives a right or cause of action to the Unites States and that right vests,

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[12] *See United States v. Patras,* 544 Fed. Appx. 137, 143 (3d Cir. 2013); *United States v. Evans*, 340 Fed. Appx. 990, 993 (5th Cir. 2009); *United States v. Fernon*, 640 F.2d 609, 613 (5th Cir. 1981); *United States v. Isaac*, 1992 U.S. App. LEXIS 16657 (6th Cir. July 10, 1992); *United States v. Wurdemann*, 663 F.2d 50, 51 (8th Cir. 1981); *Bresson v. Commissioner*, 213 F.3d 1173, 1178 (9th Cir. 2000).

[13] *United States v. Templeton*, 1992 U.S. App. LEXIS 19244 (7th Cir. Aug. 10, 1992) (unpublished).

[14] *United States v. Stavros*, 2002 U.S. Dist. LEXIS 22153 (N.D. Ill. 2002); *United States v. Hatfield*, 1996 U.S. Dist. LEXIS 4147 (N.D. Ill. 1996); *United States v. Smith*, 950 F. Supp. 1394, 1403 (N.D. Ind. 1996); *United States v. Cody*, 961 F. Supp. 220, 221 (S.D. Ind. 1997) *United States v. Cody*, 961 F. Supp. 220, 221 (S.D. Ind. 1997)

[15] However, the statute of limitations was worded as extinguishing a claim in an overt attempt to subvert the *Summerlin* rule with respect to the UFTA. *See Bresson*, 213 F.3d at 1176, *see also,* Official Comments, UFTA § 9 ("The section rejects the rule applied in *United States v. Gleneagles Inv. Co.*, 565 F.Supp. 556, 583 (M.D.Pa. 1983) (state statute of limitations held not to apply to action by United States based on Uniform Fraudulent Conveyance Act)").

it cannot be taken away by the passage of time under state law. Once the U.S. has the claim, only Congress has the right to set the time for expiration.

Congress has provided a statute of limitations of sorts for the IRS to bring a fraudulent transfer suit to collect a tax debt. Fraudulent transfer suits are "collection suits" under the IRC and therefore the general collection statute of limitations found in IRC § 6502 applies.[16] Section 6502 provides that such suit must be brought within 10 years of the assessment of the tax. Assessment is generally required within 3 years of the applicable tax return filing.[17] And again, an extra year is added on to assess a tax against the transferee.[18] This means that the IRS may assess a tax against the tax payer three years after he filed a return (which he failed to pay the taxes under), and then assess that tax liability against a transferee up to a year after that, and then, if that does not lead to recovery, bring a suit to collect against the transferee up to 10 years after that—a total of 14 years after the date the return was filed under which the debt was owed.[19] Additionally, if a return is not filed at all, a "collection suit"—*e.g.*, a fraudulent transfer suit—may be initiated at any time whatsoever.[20] So the IRS clearly possesses better than normal rights when seeking to avoid fraudulent transfers.

B. OPEN QUESTIONS AFTER KAISER.

Generally the IRS must bring a fraudulent transfer complaint within 10 to 14 years of the tax return that caused the liability, but if a complaint is timely brought, how far may the IRS reach back in avoiding transfers? This question arises because the statute of limitations for the IRS is not started upon the occurrence of the complained of event—*i.e.*, the fraudulent

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[16] *Id* at 5.17.14.4.4(2). ("Since a suit to establish transferee or fiduciary liability is a collection suit, the ten-year statute of limitations in IRC § 6502 for suits to collect taxes applies.").
[17] *See* IRC § 6502(a); IRC § 6501(a).
[18] *See* IRC § 6901.
[19] *See Kaiser,* 525 B.R. at 710.
[20] *See* IRC § 6501(c)(3).

transfer—but instead upon the occurrence of some other unrelated event—*e.g.*, the filing of the tax return. Thus, the statute of limitations is unlinked from the event complained of.

