

THE STRONG-ARM POWER ON STEROIDS—EXPANDING NON-AVOIDANCE TRUSTEE CLAIMS UNDER § 544(a)(1)

by

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The so-called strong-arm power¹—§ 544(a) of the Bankruptcy Code²—has traditionally been used by a trustee in bankruptcy³ to avoid security interests in personal property or real property interests that are unperfected or unrecorded at the moment the bankruptcy case is commenced.⁴ Called one of the “avoiding powers” of the trustee,⁵ § 544(a) states that the “trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by” three different entities.⁶ Among those entities is a creditor that extends credit and obtains a judicial lien with respect to that credit at the time of the commencement of the case on all property on which a contract creditor could have obtained a judicial lien.⁷

Section 544(a) makes clear that no such entity need exist; the trustee assumes the position of a hypothetical creditor that meets the applicable requirements.⁸ By contrast, § 544(b)(1) allows the trustee to avoid transfers or obligations that are voidable under applicable law by an actual creditor holding an allowable claim.⁹ That provision does not give the trustee more generally the “rights and powers” of those actual creditors.

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¹ See generally 5 COLLIER ON BANKRUPTCY ¶ 544.LH[1] (16th ed. 2024).

² 11 U.S.C. § 544(a).

³ Unless otherwise limited by the court “a debtor in possession shall have all the rights . . . and powers, and shall perform all the functions and duties . . . of a trustee serving in a case under [chapter 11].” *Id.* § 1107(a). The debtor in possession is defined to mean the “debtor except when a person that has qualified under section 322 of this title is serving as trustee in the case.” *Id.* § 1101(1). For purposes of this article, I will refer to the “trustee” exercising the strong-arm powers even though in any particular case it may be the debtor in possession.

⁴ See, e.g., *IPC (USA), Inc. v. Ellis (In re Pettit Oil Co.)*, 917 F.3d 1130, 1133–34 (9th Cir. 2019); *Harker v. PNC Mortg. Co. (In re Oakes)*, 917 F.3d 523, 532 (6th Cir. 2019); *Viegelahn v. TMX Credit, Inc. (In re Mireles)*, No. 22-50970, Adv. No. 23-05046, 2024 WL 2704041, at *7 (Bankr. W.D. Tex. May 24, 2024) (using § 544(a) to avoid unperfected security interests or unrecorded mortgages).

⁵ See 11 U.S.C. § 546 (providing statute of limitations for actions or proceedings under, among other sections, § 544).

⁶ *Id.* § 544(a).

⁷ *Id.* § 544(a)(1).

⁸ Section 544(a)(1) includes language permitting the exercise of the trustee’s authority under those provisions “whether or not such a creditor exists.”

⁹ *Id.* § 544(b)(1).

In this article I suggest that, although § 544(a)(1) confers on the trustee the “rights and powers” of a lien creditor, it was never intended to allow the trustee to exercise rights and powers that are generally given under state law to *all* creditors rather than just *lien creditors*. Giving the trustee the exclusive right to bring causes of action that could be asserted by creditors as a group is inconsistent with the history, language, and policy underlying the avoiding powers.

I. History of the Strong-Arm Power

As originally enacted, the Bankruptcy Act of 1898¹⁰ did not confer hypothetical lien creditor status on the trustee. Instead, the Act included several provisions permitting the trustee to avoid transactions. Section 60b allowed the trustee to avoid a preference (as defined in § 60a¹¹) made within four months before the filing of a petition when the recipient or benefitted party “had reasonable cause to believe that it was intended thereby to give a preference.”¹² Section 67c¹³ allowed the trustee to avoid preferential liens, and § 70e¹⁴ permitted the trustee avoid any transfer of property which any creditor might have avoided. Only when the Bankruptcy Act was amended in 1910¹⁵ was the second clause of § 47a¹⁶ amended to include a provision conferring on the trustee, with respect to all property in the custody of the bankruptcy court, “all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon” (as well as the rights of a judgment creditor holding an execution duly returned unsatisfied).¹⁷

¹⁰ Act of July 1, 1898, ch. 541, 30 Stat. 544 (1898) [hereinafter “Bankruptcy Act”].

¹¹ *Id.* § 60a (codified at 11 U.S.C. § 96a (1976)). The provision provided that “a person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment, or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class.”

¹² *Id.* § 60b.

¹³ *Id.* § 67c (codified at 11 U.S.C. § 107(c) (1976)).

¹⁴ *Id.* § 70e (codified at 11 U.S.C. § 110(e) (1976)).

¹⁵ Act of June 25, 1910, Pub. L. No. 61-294, 36 Stat. 838 (1910).

¹⁶ Section 47(a)(2) previously specified that trustees were required to “collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest.” Bankruptcy Act § 47(a)(2).

¹⁷ *Id.* § 8, 36 Stat. at 840 (codified at 11 U.S.C. § 75 (1910)). The amendment was responsive to a Supreme Court case denying the trustee, who did not have the rights of a lien creditor, the right to prevent recovery of property of the estate by a seller who had not recorded its interest in the property. The Court held that a general creditor—whose rights were exercised by the trustee—would not have the right to avoid the unperfected claim. *York Mfg. Co. v. Cassell*, 201 U.S. 344, 352–53 (1906). *See generally*

The Chandler Act¹⁸ amended both the avoiding powers and the provisions giving the trustee the status of a lien creditor, retaining the preference provisions in § 60b and fraudulent transfer provisions in § 70e, but moving to § 70c the provisions formerly included in § 47a(2) giving the trustee the rights of a lien creditor and unsatisfied execution creditor.¹⁹ The amended language explicitly gave the trustee the benefit of any defenses available to the debtor as well as the position of a hypothetical lien creditor.²⁰

Section 70c was amended again in 1950,²¹ 1952,²² and 1966.²³ From 1966 until it was repealed upon Bankruptcy Code's enactment, § 70c conferred on the trustee the "rights and powers of . . . a creditor who upon the date of bankruptcy obtained a lien by legal or equitable proceedings upon all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt upon a simple contract could have obtained such a lien, whether or not such a creditor exists."²⁴

Section 70c and its predecessor § 47a(2) never explicitly included the right to avoid any transaction. Whatever powers were included in the "rights, remedies, and powers" of a lien creditor were determined by applicable state

Jonathan M. Landers, *A Unified Approach to Parent, Affiliate and Subsidiary Questions in Bankruptcy*, 42 U. CHI. L. REV. 589, 611–12 n.65 (1975).

¹⁸ Act of June 22, 1938, ch. 575, Pub. L. No. 75-696, 52 Stat. 840 (1938).

¹⁹ Section 47(a) returned to its pre-1910 purpose of setting out the various duties of the trustees. Amended § 70(c) brought within § 70 the provisions giving the trustee the benefit of all defenses available to the bankrupt as against third persons; the provisions conferring on the trustee the rights of a lien creditor, and in the next two paragraphs (§ 70(d) and § 70(e)) the provisions defining fraudulent transfers and allowing the trustee to avoid them.

²⁰ The language read as follows:

The trustee, as to all property in the possession or under the control of the bankrupt at the date of bankruptcy or otherwise coming into the possession of the bankruptcy court, shall be deemed vested as of the date of bankruptcy with all the rights, remedies, and powers of a creditor then holding a lien thereon by legal or equitable proceedings, whether or not such a creditor actually exists; and, as to all other property, the trustee shall be deemed vested as of the date of bankruptcy with all the rights, remedies, and powers of a judgment creditor then holding an execution duly returned unsatisfied, whether or not such a creditor actually exists.

Id. § 70c, 52 Stat. at 881.

²¹ Act of Mar. 18, 1950, ch. 70, 64 Stat. 26 (1950). The amendment extended the trustee's status of lien creditor to all property of the bankrupt at the date of bankruptcy whether or not coming into possession or control of the court. *See* H.R. Rep. No. 81-1293, at 4 (1949).

²² Act of July 7, 1952, ch. 579, 66 Stat. 429 (1952). The amendment deleted the requirement that the rights, remedies, and powers of a lien creditor be with respect to property of the bankrupt and extended the lien creditor status to all property "upon which a creditor of the bankruptcy could have obtained a lien by legal or equitable proceedings at the date of bankruptcy." 66 Stat. at 430.

²³ Act of July 5, 1966, Pub. L. No. 89-495, 80 Stat. 268 (1966). The amendment conferred on the trustee the rights and powers of a judgment creditor.

²⁴ Bankruptcy Act § 70c (codified at 11 U.S.C. § 110 (1976)).

law. Before the Uniform Commercial Code was enacted,²⁵ there was no single structure for obtaining personal property interests to secure debt, much less any single approach to establishing the priority of those interests as against a lien creditor.²⁶ Therefore, the cases in which the trustee attempted to exercise its rights under this provision were dependent on the particular state law.²⁷

For example, in one of the earliest cases to be decided under § 47a(2), the court held that the trustee, with the rights and powers of a lien creditor, under Pennsylvania law could defeat the claim of a seller of farm implements who retained a “secret lien” to secure the obligation to pay the purchase price.²⁸

²⁵ The Uniform Commercial Code was first adopted by the National Conference of Commissioners on Uniform State Laws and the American Law Institute, who sponsored its development, in 1951. It was enacted by almost all of the states by 1966. *See generally* William A. Schnader, *A Short History of the Preparation and enactment of the Uniform Commercial Code*, 22 U. MIA. L. REV. 1, 10 (1967).

²⁶ Prior to Article 9 of the Uniform Commercial Code, states used such structures as the chattel mortgage, conditional sales contract, the pledge, the field warehouse, assignments of contract rights, factor’s liens, and bailments, among others. *See generally* Peter Winship, *An Historical Overview of UCC Article 9*, in SECURED TRANSACTIONS LAW REFORM: PRINCIPLES, POLICIES AND PRACTICE (Louise Gullifer & Orkun Ackseli eds., 2016).

²⁷ For several years there were disputes over whether the trustee’s position as a lien creditor gave the trustee the power under the Internal Revenue Code to avoid tax liens because the tax code provided that the tax lien was not valid against (among others) “judgment creditors” until a notice of lien had been filed. *Compare In re Fid. Tube Corp.*, 278 F.2d 776, 782 (3d Cir. 1960) (holding that the trustee could not prevail against the tax lien), *with United States v. Speers (In re Kurtz Roofing Co.)*, 335 F.2d 311, 313 (6th Cir. 1964), *Brust v. Sturr*, 237 F.2d 135, 136 (2d Cir. 1956), *and United States v. England*, 226 F.2d 205, 206–07 (9th Cir. 1955) (holding that trustee should prevail over tax lien). The Supreme Court in *United States v. Speers* held that the unrecorded federal tax lien was invalid as against the trustee in bankruptcy as a lien creditor. 382 U.S. 266, 275 (1965). *See generally* Charles Romano, *Bankruptcy—Unrecorded Federal Tax Liens—Rights of a Trustee Under Section 70c of the Bankruptcy Act*, 27 LA. L. REV. 318 (1967).

²⁸ *In re Hartdagen*, 189 F. 546, 549 (M.D. Penn. 1911); *see also* *Pearson v. McKinlay (In re Goodwin Corp.)*, 87 F.2d 468, 470 (7th Cir. 1937) (avoiding unrecorded equitable lien on debtor’s property applying Illinois law); *Barbee v. Spurrier Lumber Co.*, 64 F.2d 5, 6 (10th Cir. 1933) (under Oklahoma law trustee, as lien creditor, could retain property sold under unrecorded conditional sales contract); *Bank of Hampton v. Wright*, 35 F.2d 321, 323 (8th Cir. 1929) (applying Arkansas law to defeat mortgage); *Albert Pick & Co. v. Wilson*, 19 F.2d 18, 20 (8th Cir. 1927) (finding trustee could prevail over unrecorded chattel mortgage applying Iowa law); *Brandes v. Barber*, 13 F.2d 65, 67 (8th Cir. 1926) (holding trustee’s rights were superior those under unrecorded chattel mortgage under Arkansas law); *Indus. Fin. Corp. v. Cappelmann*, 284 F. 8, 13 (4th Cir. 1922) (allowing the trustee to avoid an unrecorded conditional sale or bailment agreement as a lien creditor under South Carolina law); *In re Shiflet*, 240 F. Supp. 183, 185 (E.D. Ark. 1965) (under Arkansas law lien on automobile must be filed with Motor Vehicle division and unfiled lien was invalid against trustee).

For some time there was confusion over whether a trustee could avoid a conditional sales contract or chattel mortgage based on delayed recording. State law allowed the lien creditor to avoid the security interest if it acquired its lien before the contract was filed. Even though the contract was filed before bankruptcy and there were no creditors who had actually obtained a lien between execution of the contract and the date it was filed, some courts concluded that the trustee could exercise the rights of a hypothetical creditor who obtained a lien during that period. *Cf. England v. Sanderson*, 236 F.2d 641, 643 (9th Cir. 1956) (reversing a lower court decision that relied on *Constance* to permit the trustee to assert the rights of creditors whose claims arose before an increase in the state homestead allowance for the benefit of all

By contrast, applying Washington law, the Ninth Circuit held that the trustee could avoid a chattel mortgage, but did not have the ability to challenge a real property mortgage because under state law only a bona fide purchaser could avoid a real property mortgage.²⁹

After Article 9 of the Uniform Commercial Code was adopted, that law became the applicable state law governing the respective rights of secured creditors and lien creditors.³⁰ Cases thereafter uniformly permitted the trustee to subordinate unperfected security interests in personal property under § 70c.³¹

creditors). *Compare, e.g.,* Constance v. Harvey, 215 F.2d 571, 575 (2d Cir. 1954), *cert. denied*, 348 U.S. 913 (1955) (finding that trustee could prevail over holder of chattel mortgage based on delayed recording), *with, e.g.,* Schueler v. Weintrob, 105 N.W.2d 42, 48 (Mich. 1960), and *In re Billings*, 170 F. Supp. 253, 258 (W.D. Mo. 1959) (rejecting the view that a trustee can assume the position of a hypothetical “gap” lien creditor when there is a delay in recording).

