IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE: EQUIPMENT ACQUISITION RESOURCES, INC. Debtor.	)	(Bk. No. 09 B 39937) (Chapter 11) (Honorable John H. Squires) (Adv. No. 10-00099)
UNITED STATES OF AMERICA, Appellant, v. EQUIPMENT ACQUISITION RESOURCES, INC., Appellee.	)	Case No. 1:11-cv-05045 Honorable Edmond E. Chang

REPLY BRIEF OF THE
APPELLANT UNITED STATES OF AMERICA

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Introduction

Appellant United States of America is appealing an order from the Bankruptcy Court denying the United States' Motion to Dismiss Count IV of the first amended complaint of Appellee Equipment Acquisition Resources, Inc. ("EAR"), based on the United States' "Second Defense" in its answer to the complaint based on sovereign immunity. On September 12, 2011, the United States filed its Opening Brief. *See* Dkt. No. 7. On October 17, 2011, EAR filed its Answer Brief. *See* Dkt. No. 12. For the reasons more fully stated in its Opening Brief and in this Reply, this Court should reverse the Bankruptcy Court's holding and enter judgment in favor of the United States.

Many of the arguments raised in both the Opening Brief and in the Answer Brief have been fully addressed. Accordingly, this Reply will therefore only focus on those issues that merit further emphasis, as both sides have already analyzed every case-on-point in comprehensive detail.

Argument

I. Since No Unsecured Creditor Could Have Filed an Action Against the United States Under § 544(b), EAR is Similarly Barred From Doing So Based on Sovereign Immunity

A. Nothing in § 106(a)(1) Suggests that § 544(b) Was Amended Silently

EAR primarily focuses on canons of statutory interpretation and argues that the plain language of § 106(a)(1) shows that Congress intended to abrogate sovereign immunity for a variety of statutes, including § 544(b). At the outset, the United States does not dispute the established canons; however, as stated in our Opening Brief, that analysis must yield to the plain language of § 544(b) itself, and to long-standing Supreme Court precedent that ambiguities with respect to waivers of sovereign immunity must be resolved in favor of immunity. *See* Opening Brief at 12, 15, 28, 32. Section 544(b) by its terms requires that a creditor would be able to

avoid the transfer *under non-bankruptcy law* on the petition date (but for the automatic stay enjoining such an action). Under the most natural reading, if no creditor could have done that, neither can the trustee.

EAR's analysis largely mirrors the Bankruptcy Court's holding that the plain language of the words "immunity," "sovereign immunity," and "abrogate" clearly and unambiguously communicate congressional intent to abolish the government's immunity from being sued under several Bankruptcy Code provisions, including § 544(b), simply because § 544 is among the Code sections listed in § 106(a)(1). Nevertheless, this analysis is flawed because EAR and the Bankruptcy Court both fail to reconcile the tension between the abrogation of sovereign immunity in § 106 and the plain language of § 544(b), which explicitly conditions such a claim on the existence of an unsecured creditor that could have avoided the transfer under applicable non-bankruptcy law outside of bankruptcy.

In this connection, EAR admits that "two potentially conflicting statutes exist," referring to § 544(b) and § 106(a)(1) (at least as construed by EAR – we submit there is no conflict at all) and then argues that the Court should "harmonize" them by applying the rule that the later-enacted provision takes precedence. (Answer Brief at 8, 17.) This flies in the face of the rule for resolving ambiguities against broadening a waiver of sovereign immunity. Moreover, the provisions can be harmonized by simply recognizing that § 106(a)(1) does no more than abrogate sovereign immunity to the extent that § 544 actually sets forth either a direct impact on the rights of the United States from the filing of a bankruptcy "case" under 28 U.S.C. § 1334(a) or provides for a cause of action against the United States that is a "civil proceeding" under 28 U.S.C. § 1334(b). Section 544(b) sets forth a cause of action but, by its own explicit terms, that cause of action does not exist against the United States.

EAR insists that because § 106(a)(1) "abrogates" sovereign immunity with respect to § 544, it necessarily follows that it wipes out or repeals or amends or negates explicit limitations on any causes of actions contained in § 544(b) itself. (Answer Brief 18-19.) This is a *non-sequitur*. Section 106(a)(1) abrogates sovereign immunity for the "case" remedies under 28 U.S.C. § 1334(a), and the "civil proceedings" under § 1334(b) that are spelled out in the Bankruptcy Code sections it lists and does not remotely indicate ignoring a limitation self-imposed by one of those sections.[1]

EAR's position might have more force if § 544's sole utility vis-a-vis any governmental units was nullified by a plain reading, but as reiterated below, that is simply not the case.