For example, if the IRS is owed money from a tax return filed for tax year 2010, it may generally bring a fraudulent transfer claim between 10 to 14 years later. Thus, it may be able to file a suit until 2024. In such a case, if the IRS files a complaint in 2012 it would clearly be within the statute of limitations period because only 2 years passed. However, what if the transfers it claims were fraudulent occurred in 2000? What if the IRS waited until 2024 to file its complaint on those transfers that occurred in 2000? The complaint would be still be timely as it was filed within the 14 years provided under the IRC as held in *Kaiser*. But what if the transfer did not occur until 2025? Because the statute of limitations is not tied to the transfer date but instead the filing of a tax return, the statute of limitations would have already run on an event that did not even occur yet.

This, however, is unquestionably how the statute of limitations works for the IRS, and thereby the trustee under § 544. The open question then is, what is the applicable reach back period for the IRS assuming it brings a timely complaint?

This has been taken up by very few cases and they hold essentially that there is no limit on the reach back period if the complaint is timely filed by the IRS to avoid a fraudulent transfer. This is because, at least with respect to actual fraud, even future creditors may avoid transfers.[21] Thus, in our example above, if the IRS becomes a creditor at the end of 2010, it could clearly still avoid transfers prior to that, and there is no set limit on how far back. The only requirement is that the complaint asserting that the

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[21] *See United States v. Perrina,* 877 F. Supp. 215, 219 (D.N.J. 1994) (Transfer occurred in 1985, IRS became a debtor a year later and filed a suit over 6 years after that. Court held the IRS could avoid the transfer as a future creditor).

fraudulent transfers occurred needs to be brought before 2024.[22]

IV. Section 544 and the Federal Debt Collection Procedures Act.

In addition to the IRS statute of limitations under the Internal Revenue Code, other federal government entities also have more powerful rights that a chapter 7 trustee may be able to use under § 544. As stated above, while most actions under § 544(b) proceed pursuant to state law fraudulent transfer statutes, the practitioner should not forget about 28 U.S. §§3301 through 3308, Part D of the Federal Debt Collection Procedure Act dealing with fraudulent transfers and insider preferences. The major advantage of this statute over the Illinois Fraudulent Transfer Act is its longer statutes of limitation. Section 3306(b) provides a six year statute of limitations for fraudulent transfers, a two year discovery statute of limitations if the transfer was made with the actual intent to delay, hinder and defraud and a two year statute of limitations to avoid an insider preference. In addition, a debtor who is not paying its debts as they come due is presumed to be balance sheet insolvent.[23]

In order to take advantage of the statute, the trustee must allege that a federal corporation; an agency, department, commission, board, or other entity of the United States; or an instrumentality of the United States as the golden creditor.[24]

At least one court, the U.S. Court of Appeals for the Fifth Circuit, in *MC Asset Recovery LLC v. Commerzbank A.G. (In re Mirant Corporation*) 675 F.3d 530 (5th Cir. 2012) has taken a skeptical view to applicability of this statute in Title 11 cases. The Court of Appeals held that 28 U.S.C. §3003(c)

[22] And under one version of constructive fraud, the only limit would be that the IRS must have a claim against the debtor prior to the transfer sought to be avoided.
[23] 28 U.S.C. §3302(b).
[24] 28 U.S.C §3002(15).

prevents Trustees from using the Federal Debt Collection Practice Act to modify or supersede Title 11. However, the explanation as to why this law limits or modifies Title 11 is wanting. Why is the federal law different than any other non-bankruptcy fraudulent transfer state laws? Outside the Fifth Circuit, this decision is not followed.[25]

The *Kaiser* court, although not directly applying the FDCPA, was critical of the *Mirant* opinion, providing that § 544 is not altered in any way by plugging in other applicable law, whether state or federal. The court aptly stated that § 544 is merely a formula and plugging in variables does not change the formula.[26] The growing majority of cases are contrary to *Mirant* and allow the trustee to step into the shoes of a federal government creditor and use the FDCPA to avoid transfers.