The Supreme Court ultimately rejected the holding of *Constance* in *Lewis v. Manufacturers National Bank of Detroit* concluding that the rights of a hypothetical lien creditor under § 70c must be determined at the time the bankruptcy petition is filed, not at an earlier point of time. 364 U.S. 603 (1961). *See generally* Frank R. Kennedy, *The Bankruptcy Amendments of 1966*, 1 GA. L. REV. 149, 170–71 (1967). The Supreme Court holding was codified in the Bankruptcy Code in 1978, which also made it clear that there need not be an actual creditor who could become a lien creditor at that time, rejecting the holding of *Pac. Fin. Corp. v. Edwards*, 304 F.2d 224 (9th Cir. 1962) and *In re Feds., Inc.*, 553 F.2d 509 (6th Cir. 1977); *see* H.R. REP. NO. 95-595, at 370 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 5963, 6326; S. REP. NO. 95-989, at 85 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5871.

²⁹ *Pac. State Bank v. Coats*, 205 F. 618, 626 (9th Cir. 1913); *see also* *Ivey v. Transouth Fin. Corp.* (*In re Clifford*), 566 F.2d 1023, 1027 (5th Cir. 1978) (under Georgia law improperly recorded security deed was valid against trustee exercising rights of judgment lien holder); *Verbest v. Michael Yundt Co.* (*In re Pointer Brewing Co.*), 105 F.2d 478, 480 (8th Cir. 1939) (finding trustee could not avoid unrecorded conditional sales agreement under Iowa law); *S. Dairies, Inc. v. Banks* (*In re Bland*), 92 F.2d 282, 286–87 (4th Cir. 1937) (concluding that trustee did not have a lien on land in possession of third party whose deed was not properly indexed under North Carolina law); *Eichler v. Gray* (*In re Smith*), 27 F.3d 328, 329 (9th Cir. 1928) (because trustee was not subsequent purchaser or mortgagee for value and in good faith, under California law trustee could not challenge validity of trust deed); *Robertson v. Schlotzhauer*, 243 F. 324, 331 (7th Cir. 1917) (holding trustee was not a bona fide purchaser for value of property who could avoid unrecorded deed under Indiana law); *Constad v. Buell* (*In re Gold*), 210 F. 410, 414 (7th Cir. 1913) (finding trustee’s rights as a lien creditor did not prevail over rights of defrauded vendor under Illinois law); *Creel v. Birm. Tr. Nat’l Bank*, 383 F. Supp. 871, 876–77 (N.D. Ala. 1974) (holding trustee could not assert claim to funds held in irrevocable trust under Alabama law); *In re Smith*, 348 F. Supp. 1290, 1294 (E.D. Va. 1972) (holding property held in resulting trust was not subject to recovery by trustee as lien creditor under Virginia law).

³⁰ Under U.C.C. § 9-301(1)(b) (A.L.I. & UNIF. L. COMM’N 1952), an unperfected security interest was subordinate to the rights of “a person who becomes a lien creditor without knowledge of the security interest and before it is perfected.” Article 9 has been amended several times since and the 2010 version has been enacted by all states. The current provision subordinating an unperfected security interest to a lien creditor is § 9-317(a)(2).

³¹ *See, e.g.,* *Frearson v. Wingold* (*In re Equitable Dev. Corp.*), 617 F.2d 1152, 1157 (5th Cir. 1980); *In re Dennis Mitchell Indus., Inc.*, 419 F.2d 349, 358 (3d Cir. 1969); *Stowman v. Fargo Nat’l Bank & Tr. Co.* (*In re Buckley*), 5 B.R. 503, 505 (D. Minn. 1980); *In re Coed Shop, Inc.*, 435 F. Supp. 472, 475 (N.D. Fla. 1977); *Fruehauf Corp. v. Sherman* (*In re Gringeri Bros. Transp. Co.*), 14 B.R. 396, 403 (Bankr. D.

In 1970, Congress created a Commission on the Bankruptcy Laws of the United States to consider changes to the Bankruptcy Act.³² The Commission issued its report in July 1973, and with respect to the strong-arm clause recommended that it be continued “with simplifying language changes.”³³ It further recommended that “potential confusion or controversy be avoided by including the phrase: ‘the trustee’s rights and powers . . . shall not be affected by his own knowledge or that of any or all creditors.’”³⁴ More directly bearing on the use of the trustee’s rights and powers under the strong-arm power, the Commission recommended that “the trustee be given the right to assert any cause of action existing in favor of the creditors as a class or some portion of them, for the benefit of those creditors in whose favor the cause of action exists,”³⁵ overruling the decision of the Supreme Court in *Caplin v. Marine Midland Grace Trust Co.*³⁶ The Commission proposed the following language:³⁷

Section 4-604. Rights of Trustee as Lien Creditor and as
Successor to Creditors

(a) Lien Creditor. The trustee shall have as of the date of the petition, the rights and powers of a judicial lien creditor of the debtor and of a creditor with an execution returned unsatisfied against the debtor. The trustee’s rights and powers under this subdivision shall not be affected by his own knowledge or that of any or all creditors.

(b) Successor to Creditors.

(1) ***³⁸

Mass. 1981); *United Gen. Leasing, Inc. v. Gehrke Enter., Inc.* (*In re Gehrke Enter., Inc.*), 1 B.R. 647, 653 (Bankr. W.D. Wis. 1979) (allowing trustee to prevail against unperfected security interests under § 70c).

³² Act of July 24, 1970, Pub. L. No. 91-354, 84 Stat. 468 (1970). Designed to “study, analyze, evaluate, and recommend changes” to the Bankruptcy Act “to reflect and adequately meet the demands of present technical, financial, and commercial activities.” *Id.*

³³ Report of the Commission on the Bankruptcy Laws of the United States, House Doc. No. 93-137, Part I, 93rd Cong. 1st Sess., at 200 (1973) [hereinafter “1973 Commission Report”]. The Commission recommended omitting clause (1) in § 70c as unnecessary and streamlining clause (3) by use of a definition of “judicial lien creditor.” *Id.* at 200 n.121.

³⁴ 1973 Commission Report, Part II, at 200 n.121.

³⁵ *Id.* at 20.

³⁶ 406 U.S. 416 (1972). In *Caplin*, the Court held that a chapter X trustee had no statutory authority to bring a claim on behalf of debenture holders against their indenture trustee for misconduct. *See infra* Section II(4). The Commission explained that the authority should be “exercised only when in the best interest of the estate, as when the recovery would reduce or eliminate some claims against the estate and thus enhance dividends for other creditors or improve the prospect for rehabilitation of the debtor.” 1973 Commission Report, Part II, at 161.

³⁷ 1973 Commission Report, Part II, at 160.

³⁸ This section was intended to replace § 70e allowing the trustee to avoid a transfer or obligation that could be avoided by a creditor with an allowable claim.

(2) Creditors' Claims. The trustee may, when in the best interest of the estate, enforce any claim which any class of creditors has against any person and if necessary for that purpose, the court may stay any other pending action on such claims. If the trustee brings an action on such claim, he shall give notice to all creditors who could have brought an action on the claim if the trustee had not done so. Any judgment entered for or against the trustee on such claim shall be binding on all such creditors and any recovery by the trustee shall be for the benefit only of such creditors after the deduction of all expenses incurred by the trustee in effecting such recovery.

Bills were introduced in 1973 in both the House and Senate to enact the language suggested by the Commission, but they were not pursued.³⁹ Bills introduced over the next two years with the same language met the same fate.⁴⁰

In 1977, a completely reworked draft Bankruptcy Code was proposed by Rep. Edwards,⁴¹ which differed from the Commission's proposal in three significant ways. First, it gave the trustee not only the rights and powers of a lien creditor, but also explicitly gave the trustee the ability to avoid transfers of property or obligations incurred by such a creditor.⁴² Second, it gave the trustee the rights and powers of, and the ability to avoid transfers and obligations voidable by execution creditors and added a new clause giving the trustee the status of a bona fide purchaser of real property.⁴³ Third, the draft expanded the proposal to permit the trustee to assert claims of a creditor or class of creditors.⁴⁴ The proposed language for a new § 544(a) and (c) were as follows:⁴⁵

§ 544. Trustee as lien creditor and as successor to creditors

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

³⁹ H.R. 10792, 93rd Cong. (1st Sess. 1973); S. 2565, 93d Cong. (1st Sess. 1973).

⁴⁰ See H.R. 16643, 93rd Cong. (2d Sess. 1974); S. 4046, 93rd Cong. (2d Sess. 1974); S. 236, 94th Cong. (1st Sess. 1975); S. 235, 94th Cong. (1st Sess. 1975); H.R. 31, 94th Cong. (1st Sess. 1975); H.R. 32, 94th Cong. (1st Sess. 1975).

⁴¹ H.R. 6, 95th Cong. (1st Sess. 1977).

⁴² *Id.* § 544(a)(1).

⁴³ *Id.* §§ 544(a)(2), (a)(3).

⁴⁴ *Id.* §§ 544(a)(2), (a)(3).

⁴⁵ *Id.* § 544.

(1) a creditor that extended credit to the debtor at the time of the commencement of the case, and that obtained, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained a judicial lien, whether or not such a creditor exists;

(2) a creditor that extended credit to the debtor at the time of the commencement of the case, and obtained at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists; and

(3) a bona fide purchaser that purchased, at the time of the commencement of the case, all of the real property of the debtor, whether or not such a purchaser exists.

(c)(1) The trustee may enforce any cause of action that a creditor or a class of creditors has against any person, if –

(A) the trustee could not recover against such person on such cause of action other than under this subsection;

(B) recovery by the trust for the benefit of such creditor or the members of such class will reduce the claim of such creditor or of such members against the estate;

(C) recovery against such person will not create a right of subrogation in such person against the estate; and

(D) enforcement of such cause of action is in the best interest of the estate.

(2) If the trustee brings an action on such cause of action–

(A) the court may stay the commencement or continuation of any other action on such cause of action; and

(B) the clerk shall give notice to all creditors that could have brought an action on such cause of action if the trustee had not done so.

(3) A judgment in any such action brought by the trustee binds all creditors that could have brought an action on such cause of action. Any recovery by the trustee, less any expense

incurred by the trustee in effecting such recovery, shall be for the benefit only of such creditors.

Rep. Edwards introduced a revised version of the bill later that year.⁴⁶ The bill expanded the proposed trustee powers under § 544(c) to permit the trustee to enforce causes of action not only of a creditors or class of creditors but also of an equity security holder or class of equity security holders.⁴⁷ The House Report on the bill noted that subsection (c) was a new provision intended to overrule *Caplin v. Marine Midland Grace Trust Co.*⁴⁸ The House passed the bill on Feb. 1, 1978.⁴⁹

When the companion bill was introduced in the Senate by Sen. DeConcini,⁵⁰ paragraph (c) had been eliminated.⁵¹ The House bill was amended on the floor of the Senate to substitute for its text the entire text of the amended Senate bill and it was then passed in that form.⁵² No significant changes had been made to § 544(a) since the introduction of the original Senate bill.⁵³ Both House and Senate agreed to minor amendments—none of which affected § 544(a)—and the bill became law. As enacted, § 544(a) read as follows:⁵⁴

§ 544. Trustee as lien creditor and as successor to certain creditors and purchasers

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

(1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a

⁴⁶ H.R. 8200, 95th Cong. (1st Sess. 1977).

⁴⁷ *Id.* § 544(c)(1). The bill also made minor changes to § 544(a).

⁴⁸ H.R. Rep. No. 95-595, at 370 (1977), as reprinted in 1977 U.S.C.C.A.N. 5963, 6326. See *supra* note 36 and accompanying text.

⁴⁹ 123 CONG. REC. H478 (daily ed. Feb. 1, 1978).

⁵⁰ S. 2266, 95th Cong. (1st Sess. 1977).

⁵¹ *Id.* § 544.

⁵² 123 CONG. REC. S14745 (daily ed. Sept. 7, 1978).

⁵³ The only changes from the original version of § 544 in S. 2266 were (1) in § 544(a), the word “and” between “rights and powers of,” and “may avoid any transfer of property of the debtor” was changed to “or”; and (2) in clause (a)(3) the phrase “real property of the debtor” was changed to “real property from the debtor” and the phrase “against whom applicable law permits such transfer to be perfected,” was inserted before “that obtains the status of a bona fide purchaser.”

⁵⁴ Pub. L. No. 95-598, 92 Stat. 2596 (1978).

creditor on a simple contract could have obtained a judicial lien, whether or not such a creditor exists;

(2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists; and

(3) a bona fide purchaser of real property from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser at the time of the commencement of the case, whether or not such a purchaser exists.

In 1984 Congress made three amendments to § 544(a). It amended § 544(a)(1) to insert the word “such” before the word “obtained.”⁵⁵ In § 544(a)(2) it replaced the final word “and” with “or.”⁵⁶ And in § 544(a)(3) it inserted the words “, other than fixtures,” after “a bona fide purchaser of property” and added the phrase “and has perfected such transfer” after “status of a bona fide purchaser.”⁵⁷ Since 1984, no further amendments have been made.