B. The United States' Position Does Not Render the Abrogation of Sovereign Immunity in § 106(a)(1) With Respect to § 544 "Meaningless"

EAR argues that the government's interpretation of the abrogation of sovereign immunity would render § 106 "meaningless," but that analysis does not withstand scrutiny. Preliminarily, if EAR literally means that all of § 106 would be rendered meaningless, the contention is absurd since the abrogation found in § 106(a)(1) applies to numerous Bankruptcy Code provisions for which Congress clearly intended to permit actions against the federal government. *See* Opening Brief at 19-22, 35-37.

Viewing EAR's target more narrowly as § 106(a)(1)'s listing of § 544, there is no dispute that § 106(a)(1) "unambiguously" waives sovereign immunity "with respect to . . . [§] 544 . . . ." But EAR focuses only on § 544(b) and ignores § 544(a). As stated in our Opening Brief, there

[1] If EAR's argument is accepted it could mean that, because § 541 is listed, and (according to black letter bankruptcy law) any pre-petition cause of action held by the debtor becomes property of the estate, sovereign immunity is similarly "abrogated" completely for every other conceivable cause of action a debtor might assert against any governmental unit. For example, a condition of the waiver of sovereign immunity in the Federal Tort Claims Act is to file a timely administrative claim with the allegedly tort-committing federal agency. Under EAR's theory, this condition on the statutory waiver of sovereign immunity is abrogated too.

are many other ways in which § 544's other provisions apply to the United States. For example, § 544(a) gives the trustee the status, rights, and powers of a hypothetical judicial lien creditor as of the petition date. This enables a trustee to prime a post-petition federal lien, including a federal tax lien, since I.R.C. § 6323 renders a tax lien "not valid" against a judicial lien perfected before notice of the federal tax lien is recorded. Moreover, unlike § 544(b) which requires a trustee to identify an actual pre-petition creditor that could have avoided a transfer under non-bankruptcy law, subsection (a) utilizes a hypothetical judicial lien creditor without regard to whether one exists. *See In re Eichhorn*, 338 B.R. 793 (Bankr. S.D. Ill. 2006). Accordingly, it is § 106(a)(1)'s listing of § 544 that gives the provision practical utility against the United States (and other government units with sovereign immunity).

The same provision (§ 544(a)) explicitly allows a trustee to avoid certain transfers, not as fraudulent transfers, but for other reasons, by also making him a hypothetical "purchaser" of real property. 11 U.S.C. § 544(a)(3). This, for example, would enable a trustee to avoid a sale of real property by the IRS under I.R.C. § 6335 if the deed was not yet recorded and if the notice of federal tax lien was not filed in a manner that would put a purchaser on notice thereof as required by I.R.C. § 6323(f)(4). It would similarly enable the trustee to avoid a judicial foreclosure sale by a government agency with a mortgage, for example, if there was no *lis pendens* recorded and, again, the deed of the judicial officer conducting the sale was not recorded until after the petition. There is no doubt that such an action (under § 544(a)) is a "cause of action . . . existing under this title" within the meaning of § 106(a)(5), and one that in no way relies on there being, prior to the petition, a cause of action available against the government in favor of some person under non-bankruptcy law because, again, § 544(a)(3) applies a *hypothetical* purchaser test. *See In re Lieurance*, —B.R.—, 2011 WL 5041521 (Bankr. D. Kan. 2011).

EAR reiterates the Bankruptcy Court's conclusion that Congress would have listed only § "544(a)" in § 106(a)(1) if it did not intend § 544(b) to apply to the United States, by pointing out that other Bankruptcy Code provisions contain occasional references to particular subsections. (Answer Brief at 23.) First, regardless of whether that is so, it remains the case that our argument does not render the listing of § "544" as a whole meaningless. Second, EAR cannot refute that, while some other Code sections contains some cross-references to particular subsections, there is no other provision in the Code that contains any list of provisions remotely as long as § 106(a)(1)'s list. More probatively, EAR cannot refute that dozens of the provisions so listed have particular subsections that have nothing whatsoever to do with an remedy, relief, or cause of action and thus do not logically implicate the issue of sovereign immunity in the first place.[2] Thus, it is apparent that Congress was not considering the need to break down the list by necessarily-applicable subsections.[3]

And even as to § 544(b), EAR fails to address the point that some states have abrogated their own sovereign immunity more broadly than the United States, such that § 544(b) could then

[2] EAR does state in conclusory fashion that the Court should reject the government's suggestion that many listed Code provisions have some subsections that are not logically implicated by sovereign immunity in the first place, by insisting that the government "submits no authority to support this argument." (Answer Brief at 23.) In fact our Opening Brief did give an example at page 20-21. Even a quick random check of some of the listed Code sections will confirm our description. To the extent EAR is looking for case law, no one to our knowledge has ever argued to the contrary, so there would be no reason to expect such case law.