V. Section 544 and The Illinois Rights of Married Persons Act.

Finally, in a companion adversary filed by the chapter 7 trustee in the *Kaiser* bankruptcy, *Ebner v. Kaiser,* Case No. 13-ap-340, the court granted summary judgment to the trustee to avoid transfers of hundreds of thousands in jewelry, silverware, and fine arts, from the debtor to his wife under § 544 and § 9 of the Illinois Rights of Married Persons Act (the "***Act***"). This little used statute provides trustees with great power to combat those debtors that claim to own nothing while their non-debtor spouses own vast personal property that the debtor purportedly gifted to them.

A. BACKGROUND OF THE CASE.

In this case, the trustee sought to recover for the estate personal property—fine arts, silverware, and jewelry—itemized on the debtor's home owner's insurance policy valued at over $500,000. The debtor claimed to own none of the property, asserting it was previously gifted to his wife. The

[25] *See Gordon v. Harrison (In re Alpha Protective Servs.)*, 531 B.R. 889, 906 (Bankr. M.D. Ga. 2015) (collecting cases).
[26] *Kaiser*, 525 B.R. at 713, n. 11.

obstacle to recovery for the trustee was that the debtor and his wife asserted all the gifts occurred decades prior to the petition date leaving the trustee unlikely to recover under the UFTA.

The trustee filed a complaint alleging, among other things, that under § 544 she could step into the shoes of a creditor and avoid or invalidate all the alleged transfers from the debtor to his wife while they were married and living together because they were not in writing and not recorded with the secretary of state as required by Section 9 of the Act. The defendant admitted that the alleged transfers occurred when she was married to the debtor and while they living together. She also admitted that the transfers were never recorded. The trustee moved for summary judgment, which was granted.

B. THE LEGAL ANALYSIS.

Section 9 of the Act first provides: "A married person may own in his or her own right real and personal property obtained by descent, gift, or purchase and may manage, sell, and convey that property to the same extent and in the same manner as an unmarried person."[27] It, however, then goes on to provide:

> When husband and wife live together, however, no transfer or conveyance of goods and chattels between the husband and wife ***shall be valid as against the rights and interests of any third person*** unless the transfer or conveyance is in writing and filed in the same manner as security interests are required to be filed by the laws of this State in cases where the possession of the property is to remain with the person giving the security.[28]

Thus, under § 9 of the Act, all transfers of "goods and chattels between husband and wife" must be in writing and recorded with the Illinois Secretary of State to be valid. If they are not valid, with respect to the rest of

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[27] 750 ILCS 65/9.
[28] *Id* (emphasis added).

the world, including all creditors, ownership remains with the transferor spouse.

This is because § 9 of the Act is a recording act and not a fraudulent transfer act. Recording is required to give the public notice of who owns the property, the same way recording of a deed or mortgage is required to bind the rest of the world. Therefore, in the same way a judicial lien creditor may levy on real property of his debtor even when the debtor claims he transferred the property 20 years before to his wife if that transfer was never recorded. Recording is simply required to effectuate the transfer as to third persons.

Prior versions of the Act passed along with the Chattel Mortgage Act in 1874 make this clear. The original applicable portion of the act read:

> *Provided,* that where husband and wife shall be living together, no transfer or conveyance of goods and chattels between such husband and wife ***shall be valid as against the rights and interest of any third person***, unless such transfer or conveyance be in writing, and be acknowledged and recorded by the laws of this state, in cases where the possession of the property is to remain with the mortgagor.[29]

In turn, the Chattel Mortgage Act of 1874 provided for nearly identical language for perfecting a lien against a chattel. It provided:

> Than no mortgage, trust deed or other conveyance of personal property having the effect of a mortgage or lien upon such property, ***shall be valid as against the rights and interest of any third person***, unless possession thereof shall be delivered to and remain with the grantee, or the instrument shall provide for possession of the property to remain with the grantor, and the instrument is acknowledged and recorded …[30]