II. Interpreting “Rights and Powers”

A. Trustee Asserting Claim of Debtor, Actual Unsecured Creditor or Hypothetical Lien Creditor

All courts agree that if the debtor could have asserted the same claim that creditors could have asserted prior to the bankruptcy filing, the cause of action becomes part of the bankruptcy estate under § 541(a).⁵⁸ For such causes of action, the trustee has the exclusive right to bring the claim during the bankruptcy case.⁵⁹ For example, *In re 305 East 61st St. Group LLC* involved

⁵⁵ Pub. L. No. 98-353, § 459(1) (1984).

⁵⁶ *Id.* § 459(2).

⁵⁷ *Id.* § 459(3).

⁵⁸ Section 541(a)(1) includes in the bankruptcy estate “all legal or equitable interests of the debtor in property as of the commencement of the case.” 11 U.S.C. § 541(a)(1).

⁵⁹ *See, e.g.,* *Artesanias Hacienda Real S.A. DE C.V. v. N. Mill Cap., LLC (In re Wilton Armetale, Inc.)*, 968 F.3d 273, 282–83 (3d Cir. 2020); *Bd. of Trs. of Teamsters Local 863 Pension Fund v. Foodtown, Inc.*, 296 F.3d 164, 169 (3d Cir. 2002); *In re Geise*, 992 F.2d 651, 655 (7th Cir. 1993); *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114, 118 (2d Cir. 1991); *Sierra Switchboard Co. v. Westinghouse Elec.*

causes of action for breach of fiduciary duty and for aiding and abetting breach of fiduciary duty.⁶⁰ The Second Circuit found that under Delaware law those causes of action were available only to the debtor limited liability company—not to individual company members—because their injuries were derivative of those suffered by the company.⁶¹ (By contrast, claims for breach of contract and for breach of the implied covenant of good faith and fair dealing were premised on contractual duties owed to the individual members rather than the company and could be asserted independently.⁶²)

Courts also agree that under § 544(a) the trustee in bankruptcy has the power to avoid unperfected security interests to the same extent as a hypothetical lien creditor.⁶³ And if there is an actual creditor holding an unsecured claim who could avoid a transfer of an interest of the debtor in property or the incurrence of an obligation by the debtor, § 544(b)(1) gives the trustee the right to pursue that avoidance.⁶⁴

B. Trustee Asserting Claims of Creditors

Neither § 541 nor § 544(b) confers on the trustee the ability to pursue claims that are neither part of the bankruptcy estate nor held by creditors who hold allowed unsecured claims. If the trustee has such power, it must be conveyed by § 544(a).

1. Language of § 544(a)

Section 544(a) has two discrete operational phrases. The first provides that the trustee “shall have . . . the rights and powers of” the described entities. The second gives the trustee the right to “avoid any transfer of property of the debtor or any obligation incurred by the debtor that is avoidable by” any the described entities. As discussed in Part I, the second concept was not explicitly

Corp., 789 F.2d 705, 707 (9th Cir. 1986); *Miller v. Shallowford Cmty. Hosp., Inc.*, 767 F.2d 1556, 1559 (11th Cir. 1985); *Stanziale v. McGladrey & Pullen, LLP (In re Student Fin. Corp.)*, 334 B.R. 776, 778 (D. Del. 2005); *Voiland v. Marston (In re Marston)*, 417 B.R. 766, 770 (Bankr. N.D. Ill. 2009) (holding that claims that could have been asserted by debtor on petition date became part of property of the estate). *See generally* H.R. REP. NO. 95-595, at 367 (1977); S. Rep. No. 95-989, at 82 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5868, 6323.

⁶⁰ *Little Hearts Marks Fam. II L.P v. Carter (In re 305 E. 61st St. Grp. LLC)*, 130 F.4th 272, 274 (2d Cir. 2025).

⁶¹ *Id.* at 280.

⁶² *Id.* at 280–82.

⁶³ *See supra* note 4.

⁶⁴ 11 U.S.C. § 544(b)(1). *See United States v. Miller*, 604 U.S. 518, 523, 145 S. Ct. 839, 847, 221 L. Ed. 2d 373 (2025).

included in the Bankruptcy Act but was added when the Bankruptcy Code was enacted.⁶⁵

Courts have struggled to reconcile the two concepts. Some courts interpret “rights and powers” referred to in the first clause to be coextensive with the avoiding powers described in the second clause.⁶⁶ In their view, § 544(a) is purely a mechanism for avoiding prepetition transactions and not for asserting creditor claims on the estate’s behalf.

It is true that when § 544 is referred to in other Code sections it is almost always used in connection with a reference to avoidance of “a transfer”⁶⁷ or “a security interest”⁶⁸ or “a lien”⁶⁹ under § 544(a). Moreover, § 546(b)(1)—which makes the trustee’s rights and powers under § 544 subject to any generally applicable law permitting perfection of an interest in property to be effective against an entity acquiring rights in the property before perfection—implies that the rights and powers are those allowing the trustee to avoid an unperfected interest in property. Similarly, §§ 546(c)(1) and 546(d)(1) making “the rights and powers of the trustee under section[] 544(a)” subject to the right of reclamation make sense only if the rights and powers are those seeking to avoid an interest in the goods subject to the right of reclamation, not some other right or power unrelated to that property.⁷⁰ Section 550(a) describes the potential targets of an action in which “a transfer is avoided” under, among other sections, § 544.⁷¹ There is no limitation on the parties who might be liable based on other actions. And § 551 provides that “[a]ny transfer avoided under” § 544, among other provisions, “is preserved for the benefit of the estate but only with

⁶⁵ See *supra* note 40 and accompanying text.

⁶⁶ See, e.g., *Kapila v. Atl. Mort. & Inv. Corp.* (*In re Halabi*), 184 F.3d 1335, 1337 (11th Cir. 1999); *Mixon v. Anderson* (*In re Ozark Rest. Equip. Co.*), 816 F.2d 1222, 1226–30 (8th Cir. 1987); *Flatau v. Johnson* (*In re Stewart*), 339 B.R. 524, 528 (M.D. Ga. 2006); *Stanziale v. McGladrey & Pullen, LLP* (*In re Student Fin. Corp.*), 334 B.R. 776, 778 (D. Del. 2005); *In re First Leads & Mktg., Inc.*, No. 22-10245, 2023 WL 4163478, at *5 (Bankr. N.D. Ga. June 23, 2023); *Mukamal v. Gen. Elec. Cap. Corp.* (*In re Palm Beach Fin. Partners, L.P.*), 568 B.R. 874, 888–90 (Bankr. S.D. Fla. 2017); *Goldin v. Primavera Familienstiftung, TAG Assocs., Ltd.* (*In re Granite Partners, L.P.*), 194 B.R. 318, 324 (Bankr. S.D.N.Y. 1996) (holding that the strong-arm power of § 544(a) is limited to avoiding transfers of property or obligations incurred by debtor); cf. *Rodriguez v. Countrywide Home Loans, Inc.* (*In re Rodriguez*), 402 B.R. 299, 311 (Bankr. N.D. Ind. 2009); *Mills v. Brown* (*In re Brown*), 182 B.R. 778, 782 (Bankr. E.D. Tenn. 1995) (holding that § 544(a)(3) is limited to the avoidance of transfers of real property). See generally 5 Collier on Bankruptcy ¶¶ 544.01 (16th ed. 2025) (“It is generally thought that section 544 is limited to avoidance actions.”).

⁶⁷ 11 U.S.C. §§ 303(b)(2), 349(b)(1)(B), 362(b)(24), 502(d), 522(h)(1), 522(i)(2), 546(e), 546(f), 546(g), 546(j), 548(c), 550, 551, 749(a), 749(b), 764(a), and 764(b).

⁶⁸ *Id.* §§ 521(d), 552(b).

⁶⁹ *Id.* § 522(c)(2)(A)(i).

⁷⁰ *Id.* § 546(c)(1), (d)(1); see also *id.* § 546(h) (dealing with return of goods).

⁷¹ 11 U.S.C. § 550(a).

respect to property of the estate.”⁷² Nothing is said about property received as a result of asserting any other right or power of the trustee.

The problem with interpreting § 544(a) to deal exclusively with avoidance is its statutory language. Section 544(a) includes not only the clause allowing the trustee to bring avoidance actions, but also the clause that confers on the trustee the “rights and powers” of the specified entities. The two clauses are separated by the word “or.” This clearly implies that the trustee may not only seek to avoid transfers or obligations but may also exercise the rights and power of the described entities.⁷³ If § 544(a) is intended only to allow the trustee to avoid transfers or obligations, the language giving the trustee the “rights and powers” of those entities is surplusage. The Supreme Court has directed that “[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.”⁷⁴ The limited view of the scope of § 544(a) runs afoul of this directive.

Therefore, most courts reject the limited view of § 544(a) and view the “rights and powers” clause to permit the trustee to assert any cause of action that hypothetical lien creditors or unsatisfied execution creditors or bona fide purchasers of real property could have asserted under other law.⁷⁵ But if the trustee can pursue any claim that a hypothetical lien creditor can bring under applicable state law, then it can also bring any claim that a general unsecured creditor can assert (because a lien creditor is just a general unsecured creditor who has a lien).

⁷² *Id.* § 551.

⁷³ *See, e.g.,* Rupp v. Duffin (*In re Duffin*), 457 B.R. 820, 828 (10th Cir. B.A.P. 2011); Whittaker, Clark & Daniels, Inc. v. Brenntag AG (*In re Whittaker, Clark & Daniels*), 663 B.R. 1, 15 (Bankr. D.N.J. 2024); S. Bank & Tr. Co. v. Alexander (*In re Alexander*), No. 11-74515, 2014 WL 3511499, at *9 (Bankr. E.D. Va. July 16, 2014); *In re Saunders*, 413 B.R. 722, 725 (Bankr. D. Idaho 2009) (noting that the disjunctive phrasing of § 544(a) gives trustee more than avoiding powers).

⁷⁴ Corley v. United States, 556 U.S. 303, 314 (2009) (citations and quotation marks omitted). *See generally* ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW* 174 (2012) (stating that no provision “should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence” (boldface deleted)).

⁷⁵ *See, e.g.,* Zilkha Energy Co. v. Leighton, 920 F.2d 1520, 1523 (10th Cir. 1990); *Duffin*, 457 B.R. at 828; Miller v. New Penn Fin., LLC (*In re Miller*), No. 15-70981, 2020 WL 1933922, at *3 (Bankr. N.D. Ga. Apr. 21, 2020); *Alexander*, 2014 WL 3511499, at *9; *In re Guillot*, 250 B.R. 570, 593 (Bankr. M.D. La. 2000) (allowing trustee to bring action available to lien creditor, unsatisfied execution creditor, or bona fide purchaser of real property under state law).

2. Whose Claims May Trustee Assert under § 544(a)?

I suggest that interpreting the trustee's authority under § 544(a) is not binary, that is, neither limited to avoiding powers nor so expansive as to permit assertion of all claims of general unsecured creditors. There is a third approach that both gives effect to the language of § 544(a) and is consistent with the structure and history of § 544 as a whole.

I start by assuming that Congress intended to add something to the trustee's avoiding powers when it included language conferring on the trustee the "rights and powers" of the lien creditors, unsatisfied execution creditors, and bona fide purchasers of real property. But the rights and powers that the trustee is given are not those of creditors generally; the trustee is given only rights and powers of lien creditors, unsatisfied execution creditors, and bona fide purchasers of real property. To determine what those rights and powers are, we have to look to state law.⁷⁶ I suggest that the state laws that may be invoked by the trustee are not those that confer rights on general unsecured creditors, but rather those that specifically give rights to lien creditors, unsatisfied execution creditors, or bona fide purchasers in their capacity as such.⁷⁷

The following discussion focuses on four different types of claims trustees have asserted under § 544(a)(1) and that some courts have agreed can be pursued under that provision. I would maintain that in only one of these situations should the trustee be able to assert the claim under § 544(a)(1), and even then only in limited circumstances. In the others, I suggest using § 544(a)(1) to assert the claim of creditors is inappropriate.

a. Marshaling of Assets

Marshaling of assets (sometimes called the "two-funds doctrine"⁷⁸) is a common law doctrine governed by state law. It is an equitable doctrine that can

⁷⁶ See, e.g., *Grogan v. Harvest Cap. Co. (In re Grogan)*, 476 B.R. 270, 278 (Bankr. D. Or. 2012) (concluding that under § 544(a) the trustee had the rights and powers of a creditor with a lien by levy on personal property given by Oregon law); *Waldschmidt v. Dennis (In re Muller)*, 185 B.R. 552, 554 (Bankr. M.D. Tenn. 1995) (finding that trustee had the powers of a judicial lien creditor under Tennessee law to prevail over an unrecorded deed of trust or mortgage).

⁷⁷ See generally GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY 1295 (1965) (suggesting that § 70(c), the predecessor to § 544(a), "merely supplements § 70(e) by conferring lien status on the trustee in his representation of existing or actual creditors if applicable state law provides that *only lien creditors can avoid the challenged transaction*") (emphasis added); Frank R. Kennedy, *The Trustee in Bankruptcy as a Secured Creditor Under the Uniform Commercial Code*, 65 MICH. L. REV. 1419, 1423 (1967) (quoting Gilmore).