[3] On page 20 of the Answer Brief, EAR misstates our position as being that "because Congress did not enumerate every state statute which could serve as the basis of an avoidance action under § 544 that § 106 does not abrogate sovereign immunity as to the USA." We made no such argument. Congress could easily effectuate the amendment for which EAR advocates by either (1) amending § 106 to state that where one of the listed provisions confers on the trustee the powers of a creditor, the provision abrogates sovereign immunity notwithstanding that a creditor would be barred by sovereign immunity from bringing the kind of action described; or (2) amending § 544(b)(1) by adding the clause "or that is not avoidable by such creditor solely by reason of sovereign immunity applicable under non-bankruptcy law."

be used by a "trustee" against a state, given § 106(a)(1)'s listing of § 544. Without that listing, a state could argue that it waived sovereign immunity only to an action by a creditor that was actually defrauded by a transfer to the state, and not to one by a trustee who wished to spread the benefits of avoidance to other creditors, including ones that were not themselves defrauded, consistent with § 551.[4] In discussing the cases involving states, EAR vaguely suggests that § 544(b) does not apply to state sovereign immunity at all because of some question about whether Congress has the power to waive state sovereign immunity by virtue of the Bankruptcy Clause. The argument is without merit. Most courts have held that in ratifying the Constitution, states subordinated their authority to Congress's power to subject them to bankruptcy laws, including not just discharge of indebtedness, but also where relief is necessary against a state in a cause of action. In fact, the legislative history to the very amendments to § 106 upon which EAR relies indicates that the amendments were specifically intended not only to overrule *United States v. Nordic Village, Inc.*, 503 U.S. 30, 34 (1992), which involved federal sovereign immunity vis-a-vis an action to avoid a post-petition transfer under § 549, but also *Hoffman v. Connecticut Dept. of Income Maintenance*, 492 U.S. 96 (1989), which involved state sovereign immunity vis-a-vis an action to avoid a preferential transfer under § 547.

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[4] In this regard, certain creditors can in fact be affirmatively harmed by § 544(b). If D transfers real property to his son while insolvent and indebted to creditors C1 and C2 in 2008 and a year later suffers an involuntary liability to creditor C3 whose claim was not contemplated at the time of the transfer (for example, a claim for causing an injury by negligence), a bankruptcy petition by D a year after that will enable a trustee to avoid the transfer in the shoes of C1 and C2 but share the benefits with all three creditors (and any others). This is so even though C3's claim may be so large as to essentially deprive C1 and C2 of significant recovery, and even though C3 had no cause of action for avoidance. The point here is that, if the transfer was, instead of real estate, the payment to a state of a debt owed by D's son (for which D himself received no consideration while insolvent), even a state that waived sovereign immunity to claims by actual creditors would not necessarily be suable by a trustee, but for § 544's listing in § 106(a)(1). It is that listing that allows a trustee to utilize state fraudulent transfer law to achieve a different result that state law would allow.

The United States submits that this Court should pause before allowing a § 544(b) action against the United States since the very language of § 544(b) rests upon the existence of an actual unsecured creditor that could have avoided the transfer to the United States outside bankruptcy under non-bankruptcy law, and the United States is indisputably immune from state-law causes of action of that nature. In that respect, and as shown above and in the Opening Brief, the abrogation of sovereign immunity in § 106(a)(1) in no way invalidates or renders meaningless the listing of § 544 in § 106(a)(1).

C. The Amendments to § 106 in 1994 were not Intended to Create New State-Law Causes of Action Against the United States

EAR posits that a claim filed against the United States under § 544(b) does not run afoul of the qualifying provision of § 106(a)(5), which states "[n]othing in this section shall create any substantive claim for relief or cause of action not otherwise existing under this title, the Federal Rules of Bankruptcy Procedure, or nonbankruptcy law."