Thus, if the chattel mortgage was not recorded or possession retained

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[29] *See,* Ill. R.S. Ch. 68, Sec. 9, p. 577 (1874) (emphasis added); available at: http://www.idaillinois.org/cdm/ref/collection/isl/id/16788.
[30] *See,* Ill. R.S. Ch. 95, Sec. 1, p. 711 (1874) (emphasis added); available at: http://www.idaillinois.org/cdm/ref/collection/isl/id/16788.

by the mortgagee, any third person could come in and trump the rights of that mortgagee. The same is true for § 9 of the Act, except, it clearly does not allow for possession as a valid means to show ownership, as the Chattel Mortgage Act does. Today, the UCC governs the recording of liens and mortgages against personal property, and thus § 9 of the Act has been amended to provide that transfers must be recorded in the same manner as a lien on personal property where possession is not transferred—*i.e.*, recorded with the Illinois Secretary of State.

Illinois is not the only state with this statute on the books. Both Kentucky and Mississippi have versions of the statute.[31] And at least one county in Kentucky provides instructions on how to comply with this law to effectuate a transfer between husband and wife.[32]

The rationale for Section 9 was stated over 130 years ago when the Illinois Supreme Court recognized that "[w]here a husband and wife are residing together, there is manifest wisdom in requiring a transfer of goods and chattels, from one to the other, to be in writing and acknowledged and recorded, so that all may know to whom the property belongs, and one may be prevented from setting up a secret transfer of the property, should it

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[31] Ky. Rev. Stat. 404.020(2) provides:

> A gift, transfer or assignment of personal property between husband and wife shall not be valid as to third persons, unless it is in writing, and acknowledged and recorded as chattel mortgages are required to be acknowledged and recorded.

Miss. Code § 93-3-9 provides:

> A transfer or conveyance of goods and chattels, or lands, or any lease of lands, between husband and wife, shall not be valid as against any third person, unless the transfer or conveyance be in writing and acknowledged and filed for record as a mortgage or deed of trust is required to be. Possession of the property shall not be equivalent to filing the writing for record, but, to affect third persons, the writing must be filed for record.

[32] https://www.fayettecountyclerk.com/web/landrecords/documentrecording/deeds/assignmentofpersonalproperty.htm

be seized by execution as the property of the other."[33]

The Supreme Court of Mississippi further explained the purpose of a nearly identical statute, noting:

> The evil sought to be guarded against was the frequent perpetration of frauds by pretended transfers of property between husbands and wives, and the very great difficulty of detecting them. Such was the magnitude of the evil that the lawgiver sought at once to extirpate it by declaring void, as to third persons, every such conveyance, ***whether made bona fide or mala fide***, unless the same is in writing and spread at large upon the public records of the country. The only way to obviate this difficulty and make the law effective is to enforce it exactly as written, by holding that wherever the rights of any third person intervenes, whether he be creditor or purchaser, and whether his rights accrued before or after the alleged transfer, ***no proof of a transfer made in any other method than in that pointed out by the statute shall be received***.[34]

While the trustee in this case attacked the transfers under § 544(b) by using the rights of an actual creditor, it would likely be just as applicable in avoid such transfers under § 544(a) as a hypothetical lien creditor. Section 544(a) in the normal method of avoid unperfected liens and unrecorded transfers of the debtor's property. As of the writing of these materials, this case was under advisement on appeal to the District Court.

CONCLUSION

The *Kaiser* bankruptcy case has undeniably provided trustees with additional ammunition in avoiding transfers, although at the cost of subjecting the trustee to the same defenses that could have been asserted against the "golden creditor." And debtor's counsel need to be just as aware of these issues as the trustees they may soon be litigating against.

[33] *Cole v. Marple,* 98 Ill. 58, 67 (1880).
[34] *Gregory, Stagg & Co. v. Dodds*, 60 Miss. 549, 552 (1882) (emphasis added).