⁷⁸ See *Keating v. Deutsche Bank Nat'l Tr. Co. (In re Miller)*, No. 14-62036, 2016 WL 3923124, at

be invoked by a secured creditor whose interest in a debtor's property is subordinate to an interest held by another secured creditor.⁷⁹ When the court grants a motion to apply the doctrine, the senior secured creditor is required to proceed against property on which the senior creditor has the exclusive claim rather than taking action against the property in which there are joint claims by both senior and subordinated creditors, thus maximizing the potential return for the subordinated creditor.⁸⁰ Junior creditors may not invoke the doctrine if it would be detrimental to the senior creditor.⁸¹

Three elements must be present to justify marshaling.⁸² First, there must be a senior and a junior secured creditor of a common debtor with two or more funds. Second, the senior secured creditor must have an interest in two or more of the funds. Third, the junior secured creditor must have a junior interest in

*5 (Bankr. D. Ore. May 27, 2016); *In re Corso Stein Enters., Inc.*, 79 B.R. 584, 587 (Bankr. D.N.J. 1987); *Peoples Bank v. The Computer Room, Inc. (In re The Computer Room, Inc.)*, 24 B.R. 732, 734 (Bankr. N.D. Ala. 1982).

⁷⁹ See *Meyer v. United States*, 375 U.S. 233, 237, 84 S. Ct. 318, 321, 11 L. Ed. 2d 293 (1963) (noting that the purpose of the marshaling doctrine "is to prevent the arbitrary action of a senior lienor from destroying the rights of a junior lienor or a creditor having less security"). Courts generally reject efforts to invoke the doctrine by unsecured creditors. See, e.g., *First Nat'l Bank of Bos. v. Proctor*, 40 F.2d 841, 844 (1st Cir. 1930); *In re Borges*, 184 B.R. 874, 879 (Bankr. D. Conn. 1995) (quoting *Greenwich Tr. Co. v. Tyson*, 27 A.2d 166, 174 (Conn. 1942); *Craner v. Marine Midland Bank, N.A. (In re Craner)*, 110 B.R. 111, 122–23 (Bankr. N.D.N.Y. 1988), *rev'd on other grounds sub nom. Internal Revenue Serv. v. Craner*, 110 B.R. 124 (N.D.N.Y. 1989); *In re Mel-O-Gold, Inc.*, 88 B.R. 205, 208 (Bankr. S.D. Iowa 1988) (rejecting efforts by unsecured creditors to invoke marshaling doctrine). But see *Berman v. Green (In re Jack Green's Fashions for Men Big & Tall, Inc.)*, 597 F.2d 130, 133 (8th Cir. 1979) (allowing the trustee to invoke marshaling because failure to do so "would leave the general creditors of the business with nothing" without mentioning a statutory basis to do so); *In re Hale*, 141 B.R. 225, 227 (Bankr. N.D. Fla. 1992) (allowing unsecured creditor of debtor's estate to require marshaling).

⁸⁰ See, e.g., *Meyer*, 375 U.S. at 236–37; *Peoples State Bank v. Gen. Elec. Cap. Corp. (In re Ark-La-Tex Timber Co., Inc.)*, 482 F.3d 319, 331 n.16 (5th Cir. 2007); *United States v. Houghton (In re Szwyd)*, 408 B.R. 547, 550 (D. Mass. 2009) (stating that marshaling requires a creditor who can satisfy its claim from two funds to look to the fund that only it can access to protect interest of creditor who can reach only one of the funds).

⁸¹ See, e.g., *Hennessey Cap. SE, LLC v. David (In re Miller Eng'g, Inc.)*, 398 B.R. 473, 490 (Bankr. S.D. Fla. 2008); *Herkimer Co. Tr. Co. v. Swimelar (In re Prichard)*, 170 B.R. 41, 45 (Bankr. N.D.N.Y. 1994); *In re Wilmot Mining Co.*, 167 B.R. 806, 811–12 (Bankr. W. D. Pa. 1994); *Ray v. Am. Nat'l Bank & Tr. Co. (In re Payne & Haddock, Inc.)*, 103 B.R. 166, 169 (Bankr. E.D. Tenn. 1988); *In re United Retail Corp.*, 33 B.R. 150, 154 (Bankr. D. Haw. 1983); *Canal Nat'l Bank v. Larry's Equip. Serv., Inc. (In re Larry's Equip. Serv., Inc.)*, 23 B.R. 132, 134 (Bankr. D. Me. 1982); *Westinghouse Credit Corp. v. Cent. Tr. Co. Rochester (In re Leonardo)*, 11 B.R. 453, 455 (Bankr. W.D.N.Y. 1981) (declining to allow marshaling when senior creditor would be harmed); see also *Cullen v. Revere Copper & Brass, Inc. (In re John I. Paulding, Inc.)*, 76 B.R. 7, 9 (Bankr. D. Mass. 1987) (holding that trustee holding avoided interests of junior secured creditors could invoke marshaling in respect of those claims); cf. *In re Multiple Servs. Indust., Inc.*, 18 B.R. 635, 637 (Bankr. E.D. Wis. 1982) (conditionally ordering marshaling if trustee maintained funds in account in an amount sufficient to pay claim of senior creditor).

⁸² See *Craner*, 110 B.R. at 122–23; *Computer Room*, 24 B.R. at 734. See generally 53 AM. JUR. 2D *Marshaling Assets and Inverse Order of Alienation* § 1 (2025).

fewer of the funds than the senior secured creditor. Bankruptcy courts have often ordered marshaling of assets when a junior secured creditor requested the remedy with respect to a senior secured creditor.⁸³

When the bankruptcy trustee seeks marshaling of assets, it seeks to assume the position of the junior creditor because it has the rights of a hypothetical judgment lien creditor under § 544(a)(1). Section 544(a)(1) puts the trustee in the legal position of a judgment creditor who obtains a lien on all of the debtor's property as of the moment of the bankruptcy filing.⁸⁴ The holder of that judicial lien is a secured creditor.⁸⁵ If there is a senior secured creditor with a security interest on property included in the estate, the trustee's lien will be junior to that security interest.⁸⁶ Therefore, several cases have concluded that the trustee, exercising its powers as a lien creditor or unsatisfied execution creditor under § 544(a), has the ability to sue a senior secured creditor to compel marshaling of assets under applicable state law.⁸⁷

⁸³ See, e.g., *Caplinger v. Patty*, 398 F.2d 471, 474–76 (8th Cir. 1968); *Azabu Liquidating Tr. v. Beecher, Ltd. (In re Azabu Bldgs. Co., Ltd.)*, 383 B.R. 738, 746–48 (Bankr. D. Haw. 2008); *First City Nat'l Bank of Midland v. Mid-West Motors, Inc. (In re Mid-West Motors, Inc.)*, 82 B.R. 439, 443 (Bankr. N.D. Tex. 1988); *Elgin State Bank v. Bennett (In re All Am. Holding Corp.)*, 10 B.R. 71, 73 (Bankr. S.D. Fla. 1981); *Va. Block Co. v. Bank of Christiansburg (In re Va. Block Co.)*, 6 B.R. 670, 674 (Bankr. W.D. Va. 1980) (allowing marshaling of assets in bankruptcy case).

⁸⁴ A lien is defined in § 101(37) to mean a “charge against or interest in property to secure payment of a debt or performance of an obligation.” 11 U.S.C. § 101(37).

⁸⁵ A “judicial lien” is a “lien obtained by judgment, levy, sequestration, or other legal or equitable process of proceeding.” *Id.* § 101(36).

⁸⁶ See U.C.C. § 9-317(a)(2)(A) (A.L.I. & UNIF. L. COMM'N 2010) (providing that a security interest is subordinate to the rights of a person that becomes a lien creditor before the security interest is perfected).

⁸⁷ See, e.g., *Berman v. Green (In re Jack Green's Fashions for Men Big & Tall, Inc.)*, 597 F.2d 130, 133 (8th Cir. 1979); *In re Phelps*, 654 B.R. 634, 643 (Bankr. M.D. Fla. 2023); *Houghton v. U.S. (In re Szwyd)*, 394 B.R. 230, 237–38 (Bankr. D. Mass. 2008), *aff'd*, 408 B.R. 547 (D. Mass. 2009); *Off. Comm. of Unsecured Creditors v. Lozinski (In re High Strength Steel, Inc.)*, 269 B.R. 560, 574 (Bankr. D. Del. 2001); *In re Newcorn Enter. Ltd.*, 287 B.R. 744, 747–48 (Bankr. E.D. Mo. 2002); *In re Wilmot Mining Co.*, 167 B.R. 806, 811 (Bankr. W.D. Pa. 1994); *Fundex Cap. Corp. v. Balaber-Strauss (In re Tampa Chain Co., Inc.)*, 53 B.R. 772, 777 (Bankr. S.D.N.Y. 1985); *Comm. of Creditors of Ludwig Honold Manuf. Co. v. Cent. Penn Nat'l Bank (In re Ludwig Honold Manuf. Co.)*, 33 B.R. 724, 727 (Bankr. E.D. Pa. 1983); *In re Multiple Servs. Indust., Inc.*, 18 B.R. 635, 637 (Bankr. E.D. Wis. 1982); *Merrigan v. SBA (In re Clary House, Inc.)*, 11 B.R. 462, 466 (Bankr. W.D. Mo. 1981) (allowing trustee to seek marshaling of assets under § 544(a)(1)); *cf. Owens-Corning Fiberglas Corp. v. Center Wholesale, Inc. (In re Ctr. Wholesale, Inc.)*, 759 F.2d 1440, 1447 (9th Cir. 1985) (holding trustee had standing to object to marshaling by secured creditor); *Duck v. Wells Fargo Bank, N.A. (In re Spectra Prism Indus., Inc.)*, 28 B.R. 397, 399 (9th Cir. B.A.P. 1983) (holding trustee had standing under § 544(a) to block issuance of order requiring senior lienholder to marshal assets).

Even when courts conclude that the trustee has the right to seek marshaling, they disagree over whether marshaling may be sought against the government. Compare *Silverstein v. U.S. (In re Ackerman)*, 424 F.2d 1148, 1150 (9th Cir. 1970), *U.S. (Internal Revenue Service) v. Valley Nat'l Bank (In re Decker)*, 199 B.R. 684, 688 (9th Cir. B.A.P. 1996), and *U.S. (Internal Revenue Service) v. Ries*, No. 24-CV-146, 2025 WL 557778, at *5 (N.D. Tex. Feb. 10, 2025) (finding that marshaling may not be pursued against government), with *Ramette v. U.S. (In re Bame)*, 279 B.R. 833, 837–39 (8th Cir. BAP

Nevertheless, there has been a robust scholarly dispute over whether and how marshaling should be applied in bankruptcy cases,⁸⁸ and some courts have declined to permit the trustee to use § 544(a) to seek marshaling.⁸⁹ The argument against allowing the trustee to invoke marshaling is very simple. The trustee represents *unsecured* creditors and any recovery the trustee obtained through marshaling would go to those unsecured creditors. The entire objective of marshaling is to benefit a junior *secured* creditor without harming a senior secured creditor. Therefore, using the trustee’s powers under § 544(a) to seek marshaling is “inconsistent with the historical background of the doctrine of marshaling of assets”⁹⁰ and undermines the rights given to secured creditors under the Uniform Commercial Code and the Bankruptcy Code to foreclose on their collateral in whatever order they wish.⁹¹

In a 2025 case from the district court in the Northern District of Texas, *United States (Internal Revenue Service) v. Ries*, the court declined to permit the trustee to require the Internal Revenue Service to marshal assets by seeking recovery from exempt property of the debtor before pursuing property that remained in the bankruptcy estate.⁹² The court found that marshaling would interfere with the statutorily prescribed order of distributions in the chapter 7 case under which the IRS had a priority claim and was entitled to receive payment from the estate before lower priority claims were paid.⁹³ Although the court characterized its holding as “narrow,” it recognized that the implication of its analysis might render “the doctrine of marshaling . . . wholly inapplicable

2002), *Szwyd*, 394 B.R. at 237–38, and *Me. Assocs. v. U.S. (In re Morahan)*, 53 B.R. 489, 492 (D. Me. 1985) (holding that marshaling against government is permissible).

⁸⁸ See Craig H. Averch & Jeff P. Prostock, *The Doctrine of Marshaling: An Anachronistic Concept Under the Bankruptcy Code*, 22 U.C.C.L.J. 224 (1990); Jacquelyn Michael Davis, *Marshaling of Assets in Bankruptcy*, 5 BANKR. DEV. J. 309 (1987); Moses Lachman, Note, *Marshaling Assets in Bankruptcy: Recent Innovations in the Doctrine*, 6 CARDOZO L. REV. 671, 672 (1985); Howard Karasik & Robert Kolodney, *The Doctrine of Marshaling Under the Bankruptcy Code*, 89 COMM. L.J. 102 (1984); Ephraim K. Liebowitz, *Marshaling of Assets Under Bankruptcy Code*, 189 N.Y.L.J. 116, p. 1, col. 1 (June 16, 1983).

⁸⁹ See *Fed. Land Bank of Columbia v. Tidwell (In re McElwaney)*, 40 B.R. 66, 70–71 (Bankr. M.D. Ga. 1984); cf. *Computer Room*, 24 B.R. at 734 n.5 (expressing opinion of the court that trustee should not be allowed to invoke marshaling doctrine because trustee is not a secured creditor); *Wurst v. City of New York (In re Packard Props., Ltd.)*, 112 B.R. 154, 158 (Bankr. N.D. Tex. 1990) (declining to allow city with tax lien to compel marshaling by trustee with respect to collection of administrative expense claims because those priority claims were not secured); *Pittsburgh Nat’l Bank v. Lomb (In re Lomb)*, 74 B.R. 711, 712 (Bankr. W.D. Pa. 1987) (assuming that the trustee could invoke marshaling, it would be denied when it would not benefit estate).