As stated in our Opening Brief, the 1994 amendments to § 106 were intended to overrule two Supreme Court decisions – *Hoffman*, involving § 547 of the Bankruptcy Code, and *Nordic Village*, involving § 549 of the Bankruptcy Code. Section 549 concerns post-petition transfers, and in no way relies upon *state* law in the way in which § 544(b) is explicitly conditioned on the existence of an unsecured creditor using non-bankruptcy law to avoid a transfer. Similarly, § 547 concerns preferential transfers within a short period before a bankruptcy petition and in no way relies on *state* law avoidance doctrine. Congress chose to amend § 106(a)(1) after *Nordic Village* and *Hoffman* and thus open the door to allow suits filed against the United States and states. But in doing so, it did not in any way invite causes of action that are explicitly conditioned on unsecured creditors using non-bankruptcy law against the United States, like § 544(b). Moreover, we submit that Congress assumed courts would not bend the text of

subsection (b) to give the trustee a superpower to nullify defenses that would exist against the "unsecured creditor" in whose shoes a trustee must stand or fall. The fact that § 544 was included in the list of provisions in § 106(a)(1) is not a sufficient indication of a contrary intent, given that, as demonstrated above and in our Opening Brief, there are other reasons to include § 544 in the list. In other words, the mere listing of § 544 in § 106(a)(1) is not a sufficiently *unambiguous* mandate to override the plain language of subsection (b) of § 544 in particular, given the rule of statutory construction that sovereign immunity waivers are strictly construed and all ambiguities resolved in favor of continued immunity.

EAR also insists that its position does not effectuate any new cause of action in contravention of § 106(a)(5) because bankruptcy trustees have long held the power to avoid fraudulent transfers. (Answer Brief at 21.) But it is clear that prior to 1994, it was simply not possible, under any legal theory, for any creditor or any bankruptcy trustee to recover as an allegedly fraudulent transfer a voluntary tax payment made to the IRS for the tax liabilities of a related third party such as a shareholder of a subchapter S corporation, the income from which caused the shareholder's tax liability in the first place. *See* Opening Brief at 11-12, 16, 24, 32-33.

II. EAR Misunderstands the Law of 26 U.S.C. §§ 7422 and 7426, Both of Which are "Applicable Law" for the Purposes of § 544(b)

Preliminarily, in addressing the government's reliance on I.R.C. § 7422, EAR fundamentally misstates our point. The point is not simply that due to that provision and I.R.C. § 7426 "Congress did not likely anticipate that a Trustee could use § 544(b) to recover tax payments more than two years after the petition date" (Answer Brief at 34), but more fundamentally that § 7422 flatly and independently bars such a cause of action, and is part of the

"applicable law" that § 544(b) contemplates applying.[5] That is, even if EAR is correct that § 106(a)(1)'s listing of § 544 more generally waives federal sovereign immunity to state-law fraudulent transfer claims, the recovery of voluntary tax payments is specifically barred by § 7422.[6]

The Answer Brief characterizes as inapposite the language of I.R.C. § 7422, by insisting that EAR is not claiming a tax "refund" but rather is seeking "recovery of a fraudulent transfer." (Answer Brief at 36.) But it is undisputed that EAR made the payment and wants the money back. This is perfectly analogous to the situation in *Williams v. United States*, 514 U.S. 527 (1995), in which the Supreme Court allowed a tax refund claim by a non-taxpayer who voluntarily paid another person's tax in order to remove a lien from her home. Moreover, § 7422(a) does not use the word "refund" either. Its extremely sweeping language provides that no suit shall be maintained "in any court" (which includes a Bankruptcy Court) "for the recovery" (the same word EAR uses) of any tax "or of any sum alleged to have been . . . in any manner wrongfully collected," as recently pointed out by the Supreme Court in *United States v. Clintwood Elkhorn Min. Co.*, 553 U.S. 1, 7 (2008). The Supreme Court in *Williams* held this included the retention of a voluntary payment made by a third party under circumstances that effectively made the retention wrongful where there was no other remedy at law.

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[5] EAR appears to be responding to a somewhat differently worded argument we made in the Bankruptcy Court. Because the Bankruptcy Court seemed to miss the point, we decided to be more blunt on appeal.