⁹⁰ *Computer Room*, 24 B.R. at 737. See generally Karasik & Kolodney, *supra* note 88, at 103.

⁹¹ See Averch & Prostock, *supra* note 88, at 235.

⁹² 765 F. Supp. 3d 564, 571 (N.D. Tex. Feb. 10, 2025).

⁹³ *Id.* at 569.

in bankruptcy proceedings and claims governed by the priority scheme of 11 U.S.C. Sections 725 and 726.”⁹⁴ But the court declined “to reach that far in this case.”⁹⁵

This article takes no position on whether marshaling of assets should ever be permitted in a bankruptcy case insofar as it affects the statutory priorities for distribution under the Bankruptcy Code. But I suggest that use of § 544(a) is inappropriate in this context except in very limited circumstances.

Those cases that permit the trustee to seek marshaling generally involve one of two fact patterns. In some cases, the trustee seeks to compel marshaling with respect to assets that do not, and never did, belong to the debtor.⁹⁶ As these cases are inconsistent with the basic requirement for marshaling that the two funds belong to a single debtor, I find them unconvincing.⁹⁷

⁹⁴ *Id.* at 571.

⁹⁵ *Id.*

⁹⁶ *See, e.g.,* Berman v. Green (*In re* Jack Green’s Fashions for Men Big & Tall, Inc.), 597 F.2d 130, 133 (8th Cir. 1979) (allowing the trustee for corporate debtor to compel bank to collect from real estate on which bank had mortgages granted by individual debtors and their non-debtor wives before pursuing corporate assets); Off. Comm. of Unsecured Creditors v. Lozinski (*In re* High Strength Steel, Inc.), 269 B.R. 560, 574 (Bankr. D. Del. 2001) (holding trustee could seek to compel secured creditor to pursue remedies against other parties who are co-obligors because “common debtor” requirement for marshaling “is not mandatory”); *In re* Newcorn Enter. Ltd., 287 B.R. 744, 747–48 (Bankr. E.D. Mo. 2002) (granting Official Committee derivative standing to see marshaling with respect to real estate on which senior lender had deed of trust owned by debtor’s principal shareholders); Fundex Cap. Corp. v. Balaber-Strauss (*In re* Tampa Chain Co., Inc.), 53 B.R. 772, 778–80 (Bankr. S.D.N.Y. 1985) (using marshaling doctrine to compel bank to pursue shareholder/guarantors of corporate debt before collecting from corporate assets); Comm. of Creditors of Ludwig Honold Manuf. Co. v. Cent. Penn Nat’l Bank (*In re* Ludwig Honold Manuf. Co.), 33 B.R. 724, 727 (Bankr. E.D. Pa. 1983) (refusing to dismiss complaint filed by trustee seeking marshaling of property of debtor’s sureties in which secured creditor also held security interest); *In re* Multiple Servs. Indust., Inc., 18 B.R. 635, 637 (Bankr. E.D. Wis. 1982) (granting trustee’s application for marshaling against bank with mortgage granted by corporate shareholders); Merrigan v. SBA (*In re* Clary House, Inc.), 11 B.R. 462, 466 (Bankr. W.D. Mo. 1981) (compelling secured creditor to seek satisfaction of its secured indebtedness first from assets of co-maker with debtor of secured note).

⁹⁷ In a number of cases in which the court declined to order a marshaling of assets requested by the trustee, the property from which the trustee sought the senior creditor to satisfy its debt was not part of the bankruptcy estate. Under applicable state law, the two “funds” or collateral had to belong to the debtor to warrant marshaling. *See, e.g.,* Sicherman v. Page (*In re* Page), No. 05-24905, 2006 WL 4458355, at *5 (Bankr. N.D. Ohio Oct. 20, 2006); Dionne v. First Ala. Bank (*In re* XYZ Options, Inc.), 217 B.R. 912, 922–23 (Bankr. N.D. Ala. 1998); Blackwell v. First Nat’l Bank of St. Louis (*In re* Liberty Outdoors, Inc.), 204 B.R. 746, 750 (Bankr. E.D. Mo. 1997); *In re* Mel-O-Gold, Inc., 88 B.R. 205, 208 (Bankr. S.D. Iowa 1988); *In re* Dealer Support Servs Int’l, Inc., 73 B.R. 763, 765 (Bankr. E.D. Mich. 1987); *In re* C & B Oil Co., Inc. 72 B.R. 228, 231 (Bankr. N.D. Ohio 1987); *In re* Price, 50 B.R. 226, 231 (Bankr. E.D. Mich. 1985); Whirlpool Corp. v. Plad, Inc. (*In re* Plad, Inc.), 24 B.R. 676, 680 (Bankr. M.D. Tenn. 1982); McDonald v. First Nat’l Bank of Athens (*In re* Harrold’s Hatchery & Poultry Farms, Inc.), 17 B.R. 712, 716 (Bankr. M.D. Ga. 1982); United States v. Friend (*In re* A.E.I. Corp.), 11 B.R. 97, 100 (Bankr. E.D. Pa. 1981) (declining to allow marshaling because second fund not owned by debtor). Compare Davis, *supra* note 88, at 323 (supporting relaxation of two-funds requirement to allow marshaling of guarantor’s assets when there is evidence of fraudulent activity), with Lachman, *supra* note 88, at 684–86 (opposing approach allowing marshaling of surety’s assets).

The second scenario, illustrated by the *Ries* case described above, involves an attempt by the trustee to seek marshaling when the senior secured creditor has a security interest on property that is exempt and is therefore no longer subject to the trustee’s lien under § 544(a)(1).⁹⁸ This is the only situation in which I find it appropriate for the trustee to invoke the marshaling doctrine. Although the trustee initially had a lien under § 544(a)(1) on all property of the debtor at the moment of the bankruptcy filing, when property is found to be exempt it is not property “on which a creditor on a simple contract could have obtained . . . a judicial lien” as required by § 544(a)(1).⁹⁹ Therefore, there are two “funds”—non-exempt property of the estate and exempt property of the debtor—that satisfy the requirements for marshaling. The trustee, in its capacity as a judicial lien holder, should be able to compel a senior secured creditor with an interest in both exempt property and non-exempt property to pursue the exempt property first to the same extent any other junior secured creditor could do so.

b. Charging Orders

All states have laws that allow judgment creditors of a member of a limited liability company, general partnership, or limited partnership to seek a charging order on the member’s transferable interest in the company or partnership.¹⁰⁰ If a charging order is imposed, the creditor has a lien on the

⁹⁸ See, e.g., *In re Phelps*, 654 B.R. 634, 643 (Bankr. M.D. Fla. 2023) (refusing to confirm chapter 13 plan that did not provide for marshaling with respect to exempt real estate); *Houghton v. U.S.* (*In re Szwyd*), 394 B.R. 230, 235 (Bankr. D. Mass. 2008), *aff’d*, 408 B.R. 547 (D. Mass. 2009) (allowing marshaling sought by chapter 7 trustee with respect to exempt homestead).

⁹⁹ 11 U.S.C. § 544(a)(1).

¹⁰⁰ See ALA. CODE §§ 10A-5A-5.03, 10A-9A-7.03, 10A-8A-5.03 (2025); ALASKA STAT. §§ 32.06.504, 10.50.380, 32.11.340 (2025); ARIZ. REV. STAT. ANN. §§ 29-3503, 29-1044 (2025); ARK. CODE ANN. §§ 4-38-503, 4-47-703, 4-46-504 (2025); Cal. Corp. Code §§ 15907.03, 17705.03, 16504 (West 2025); COLO. REV. STAT. ANN. §§ 7-58-605, 7-64-504 (2025); CONN. GEN. STAT. ANN. §§ 34-259b, 34-349 (2025); DEL. CODE ANN. tit. 6, §§ 17-703, 18-703, 15-504 (2025); FLA. STAT. ANN. §§ 605.0503, 620.8504, 620.1703 (West 2025); GA. CODE ANN. § 14-11-504 (2025); HAW. REV. STAT. §§ 428-504, 425E-703, 425-129 (2025); IDAHO CODE §§ 30-25-503, 30-24-703, 30-23-504 (2025); 805 ILL. COMP. STAT. 180/30-20, 206/504, 215/703 (2025); IND. CODE 23-16-8-3, 23-4-1-28, 23-18-6-7 (2025); IOWA CODE ANN. §§ 488.703, 486A.504, 489.503 (West 2025); KAN. STAT. ANN. §§ 56A-504, 17-76,113 (2025); KY. REV. STAT. ANN. §§ 275.260, 362.2-703, 362.1-504, 362.481, 272A-6-050386A.6-060 (2025); LA. STAT. ANN. § 12:1331 (2025); ME. REV. STAT. ANN. tit. 31 §§ 1054, 1383, 1573 (2025); MD. CODE ANN. CORPS. & ASS’NS §§ 4A-607, 9A504 (2025); MASS. GEN. LAWS ch. 109, § 41 (2025); MASS. GEN. LAWS ch. 156C, § 40 (2025); MICH. COMP. LAWS §§ § 450.4507, 449.28 (2025); MINN. STAT. §§ 322C.0503, 321.0703, 323A.0504 (2025); MISS. CODE ANN. §§ 79-14-703, 79-13,504, 79-29-705 (2025); MO. ANN. STAT. §§ 358.280, 347.119 (2025); MONT. CODE ANN. §§ 35-12-1103, 35-8-705, 35-10-505 (2025); NEB. REV. STAT. §§ 21-142, 67-430 (2025); NEV. REV. STAT. §§ 86.401, 87A.480, 87.280,

member's interest and has the right to receive any distributions to which the member would otherwise have been entitled in respect of that interest.¹⁰¹ That lien is created by judicial process and therefore would qualify as a "judicial lien" under the Bankruptcy Code.¹⁰²

Some courts have concluded that under § 544(a)(1) the trustee has the rights and powers of a hypothetical judgment creditor to obtain a charging order on the judgment debtor's membership interest in a limited liability company or partnership if that interest is an asset of the bankruptcy estate.¹⁰³

There are two problems with this conclusion. First, it is entirely unnecessary. The debtor's membership interest in the company or partnership becomes part of the bankruptcy estate when the bankruptcy case is filed.¹⁰⁴ Although the trustee may not have the right to dispose of that interest under the

87.4342, 88.535 (2025); N.H. REV. STAT. ANN. §§ 304-A:28, 304-B:41; 304-C:126 (2025); N.J. STAT. ANN. §§ 42:1A-30, 42:2C-43 (2025); N.M. Stat. Ann. §§ 53-19-35, 54-2A-703, 54-1A-504 (2025); N.Y. P'SHIP LAW §§ 54, 111 (McKinney 2025); N.Y. LTD. LIAB. CO. LAW § 607 (McKinney 2025); N.C. Gen. Stat. §§ 57D-5-03, 59-58 (2025); N.D. CENT. CODE §§ 10-32.1-45, 45-10.2-64, 45-17-04 (2025); OHIO REV. CODE ANN. §§ 1706.342, 1776.50, 1782.41 (LexisNexis 2025); OKLA. STAT. ANN. tit. 18, § 2034 (2025); OR. REV. STAT. §§ 63.259, 67.205, 70.295 (2025); OKLA. STAT. ANN. tit. 54 §§ 1-504, 500-703A (2025); 15 PA. CONS. STAT. §§ 8454, 8673, 8853 (2025); 1956 R.I. GEN. LAWS §§ 7-13.1-703, 7-12.1-504, 7-16-37 (2025); S.C. CODE ANN. §§ 33-41-750, 33-44-504 (2025); S.D. CODIFIED LAW §§ 47-34A-504, 48-7A-504, 48-7A-505 (2025); TENN. CODE ANN. §§ 61-3-703, 61-1-504, 48-249-509 (2025); TEX. BUS. ORGS. CODE ANN. §§ 101.112, 153.256, 152.308 (West 2025); Utah Code Ann. §§ 48-2e-703, 48-3a-503, 48-1d-604 (2025); 11 VT CODE R. §§ 3244, 4074 (2025); VA. CODE ANN. §§ 13.1-1041.1, 50-73.108, 50-73.46:1 (2025); WASH. REV. CODE §§ 25.05.215, 25.10.556, 25.15.256 (2025); W.VA. CODE §§ 31B-5-504, 47B-5-4 (2025); WIS. STAT. §§ 178.0504, 179.0703, 183.0503 (2025); WYO. STAT. ANN. §§ 17-21-504, 17-29-503 (2025).

Some states permit a charging order against other assets. *See, e.g.*, IOWA CODE ANN. § 501A.903 (allowing charging order against member's interest in cooperative association); NEV. REV. STAT. § 78.746 (allowing charging order against stock); OKLA. ST. ANN. tit. 18, § 441-605 (West 2025) (allowing charging order against financial rights of member of limited cooperative association); UTAH CODE ANN. § 16-16-605 (West 2025) (allowing entry of charging order against financial rights of member of limited cooperative association); VT. STAT. ANN. tit. 11C, § 605 (allowing charging order against financial rights in mutual benefit enterprises).

¹⁰¹ *Supra* note 93100.

¹⁰² Section 101(a)(36) defines a "judicial lien" as one "obtained by judgment, levy, sequestration, or other legal or equitable process of proceeding." 11 U.S.C. § 101(a)(36).