[6] It may be noted that EAR is correct in pointing out that we have not asserted that the "voluntary payment doctrine exists under Illinois law" as it does in Maryland. (Answer Brief at 27, distinguishing one aspect of *Abatement Environmental Resources.*) Instead, we assert that I.R.C. § 7422 bars recovery of a voluntary payment of tax without a timely administrative claim, just as the court in *Anton Motors*, discussed *infra*, similarly held that Maryland law's analogous provision bars a § 544(b) claim against a local taxing authority in that state.

EAR correctly points out that this is a "new" argument by the United States that was not advanced in the cases upon which EAR relies. However, that is reason not to rely on the cases the IRS lost, as opposed to applying their reasoning blindly. EAR has failed to respond to the point that the court in *In re Anton Motors, Inc.*, 177 B.R. 58 (Bankr. D. Md. 1995), used an almost identical analysis to hold that the refund provisions of Maryland's tax code were applicable to any claim to avoid a fraudulent transfer to a local taxing authority under § 544(b). It may also be noted that Illinois has a similar rule. *See* 35 ILCS 5/911(a)(2) (flatly barring any tax refund absent a timely filed administrative claim); *cf.* 26 U.S.C. § 6511(b)(2) (similarly barring any federal tax refund in the absence of a timely administrative claim). The Answer Brief also neglects to address the *Franklin Savings* decision, discussed more fully in the Opening Brief at pages 43-44.[7]

The Answer Brief argues (p.36) that the refund provisions cannot apply because the cause of action did not even exist before the bankruptcy petition, citing a § 547 case (*In re Tek-Aids Indus., Inc.*, 145 B.R. 253 (Bankr. N.D. Ill. 1992)), and one under § 549 (*In re Gerlinger, Inc.*, 2008 WL 3992140, at *9 (Bankr. N.D. Ohio 2008)), and tying them to § 544(b) by analogy because all avoidance actions rely on § 550 for the remedies. But whatever may be said of the other avoidance provisions for which § 550 defines the remedies, EAR is neglecting the fact that § 544(b) is dependent quite explicitly on the existence of a pre-bankruptcy cause of action by an unsecured creditor. Our point is that if the unsecured creditor's claim is barred by § 7422(a)

[7] *In re Franklin Sav. Corp.*, 385 F.3d 1279 (10th Cir. 2004). Briefly, the Tenth Circuit held that the abrogation of sovereign immunity for counterclaims and setoffs in § 106(b) and (c) did not unambiguously override a time bar on the submission of an administrative claim against the United States under the Federal Tort Claims Act as a precondition to suit. The situation for I.R.C. § 6511 and § 7422 (which bars any suit in any court absent a timely administrative claim) is quite analogous.

because the limitations period on an administrative claim has already expired by the petition date, then so is the Trustee's.

III. EAR is Wrong to Insist that the Cases On Our Side Rest on Congress's Inability to Override State Sovereign Immunity

While we will not delve deeply into the competing case law as both sides have fully addressed the six cases in EAR's camp and the three that we maintain support our view of the issue, we must nevertheless refute EAR's argument that the cases on our side all rest on some supposed impediment of Congress to override state sovereign immunity.[8] The bankruptcy court in *Anton Motors* held that § 106 abrogated both Eleventh Amendment immunity as well as federal sovereign immunity and did not suggest that Congress lacked power under the Bankruptcy Clause to override ordinary state sovereign immunity. The bankruptcy court in *In re Grubbs*, 321 B.R. 346 (Bankr. M.D. Fla. 2005), did hold that § 106(a)(1) exceeded Congress's authority in respect to Eleventh Amendment immunity but held that § 106(c) nevertheless applied to overcome such immunity in the case. It then turned to § 544(b) and held that it did not override state common-law immunity because it rests on the ability of a creditor to avoid a transfer under state law which a creditor could not do against the State of Florida.[9] Finally *In re Ginn-LA St. Lucie Ltd., Ltd.*, Adv. Proc. 10-2976-PGH (Bankr. S.D. Fla. 2010) did, on the one hand, hold that Congress could not overcome Eleventh Amendment immunity for § 544(b) in

[8] Without discussing the cases in EAR's camp, we would add that EAR vastly overstates the impact of our position in suggesting it "would herald a sea change in the jurisprudence in this area." (Answer Brief at 22.) It rests this thesis on six bankruptcy court opinions, all but two were issued in 2010 or 2011 and are interlocutory. Of the older two, one was rendered moot on appeal and the other could not be appealed because the government won on the merits. The law on this issue, we submit, is not, by any stretch of the imagination, well settled.