¹⁰³ *See, e.g.*, *Pettine v. Direct Biologics, LLC* (*In re Pettine*), 655 B.R. 196, 217–18 (10th Cir. B.A.P. 2023); *In re Talbut*, No. 08-34763, 2016 WL 937373, at *3 (Bankr. N.D. Ohio Mar. 10, 2016); *Crawford v. Zambrano* (*In re Zambrano Corp.*), No. 09-20453, 2014 WL 585305, at *1 (Bankr. W.D. Pa. Feb. 13, 2014); *In re Grand Centreville, LLC*, No. 13-13590, 2014 WL 5302821, at *3 (Bankr. E.D. Va. Aug. 27, 2014); *Broyhill v. DeLuca* (*In re DeLuca*), 194 B.R. 65, 78 (Bankr. E.D. Va. 1996) (allowing trustee to obtain charging order under § 544(a)); *cf. Anderson v. Patel* (*In re Diplomat Constr., Inc.*), 512 B.R. 721, 726 (Bankr. N.D. Ga. 2014) (permissively abstaining from hearing adversary proceeding seeking, among other things, a charging order); *Zilkha Energy Co. v. Leighton*, 920 F.2d 1520, 1523 (10th Cir. 1990) (holding trustee could use § 544(a)(1) to enforce judgment creditor's rights against any equitable interest of a judgment debtor under Oklahoma law).

¹⁰⁴ 11 U.S.C. § 541(a)(1).

terms of the agreement governing the company or partnership and state law,¹⁰⁵ the trustee certainly has the right to the economic benefit of that membership interest, including the right to any distributions that are made in respect thereof.¹⁰⁶ This is the functional equivalent of obtaining a charging order,¹⁰⁷ without the procedural requirements of state law to obtain such an order.¹⁰⁸

Second, the right to obtain a charging order on membership interests is conferred by state law on a judgment creditor, not a judgment lien creditor. A judgment creditor is not a lien creditor until and unless it takes the actions required by state law to obtain a property interest in the judgment debtor's assets as by execution or garnishment. As I maintain that the rights and powers conferred on the trustee under § 544(a)(1) are limited to those that accrue to and are exercised by a lien creditor—not a judgment creditor—the trustee should have no right to seek a charging lien under that section.

c. Alter Ego/Piercing the Corporate Veil

When a debtor has insufficient assets to satisfy its debts, creditors may seek recovery from the debtor's owners or parent company on the theory that the debtor was simply an alter ego of the owner or parent.¹⁰⁹ Successfully asserting the alter ego doctrine under state law typically requires a showing that the alleged alter ego was controlled by another entity to such an extent that it lacked independent existence, that its form was used fraudulently or for an improper purpose, and that using the alter ego's corporate form caused harm.¹¹⁰ Piercing the corporate veil more generally refers to circumstances under which

¹⁰⁵ Under many statutes providing for a charging order, the judgment creditor is given no right to dispose of the membership interest to which the order pertains. *See, e.g.*, TEX. BUS. ORGS. CODE ANN. § 101.112(d) (2025); FLA. STAT. ANN. § 605.0503(3) (2025); MISS. CODE ANN. § 79-29-705(3) (2025); TENN. CODE ANN. § 61-1-504(e) (2025); *see also Talbut*, 2016 WL 937373, at *4; *cf. Hagemeyer v. Peachy Adventures, LLC (In re Neal)*, No. 12-25439, 2013 WL 12108275, at *3 (Bankr. W.D. Tenn. Feb. 5, 2013) (holding that trustee could dissolve single-member limited liability company owned by debtors); *In re Albright*, 291 B.R. 538, 541 (Bankr. Colo. 2003) (finding that trustee could liquidate property owned by individual debtor's limited liability company of which debtor was only member).

¹⁰⁶ *See DeLuca*, 194 B.R. at 78.

¹⁰⁷ *See Cutler v. Cutler (In re Cutler)*, 165 B.R. 275, 282 (Bankr. D. Ariz. 1994).

¹⁰⁸ *See Montana v. Blixseth (In re Blixseth)*, 484 B.R. 360, 369 (9th Cir. B.A.P. 2012) (holding trustee would have to seek a charging order from Nevada state court).

¹⁰⁹ *See generally* Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036 (1991); Note, *Piercing the Corporate Law Veil: The Alter Ego Doctrine Under Federal Common Law*, 95 HARV. L. REV. 853 (1982).

¹¹⁰ *See, e.g.*, *W.P. Prods., Inc. v. Tramontina U.S.A., Inc.*, 101 F.4th 787, 791 (11th Cir. 2024); *Brugnara Props. VI v. IRS (In re Brugnara Props. VI)*, 606 B.R. 371, 380 (Bankr. N.D. Cal. 2019) (listing elements required to pierce corporate veil under state law).

the corporate form is disregarded when it has been used to achieve an inequitable result.¹¹¹ The question is whether the trustee has standing to bring this claim under its § 544(a)(1) strong-arm powers.

The leading case for proposition that the trustee may seek to pierce the corporate veil is the 1967 case of *Long v. McGlon*, in which the trustee brought an action against the corporation's shareholders to hold them personally liable for corporate debts.¹¹² The court held that § 70(c) of the Bankruptcy Act conferred standing on the trustee to "look behind the corporate form" if creditors could do so.¹¹³ Several cases in recent years have similarly concluded that the trustee may seek to pierce the corporate veil to reach assets of another entity under § 544(a) if the debtor's creditors could file such an action.¹¹⁴

But as was pointed out by the California Court of Appeal in *Stodd v. Goldberger*, the trustee's standing in *Long* could be justified because the allegations in the complaint were that the defendants had converted or misappropriated debtor's property prior to the bankruptcy filing.¹¹⁵ As a result, the cause of action belonged to the corporation and could be asserted by the trustee because it was part of the bankruptcy estate.¹¹⁶ Most cases that have found that the trustee could seek to invoke veil piercing or alter ego doctrines have concluded that the debtor could have asserted a claim against the owner or parent corporation outside of bankruptcy under the applicable state law.¹¹⁷ Therefore, that claim belonged to the estate under § 541(a)(1).

¹¹¹ See generally Note, *Piercing the Corporate Law Veil*, *supra* note 109, at 854.

¹¹² 263 F. Supp. 96 (D.S.C. 1967). There was an earlier case in which the parent of the debtor corporation was held liable for the subsidiary's debts, but in that case the trustee was joined by the creditors of the subsidiary in suing the parent corporation and the parent did not challenge the trustee's standing. See *Henderson v. Rounds & Porter Lumber Co.*, 99 F. Supp. 376, 385 (W.D. Ark. 1951).

¹¹³ *Long*, 263 F. Supp. at 98.

¹¹⁴ See, e.g., *Reid v. Wolf (In re Wolf)* 644 B.R. 725, 748 (N.D. Ill. 2022); *Despins v. Lamp Cap. LLC (In re Kwok)*, No. 22-50073, Adv. Pro. 23-05023, 2024 WL 1261803, at *9 (Bankr. D. Conn. Mar. 22, 2024); *In re Archdiocese of Milwaukee*, 483 B.R. 693, 697 (Bankr. E.D. Wis. 2012) (holding that trustee had power under § 544(a) to assert veil-piercing claim). See generally Jonathan M. Landers, *A Unified Approach to Parent, Subsidiary, and Affiliate Questions in Bankruptcy*, 42 U. CHI. L. REV. 589, 616 (1975) (suggesting that the bankruptcy trustee should be able to pursue an action to pierce the corporate veil under § 70c of the Bankruptcy Act (predecessor to § 544(a)).

¹¹⁵ 151 Cal. Rptr. 67, 72 (Ct. App. 1977).

¹¹⁶ *Id.*

¹¹⁷ See, e.g., *Cadle Co. v. Mims (In re Moore)*, 608 F.3d 253, 258–59 (5th Cir. 2010); *Schimmelpenninck v. Byrne (In re Schimmelpenninck)*, 183 F.3d 347, 358 (5th Cir. 1999); *Kalb Voorhis & Co. v. Am. Fin. Corp.*, 8 F.3d 130, 133 (2d Cir. 1993); *St. Paul Fire & Marine Ins. Co. v. PepsiCo, Inc.*, 884 F.2d 688, 703–04 (2d Cir. 1989); *Steyr-Daimler-Puch of Am. Corp. v. Pappas*, 852 F.2d 132, 136 (4th Cir. 1988); *Koch Refin. v. Farmers Union Cent. Exch., Inc.*, 831 F.2d 1339, 1346 (7th Cir. 1987); *S.I. Acquisition, Inc. v. Eastway Delivery Serv., Inc. (In re S.I. Acquisition, Inc.)*, 817 F.2d 1142, 1153 (5th Cir. 1987); *Harrison v. Sorooof Int'l, Inc.*, 320 F. Supp. 3d 602, 627 (D. Del. 2018); *Stamps v. Knobloch (In re City Commc'ns, Ltd.)*, 105 B.R. 1018, 1022–23 (Bankr. N.D. Ga. 1989) (holding that alter ego/veil piercing claims were property of the estate); *cf. Baillie Lumber Co. v. Thompson (In re*

Allowing the trustee to pierce the corporate veil based on an alter ego theory under § 541 is problematic despite the many cases that have permitted it. Outside of bankruptcy the party with standing to invoke veil piercing is someone with a claim against the debtor who is seeking recovery from someone else—such as the debtor’s owner or parent—who is allegedly the debtor’s alter ego. Veil piercing is therefore a remedy, not a cause of action itself.¹¹⁸ But a debtor never has a claim against itself for which it would seek to recover from its alter ego. Therefore, state law should not be interpreted to allow a debtor to reach assets of its owner or parent on the basis of the alter ego theory. If the debtor cannot invoke the theory outside of bankruptcy, there is no cause of action to become part of the bankruptcy estate, and the trustee should have no ability to pursue the same recovery under § 541.¹¹⁹

As to § 544(a)(1), as discussed in subpart d below, the trustee should not be able to use that section to seek to pierce the corporate veil on behalf of general creditors, even if all such creditors would have the right to do so (a “general” claim as opposed to a “personal” claim). Section 544(a)(1) confers on the trustee only the rights and powers of a *lien creditor*, not a general unsecured creditor or group of such creditors or all such creditors, even though any recovery obtained by the trustee under § 544(a)(1) accrues to the benefit of

Icarus Holding, LLC), 391 F.3d 1315, 1322 (11th Cir. 2004) (certifying question to the Georgia Supreme Court whether corporation could bring alter ego claim against its former principal, a question the Georgia Supreme Court subsequently answered affirmatively); *Martinson v. Towe* (*In re Towe*), 173 B.R. 217, 220 (Bankr. D. Mont. 1994) (concluding that trustee had standing to bring alter ego claim but not specifying whether § 541 or § 544(a)(1) was the source of that standing). See generally Irve J. Goldman, *Whose Cause of Action Is It, Anyway?*, 23 AM. BANKR. INST. J. 1 (2004); Thomas R. Phinney, *The Trustee’s Standing to Pursue Alter Ego Claims*, 26 CAL. BANKR. J. 214 (2002); Steven E. Boyce, *Koch Refining and In re Ozark: The Chapter 7 Trustee’s Standing to Assert an Alter Ego Cause of Action*, 64 AM. BANKR. L.J. 315 (1990) (supporting the thesis that trustee may bring alter ego claim under § 541).

¹¹⁸ 1 FLETCHER CYC. CORP. § 41.10 (2024).

¹¹⁹ See, e.g., *Ahcom, Ltd. v. Smeding*, 623 F.3d 1248, 1252 (9th Cir. 2010); *Spartan Tube & Steel Inc. v. Himmelspach* (*In re RCS Engineered Prods. Co., Inc.*), 102 F.3d 223, 226–27 (6th Cir. 1996); *Mixon v. Anderson* (*In re Ozark Rest. Equip. Co.*) 816 F.2d 1222, 1229 (8th Cir. 1987); *Ginger Root Off. Assocs., LLC v. Farmer* (*In re Advanced Packaging & Prods. Co.*), 426 B.R. 806, 823 (C.D. Cal. 2010); *Limor v. Buerger* (*In re Del-Met Corp.*), 322 B.R. 781, 833–34 (Bankr. M.D. Tenn. 2005); *Turner v. Bolduc* (*In re Crowe Rope Indus., LLC*), 307 B.R. 1, 7 (Bankr. D. Me. 2004); *Helverson v. Schuster* (*In re Schuster*), 132 B.R. 604, 608 (Bankr. D. Minn. 1991); *Morrow v. Kelson* (*In re Morgan-Staley Lumber Co.*), 70 B.R. 186, 188 (Bankr. D. Or. 1986) (holding trustee could not bring alter ego claim on behalf of creditors). See generally Mark L. Prager & Jonathan A. Backman, *Pursuing Alter-Ego Liability Against Non-Bankrupt Third Parties: Structuring a Comprehensive Conceptual Framework*, 35 ST. LOUIS U. L.J. 657, 690 (1991) (suggesting that estate does not succeed to a claim to pierce the corporate veil); Landers, *supra* note 114, at 608–09 (suggesting that a cause of action for piercing the corporate veil cannot be maintained by a subsidiary against its parent corporation and therefore cannot be pursued by the bankruptcy trustee for the subsidiary corporation under § 70a(5) of the Bankruptcy Act (predecessor to § 541)).

general unsecured creditors. The trustee should have no ability to seek to reach assets of an owner or parent of whom the debtor is the alter ego under § 544(a)(1).¹²⁰

d. General Claims of Unsecured Creditors

To analyze whether the trustee has the right to bring any claims on behalf of unsecured creditors under § 544(a)(1), we have to take a deep look at the Supreme Court's 1972 decision in *Caplin v. Marine Midland Grace Trust Co.*¹²¹ The petitioner, a chapter X trustee in the reorganization case of Webb & Knapp, Inc. brought claims of misconduct against Marine Midland Trust Company of New York which had acted as an indenture trustee on behalf of holder of debentures issued by the debtor.¹²² After investigating the debtor's financial affairs, the trustee determined Marine had permitted the debtor to violate the indenture by engaging in prohibited transactions.¹²³ The trustee then filed an action on behalf of the debenture holders against Marine seeking damages for its malfeasance.¹²⁴ Marine moved to dismiss the action on the basis that the trustee lacked standing.¹²⁵ The Court agreed for three reasons.

The Court first noted that the language of chapter X did not resolve the issue, although it was "capable of resolution by explicit congressional action."¹²⁶ The court examined the powers of the trustee under § 587 of the Bankruptcy Act,¹²⁷ as well as the itemization of property vested in the trustee under § 110(a),¹²⁸ neither of which the Court found gave the trustee the ability to collect money "not owed to the estate."¹²⁹

¹²⁰ See, e.g., *Del-Met*, 322 B.R. at 835; *Ellenberg v. Waliagha (In re Mattress N More, Inc.)*, 231 B.R. 104, 110 (Bankr. N.D. Ga. 1998); *Schuster*, 132 B.R. at 609; *City Communications*, 105 B.R. at 1020; *Goldman v. Haverstraw Assocs. (In re R.H.N. Realty Corp.)*, 84 B.R. 356, 360 (Bankr. S.D.N.Y. 1988) (holding that chapter 7 trustee does not have standing to bring an alter ego clause of action on behalf of debtor's creditors). But see 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, 451-54 (2017) (arguing that under plain language of § 544(a) the trustee can bring action to pierce corporate veil on basis of alter ego theory); Seymour Roberts, Jr., *Alter-Ego Claims in Bankruptcy*, 2005 ANN. SURV. OF BANKR. L. 18 (2005) (arguing that the trustee is the logical party to bring an alter ego action in a bankruptcy case).

¹²¹ 406 U.S. 416 (1972).

¹²² *Id.* at 417.

¹²³ *Id.* at 419.

¹²⁴ *Id.* at 420.

¹²⁵ *Id.* at 420.

¹²⁶ *Id.* at 422.

¹²⁷ Bankruptcy Act § 187 (codified at 11 U.S.C. § 567) (predecessor to Bankruptcy Code § 1106).

¹²⁸ Bankruptcy Act § 70a (codified at 11 U.S.C. § 110(a)) (predecessor to Bankruptcy Code § 541(a)).

¹²⁹ 406 U.S. at 428.

The petitioner argued that because the trustee has the rights of a receiver in equity—if one were appointed by a court for the debtor’s property—it should be able to sue third parties on behalf of the bondholders, citing *McCandless v. Furlaud*.¹³⁰ The Court noted that the receiver in *McCandless* was suing on behalf of the corporation, not on behalf of third parties as the trustee sought to do in *Marine Midland*.¹³¹ Therefore there was no statutory authority conferring the power to sue on the chapter X trustee under the Bankruptcy Act.

Second, the Court noted that the trustee did not assert that the corporation had any claim against the indenture trustee.¹³² In fact, the corporation might also be guilty of wrongdoing. If the trustee successfully asserted its claims against the indenture trustee, the indenture trustee might be subrogated to the debenture holders’ claims against the debtor itself. If that were true, *Marine* would simply be substituted for the debenture holders as claimants against the estate and the other creditors would not benefit.¹³³ Nor could the question of damages be determined until the debenture holders recovered their proportionate share of the distributions by the debtor, because they have a claim against the indenture trustee only to the extent that they were unable to recoup their losses. And at that point the Court thought the debenture holders would be “capable of deciding for themselves whether or not it is worthwhile to seek to recoup whatever losses they may have suffered by an action against the indenture trustee.”¹³⁴

Third, the Court pointed out that no one was asserting that a suit by the trustee preempted individual actions by affected bond holders.¹³⁵ But any action by the trustee could be inconsistent with any independent actions by the debenture holders, and the preclusive effect of a trustee judgment was unclear.¹³⁶ In sum, the Court said, “there is no showing whatever that by giving petitioner standing to sue on behalf of the debenture holders we would reduce litigation. On the contrary, there is every indication that litigation would be increased, or at least complicated.”¹³⁷

The Court concluded by reemphasizing that “Congress has not yet indicated even a scintilla of an intention” to confer standing on trustees to sue

¹³⁰ 296 U.S. 140 (1935).

¹³¹ 406 U.S. at 429.

¹³² *Id.* at 429.

¹³³ *Id.* at 430.

¹³⁴ *Id.* at 431.

¹³⁵ *Id.* at 432.

¹³⁶ *Id.* at 432.

¹³⁷ *Id.* at 434.

on behalf of debenture holders and “such a policy decision must be left to Congress and not to the judiciary.”¹³⁸

One could certainly take the position that *Caplin* tells us nothing about the ability of a bankruptcy trustee to sue third parties on behalf of creditors under § 544(a)(1), the successor provision to § 110(c). But at the time the case was decided, § 110(c) of the Bankruptcy Act conferred on the trustee “all the rights, remedies, and powers of a creditor then holding a lien thereon by legal or equitable proceedings, whether or not such a creditor actually exists.”¹³⁹ The Court never mentions § 110(c), nor do the briefs filed in the case. Perhaps the Court never considered the issue.

Alternatively, the Court may have looked at § 110(c) (as it certainly looked at § 110(a)) and concluded that § 110(c) did not give the trustee the right to sue on behalf of the debenture holders. Bankruptcy Code § 544(a)(1) uses almost identical language to Bankruptcy Act § 110(c) (“rights and powers” rather than “rights, remedies and powers”). If the court implicitly held that § 110(c) does not give the trustee standing to assert creditor claims against third parties, then *Caplin* would have implicitly decided that a trustee has no power under § 544(a)(1) to do so either.

After *Caplin* was decided, Congress reacted as if the decision barred the trustee from using § 544(a) to bring creditor claims. When Congress originally considered language for § 544 it included a subsection (c) that was subsequently deleted, a subsection that would have explicitly permitted the trustee to bring actions on behalf of creditors.¹⁴⁰ Such a provision would not be necessary if Congress believed that the trustee already had that ability under the existing language of § 544(a)(1). Although no reason was provided for the deletion of the subsection, it can only be taken as an indication that Congress did not wish to follow through on the suggestion of the Court in *Caplin* to provide expressly for the trustee to have the power to assert creditor claims.¹⁴¹

¹³⁸ *Id.*

¹³⁹ Bankruptcy Act § 70c, 52 Stat. at 881 (codified at 11 U.S.C. § 110(c)).

¹⁴⁰ See *supra* note 36 and accompanying text. The House Report on H.R. 8200 stated “Subsection (c) is new. It overrules *Caplin v. Marine Midland Grace Tr. Co.*, 406 U.S. 416 (1972), which precluded a chapter X trustee from enforcing a claim on behalf of debenture holders against an indenture trustee for misconduct.” H.R. Rep. No. 95-595, at 370 (1977), as reprinted in U.S.C.C.A.N. 5963, 6326. On the House floor Rep. Edwards stated that “The House amendment deletes section 544(c) of the House bill.” 124 Cong. Rec. H11097 (daily ed. Sept. 28, 1978), as reprinted in U.S.C.C.A.N. 6436, 6456; see also 124 CONG. REC. S17413 (daily ed. Oct. 6, 1978) (statement of Sen. Byrd). No explanation was provided for the deletion.

¹⁴¹ Although the omission of an express authorization in legislation might normally be interpreted as an indication that Congress did not believe it was necessary (in this case because Congress believed that the trustee already had the power to assert creditor claims), the failure to overrule *Caplin*, which expressly held that the trustee lacked that power under the Bankruptcy Act—which included a provision very similar

Most courts confronted with the issue agree that *Caplin* bars the bankruptcy trustee from asserting creditor claims (as opposed to claims of the debtor that became part of the estate).¹⁴² For example, in *Voiland v. Marston* the bankruptcy court for the Northern District of Illinois dismissed an adversary proceeding commenced by the trustee seeking to recover money for the estate from the debtor’s non-filing husband under the Illinois Family Expense Act.¹⁴³ Although the court noted that the trustee has a duty to “sue parties for recovery of all property available under state law,” the trustee cannot bring suit against a third party if that third party “has injured not the bankrupt debtor, but a creditor of that debtor.”¹⁴⁴ As the Seventh Circuit explained in *Steinberg v. Buczynski*, “the point is simply that the trustee is confined to enforcing

to § 544(a)—makes such an interpretation unlikely.

¹⁴² See, e.g., *Picard v. JPMorgan Chase & Co. (In re Bernard L. Madoff Inv. Sec. LLC)*, 721 F.3d 54, 67 (2d Cir. 2013); *Ingalls v. Gressett (In re Bradley)*, 326 F. App’x 838, 839 (5th Cir. 2009); *Steinberg v. Buczynski*, 40 F.3d 890, 892 (7th Cir. 1994); *Schertz-Cibolo-Universal City v. Wright (In re Educators Grp. Health Tr.)*, 25 F.3d 1281, 1284 (5th Cir. 1994); *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114, 118 (2d Cir. 1991); *E.F. Hutton & Vo., Inc. v. Hadley*, 901 F.2d 979, 986 (11th Cir. 1990); *Williams v. Cal. 1st Bank*, 859 F.2d 664, 666–67 (9th Cir. 1988); *Mixon v. Anderson (In re Ozark Res. Equip. Co.)*, 816 F.2d 1222, 1227–30 (8th Cir. 1987); *Rochelle v. Marine Midland Grace Tr. Co. of N.Y.*, 535 F.2d 523, 527 (9th Cir. 1976); *Sigmon v. Miller-Sharpe, Inc. (In re Miller)*, 197 B.R. 810, 814–15 (W.D.N.C. 1996); *Baehr v. Touche Ross & Co.*, 62 B.R. 793, 798 (E.D. Pa. 1986); *Pergament v. Diamond (In re Diamond)*, No. 20-71878, 2024 WL 4099893, at *4 (Bankr. E.D.N.Y. Sept. 5, 2024); *Mukamal v. Gen. Elect. Cap. Corp. (In re Palm Beach Fin. Partners, L.P.)*, 568 B.R. 874, 886–90 (Bankr. S.D. Fla. 2017); *Goernitz v. Kohner (In re Kohner)*, No. 13-02159, 2014 WL 4639920, at *6 (Bankr. D. Ariz. Sept. 11, 2014); *Gordon v. Harman (In re Harman)*, 520 B.R. 906, 911–12 (Bankr. N.D. Ga. 2014); *Silverman v. Meister Seelig & Fein, LLP (In re Agape World, Inc.)*, 467 B.R. 556, 574 (Bankr. E.D.N.Y. 2012); *State Bank & Tr. Co. v. Spaeth (In re Motorwerks, Inc.)*, 371 B.R. 281, 288–91 (Bankr. S.D. Ohio 2007); *Rieser v. Hayslip (In re Canyon Sys. Corp.)*, 343 B.R. 615, 657–58 (Bankr. S.D. Ohio 2006); *Stanziale v. McGladrey & Pullen, LLP (In re Student Fin. Corp.)*, 334 B.R. 776, 778–79 (Bankr. D. Del. 2005); *Alberts v. Tuft (In re Greater Se. Cmty. Hosp. Corp.)*, 333 B.R. 506, 519–21 (Bankr. D.D.C. 2005); *Erricola v. Gaudette (In re Gaudette)*, 241 B.R. 491, 498–500 (Bankr. D.N.H. 1999); *Rodolakis v. Shaddock (In re Shaddock)*, 208 B.R. 1, 5 (Bankr. D. Mass. 1997); *Goldin v. Primavera Familienstiftung, TAG Assocs., Ltd. (In re Granite Partners, L.P.)*, 194 B.R. 318, 324 (Bankr. S.D.N.Y. 1996); *Amazing Enter. v. Jobin (In re M & L Bus. Mach. Co., Inc.)*, 136 B.R. 271, 275–78 (Bankr. D. Colo. 1992) (citing *Caplin* for the proposition that the trustee has no standing to assert claims of creditors); cf. *Hoskins v. Citigroup, Inc. (In re Viola)*, 469 B.R. 1, 9 (9th Cir. B.A.P. 2012) (holding in reliance on *Caplin* that trustee did not have standing under § 544(a)(2) to bring claim for aiding and abetting fraudulent transfers because estate had no claim); *Gill v. Nexgen Entergy Holdings PCC Ltd. (In re Taheripour)*, No. 12-30028, 2016 WL 1255298, at *9–10 (Bankr. C.D. Cal. Mar. 30, 2016) (holding that under *Caplin* trustee lacked standing to assert claim for conspiracy).

¹⁴³ 417 B.R. 766, 769 (Bankr. N.D. Ill. 2009). The Illinois Family Expense Act provides that the “expenses of the family and of the education of the children shall be chargeable upon the property of both husband and wife, or of either of them, in favor of creditors therefor.” 750 ILL. COMP. STAT. 65/15(a)(1) (2025).

¹⁴⁴ 417 B.R. at 771.

entitlements of the corporation. He has no right to enforce entitlements of a creditor.”¹⁴⁵

In *In re D.H. Overmyer Telecasting Co, Inc.*, the bankruptcy court expressly declined to allow the bankruptcy trustee to assert legal malpractice and breach of fiduciary duty claims against attorneys for the unsecured creditors’ committee, saying that the claims belonged to the creditors’ committee “or to the unsecured creditors in general. The debtor-in-possession may not recover on those claims for the benefit of unsecured creditors.”¹⁴⁶

Courts that find the trustee has the right to assert causes of action held by creditors have attempted to reconcile their decisions with *Caplin*.¹⁴⁷ They acknowledge that *Caplin* bars the trustee from bringing a cause of action on behalf of an individual creditor or a subset of creditors (a personal claim). But they conclude that *Caplin* does not prevent the trustee from bringing a so-called general claim on behalf of all creditors under § 544(a)(1) if a lien creditor would have the power to do so.