[9] The bankruptcy court below held that *Grubbs* was inapposite because it relied on § 106(c) rather than § 106(a)(1) but that makes no sense. If any provision of § 106 authorized suit against the state under § 544(b), the next issue is the same – whether the latter provision in fact allows a trustee to avoid a transfer that an ordinary creditor could *not* avoid.

particular (because unlike § 548, § 544(b) is not a "uniform" law on bankruptcy within the meaning of Article I's Bankruptcy Clause).[10] But the court went on to make an alternative holding that, even if Eleventh Amendment immunity was not an impediment, "the Trustee's claim fails because there is no creditor that can bring a fraudulent transfer cause of action under Florida law against the University of Michigan." *Ginn-LA Lucie*, slip op. at 12.

IV. EAR Misses the Point in Respect to Illinois Law

EAR insists that the government is asking the Court to rewrite the Illinois fraudulent transfer statute because EAR construes us to be relying on the good faith defense in 740 ILCS 160/9(a), which it correctly points out only applies to suits based on actual fraud under 160/5(a)(1) and not constructive fraud under 160/5(a)(2). But our argument was quite different. What we said was that, "when the statute is read as a whole, it is clear that the reason that § 9(a)'s defense is limited to § 5(a)(1) (*i.e.*, actual fraud) is because the state legislature did not envision that the *rest of the statute* could ever be construed to deprive a transferee of that defense in respect to a constructive fraud claim." (Opening Brief at 45 (italics added).)

Thus, we argued that 160/9(b)(1) would not be read by the Illinois Supreme Court to allow the imposition of liability on the payee of a check as the first transferee, but rather would mandate imposing liability on " the person for whose benefit the transfer was made" in those *constructive fraud* cases in which the transfer was for the benefit of another person who in fact

[10] It should be noted that if the *Ginn-LA St. Lucie* court is correct that § 544(b) does not pass muster as a "uniform" law on bankruptcies because it depends on state law that varies from state to state, then logically § 544(b) is unconstitutional no matter who the defendant is – even a private creditor. In fact, the provision does permit trustees in some states to recover transfers that they could not recover in other states. We submit, however, that *Ginn-LA St. Lucie* reads too much into the "uniform" requirement in Article I, § 8, and that Congress has the power to give trustees the rights of state-law creditors *in all states* notwithstanding that the particular facts in a hypothetical case in one state that would support recovery might not support recovery in another state.

received that benefit. In that regard, 160/9(b) is the remedy provision and states first how much the creditor may recover (the lesser of the value of the asset, less any consideration paid to the debtor, or the amount of the creditor's claim) and then states that "[t]he judgment may be entered against: (1) the first transferee of the asset or the person for whose benefit the transfer was made."[11] This language, we argued, anticipates that a court will impose the judgment against the person who received the benefit of the transfer rather than on such person's good faith creditor who for years has not tried to collect a debt that appeared to have been satisfied long ago, because the opposite construction would be so outrageously inequitable that such intent cannot be ascribed to the State legislature. This is also the only way to make sense of the fact that the provision that EAR *thinks* we were relying upon, 160/9(a) allows a good faith defense for the transferee in a case of actual fraud but not constructive fraud, notwithstanding that actual fraud is the far more egregious circumstance. *See* Opening Brief at 45-47 for a more complete presentation of the argument.

Our research has not disclosed cases either accepting or rejecting our interpretation but neither do there appear to be cases that, without addressing the issue, have imposed liability on an innocent creditor that received payment by an insolvent transferor for the benefit of a family member, for example – a scenario that one would not expect to be all that rare (*e.g.*, an insolvent father preferring to pay his son's debts rather than his own). In other words, it does not appear that creditors in Illinois have seen fit to apply the statute the way EAR wants to apply it here in order to make whole the defrauded creditors of one entity by essentially using the courts to foist an equal injustice on creditors of a related person.

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[11] As our Opening Brief pointed out, this language is *not* identical to the remedy provision for avoidance actions under the Bankruptcy Code, § 550. But to invoke that provision, a trustee using § 544(b) must first be able to prevail under state law.

Conclusion

For the reasons more fully stated in the United States' Opening Brief and in this Reply, this Court should reverse the Bankruptcy Court's holding and enter judgment in favor of the United States.

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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of October, 2011, a copy of the foregoing **Reply Brief of the Appellant United States of America** will be sent to those parties registered to receive notification through the Court's CM/ECF System.

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