The first case to make such a distinction was *In re Western World Funding, Inc.* where the trustee brought suit against officers and directors of the debtor corporations alleging breach of fiduciary duty, conversion of corporate assets, and preferences, among other claims.¹⁴⁸ All parties had conceded that the trustee had standing under § 541 as representative of the debtors, but claimed the action was barred by the doctrine of implied ratification (an assertion the court rejected).¹⁴⁹

The court noted that, even if the doctrine of ratification or estoppel had applied, the trustee also asserted the right to bring the action under § 544(a).¹⁵⁰ The defendants argued that the trustee lacked standing, because the trustee represented creditors and no creditor could sue for breach of fiduciary duty because that duty was owed to the corporation, not to creditors.¹⁵¹ The

¹⁴⁵ Steinberg v. Buczynski, 40 F.3d 890, 893 (7th Cir. 1994).

¹⁴⁶ Fisher, Hecht & Fisher v. D.H. Overmyer Telecasting Co., Inc. (*In re D.H. Overmyer Telecasting Co, Inc.*), 47 B.R. 823, 824 (Bankr. N.D. Ohio 1985) (citing *Caplin*).

¹⁴⁷ See, e.g., Whittaker, Clark & Daniels, Inc. v. Brenntag AG (*In re Whittaker, Clark & Daniels*), 663 B.R. 1, 18 (Bankr. D.N.J. 2024) (distinguishing *Caplin* as predating the Bankruptcy Code and “not determinative as to the scope of § 544”); St. Paul Fire & Marine Ins. Co. v. PepsiCo, Inc. 884 F.2d 688, 700 (2d Cir. 1989) (distinguishing *Caplin* because it did not involve either alter ego relations or state tort law); Koch Refin. v. Farmers Union Cent. Exch., Inc., 831 F.2d 1339, 1347 n.11 & 1348 (7th Cir. 1987) (distinguishing *Caplin* as affecting the trustee’s rights to assert action on behalf of only some creditors (“personal” claims), not all (“general” claims)).

¹⁴⁸ Henderson v. Buchanan (*In re W. World Funding, Inc.*), 52 B.R. 743, 753 (Bankr. D. Nev. 1985), *aff’d in part and rev’d in part*, 131 B.R. 859 (D. Nev. 1990), *rev’d*, 985 F.2d 1021 (9th Cir. 1993).

¹⁴⁹ *Id.* at 771–72 & 771 n.7.

¹⁵⁰ *Id.* at 773.

¹⁵¹ *Id.* at 773.

bankruptcy court acknowledged that the trustee had no standing to bring “personal” creditor actions, citing *Caplin*.¹⁵² But the court held that the trustee had authority under § 544(a) to bring this action because the claim of breach of fiduciary duty was not a “personal” claim.¹⁵³ The court concluded that “[s]ince all these actions are for the benefit of creditors in general, and may be available by ‘any’ creditor without regard to his personal dealings with the defendants, the trustee’s action is an appropriate application of his status as a ‘supposed or hypothetical’ creditor under § 544(a).”¹⁵⁴

On appeal, the district court agreed that the trustee had standing under § 541, but reversed its holding that § 544(a) allowed the trustee to pursue a chose in action on behalf of creditors.¹⁵⁵ The Ninth Circuit reversed the holding of the district court that two individual defendants were not liable for breach of fiduciary duty, but left the district court’s decision on standing undisturbed.¹⁵⁶

Subsequent cases have picked up on the distinction between “personal” and “general” claims to determine whether a trustee may assert creditor claims under § 544(a)(1), and have found that the trustee had standing to assert a range of claims whether or not they could have been asserted by the debtor under § 541.¹⁵⁷ As put by the court in *In re Whittaker, Clark & Daniels*,¹⁵⁸ “[s]ection 544(a)(1) afford the Debtors the opportunity to pursue any such claim that a hypothetical creditor could bring for the benefit of all creditors” even if claim was not an asset of the estate under § 541.¹⁵⁹ There are several problems with that position.

¹⁵² *Id.* at 774.

¹⁵³ *Id.* at 775.

¹⁵⁴ *Id.*

¹⁵⁵ *Buchanan v. Henderson*, 131 B.R. 859, 865 (D. Nev. 1990).

¹⁵⁶ *Henderson v. Buchanan*, 985 F.2d 1021, 1025 (9th Cir. 1993).

¹⁵⁷ *See, e.g., Sender v. Mann*, 423 F. Supp. 2d 1155, 1172–75 (D. Colo. 2006) (breach of fiduciary duty, aiding and abetting breach of fiduciary duty, aiding and abetting fraud, malpractice, violations of Colorado Organized Crime Control Act, fraudulent transfer and conspiracy); *Hill v. Gibson Dunn & Crutcher, LLP (In re MS55, Inc.)*, No. 06-cv-01233, 2007 WL 2669150, at *10-*13 (D. Colo. 2007) (civil conspiracy and aiding and abetting breach of fiduciary duties); *Sender v. Porter (In re Porter McLeod, Inc.)*, 231 B.R. 786, 792–93 (D. Colo. 1999) (malpractice and aiding and abetting breach of fiduciary duty); *Weiboldt Stores, Inc. v. Schottenstein*, 131 B.R. 655, 668 (N.D. Ill. 1991) (breach of fiduciary duty); *Despins v. Lamp Cap. LLC (In re Kwok)*, No. 22-50073, 2024 WL 1261803, at *4 (Bankr. D. Conn. Mar. 22, 2024) (alter ego); *Whittaker, Clark & Daniels, Inc. v. Brenntag AG (In re Whittaker, Clark & Daniels)*, 663 B.R. 1, 23 (Bankr. D.N.J. 2024) (successor liability); *Martinson v. Towe (In re Towe)*, 173 B.R. 217, 220 (Bankr. D. Mont. 1994) (alter ego); *cf. Collins v. Kohlberg & Co. (In re Sw. Supermarkets, LLC)*, 325 B.R. 417, 424–25 (Bankr. D. Ariz. 2005), *vacated*, 376 B.R. 281 (D. Ariz. 2007) (trustee had standing under § 544(a)(2) to bring breach of fiduciary duty claims under § 544(a)(2)).

¹⁵⁸ 663 B.R. 1 (Bankr. D.N.J. 2024).

¹⁵⁹ *Id.* at 23.

First, the draft subsection that Congress deleted before enacting the Bankruptcy Code would have given the trustee not only the right to bring causes of action on behalf of classes of creditors, but also on behalf of creditors as a whole.¹⁶⁰ Had Congress wanted the trustee to have the power to assert general claims, it could have modified the subsection accordingly. Instead, it deleted it entirely.¹⁶¹ Congress could also have expanded the language of what is now § 544(b)(1) which gives the trustee the right to avoid transfers or obligations that are avoidable by an actual creditor with an allowed unsecured claim. If Congress had wished it could have conferred on the trustee the rights and powers of such an actual creditor, which would have allowed the trustee to pursue claims against third parties on behalf of those creditors. It did not do that either.

And even if one does not want to read too much into an unexplained decision by Congress to delete language in proposed legislation, the *Caplin* decision itself did not turn in any respect on the fact that the trustee sought a recovery on behalf of a subset of creditors rather than creditors as a group (personal v. general claims).¹⁶² The arguments made by the Court against standing would apply equally to an attempt by the trustee to assert claims held by all creditors against a third party: the lack of statutory authority; the absence of any claim by the corporation against the third party; and the problem of potential independent actions by the creditors themselves. The trustee has the duty to collect money “owed to the estate” and not money owed to creditors.¹⁶³

Interpreting § 544(a)(1) to permit the trustee to assert claims that can be brought by unsecured creditors is also inconsistent with the interplay between § 544(a) and § 544(b). Section 544(b) allows the trustee to step into the shoes of an actual unsecured creditor to “avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor” that was avoidable by that creditor under applicable law.¹⁶⁴ Unlike § 544(a), § 544(b) does not confer on the trustee any rights or powers of that unsecured creditor other than the ability to avoid transfers and obligations. Therefore, courts have refused to allow trustees to pursue actions that might be brought by unsecured creditors other than avoidance actions under § 544(b).¹⁶⁵

¹⁶⁰ See *supra* note 42 and accompanying text.

¹⁶¹ See Richard L. Epling, *Trustee's Standing to Sue in Alter Ego of Other Damage Remedy Actions*, 6 BANKR. DEV. J. 191, 198–99 (1989) (suggesting expansion of § 544 to permit trustee to bring actions where there has been a continuing course of conduct by corporation).

¹⁶² The trustee in *Caplin* was seeking to assert claims on debenture holders against the indenture trustee. *Caplin v. Marine Midland Grace Tr. Co.*, 406 U.S. 416, 420–21 (1972).

¹⁶³ *Id.* at 428–29 (1972).

¹⁶⁴ 11 U.S.C. § 544(b)(1).

¹⁶⁵ See, e.g., *Kleven v. Stewart (In re Myers)*, 320 B.R. 667, 669 (Bankr. N.D. Ind. 2005); Wayne

Another concern is that allowing the trustee to bring an action on behalf of all creditors but not a lesser group requires an arbitrary line be drawn. Suppose one of the creditors has settled with the target of the suit prior to its institution. Does the trustee still have standing to sue, even though not all creditors will share in the benefits of the suit? What if it were more than one creditor? At what point would the suit be barred by *Caplin* because it is on behalf of less than all creditors? As a doctrinal and statutory interpretative matter, either the trustee can assert rights held exclusively by creditors or it cannot. The number of creditors should not matter.

III. Conclusion

The bankruptcy trustee has many tools to collect assets for creditors. Among them is the power to pursue causes of action held by the debtor prior to the bankruptcy filing which themselves become part of the estate.¹⁶⁶ These can include claims for prepetition breach of fiduciary duty, mismanagement or fraud, fraudulent transfers, or illegal activity that harmed the debtor.¹⁶⁷

The trustee can also exercise the rights and powers of a hypothetical lien creditor, unsatisfied execution creditor, or bona fide purchaser of real property to pursue a cause of action that is given to a creditor holding that status as of the filing date under state law.¹⁶⁸ In exercising those powers, the trustee may set aside transfers of interests in personal and real property and may file actions under state law to pursue equitable remedies available to those types of creditors and bona fide purchasers.¹⁶⁹

Moreover, the trustee can step into the shoes of an actual holder of an allowed unsecured claim to avoid a transfer or obligation that such a creditor could avoid under applicable state law under § 544(b),¹⁷⁰ but that provision provides no rights to pursue claims for anything other than avoidance.¹⁷¹

There is no question that giving the bankruptcy trustee the authority to pursue claims of general creditors—actual or hypothetical—who do not hold

Film Sys. Corp. v. Film Recovery Sys. Corp., 64 B.R. 45, 51 (N.D. Ill. 1986); Savage & Assocs., P.C. v. BLR Servs. SAS (*In re* Teligent, Inc.), 307 B.R. 744, 749 (Bankr. S.D.N.Y. 2004); Jones v. Hyatt Legal Servs. (*In re* Dow), 132 B.R. 853, 861–62 (Bankr. S.D. Ohio 1991) (holding that trustee had no right under § 544(b) to pursue action that could be brought by creditors).

¹⁶⁶ 11 U.S.C. § 541(a)(1).

¹⁶⁷ See *supra* notes 59–60.

¹⁶⁸ 11 U.S.C. § 544(a).

¹⁶⁹ See *supra* Section II.

¹⁷⁰ 11 U.S.C. § 544(b).

¹⁷¹ See *supra* note 165.

any status described in § 544(a) would be efficient. It would allow creditors who do not have the resources to pursue claims on their own to benefit from the trustee's aggressiveness. It would prevent disparate recoveries by different creditors based on their individual success in separate litigation against a common defendant. Instead, all creditors would share pro rata in any recovery made by the trustee. It would also benefit the defendant in any such suit because the defendant would be able to focus on a single action rather than multiple actions brought by those creditors with a claim. Undoubtedly this goal of unifying claims that involve the debtor's creditors explains the proposal of the Commission on the Bankruptcy Laws of the United States in 1973 to overrule *Caplin*,¹⁷² the draft bills in Congress to implement that proposal,¹⁷³ and the decisions of some courts to use § 544(a)(1) to confer standing on the trustee to pursue "general" creditor claims.¹⁷⁴

But the Supreme Court in *Caplin* found that the trustee did not have this superpower, and Congress declined to overrule the Supreme Court, despite the opportunity to do so. As enacted, § 544(a) permits the trustee to exercise rights and powers only of lien creditors, execution creditors, and bona fide purchasers of real property. It has no power to pursue claims of hypothetical general creditors. The expansion of non-avoidance claims under § 544(a) to embrace claims of creditors under state law that are not tied to their status as lien creditors, execution creditors, or bona fide purchasers of real property is without legal basis, no matter how many creditors the trustee seeks to represent and no matter where any recovery would go. This trend to pump up the trustee's powers should be deflated.

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¹⁷² See *supra* notes 35–36 and accompanying text.

¹⁷³ See *supra* notes 39–48 and accompanying text.

¹⁷⁴ See *supra* note 157.